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INHERITANCE CRIMES

David Horton[*] & Reid Kress Weisbord[**]

Abstract: The civil justice system has long struggled to resolve disputes over end-of-life transfers. The two most common grounds for challenging the validity of a gift, will, or trust—mental incapacity and undue influence—are vague, hinge on the state of mind of a dead person, and allow factfinders to substitute their own norms and preferences for the donor's intent. In addition, the slayer doctrine—which prohibits killers from inheriting from their victims—has generated decades of constitutional challenges.

But recently, these controversial rules have migrated into an area where the stakes are significantly higher: the criminal justice system. For example, states have criminalized financial exploitation of an elder, which includes obtaining assets through undue influence. Likewise, prosecutors are bringing theft charges against people who accept transfers from mentally diminished owners. Finally, legislatures are experimenting with abuser statutes that extend the slayer doctrine by barring anyone from receiving property from the estate of a senior citizen whom they mistreated.

This Article evaluates the benefits and costs of this trend. It explains that these new sanctions deter elder abuse: wrongdoing that is rampant, pernicious, and underreported. Nevertheless, this Article exposes the dangers of criminalizing this unique area of law. First, criminal undue influence and the abuser doctrine may be unconstitutional in some situations. Second, inheritance crimes suffer from the flaws that make probate litigation so unreliable. Third, because inheritance law and criminal law have been traditionally understood as distinct, jurisdictions have not yet figured out how to gracefully merge them. Finally, this Article builds on these insights to argue that states should abolish criminal undue influence, harmonize civil and criminal rules, and create exceptions to abuser laws.

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INTRODUCTION

In the 1940s, a young Texan named Mary Ellen Bendtsen enjoyed a budding career as a model and musician.[1] Bendtsen graced the cover of *Cosmopolitan* and performed for Cole Porter and Harry Truman.[2] She was the "toast of Dallas society," throwing lavish parties in her home, 4949 Swiss Avenue.[3] Bendtsen was deeply attached to her residence and made no secret that she intended to "go[] out feet-first."[4] As an old friend put it, "Mary Ellen was the house and the house was Mary Ellen."[5]

However, the glamour gradually faded. In 1985, Bendtsen's husband died.[6] Around 2000, Bendtsen began to behave erratically.[7] 4949 Swiss Avenue fell into disrepair.[8] Tension flared between Bendtsen's daughter, Frances Ann Giron, and one of Bendtsen's close friends, Mark McCay.[9] In particular, Giron urged Bendtsen to move into a smaller house, saying that 4949 Swiss Avenue "gave [her] the creeps."[10] Conversely, McCay and his partner Justin Burgess—who Bendtsen called "the boys"—coveted the mansion, and helped her maintain it.[11]

On February 22, 2005, Bendtsen suffered a stroke.[12] McCay, Burgess, and Edwin Olsen, a lawyer, raced to her hospital room.[13] Olsen had drafted a will that left most of Bendsten's estate, including 4949 Swiss Avenue, to McCay and Burgess.[14] As McCay and Burgess stood at the foot of the bed, Olsen read this document aloud and helped Bendsten sign it with a mark.[15] Eight days later, Bendtsen died.[16]

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1. *See* Andrew Paparella, *'Mary Ellen's Mansion': Friendly Care – Or Con?*, ABC NEWS (Nov. 2, 2009, 7:23 AM), https://abcnews.go.com/2020/mary-ellens-mansion-elder-abuse/story?id=8974477 [https://perma.cc/85TE-HWWF].

2. Lee Hancock, *A Saga of Fading Glory: Greed, Deception, Delusion - And One Woman's Piece of Old East Dallas*, DALL. MORNING NEWS, Aug. 13, 2006, at 1A, 2006 WLNR 14018329.

3. Paparella, *supra* note 1.

4. *Id.*

5. Appellant's Amended Redrawn Brief at 3, McCay v. State, 476 S.W.3d 640 (Tex. App. 2015) (No. 05-12-01199-CR), 2014 WL 5849125, at *2 [hereinafter McCay Brief].

6. *See* Hancock, *supra* note 2.

7. *See id.*

8. *See id.*

9. *See id.*

10. *Id.*

11. *See id.*

12. *See* McCay v. State, 476 S.W.3d 640, 643 (Tex. App. 2015).

13. *See id.*

14. *See id.*

15. *See id.*

16. *Id.*

What happened next is a familiar part of the American succession process. Giron filed a lawsuit in probate court seeking to nullify the will.[17] She alleged that Bendsten lacked mental capacity, that McCay and Burgess had exerted undue influence, and that Olsen had not followed the formalities of the state Wills Act.[18] The judge ultimately sided with Giron, refusing to enforce the document because it had not been signed by two witnesses in Bendsten's presence as Texas law requires.[19] In this way, Bendsten's case was not unusual. Indeed, conflict is so endemic in end-of-life planning that wills are "more apt to be the subject of litigation than any other legal instrument."[20]

But then the matter took an unprecedented turn. After the probate case ended, prosecutors charged McCay with attempted theft.[21] Observing that Texas defines "theft" as acquiring property without the owner's "effective consent," the government argued that "the boys" had tried to trick the incapacitated Bendsten into leaving them her property.[22] McCay objected that the state was impermissibly trying "to criminalize a will contest."[23] And indeed, at trial, the prosecution's own expert witness admitted that he "had never encountered a situation where the losing party in a will contest was subsequently charged with a crime."[24] Nevertheless, a jury found McCay guilty and the court sentenced him to ten years in prison.[25]

The civil justice system has long struggled to resolve disputes about inheritances.[26] These cases suffer from the "worst evidence" problem: they hinge on the intent of a dead property owner, who cannot take the witness stand to "authenticate or clarify his declarations, which may have been made years, even decades past."[27] Likewise, the two most

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17. *See* Brief of Appellee at 5, Olsen v. Comm'n for Law. Discipline, 347 S.W.3d 876 (Tex. App. 2011) (No. 05-09-00945-CV), 2010 WL 3141562, at *5.

18. *See id.*; *In re* Estate of Bendtsen, 230 S.W.3d 823, 827 (Tex. App. 2007).

19. *See id.* at 826.

20. Leon Jaworski, The Will Contest, Address Delivered to American College of Trial Lawyers (Apr. 16, 1958), *in* 10 BAYLOR L. REV. 87, 88 (1958).

21. *See McCay*, 476 S.W.3d at 643. The case does not explain why the state declined to charge Burgess.

22. *Id.* at 645 (citing TEX. PENAL CODE ANN. § 31.03(b)(1) (West Supp. 2014)).

23. *Id.* at 646.

24. McCay Brief, *supra* note 5, at 13 n.14.

25. *See McCay*, 476 S.W.3d at 643–44, 653.

26. *Cf.* Jaworski, *supra* note 20, at 88 (observing that "a will is more apt to be the subject of litigation than any other legal instrument").

27. John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance*, 65 STAN. L. REV. 335, 344 (2013) (first quoting John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2046 (1994) [hereinafter Langbein, *Will Contests*]; and then quoting John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 492 (1975) [hereinafter Langbein, *Substantial Compliance*]).

commonly-asserted grounds for trying to invalidate a gift, will, or trust—mental incapacity and undue influence—are notoriously vague.[28] Scholars have demonstrated that judges and juries purporting to apply these doctrines ignore the decedent's wishes and strike down transfers that violate their "own views of morality and propriety."[29] In turn, because factfinders believe "that people should provide for their families,"[30] they are suspicious of "the 'abhorrent' testator" who leaves property at death to "a non-mainstream religion, a radical political organization, or a same-sex romantic partner."[31] Finally, even the slayer rule—the sensible-seeming principle that killers cannot inherit from their victims—has inspired waves of constitutional litigation since the late 1800s.[32] These troublesome doctrines exemplify the "the deep disorder that afflicts the administration of justice in the wealth transfer process in the United States."[33]

Yet as the battle over Bendsten's estate reveals, the same rules that make probate litigation so controversial have quietly spread to a field

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28. *See infra* section I.A.

29. ELIAS CLARK, LOUIS LUSKY, ARTHUR W. MURPHY, MARK L. ASCHER & GRAYSON M.P. MCCOUCH, CASES AND MATERIALS ON GRATUITOUS TRANSFERS: WILLS, INTESTATE SUCCESSION, TRUSTS, GIFTS, FUTURE INTERESTS AND ESTATE AND GIFT TAXATION 231 (5th ed. 2007); *cf.* Bd. of Foreign Missions of Presbyterian Church v. Bevan, 2 Ohio App. 182, 193 (1913) ("The verdict in this case can not [sic] be accounted for on any theory other than prejudice of the jury."), *aff'd sub nom.* Bevan v. Bd. of Foreign Missions of Presbyterian Church in U.S., 110 N.E. 1054 (Ohio 1914).

30. Ray D. Madoff, *Unmasking Undue Influence*, 81 MINN. L. REV. 571, 576 (1997).

31. E. Gary Spitko, *Gone but Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 CASE W. RSRV. L. REV. 275, 282 (1999) (footnotes omitted); *see also* Frances H. Foster, *The Family Paradigm of Inheritance Law*, 80 N.C. L. REV. 199, 210–11 (2001) ("Bequests to individuals other than 'natural objects of the decedent's bounty'—essentially family members—raise judicial red flags, even when the beneficiary was the decedent's dependent or primary caregiver." (footnotes omitted)); Jeffrey G. Sherman, *Undue Influence and the Homosexual Testator*, 42 U. PITT. L. REV. 225, 267 (1981) ([T]here is at least some evidence to suggest that a homosexual testator who bequeaths the bulk of his estate to his lover stands in greater risk of having his testamentary plans overturned . . . .").

32. *See infra* section I.B. For prominent articles on the slayer rule, see James Barr Ames, *Can a Murderer Acquire Title by His Crime and Keep It?*, 45 AM. L. REG. & REV. 225 (1897); J. Chadwick, *A Testator's Bounty to His Slayer*, 30 L.Q. REV. 211 (1914); Nili Cohen, *The Slayer Rule*, 92 B.U. L. REV. 793 (2012); Mary Louise Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 IOWA L. REV. 489 (1986); William M. McGovern, Jr., *Homicide and Succession to Property*, 68 MICH. L. REV. 65 (1969); Alison Reppy, *The Slayer's Bounty—History of Problem in Anglo-American Law*, 19 N.Y.U. L.Q. REV. 229 (1942); Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CIN. L. REV. 803 (1993); Carla Spivack, *Killers Shouldn't Inherit from Their Victims—or Should They?*, 48 GA. L. REV. 145 (2013); F. F. Thomas, Jr., *Public Policy as Affecting Property Rights Accruing to a Party as a Result of Wrongful Acts*, 1 CALIF. L. REV. 397 (1913); John W. Wade, *Acquisition of Property by Wilfully Killing Another—A Statutory Solution*, 49 HARV. L. REV. 715 (1936); L.E.L., Note, *Constructive Trusts—Can a Murderer Acquire Title by His Crime and Keep It?*, 64 U. PA. L. REV. 307 (1916).

33. Langbein, *Will Contests*, *supra* note 27, at 2048.

where the stakes are higher. Inheritance disputes have started to evolve into criminal and quasi-criminal matters.[34] This change is occurring on three fronts. First, states have passed elder abuse statutes that prohibit "financial exploitation," including acquiring a senior's assets via "undue influence."[35] Second, as in Bendsten's case, prosecutors are bringing theft charges against people who accept transfers from impaired donors—a novel crime that we call "estate theft."[36] Third, legislatures have expanded their slayer statutes to disinherit not only killers, but anyone who engages in verbal, physical, or financial elder abuse (the "abuser" rule).[37] Surprisingly, although these developments upend centuries of settled law, "the legal academy has been almost entirely silent on this trend."[38]

This Article explores the advantages and drawbacks of inheritance-related crimes. On the one hand, it explains that these measures are powerful weapons against the scourge of elder abuse. For decades, policymakers have sounded the alarm about this rampant, pernicious, and underreported form of wrongdoing.[39] And recently, a major demographic shift has made the issue even more pressing. The U.S. is experiencing a "silver tsunami."[40] By 2050, nearly eighty-four million Americans will be age sixty-five or over.[41] Moreover, this generation has stockpiled a staggering $30 trillion in wealth.[42] Fear that wrongdoers will target seniors

34. *See infra* Part II.

35. *See infra* section II.A.

36. *See infra* section II.B.

37. *See infra* section II.C.

38. Nina A. Kohn, *Elder (In)justice: A Critique of the Criminalization of Elder Abuse*, 49 AM. CRIM. L. REV. 1, 2 (2012) (discussing criminal elder abuse statutes). A few law review articles have focused on discrete aspects of the broader criminalization phenomenon that we address in this Article. *See, e.g.*, Andrew Jay McClurg, *Preying on the Graying: A Statutory Presumption to Prosecute Elder Financial Exploitation*, 65 HASTINGS L.J. 1099, 1105 (2014) (proposing that states presume that certain transfers from elders to non-relatives are suspect). Likewise, a handful of student notes have advocated for wider adoption of the abuser rule. *See* Travis Hunt, Comment, *Disincentivizing Elder Abuse Through Disinheritance: Revamping California Probate Code § 259 and Using It as a Model*, 2014 BYU L. REV. 445, 470; Kymberleigh N. Korpus, Note, *Extinguishing Inheritance Rights: California Breaks New Ground in the Fight Against Elder Abuse but Fails to Build an Effective Foundation*, 52 HASTINGS L.J. 537, 542 (2001).

39. *See* LIFESPAN OF GREATER ROCHESTER, INC., WEILL CORNELL MED. CTR. OF CORNELL UNIV. & N.Y.C. DEP'T FOR THE AGING, UNDER THE RADAR: NEW YORK STATE ELDER ABUSE PREVALENCE STUDY 11–12 (2011), https://ocfs.ny.gov/main/reports/Under%20the%20Radar%2005%2012%2011%20final%20report.pdf [https://perma.cc/2WK6-6R8Y].

40. Amy Ziettlow & Naomi Cahn, *The Honor Commandment: Law, Religion, and the Challenge of Elder Care*, 30 J.L. & RELIGION 229, 229 (2015).

41. *See* JENNIFER M. ORTMAN, VICTORIA A. VELKOFF & HOWARD HOGAN, U.S. CENSUS BUREAU, AN AGING NATION: THE OLDER POPULATION IN THE UNITED STATES 1 (2014), https://www.census.gov/prod/2014pubs/p25-1140.pdf [https://perma.cc/5BNQ-PGCB].

42. *See* Mark Hall, *The Greatest Wealth Transfer in History: What's Happening and What Are*

recently prompted the Securities and Exchange Commission to call financial elder abuse the "crime of the 21st century."[43] For these reasons, financial exploitation statutes, estate theft, and the abuser rule are timely and necessary interventions.[44]

But on the other hand, the Article argues that the criminalization of probate law is partially misguided. First, these new crimes raise unsettled constitutional questions. For example, courts disagree about whether broad financial exploitation statutes are void for vagueness under the Due Process Clause.[45] Similarly, the abuser rule coexists uneasily with state constitutional provisions that abolish forfeiture and corruption of blood—ancient British rules that deprived felons and their families of property rights.[46] Second, inheritance crimes attach draconian punishments to conduct that the legal system has long struggled to regulate.[47] Indeed, because incapacity and undue influence give factfinders so much leeway, the risk of error hangs like a thundercloud over criminal inheritance law.[48] Third, probate law and criminal law do not fit neatly together. Inheritance law's goal of furthering a decedent's intent can clash with criminal law's objective of deterring and punishing harmful conduct.[49]

The Article then uses this critique as a springboard to propose reforms. For one, it argues that legislatures should narrow their financial exploitation statutes to exclude undue influence. Trusts and estates scholars have argued that undue influence should be abolished for "fail[ing] to meet any standard of clarity, fairness, or predictability that a legal doctrine should satisfy."[50] Yet by *criminalizing* undue influence, states have taken this baton and sprinted in the wrong direction. Next, the

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the Implications, FORBES (Nov. 11, 2019, 12:14 PM), https://www.forbes.com/sites/markhall/2019/11/11/the-greatest-wealth-transfer-in-history-whats-happening-and-what-are-the-implications/#eaac2e64090a [https://perma.cc/3YZX-VFT9].

43. STEPHEN DEANE, OFF. OF THE INV. ADVOC., U.S. SEC. & EXCH. COMM'N, ELDER FINANCIAL EXPLOITATION: WHY IT IS A CONCERN, WHAT REGULATORS ARE DOING ABOUT IT, AND LOOKING AHEAD 7 (2018), https://www.sec.gov/files/elder-financial-exploitation.pdf [https://perma.cc/4M2M-KRLA].

44. The phenomenon we describe is part of the overcriminalization trend, in which "[e]very year, additional crimes, increased punishments, and novel applications of the criminal justice system enter U.S. jurisprudence." Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 703 (2005). However, we will focus more narrowly on the pros and cons of criminalizing inheritance-related conduct than on overcriminalization.

45. *See infra* section II.A.

46. *See infra* section III.C.

47. *See infra* sections II.A–B.

48. *See infra* section III.A.

49. *See infra* section III.C.

50. Carla Spivack, *Why the Testamentary Doctrine of Undue Influence Should Be Abolished*, 58 U. KAN. L. REV. 245, 245 (2010).

Article claims that the legal system should harmonize probate and criminal rules. Some courts have refused to apply civil law when deciding whether misconduct rises to the level of an inheritance crime. For instance, the Texas appellate court that affirmed McCay's conviction did not care that the probate judge had never found that Bendsten lacked capacity or "the boys" exerted undue influence.[51] As the appellate court saw it, these concepts "are rooted in the civil law and are [only] meaningful in probate proceedings."[52] Yet this approach creates the potential for someone to be imprisoned for accepting a transfer that is actually *valid*. Finally, the Article explains why jurisdictions should create exceptions to the abuser doctrine. By straying from the purpose of the slayer rule, the abuser doctrine can be unconstitutional and produce outcomes that are inconsistent with the victim's intent.[53] Giving courts the discretion to *not* apply the disinheritance penalty would shave off these rough edges.

At the outset, we must clarify what we mean by "probate" and "inheritance" law. Traditionally, most people passed wealth at death through wills and "will substitutes" such as revocable *inter vivos* trusts.[54] But as life expectancies have soared, elders are often delegating financial management to caregivers.[55] This means that third parties can freely spend seniors' funds under powers of attorney or as joint accountholders.[56] These lifetime transfers fall under the law of gifts and contracts.[57] Yet we include them in our analysis because they can be a species of estate planning and because litigation over them is marred by the worst evidence problem.[58] Thus, when we refer to "probate" or "inheritance" law, we

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51. *See* McCay v. State, 476 S.W.3d 640, 645 (Tex. App. 2015).

52. *Id.*

53. *See infra* section III.C.

54. John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1109 (1984) (coining the phrase "will substitutes" to describe revocable trusts, life insurance, pensions, and joint accounts).

55. *See infra* section II.A.

56. *Cf.* UNIF. POWER OF ATT'Y ACT § 201 (UNIF. L. COMM'N 2006) (enumerating powers of an agent to transact on behalf of the principal pursuant to a power of attorney); UNIF. PROB. CODE § 6-205 (UNIF. L. COMM'N 2010) (describing the designation of an agent to transact on behalf of an accountholder).

57. *Cf.* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.1 (AM. L. INST. 2003) (distinguishing capacity standard for wills and will substitutes from irrevocable transfers and lifetime gifts).

58. *See infra* sections II.A–B; *c.f.* Ben Chen, *Elder Financial Abuse: Capacity Law and Economics*, 106 CORNELL L. REV. (forthcoming 2021) (manuscript at 24–26), https://ssrn.com/abstract=3710237 [https://perma.cc/B64X-ZNH6] (describing the "the hidden role of inheritance expectations in transactional capacity disputes" as the most common motive for asserting a civil action to avoid an *inter vivos* transaction on grounds of financial exploitation).

mean the entire sprawling infrastructure that governs the transmission of property at or near the owner's death.

The Article contains three Parts. Part I sets the stage for our discussion of criminal inheritance law by surveying three core principles from the realm of probate litigation: mental incapacity, undue influence, and the slayer rule. Part II explains how concern about inheritance-related wrongdoing has prompted states to give these doctrines a punitive makeover. Part III outlines better ways for the legal system to merge inheritance law and criminal law.

I. CIVIL INHERITANCE LAW

To see why the criminalization of inheritance-related conduct is so fraught, we begin with a primer on probate litigation and describe some of the unique features of posthumous adjudication. This Part surveys two especially tricky types of disputes about estates: contests and the slayer doctrine.

A. Contests

"Contests"—challenges to the validity of a gift, will, or trust—are a fixture in the probate system.[59] These lawsuits are usually based on the doctrines of mental incapacity or undue influence (or both).[60] This section describes these rules and why they have provoked sustained debate.

The first principle in the field of inheritance law is to carry out a decedent's intent.[61] Indeed, owners enjoy the virtually unfettered right to choose beneficiaries and divide assets among them.[62] As the Restatement (Third) of Property puts it, courts lack the "general authority to question the wisdom, fairness, or reasonableness of the donor's decisions about how to allocate his or her property."[63]

One way in which the law facilitates this freedom is by refusing to enforce gifts, wills, trusts, and other devices that are not true expressions

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59. *See* David Horton & Reid Kress Weisbord, *Probate Litigation*, U. ILL. L. REV. (forthcoming 2022) (manuscript at 34), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3805381 [https://perma.cc/3BPG-UWF8].

60. *Id.*

61. *See, e.g.*, Langbein, *Substantial Compliance*, *supra* note 27, at 491 ("[V]irtually the entire law of wills derives from the premise that an owner is entitled to dispose of his property as he pleases in death as in life.").

62. *See, e.g.*, Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 2 (1941) (arguing that courts should generally honor an owner's wishes about how to distribute her property at death).

63. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. L. INST. 2003).

of the decedent's wishes. For example, a common ground for attacking an end-of-life transfer is by alleging that the donor lacked mental capacity.[64] The test for capacity varies with the type of the conveyance.[65] The easiest hurdle to clear is "testamentary capacity," which requires that someone who creates a will or a revocable trust be able to grasp the bare rudiments of estate planning:

> [A] testator [or settlor] must: (1) know the natural objects of her bounty; (2) know her obligations to them; (3) know the character and value of her estate; and (4) dispose of her estate according to her own fixed purpose. Merely being an older person, possessing a failing memory, momentary forgetfulness, weakness of mental powers or lack of strict coherence in conversation does not render one incapable . . . .[66]

Conversely, the standard for executing instruments that are not unilaterally revocable, such as gifts and contracts, is more demanding.[67] Because these transactions occur during life—rather than after death—an owner will personally experience the results of a bad decision. Thus, judges insist that a party to a contract know "the nature and consequences of the transaction"[68] and the giver of a gift appreciate "the effect that the gift may have on [her] future financial security . . . and of anyone who may be dependent on [her]."[69]

One of the biggest obstacles to prevailing on an incapacity claim is

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64. *See* Horton & Weisbord, *supra* note 59, at 34–35.

65. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE. TRANSFERS § 8.1 (AM. L. INST. 2003) (describing capacity standard for wills, will substitutes, irrevocable transfers, and lifetime gifts).

66. Bye v. Mattingly, 975 S.W.2d 451, 455–56 (Ky. 1998) (noting also that "[t]he minimum level of mental capacity required to make a will is less than that necessary to make a deed or a contract" (citation omitted)); *see also* Weaver v. Mietkiewicz, No. 10–P–2260, 2012 WL 592849, at *1 (Mass. App. Ct. Feb. 24, 2012) (unpublished table decision) ("[T]he standard for executing a will is different from and less stringent than the standard for the capacity to execute a contract."). The majority view is revocable trusts also require testamentary capacity, because—like wills—they can be freely cancelled or amended during their creator's life. *See* Ivie v. Smith, 439 S.W.3d 189, 200 (Mo. 2014) (en banc) ("The capacity required to make or amend a revocable trust is the same as that required to make a will—'testamentary capacity.'"); UNIF. TR. CODE § 601 (UNIF. L. COMM'N 2010) ("The capacity required to create, amend, revoke, or add property to a revocable trust . . . is the same as that required to make a will."). *But see* Whittemore v. Neff, No. 064348, 2001 WL 753802, at *6 (Conn. Super. Ct. June 11, 2001) (reasoning that because revocable trusts can be complicated, "a higher degree of mental capacity may be required . . . than is required to execute a will").

67. *See* Chen, *supra* note 58, at 33 (explaining that "American law formally sets a lower threshold for testamentary capacity than for capacity to make contracts, irrevocable gifts and other lifetime transactions").

68. RESTATEMENT (SECOND) OF CONTS. § 15 (AM. L. INST. 1981).

69. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.1 (AM. L. INST. 2003). Similarly, "[a] property owner who does not have the capacity to make a gift lacks capacity to establish an irrevocable trust." RESTATEMENT (THIRD) OF TRS. § 11 cmt. c (AM. L. INST. 2003).

temporal. Courts have long assumed "that every person is sane, until the contrary is proven."[70] As a result, "the party alleging incapacity [must] show such incapacity at the *particular time* of the transactions being challenged."[71] To be sure, evidence from other periods is relevant if it sheds light on the owner's mental state on the day in question.[72] But because owners whose mental acuity fluctuate are entitled to a presumption that they acted during a lucid interval, courts often discount non-contemporaneous proof.[73]

For example, in *van Gorp v. Smith* (*In re Estate of Mann*),[74] Hazel Mann became unable to care for herself and was placed under a conservatorship.[75] She exhibited several telltale signs of dementia: she "was unclean and smelled of urine," "did not seem to know how to order the right food from a store," and "described a toy doll as 'me.'"[76] As she was declining, she signed a will.[77] A jury nullified the document for mental incompetence, but a California appellate court reversed.[78] As the court explained, "[t]he only evidence suggestive of [Mann's] incapacity at the time the will was executed is in fact evidence of her condition at other times," which did not "overcome the presumption that [she] was sane."[79]

Another oft-invoked basis for invalidating a wealth transfer is undue

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70. Troy Health & Rehab. Ctr. v. McFarland, 187 So. 3d 1112, 1119 (Ala. 2015) (quoting Thomas v. Neal, 600 So. 2d 1000, 1001 (Ala. 1992)).

71. Wheeless v. Gelzer, 780 F. Supp. 1373, 1382 (N.D. Ga. 1991) (emphasis added).

72. *See, e.g.*, Ivie v. Smith, 439 S.W.3d 189, 200 (Mo. 2014) (en banc) ("[E]vidence of mental unsoundness either before or after execution, which is not too remote, is admissible to prove lack of testamentary capacity, as long as the evidence indicates the unsoundness existed at the time the will or trust was made."); *In re* Estate of Clements, 505 N.E.2d 7, 9 (Ill. App. Ct. 1987); *In re* Estate of Nalaschi, 2014 PA Super 73, ¶ 9, 90 A.3d 8, 12–13 ("Evidence of [the owner's] state of mind may be received for a reasonable time before and after execution as reflective of decedent's testamentary capacity." (quoting *In re* Agostini's Estate, 457 A.2d 861, 867 (Pa. Super. Ct. 1983))); Rich v. Rich, 615 S.W.2d 795, 797 (Tex. App. 1980) ("[T]he court may also look to the state of the testator's mind at time other than when he executed his will, if it tends to show the testator's state of mind at the time of the execution.").

73. *See* Goetz v. Roberts (*In re* Goetz' Estate), 61 Cal. Rptr. 181, 186 (Ct. App. 1967) ("When one has a mental disorder in which there are lucid periods, it is presumed that his will has been made during a time of lucidity."). On the flip side, "[i]f it appears that the testator was insane prior to the execution of the will, and that his insanity was of a progressive and permanent type, there is no basis for indulging in a presumption that the will was executed during a lucid interval." Alexander v. Estate of Callahan, 132 So. 2d 42, 43 (Fla. Dist. Ct. App. 1961).

74. 229 Cal. Rptr. 225 (Ct. App. 1986).

75. *Id.* at 227.

76. *Id.*

77. *See id.* at 228.

78. *See id.* at 230–31.

79. *Id.*

influence.[80] This rule "is one of the most bothersome concepts in all of law," because "[i]t cannot be precisely defined."[81] After all, *any* decision to leave assets to someone else is "the result of influence."[82] But supposedly, influence crosses the line and becomes "undue" when it overcomes the victim's autonomy so "his action[] is contrary to his true desire and free will."[83] The test is highly subjective:

> It is only when the will of the person who becomes a testator is coerced into doing that which he or she does not desire to do, that it is undue influence. The coercion may of course be of different kinds, it may be in the grossest form, such as actual confinement or violence, or a person in the last days or hours of life may have become so weak and feeble, that a very little pressure will be sufficient to bring about the desired result . . . .[84]

Undue influence claims are often litigated under a unique burden-shifting regime. The challenger first tries to establish a presumption of undue influence.[85] For gifts and contracts, this presumption arises if there is a confidential relationship between the parties—such as attorney-client, principal-agent, or doctor-patient—and the arrangement favors the dominant individual.[86] Alternatively, for wills, the brute fact that a trusted person reaps a benefit from the instrument does not create a prima facie case.[87] Instead, the contestant must also point to one or more "suspicious

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80. Undue influence dates to the seventeenth century. *See* HENRY SWINBURNE, A BRIEFE TREATISE OF TESTAMENTS AND LAST WILLES 283 (1611).

81. *In re* Estate of Herbert, 979 P.2d 39, 52 (Haw. 1999) (quoting JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 160 (1995)).

82. Madoff, *supra* note 30, at 575.

83. Howe v. Palmer, 956 N.E.2d 249, 253–54 (Mass. App. Ct. 2011).

84. Wingrove v. Wingrove (1886) 11 PD 81, 82–83 (UK); *cf.* Neill v. Brackett, 126 N.E. 93, 94 (Mass. 1920) (explaining that undue influence in the context of a deed "may be caused by physical force, by duress, by threats, or by importunity" or "may arise from persistent and unrelaxing efforts in the establishment or maintenance of conditions intolerable to the particular [victim]").

85. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmt. f (AM. L. INST. 2003) (explaining the presumption of undue influence).

86. *See, e.g.*, Bitler Inv. Venture II, LLC v. Marathon Ashland Petroleum, LLC, 779 F. Supp. 2d 858, 884 (N.D. Ind. 2011) ("Certain legal and domestic relationships (i.e., attorney-client, guardian-ward, principal-agent, pastor-parishioner, and parent-child) raise a presumption of trust and confidence as to the subordinate and a corresponding influence as to the dominant party on the other."); *cf.* D'Onofrio v. Mother of God with Eternal Life, 79 N.Y.S.3d 902, 911 (Sup. Ct. 2018) ("[R]elationships between individuals and their 'spiritual advisors' may involve trust and confidence.").

87. *See, e.g.*, Hutcheson v. Bibb, 38 So. 754, 754 (Ala. 1905) ("In transactions testamentary in character, the mere existence of confidential relations between the testator and the beneficiary under the will are not, in and of themselves alone, sufficient to raise the presumption of undue influence . . . ."); Moore v. Moore, 429 P.3d 607, 618 (Kan. Ct. App. 2018) (analyzing why courts apply a "more rigorous standard to reverse the usual burden of proving undue influence for wills than

circumstances."[88] These red flags can include a testator who was ill or mentally diminished, a beneficiary who actively participated in procuring the will, and the existence of an "unnatural" bequest.[89] If the challenger succeeds in raising the presumption, undue influence has been established unless the alleged wrongdoer can prove by clear and convincing evidence that the transfer was voluntary.[90]

A parade of scholars has argued that incapacity and undue influence are flawed. These critics make three related arguments. First, they assert that incapacity (to some degree) and undue influence (to a greater extent) do not actually protect testamentary autonomy, but rather seek to keep inheritance within families.[91] For example, both rules hinge on whether a beneficiary is a "natural" recipient of the decedent's assets.[92] The majority view is that an "unnatural" bequest is one that flows to a beneficiary "who is not related [to the decedent] by blood or marriage."[93] Thus, incapacity

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for contracts"); *cf.* Mullis v. Welch, 815 S.E.2d 282, 286 (Ga. Ct. App. 2018) (applying the undue influence test for wills to an irrevocable trust).

88. Kelley v. Johns, 96 S.W.3d 189, 195 (Tenn. Ct. App. 2002); *see also* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 & cmts. f, h (AM. L. INST. 2003) (offering a laundry list of "suspicious circumstances" and taking the position that the wills doctrine of undue influence should also extend to gifts and irrevocable trusts).

89. Youngs v. Hitz (*In re* Estate of Novak), 458 N.W.2d 221, 226 (Neb. 1990).

90. *See* Caraveo v. Perez (*In re* Estate of Bethurem), 313 P.3d 237, 241 (Nev. 2013); *cf. In re* Estate of Gaaskjolen, 2020 SD 17, ¶ 23, 941 N.W.2d 808, 815 (describing the beneficiary's "burden to produce evidence that she 'took no unfair advantage of the decedent'" (quoting *In re* Estate of Dokken, 2000 SD 9, ¶ 28, 604 N.W.2d 487, 495)). Other jurisdictions only require the beneficiary to rebut the presumption by a preponderance of the evidence. *See* Smith v. Smith (*In re* Estate of Smith), 2020 Ark. App. 113, at 20–21, 597 S.W.3d 65, 77.

91. *See, e.g.*, Melanie B. Leslie, *The Myth of Testamentary Freedom*, 38 ARIZ. L. REV. 235, 236–37 (1996) (describing how triers of fact use the capaciousness of incapacity and undue influence "to frustrate the testator's intent and distribute estate assets to family members"); Foster, *supra* note 31, at 210 (explaining that "judges and juries manipulate mental capacity doctrines such as 'undue influence' and 'insane delusion' to reach results more in accord with the family paradigm"); Madoff, *supra* note 30, at 577 (asserting that undue influence does not "protect the intent of the testator, but rather to protect the testator's biological family from disinheritance").

92. *See, e.g.*, M. C. Slough, *Testamentary Capacity: Evidentiary Aspects*, 36 TEX. L. REV. 1, 20 (1957) ("When a testator passes over the natural objects of his bounty in favor of an outsider, it is not uncommon for courts to characterize his action as harsh or unnatural or irrational, treating it as corroborative evidence of lack of testimentary [sic] capacity."); Suagee v. Cook (*In re* Estate of Maheras), 897 P.2d 268, 272 (Okla. 1995) (asking "[w]hether the person charged with undue influence was *not* a natural object of the maker's bounty" (emphasis in original)).

93. Ingersoll v. Ingersoll (*In re* Ingersoll Trust), 950 A.2d 672, 698 (D.C. 2008); *see also* Sutton v. Combs, 419 S.W.2d 775, 776 (Ky. 1967) ("It is natural that a person recognizes his relatives as the objects of his bounty unless there is some reason not to do so."); Hanson v. Vanniewaal (*In re* Estate of Hock), 322 S.W.3d 574, 583 (Mo. Ct. App. 2010) ("[A]n 'unnatural disposition of property' may be based on evidence of a transfer of property without apparent reason, to non-blood heirs[,] excluding the natural objects of one's bounty."); Barber v. Pound (*In re* Estate of Strozzi), 903 P.2d 852, 857 (N.M. Ct. App. 1995) ("The natural objects of [the testator's] bounty are . . . those persons designated

and undue influence are especially likely to invalidate transfers to friends, lovers, same-sex partners, and caregivers.[94]

Second, academics have shown that the elasticity of incapacity and undue influence allows factfinders to resolve disputes according to their own biases.[95] Several ignoble cases from the mid-twentieth century bear this out. The most infamous example is likely the Supreme Court of New York, Appellate Division's 1964 decision in *Weiss v. Kaufmann* (*In re Will of Kaufmann*).[96] Robert Kaufmann, an heir to the Kay Jewelry franchise, left his estate to his lover, Walter Weiss, instead of his brothers.[97] Robert enclosed a letter with his will thanking Walter for fostering his interest in art, giving him "a balanced, healthy sex life" and making him happy "after so many wasted, dark, groping, fumbling immature years."[98] Upholding a jury verdict of undue influence, the court described the letter as "utterly unreal, highly exaggerated and pitched to a state of fervor and ecstasy."[99] Opinions like *Kaufmann* elucidate that some undue influence cases are not about "whether the document represented the testator's intent, but whether the testator's intentions offended the

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to inherit from him in the absence of a will."). *But see* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.1 cmt. c (AM. L. INST. 2003) (declaring that "natural" recipients of a decedent's property can be as varied as close family members, stepchildren, and unmarried partners); Winston v. Gibbs (*In re* Estate of Sarabia), 270 Cal. Rptr. 560, 564 (Ct. App. 1990) (holding that the "unnatural bequest" element requires an examination of "the respective relative standings of the beneficiary and the contestant to the decedent in order . . . [to] determine which party would be the more obvious object of the decedent's testamentary disposition").

94. *See, e.g.*, Snyder v. Erwin, 79 A. 124, 124–25 (Pa. 1911) (holding that the testator's "unlawful relation" with beneficiary and "exclusion of an only daughter . . . was evidence of an undue influence exerted by the proponent affecting the dispositions of the will, and sufficient in itself to carry the case to the jury"); Leslie, *supra* note 91, at 245 (observing that when testators left property to non-relatives, courts "often emphasize the beneficiary's inability to explain the 'unnatural' nature of the bequest").

95. *See, e.g.*, Burkhalter v. Burkhalter, 841 N.W.2d 93, 105 (Iowa 2013) ("[B]ecause of its spongy character, it has been argued the law of undue influence may undermine testamentary freedom in order to promote social goals thought to be desirable."); Joseph W. deFuria, Jr., *Testamentary Gifts Resulting from Meretricious Relationships: Undue Influence or Natural Beneficence?*, 64 NOTRE DAME L. REV. 200, 201 (1989) (arguing that undue influence "often functions instead as a barometer of society's mores"); Kurt Wanless, Comment, *Rethinking Oregon's Law of Undue Influence in Will Contests*, 76 OR. L. REV. 1027, 1027 (1997) (asserting that undue influence "provides a mechanism for judges and juries to rewrite wills to conform with their subjective senses of fair disposition"); *cf.* Lawrence A. Frolik & Mary F. Radford, *"Sufficient" Capacity: The Contrasting Capacity Requirements for Different Documents*, 2 NAT'L ACAD. ELDER L.J. 303, 309 (2006) (noting that "[t]he inherent vagueness of the testamentary capacity requirement leaves much of the determination of capacity in the hands of the fact-finder").

96. 247 N.Y.S.2d 664 (App. Div. 1964), *aff'd*, 205 N.E.2d 864 (N.Y. 1965).

97. *See id.* at 671, 673.

98. *Id.* at 671.

99. *Id.* at 674; *see also* Holland v. Traylor (*In re* Will of Moses), 227 So. 2d 829, 833 (Miss. 1969) (striking down a bequest made by a tough, free-spirited businesswoman to her younger lover and remarking that she "entertained the pathetic hope that he might marry her").

[trier of fact's] sense of justice or morality."[100]

Third, academics have challenged undue influence's psychological underpinnings. To them, it is naïve to conceptualize the mind as a kind of airplane that can be hijacked. As Carla Spivack puts it, undue influence reflects eighteenth century ideas "of the self as impermeable from without, 'free and indivisible,' and having its own distinct 'will' separable from that of others."[101] Today, we understand that people are ambivalent, that relationships ebb and flow, and that intentions are rarely fixed and determinate.[102] Therefore, by inquiring whether a decedent's "free agency was destroyed" and "h[er] volition was substituted for that of another," courts ask an unanswerable question.[103]

To summarize, contests have long been one of civil law's problem children. As we discuss next, another key probate rule—the slayer doctrine—has fared no better.

B. The Slayer Rule

The slayer doctrine bars someone from inheriting from the estate of a person whose death they caused.[104] This section describes the history of the rule and why it stands on shaky constitutional footing.

Understanding the slayer principle begins with the ancient concept of attainder. For centuries, the English common law deemed convicted felons to be "attainted."[105] This term comes from the Latin word *attinctus*, which means "stained or polluted."[106] Being branded with this scarlet mark triggered harsh consequences, called "incidents," which placed the attainted person in a state of "civil death."[107]

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100. Leslie, *supra* note 91, at 246. The "family favoritism" critique is linked to the "morality" critique because courts and juries often believe that it is somehow wrongful *not* to provide for one's family. *See, e.g.*, Madoff, *supra* note 30, at 576 (contending that "the undue influence doctrine denies freedom of testation for people who deviate from judicially imposed testamentary norms—in particular, the norm that people should provide for their families").

101. Spivack, *supra* note 50, at 271.

102. *See id.* (criticizing the antiquated idea that there is "a stable, independent self with firm and discernible boundaries between itself and others"); Madoff, *supra* note 30, at 622 (observing that undue influence depends on the faulty premises that "a person's natural state is one of independence from others" and "for people who are dependent on other people, it is possible to determine what their intentions would be if they were not dependent").

103. Melcher v. Benson (*In re* Estate of McLean), 2004 WY 126, ¶ 11, 99 P.3d 999, 1004 (Wyo. 2004).

104. *See generally* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.4 (AM. L. INST. 2003) (restating the slayer rule).

105. 1 FREDERICK POLLOCK & FREDERIC WILLIAM MAITLAND, THE HISTORY OF ENGLISH LAW 476 (2d ed. 1909).

106. 1 J. CHITTY, A PRACTICAL TREATISE ON THE CRIMINAL LAW 499 (1819) (emphasis omitted).

107. Avery v. Everett, 18 N.E. 148, 150 (N.Y. 1888).

Two incidents of attainder are especially important for our purposes. First, under the forfeiture doctrine, attainted individuals surrendered their property to the Crown or to their lord.[108] Second, the legal system deemed the blood of felons to be "corrupt," which meant that they could neither inherit assets nor transmit them at death.[109] This double-barreled penalty was devastating:

> [A]ll the property of one attained, real and personal, is forfeited; his blood is corrupted, so that nothing can pass by inheritance to, from, or through him; . . . and thus, his wife, children, and collateral relations suffering with him, the tree, falling, comes down with all its branches.[110]

Nevertheless, as Blackstone explained, these tenets reflected the prevailing belief that ownership was a privilege that the monarchy could freely revoke.[111]

In America, the founding generation rejected these harsh rules.[112] In their eyes, the forfeiture rule's disregard for the sanctity of private property smacked of feudalism.[113] But the legal intelligentsia at the time were especially appalled by corruption of blood. James Madison

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108. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 381–84 (12th ed. 1793) (explaining that attainder resulted in "forfeit[ure] to the king all the lands and tenements"). The Crown had the right to seize the felon's real property, and if it did not exercise this prerogative, the land would escheat to the lord. *See* POLLOCK & MAITLAND, *supra* note 105, at 351. This was consistent with the prevailing norm that criminal justice "was a profitable source of revenue" for the monarchy. F. W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 10 (A. H. Chaytor & W. J. Whittaker eds., 1936).

109. *See* Lord de la Warre's Case (1597) 77 Eng. Rep. 1145, 1146; 11. Co. Rep. 1 a, 1 b (explaining that "where one is attainted of treason and felony," one suffers "absolute and perpetual disability by corruption of blood for any of his posterity to claim any inheritance in fee-simple"); Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518, 607 (1819) ("In England, . . . corruption of blood, and consequent forfeiture of the entire property of the criminal, [w]as the regular and inevitable consequences of a capital conviction at common law.").

110. 1 JOEL PRENTISS BISHOP, BISHOP ON CRIMINAL LAW § 967, at 716 (John M. Zane & Carl Zollmann eds., 9th ed. 1923).

111. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND 299 (12th ed. 1793) (opining that because "all property is derived from society," a felon "violates the fundamental contract of his association").

112. The Framers were particularly concerned about the British practice of using of bills of attainder: legislation that imposes criminal penalties on specific people without a judicial trial. *See* Charles H. Wilson, Jr., Comment, *The Supreme Court's Bill of Attainder Doctrine: A Need for Clarification*, 54 CALIF. L. REV. 212, 213–15 (1966) (describing how bills of attainder "were designed to remove a political enemy before he became powerful enough to pose a real threat to the King or to Parliament"). Thus, Article I, Section 9, Clause 3 of the U.S. Constitution expressly abolishes "Bill[s] of Attainder." U.S. CONST. art. I, § 9, cl. 3. In addition, Article III, Section 3, Clause 2 declares that "[t]he Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person attainted. *Id.* art. III, § 3, cl. 2.

113. *See* Reppy, *supra* note 32, at 233–34 (describing forfeiture's feudal origins).

described this ruthless principle as "extending the consequences of guilt beyond the person of its author."[114] Likewise, Joseph Story argued that the doctrine had the potential to lead a felon's innocent family to "poverty and ruin."[115] Thus, both the federal Crimes Act of 1790 and nearly every state constitution declares that "no conviction . . . shall work corruption of blood, or forfeiture of any estate."[116]

This seismic shift in criminal law revealed a gap in the field of wills and trusts. With surprising frequency, a murderer was either an intestate heir of the decedent or a beneficiary under the decedent's will.[117] Could the killer receive the victim's property? This issue had never arisen in the era of forfeiture and corruption of blood, because perpetrators relinquished their assets and their ability to participate in the inheritance process.[118] But now that these rules were defunct, there was no authority on point.

Until the late nineteenth century, most courts allowed killers to take from their victims' estates.[119] These decisions rested on two pillars. The first was judicial modesty. Statutes in every state require courts to enforce duly executed wills and to distribute an intestate decedent's property to specific heirs.[120] Because, in the nineteenth century, these laws did not exempt slayers, judges held that they could not create such an exclusion

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114. THE FEDERALIST NO. 43, at 221 (James Madison) (John Dunn et al. eds., 2009).

115. 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES § 1295, at 172 (1833).

116. Crimes Act of 1790, ch. 9, § 24, 1 Stat. 112, 117; *see* ALA. CONST. art. I, § 19; ALASKA CONST. art I, § 15; ARIZ. CONST. art 2, § 16; COLO. CONST. art II, § 9; CONN. CONST. art. IX, § 4; DEL. CONST. art. I, § 15; FLA. CONST. art. I, § 17; GA. CONST. art. I, § 1, ¶ XX; ILL. CONST. art. I, § 11; IND. CONST. art. I, § 30; KAN. CONST. § 12; KY. CONST. § 20; ME. CONST. art I, § 11; MD. CONST. art. 27; MICH. CONST. art. I, § 10; MINN. CONST. art. I, § 11; MO. CONST. art. I, § 30; MONT. CONST. art. II, § 30; NEB. CONST. art. I, § 15; N.C. CONST. art I, § 29; OHIO CONST. art. I, § 12; OKLA. CONST. art. II, § 15; OR. CONST. art. I, § 25; PA. CONST. art I, §§ 18–19; S.C. CONST. art. I, § 4; TENN. CONST. art. I, § 12; TEX. CONST. art. I, § 21; WASH. CONST. art. I, § 15; W. VA. CONST. art. III, § 18; WIS. CONST. art I, § 12. Other states passed similar statutes. HAW. REV. STAT. § 831-3 (2020); N.H. REV. STAT. ANN. § 607-A:3 (2020); 12 R.I. GEN. LAWS § 12-19-4 (2020); VA. CODE ANN. § 55.1-103 (2020).

117. *See* Ames, *supra* note 32, at 226 (noting that "[b]y a strange chance there have been seven of these cases reported in the last nine years").

118. *See* Reppy, *supra* note 32, at 230 (attributing "[t]he absence of early English decisions on this problem" to incidents of attainder).

119. *See* Shellenberger v. Ransom, 59 N.W. 935, 941 (Neb. 1894); Owens v. Owens, 6 S.E. 794, 795 (N.C. 1888); Deem v. Millikin, 6 Ohio C.C. 357 (Cir. Ct. May 1892), *aff'd sub nom.* Deem v. Milliken, 44 N.E. 1134 (Ohio 1895); *In re* Carpenter's Estate, 32 A. 637, 639 (Pa. 1895). *But see* N.Y. Mut. Life Ins. Co. v. Armstrong, 117 U.S. 591, 600 (1886) (refusing to allow the beneficiary of a life insurance policy to recover when he had feloniously killed the insured).

120. *See, e.g.*, UNIF. PROB. CODE § 3-101(UNIF. L. COMM'N 2010) ("Upon the death of a person, [the person's] real and personal property devolves to the persons to whom it is devised by [the person's] last will . . . or in the absence of testamentary disposition, to [the person's] heirs . . . .").

out of whole cloth.[121] Second, courts opined that their jurisdiction's constitutional prohibition on incidents of attainder prevented them from disqualifying slayers.[122] For example, in *In re Carpenter's Estate*,[123] an 1895 Pennsylvania Supreme Court decision, a son murdered his father "for the purpose of securing [his father's] property" in intestacy.[124] The court allowed the son to inherit, declaring: "The penalty for murder in the first degree . . . is death by hanging. No confiscation of lands or goods, and no deprivation of the inheritable quality of blood, constitutes any part of the penalty of this offense."[125]

But gradually, the tide began to turn. The catalyst for this change was the New York Court of Appeals' celebrated decision in *Riggs v. Palmer*.[126] Francis Palmer executed a will that left most of his estate to his sixteen-year-old grandson, Elmer Palmer.[127] Later, Elmer learned that Francis was considering revoking the instrument.[128] Before Francis could do so, Elmer poisoned him.[129] After Elmer was convicted of murder, Francis's daughters filed an action to disinherit him.[130] The state justices admitted that the probate code, if "literally construed," required them to uphold Francis's will as written.[131] Nevertheless, the Court held that lawmakers simply could not have intended "a donee who murdered the testator to make the will operative [to] have any benefit under it."[132] Thus, the Court erased Elmer from Francis's will to avoid the perverse result of a slayer "acquir[ing] property by his own crime."[133] After *Riggs*, every American jurisdiction adopted some version of the slayer rule.[134]

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121. *See Shellenberger*, 59 N.W. at 939 ("In our statute of descent there is neither ambiguity, nor room for construction."); *Owens*, 6 S.E. at 795; *Deem*, 6 Ohio C.C. 357; *In re Carpenter's Estate*, 32 A. at 637.

122. *See Owens*, 6 S.E. at 795 ("Forfeitures of property for crime are unknown to our law . . . ."); *Deem*, 6 Ohio C.C. 357 ("[A] legislative body, careful to respect both the letter and the spirit of the constitution, should hesitate to attach to felonies any of the consequences of the corruption of blood.").

123. 32 A. 637 (Pa. 1895).

124. *Id.* at 639 (Williams, J., concurring).

125. *Id.* at 637 (majority opinion).

126. 22 N.E. 188 (N.Y. 1889).

127. *Id.* at 188–89.

128. *Id.* at 189.

129. *Id.*

130. *See id.* at 188, 191.

131. *See id.* at 189.

132. *Id.*

133. *Id.* at 190.

134. Most jurisdictions have adopted the slayer rule by statute. *E.g.*, ALA. CODE § 43-8-253 (2020); ARK. CODE ANN. § 28-11-204 (West 2020); CAL. PROB. CODE § 250 (West 2021); COLO. REV. STAT. § 15-11-803 (2020); CONN. GEN. STAT. § 45a-447 (2020); D.C. CODE § 19-320 (2020); FLA. STAT.

In most states, the slayer doctrine now bars a person from receiving property via intestacy, will, trust, or nonprobate transfer from someone whom the slayer intentionally and feloniously kills.[135] As such, the slayer rule furthers the goals of both inheritance and criminal law. For starters, it carries out a decedent's presumed intent.[136] Indeed, slayers cannot inherit because "the victim would not want his murderer to receive the legacy."[137] At the same time, in a nod to criminal law, the doctrine also disincentives illegal behavior by ensuring that "no one [is] allowed to profit by his own wrong."[138]

Yet lurking beneath this intuitive doctrine are several mind-bending complexities. For example, the relationship between criminal trials and petitions to disqualify a slayer in probate court can be confusing. Prosecutors must prove criminal liability by the most onerous standard in

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§ 732.802 (2020); HAW. REV. STAT. § 560:2-803 (2020); IDAHO CODE § 15-2-803 (2020); 755 ILL. COMP. STAT. 5/2-6 (2020); IND. CODE § 29-1-2-12.1 (2020); IOWA CODE § 633.535 (2020); KAN. STAT. ANN. § 59-513 (2020); KY. REV. STAT. ANN. § 381.280 (West 2020); MASS. GEN. LAWS ch. 265, § 46 (2020); MINN. STAT. § 524.2-803 (2020); NEB. REV. STAT. § 30-2354 (2020); N.M. STAT. ANN. § 45-2-803 (2020); OHIO REV. CODE ANN. § 2105.19 (West 2020); TENN. CODE ANN. § 31-1-106 (2020); UTAH CODE ANN. § 75-2-803 (West 2020); VA. CODE ANN. § 64.2-2500-01 (2020); WASH. REV. CODE § 11.84.010 (2020); W. VA. CODE § 42-4-2 (2020). In addition, a handful of states apply the slayer rule as a matter of common law, often using the equitable remedy of a constructive trust to transmit the victim's property to the rightful recipients. *E.g.*, Wright v. Wright, 449 S.W.2d 952, 953–54 (Ark. 1970); Welch v. Welch, 252 A.2d 131, 133–34 (Del. Ch. 1969); Perry v. Strawbridge, 108 S.W. 641, 648 (Mo. 1908); *In re* Estate of Bach, 383 N.Y.S.2d 653, 654 (App. Div. 1976); Hargrove v. Taylor, 389 P.2d 36, 37 (Or. 1964); Thompson v. Mayes, 707 S.W.2d 951, 955 (Tex. App. 1986).

135. *See, e.g.*, CAL. PROB. CODE § 250 ("A person who feloniously and intentionally kills the decedent is not entitled to . . . [a]ny property, interest, or benefit under a will of the decedent, or . . . [a]ny property of the decedent by intestate succession.").

136. *See, e.g.*, Sherman, *supra* note 32, at 861 ("[I]f *A*, a legatee under *B*'s will, murders *B*, *A* is barred from inheriting not because *A* has done something bad—the badness will, after all, be addressed by the criminal law—but because we can infer with confidence that *B* would have wanted *A* disinherited." (emphasis in original)); Stephanie J. Willbanks, *Does It Pay to Kill Your Mother? The Effect of a Criminal Acquittal in a Subsequent Civil Proceeding to Disqualify the Slayer*, 16 CONN. L. REV. 29, 50 (1983) ("[D]isqualification statutes merely attempt to accomplish what the decedent would have done had he known the true state of affairs."). *But see* Adam J. Hirsch, *Freedom of Testation / Freedom of Contract*, 95 MINN. L. REV. 2180, 2214 (2011) (observing that slayer statutes do not contain exceptions for decedents who forgive their murderers before dying or assisted suicide and concluding that "intent makes no difference" (emphasis omitted)).

137. Note, *Constructive Trust Theory as Applied to Property Acquired by Crime*, 30 HARV. L. REV. 622, 624 (1917); Chadwick, *supra* note 32, at 212 ("[T]here is a presumption . . . that the testator would have revoked the bequest . . . .").

138. Wade, *supra* note 32, at 715; *Strawbridge*, 108 S.W. at 642 ("Can it be said that one, by high-handed murder, can not only make himself an heir in fact, when he had but a mere expectancy before, but further shall enjoy the fruits of his own crime?"); RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 45 cmt. c (AM. L. INST. 2011) ("The transparent purpose of the slayer rule is to prevent unjust enrichment by homicide.").

law: beyond a reasonable doubt.[139] As a result, someone who has been convicted of an intentional and felonious killing and exhausted their appellate rights is barred from inheriting.[140] But on the flip side, an acquittal in the criminal matter means nothing in probate.[141] Indeed, the same evidence may fail to establish guilt but also satisfy the probate judge that the accused more likely than not committed the crime.[142] For instance, in *Castro v. Ballesteros-Suarez*,[143] an Arizona appellate court found that a murder victim's widow was his "slayer" even though the police determined that they did not even have probable cause to arrest her.[144]

In addition, courts had to rationalize the slayer rule in the face of state constitutional provisions that abolish incidents of attainder. A handful of opinions have strongly implied—albeit never held—that the slayer doctrine improperly allows "forfeiture of property rights [to] follow conviction for crime."[145] However, these decisions, which predate the widespread adoption of slayer statutes, merely cite the forfeiture doctrine as a reason not to create a common law slayer rule.[146] Thus, they punch with little weight today.

Conversely, the overwhelming majority of opinions have rejected

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139. *See, e.g.*, Wiley v. State, No. 989, 2020 WL 241523, at *5 n.5 (Md. Ct. Spec. App. Jan. 15, 2020) ("Viewing various burdens of proof as a continuation running from the highest to the lowest, the most demanding burden would be 'beyond a reasonable doubt . . . .'").

140. *See, e.g.*, IND. CODE § 29-1-2-12.1(a) (2020) ("A judgment of conviction is conclusive in a subsequent civil action . . . ."); MINN. STAT. § 524.2-803(f) (2020) (same); Sulser v. Winnick, No. CV074027013, 2007 WL 2390676, at *2 (Conn. Super. Ct. Aug. 2, 2007) (holding that a criminal conviction is dispositive in a later probate proceeding "where all rights of appeal have been exhausted or the time for appeal has expired").

141. *See, e.g.*, Hoss v. Hoge (*In re* Estate of Kissinger), 166 Wash. 2d 120, 128, 206 P.3d 665, 669 (2009) ("No jurisdiction treats an acquittal as conclusive evidence of the lawfulness of the killing.").

142. *See, e.g.*, Webb v. McDaniel, 127 S.E.2d 900, 902 (Ga. 1962) ("[A] finding by a preponderance of the evidence that the defendant had with malice aforethought killed his wife and thereby forfeited his right of inheritance would be wholly consistent with the finding that the [s]tate had failed to prove [the same facts] beyond a reasonable doubt . . . ."); UNIF. PROB. CODE § 2-803(g) (UNIF. L. COMM'N 2010) ("In the absence of a conviction, the court . . . must determine whether, under the preponderance of evidence standard, the individual would be found criminally accountable for the felonious and intentional killing of the decedent.").

143. 213 P.3d 197 (Ariz. Ct. App. 2009).

144. *Id.* at 203.

145. Wall v. Pfanschmidt, 106 N.E. 785, 790 (Ill. 1914) (quoting Collins v. Metro. Life Ins. Co., 83 N.E. 542, 543 (Ill. 1907)); *see also* Hagan v. Cone, 94 S.E. 602, 604 (Ga. Ct. App. 1917); Wilson v. Randolph, 261 P. 654, 655 (Nev. 1927).

146. *See, e.g.*, *Wall*, 106 N.E. at 790 ("If other punishment be required, the duty to so provide rests upon the legislative branch of the government."); *Wilson*, 261 P. at 655 ("The right of inheritance is a civil right existing by virtue of law, and the Legislature has not provided that any of those facts shall deprive one of such right of inheritance.").

forfeiture challenges.[147] Many of these cases invoke what is known as the "owned interest" rationale.[148] This view relies on the fact that, when a property owner is still alive, third parties usually have no stake in the owner's property. An owner who is intestate can always create an estate plan, and a testator or settlor who has executed a will or a revocable trust can amend or cancel the instrument.[149] Technically, then, the slayer rule does not force a criminal to disgorge *the slayer's* property.[150] Indeed, at the time of the murder, the slayer has a mere expectancy, not a "vested interest . . . upon which the constitutional prohibition against forfeiture could operate."[151] As Maryland's highest court succinctly put it, "[o]ne cannot forfeit what [one] never had."[152] Thus, the common principle underpinning all of these cases is that the slayer rules do not violate state constitutional prohibitions on forfeiture because they do not disgorge any vested property interest belonging to the slayer.

Yet the owned interest rationale only goes so far. Courts developed the theory in the early twentieth century, when intestacies and wills were common.[153] Starting in the 1960s, the nonprobate revolution muddied the waters.[154] Owners began to use devices like trusts and joint accounts to

147. *See* Moore v. Moore, 168 S.E.2d 318, 320 (Ga. 1969); Helwinkel v. Helwinkel (*In re* Helwinkel's Estate), 18 Cal. Rptr. 473, 475–76 (Ct. App. 1962); Legette v. Smith, 85 S.E.2d 576, 580 (S.C. 1955); Weaver v. Hollis, 22 So. 2d 525, 529 (Ala. 1945).

148. Fellows, *supra* note 32, at 540.

149. *See, e.g.*, Wass v. Hammontree, 77 S.W.2d 1006, 1010 (Mo. 1934) ("[N]o one is an heir to the living . . . .").

150. *See, e.g.*, Bell *ex rel.* Bell v. Casper *ex rel.* Church, 717 S.E.2d 783, 788 (Va. 2011) (reasoning that the slayer statute "does not work a corruption of blood because it does not deprive a 'slayer's' heirs the right to inherit from the 'slayer' property properly belonging to the 'slayer'" (emphasis omitted)); Lore v. Habermeyer (*In re* King's Estate), 52 N.W.2d 885, 888 (Wis. 1952) ("As to attainder, there is none because in our view of the law the estate never vested in [the slayer].").

151. *Moore*, 168 S.E.2d at 320; Blodgett v. Blodgett (*In re* Estate of Blodgett), 147 P.3d 702, 710 (Alaska 2006) ("By killing the decedent, the slayer prevents the property interest from vesting in himself."); *Weaver*, 22 So. 2d at 529 ("The exclusion of the murderer from the property benefit does not inflict upon him any greater or other punishment for his crime than the law specifies, and takes no property from him, but simply bars him from acquiring property by his crime . . . ."); *In re Helwinkel*, 18 Cal. Rptr. at 476 ("To hold that appellant cannot profit by murder is not to invoke a forfeiture, as she had no right to the [property] in the first instance."); Box v. Lanier, 79 S.W. 1042, 1047 (Tenn. 1904) ("[T]he surviving husband never acquired an estate in this property, and therefore there was nothing upon which this constitutional provision could operate."); RESTATEMENT (FIRST) OF RESTITUTION § 187 cmt. c (AM. L. INST. 1937) ("[T]he murderer is not deprived of property lawfully acquired by him, but is merely prevented from acquiring . . . property through his unlawful act.").

152. Price v. Hitaffer, 165 A. 470, 471 (Md. 1933); Perry v. Strawbridge, 108 S.W. 641, 648 (Mo. 1908) (reasoning that when the slayer doctrine disinherits a killer, it "takes nothing from [her], but simply says, 'you cannot acquire property in this way'").

153. *See* Langbein, *supra* note 54, at 1108 (describing the decline in probate-based wealth transfer, such as wills, and the rise of trusts, life insurance, and pay-on-death accounts).

154. *See id.*

bypass the unpopular probate system.[155] In turn, this meant that the slayer rule began to apply to assets that had *already passed* to the slayer. For instance, the beneficiaries of an irrevocable trust are "vested with the equitable ownership of . . . the property."[156] Likewise, if the victim and the slayer hold title in joint tenancy, they each possess "a present interest rather than a future expectancy."[157] Courts began to recognize that when the slayer rule divests the killer of one of these rights or items, it actually does "work a forfeiture" by depriving slayers of a "property interest which [they] had at the instant *before* the slaying."[158]

Modern authority has tried to plug the holes in the owned interest rationale with an account that this Article calls the "murder profiteering" theory. This perspective argues that the forfeiture doctrine was objectionable because it meted out "punishment based solely on an individual's criminal *status* as a convicted felon."[159] But the slayer rule does not penalize for the sake of penalizing. Instead, it also serves a second purpose: preventing unjust enrichment by vindicating "the accepted policy that a killer should not profit from his wrong."[160] Thus, under the murder profiteering view, the slayer doctrine does not impermissibly punish a criminal *because* slayers are criminals; rather, it simply strips killers of the fruits of their crime.[161]

In addition, corruption of blood challenges to the slayer rule have been

155. *See id.*

156. Taylor v. Bunnell, 23 P.2d 1062, 1063 (Cal. Ct. App. 1933).

157. Wieser v. Heinol, 2014 IL App (1st) 132859-U, ¶ 7 (unpublished opinion).

158. Johansen v. Pelton, 87 Cal. Rptr. 784, 789 (Ct. App. 1970) (emphasis added); Snortland v. Mercer (*In re* Estate of Snortland), 311 N.W.2d 36, 38 n.1 (N.D. 1981); Shields v. Shields (*In re* Estate of Shields), 574 P.2d 229, 233 (Kan. Ct. App. 1977), *aff'd*, 584 P.2d 139 (Kan. 1978); Wade, *supra* note 32, at 728 (observing that a slayer rule that deprived the killer of her share of property held in joint tenancy would be problematic because "the slayer already has a property interest, of which he cannot constitutionally be deprived by the statute"); *cf.* Neiman v. Hurff, 93 A.2d 345, 347–48 (N.J. 1952) (acknowledging that divesting a slayer of his interest in corporate stock held in joint tenancy would be an unconstitutional forfeiture, but imposing a constructive trust on the killer that required him to pay income from the stock to the victim's beneficiaries).

159. Robert F. Hennessy, *Property—The Limits of Equity: Forfeiture, Double Jeopardy, and the Massachusetts "Slayer Statute,"* 31 W. NEW ENG. L. REV. 159, 197 (2009) (emphasis added).

160. Blodgett v. Blodgett (*In re* Estate of Blodgett), 147 P.3d 702, 710 (Alaska 2006) ("[A]ny loss caused by a slayer statute is not improperly based on attainders or on the legal status of a felon; rather, the slayer statute exists to effectuate the accepted policy that a killer should not profit from his wrong."); Nat'l City Bank of Evansville v. Bledsoe, 144 N.E.2d 710, 716 (Ind. 1957) ("These statutes . . . merely prevent the murderer from profiting by his act."); Fellows, *supra* note 32, at 544.

161. *See* Fellows, *supra* note 32, at 544 ("The constitutional prohibitions against forfeiture of estate and corruption of blood were designed to restrict punishment based on the criminal status, leaving the state free to impose forfeitures that have a nexus to the criminal act.").

less common but more successful than forfeiture challenges.[162] These claims are usually brought by the slayer's children.[163] As a result, they operate in tandem with the doctrines of lapse and antilapse. The rule of lapse holds that a beneficiary must survive the decedent to inherit from the decedent's estate.[164] Slayer rules absorb this concept by treating the killer as having "predeceased the [victim]," which, in turn, causes any devise from the victim to the slayer to lapse.[165] Antilapse, however, tempers the rule of lapse when a predeceased beneficiary is closely related to the testator, in which case, the share that would have passed to the predeceased beneficiary is instead reallocated to that relative's own descendants.[166] Some jurisdictions extend antilapse to slayers and thus allow the slayer's kids or grandkids to inherit the slayer's share of the victim's estate.[167] For example, as a Kentucky judge reasoned while refusing to penalize the slayer's four-year-old daughter:

> I cannot believe that it was the intention of the [l]egislature . . . to deny the right to inherit the estate to an innocent child, even though the child is a daughter of the person who committed the murder. To so hold in this case is to punish a baby who could not have counseled, advised or influenced her father in the commission of his crime, and takes from her the inheritance to which she is . . . entitled.[168]

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162. *Compare supra* text accompanying notes 147–152, *with infra* text accompanying notes 168, 171–176.

163. *See infra* text accompanying note 168, 171–176.

164. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 1.2 cmt. a (AM. L. INST. 2003) ("[A]n individual who fails to survive the decedent cannot take as . . . a devisee.").

165. DEL. CODE ANN. tit. 12, § 2322 (2020); IDAHO CODE § 15-2-803 (2020); IOWA CODE § 633.535 (2020); N.C. GEN. STAT. § 31A-4 (2019); 33 R.I. GEN. LAWS § 33-1.1-4 (2020); 20 PA. CONS. STAT. §§ 8803–04 (2020); VA. CODE ANN. § 64.2-2502 (2020); WASH. REV. CODE § 11.84.030 (2020); W. VA. CODE § 42-4-2(a) (2020); *In re* Estate of Van Der Veen, 935 P.2d 1042, 1046 (Kan. 1997).

166. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 5.5 (AM. L. INST. 2003).

167. *See, e.g.*, VA. CODE ANN. § 64.2-2502 ("[T]he antilapse provisions . . . are applicable . . . ."); RESTATEMENT (THIRD) OF PROP.: WILLS & DONATIVE TRANSFERS § 8.4 cmt. k (AM. L. INST. 2003) (calling for antilapse to apply).

168. Bates v. Wilson, 232 S.W.2d 837, 838 (Ky. 1950). Although *Bates v. Wilson* is unclear, it appears to have presented the question of whether the slayer's daughter could inherit through her murderous father in intestacy. 232 S.W.2d 837 (Ky. 1950). That issue is similar—but not identical—to antilapse, because it involves interpreting the statute of descent and distribution, rather than antilapse legislation. As with antilapse, not every court is willing to allow the slayer's children to inherit through the slayer in intestacy. The problem is that the slayer is still alive, and intestacy statutes prohibit an heir from taking property through a living parent. *See* Cook v. Grierson, 845 A.2d 1231, 1235 (Md. 2004) ("While [the slayer] is prohibited from inheriting from his father because of his act

But many states exempt slayers from antilapse.[169] Lawmakers and courts in this camp reason that the slayer's descendants should not inherit because their benefit flows just as inexorably from the crime as the slayer's benefit.[170]

Slayers' children sometime argue that antilapse is required to avoid resurrecting the harsh doctrine of corruption of blood. For instance, in *Misenheimer v. Misenheimer*,[171] Isam Misenheimer executed a will that left the residue of his estate to his eight kids equally, including his son John.[172] John then murdered Isam.[173] Because John had two sons of his own, the North Carolina Supreme Court had to decide whether to apply antilapse and give John's share of the estate to his children or to allow Isam's remaining seven kids to absorb John's share.[174] The justices ruled in favor of John's sons, remarking that "[w]hile it may be true that 'the gods visit the sins of the fathers upon the children,' . . . [we] will not do so."[175] Then, in a long footnote, the Court opined that reaching the opposite conclusion "would render the slayer statute unconstitutional as applied" by disinheriting John's sons "because of their father's corrupt blood."[176]

To conclude, there is tension between the slayer doctrine and state constitutional prohibitions on forfeiture laws and the corruption of blood doctrine. Although courts have mostly rejected forfeiture challenges, they have done so for reasons that are anachronistic. Also, judges seem to be more receptive to the fine-grained claim that failing to apply antilapse contravenes the proscription on corruption of blood.

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Inheritance litigation has long vexed the civil justice system. The

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of patricide, he is, nevertheless, still living. Consequently, the grandchildren are not 'issue' within the meaning of the intestacy statute.").

169. *See* CAL. PROB. CODE § 250 (West 2021); 33 R.I. GEN. LAWS § 33-1.1-4 ("The slayer shall be deemed to have predeceased the decedent as to property which would have passed to the slayer by devise or legacy from the decedent, except that the provisions of [antilapse] shall not apply."); McGhee v. Banks, 154 S.E.2d 37, 40 (Ga. Ct. App. 1967) (holding that antilapse does not apply to slayers).

170. *See* Wade, *supra* note 32, at 727 ("[T]he heirs or next of kin of the slayer may claim the property if they are entitled to it in their own right, but they cannot claim through an ancestor who has disqualified himself by his wrong.").

171. 325 S.E.2d 195 (N.C. 1985).

172. *Id.* at 196.

173. *Id.*

174. *See id.* at 197.

175. *Id.* at 198 (citations omitted) (quoting EURIPIDES, PHRIXUS).

176. *Id.* at 198–99 n.2. *But see* Bell *ex rel.* Bell v. Casper *ex rel.* Church, 717 S.E.2d 783, 788 (Va. 2011) (applying both the owned interest and murder profiteering theories to reject a corruption of blood challenge).

doctrines of mental incapacity and undue influence suffer from the worst evidence problem and give factfinders the "latitude to substitute their wishes for the testator's."[177] In addition, state constitutions cast a long shadow over the slayer rule. Yet as the next Part explains, these challenging principles have strayed beyond their traditional domain in probate court and started to infiltrate the field of criminal law.

II. CRIMINAL INHERITANCE LAW

The law generally "does not seek to 'punish and deter' ordinary private wrongs."[178] Traditionally, then, there has been little doubt that "[i]nterference with freedom of testation . . . does not constitute a crime."[179] However, this Part reveals that states are now creating punitive sanctions for conduct that they once regulated solely through probate rules. These newly minted doctrines both serve important purposes and raise thorny questions.

A. Financial Exploitation

Nearly every state has enacted legislation that criminalizes verbally or physically assaulting a senior.[180] In addition, as this section explains, many of these statutes also outlaw the amorphous offense of "financial exploitation" through "undue influence."[181]

The seeds of criminal elder abuse statutes were sown in the late twentieth century. In 1981, the Select Committee on Aging of the U.S. House of Representatives published a report on the little-noticed crisis of antisocial conduct directed at seniors.[182] After a year-long investigation, the Committee reached three sobering conclusions. First, the Committee determined that about 4% of seniors suffered moderate or severe

177. Langbein, *Will Contests*, *supra* note 27, at 2043.

178. Romo v. Ford Motor Co., 6 Cal. Rptr. 3d 793, 799 (Ct. App. 2003); *see also* Commonwealth v. Drew, 36 Mass. (19 Pick.) 179, 185 (1837) ("It is not the policy of the law to punish criminally mere private wrongs.").

179. Eike G. Hosemann, *Protecting Freedom of Testation: A Proposal for Law Reform*, 47 U. MICH. J.L. REFORM 419, 444 (2014).

180. *See infra* note 192 and accompanying text.

181. *See infra* note 197 and accompanying text.

182. *See* SELECT COMM. ON AGING, 97TH CONG., ELDER ABUSE: AN EXAMINATION OF A HIDDEN PROBLEM, at III (Comm. Print 1981) [hereinafter HOUSE REPORT ON ELDER ABUSE]. At the time, only a handful of states regulated elder abuse. *See id.* at 127. In addition, these laws merely required health care professionals and law enforcement officials to report suspected abuse. *See id.*; Lawrence R. Faulkner, *Mandating the Reporting of Suspected Cases of Elder Abuse: An Inappropriate, Ineffective and Ageist Response to the Abuse of Older Adults*, 16 FAM. L.Q. 69, 88 (1982).

mistreatment each year.[183] Second, the Committee found that the perpetrators were often the victim's friends, family, or caretakers.[184] Third, the Committee discovered that shame and fear often drove elders not to report harm.[185] For these reasons, the Committee declared that elder abuse was "a full-scale national problem which exists with a frequency that few have dared to imagine."[186]

Since then, these concerns have intensified. America is undergoing a demographic sea change. As baby boomers are becoming senior citizens, the U.S. elderly population is skyrocketing. For example, in 1990, thirty-one million individuals were sixty-five or older.[187] By 2012, that number had swollen to forty-three million, and by 2050, it will top eighty million.[188] In turn, as the ranks of the elderly grow, "so too will the numbers of new and existing cases of Alzheimer's [and] dementia."[189] Because this generation is the wealthiest in history,[190] its members are inviting targets for scams and manipulation.[191]

As a result, most jurisdictions have now passed criminal elder abuse schemes.[192] Some of these laws safeguard all people above a certain age

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183. HOUSE REPORT ON ELDER ABUSE, *supra* note 182, at XIV. More recent studies show that about 10% of elders have experienced some form of abuse. *See* Ron Acierno, Melba A. Hernandez, Ananda B. Amstadter, Heidi S. Resnick, Kenneth Steve, Wendy Muzzy & Dean G. Kilpatrick, *Prevalence and Correlates of Emotional, Physical, Sexual, and Financial Abuse and Potential Neglect in the United States: The National Elder Mistreatment Study*, 100 AM. J. PUB. HEALTH 292, 294 (2010).

184. *See* HOUSE REPORT ON ELDER ABUSE, *supra* note 182, at XIV.

185. *See id.* at XV.

186. *Id.* at XIV.

187. LISA HETZEL & ANNETTA SMITH, U.S. CENSUS BUREAU, THE 65 YEARS AND OVER POPULATION: 2000, at 1 (2001), https://www.census.gov/prod/2001pubs/c2kbr01-10.pdf [https://perma.cc/X4SV-3QW5].

188. *See id.* The rising number of seniors is also a product of increased life expectancy. *See* AMY ZIETTLOW & NAOMI CAHN, HOMEWARD BOUND: MODERN FAMILIES, ELDER CARE, AND LOSS 15 (2017).

189. ALZHEIMER'S ASS'N, 2019 ALZHEIMER'S DISEASE FACTS AND FIGURES 23 (2019), https://www.alz.org/media/documents/alzheimers-facts-and-figures-2019-r.pdf [https://perma.cc/U8EH-TCVM].

190. *See* Emily Brandon, *3 Reasons Baby Boomers Are the Richest Generation in History*, U.S. NEWS & WORLD REP. (Nov. 21, 2008, 2:07 PM), https://money.usnews.com/money/blogs/planning-to-retire/2008/11/21/3-reasons-baby-boomers-aare-the-richest-generation-in-history (last visited Apr. 7, 2021).

191. *See generally* Rebecca C. Morgan, Pamela B. Teaster & Randolph W. Thomas, *A View from the Bridge: A Brief Look at the Progression of Cases of Elder Financial Exploitation Prosecutions*, 25 ELDER L.J. 271, 309–10 (2018) (observing that the aging of baby boomers has increased the number of potential victims of elder financial exploitation).

192. *See* ALA. CODE § 38-9D-2 (2020); ALASKA STAT. § 47.24.900 (2020); ARIZ. REV. STAT. ANN. § 46-451 (2020); ARK. CODE ANN. § 12-12-1703 (2020); CAL. PENAL CODE § 368 (West 2020);

(usually about sixty-five),[193] while others also require the victim to be vulnerable in some fashion.[194] They impose stringent criminal penalties on defendants who deliberately cause a member of the protected class to experience "physical pain or mental suffering."[195]

Yet many of these statutes go further and criminalize knowingly engaging in "financial exploitation."[196] Although states define "financial exploitation" differently, all of them employ extremely broad language. Georgia's legislation is typical:

> "[Financial] exploitation" means the illegal or improper use of . . . [an elder] person's resources through undue influence,

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COLO. REV. STAT. § 26-3.1-101 (2020); CONN. GEN. STAT. § 17b-450 (2020); DEL. CODE ANN. tit. 31, § 3902 (2020); D.C. CODE § 7-1901 (2020); FLA. STAT. § 415.102 (2020); GA. CODE ANN. § 30-5-3 (2020); IDAHO CODE § 39-5302 (2020); 720 ILL. COMP. STAT. 5/17-56 (2020); IOWA CODE § 235B.2 (2020); KAN. STAT. ANN. § 39-1430 (2020); LA. STAT. ANN. § 15:1503 (2020); ME. STAT. tit. 22, § 3472 (2020); MD. CODE ANN., CRIM. LAW §§ 3-604, 8-801 (West 2020); MASS. GEN. LAWS ch. 19A, § 14 (2020); MINN. STAT. § 609.232 (2020); MISS. CODE ANN. § 43-47-5 (2020); MO. REV. STAT. § 192.2400 (2020); MONT. CODE ANN. § 52-3-803 (2020); NEV. REV. STAT. § 200.5092 (2020); N.J. STAT. ANN. § 52:27D-407 (West 2020); N.M. STAT. ANN. § 27-7-16 (2020); N.Y. SOC. SERV. LAW § 473 (McKinney 2020); N.C. GEN. STAT. § 108A-101 (2019); N.D. CENT. CODE § 50-25.2-01 (2020); OHIO REV. CODE. ANN.§ 5101.60 (West 2020); OKLA. STAT. tit. 43A, § 10-103 (2020); OR. REV. STAT. § 124.005 (2020); 35 PA. CONS. STAT. § 10225.103 (2020); 42 R.I. GEN. LAWS § 42-66-4.1 (2020); S.C. CODE ANN. § 43-35-10 (2020); TENN. CODE ANN. § 71-6-102 (2020); TEX. HUM. RES. CODE ANN. § 48.002 (West 2020); UTAH CODE ANN. § 62A-3-301 (West 2020); VA. CODE ANN. § 63.2-1605 (2020); WASH. REV. CODE § 74.34.020 (2020); W. VA. CODE § 9-6-1 (2020); WYO. STAT. ANN. § 35-20-102 (2020).

193. *See* COLO. REV. STAT. § 18-6.5-102(2) (2020) (seventy); DEL. CODE ANN. tit. 31, § 3902(7) (sixty-two); DEL. CODE ANN. tit. 11, § 222(9) (2020) (sixty-two); GA. CODE ANN. § 30-5-3(6) (sixty-five); 720 ILL. COMP. STAT. 5/17-56(c)(1) (sixty); KAN. STAT. ANN. § 21-5417(e)(3) (2020) (sixty); MD. CODE ANN., CRIM. LAW § 8-801(b)(2) (sixty-eight); NEB. REV. STAT. § 28-366.01 (2020) (sixty-five); NEV. REV. STAT. § 200.5092(6) (sixty).

194. *See, e.g.*, IOWA CODE. § 235B.2(4) (noting that the victim must be "unable to protect the person's own interests or unable to adequately perform or obtain services necessary to meet essential human needs"); KAN. STAT. ANN. § 39-1430(a) (same); MINN. STAT. § 609.232 (protecting people who cannot "provide adequately for [their] own care"); MISS. CODE. ANN. § 43-47-5(q) (covering individuals "whose ability to perform the normal activities of daily living or to provide for his or her own care . . . is impaired").

195. CAL. PENAL CODE § 368(b)(1); *see also, e.g.*, ALA. CODE § 38-9-7(a) (2020) ("It shall be unlawful for any person to abuse, neglect, exploit, or emotionally abuse any protected person."); ARIZ. REV. STAT. ANN. § 46-451(A)(1)(a), (c) (prohibiting "[i]ntentional infliction of physical harm" and "[u]nreasonable confinement"); KY. REV. STAT. ANN. § 209.990(2) (West 2020) ("Any person who knowingly abuses or neglects an adult is guilty of a . . . felony.").

196. *See generally* GA. CODE ANN. § 30-5-3(8) ("[I]llegal or improper use of a disabled adult or elder person . . . through undue influence, coercion, harassment, duress, deception, false representation, false pretense, or other similar means."). The precise mens rea for financial exploitation statutes varies between jurisdictions, but generally requires that the defendant act "knowingly." *See, e.g.*, COLO. REV. STAT. § 18-6.5-103(7.5)(a) ("knowingly"); DEL. CODE ANN. tit. 31, § 3913(a) ("knowingly or recklessly"); MD. CODE ANN., CRIM. LAW § 8-801(b)(1) ("knowingly and willfully"). This means that the culprit needs to be aware of the relevant facts and likely consequences of her conduct. *See* MODEL PENAL CODE § 2.02(b)(i)–(ii) (AM. L. INST. 1985).

> coercion, harassment, duress, deception, false representation, false pretense, or other similar means for one's own or another's profit or advantage.[197]

Some components of financial exploitation laws are relatively straightforward. For instance, outlawing the acquisition of an elder's assets through "coercion," "duress," "deception," "false representation," or "false pretense" breaks little new ground.[198] Indeed, states already recognize the offenses of theft by extortion[199] and deception.[200] Thus, when applied to these crimes, financial exploitation laws merely empower judges to impose enhanced penalties on defendants who prey on the vulnerable.[201]

But other aspects of financial exploitation legislation are veritable minefields. For starters, none of the statutes cited above elaborates on the meaning of "illegal" or "improper" conduct. Accordingly, as one financial exploitation defendant objected, these empty word balloons permit states to imprison people for behavior that merely "offend[s] the sensitivities or

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197. GA. CODE ANN. § 30-5-3(8); *see also* COLO. REV. STAT. § 18-6.5-103(7.5)(a) (prohibiting "deception, harassment, intimidation, or undue influence"); DEL. CODE ANN. tit. 31, § 3902(12)(a) ("deception, intimidation, or undue influence"); 720 ILL. COMP. STAT. § 5/17-56(c) ("undue influence, breach of a fiduciary relationship, fraud, deception, extortion, or use of the assets or resources contrary to law"); IOWA CODE § 235B.2(5)(c) ("undue influence, harassment, duress, deception, false representation, or false pretenses"); KAN. STAT. ANN. § 21-5417(2)(a) ("[u]ndue influence, coercion, harassment, duress, deception, false representation, false pretense or [a transaction] without adequate consideration"); MINN. STAT. § 609.2335(2)(i) ("undue influence, harassment, or duress"); MD. CODE ANN., CRIM. LAW § 8-801(b)(2) ("deception, intimidation, or undue influence"); MISS. CODE. ANN. § 43-47-5(i) ("the illegal or improper use of a vulnerable person or his resources for another's profit, advantage or unjust enrichment, with or without the consent of the vulnerable person"); MO. REV. STAT. § 570.145(1), (2), (8) (2020) ("[d]eceit," "[c]oercion," and "[u]ndue influence"); NEB. REV. STAT. § 28-358 ("undue influence, breach of a fiduciary relationship, deception, extortion, intimidation, force or threat of force, isolation, or any unlawful means"); NEV. REV. STAT. § 200.5092(3)(a) ("deception, intimidation or undue influence"); N.D. CENT. CODE § 12.1-31-07.1(1)(a) (2020) ("deception, intimidation, or undue influence"); S.C. CODE ANN. § 43-35-10(3)(c) ("(i) undue influence, (ii) harassment, (iii) duress, (iv) force, (v) coercion, or (vi) swindling"); UTAH CODE ANN. § 76-5-111(9)(a)(i) (West 2020) ("undue influence . . . deception or intimidation"); WYO. STAT. ANN. § 35-20-102(ix)(a) ("deception, harassment, intimidation or undue influence").

198. *See* GA. CODE ANN. § 30-5-3(8).

199. *See* State v. Mendoza-Tapia, 273 P.3d 676, 679–80 (Ariz. Ct. App. 2012).

200. *See* MODEL PENAL CODE § 223.3 (AM. L. INST. 1985); State v. Miller, 590 N.W.2d 45, 46–47 (Iowa 1999); Germaine Music v. Universal Songs of Polygram, 275 F. Supp. 2d 1288, 1304 (D. Nev. 2003), *aff'd in part, rev'd in part*, 130 F. App'x 153 (9th Cir. 2005).

201. *See, e.g.*, State v. Buller, 582 S.W.3d 124, 125–27 (Mo. Ct. App. 2019) (upholding thirty-year sentence for defendant who "engaged in a systematic scam" to trick an elderly and gullible woman into surrendering at least $50,000, which the defendant spent on "gambling, drinking, buying vehicles, and investing"); Kohn, *supra* note 38, at 10 ("[I]n many cases, the explicit criminalization of elder abuse simply creates new penalties for behavior that was already criminal and could have been prosecuted under existing criminal laws.").

moral compass of the prosecutor or members of a jury."[202]

As a result, broad definitions of "financial exploitation" may be unconstitutional. The Fourteenth Amendment declares that no state shall "deprive any person of life, liberty, or property, without due process of law."[203] As a result, under the void for vagueness rule, a "criminal statute must clearly define the conduct it proscribes."[204] A law flunks this test if it either "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement."[205] But because judges must evaluate "whether a statute is vague as applied to the particular facts at issue," a defendant whose actions are obviously prohibited lacks standing to complain about how the law might be "applied to the conduct of others."[206]

Some courts have recognized that financial exploitation laws are fatally imprecise. For example, in *Cuda v. State*,[207] James Cuda convinced an eighty-year-old man to make nearly $1,000,000 in unsuitable investments.[208] Cuda was accused of violating a Florida statute that made it a felony to "exploit[] an aged person . . . by the improper or illegal use or management" of their assets.[209] The Florida Supreme Court held that the words "improper" and "illegal" failed to specify exactly what behavior was impermissible.[210] In addition, the justices were alarmed by the fact that "the determination of a standard of guilt is left to be supplied by the courts or juries."[211] Thus, the Court struck down the statute as "unconstitutionally vague."[212]

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202. Brief of Appellant Nicholas Marks at 44, Marks v. State, 623 S.E.2d 504 (Ga. 2005) (No. S05A1729), 2005 WL 4829479, at *44.

203. U.S. CONST. amend. XIV, § 1.

204. Skilling v. United States, 561 U.S. 358, 415 (2010); Kolender v. Lawson, 461 U.S. 352, 357 (1983) ("[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.").

205. United States v. Williams, 553 U.S. 285, 304 (2008).

206. Holder v. Humanitarian L. Project, 561 U.S. 1, 18–19 (2010) (quoting Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 495 (1982)).

207. 639 So. 2d 22 (Fla. 1994).

208. *Id.* at 23; *see also* Respondent's Brief on the Merits at 1, *Cuda*, 639 So. 2d 22 (No. 82,203), 1993 WL 13012761, at *1.

209. *Cuda*, 639 So. 2d at 23 n.1 (quoting FLA. STAT. § 415.111(5) (1991)).

210. *Id.* at 23, 25.

211. *Id.* at 24 (quoting Locklin v. Pridgeon, 30 So. 2d 102, 103 (Fla. 1947)).

212. *Id.* at 25; *see also* Decker v. State, 2008-CT-01621-SCT (¶23) (Miss. 2011), 66 So. 3d 654, 658 (expressing discomfort at a similar statute's "broad reach," but avoiding the constitutional issue by deciding the dispute on other grounds). *But see* State v. Sailer, 684 A.2d 1247, 1249 (Del. Super.

But other judges have ducked the issue by finding that the defendant's conduct was so "clearly prohibited, [that] he lacks standing to challenge the statute based on another's hypothetical conduct."[213] For instance, in February 2020, the Court of Appeals of Utah rejected a vagueness challenge to a financial exploitation law in *State v. Jones*.[214] David Jones, who held a power of attorney for his father, loaned himself the money to start two restaurants and to cover his own living expenses.[215] When Jones's ventures failed, his father was evicted from his assisted living facility.[216] Jones was found guilty of "unjustly or improperly us[ing] or manag[ing] the resources of a vulnerable adult."[217] In the state court of appeals, Jones argued that "'unjust' and 'improper' are subjective terms" that "could lead to charges against virtually anyone who uses a vulnerable adult's resources."[218] The judges rejected this argument, observing that "any vagueness inherent in the language of the exploitation of a vulnerable adult statute" was irrelevant because "Jones's conduct in this case was clearly proscribed."[219]

The only due process challenge to criminal undue influence reached a similar result.[220] In *State v. Ahart*,[221] a caretaker had written large checks on the victim's account and hired her friends and relatives to work for the victim at outrageous salaries.[222] She was accused of acquiring assets from a dependent adult through undue influence, and she moved to dismiss the charges as void for vagueness.[223] A Kansas trial court denied her request and the state court of appeals affirmed.[224] The appellate panel reasoned

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Ct. 1995) (refusing to follow *Cuda* and citing dictionaries to conclude that "'illegal' is defined as 'prohibited by law'" and "improper" means "not in keeping with accepted standards of what is right" (quoting AMERICAN HERITAGE DICTIONARY 899, 909 (3d ed. 1992))).

213. State v. Jones, 2020 UT App 31, ¶ 55, 462 P.3d 372, 386 (quoting State v. Jones, 2018 UT App 110, ¶ 16, 427 P.3d 538); Marks v. State, 623 S.E.2d 504, 508–09 (Ga. 2005) ("[O]ne whose own conduct may be constitutionally proscribed will not be heard to challenge a law because it may conceivably be applied unconstitutionally to others." (quoting Hubbard v. State, 352 S.E.2d 383, 384 (Ga. 1987))).

214. 2020 UT App 31, 462 P.3d 372.

215. *See id.* ¶ 2–9, 462 P.3d at 376–77.

216. *See id.* ¶ 7, 462 P.3d at 377.

217. *See id.* ¶ 54, 462 P.3d at 385 (quoting UTAH CODE ANN. § 76-5-111(4)(a)(iii) (LexisNexis 2012)).

218. Brief of Appellant at 40, *Jones*, 2020 UT App 31, 462 P.3d 372 (No. 20170815-CA), 2018 WL 10637372, at *40.

219. *Jones*, 2020 UT App 31, ¶ 21, 462 P.3d at 386.

220. State v. Ahart, No. 108,086, 2013 WL 5303521, at *4 (Kan. Ct. App. Sept. 20, 2013).

221. No. 108,086, 2013 WL 5303521 (Kan. Ct. App. Sept. 20, 2013).

222. *See id.* at *5.

223. *See id.* at *1.

224. *See id.*

that the phrase "undue influence" is "used in several related legal contexts" and thus could be understood by "a person of common intelligence."[225] Yet the court also admitted that nailing down "a precise definition is difficult" and did not even attempt to articulate the rule that the defendant had violated.[226] Ultimately, the judges upheld the statute as applied and remarked that "[a]lthough there may be cases at the margin in which a closer question would be presented, this is not such a case."[227]

Thus, for better or for worse, financial exploitation statutes cast a wide net by outlawing the acquisition of an elder's assets by unseemly or distasteful measures. However, until those prohibitions are more thoroughly ventilated in the courts, the scope and enforceability of financial exploitation statutes will remain uncertain. And as we discuss next, prosecutors are also combatting similar behavior by stretching the contours of theft law.

B. Estate Theft

Incapacity has long been grounds to strike down a gift, contract, will, or trust.[228] But recently, this complex doctrine has spilled over into criminal law. As this section explains, a rising number of states have recognized an offense that we call "estate theft": accepting an end-of-life transfer from a donor who is mentally compromised.

The backdrop of this discussion is the relationship between consent and theft. In general, the victim's consent can be a defense to a charge if it "negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented."[229] Theft is a prime example. That crime (which is still called larceny in some states) is the unlawful taking of the "property of another with purpose to deprive him thereof."[230] It requires a "trespass": the hostile appropriation of the victim's assets.[231] In turn, there

225. *See id.* at *4.

226. *Id.*

227. *Id.* at *5.

228. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.1 (AM. L. INST. 2003) (describing capacity standard for wills, will substitutes, irrevocable transfers, and lifetime gifts).

229. MODEL PENAL CODE § 2.11(1) (AM. L. INST. 1985); *see also* N.J. STAT. ANN. § 2C:2-10(a) (West 2020); 18 PA. CONS. STAT. § 311 (2020). The victim's consent is not a defense to other crimes, such as statutory rape. *See* State v. Collier, 411 S.W.3d 886, 894 (Tenn. 2013).

230. MODEL PENAL CODE § 223.2(1) (AM. L. INST. 1980).

231. *See* People v. March, 886 N.W.2d 396, 405 (Mich. 2016) ("[I]t [i]s the unlawful, or trespassory, 'taking' that define[s] the fundamental nature of the crime."). Many states once recognized separate theft-like crimes such as larceny (dispossessing an owner of her property) and embezzlement (theft by someone who was lawfully entrusted with possession, like a fiduciary). *See*

is no trespass—and thus no theft—"when property is voluntarily surrendered."[232]

Questions about consent are relatively straightforward in most theft prosecutions. Often, the injured party's "lack of consent is presumed."[233] Consider "theft by stealth," such as surreptitiously removing a wallet from someone's backpack on the subway. Because the victim is "unaware that his pocket [i]s being picked," the victim's lack of assent is blazingly obvious.[234] Similarly, other theft-like crimes involve "ineffective consent."[235] In these cases—which include robbery and extortion—victims actually *give* their property away, but this volitional act has no legal significance because "it is induced by force, duress or deception."[236] These situations are so intuitive that the Model Penal Code remarks that "the law on the point is neither difficult nor controversial."[237]

Yet there is another form of "ineffective consent" that, until recently, prosecutors had rarely invoked in theft cases. A person cannot consent if "youth, mental disease or defect or intoxication" makes them "unable to make a reasonable judgment as to the nature or harmfulness of the [illegal] conduct."[238] The Model Penal Code only briefly mentions how this rule

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George P. Fletcher, *The Metamorphosis of Larceny*, 89 HARV. L. REV. 469, 469 (1976) (noting that the law once distinguished between "larceny, embezzlement, larceny by trick, and obtaining property by false pretenses"). Many jurisdictions have now consolidated these crimes under the umbrella of "theft." *See, e.g.*, CAL. PENAL CODE § 484(a) (West 2020) (criminalizing both the act of taking "the personal property of another" and "appropriate[ing] property which has been entrusted to [the defendant]").

232. Fussell v. United States, 505 A.2d 72, 73 (D.C. 1986); *see also* Lowe v. State, 32 So. 956, 957 (Fla. 1902) ("[A] taking by the voluntary consent of the owner . . . does not constitute larceny."); 1 CHARLES E. TORCIA, WHARTON'S CRIMINAL LAW § 46 (15th ed. 1993) ("[C]onsent destroys the criminal character of an act of . . . taking the property of another which would otherwise constitute larceny.").

233. Jones v. State, 666 So. 2d 960, 964 (Fla. Dist. Ct. App. 1996).

234. Murray v. State, 135 A.2d 314, 316 (Md. 1957); Goertz v. State, 233 P. 768, 768 (Okla. Crim. App. 1925) (explaining that the circumstances surrounding theft charges "clearly negat[e] any inference that consent to the taking of the property was obtained").

235. MODEL PENAL CODE § 2.11(3)(a)–(d) (AM. L. INST. 1985); *see also* J. H. Beale, Jr., *Consent in the Criminal Law*, 8 HARV. L. REV. 317, 326 (1895) (distinguishing between "lack of consent" and "ineffectiveness of consent").

236. MODEL PENAL CODE § 2.11(3)(d); Burkhalter v. State, 247 S.W. 539, 545 (Tex. Crim. App. 1922) (explaining that the victim of a robbery only hands over his property "in fear of death, and against his will"); 18 U.S.C. § 1951(b)(2) (defining "extortion" as "the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right").

237. MODEL PENAL CODE AND COMMENTARIES § 2.11 cmt. 3 (AM. L. INST., Official Draft and Revised Comments 1985) [hereinafter MODEL PENAL CODE COMMENTARIES].

238. MODEL PENAL CODE § 2.11(3)(b); COLO. REV. STAT. § 18-1-505(3)(b) (2020); HAW. REV. STAT. § 702-235(2) (2020); 18 PA. CONS. STAT. § 311(c) (2020); *cf.* TEX. PENAL CODE ANN.

applies to theft, remarking that it might be triggered if "[a] drunk . . . 'consents' to the taking of his property."[239] Likewise, until the end of the twentieth century, only a handful of courts had grappled with whether a victim's impairment transformed a seemingly-consensual transaction into a theft.[240]

But recently, states have begun testing the boundaries of theft law by prosecuting individuals who received property from incapacitated donors. For example, in *People v. Camiola*,[241] a senile and elderly woman executed a series of transfers to the defendant.[242] A jury found the defendant guilty of theft.[243] A New York appellate court affirmed, noting "the paucity of [relevant] case law," but holding that "the victim was incapable of consenting to defendant's actions and that [the] defendant was cognizant of her diminished mental capacity."[244] Likewise, legislatures and judges in Alabama, California, Connecticut, Florida, Georgia, Massachusetts, North Dakota, Oklahoma, Rhode Island, Texas, and Utah have adopted similar rules.[245] In some states, donees can be

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§ 31.01(3)(C) (West 2020) ("Consent is not effective if [it is] . . . given by a person who by reason of youth, mental disease or defect, or intoxication is known by the actor to be unable to make reasonable property dispositions.").

239. MODEL PENAL CODE COMMENTARIES, *supra* note 237, at § 2.11 cmt. 3.

240. *See, e.g.*, State v. Harris, 82 S.W.2d 877, 880 (Mo. 1935) (describing a "unique" case in which prosecutors "relie[d] upon the incapacity, because of impaired mental faculties, of [the elderly victim] to consent to the taking"). Several of these cases are from Texas, which deems a transfer to be theft when consent is "given by a person who by reason of advanced age is known by the [defendant] to have a diminished capacity to make informed and rational decisions about the reasonable disposition of property." TEX. PENAL CODE ANN. § 31.01(3)(E); Porter v. State, No. 04-99-00115-CR, 2000 WL 863092, at *4 (Tex. App. June 28, 2000) (holding that the victim "was unable to give effective consent to the alleged incidents of theft because of her diminished mental capacity and numerous health problems, including depression, severe dementia, and Alzheimers disease"); Cook v. State, No. A14-91-00865-CR, 1992 WL 91284, at *6 (Tex. App. May 7, 1992) (finding defendant guilty of estate theft when the victim's "incompetence was readily apparent to everyone she came in contact with after a few minutes of conversation").

241. 639 N.Y.S.2d 35 (App. Div. 1996).

242. *Id.* at 36. The opinion mentions that the victim transmitted the property through written instruments, but does not specify whether they were deeds, gifts, or contracts. *See id.*

243. *See id.*

244. *Id.*

245. Some jurisdictions have woven estate theft into elder abuse statutes. *See* FLA. STAT. § 825.103(1)(b) (2020); N.D. CENT. CODE § 12.1-31-07.1 (2020); OKLA. STAT. tit. 21, § 843.4(1)(b) (2020); 11 R.I. GEN. LAWS § 11-68-2(a)(2) (2020); UTAH CODE ANN. § 76-5-111(9)(a)(ii) (West 2020). Thus, these laws only apply if the victim is older than a certain age or disabled (or both). *See, e.g.*, FLA. STAT. § 825.103(1) (protecting "elderly person[s] or disabled adult[s]"). In addition, this form of estate theft requires that the defendant "know[] or should know that the vulnerable adult lacks the capacity to consent." UTAH CODE ANN. § 76-5-111(9)(a)(ii). Conversely, other states have adopted estate theft through the common law. This species of estate theft covers all victims (not just elders) but insists that the defendant had *actual* (not constructive) knowledge "of the victim's

found guilty of theft if they "know[] or reasonably should know that the elderly person or disabled adult lacks the capacity to consent."[246]

Estate theft can be a potent weapon against people who rip off impaired seniors. For example, in *Commonwealth v. St. Hilaire*,[247] David St. Hilaire was neighbors with Erika Magill, who was eighty-six and had lived in the same home for half a century.[248] After Magill's husband died, St. Hilaire offered to purchase the property.[249] To put it mildly, Magill refused:

> She expressed her resolve not to sell to [St. Hilaire] in colorful language. She told one person, "That son of a bitch wants my house, and he's not getting it." She said to another that there was "no way in hell" she would sell to [St. Hilaire] and that her late husband would "flip over in his grave" if she did.[250]

But then Magill broke her hip and her health declined to the point where she was "incoherent and incapable of expressing herself."[251] St. Hilaire went to Magill's bedside and convinced her to deed her residence to him.[252] Previously, no Massachusetts court had ever imposed liability for theft under similar circumstances.[253] But the Supreme Judicial Court held that St. Hilaire would be guilty if the jury found that Magill lacked mental capacity and that St. Hilaire knew about Magill's impairment.[254]

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diminished capacity." People v. Gbohou, 718 N.Y.S.2d 791, 795 (Sup. Ct. 2000); People v. Larson, No. B292764, 2020 WL 90813, at *5 (Cal. Ct. App. Jan. 8, 2020) (affirming conviction of estate theft when victim "was mentally incapable of consenting to give [the defendant] money from her bank account"); State v. Calonico, 770 A.2d 454, 465–66 (Conn. 2001) ("[T]he trial court reasonably could have found that the victim's mental incapacity rendered her incapable of consenting to the defendant's financial stratagem and that the defendant was aware of the victim's mental incapacity."); Deranger v. State, 652 So. 2d 400, 401 (Fla. Dist. Ct. App. 1995) (rejecting defendant's argument "that there is insufficient evidence of theft because the victim signed the checks and gave them to her"); McCay v. State, 476 S.W.3d 640, 647 (Tex. App. 2015) ("[W]hen an actor appropriates property knowing its owner cannot give effective consent to the transfer, the appropriation—or attempted appropriation—is a criminal offense, not a probate matter.").

246. *See* FLA. STAT. § 825.103(1)(b).

247. 21 N.E.3d 968 (Mass. 2015).

248. *Id.* at 971.

249. *See id.*

250. *Id.*

251. *Id.* at 972.

252. *See id.*

253. *See* Brief and Record Appendix of for the Defendant on Appeal from Guilty Finding in the Superior Court at 21–22, *St. Hilaire*, 21 N.E.3d 968 (No. SJC-11566), 2014 WL 1575668, at *21–22.

254. *See St. Hilaire*, 21 N.E.3d at 979. The trial judge had ruled that theft "may be proved by evidence that (1) the victim lacked the mental capacity to understand the transaction she entered into with the defendant; and (2) the defendant knew or should have known that she lacked such capacity." *Id.* at 970–71. Applying this standard, the jury had convicted St. Hilaire. *See id.* at 970. The Supreme Judicial Court remanded the matter, holding that because theft is a specific intent crime, the prosecution needed to demonstrate that St. Hilaire *actually* knew that Magill lacked capacity. *See id.* at 978–79.

Other estate theft cases have been less clear-cut. For instance, in *Gainer v. State*,[255] Frances Gainer, a beautician at a nursing home, befriended eighty-three-year-old Margaret Endicott.[256] Endicott, who suffered from Parkinson's Disease, had no close family, and Gainer visited her every day.[257] What happened next initially seems alarming. Endicott had previously been thrifty, but she started to write large checks to Gainer and also added her as a co-signatory with the right of survivorship on her financial accounts.[258] Gainer used these funds to purchase a Corvette, a sailboat, a computer, a tanning bed, and jewelry.[259] But there was also evidence that Endicott was paying Gainer back for her companionship. For instance, Endicott's doctor described their relationship as so "loving and devoted" that he assumed they were mother and daughter.[260] Nevertheless, after Endicott died, Gainer was convicted of estate theft.[261] An Alabama appellate court upheld the verdict despite admitting that the case was marred by the worst evidence problem and it could only speculate about Endicott's intent.[262]

In another complication, the role of civil principles in estate theft cases is unclear. Some judges treat the issue as a pure matter of criminal law. For example, in *Fanuiel v. State*,[263] Wade Watkins, who was suffering from dementia, gave his home and an annuity to Shirley Fanuiel, his goddaughter.[264] Fanuiel was then convicted of estate theft.[265] On appeal, Fanuiel argued that the state had failed to prove that Watkins was incapacitated on the specific dates that he had executed the transfers.[266] However, a Texas appellate court declined to apply this settled aspect of civil law in a criminal case, reasoning that "that is not the standard of

255. 553 So. 2d 673 (Ala. Crim. App. 1989).

256. *See id.* at 675–76.

257. *See id.* at 675, 683–84.

258. *See id.* at 676.

259. *See id.*

260. *Id.* at 684. Conversely, Gainer also isolated Endicott and did not always take good care of her. *See id.* at 677 (describing an incident in which one of Endicott's neighbors "found her alone, semi-conscious on her bed, and lying in her own excrement").

261. *See id.* at 675.

262. *See id.* at 681. A decedent's unavailability to testify cut the other way in *State v. Richardson*. 288 P.3d 995 (Or. Ct. App. 2012). The defendant persuaded a morphine-addled elderly victim to deed her house to her nephew. *See id.* at 996. Later, when discussing the transfer, the victim allegedly "said that she had been robbed or that her home had been taken from her." *Id.* at 997. Based on the victim's statements, the jury convicted the defendant of estate theft. *See id.* at 996. The Oregon Court of Appeals reversed because the victim's account of the events was hearsay. *See id.* at 998.

263. No. 14-17-00297-CR, 2019 WL 546846 (Tex. App. Feb. 12, 2019).

264. *Id.* at *1–4; *see also* Appellant's Brief at 5, *Fanuiel*, No. 14-17-00297-CR, 2017 WL 2931414.

265. *See Fanuiel*, 2019 WL 546846, at *5.

266. *See id.* at *6.

proof required in a criminal theft case such as we are presented with here."[267] Thus, as the court saw it, estate theft, like robbery and extortion, hinges on the *criminal* doctrine of "ineffective consent,"[268] rather than "similar concepts from the civil law."[269]

At the opposite pole, in *State v. Maxon*,[270] a Kansas appellate court not only assumed that *civil* incapacity rules applied, but refused to recognize estate theft as an offense.[271] Bea Bergman, who was elderly, suffered from bipolar disorder.[272] After Bea's husband died, she befriended Ron and Joyce Maxon.[273] Although Bea had once been frugal, she began to transfer assets to the Maxons.[274] In particular, Bea sold her house for about half of its market value to two of the Maxons's children, Christopher and Jodi, and also bought a new truck for Christopher.[275] A jury found Christopher and Jodi guilty of estate theft.[276] But the appellate panel reversed, reasoning that it would be unfair to predicate criminal liability on byzantine civil incapacity principles:

> The initial dilemma presented by the [s]tate's argument is determining the legal standard that should be applied to determine the level of incapacity that would vitiate the transferor's consent. Without some standard, a donee would not have a sufficiently adequate warning that his or her acceptance of a gift is a theft and the law would not adequately guard against arbitrary and discriminatory enforcement. Does a transferor have to possess the capacity to contract? . . . Or, do we look at the rather minimal

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267. *Id.* at *6–7.

268. The Texas Penal Code's subchapter on theft provides that:

> Consent is not effective if . . . given by a person who by reason of . . . mental disease or defect . . . is known by the actor to be unable to make reasonable property dispositions; [or] given by a person who by reason of advanced age is known by the actor to have a diminished capacity to make informed and rational decisions about the reasonable disposition of property.

TEX. PENAL CODE ANN. § 31.01(3)(C), (E) (West 2020).

269. *See Fanuiel*, 2019 WL 546846, at *6; *see also* People v. Cain, 605 N.W.2d 28, 46 (Mich. Ct. App. 1999) (affirming trial court's jury instruction on capacity in estate theft case that deviated from the relevant civil law standard); McCay v. State, 476 S.W.3d 640, 645 (Tex. App. 2015) ("In a criminal proceeding, the State can prove the accused attempted to appropriate property unlawfully in many ways. One of those ways is by proving the owner did not give effective consent.").

270. 79 P.3d 202 (Kan. Ct. App. 2003).

271. *Id.* at 209 (declining to hold that "a donee can be convicted of theft for accepting a gift from a mentally impaired donor").

272. *See id.* at 204–05.

273. *See id.* at 205.

274. *See id.* at 205, 211.

275. *See id.* at 205.

276. *See id.*

capacity needed to make a testamentary disposition?[277]

Similarly, other judges have balked at criminalizing conduct that was once the exclusive province of civil law. For example, in *People v. Brock*,[278] an elderly man named Norman Roussey suffered from crippling anxiety.[279] Ronald Leon Block helped Roussey manage his disorder by serving as a lay psychologist.[280] In return, Roussey gave Block more than $600,000 in gifts.[281] As Roussey explained, "I help [Block and] he helps me."[282] Block was convicted of estate theft after the trial judge used jury instructions from contracts cases, asking whether "Roussey's consent resulted from [Block] taking unfair advantage of Roussey's 'weak mind.'"[283] The court of appeals overturned the verdict, opining that the state "provide[d] no reason in law or logic for concluding that the same factors that make a contract voidable or a will ineffective should, without more, justify a criminal conviction for theft."[284]

Therefore, estate theft is both a powerful check against wrongdoing and a source of great uncertainty. As we discuss next, the abuser rule—a quasi-criminal penalty that drastically expands the scope of the slayer doctrine—is also a double-edged sword.

C. The Abuser Rule

The slayer doctrine has been divisive since it emerged in the nineteenth century.[285] Yet this section explains that states have recently doubled down on it by experimenting with "abuser rules": expanded slayer statutes that disinherit people for committing elder abuse.[286]

Abuser rules are slowly spreading throughout the U.S. The first such law appeared in Arizona in 1996.[287] It came on the heels of articles in the *Arizona Republic* that had exposed rampant "financial exploitation and physical abuse in adult care homes."[288] To address this crisis, lawmakers

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277. *Id.* at 210 (citations omitted). Nevertheless, the court affirmed Christopher and Jodi's conviction for committing undue influence under the state's elder abuse statute. *See id.* at 207.

278. 49 Cal. Rptr. 3d 879 (Ct. App. 2006).

279. *Id.* at 881.

280. *See id.* at 881–82.

281. *See id.* at 881.

282. *Id.* at 882.

283. *Id.* at 887.

284. *Id.* at 888.

285. *See supra* section I.B.

286. *See infra* text accompanying notes 287–313.

287. *See* 1996 Ariz. Sess. Laws 1401–03.

288. Appellant's Reply Brief at 4, Newman v. Newman (*In re* Estate of Newman), 196 P.3d 863 (Ariz. Ct. App. 2008) (No. 1 CA-CV 07-0373), 2007 WL 2983305 [hereinafter Newman Reply Brief].

enacted penalties for people who exploit "a position of trust and confidence" over a vulnerable adult.[289] Borrowing from the slayer rule, the statute required violators to "forfeit[] all benefits with respect to the estate of [a] deceased [victim]."[290] This hardline stance against elder abuse resonated with lawmakers. Because most mistreatment is committed by the victim's spouse or adult children—people who are likely also the victim's heirs and beneficiaries—disinheritance seemed to be a promising deterrent.[291] As a result, California, Illinois, Kentucky, Maryland, Michigan, Oregon, Washington, and West Virginia passed their own abuser laws.[292]

However, these jurisdictions disagree about how to calibrate their abuser rules. First, there is no consensus about what type of wrongdoing should activate the penalty. Although some statutes apply to any kind of elder abuse, including violence,[293] others confine the offense to financial exploitation.[294]

Second, abuser legislation punishes wrongdoers in divergent ways. Most strip abusers of any interest they would take from the victim through intestacy, will, trust, pension, life insurance, pay-on-death account, or any other form of joint ownership.[295] For example, Illinois broadly mandates

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289. 1996 Ariz. Sess. Laws 1402. The law defined "position of trust and confidence" to include fiduciaries, such as a conservator, but also less formal arrangements, such as "[o]ne who has assumed a duty to provide care." *Id.* at 1402–03.

290. *Id.* The current version of the law can be found at ARIZ. REV. STAT. ANN. § 46-456 (2020).

291. *See* Kohn, *supra* note 38, at 4 (discussing domestic elder abuse, as opposed to abuse that occurs in institutions).

292. *See* CAL. PROB. CODE § 259 (West 2021); 755 ILL. COMP. STAT. 5/2-6.2(b) (2020); KY. REV. STAT. ANN. § 381.280(1) (West 2020); MD. CODE ANN., CRIM. LAW § 8-801(e)(1) (West 2020); MICH. COMP. LAWS § 700.2803(1) (2018); OR. REV. STAT. § 112.465(1) (2020); WASH. REV. CODE § 11.84.020 (2020); W. VA. CODE § 42-4-2 (2020).

293. *See, e.g.*, CAL. PROB. CODE § 259(a)(1) (covering "physical abuse, neglect, or financial abuse"); OR. REV. STAT. § 112.457 (applying to "physical abuse . . . or financial abuse"); 755 ILL. COMP. STAT. 5/2-6.2 (governing both forms); W. VA. CODE § 42-4-2 (governing both physical and financial abuse).

294. *See, e.g.*, ARIZ. REV. STAT. ANN. § 46-456(A) (applying to people who abuse their position of trust and confidence and use an elder's assets for their own purposes); MD. CODE ANN., CRIM. LAW § 8-801(b)(1) (governing the illegal acquisition of an elder or dependent adult's property with an intent to deprive them of it); WASH. REV. CODE § 11.84.010(1) ("'Abuser' means any person who participates . . . in the willful and unlawful financial exploitation of a vulnerable adult.").

295. *See* ARIZ. REV. STAT. ANN. § 46-456 (mandating that an abuser "forfeit[s] all or a portion of the person's . . . [i]nterest" in the victim's estate); KY. REV. STAT. ANN. § 381.280(1) ("[T]he person so convicted forfeits all interest in and to the property of the decedent."); MICH. COMP. LAWS § 700.2803(1) (requiring abusers to "forfeit[] all benefits . . . with respect to the decedent's estate"); WASH. REV. CODE § 11.84.020 ("No slayer or abuser shall in any way acquire any property or receive any benefit as the result of the death of the decedent."); W. VA. CODE § 42-4-2(c) (declaring that abusers "may not take or acquire any money or property, real or personal, or any interest in the money or property, from the victim").

that offenders "shall not receive any property, benefit, or other interest by reason of the death of th[e] elderly person."[296] Conversely, California merely bars abusers from inheriting any funds the victim or the victim's estate wins in a civil complaint stemming from the underlying abuse.[297] This modest step closes the possible loophole that would otherwise allow abusers to pay damages to themselves as beneficiaries of the victim's estate. Likewise, Maryland only forces abusers to disgorge any amount that they have stolen from the victim and not yet returned.[298]

Third, states view the link between criminal and probate proceedings differently. The majority approach disinherits heirs or beneficiaries only if they are *convicted* of felony elder abuse.[299] This is a sharp departure from the norm that an acquittal in a criminal trial does not conclusively preclude application of the slayer rule in the probate matter.[300] In contrast, California and Washington follow the conventional view that an abuser can be acquitted of a crime but found civilly liable.[301]

Fourth, some abuser statutes address the possibility of the victim forgiving the offender. Unlike the slayer context, where the death and the crime almost always occur simultaneously, time may pass between elder abuse and the victim's demise.[302] During this interim, victims might decide that they still want to leave assets to an abuser. Accordingly, Illinois, Kentucky, and Washington provide that the disinheritance

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296. 755 ILL. COMP. STAT. 5/2-6.2(b).

297. *See* CAL. PROB. CODE § 259(c) (stating that abusers cannot "receive any property, damages, or costs that are awarded to the decedent's estate [for elder abuse]").

298. *See* MD. CODE ANN., CRIM. LAW § 8-801(e)(1) ("If a defendant fails to restore fully the property taken or its value, . . . the defendant is disqualified, to the extent of the defendant's failure to restore the property or its value, from inheriting . . . from the estate, insurance proceeds, or property of the victim of the offense.").

299. *See, e.g.*, KY. REV. STAT. ANN. § 381.280(1) (stating that if anyone "takes the life of the decedent or victimizes the decedent by the commission of any felony under [the state elder abuse statute] and in either circumstance is convicted therefor, the person so convicted forfeits all interest in and to the property of the decedent"); MICH. COMP. LAWS § 700.2803(1) ("An individual who . . . is convicted of committing abuse, neglect, or exploitation with respect to the decedent forfeits all benefits under this article with respect to the decedent's estate.").

300. *See supra* text accompanying notes 139–144.

301. *See* CAL. PROB. CODE § 259(a)(1); WASH. REV. CODE § 11.84.150(2) (2020) ("[A] superior court finding by clear, cogent, and convincing evidence that a person participated in conduct constituting financial exploitation against the decedent is conclusive for purposes of determining whether a person is an abuser under this section."). In Illinois, an abuser must forfeit their inheritance if either they are convicted of felony physical abuse or neglect or found liable for financial exploitation by a preponderance of the evidence. *See* 755 ILL. COMP. STAT. 5/2-6.2(b); *see also* Dudley v. FNBC Bank & Tr. (*In re* Estate of Lewy), 2018 IL App (1st) 172552, ¶¶ 1–12, 112 N.E.3d 1062, 1064–66 (holding that the abuser statute did not apply to a caregiver who pled guilty to misdemeanor battery of an elder).

302. *Cf.* Hirsch, *supra* note 136, at 2214 (observing that "[a] mortally wounded testator might linger for a time, and in the aftermath forgive his or her slayer, republishing the original will").

penalty does not apply if the victim "reaffirms" or "ratifies" the original estate plan.[303]

Fifth, a few laws give courts discretion not to disinherit the abuser. These states recognize that robotic application of the penalty can be harsh. For example, Arizona's original statute unequivocally declared that a wrongdoer "forfeits" any inheritance from the victim.[304] In *Newman v. Newman* (*In re Estate of Newman*),[305] an Arizona appellate court carried out this directive and disinherited a child who had quit his job to take care of his cancer-ridden mother.[306] In 2001, when Celia Newman fell ill, two of her kids stayed put on the East Coast.[307] Conversely, Celia's son, Max, blew up his life to care for her:

> During the period October 2001 through October 2002, Max (who was living in San Francisco at the time and working as a stockbroker) flew to Phoenix at least twenty-four (24) times to visit his mother. Most of the visits were three to four days in duration, requiring Max to miss one or two days of work each time. Ultimately, Celia persuaded Max to move to Phoenix, which he did in about October 2002.[308]

Unfortunately, Max improperly transferred Celia's retirement funds into an account that he co-owned and cut his sister out of Celia's trust.[309] Despite the fact that Max "was at [Celia's] beck and call 24/7,"[310] the court held that "[u]nder the plain language of the statute, the forfeiture is mandatory and automatic if a violation . . . is found."[311] Shortly after the

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303. 755 ILL. COMP. STAT. 5/2-6.2(b) (requiring "clear and convincing evidence that the victim of that offense knew of the conviction or finding of civil liability and . . . expressed or ratified his or her intent to transfer the property, benefit, or interest to the [abuser]"); KY. REV. STAT. ANN. § 381.280(2)(b) (apparently requiring only a preponderance of the evidence that the "decedent, with knowledge of the person's disqualification, reaffirmed the[ir] right" to inherit); WASH. REV. CODE § 11.84.170(1)(a)–(b) ("An abuser is entitled to acquire or receive an interest in property or any other benefit described in this chapter if the court determines by clear, cogent, and convincing evidence that the decedent: (a) Knew of the financial exploitation; and (b) Subsequently ratified his or her intent to transfer the property interest or benefit to that person.").

304. 1996 Ariz. Sess. Laws 1402.

305. 196 P.3d 863 (Ariz. Ct. App. 2008).

306. *Id.* at 879; Petition for Removal of Adina Newman as Personal Representative and Trustee and Petition for Appointment of Neutral Independent Personal Representative and Trustee at 4, Newman v. Newman (*In re* Estate of Newman), No. PB2004-003475 (Ariz. Super. Ct. Mar. 19, 2007), 2005 WL 5553573 [hereinafter Petition for Removal of Adina Newman] (describing the close relationship between the mother and son).

307. *See* Newman Reply Brief, *supra* note 288, at 4.

308. Petition for Removal of Adina Newman, *supra* note 306, at 4.

309. *See Newman*, 196 P.3d at 866–67.

310. Newman Reply Brief, *supra* note 288, at 15.

311. *Newman*, 196 P.3d at 872.

decision, the Arizona legislature softened the language of the abuser statute, providing that judges "may" strip an abuser of "all or a portion" of the estate.[312] In the same vein, Illinois and Washington give courts the power to limit the impact of the abuser rule "in any manner [that they] deem[] equitable."[313]

Finally, the constitutionality of the abuser rule is a blank slate. No case has yet grappled with whether the principle violates state constitutional provisions forbidding forfeiture and corruption of blood.[314]

* * *

Disputes over inheritances are spawning criminal and quasi-criminal proceedings. Undue influence has been transplanted into financial exploitation statutes. Incapacity has been repurposed as estate theft. And the slayer rule has been given a contemporary spin through the abuser doctrine. Although these punitive measures are a bulwark against the "virtual epidemic" of financial elder abuse,[315] they also create constitutional friction and raise fresh questions of law and policy. Thus, the next Part proposes better ways to fuse two disciplines that have traditionally shared little in common.

III. POLICY PROPOSALS

This Part suggests three reforms to the nascent field of inheritance crime. First, it suggests dropping "undue influence" from the definition of "financial exploitation." Second, it asserts that states should rely on civil precedent in estate theft prosecutions. Third, it contends that abuser statutes should contain safe harbors to avoid violating state constitutions and frustrating a decedent's intent.

A. Criminal Undue Influence

For decades, commentators have argued that "[d]istinguishing between a product of free will and an instrument procured by undue influence is,

312. ARIZ. REV. STAT. ANN. § 46-456(C)(1) (2020).

313. WASH. REV. CODE § 11.84.170 (2020). Washington instructs courts to balance three factors when making this determination, including (1) the terms of the decedent's estate plan, (2) the decedent's "likely intent," and (3) the harm the abuser caused. *Id.* Illinois only allows courts to decline to disinherit abusers who are found civilly (not criminally) liable. *See* 755 ILL. COMP. STAT. 5/2-6.2(f) (2020).

314. One commentator predicts that a statutory inheritance bar applied to individuals who wrongfully interfere with the decedent's freedom of testation would not violate state constitutional forfeiture prohibitions under the owned interest rationale discussed above in section I.B. *See* Eike G. Hosemann, *Protecting Freedom of Testation: A Proposal for Law Reform*, 47 U. MICH. J.L. REFORM 419, 464 (2014).

315. Mark S. Lachs & Karl A. Pillemer, *Elder Abuse*, 373 NEW ENG. J. MED. 1947, 1947 (2015).

at best, problematic."[316] However, some financial exploitation statutes make the use of undue influence a crime.[317] This section argues that this choice is profoundly unwise.

There are several drawbacks to criminalizing undue influence. For starters, doing so may violate the void for vagueness doctrine. Unfortunately, as Justice Frankfurter once quipped, constitutional vagueness "is itself an indefinite concept."[318] Indeed, the hallmark of the Court's caselaw on the topic is its "lack of informing reasoning."[319] Moreover, to challenge a statute as unconstitutionally vague, defendants must establish standing by demonstrating that they are not merely complaining about "the vagueness of the law as it might apply to the conduct of persons not before the court."[320] Despite the uphill battle, however, some of the recently enacted criminal undue influence statutes could be plausibly challenged under the void for vagueness doctrine.

Recall that the void for vagueness rule demands two things from criminal laws.[321] First, these statutes must "define the criminal offense with sufficient definiteness."[322] As the Court has explained, linguistic precision is indispensable to due process:

> Vague laws offend several important values. . . . [B]ecause we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning.[323]

Thus, a few courts have either held or implied that financial exploitation statutes that outlaw "improper," "unfair," or "illegal" behavior defy this mandate.[324] These judges have reasoned that these words are "not defined within the statutes"[325] and thus fail to offer a "clear explanation of the

316. Wanless, *supra* note 95, at 1029; *see also* text accompanying notes 91–103.

317. *See supra* note 197.

318. Winters v. New York, 333 U.S. 507, 524 (1948) (Frankfurter, J., dissenting).

319. A. G. A., Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 70–71 (1960); *see also* John Calvin Jeffries, Jr., *Legality, Vagueness, and the Construction of Penal Statutes*, 71 VA. L. REV. 189, 196 (1985) ("[T]here is no yardstick of impermissible indeterminacy."); Michael J. Zydney Mannheimer, *Vagueness as Impossibility*, 98 TEX. L. REV. 1049, 1051 (2020) ("[T]he Court's cases in this area leaves one wondering how lower courts and litigants are to tell the difference between statutes that are sufficiently definite and those that are not.").

320. State v. Montoya, 933 N.W.2d 558, 583 (Neb. 2019).

321. *See supra* text accompanying notes 204–205.

322. Kolender v. Lawson, 461 U.S. 352, 357 (1983).

323. Grayned v. City of Rockford, 408 U.S. 104, 108 (1972).

324. *See supra* text accompanying notes 207–227.

325. Decker v. State, 2008-CT-01621-SCT (¶ 20) (Miss. 2011), 66 So. 3d 654, 658.

proscribed conduct."[326]

It is unclear whether criminal undue influence satisfies the "fair notice" mandate. In *State v. Ahart*, the only decision to confront a void for vagueness challenge to undue influence, a Kansas appellate court cited the rule's common law heritage as proof that "a person of common intelligence c[ould] understand which conduct is prohibited."[327] However, this conclusion is debatable. On the one hand, *Ahart* is correct that judges usually reject vagueness attacks on phrases that have "a well-settled common-law meaning,"[328] and undue influence has been around since the seventeenth century.[329] But on the other hand, although there are scores of reported undue influence opinions, they do little more than "beg the underlying question: what influence is undue . . . ?"[330] Indeed, because the rule is so fuzzy, attempts to define it "degenerate[] into nothing more than platitudes about 'substituting one's volition for another.'"[331] Even in civil cases—where money, not a person's liberty, hangs in the balance—scholars have argued that "the doctrine does not comport with notions of legal fairness or notice."[332] Accordingly, there are colorable arguments both ways on the first component of the void for vagueness test.

Second, even if a law's text is sufficiently clear, it cannot "encourage arbitrary and discriminatory enforcement"[333] by allowing police,

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326. Cuda v. State, 639 So. 2d 22, 25 (Fla. 1994).

327. State v. Ahart, No. 108,086, 2013 WL 5303521, at *4 (Kan. Ct. App. Sept. 20, 2013); *see also supra* text accompanying notes 220–227.

328. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926).

329. *See supra* text accompanying note 80. We are assuming for the sake of argument that financial exploitation statutes *do* incorporate the common law undue influence rule. But this is no sure thing. Some of these laws define "undue influence" in ways that resemble—but do not mirror—the conventional black letter test. For instance, Colorado describes the crime as "tak[ing] advantage of an at-risk person's vulnerable state of mind, neediness, pain, or emotional distress." COLO. REV. STAT. § 18-6.5-102(13) (2020). Likewise, Utah specifies that undue influence occurs if someone uses their "role, relationship, or power . . . to gain control deceptively over the decision making of [a] vulnerable adult." UTAH CODE ANN. § 76-5-111 (West 2020). Finally, Maryland and Nevada specify that "'[u]ndue influence' does not include the normal influence that one member of a family has over another." MD. CODE ANN., CRIM. LAW § 8-801 (West 2020); NEV. REV. STAT. § 200.5092 (2020). By contrast, courts tend to cite civil precedent in criminal undue influence cases, which suggests that there is a single, unified standard. *See* People v. Gayle, 2012 IL App (4th) 100132-U, ¶ 109 (unpublished opinion); Tarray v. State, 979 A.2d 729, 738 (Md. 2009). A distinctive criminal version of the undue influence doctrine would probably be more susceptible to a due process challenge because the added uncertainty about what it means.

330. Spivack, *supra* note 50, at 264.

331. Ronald J. Scalise, Jr., *Undue Influence and the Law of Wills: A Comparative Analysis*, 19 DUKE J. COMPAR. & INT'L L. 41, 43 (2008).

332. Spivack, *supra* note 50, at 267; *see also* Adam J. Hirsch, *Testation and the Mind*, 74 WASH. & LEE L. REV. 285, 347 (2017) ("Undue influence has elicited an outpouring of scholarly commentary more voluminous than any other state-of-mind rule.").

333. Kolender v. Lawson, 461 U.S. 352, 357 (1983).

prosecutors, and juries to "pursue their personal predilections."[334] The Court has called this "the more important aspect of vagueness doctrine," and it has evolved dramatically over time.[335] Before the New Deal, the Justices cited concerns about "discriminatory enforcement" to strike down attempts to regulate businesses.[336] For example, in *United States v. L. Cohen Grocery Co.*,[337] the Court invalidated section 4 of the Food Control Act, which prohibited charging "unjust or unreasonable rate[s]" for necessary goods and services.[338] The Court opined that the statute vested too much authority in the trier of fact by essentially "punish[ing] all acts [that are] . . . unjust and unreasonable in the estimation of the court and jury."[339] That description fits criminal undue influence like a glove. Indeed, there may be no doctrine in all of law that is as much of an inkblot. Like the Food Control Act, undue influence statutes permit factfinders to penalize beneficiaries whose receipt of property violates their "idea[s] of what is fair and right."[340]

Even more to the point, the Warren and Burger Courts used the "discriminatory enforcement" inquiry for a starkly different purpose: to protect "nonconformists."[341] For instance, in *Papachristou v. City of Jacksonville*,[342] a Florida city passed an anti-vagrancy ordinance that outlawed "prowling by auto" and "wandering or strolling around from place to place."[343] Citing the law, police arrested two Black men and two white women who were riding together in a car.[344] The Court held that the ordinance's open-ended terms provided a "tool for 'harsh and discriminatory enforcement by local prosecuting officials[] against particular groups deemed to merit their displeasure.'"[345] Similarly, in *Coates v. City of Cincinnati*,[346] the Justices found that a Cincinnati regulation that barred gathering on the sidewalks and "annoying" others

334. Smith v. Goguen, 415 U.S. 566, 575 (1974).

335. *Kolender*, 461 U.S. at 358.

336. *See, e.g.*, Connally v. Gen. Constr. Co., 269 U.S. 385, 388, 393–94 (1926) (striking down minimum wage law); Champlin Refin. Co. v. Corp. Comm'n of Okla., 286 U.S. 210, 241–43 (1932) (invalidating statute that outlawed "waste" in the production of crude oil).

337. 255 U.S. 81 (1921).

338. *Id.* at 86 (quoting Food and Fuel Control Act of 1917, Pub. L. No. 65-41, § 4, 40 Stat. 276, 277 (amended 1919)).

339. *See id.* at 89.

340. Jaworski, *supra* note 20, at 88.

341. Papachristou v. City of Jacksonville, 405 U.S. 156, 164 (1972).

342. 405 U.S. 156 (1972).

343. *Id.* at 156 n.1, 158 (quoting JACKSONVILLE, FLA., ORDINANCE CODE § 26-57 (1971)).

344. *See id.* at 158–59.

345. *Id.* at 170 (quoting Thornhill v. Alabama, 310 U.S. 88, 97–98 (1940)).

346. 402 U.S. 611 (1971).

was unconstitutional.[347] As the Court explained, the law could be deployed "against those whose association together is 'annoying' because their ideas, their lifestyle, or their physical appearance is resented by the majority of their fellow citizens."[348] Cases like *Papachristou* and *Coates* elucidate that the Due Process Clause overrides statutes that can propagate "majority prejudices about other, less powerful groups."[349]

This is precisely the accusation that trusts and estates scholars have been levying against undue influence.[350] As Gary Spitko has explained, by delegating so much authority to courts and juries, undue influence harms "cultural minorities"[351]:

> [Undue influence] imperils any estate plan that disfavors the testator's legal spouse or close blood relations in favor of non-family beneficiaries. The[] doctrine[] also [is] sufficiently ambiguous that [it] provide[s] cover for a trier of fact that wishes to reorder an estate plan to conform to her own values. The trier of fact might wish to do so, particularly if the values reflected in the testator's estate plan offend her sensibilities.[352]

In civil litigation, this aspect of the rule is grounds for criticism and reform. But in criminal matters, it is an irremediable flaw. Thus, criminal undue influence could easily be unconstitutional.[353]

On top of these due process concerns, criminalizing undue influence is

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347. *Id.* at 616.

348. *Id.*

349. Guyora Binder & Brenner Fissell, *A Political Interpretation of Vagueness Doctrine*, 2019 U. ILL. L. REV. 1527, 1537; Tammy W. Sun, *Equality by Other Means: The Substantive Foundations of the Vagueness Doctrine*, 46 HARV. C.R.-C.L. L. REV. 149, 156 (2011) (noting that the Court has employed the "discriminatory enforcement" rationale to minimize a "law's effect on minority and disadvantaged groups").

350. *See supra* text accompanying notes 91–103.

351. Spitko, *supra* note 31, at 275 n.1 (defining "'culture' as a set of shared values and beliefs" and a member of a "'cultural minority' . . . as an individual whose core religious, political or social values and beliefs differ meaningfully and substantially from majoritarian norms").

352. *Id.* at 276.

353. One potentially formidable counterargument is that the Court has suggested that "scienter requirements alleviate vagueness concerns." Gonzales v. Carhart, 550 U.S. 124, 149 (2007). The basic idea is that, by criminalizing the *deliberate* violation of a statute, lawmakers can ensure that nobody will violate it in "good faith." *Id.* at 150 (quoting Colautti v. Franklin, 439 U.S. 379, 395 (1979)). This sub-rule could come into play because, as noted, financial exploitation statutes only apply when a person "knowingly" commits undue influence. *See supra* text accompanying note 195; *cf.* State v. Campbell, 756 N.W.2d 263, 276 (Minn. Ct. App. 2008) (rejecting a void for vagueness challenge to different language in a financial exploitation statute "because [it] includes a mens rea requirement"). Then again, as scholars have noted, although a scienter element might cure "fair notice" problems, it does not address the discrete issue of "discriminatory enforcement." *See, e.g.*, Mannheimer, *supra* note 319, at 1093 (arguing that "it is unclear how a scienter requirement can do anything to ameliorate the excessive delegation inherent in an otherwise vague statute").

bad policy. The doctrine hinges on relationships and interactions that are plagued by evidentiary headaches and intense moral ambiguity. For one, the factfinder must divine the intent of a dead person. Because the star witness cannot testify, "a speculative element is necessarily introduced into the [case]."[354] Moreover, the alleged wrongdoer is usually a caregiver or close friend. This theme runs through many of the matters already discussed. For instance, in *State v. Maxon*, the Maxons were charged with unduly influencing Bea Bergman, a lonely widow, even though they essentially adopted Bea into their family:

> Joyce [Maxon] became a frequent visitor at Bea's house. She would transport Bea to antique shops, to the grocery store, to the doctor's office, and to church. Eventually, Joyce was spending weekday nights at Bea's house, and Bea would spend the weekend at Joyce's house . . . . Bea attended Maxon family functions and wanted the Maxons to call her "Aunt Bea."[355]

Likewise, in *People v. Brock*, Ronald Brock purportedly unduly influenced Norman Roussey, but also helped him manage his anxiety by fielding 2,500 phone calls from him.[356] Accordingly, the line between a gift that is the product of undue influence and an expression of gratitude is paper-thin.

Criminal undue influence also upends procedural norms from probate litigation. Most criminal cases are tried to a jury.[357] But trusts and estates scholars believe that "[f]ew questions are less well suited to the determination of a jury than . . . undue influence."[358] Indeed, juries are susceptible "to the emotional overlays which often pervade the trial"[359] and "decide without giving reasons," which permits them to veto a decedent's choices.[360] Two (admittedly dated) empirical studies bear out this point. One looked at undue influence trials from Minnesota in the early twentieth century and concluded that juries were reversed on appeal

354. Burkhalter v. Burkhalter, 841 N.W.2d 93, 105 (Iowa 2013).

355. State v. Maxon, 79 P.3d 202, 205 (Kan. Ct. App. 2003).

356. People v. Brock, 49 Cal. Rptr. 3d 879, 882 (Ct. App. 2006).

357. Ellis v. United States (*In re* Ellis), 356 F.3d 1198, 1234 (9th Cir. 2004) (Kleinfeld, J., dissenting). In federal court, roughly 86% of criminal trials are by jury. *See* Sean Doran, John D. Jackson & Michael L. Seigel, *Rethinking Adversariness in Nonjury Criminal Trials*, 23 AM. J. CRIM. L. 1, 9–10 (1995). The numbers in state courts vary widely but indicate that jury trials remain customary. *See id.* at 10–11; T. Ward Frampton, *The Uneven Bulwark: How (and Why) Criminal Jury Trial Rates Vary by State*, 100 CALIF. L. REV. 183, 191 (2012).

358. Comment, *Will Contests on Trial*, 6 STAN. L. REV 91, 95 (1953).

359. *Id.*

360. Langbein, *Will Contests*, *supra* note 27, at 2043; Josef Athanas, Comment, *The Pros and Cons of Jury Trials in Will Contests*, 1990 U. CHI. LEGAL F. 529, 530 (1990) ("[J]ury trials are less 'legally fair' than bench trials because juries are more likely to reach a verdict contrary to the law.").

six times more often than judges.[361] The other examined litigation from California between 1892 and 1953 and discovered that 62% of verdicts for contestants in undue influence cases were overturned for insufficiency of evidence.[362] In fact, in 1990, policymakers in the Golden State cited these findings to abolish the right to a jury trial in contests.[363] Nevertheless, given the gravitational pull toward jury trials in criminal matters, most undue influence prosecutions will likely be by jury.

To be sure, criminal defendants are also entitled to greater protection than parties in probate litigation. Prosecutors must prove guilt beyond a reasonable doubt.[364] But this heightened burden does not mitigate the hazards of entrusting juries with deciding the "I know it when I see it" question of whether influence was "undue."[365] Because the underlying doctrine is so nebulous, and its pathologies are so well-documented, requiring stronger evidence of its existence does little to prevent jurors from deciding cases based on their gut feelings and prior beliefs.[366]

Finally, deleting undue influence from the definition of "financial exploitation" would leave criminal elder abuse statutes largely intact. Indeed, these laws are spectacularly broad. For example, even without undue influence, they would prohibit a laundry list of deleterious conduct, such as "coercion, harassment, duress, deception, false representation, [and] false pretense."[367] Thus, courts would still have ample firepower to combat wrongdoers who target seniors.

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361. *See* Edward S. Bade, *Jury Trial in Will Cases in Minnesota*, 22 MINN. L. REV. 513, 516–17 (1938).

362. *See* Comment, *supra* note 358, at 92 n.4.

363. *See* CAL. L. REVISION COMM'N, RECOMMENDATIONS RELATING TO PROBATE LAW 793 n.14 (1987), http://www.clrc.ca.gov/pub/Printed-Reports/Pub159.pdf [https://perma.cc/ZPT7-8EQW] ("[J]ury verdicts upholding a contest are reversed on appeal in the great majority of cases."); CAL. PROB. CODE § 825 (West 2021) (providing that "there is no right to a jury trial" for contests). Other states are divided over the right to a jury trial for probate matters. Some courts hold that because "probate matters are generally equitable in nature, no right to a jury trial ordinarily exists in a probate case." Riddell v. Edwards, 32 P.3d 4, 7 (Alaska 2001); *see also* Wilson v. Wilson (*In re* Estate of Johnson), 820 A.2d 535, 538 (D.C. 2003) (refusing to recognize a jury trial in probate matters); Foster v. Gilliam (*In re* Estate of Foster), 165 Wash. App. 33, 47, 268 P.3d 945, 952 (2011) (holding that there is no right to a jury in probate cases). Conversely, statutes in other states create a right to a jury for contests. *See* Athanas, *supra* note 360, at 537–40.

364. *See supra* text accompanying note 139.

365. Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (stating "I know it when I see it" to explain why a movie was not "hard-core pornography").

366. For example, in *People v. Brock* the state tried to defend a jury verdict against the defendant for theft through undue influence by noting that the judge required proof of the crime beyond a reasonable doubt. 49 Cal. Rptr. 3d 879, 889–90 (Ct. App. 2006). The California Court of Appeals rejected this argument, reasoning that a heightened standard of proof did not change the fact that undue influence should not be grounds for criminal liability. *See id.* at 890.

367. GA. CODE ANN. § 30-5-3(8) (2020); *see also* sources cited *supra* note 197.

For these reasons, jurisdictions should decriminalize undue influence. Furthermore, as we discuss next, they ought to clarify the role of civil law in prosecutions for estate theft.

B. Civil or Criminal Rules

States disagree about the role that probate concepts play in estate theft cases. This section urges them to align civil and criminal law.

Many jurisdictions view estate theft as a pure matter of criminal law. For example, judges have ignored the convention of discounting non-contemporaneous evidence and the venerable distinctions between competence to make a gift, contract, or will.[368] Instead they gloss over these nuances and merely instruct the jury to "evaluate the victim's capacity."[369] For them, estate theft, like robbery and extortion, falls under the umbrella of criminal law's "ineffective consent" rule, and raises the one-size-fits-all question of whether the victim's decision to transfer property was an "act of reason accompanied with deliberation."[370]

This view is shortsighted. First, constructing separate doctrinal tracks for criminal and civil matters would sow confusion. Although civil incapacity is far from perfect, it has been fleshed out over the course of centuries and untold numbers of opinions.[371] Therefore, it would be harder for beneficiaries to anticipate whether they might face charges if courts reinvented the proverbial wheel in criminal matters.[372]

Second, a criminal-specific incapacity doctrine could breed anomalous results. For instance, some estate theft statutes define incompetence as being unable to "make . . . reasonable decisions."[373] This sets the bar *below* the threshold required for creating a valid will or revocable trust. As we observed, testamentary capacity is "the lowest level of mental

368. *See supra* text accompanying notes 263–284.

369. People v. Camiola, 639 N.Y.S.2d 35, 36 (App. Div. 1996).

370. Shehany v. Lowry, 152 S.E. 114, 115 (Ga. 1930). One state, North Dakota, embraces a unique rule called the "civil dispute doctrine," which "bars criminal prosecution if the case presents a 'legitimate dispute . . . on a unique issue of property, contract, or other civil law, and the issues in th[e] case would . . . be more appropriately settled in a civil forum." State v. Conrad, 2017 ND 79, ¶ 10, 892 N.W.2d 200, 203 (quoting State v. Curtis, 2008 ND 108, ¶ 24, 750 N.W.2d 438, 445).

371. *Cf.* Susanna L. Blumenthal, *The Deviance of the Will: Policing the Bounds of Testamentary Freedom in Nineteenth-Century America*, 119 HARV. L. REV. 960, 976 (2006) (surveying testamentary capacity cases adjudicated in the nineteenth century).

372. For similar reasons, we (somewhat grudgingly) propose that states use the common law definition of undue influence if they decide not to abolish the crime. Although the rule is deeply flawed, it is nevertheless familiar. Conversely, the contours of a unique criminal version of undue influence are anyone's guess.

373. FLA. STAT. § 825.101(8) (2020); 11 R.I. GEN. LAWS § 11-68-1(6) (2020).

capacity . . . in the law"[374] and "does not depend upon the testatrix's ability to reason logically."[375] Thus, in states with idiosyncratic criminal definitions of mental capacity, a beneficiary's acceptance of a bequest from a decedent who is moderately impaired might violate criminal law even though the instrument itself would be enforceable in probate.

To make this point concrete, recall *McCay v. State*: the dispute over Mary Ellen Bendtsen's will, which we mentioned in the Introduction.[376] Mark McCay, a would-be beneficiary, was convicted of attempted theft.[377] In Texas, theft occurs when the defendant knows that the owner has difficulty making "rational decisions about the reasonable disposition of property."[378] But in probate, a testator only lacks capacity to make a will "in extreme cases of imbecility."[379] In fact, the evidence about Bendtsen's acuity in the probate trial was mixed,[380] and the judge never actually ruled that she was incompetent.[381] Therefore, McCay might have been sent to prison for trying to probate a binding will.[382]

Thus, states should import the civil test for incapacity into the black-letter rule for estate theft.[383] And as we explain next, they should also scale back their abuser laws.

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374. Whitaker v. McDonnell (*In re* Estate of Elias), 946 N.E.2d 1015, 1028 (Ill. App. Ct. 2011); *see also* Bye v. Mattingly, 975 S.W.2d 451, 455 (Ky. 1998) ("The degree of mental capacity required to make a will is minimal."); *In re* Will of Goldberg, 582 N.Y.S.2d 617, 620 (Sup. Ct. 1992) ("It is hornbook law that less mental capacity is required to execute a will than any other legal instrument."); *see also supra* text accompanying note 66.

375. *In re* Perkins' Estate, 235 P. 45, 49 (Cal. 1925); *see also* Jensen v. Molgaard, 240 N.W. 656, 657–58 (Minn. 1932) ("[T]he testator may make an unjust, unreasonable, and unfair will if he chooses.").

376. *See supra* text accompanying notes 1–25.

377. *See supra* text accompanying notes 22–25.

378. TEX. PENAL CODE ANN. § 31.01(3)(E) (West 2020).

379. Rich v. Rich, 615 S.W.2d 795, 797 (Tex. App. 1980).

380. *See* Post-Submission Letter Brief at 2, McCay v. State, 476 S.W.3d 640 (Tex. App. 2015) (No. 05-12-01199-CR), 2015 WL 1827197, at *2 (explaining how there was testimony that Bendsten was nearly comatose, but hospital personnel also considered her capable of consenting to a "Do Not Resuscitate" form).

381. *See In re* Estate of Bendtsen, 230 S.W.3d 823, 826 (Tex. App. 2007); *McCay*, 476 S.W.3d at 645.

382. To be clear, that danger was not actually present under the facts of the case, because the will was invalid for lack of proper witnessing. *See supra* text accompanying note 19. But if it were not for that technicality, the dispute would have thrust the divergence between criminal and civil definitions of incapacity into sharp relief.

383. As noted in section II.B, some judges in estate theft cases have been troubled by the granularity of civil incapacity doctrines. Yet these principles reflect careful policy judgments. For example, requiring greater mental sharpness to execute a gift or a contract—rather than a will—makes sense because presently-effective transfers deplete the donor's assets and thus can cause greater harm than revocable instruments. *See supra* text accompanying notes 67–69.

C. Abuser Safe Harbors

This section contends that abuser statutes can be constitutionally and normatively deficient. It thus urges legislatures to fix these flaws by subjecting these laws to the antilapse doctrine and carving out exceptions to the disinheritance penalty.

Recall that the vast majority of courts have rejected forfeiture and corruption of blood challenges to the slayer rule.[384] The most common ground for these holdings is the "owned interest" rationale: if the victim either died intestate or made a will or a revocable trust, then the perpetrator never had a vested right in the estate to forfeit.[385] Alternatively, to cover assets that the killer actually owned, such as irrevocable trusts and joint tenancies, judges fall back on the "murder profiteering" theory.[386] The logic here is that the slayer doctrine does not punish felons for being felons; rather, it prevents unjust enrichment by denying criminals the spoils of their crime.[387]

The abuser rule is more constitutionally perilous than the slayer doctrine. First, some abuser legislation covers assets in which the perpetrator enjoys existing rights. For example, Illinois, Kentucky, Oregon, and Washington either preclude an abuser from taking "any property, benefit, or other interest"[388] or inheriting from the victim "by will, by transfer on death deed, by trust, or otherwise."[389] The plain language of these statutes includes assets held in irrevocable trusts, which provide "beneficiaries with 'a vested and present beneficial interest.'"[390] Likewise, West Virginia bars abusers from pocketing "any interest in the money or property[] from the victim . . . by descent and distribution, or by will, or by any policy or certificate of insurance, or otherwise."[391] The state supreme court has interpreted this language to include the criminal's

384. *See supra* section I.B.

385. *See supra* text accompanying notes 147–152.

386. *See supra* text accompanying notes 159–161.

387. *See supra* text accompanying notes 160–161.

388. 755 ILL. COMP. STAT. 5/2-6 (2020); *see also* KY. REV. STAT. ANN. § 381.280(1) (West 2020) (providing that an abuser "forfeits all interest in and to the property of the decedent"); WASH. REV. CODE § 11.84.020 (2020) ("No slayer or abuser shall in any way acquire any property or receive any benefit as the result of the death of the decedent.").

389. OR. REV. STAT. § 112.465(1) (2020).

390. United States v. Harris, 854 F.3d 1053, 1055 (9th Cir. 2017) (quoting Empire Properties v. Cnty. of L.A., 52 Cal. Rptr. 2d 69, 73 (Ct. App. 1996)). Other abuser statutes are tailored to only apply to "revocable" dispositions of property, and thus exclude irrevocable trusts. *See* ARIZ. REV. STAT. ANN. § 46-456(2)(a) (2020); MICH. COMP. LAWS § 700.2803(2)(a)(i) (2020).

391. W. VA. CODE § 42-4-2(c) (2020).

share of assets held in joint tenancy.[392] Because these laws might force abusers to forfeit *their own* property, they cannot always be upheld under the owned interest rationale.

In addition, the murder profiteering theory does not apply to abuser legislation. This perspective casts the slayer doctrine not as an attainder-like punishment for the crime, but rather as an attempt to prevent unjust enrichment. Its central insight is that because the killing sets the wheels of inheritance in motion, the slayer rule merely restores the status quo by depriving the perpetrator of assets that "have a nexus to the criminal act."[393] But in sharp contrast, abuse—no matter how heinous—rarely enriches the culprit.[394] Thus, when a court disinherits an abuser, it causes the surrender of property that has no logical relationship to the underlying misdeeds.[395] Because abuser laws do not avert ill-gotten gains, they are just like the vanquished doctrines of forfeiture and corruption of blood in the sense that they are *entirely punitive*.[396] Accordingly, when applied to common fact patterns, these statutes may be unconstitutional.[397]

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392. *See* Lakatos v. Estate of Billotti, 509 S.E.2d 594, 598 (W. Va. 1998) (construing the same language in the state's slayer statute to mean that "upon the death of the victim, the total estate held in a joint tenancy passes in its entirety to the person or persons who would have taken the same if the slayer had predeceased the victim"). Conversely, several states allow the abuser to retain her share of property held in joint tenancy or community property with right of survivorship. *See* ARIZ. REV. STAT. ANN. § 46-456(c)(3); 755 ILL. COMP. STAT. 5/2-6.2; MICH. COMP. LAWS § 700.2803(b); OR. REV. STAT. § 112.475(1); WASH. REV. CODE § 11.84.050(1).

393. Fellows, *supra* note 32, at 544.

394. Although physical abuse, verbal abuse, and neglect do not put money in the abuser's pocket, financial exploitation is more complex. As the discussion in Part II, makes clear, heirs and beneficiaries who commit pecuniary misconduct sometimes divert estate property to their own use. However, the victim or her estate can obtain a remedy for this wrongdoing through a separate civil lawsuit against the abuser. The abuser rule takes the additional punitive step of deleting the perpetrator from the victim's estate plan. Thus, even financial exploitation does not have the same direct causal link between the crime and the criminal's profit that a murder does.

395. Admittedly, this analysis does not apply to California's and Maryland's abuser statutes, which are designed to make the estate whole rather than punish the offender. *See supra* text accompanying notes 297–298.

396. Courts have found similar rules to be unconstitutional for precisely this reason: because they imposed forfeitures on property that "was not the fruit of crime nor acquired in the pursuance of criminal activity." Leonard v. City of Seattle, 81 Wash. 2d 479, 488, 503 P.2d 741, 747 (1972).

397. We say "may" because a handful of courts have used rationales other than the owned interest or murder profiteering theories to uphold slayer statutes. For example, some judges have reasoned that the prohibition on forfeiture only applies when *the government* confiscates property. *See* Blodgett v. Blodgett (*In re* Estate of Blodgett), 147 P.3d 702, 711 (Alaska 2006); Houser v. Haven, 225 S.W.2d 559, 559 (Tenn. Ct. App. 1949) ("The state is making no effort to confiscate the proceeds of the [life insurance] policy."); Shields v. Shields (*In re* Estate of Shields), 584 P.2d 139, 142 (Kan. 1978) (McFarland, J., dissenting) ("The statute in question does not authorize any forfeiture of the estate to the government upon conviction."). In addition, at least one court has opined that a criminal penalty is not a "forfeiture" unless it divests a criminal of all of her property. *See Blodgett*, 147 P.3d at 710–11. Because none of these opinions have discussed these alternative justifications in depth, it is unclear whether they would survive close scrutiny.

The disconnect between the crime and the penalty highlights another flaw with abuser statutes. As mentioned, the slayer doctrine accomplishes two complementary goals: it punishes the killer *and* it effectuates the victim's likely desire to disinherit the killer.[398] But abuser laws have the potential to penalize an owner's friend or family member for an isolated altercation or lapse in judgment.[399] There is no guarantee that a victim would have responded to relatively trivial misconduct with such a heavy hammer.[400] Thus, abuser legislation can actually *thwart* a decedent's intent.

To solve these dilemmas, abuser statutes should boast two features. First, they should incorporate the antilapse doctrine. As noted, in some states, antilapse takes the sting out of the slayer rule by allocating the killer's inheritance to the killer's descendants.[401] This palliative also helps square the disinheritance penalty with the injunction against corruption of blood—the incident of attainder that was anathema to the Founders.[402] As the Washington Court of Appeals recognized in *Eaden v. Evans* (*In re Estate of Evans*)[403]—the only opinion to consider whether antilapse applies to abusers—keeping the decedent's property within the abuser's family avoids punishing the abuser's "innocent descendants."[404]

Second, disinheritance should be discretionary, rather than automatic. As noted, only three jurisdictions allow courts to mold the penalty to conform to the crime.[405] Yet this minority approach has big upsides. For

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398. *See supra* text accompanying notes 136–138.

399. *See supra* text accompanying notes 304–311.

400. We concede that one factor helps diminish this risk. Unlike the slayer rule, which generally permits probate courts to find by a preponderance of the evidence that a felonious and intentional killing occurred, most abuser statutes predicate disinheritance on a *criminal conviction* of elder abuse. *See supra* text accompanying notes 299–301. The filters of the criminal justice system—such as the choice to devote resources to prosecution and the beyond a reasonable doubt standard at trial—may weed out all but the most galling abuser claims.

401. *See supra* text accompanying notes 167–168.

402. *See supra* text accompanying notes 114–115.

403. 181 Wash. App. 436, 326 P.3d 755 (2014).

404. *Id.* at 447, 326 P.3d at 761. In *Evans*, Calvin Evans, Sr. ("Cal Sr.") had four children, including Calvin Evans, Jr ("Cal Jr."). *See id.* at 439, 326 P.3d at 757. When Cal Sr. was diagnosed with dementia, Cal Jr. took care of him. *See id.* Cal Sr. executed a will which left most of his property to Cal Jr. *See id.* at 440, 326 P.3d at 757. But Cal Jr. also used his father's money to buy several items for his own use. *See id.* at 439–40, 326 P.3d at 757. The trial court held that Cal Jr. had committed financial exploitation and thus was disinherited. *See id.* at 441, 326 P.3d at 758. However, the trial judge invoked antilapse to pass Cal Jr.'s share to his own children. *See id.* The court of appeals affirmed, reasoning that the abuser statute "is not intended to be penal" and that "any incidental benefit" that an abuser reaps from his wrongdoing "does not warrant denying benefits to the abuser's innocent heirs." *Id.* at 447–48, 326 P.3d at 760–61. Accordingly, Cal Jr.'s kids took his share under Cal. Sr.'s will. *See id.* at 450, 326 P.3d at 762.

405. *See supra* text accompanying notes 312–313.

one, it increases the odds of abuser laws surviving constitutional scrutiny. For instance, a court could surgically excise property in which the abuser has a vested right and thus defuse forfeiture objections. Similarly, judges could decline to disinherit offenders in cases like *Newman v. Newman*[406]: where the abuser made great personal sacrifices to shepherd the victim through her cancer treatment and "the evidence was overwhelming as to their mutual love and devotion."[407] Giving courts this power would create a safety valve for situations in which revoking the transfer to the abuser flouts the victim's likely wishes.

CONCLUSION

The civil justice system has long grappled with the worst evidence problem, the empty shell of undue influence, and the intricacies of the slayer rule. This Article has revealed that these principles have recently seeped into the field of criminal law. Innovations like estate theft, criminal undue influence, and the abuser rule help stem the rising tide of inheritance-related misconduct. Yet they can also be unconstitutional, generate injustice, and run roughshod over a decedent's intent. States should calibrate punitive probate rules with an eye not just on their benefits, but also their costs.

406. *See supra* text accompanying notes 305–311.

407. Newman Reply Brief, *supra* note 288, at 15.