# CRIMES AGAINST PROBATE

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Abstract

Policymakers have increasingly turned their attention to wrongdoing that affects wills, such as the forgery of wills, the procurement of wills through coercion or deceit, and the destruction or suppression of wills. In particular, they have attempted to deter this misconduct by punishing wrongdoers through new forms of criminal and civil liability. Because the United States is on the precipice of the largest intergenerational wealth transfer in history, a significant portion of which will take place through wills, these attempts of deterrence are well-intentioned. However, their implementation has been flawed.

These implementation difficulties stem from the fact that a will has no legal effect until the testator's death. Because the consequences of misconduct affecting wills are delayed until after the victim's demise, policymakers have stretched traditional conceptions of criminal law and tort law to fit situations to which they do not easily apply. Specifically, they have created crimes akin to theft that punish conduct that does not deprive the testator of property rights during life and torts that remedy property harms inflicted upon a deceased victim who arguably can suffer no more harms. Current conceptions of criminal and civil liability for wrongdoing affecting wills are therefore riddled with theoretical and doctrinal shortcomings.

To remedy these shortcomings, this Article reconceptualizes wrongdoing affecting wills as evidentiary misconduct. A will is documentary evidence of a testator's intent that probate courts use to determine how to distribute a testator's property upon death, and misconduct that affects a will diminishes its evidentiary value. When wrongdoing affecting wills is framed as evidentiary misconduct that impedes the functioning of probate courts, rather than as property offenses, sounder theoretical footing for punishing this misconduct emerges. The victim is no longer the deceased testator but is instead the probate system itself.

Reframing the wrongdoing as an interference with evidence also alleviates some of the doctrinal shortcomings of the current scheme. Misconduct involving evidence that impedes judicial proceedings is

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already criminalized in a variety of contexts. However, the idiosyncrasies of the probate system counsel in favor of an evidentiary crime that is specifically tailored to wills. This Article therefore proposes a new evidentiary crime, entitled *Intentional or Willful Interference with Probate*, that better deters misconduct and is more easily implemented than the law's current deterrent mechanisms.

## INTRODUCTION

In recent decades, policymakers have increasingly taken steps to deter wrongdoing that interferes with the probate of a decedent's estate.[1] This misconduct can either cause the distribution of a decedent's property in accordance with the terms of an inauthentic or involuntarily induced will or prevent the distribution of a decedent's property in accordance with the terms of a genuine will.[2] There are two types of attempts to deter this misconduct: in some jurisdictions, wrongdoers face civil liability, including punitive damages;[3] and in others, they face criminal punishment, including fines and incarceration.[4]

These deterrent efforts are noble. Elder abuse, including misconduct that disrupts an individual's estate plan,[5] is a concerning problem,[6] which will only intensify as a large cohort of Americans enters the last quarter of life.[7] But while policymakers are well-intentioned in seeking to deter

1. *See* John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance*, 65 STAN. L. REV. 335, 337 (2013) ("[C]ourts, lawyers, and legal scholars are increasingly inclined to recognize a tort cause of action for wrongful interference with an expected inheritance."); David Horton & Reid Kress Weisbord, *Inheritance Crimes*, 96 WASH. L. REV. 561, 584 (2021) (noting that inheritance law traditionally does not seek to deter wrongdoing but that "states are now creating punitive sanctions for conduct that they once regulated solely through probate rules"); *infra* Part II.

2. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 46 cmt. d (AM. L. INST. 2011) ("Wrongful interference . . . may induce a donative disposition, for instance the making of a will or a particular bequest. Alternatively, the misconduct may induce revocation or alteration of a prior disposition—such as revocation of a will . . . .").

3. *See* RESTATEMENT (SECOND) OF TORTS § 774B Reporter's Note (AM. L. INST. 1979) ("A substantial majority of the cases now grant recovery in tort for intentionally and tortiously interfering with the expectation of an inheritance or gift."); ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS AND ESTATES 326 (11th ed. 2017) ("[C]ourts in almost half the states have recognized this new tort."); *infra* Section II.A.

4. *See* Horton & Weisbord, *supra* note 1, at 590 ("[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."); *infra* Section II.B.

5. *See* Eike G. Hosemann, *Protecting Freedom of Testation: A Proposal for Law Reform*, 47 U. MICH. J.L. REFORM 419, 421–22 (2014) ("[T]here is reason to assume that, in a wealthy and aging society such as the United States, interferences with freedom of testation will become more frequent in the future.").

6. *See* John B. Breaux & Orrin G. Hatch, Essay, *Confronting Elder Abuse, Neglect, and Exploitation: The Need for Elder Justice Legislation*, 11 ELDER L.J. 207, 207–08 (2003) ("[E]lder abuse continues to be an enormous problem in America. Congressional hearings on elder abuse have declared it a national disgrace[.]"); Horton & Weisbord, *supra* note 1, at 565 ("For decades, policymakers have sounded the alarm about this rampant, pernicious, and underreported form of wrongdoing.").

7. *See* Jodie Distler, *Re-Considering Undue Influence in the Digital Era*, 44 ACTEC L.J. 131, 131–32 (2019) ("By 2030, the entirety of the baby boomer generation will have reached age [sixty-five] and [one] in every [five] U.S. residents will be retirement age. The potential for widespread fraud and abuse has been recognized by lawmakers." (footnote omitted)); Michael C.

this type of wrongdoing, their deterrent mechanisms, both civil and criminal, have been poorly crafted and implemented.

On a surface level, policymakers have structured liability for wrongdoing that interferes with probate in ways that result in under-deterrence. Civil liability for this misconduct is limited in various ways that render the award of punitive damages uncertain, if not unlikely, which in turn, diminishes its deterrent effect.[8] By contrast, criminal liability typically penalizes only some types of misconduct that interfere with probate, and by leaving other types of misconduct unpunished, criminal law's deterrence efforts are incomplete.[9]

On a deeper level, theoretical and doctrinal shortcomings have beleaguered the implementation of these deterrents. Most of these difficulties flow from probate's worst evidence problem. Probate's main concern is accurately and efficiently carrying out a decedent's intended estate plan,[10] but probate occurs after the decedent's death.[11] The individual whose intent is at issue is inherently unavailable to testify, and consequently, the best evidence of the decedent's intent is absent.[12] In light of this problem, the law directs probate courts to identify a

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Pollack & Lior Jacob Strahilevitz, *Property Law for the Ages*, 63 WM. & MARY L. REV. 561, 565 (2021) ("[W]ithin the next forty years the percentage of Americans over age sixty-five is projected to reach [twenty-nine] percent, growing from [nineteen] percent today and [thirteen] percent a decade ago."); Amy Ziettlow & Naomi Cahn, *The Honor Commandment: Law, Religion, and the Challenge of Elder Care*, 30 J.L. & RELIGION 229, 234–35 (2015) ("[B]eginning on January 1, 2011, and continuing for twenty years, . . . 10,000 baby boomers w[ill] reach the age of [sixty-five] every day. . . . The number of seniors over eighty . . . will grow from [twenty] million in 2030 to almost [thirty-five] million by 2050." (footnotes omitted)).

8. *See infra* notes 127–45 and accompanying text.

9. *See infra* notes 123–26 and accompanying text.

10. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 (AM. L. INST. 2003) ("[T]he controlling consideration in determining the meaning of a donative document is the donor's intention."); Richard Lewis Brown, *The Holograph Problem—The Case Against Holographic Wills*, 74 TENN. L. REV. 93, 96 (2006) ("The primary goal of the American law of wills is the effectuation of the decedent's testamentary intent."); Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 2 (1941) ("One fundamental proposition is that, under a legal system recognizing the individualistic institution of private property and granting to the owner the power to determine his successors in ownership, the general philosophy of the courts should favor giving effect to an intentional exercise of that power."). *See generally* Mark Glover, *A Taxonomy of Testamentary Intent*, 23 GEO. MASON L. REV. 569 (2016) (explaining and clarifying the centrality of the testator's intent in property law).

11. *See* Gulliver & Tilson, *supra* note 10, at 6 (noting the traditional law's "absence of any procedure for determining the validity of a will before the death of the testator"). A few states now have statutes that authorize probate during the testator's life. *See* SITKOFF & DUKEMINIER, *supra* note 3, at 316.

12. *See* Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 647 (2014) ("A will is a peculiar legal instrument . . . in that it does not take effect until after the testator dies. As a consequence, probate courts follow what has been called a 'worst evidence' rule of procedure. The witness who is best able to [provide evidence of intent] is dead by the time the court considers such issues.").

decedent's intent as it is expressed in a will.[13] The will, which the decedent executes during life, serves as evidence of the decedent's intent at death.[14]

While probate and the law of wills have deliberately developed to accommodate this worst evidence problem,[15] other areas of law are less familiar with it.[16] Accordingly, policymakers' attempts to craft a cause of action in tort or define the elements of a crime to deter wrongdoing when the ostensible victim is inevitably dead at the time the misconduct is adjudicated have been clumsy and cumbersome. With respect to civil liability, policymakers have created a new type of tort, one for which others bring a claim based upon fraud, duress, or other types of wrongdoing that were inflicted upon an absent victim.[17] With respect to criminal liability, policymakers have created crimes similar to theft to punish misconduct that does not deprive the victim of enjoyment of property during life.[18] In sum, the peculiarities of probate and the worst evidence problem have led policymakers to stretch established conceptions of civil and criminal liability to fit situations to which they do not easily apply.

Despite the difficulty that policymakers have had in crafting and implementing deterrence mechanisms for misconduct that interferes with probate, a solution exists, and it does not require dramatically reimagining tort law or criminal law. To find this solution, however, one must reconceptualize the misconduct that the law seeks to deter. Instead of treating the wrongdoing as fraud or theft against the decedent or against the decedent's beneficiary, policymakers should view it as misconduct akin to evidence tampering, which disrupts the orderly and efficient functioning of probate courts.[19] Put simply, the victim of the

13. *See* Lawrence W. Waggoner, *Marital Property Rights in Transition*, 59 MO. L. REV. 21, 29 (1994) ("People whose individuated intention differs from the common intention must assume the responsibility of making a will; otherwise, their property will be distributed, by default, according to common intention or, more accurately, according to intention as attributed to them by the state legislature.").

14. *See* Gulliver & Tilson, *supra* note 10, at 4 ("[B]ecause the issue of the validity of the transfer is almost always raised after the alleged transferor is dead, . . . it seems quite clear that the existing requirements of transfer emphasize the purpose of supplying satisfactory evidence to the court.").

15. *See* Goldberg & Sitkoff, *supra* note 1, at 344 ("[T]he procedures and remedies in inheritance law for posthumous litigation over the intent of a decedent are rooted in principled policy decisions, ongoing and self-consciously made, about how best to resolve such matters given the derivative nature of the litigation and the worst evidence problem.").

16. *See id.* at 338 ("[T]ort law . . . is ill-suited to posthumous reconstruction of the true intent of a decedent. . . . In contrast to tort law, inheritance law has developed a host of specialized doctrines and procedures to deal with [the worst evidence problem].").

17. *See infra* Section II.A.

18. *See infra* Section II.B.

19. *See infra* Section IV.B.

wrongdoer's misconduct is not the decedent or the decedent's beneficiary but is instead the probate system itself.

When the misconduct is framed in this way, criminal law emerges as the obvious means of deterrence because evidentiary misconduct that interferes with legal proceedings is already illegal.[20] While these existing evidentiary crimes aptly serve as templates for deterring wrongdoing affecting wills, the idiosyncrasies of probate necessitate a crime specifically tailored to probate proceedings. To that end, this Article proposes a new evidentiary crime, entitled *Intentional or Willful Interference with Probate*, that both better deters misconduct and more easily accommodates the worst evidence problem than the law's current deterrent mechanisms.

This Article proceeds in five Parts. Part I explains how the law directs probate courts to identify a decedent's intent and how probate reckons with the worst evidence problem. Part II then explains the law's current attempts at deterring wrongdoing that disrupts probate's task of deciphering intent. Part III identifies the problems with how the law currently frames the misconduct that it seeks to deter, and Part IV argues that policymakers should reconceptualize this misconduct as an evidentiary crime that interferes with the probate system. Finally, Part V makes specific proposals regarding how policymakers should implement the crime of *Intentional or Willful Interference with Probate*, including the elements of the crime, punishment guidelines, and other details.

## I. PROBATE'S SEARCH FOR INTENT

Individuals have broad discretion to decide how their property should be distributed when they die.[21] This discretion is known as freedom of disposition, and it is the organizing principle of the American law of succession.[22] Because the law's goal is to facilitate the exercise of freedom of disposition,[23] policymakers design the law to accurately and

20. *See infra* Section IV.C.

21. *See* SITKOFF & DUKEMINIER, *supra* note 3, at 1 ("The right of a property owner to dispose of her property at death on terms that she prescribes has come to be recognized as a separate stick in the bundle of rights called property.").

22. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. a (AM. L. INST. 2001) ("The organizing principle of the American law of donative transfers is freedom of disposition. Property owners have the nearly unrestricted right to dispose of their property as they please."); Sitkoff, *supra* note 12, at 643–44 ("The American law of succession embraces freedom of disposition, authorizing *dead hand* control, to an extent that is unique among modern legal systems.").

23. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c ("The main function of the law in this field is to facilitate rather than regulate."); Sitkoff, *supra* note 12, at 644 ("For the most part, . . . the American law of succession facilitates, rather than regulates, the carrying out of the decedent's intent. Most of the law of succession is concerned

efficiently carry out an individual's intent regarding the disposition of property at death.[24] This task, however, is not easy, as the ascertainment of an individual's subjective intent regarding property distribution at death poses obvious evidentiary obstacles.

### A. *The Worst Evidence Problem*

To begin with, one's subjective intent, unlike objective conduct, cannot be observed, and consequently, the probate court simply cannot obtain direct evidence of subjective intent.[25] Moreover, unlike other areas of law, such as criminal law or tort law, in which an individual's subjective intent can be at issue, the law of wills inherently encounters an exacerbating evidentiary difficulty. When a court must determine the intent of an alleged criminal or tortfeasor, that individual might be available to testify so that she can explain her intent to the court. However, when a probate court deciphers intent, the individual whose intent is in question is necessarily unavailable to testify because probate occurs after the property owner's death.[26] The best evidence of intent is therefore unavailable at probate.[27] This reality has led scholars to describe probate as marred by the "worst evidence" problem.[28]

The worst evidence problem has shaped how the law directs probate courts to identify a decedent's intent. One way that the law could identify a decedent's intent would be to grant the probate court broad discretion

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with enabling posthumous enforcement of the actual intent of the decedent or, failing this, giving effect to the decedent's probable intent.").

24. *See* James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009, 1033 (1992) ("[W]e should ask . . . whether [the law] promotes the intent of the testator at an acceptable administrative cost.") (alteration added); Peter T. Wendel, *Wills Act Compliance and the Harmless Error Approach: Flawed Narrative Equals Flawed Analysis?*, 95 OR. L. REV. 337, 390 (2017) ("The challenge in creating and applying a Wills Act is how to balance the competing public policy consideration of testator's intent, costs of administration, and potential for misconduct.").

25. *See* Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 656–58 (1988) (referencing "the impossible search for subjective intent"); *see also* Jan Klabbers, *How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Toward Manifest Intent*, 34 VAND. J. TRANSNAT'L. L. 283, 302–03 (2001) ("[A]s a philosophical truism, it may be well-neigh impossible to identify someone else's subjective intent; to paraphrase an ancient maxim, not even the devil knows what is inside a man's head.").

26. *See* Sitkoff, *supra* note 12, at 647.

27. *See id.* ("The witness who is best able to authenticate the will, to verify that it was voluntarily made, and to clarify the meaning of its terms is dead by the time the court considers such issues."); *see also* Adam J. Hirsch, *Testation and the Mind*, 74 WASH. & LEE L. REV. 285, 287 (2017) ("The mind of a testator teems with data, but data that is difficult to access, assess, without risk of inaccuracy or misrepresentation. Death compounds those risks.").

28. *See, e.g.*, David J. Feder & Robert H. Sitkoff, *Revocable Trusts and Incapacity Planning: More Than Just a Will Substitute*, 24 ELDER L.J. 1, 18–19 (2016); John H. Langbein, *Will Contests*, 103 YALE L.J. 2039, 2046 (1994); Reid Kress Weisbord & David Horton, *Inheritance Forgery*, 69 DUKE L.J. 855, 860–61 (2020).

to decipher that intent after the decedent's death.[29] Under this approach, the court would consider all available evidence regarding the decedent, her property, and her potential beneficiaries, and it would decide how the decedent wanted her property distributed.[30] The efficacy of this approach is significantly impaired by the worst evidence problem in two distinct ways.

The first relates to the court's accuracy in identifying the decedent's intent. With the best evidence of intent absent, a potentially broad array of evidence would likely be submitted to fill the evidentiary void. The court would have to evaluate witness testimony and documentary evidence of any statements that the decedent made during life regarding her intended estate plan or her relationships with friends and family.[31] This evidence could be vague, contradictory, or of questionable veracity.[32] With this lack of reliable evidence, the probate court's task of accurately deciding what the decedent intended is exceedingly difficult.[33]

The second way that the worst evidence problem impairs this method of deciphering a decedent's intent relates to the efficiency of the probate process. With broad discretion to determine the decedent's actual intent, litigation will inevitably ensue.[34] Litigants and the court will expend time, money, and effort to determine the testator's actual intent regarding the disposition of her estate. And with no limit to the court's discretion, these

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29. *See* Katheleen R. Guzman, *Intents and Purposes*, 60 U. KAN. L. REV. 305, 316 (2011) (suggesting that the requirement of a will could be "discard[ed]" and the focus would be on "underlying intent in each individual case") (alteration added); Wendel, *supra* note 24, at 390 ("If decedent's intent and testamentary freedom were the sole public policy concerns, a court would hold a hearing either prior to or immediately following a person's death to determine the person's testamentary wishes, whether the person died testate or intestate."); *see also* Gulliver & Tilson, *supra* note 10, at 3 ("If all transfers were required to be made before the court determining their validity, it is probable that no formalities except oral declarations in the presence of the court would be necessary. The court could observe the transferor, hear his statements, and clear up ambiguities by appropriate questions.").

30. *See* Wendel, *supra* note 24, at 390 ("The court would consider extrinsic evidence to determine the person's intent at time of death regardless of the presence or terms of a will.").

31. *See* Guzman, *supra* note 29, at 316 (explaining that intent could be established "in any form, irrespective of its oral or written expression or even original manifestation").

32. *See* Gulliver & Tilson, *supra* note 10, at 3 ("The fact that our judicial agencies are remote from the actual or fictitious occurrences relied on by the various claimants to the property, and so much accept second hand information, perhaps ambiguous, perhaps innocently misleading, perhaps deliberately falsified, seems to furnish the chief justification for requirement of transfer beyond evidence of oral statement of intent.").

33. *See* Guzman, *supra* note 29, at 316 (explaining that "an ad hoc, pure intent approach would" produce a "vastly increased likelihood of error").

34. *See id.* (explaining that "an ad hoc, pure intent approach would" produce a "vastly increased likelihood of . . . litigation over the 'answers' to each" case); Wendel, *supra* note 24, at 390 ("The cost of administration would be prohibitive . . . ."); *see also* Gulliver & Tilson, *supra* note 10, at 3 ("[S]uch a procedure does not correspond with existing mores and would be entirely impracticable in our present society for various rather obvious reasons.").

costs could rapidly amass as the litigants submit and the court considers every conceivable piece of evidence, whether written, oral, or circumstantial, that bears on the question of the decedent's intent.

### B. *Wills as Evidence of Intent*

Given the worst evidence problem, the law does not direct courts to consider all evidence of a decedent's intent.[35] Instead of charging a probate court to determine how a decedent actually intended to distribute her property upon death, the law directs the court to identify the intent that she expressed in a will.[36] By focusing on expressed intent rather than actual intent, the law ameliorates some of the complications associated with the worst evidence problem.[37]

First, the requirement that a testator express her intent in a will provides reliable evidence that the court can consider after her death.[38] Without the testator's direct testimony, a written statement prepared by the testator is perhaps the next best evidence of the testator's actual intent.[39] In this way, a requirement of a will increases the accuracy of the court carrying out the testator's intended estate plan. Second, the requirement of a will reduces the costs of deciphering the testator's intent by placing limitations on the types of evidence that courts can consider. With a requirement of a will, the court is largely limited to interpreting the will's words rather than considering extrinsic evidence of intent that

35. *See* Daniel B. Kelly, *Toward Economic Analysis of the Uniform Probate Code*, 45 U. MICH. J. L. REFORM 855, 866–67 (2012) ("[P]robate courts do not attempt to make an individualized determination of the decedent's donative intent. Neither the UPC nor any of the states authorize this type of individualized determination, even if there is some evidence—perhaps even clear and convincing evidence—[of] the decedent's wishes . . . .").

36. *See* Susan N. Gary, *Adapting Intestacy Laws to Changing Families*, 18 LAW & INEQ. 1, 1 (2000) ("An intestacy statute can serve as a default rule, but a person whose wishes do not fit the default rule must execute a will."); Kelly, *supra* note 35, at 866–67 ("Any person can 'opt out' of [intestacy] by executing a valid will."); Reid Kress Weisbord, *Wills For Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 878 (2012) ("[E]xercising testamentary freedom requires an affirmative act during life—the execution of a will . . . .").

37. *See* Wendel, *supra* note 24, at 390–92 ("Creating a presumed intent for each decedent (i.e., the *intestate* scheme), and then putting the burden on each individual to opt out of the presumed intent by properly expressing his or her intent, is a reasonable and more efficient approach.").

38. *See* Gulliver & Tilson, *supra* note 10, at 6 (explaining that the requirement of a will ensures that "testamentary intent [is] cast in reliable and permanent form").

39. *See* John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 498 (1975) ("A will must contain written terms, and the testator must sign it. . . . Writing and signature are the minimum requirement which assure the finality, accuracy[,] and authenticity of purported testamentary expressions.").

might be found outside the four corners of the will.[40] By limiting the court's discretion to consider extrinsic evidence, the requirement of a will seeks to reduce the costs of fulfilling the testator's intent, and it therefore promotes the efficiency of the probate process.[41]

### C. *Wrongdoing Affecting Wills*

Although the law's focus on expressed intent rather than actual intent diminishes the worst evidence problem, evidentiary difficulties still arise. Not all wills are authentic or voluntary expressions of the decedent's intent; some wills are the product of wrongdoing, which decreases the will's probative value regarding the decedent's actual intent.[42] More specifically, wills that are the product of wrongdoing more likely reflect the intent of the wrongdoer rather than the intent of the decedent.[43]

This type of misconduct can take the form of overt misconduct. Most obviously, when a wrongdoer forges a will, the will expresses not the intent of the decedent but that of the wrongdoer.[44] Fraud in the execution is a variant of this type of wrongdoing.[45] In a scenario that involves this type of misconduct, a wrongdoer affirmatively misrepresents the contents of a document, which the decedent voluntarily signs.[46] For instance, fraud in the execution occurs when the drafter of the will intentionally inserts provisions within the will that the decedent did not instruct her to draft, and the decedent does not carefully review the will.[47] In such a case, the

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40. *See* SITKOFF & DUKEMINIER, *supra* note 3, at 334 ("In construing wills, a majority of states follow – or purport to follow – . . . rules that . . . bar the admission of extrinsic evidence to vary the terms of a will."). To be sure, the court is authorized to consider extrinsic evidence of the testator's intent under some circumstances, and it must exercise some degree of discretion in interpreting the testator's expressed intent. For example, the court can consider extrinsic evidence when the testator's words are ambiguous. *See id*. However, the requirement of a will provides a starting point for the court in identifying the testator's intended estate plan.

41. *See* Kelly, *supra* note 35, at 867 ("The UPC's reliance on the general rules of intestacy reflects a judgement that, in the absence of a will, the decision costs of attempting to determine the intent of each decedent would outweigh the error costs of an intestate distribution that may deviate from the wishes of a certain percentage of decedents.").

42. *See* SITKOFF & DUKEMINIER, *supra* note 3, at 271 ("By making a will, a person can direct the distribution of his probate property at death . . . . But what if the person's will, although properly executed, was not *voluntarily* made? It follows from the principle of freedom of disposition that only a voluntary act of testation should be enforced.").

43. *See generally* Weisbord & Horton, *supra* note 28, at 875–83 (suggesting that forged wills are problematic because they are more indicative of the wrongdoer's intent).

44. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmt. o (AM. L. INST. 1999); Weisbord & Horton, *supra* note 28, at 875–77.

45. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmts. j, o (AM. L. INST. 1999).

46. *See* SITKOFF & DUKEMINIER, *supra* note 3, at 314–15.

47. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmt. j, illus. 8 (AM. L. INST. 1999).

decedent freely signs the will, but, because of the wrongdoer's misconduct, the will does not accurately express the decedent's intent.

Forged wills and those whose execution were fraudulently obtained are not reliable evidence of the testator's intent because they contain provisions that are unknown to the testator. However, even some wills that were carefully reviewed and authentically executed by the testator are nevertheless involuntarily made.[48] In such situations, the will does not fully reflect the testator's actual intent.[49] For example, when a decedent executes a will under duress, a wrongdoer's outright threat of physical or other type of harm coercively induces a decedent to express an intent that she did not truly harbor.[50] The testator actually executed the will and was aware of its contents, but she was forced by threat of harm to do so. Likewise, when a testamentary gift is induced by fraud, the intentional misrepresentations of a wrongdoer cause the decedent to express an intent that she would not have expressed had she not been misled.[51] Again, the testator executed the will and was familiar with its substance; however, absent the fraud, she would not have expressed the intent to make the gift.

While forgery, duress, and fraud each involve overt wrongdoing, undue influence entails subtler misconduct.[52] Undue influence occurs when a wrongdoer exerts pressure that falls short of coercion, and that pressure overcomes the testator's free will.[53] If the testator is highly susceptible to persuasion because of a weakened physical or mental condition, a relatively small degree of pressure can result in undue

48. *See* Sitkoff, *supra* note 12, at 648–49 ("[W]hat if a will, although properly executed and so authentic, was not *voluntarily* made?").

49. *See id.* ("It follows from the principle of freedom of disposition that only a volitional act of testation should be enforced.").

50. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmt. i (AM. L. INST. 1999) ("A donative transfer is procured by duress if the wrongdoer threatened to perform or did perform a wrongful act that coerced the donor into making a donative transfer that the donor would not otherwise have made. An act is wrongful if it is criminal or one that the wrongdoer had no right to do."); *see also* SITKOFF & DUKEMINIER, *supra* note 3, at 318 ("When undue influence crosses the line into coercion, it becomes *duress*.").

51. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmt. j (AM. L. INST. 1999) ("A donative transfer is procured by fraud if the wrongdoer knowingly or recklessly made a false representation to the donor about a material fact that was intended to and did lead the donor to make a donative transfer that the donor would not otherwise have made.").

52. *See* Sitkoff, *supra* note 12, at 650 ("[W]hat influence is *undue*? The line between indelicate but permissible persuasion and influence that is undue is not always clear.").

53. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3(b) (AM. L. INST. 1999) ("A donative transfer is procured by undue influence if the wrongdoer exerted such influence over the donor that it overcame the donor's free will and caused the donor to make a donative transfer that the donor would not otherwise have made.").

influence.[54] But when the testator is in good health and of sound mind, a wrongdoer's influence must be more persuasive to overcome the testator's free will.[55] Regardless of whether subtle and isolated persuasion overwhelms a highly susceptible testator or substantial and persistent pressure overcomes an unimpaired testator, when undue influence occurs, the decedent's will, or at least portions of it, expresses the influencer's intent rather than the testator's uncorrupted intent.[56]

The previously described scenarios of wrongdoing affecting wills each entail the submission to probate of a will of diminished evidentiary value, but other types of wrongdoing prevent the probate court from reviewing authentic and voluntarily executed wills or portions thereof. This type of wrongdoing, such as that which results in the probate of an inauthentic or involuntarily induced will, interferes with the probate court's ability to carry out the testator's intent. For instance, when a wrongdoer destroys or otherwise suppresses a valid will, the probate court is denied access to valuable evidence regarding how the testator wanted her property distributed at death.[57] Similarly, when a wrongdoer either induces a testator to revoke a will or prevents her from making a will through fraud, duress, or undue influence, the probate court's task of identifying the testator's intent is impaired because the wrongdoer's misconduct excludes important evidence from the court's purview.[58] In sum, probate's task of carrying out the testator's intent is impaired by misconduct that results in either the submission of an inauthentic or involuntarily induced will or the suppression of an authentic and voluntarily created will.

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54. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3 cmt. e (AM. L. INST. 1999) ("The doctrine of undue influence protects against overreaching by a wrongdoer seeking to take unfair advantage of a donor who is susceptible to such wrongdoing on account of the donor's age, inexperience, dependence, physical or mental weakness, or other factor.").

55. *See* Bowman v. Bowman, 55 S.E.2d 298, 307 (Ga. 1949) ("[A]cts, conduct, and circumstances may constitute undue influence when exercised on a person of failing mind, poor health, and other mental and bodily enfeeblements which would not be such undue influence as to void a will executed by a person of sound mind, good health, and intelligence.").

56. *See In re* Estate of Hoover, 615 N.E.2d 736, 741 (Ill. 1993) (explaining that undue influence involves "the substitution of one's will over that of the testator's original intent").

57. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 4.1 cmt. j (AM. L. INST. 1999) (suggesting that a "will [might be] wrongfully destroyed or suppressed by someone dissatisfied with its terms").

58. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 46 cmt. d (AM. L. INST. 2011) ("[M]isconduct may induce revocation or alteration of a prior disposition—such as revocation of a will . . . ."); SITKOFF & DUKEMINIER, *supra* note 3, at 321 (explaining that "a person [might] wrongfully *prevent*[] the decedent from making a will").

## II. CURRENT ATTEMPTS AT DETERRENCE

As Part I explained, the primary objective of the law of wills is to accurately and efficiently carry out the decedent's intent.[59] By contrast, it generally is not concerned with deterring misconduct.[60] Professor Carla Spivack explained, "The primary purpose of wills law . . . is to effectuate the testator's intent . . . . Unlike criminal law, inheritance law does not serve to deter dangerous or violent crimes or other socially disruptive acts."[61] The law of will's disregard for deterrence is manifest in the consequences that a wrongdoer typically experiences if her misdeeds are discovered by a probate court. When the court finds that part or all of a will has been forged or induced through undue influence, duress, or fraud, it disregards the affected portions of the will.[62] The wrongdoer fails to reap the benefit of her misconduct, but she incurs no other penalty for her attempt to undermine the testator's intent.[63]

Furthermore, when a wrongdoer's misconduct prevents the execution or revocation of a will, the law of wills provides the decedent's estate and the intended beneficiaries no recourse to be made whole.[64] While a probate court can disregard a will that was fraudulently executed or wrongfully induced, it cannot distribute property according to the terms of a will that was never executed, and it must distribute property

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59. *See supra* Section I.A.

60. One aspect of the law of wills that potentially operates as a deterrent for wrongful conduct is the slayer rule. *See* Kevin Bennardo, *Slaying Contingent Beneficiaries*, 24 U. MIA. BUS. L. REV. 31, 37 (2015) ("The slayer rule also deters slaying, although this consequence is so weak that it is rightly viewed as a collateral benefit of the rule rather than a justification for it."); Nili Cohen, *The Slayer Rule*, 92 B.U. L. REV. 793, 798 (2012) ("The rule reflects criminal-law values of deterrence and retaliation in attributing importance to life's integrity and in striving to prevent any incentive to commit what appears to be a profitable crime."); William M. McGovern, Jr., *Homicide and Succession to Property*, 68 MICH. L. REV. 65, 71 (1969) (explaining that without the slayer rule, "a temptation to crime would exist"); Paula A. Monopoli, *"Deadbeat Dads": Should Support and Inheritance Be Linked?*, 49 U. MIA. L. REV. 257, 275 (1994) ("[T]he slayer rule not only punishes, but presumably deters as well."). *But see* Mark Glover, *Restraining Live Hand Control of Inheritance*, 79 MD. L. REV. 325, 348 (2020) (noting that the slayer rule would have less of a deterrent effect if the motive for the killing was not pecuniary gain).

61. Carla Spivack, *Killers Shouldn't Inherit from Their Victims—Or Should They?*, 48 GA. L. REV. 145, 194 (2013).

62. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.3(a) (AM. L. INST. 1999); Goldberg & Sitkoff, *supra* note 1, at 345–46.

63. *See* Hosemann, *supra* note 5, at 433 ("If faced only with the possibility of a will contest, a potential interferor has, simply put, almost nothing to lose from his misbehavior."). Although punitive damages typically are unavailable in a will contest at probate, at least courts have endorsed awarding such damages in limited circumstances. *In re* Estate of Stockdale, 953 A.2d 454, 458 (N.J. 2008); *see* SITKOFF & DUKEMINIER, *supra* note 3, at 304.

64. *See* Goldberg & Sitkoff, *supra* note 1, at 349 ("[W]hat if a person has wrongfully prevented the decedent from making, amending, or revoking a will? . . . In such cases, a will contest in probate offers no relief.").

according to the terms of an authentic will that was never revoked.[65] When this type of misconduct occurs, the decedent's intended beneficiaries can pursue a claim through restitution.[66] But here again, the only potential consequence to the wrongdoer is the disgorgement of the wrongfully obtained benefit.[67] The effect of a plaintiff prevailing in either a will contest that sets aside a wrongfully produced will or a restitution suit that remedies the wrongful suppression of a will is the wrongdoer's inability to retain a benefit from the decedent's estate. The wrongdoer bears no additional penalty under either scenario.

This lack of consequences, other than the failure of the wrongdoer's scheme, provides a prospective wrongdoer with a weak disincentive to engage in misconduct. Consider a prospective wrongdoer's calculus regarding whether to attempt some sort of misconduct that undermines the decedent's freedom of disposition. A rational wrongdoer will consider the benefits of success, the costs of failure, and the likelihood of success or failure.[68] For example, a prospective wrongdoer who is contemplating unduly influencing a testator to execute a will that contains a $10,000 gift to the wrongdoer, would stand to gain $10,000 if her plan succeeds. But if this scheme is proven at probate and therefore fails, the wrongdoer would reap no benefit. Thus, if this scheme of undue influence were certain to succeed, then the prospective wrongdoer would carry it out, but if it were certain to fail, then the prospective wrongdoer would abandon it.

However, a wrongdoer's decision-making process regarding whether to engage in wrongdoing is not so simple because, while the possible

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65. *See id.* at 350–51.

66. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 46(1) (AM. L. INST. 2011) ("If assets that would otherwise have passed by donative transfer to the claimant are diverted to another recipient by fraud, duress, undue influence, or other intentional misconduct, the recipient is liable to the claimant for unjust enrichment.").

67. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 55(1) (AM. L. INST. 2011) ("If a defendant is unjustly enriched by the acquisition of title to identifiable property at the expense of the claimant or in violation of the claimant's rights, the defendant may be declared a constructive trustee, for the benefit of the claimant, of the property in question and its traceable product."); Hosemann, s*upra* note 5, at 438 ("The second problem of constructive trusts stems from a lack of deterrence because of the degree of sanctioning. . . . [C]onstructive trusts form part of the law of restitution and, as such, are directed at preventing unjust enrichment, not at imposing penalties.").

68. *See* Sandra Hoffmann, *Since Children Are Not Little Adults—Socially—What's an Environmental Economist to Do?*, 17 DUKE ENV'T L. & POL'Y F. 209, 222 (2007) ("[A] rational decision about uncertain outcomes should consider the nature of the likely alternative outcomes, their consequences, the likelihood of alternative outcomes, and the benefits or costs of the consequences to the decision maker."). Decision-makers, however, do not always act rationally. *See generally* Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998) (explaining that a decisionmaker does not always make rational decisions when contemplating the consequences of a crime).

outcomes of wrongdoing may be certain, the likelihood of which outcome will occur is not.[69] Probate courts will discover some attempts of wrongdoing, and the attempts will therefore fail, but others will go undetected and will therefore succeed.[70] This uncertainty of outcomes affects the expected value of wrongdoing. The expected value of a decision, such as whether to engage in wrongdoing, is a measure of the average outcome of that decision.[71] To make this calculus, a prospective wrongdoer will discount both the benefit of success and the cost of failure by the likelihood of each respective outcome.[72] The prospective wrongdoer will then subtract the expected cost of failure from the expected benefit of success.[73] If this expected value calculus produces a positive result, then a rational wrongdoer will proceed, but if it produces a negative result, then she will not.[74]

For instance, if the prospective undue influencer believes that she has a fifty percent chance of success, she will multiply the $10,000 benefit by .5 to reach an expected benefit of $5,000. She will also multiply the $0 cost of failure by .5 to reach an expected cost of $0. Because there is no expected cost of failure, the net expected value of the wrongdoer's scheme of undue influence is the full expected benefit of $5,000. As this hypothetical scenario exemplifies, a plan of wrongdoing will have a

69. *See* Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1990 DUKE L.J. 1, 11 n.50 ("Since the probability of being caught and convicted is less than one, the expected value of the criminal sanction is always less than the actual penalty."); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 888 (1998) ("[I]njurers sometimes escape liability for harms for which they should be liable.").

70. *See* Hosemann, *supra* note 5, at 434 ("[T]he probability of a successful contest of a wrongfully purported will is significantly less than one hundred percent, given the fact that interference with freedom of testation is not easily discovered and there are 'roadblocks' for will contestants.").

71. *See* Joshua Davis, *Expected Value Arbitration*, 57 OKLA. L. REV. 47, 52 (2004) ("Expected value is the mean of the possible outcomes in a situation with each outcome weighted by its likelihood of occurring.").

72. *See* Manuel A. Utset, *Inchoate Crimes Revisited: A Behavioral Economics Perspective*, 47 U. RICH. L. REV. 1205, 1214–15 (2013) ("Committing a crime exposes the offender to fines and imprisonment . . . . Since not all criminal conduct will be detected and punished, potential wrongdoers will discount criminal sanctions to account for the probability that they will escape detection.").

73. *See* Russell B. Korobkin & Thomas S. Ulen, *Law and Behavioral Science: Removing the Rationality Assumption from Law and Economics*, 88 CAL. L. REV. 1051, 1063 (2000) ("[T]he basic requirement of expected utility theory is that decision makers conduct an explicit or implicit cost-benefit analysis of competing options and select the optimal method of achieving their goals (that is, the method that maximizes expected benefits and minimizes expected costs, or maximizes net expected benefits), subject to external constraints.").

74. *See id.* at 1088 ("According to conventional rational choice analysis, potential criminals maximize their utility by committing crimes only if the expected benefits exceed the expected costs.").

positive expected value, and the wrongdoer will therefore proceed, if the cost of failure is nil and there is any possibility of success.[75] One caveat, however, is that the wrongdoer's cost of planning and implementing her scheme can also affect her decision-making.[76] If, for some reason, the wrongdoer's costs in terms of time, effort, and money of carrying out her plan are valued at $6,000, then she will obviously not proceed because her transaction costs outweigh her positive expected benefit. The law of will's disgorgement of a wrongdoer's benefit consequently might deter wrongdoing if the likelihood of success is sufficiently low to reduce her expected benefit below her transaction costs.[77]

Despite this possibility of deterrence, there is good reason to believe that a wrongdoer's chance of disrupting a decedent's intended estate plan is more than nominal. Just as the worst evidence problem generally impedes a probate court's ability to discern the decedent's intent, it also specifically impedes the court's ability to detect wrongdoing.[78] Not only is the testator unavailable to testify regarding the intended distribution of her property but she is also unavailable to testify regarding potential wrongdoing.[79] The absence of the best evidence of misconduct increases the likelihood that the wrongdoer will succeed, which in turn increases the likelihood that she will go forward with her plan.[80]

Although the law of wills generally does not deter wrongdoing, deterrence is a specific objective of other areas of law. As Professor Spivack suggested, deterrence is a primary concern of criminal law,[81] which deters misconduct by punishing wrongdoers.[82] By subjecting

75. *See* Hosemann, *supra* note 5, at 438 ("[I]f an interferor were almost always barred from the profits of his wrongdoing, there would be virtually no incentive for him to act . . . .").

76. *See id.* at 433–34 ("[T]he interferor will incur opportunity costs when planning and carrying out the interference with freedom of testation. In the case of a year-long campaign of undue influence, for example, these costs will likely be significant, given that, as a result of his interference attempt, the interferor will have substantially less time to pursue other activities.").

77. *See id.* at 438–39 (explaining that, because a wrongdoer "bear[s] the opportunity costs of his interference," the absence of punitive damages at probate or in a restitution suit would "not lead to an under-deterrence problem if unjust enrichment of the interferor would be rectified in most cases").

78. *See* Sitkoff, *supra* note 12, at 648–49 ("In a will contest, the contestant alleges that a will executed with proper formalities was nonetheless not volitional because of the *incapacity* of the testator or the undue influence, duress, or fraud of another. . . . The complication in these matters, as before, is the worst evidence rule of probate procedure whereby the best witness is dead by the time the question is litigated.").

79. *See id.*

80. *See* Hosemann, *supra* note 5, at 439 ("[N]ot unlike the case of the will contest, the likelihood of a constructive trust being imposed to rectify an interference with freedom of [testation] is much less than one hundred percent . . . .").

81. *See supra* note 61 and accompanying text.

82. *See* Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 672 (1984) (explaining that the "enterprise . . . of regulating conduct through deterrence" is "central to the criminal law").

criminals to punishment, such as fines or incarceration, criminal law alters the expected value calculus of wrongdoing.[83] For example, a prospective car thief will consider that if her attempted wrongdoing succeeds, she will reap the benefit of the value of the stolen car ($10,000, for example). However, if the prospective wrongdoer knows that she faces potential criminal penalties,[84] then she will consider that a failed attempt of car theft will result not only in the forgone benefit of the car but also in a negative consequence, such as a fine of $100,000.[85]

Assume that the prospective car thief is skilled and experienced, and she therefore believes that her probability of success is perhaps ninety percent. Without the potential for criminal punishment, the prospective wrongdoer will easily see that her planned car theft has an expected value of $9,000, and, because this expected value is positive, she will go forward with her plan. She, however, knows that criminal law penalizes car theft and will factor the potential $100,000 fine into her expected value calculus. In particular, she will subtract the expected cost of failure from the $9,000 expected benefit of success.

Like the expected benefit of success, which is calculated by discounting the $10,000 value of the car by the ninety percent likelihood of success, the expected cost of failure is calculated by discounting the $100,000 fine by the ten percent likelihood of failure.[86] The car thief's expected cost of failure is therefore $10,000, and, when she subtracts this expected cost from her expected benefit of success, she finds that the net expected value of her prospective wrongdoing is negative $1,000. This negative expected value will lead the car thief to abandon her planned theft. In short, the $100,000 criminal fine has deterred her misconduct.

In addition to criminal law, deterrence is also a central concern of tort law.[87] And, like criminal law, tort law deters wrongdoing by imposing

83. *See* Dau-Schmidt, *supra* note 69, at 10 n.48.

84. *See* Paul H. Robinson, *Are Criminal Codes Irrelevant?*, 68 S. CAL. L. REV. 159, 163 (1994) ("[P]eople must know the rules if the deterrent threat of sanction is to have an effect: The law cannot deter people from engaging in conduct that they do not know it prohibits, or compel people to engage in conduct that they do not know it requires.").

85. For instance, in Colorado, aggravated theft of a motor vehicle valued between $1,000 and $25,000 is a class 6 felony. COL. REV. STAT. § 18-4-409(3)(b) (2022). A class 6 felony is penalized by a fine of up to $100,000. COL. REV. STAT. § 18-1.3-401(1)(a)(III)(A) (2022).

86. *See* Dau-Schmidt, *supra* note 69, at 10 n.48 ("The *ex ante* expected value of the criminal sanction is equal to the probability the criminal will be caught and convicted, times the cost of the criminal sanction to the criminal. The *ex ante* expected value is the relevant figure in considering the individual's decision whether to commit a crime since a rational person would discount the costs of the criminal sanction by the probability he will actually suffer the sanction in deciding whether to commit the crime.").

87. Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1801 (1997) ("Currently there are two major camps of tort scholars. One understands tort liability as an instrument aimed largely at the goal of

penalties on misconduct that alters a prospective wrongdoer's expected value calculus.[88] Instead of subjecting wrongdoers to fines or imprisonment, tort law subjects tortfeasors to punitive damages that are intended to punish their wrongdoing.[89] These punitive damages represent a negative consequence to a failed attempt of wrongdoing, and like criminal fines, a prospective wrongdoer will factor these costs into her net expectation value calculus. With the expected cost of failure offsetting the expected benefit of success, prospective wrongdoers are less likely to engage in negligent or intentionally tortious conduct.[90] Because criminal law and tort law are specifically designed in this way to deter wrongdoing, policymakers have turned to these two areas of law to fill the deterrence vacuum left by the law of wills.

### A. *Civil Liability*

Although the origins of tort liability for misconduct that interferes with a decedent's freedom of disposition reaches back earlier,[91] the impetus for the widespread emergence of such liability occurred in 1979 when the Restatement (Second) of Torts endorsed the tort of intentional interference with an inheritance.[92] Section 774B of the Restatement provides, "One who by fraud, duress or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability to the other for loss of the inheritance or gift."[93] Under this provision, a decedent's intended beneficiaries can bring a tort suit against a wrongdoer who

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deterrence, commonly explained within the framework of economics. The other looks at tort law as a way of achieving corrective justice between the parties.").

88. *Id.* at 1819, 1824.

89. *See* RESTATEMENT (SECOND) OF TORTS § 908(1) (AM. L. INST. 1979) ("Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct . . . ."); Polinsky & Shavell, *supra* note 69, at 948 ("When the defendant is an individual, the connection between the imposition of punitive damages and the accomplishment of the punishment objective is conceptually straightforward: if, after assessing the blameworthiness of an individual's act, appropriate punitive damages are levied, the punishment objective is achieved.").

90. *See* RESTATEMENT (SECOND) OF TORTS § 908(1) (AM. L. INST. 1979) (explaining that punitive damages "deter [the tortfeasor] and others like him from similar conduct in the future"); Polinsky & Shavell, *supra* note 69, at 896 ("[O]ne of the two main purposes of punitive damages is deterrence.").

91. *See* Goldberg & Sitkoff, *supra* note 1, at 355–60 (describing the historical development of tortious interference with an inheritance).

92. *See id.* at 355 ("As late as 1979, there was little recognition in American law of wrongful interference as a tort. In the years since, however, the tort has been recognized by the courts in nearly half the states. The swift emergence of this tort traces to the work of William Prosser, who endorsed it in his scholarship and then wrote it into the Second Restatement of Torts.").

93. RESTATEMENT (SECOND) OF TORTS § 774B (AM. L. INST. 1979).

disrupts the decedent's intended estate plan through tortious conduct.[94] This provision makes plain that the tortious conduct can be fraud or duress, but other types of misconduct, such as forgery and undue influence, can also be a basis for the claim.[95]

Since the promulgation of Section 774B in 1979, the tort of intentional interference with an inheritance has been widely accepted. Not only did the Restatement (Third) of Torts reaffirm its support of the cause of action in 2020[96] but roughly half of the states have also recognized the tort in some way.[97] In these states, a wrongdoer faces consequences, other than those imposed by the law of wills, for misconduct that interferes with a decedent's freedom of disposition. In particular, a wrongdoer faces potential punitive damages,[98] which, as explained above, are intended to punish misconduct.[99] The punitive damages consequently represent a cost of a wrongdoer's failure to successfully carry out her plan of wrongdoing, and these costs deter misconduct by offsetting the wrongdoer's expected benefit of success, thereby reducing the expected value of wrongdoing.[100]

To illustrate, consider again the example of a wrongdoer contemplating a scheme of undue influence that would result in a gift to the wrongdoer of $10,000. In a jurisdiction that recognizes tortious interference with an inheritance, she knows that she faces potential punitive damages, perhaps as much as $50,000.[101] As explained above,

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94. *See* SITKOFF & DUKEMINIER, *supra* note 3, at 335–26.

95. *See* RESTATEMENT (SECOND) OF TORTS § 774B cmt. C (AM. L. INST. 1979) ("[T]he liability stated in this Section is limited to cases in which the actor has interfered with the inheritance or gift by means that are independently tortious in character. The usual case is that in which the third person has been induced to make or not make a bequest or gift by fraud, duress, defamation or tortious abuse of fiduciary duty, or has forged, altered or suppressed a will or a document making a gift."); Whalen v. Prosser, 719 So.2d 2, 6 (Fla. Ct. App. 1998) (explaining that the "independent tortious conduct required for this tort" includes "fraud, duress, [and] undue influence"). Inclusion of some types of wrongdoing within the Restatement's framework for liability is doctrinally clumsy. *See* Goldberg & Sitkoff, *supra* note 1, at 339 ("But in fact it makes for an awkward tort. As stated authoritatively in section 774B of the Second Restatement of Torts, an interference-with-inheritance claim must be premised on conduct that is 'independently tortious' in character—that is, the sort of wrongful conduct that would in other contexts support tort liability. Yet neither undue influence nor duress, both typical allegations in these kinds of cases, is independently tortious in this sense.").

96. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 19 (AM. L. INST. 2020).

97. *See* SITKOFF & DUKEMINIER, *supra* note 3, at 317.

98. *See id.* at 322 ("Punitive damages may be recovered in an interference-with-inheritance tort action, . . . but almost never in a will contest or restitution action.").

99. *See supra* note 89 and accompanying text.

100. *See supra* note 90 and accompanying text.

101. For example, in one case involving a claim of intentional interference with an inheritance, the jury awarded the plaintiff punitive damages in the amount of $118,343.05 against one defendant and $59,171.53 against another when the expected inheritance was valued at $1,183,430.50. In re Estate of Boman, 898 N.W.2d 202, 2017 WL 512493, at *8 (Iowa Ct. App. 2017).

the wrongdoer will discount both the benefit of success and the cost of failure by the likelihood of each outcome.[102] So, assuming that the wrongdoer maintains her expectation of a fifty percent success rate, she will have an expected benefit of $5,000. Because there is now a negative consequence of failure, the wrongdoer's expected cost is no longer $0. Instead, she will discount the $50,000 cost of failure by the fifty percent likelihood of failure, which produces an expected cost of $25,000. After subtracting the $25,000 expected cost from the $5,000 expected benefit, the wrongdoer discovers that her plan of wrongdoing has a net expected value of negative $20,000. Because of the possibility of punitive damages, her expected value is now negative, and the tort of intentional interference with an inheritance has deterred her misconduct.

### B. *Criminal Punishment*

In addition to potential civil liability for intentional interference with an inheritance, many states impose criminal penalties for certain behavior that interferes with the probate process. Generally speaking, these behaviors include creating a false will and destroying or otherwise suppressing a potentially authentic will. Perhaps recognizing that forging a will and destroying a will can be equally as disruptive to a decedent's estate plan, some states criminalize these behaviors under a single offense and attach the same penalty range to both behaviors. For example, the Utah offense of Fraudulent Handling of Recordable Writings is broad enough to include both the creation of a forged will and the destruction or concealment of an authentic will,[103] and thus the potential penalty is identical for both behaviors.[104] Most states that criminalize forgery and destruction of testamentary instruments, however, do so through separate offenses. For example, in Texas, the forgery of a testamentary instrument and the destruction of a testamentary instrument fall under different

102. *See supra* notes 69–74 and accompanying text.

103. UTAH CODE ANN. § 76-6-503.5(4)(a) (West 2022) ("Any person who with intent to deceive or injure anyone falsifies, destroys, removes, records, or conceals any will, deed, mortgage, security instrument, lien, or other writing for which the law provides public recording is guilty of fraudulent handling of recordable writings."). However, the forgery of a will would also violate the Utah criminal forgery statute. The penalty is the same under both statutes. *Id.* § 76-6-501(2), (5).

104. *Id.* § 76-6-503.5(4)(b) (making first-time violations third degree felonies); *see also id.* § 76-3-203(3) (providing for a term of imprisonment up to five years for third degree felonies); *id.* § 76-3-301(1)(b) (providing for a fine up to $5,000 for third degree felonies). However, the forgery of a will in Utah could expose an offender to additional punishment, as forgery of a writing with intent to defraud, possession of a forged writing, and filing a forged writing are all separate offenses. *Id.* §§ 76-6-501(2); *id.* 76-6-502(2); *id.* 76-8-414.

offenses in the criminal code.[105] Both offenses, however, qualify as the same class of offense[106] and carry identical punishment ranges.[107]

However, many states' criminal laws do not confer equal treatment on the forgery of a will and the destruction or suppression of a will. It is not uncommon for the potential punishment attached to forging a will to be multiple times the potential punishment attached to destroying or suppressing a will.[108] In Maine, the forgery of a will is punishable by up to ten years in prison, a term that is twenty times longer than the maximum six-month term that is available for suppressing a will.[109] In Connecticut, will forgery is a felony with a maximum term of incarceration that is five times greater than the maximum for the misdemeanor offense of concealing a will.[110] In North Carolina, the minimum punishment for forging a will (a felony offense) is harsher than the maximum punishment for suppressing a will (a misdemeanor offense).[111] Many other jurisdictions have even greater disparities by

105. *Compare* TEXAS PENAL CODE ANN. § 32.21 (West 2022) (forgery) *with id.* § 32.47 (fraudulent destruction, removal, or concealment of a writing).

106. *See id*. § 32.21(d); *id.* § 32.47(d)(1) (providing that forgery and destruction of a will are both state jail felonies).

107. *Id.* § 12.35(a), (b) (providing a period of confinement of 180 days to two years and a fine of up to $10,000 for the commission of a state jail felony).

108. For example, in Idaho, the offenses of will forgery and suppression both carry an identical mandatory minimum of one year in prison, but the maximum punishment ranges from five years for will suppression to fourteen years for forgery of a will. IDAHO CODE § 18-3206 (2022) (mutilating written instruments); *id.* § 18-3601 (forgery defined), *id.* § 18-3604 (punishment for forgery). Other jurisdictions set the maximum punishment for will forgery at twice the maximum for will suppression. *See, e.g.*, 11 R.I. GEN. LAWS § 11-17-1 (2022) (providing punishment of up to ten years' imprisonment for forgery of a will); 33 R.I. GEN. LAWS § 33-7-7 (2022) (providing up to five years' imprisonment for fraudulent theft, destruction, or concealment of a will).

109. The offense of forging a will is a class B crime, which is punishable by up to ten years in prison and a fine of $20,000. ME. REV. STAT. ANN. tit. 17-A, § 702(1)(C), (2) (2022); *id.* § 1604(1)(B); *id.* § 1704(2). The offense of suppressing a will is a class E crime, punishable by up to six months in prison and a fine of $1000. *Id.* § 706, 1604(1)(E); *id.* § 1704(5). Additionally, the offense of filing a forged will is a class D crime, punishable by up to 364 days in prison and a fine of $1,000. *Id.* § 706-A; *id.* § 1604(1)(D); *id.* § 1704(4).

110. *See* CONN. GEN. STAT. § 53a-139 (2022) (providing that forgery in the second degree is a class D felony); *id.* § 53a-131 (providing that unlawfully concealing a will is a class A misdemeanor); *id.* § 53a-35(8) (setting maximum term of imprisonment of five years for class D felonies); *id.* § 53a-36(1) (setting maximum term of imprisonment of one year for class A misdemeanors).

111. The offense of stealing, destroying, or concealing a will is a class one misdemeanor, which, for an offender with no prior convictions, is punishable by a minimum of one day of community punishment and a maximum of 120 days of active punishment. N.C. GEN. STAT. § 14-77 (2022); *id.* § 15A-1340.23(c). The offense of forging a will is a class H felony, which, for an offender with no prior convictions, is punishable by a minimum of four months of community punishment and a maximum of twenty-five months of active punishment. *Id.* § 14-122; *id.* § 15A-1340.17(c).

criminalizing the forgery of a will but not criminalizing the destruction or suppression of a will. These jurisdictions have criminal statutes that specifically penalize the forgery of a will,[112] but do not have corollary statutes that specifically penalize the destruction or suppression of a will.

Some states separately criminalize the act of presenting a forged will to probate.[113] In these states, a person who forges a will and presents it to probate could conceivably be guilty of two or more criminal offenses,[114] while a person who destroys an authentic will or otherwise prevents it from reaching probate could be guilty of no criminal offenses. Although jurisdictions generally do not criminalize the act of failing to submit a will to probate, they may treat the failure to deliver a will to probate as an act of contempt if it violates a specific court order.[115] These statutes, however, generally fall within the probate provisions of the statutory code rather than the criminal provisions.[116]

Finally, several states' criminal forgery statutes do not mention wills or testamentary documents by name, but rather broadly criminalize the forging of any written instrument.[117] It is much less common for a

112. *See* ALA. CODE § 13A-9-3(a)(1) (2022) (forgery in second degree); ALASKA STAT. § 11.46.505(a)(1) (2022) (forgery in second degree); ARK. CODE ANN. § 5-37-201(c)(1) (2022) (forgery in second degree); CAL. PENAL CODE § 470(c) (West 2022) (forgery); COLO. REV. STAT. § 18-5-102(1)(c) (West 2022) (forgery); KY. REV. STAT. ANN. § 516.030(1)(a) (West 2022) (forgery in second degree); MICH. COMP. LAWS § 750.248(1) (2022) (forgery); OKLA. STAT. ANN. tit. 21, § 1561 (2022) (forgery of wills, deeds, and certain other instruments); VT. STAT. ANN. tit. 13, § 1801 (2022) (forgery of documents).

113. *See, e.g.*, ALA. CODE § 13A-9-12(a) (2022) (offering a false instrument for recording); ALASKA STAT. § 11.46.550(a) (2022) (same); COLO. REV. STAT. § 18-5-114(1) (2022) (same); MINN. STAT. § 609.64 (2022) (filing of forged instrument); OKLA. STAT. ANN. tit. 21, § 463 (2022) (offering forged instrument for record); VT. STAT. ANN. tit. 13, § 1802 (2022) (uttering forged instruments); WASH. REV. CODE § 40.16.030 (2022) (offering false instrument for filing); P.R. LAWS ANN. tit. 33, § 4851 (2022) (filing of forged documents).

114. In California, a person who forges a will and offers it to probate can be convicted of up to four distinct felonies. *See* People v. Horowitz, 161 P.2d 833, 839 (Cal. Dist. Ct. App. 1945) (upholding four felony convictions); CAL. PENAL CODE § 470(c) (West 2022) (explaining the elements of forgery); *id.* § 115(a) (filing forged instrument); *id.* § 132 (offering forged document as evidence); *id.* § 134 (preparing false documentary evidence).

115. *See, e.g.*, NEB. REV. STAT. § 30-2356 (2022) ("[A]ny person who willfully refuses or fails to deliver a will after being ordered by the court in a proceeding brought for the purpose of compelling delivery is subject to penalty for contempt of court."); 33 R.I. GEN. LAWS § 33-7-5(a) (2022) ("[I]f any executor or other person neglects, without reasonable cause, to deliver a will, after being duly cited for that purpose by the court, he or she may be adjudged in contempt . . . ."); S.C. CODE ANN. § 62-2-901 (2022) (stating similar); WYO. STAT. ANN. § 2-6-119 (2022) (stating similar).

116. *See* sources cited *supra* note 115. All of the statutes in the immediately preceding footnote appear in the probate code of the relevant jurisdiction rather than the criminal code.

117. *See, e.g.*, 720 ILL. COMP. STAT. 5/17-3(a)(1) (2022) (criminalizing as forgery the knowingly making, with the intent to defraud, of a false document that is apparently capable of defrauding another); IND. CODE § 35-43-5-2(d)(1) (2022) (criminalizing as forgery the making of

jurisdiction to have a corollary statute that generally criminalizes the destruction of written instruments.[118] Again, states criminalize the affirmative act of forging an instrument more frequently than the act of destroying an authentic written instrument.

In sum, similar to how the tort of intentional interference with an inheritance attempts to deter wrongdoing affecting wills,[119] the criminalization of forgery or suppression of a will deters wrongdoing by punishing the proscribed conduct.[120] The punishment represents a cost of failure that alters a prospective wrongdoer's expected value calculus.[121] With the expected costs of a criminal fine or a term of imprisonment offsetting some of the expected benefit of success, the wrongdoer is less likely to forge or suppress a will.

## III. SHORTCOMINGS OF CURRENT DETERRENTS

Although policymakers in most states have recognized the need to deter misconduct that affects wills,[122] their current attempts of deterring wrongdoing, both civil and criminal, suffer from several shortcomings. To begin with, the tort of intentional interference with an inheritance and the various criminal sanctions do not adequately deter wrongdoing. Moreover, these deterrent efforts pose theoretical and doctrinal problems that relate to how the law frames the misconduct's harm and how it determines the wrongdoer's culpability.

### A. *Deterring Misconduct*

Perhaps the most problematic aspect of the current attempts to deter misconduct affecting wills is that they simply do not adequately deter. This failure is most obvious with the existing criminal sanctions.[123] As Part II made plain, these statutes are severely limited in scope.[124] All of them criminalize the forging of a will, and some criminalize the

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a written instrument, with the intent to defraud, that purports to have been made by another person).

118. There are statutes that broadly criminalize the destruction of written instruments. Kansas separately criminalizes forgery of a written instrument and destruction of a written instrument. KAN. STAT. ANN. §§ 21-5823(a)(1) (2022) (stating elements of forgery), 21-5826(a) (2022) (explaining destruction); *see also id.* § 21-5111(gg) (2022) (defining "written instrument" broadly while not expressly enumerating wills or other testamentary documents).

119. *See supra* Section II.A.

120. *See* Dan-Cohen, *supra* note 82, at 672.

121. *See supra* notes 81–86 and accompanying text.

122. *See supra* Part II.

123. *See* Hosemann, *supra* note 5, at 444 ("In regards to interference with freedom of disposition, criminal law does not close the deterrence gap left by the imperfection of civil remedies.").

124. *See supra* Section II.B.

suppression of an authentic will.[125] Other types of wrongdoing that disrupt a decedent's intended estate plan, such as undue influence, duress, and fraud, are noticeably absent from these statutes.[126] Existing criminal sanctions therefore under-deter by failing to punish some types of misconduct.

Just as the criminal statutes that penalize the forgery or suppression of a will inadequately deter misconduct that undermines a decedent's intent, the tort of intentional interference with an inheritance also provides insufficient deterrence.[127] This inadequacy, however, does not stem from the breadth of misconduct that can trigger civil liability under the tort. Indeed, undue influence, duress, and fraud are all subject to civil liability.[128] Instead, the insufficiency is the result of the uncertainty regarding whether a wrongdoer who intentionally interfered with an inheritance will be liable for punitive damages. Two limitations on civil liability for the tort of intentional interference with an inheritance create this uncertainty.

First, in many states that recognize the tort, a plaintiff can pursue a claim of intentional interference with an inheritance only if she lacks an adequate probate remedy.[129] In some jurisdictions, this limitation requires that the wrongdoer's tortious conduct not only impede the decedent's exercise of freedom of disposition but also prevents the plaintiff from pursuing a will contest during the probate of the decedent's estate.[130] To appreciate the significance of this principle, consider the case of *Schilling v. Herrera*.[131]

In this case, a brother accused his elderly sister's caretaker of unduly influencing his sister to execute a will that excluded him and benefitted

125. *See supra* notes 103–12 and accompanying text.

126. *See* Hosemann, *supra* note 5, at 444 ("Although some forms of misbehavior that amounts to interference with freedom of testation do in fact constitute criminal offenses (e.g., the forgery of a will and the subsequent offering of the forged will for probate), other particularly relevant forms of interference, such as undue influence or duress, do not necessarily constitute crimes.").

127. *See id.* at 424 ("[T]he 'new' tort remedy will [not] solve the problem of under-deterrence of interference with freedom of testation.").

128. *See supra* note 95 and accompanying text.

129. *See* SITKOFF & DUKEMINIER, *supra* note 3, at 330 ("[M]ost courts that have recognized the interference-with-inheritance tort require the plaintiff to pursue remedies if they are available. A failure to do so usually results in barring a later suit in tort . . . .").

130. *See* Goldberg & Sitkoff, *supra* note 1, at 370 ("A recurring application of the interference-with-inheritance tort involves fraud in a probate proceeding—for example, concealing the fact of the proceeding from an interested party or wrongfully suppressing or destroying a will.").

131. 952 So. 2d 1231 (Fla. Dist. Ct. App. 2007).

the caretaker.[132] Instead of instituting a will contest to set aside the will, the brother sued the caretaker for intentional interference with an inheritance.[133] The caretaker moved to dismiss the case, and the trial court granted the motion.[134] On appeal, the Florida Third District Court of Appeal acknowledged the limitation that requires a plaintiff to have no adequate remedy at probate,[135] but the brother argued that he could not pursue a will contest because the caretaker not only unduly influenced his sister but also defrauded him by failing to inform him of his sister's death until after the time to bring a will contest had expired.[136]

As the court explained, the brother "alleged two separate frauds. The first alleged fraud stems from [the caretaker's] undue influence over the deceased in procuring the will, whereas the second alleged fraud stems from [the caretaker's] actions in preventing [the brother] from contesting the will in probate court."[137] Based on these allegations, the court held that the brother stated a valid claim for relief, and therefore would prevail if he could factually establish that both types of wrongdoing occurred.[138]

Second, in addition to the probate remedy limitation, another limitation creates uncertainty regarding the likelihood of punitive damages that decreases their deterrent effect. In particular, courts typically have broad discretion over whether to award punitive damages.[139] Generally speaking, punitive damages are reserved for misconduct that courts find particularly reprehensible.[140] Thus, if the plaintiff prevails, the wrongdoer is not certain to be liable for punitive damages because the court might not find the misconduct sufficiently

132. *See id.* at 1235 ("[T]he amended complaint alleges that Mr. Schilling was named as the sole beneficiary in the decedent's last will and testament; that based on this last will and testament, he expected to inherit the decedent's estate upon her death; that Ms. Herrera intentionally interfered with his expectancy of inheritance by 'convincing' the decedent, while she was ill and completely dependent on Ms. Herrera, to execute a new last will and testament naming Ms. Herrera as the sole beneficiary; and that Ms. Herrera's 'fraudulent actions' and 'undue influence' prevented Mr. Schilling from inheriting the decedent's estate.").

133. *See id.* at 1232.

134. *See id*.

135. *See id.* at 1236. The appellate court quoted the Supreme Court of Florida, which held in a previous case that "[t]he rule is that if adequate relief is available in a probate proceeding, then that remedy must be exhausted before a tortious interference claim may be pursued." DeWitt v. Duce, 408 So. 2d 216, 218 (Fla. 1981).

136. *See Schilling*, 952 So. 2d at 1233 ("[A]fter the expiration of the creditor's period and after Ms. Herrera had petitioned the probate court for discharge of probate, Ms. Herrera notified Mr. Schilling for the first time that the decedent, his sister, had passed away . . . .").

137. *Id.* at 1236.

138. *See id*.

139. *See* RESTATEMENT (SECOND) OF TORTS § 908 cmt. D (AM. L. INST. 1979) ("Whether to award punitive damages and the determination of the amount are within the sound discretion of the trier of fact, whether judge or jury.").

140. *See id.* § 908(2) ("Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others.").

egregious.[141] This uncertainty reduces the deterrent effect of punitive damages because a prospective wrongdoer will discount the cost of punitive damages not only by the likelihood of failure but also by the likelihood that a court will award punitive damages if the wrongdoer fails. Empirical studies of tort judgments suggest that courts rarely subject tortfeasors to punitive damages,[142] and anecdotal evidence suggests that courts infrequently award punitive damages in suits alleging intentional interference with an inheritance.[143]

These limitations diminish the deterrent value of punitive damages because a prospective wrongdoer will more heavily discount her cost of failure, which in turn reduces the degree to which her expected cost offsets her expected benefit of success. To see this diminution of deterrent effect, consider again the wrongdoer who is contemplating a scheme of undue influence that would result in a gift to her of $10,000, but who knows that she faces potential punitive damages of as much as $50,000.[144] The wrongdoer will discount both the $10,000 benefit of success and the $50,000 cost of failure by the likelihood of each outcome,[145] which she believes are both fifty percent.

The wrongdoer easily calculates her expected benefit to be $5,000. Her expected cost calculus, however, is more complicated because she will discount the $50,000 cost of failure not once but thrice. First, the wrongdoer will discount a potential punitive damage award by the likelihood that the court will permit the plaintiff's claim due to the plaintiff's lack of an adequate remedy at probate, which, to keep things simple, the wrongdoer estimates is fifty percent. Second, she will discount a potential punitive damage award by the likelihood that she will lose the case if the court permits the case to proceed, which she estimates is fifty percent. Finally, she will discount her cost of failure by the likelihood that the court will award punitive damages if the plaintiff prevails, which this Article will generously assume is fifty percent. After

141. *See id.* § 908 cmt. E ("In determining the amount of punitive damages, as well as in deciding whether they should be given at all, the trier of fact can properly consider not merely the act itself but all the circumstances including the motives of the wrongdoer, the relations between the parties and the provocation or want of provocation for the act.").

142. *See* Michael Rustad & Thomas Koenig, *The Supreme Court and Junk Social Science: Selective Distortion in Amicus Briefs*, 72 N.C. L. REV. 91, 130–31 (1993) ("All five of these studies come to the same conclusion despite the diversity of their authorship and sponsorship. Their common finding is that punitive damages have been rarely awarded and even more rarely collected.").

143. *See* Dewitt v. Duce, 408 So. 2d 216, 220 n.11 (Fla. 1981) ("[W]e can find no case authority allowing punitive damages in this type of action."); Hosemann, *supra* note 5, at 443 ("[I]t seems that punitive damages are awarded only rarely in cases of interference with freedom of testation.").

144. *See supra* note 101 and accompanying text.

145. *See supra* notes 69–75 and accompanying text.

discounting the potential punitive damage award three times, the prospective wrongdoer has an expected cost of failure of $6,250. And after subtracting this expected cost from her expected benefit of success, her plan of undue influence has an expected value of $3,750. Because this expected value is positive, she will proceed with her plan.

This example illustrates that a potential punitive damage award that is several magnitudes greater than the amount a wrongdoer stands to gain from wrongdoing will not deter misconduct if the wrongdoer strongly believes she will not be liable for punitive damages. As such, the tort of intentional interference with an inheritance likely under-deters because a prospective wrongdoer will discount the specter of punitive damages by the likelihood (1) that she will be found liable; (2) that the court will permit a claim of intentional interference with an inheritance because the plaintiff had no adequate probate remedy; and (3) that the court will find her conduct sufficiently reprehensible to award punitive damages if the plaintiff proceeds with a claim and prevails. In sum, both civil liability for intentional interference with an inheritance and criminal punishment for forging or suppressing a will inadequately deters wrongdoing that undermines a decedent's intent.

### B. *Conceptualizing the Harm*

A second shortcoming of the current attempts to deter wrongdoing affecting wills is how the law conceptualizes the harm of the misconduct. It is perhaps obvious that forging a will, suppressing a will, or somehow inducing a decedent to involuntarily make a will is wrong.[146] But what specifically is harmful about these types of misconduct? Answering this question and understanding the precise nature of the harm is critical to properly selecting and calibrating mechanisms of deterrence.

One way to conceptualize the harm is that this misconduct injures property interests. Disrupting an estate plan can be conceived as a type of theft—the testator intended for Beneficiary X to receive her estate, but Beneficiary Y ends up with it as the result of a will that a wrongdoer's misconduct has tainted.[147] It may seem that Beneficiary Y "stole" the property from Beneficiary X, which places Beneficiary X in the role of the victim. Alternatively, a second property-based conception of the harm places the decedent in the role of the victim. After all, the wrongdoer's

146. *See* Hosemann, *supra* note 5, at 421 ("It is evident that such behavior . . . called 'interference with freedom of testation' . . . is wrong. . . .").

147. *See* McCay v. State, 476 S.W.3d 640, 644 (Tex. App. 2015) (involving a criminal indictment for theft alleging that the defendant "did cause [the decedent] to execute a will, naming Defendant as a beneficiary to receive her property upon her death"); Horton & Weisbord, *supra* note 1, at 565 ("[P]rosecutors are bringing theft charges against people who accept transfers from impaired donors—a novel crime that we call 'estate theft.'").

purpose is to misdirect the distribution of a decedent's estate.[148] If the probate system seeks to effectuate the dispositive preferences of the decedent, and a wrongdoer frustrates those preferences, a logical conclusion is that the decedent herself was the victim of the wrongdoing. Here again, the wrongdoing can be conceived of as a type of theft—the wrongdoer "stole" a particular type of property interest, namely the right to direct the disposition of property upon death, from the testator.

The existing statutes that criminalize forging or suppressing a will conceptualize misconduct that interferes with testation as inflicting harm against property rights. Most tellingly, the offenses of forging or suppressing a will are often located in the subpart of a jurisdiction's criminal code that is reserved for offenses against property.[149] Thus, offenses involving testamentary documents usually appear alongside offenses such as theft, burglary, and arson.[150] Some jurisdictions even go so far as to intentionally consolidate offenses involving wills with other theft and property offenses.[151] If offenses are defined by the company they keep, crimes involving testamentary instruments are currently conceptualized as property offenses.

While intuitively appealing, conceptualizing wrongdoing affecting wills as inflicting harm against property interests does not hold up well under scrutiny. Consider the conception that places the decedent's intended beneficiary in the role of the victim. To be sure, the intended beneficiary is deprived of something, but the benefit of which she is deprived is not always a property interest. A beneficiary under a will does not possess legal rights in the testator's property while the testator is

148. *See supra* Section I.C.

149. *See, e.g.*, KAN. STAT. ANN. §§ 21-5801, -5807, -5808, -5810, -5811, -5812, -5815 (2021).

150. For example, the Kansas offenses appear within Article 58 (Crimes Involving Property) of the criminal code, which includes offenses such as theft, burglary, trespass, and arson as well as criminal hunting, fossil hunting, and littering. KAN. STAT. ANN. §§ 21-5801, -5807, -5808, -5810, -5811, -5812, -5815 (2021). As additional examples, the Illinois statute cited in note 113, 720 ILL. COMP. STAT. 5/17-3(a)(1) (2021), appears in Part C (Offenses Directed Against Property) of the Title III (Specific Offenses) portion of the criminal code. Within Part C, forgery falls within Article 17 (Deception), immediately adjacent to Article 16 (Theft and Related Offenses), Article 18 (Robbery), Article 19 (Burglary), and Article 20 (Arson). The Indiana statute cited in note 113, IND. CODE § 35-43-5-2(b)(1) (2022), appears in Chapter 5 (Forgery, Fraud, and Other Deceptions) of Article 43 (Offenses Against Property) of the criminal law title. Related chapters in the same article include Chapter 1 (Arson, Mischief, and Tampering), Chapter 2 (Burglary and Trespass), Chapter 3 (Robbery [repealed]), and Chapter 4 (Theft, Conversion, and Receiving Stolen Property).

151. For example, Kentucky created a new statutory offense named *Theft by Deception* in 1974 that was meant to consolidate and replace numerous specific property offenses in its old criminal code, including the offense of *Destruction or Concealment of Will*. KY. REV. STAT. ANN. § 514.040 (2022) and commentary.

alive.[152] Instead, the beneficiary possesses a "mere expectancy."[153] While the testator is alive, the will's beneficiaries have no legal interest in the testator's property because the testator can revoke or amend her will at any time.[154] Thus, when a wrongdoer somehow interferes with a will during the testator's life, her misconduct does not deprive the testator's intended beneficiaries of cognizable property rights.[155] Because the intended beneficiaries never possessed property rights prior to a wrongdoer's misconduct, such misconduct cannot dispossess them of any rights.

When the wrongdoing occurs after the testator's death, however, the conception of the harm that places the testator's intended beneficiary in the role of the victim is sounder. If the intended beneficiary's interests in the testator's property vest at the time of the testator's death,[156] then any wrongdoing that occurs after the testator's death can deprive the beneficiary of cognizable property rights. For instance, scenarios in which, after the testator's death, a wrongdoer either forges a will or wrongfully prevents the submission of the testator's will to probate can result in harm to the intended beneficiary's property interests. This is perhaps why some states expressly criminalize the submission to probate of a forged will,[157] which inherently is an act that occurs after the testator's death.[158]

Although forging and suppressing a will can occur either before or after the testator's death, other types of wrongdoing can only occur during

152. *See* Goldberg & Sitkoff, *supra* note 1, at 342.

153. *See id.* ("The interest of a prospective beneficiary under a will or will substitute does not ripen into a cognizable legal right until the donor's death. Until then, a prospective beneficiary has a mere 'expectancy' that is subject to defeasance at the donor's whim."); Horton & Weisbord, *supra* note 1, at 580 ("[W]hen 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.").

154. *See* Goldberg & Sitkoff, *supra* note 1, at 342 ("An important corollary to the principle of freedom of disposition is that the donor remains free to revise her estate plan until the moment of death. Wills and other instruments of deathtime donative transfer, the latter called 'will substitutes,' are 'ambulatory,' that is, subject always to amendment or revocation by the donor." (footnote omitted)).

155. A similar rationale has been used to argue that the slayer rule, which prevents a donee who kills a donor from benefitting from the donor's estate, does not result in forfeiture of the donee's property interests. *See* Horton & Weisbord, *supra* note 1, at 579–80; Hosemann, *supra* note 5, at 463.

156. Monk v. Griffin, 213 S.W.3d 651, 655–56 (Ark. Ct. App. 2005) ("Title to real property . . . vests in the devisee immediately on the testator's death, and not at the probate of the will, if the will does not postpone the vesting of title."); Kevin Purcell, *Ghosts from the Grave—Inheriting Through the Predeceased Under Ohio Law*, 50 CLEV. ST. L. REV. 189, 202 (2002) ("It is well settled that in the absence of express testamentary provisions postponing vesting, a beneficiary's interest in an asset bequeathed in a will vests at the death of the testator.").

157. *See supra* notes 113–14 and accompanying text.

158. *See supra* note 11 and accompanying text.

her life. Undue influence, duress, and fraud each involve the wrongful inducement of the testator's execution of a will.[159] Each necessarily involves the testator's participation in the creation of the will, and consequently, these types of misconduct must occur during the testator's life. Thus, while conceptualizing the harm of forgery or suppression of a will as to the intended beneficiary's property rights can withstand scrutiny, conceptualizing the harm of undue influence, duress, and fraud in this way cannot because the wrongdoing necessarily occurs during the testator's life.

This distinction possibly explains why the existing criminal sanctions only apply to forgery or suppression of a will and not to these other types of misconduct.[160] But regardless of policymakers' reasons for restricting the scope of criminal sanctions in this way, the distinction between forgery and suppression on the one hand, and undue influence, duress, and fraud on the other, exemplifies the shortcomings of a property-based conception of the harm of wrongdoing affecting wills. The problem is not that this conception never adequately characterizes the harm, but instead that it does not easily characterize the harm that results from all types of wrongdoing affecting wills.

While placing the testator's intended beneficiary in the role of the victim unsatisfactorily conceptualizes the harm of wrongdoing affecting wills, the conception that places the decedent in the role of the victim is built upon similarly flimsy theoretical scaffolding. To be sure, a property owner possesses legally cognizable rights in their property during life, and in particular, the law recognizes several rights that accompany property ownership. These distinctive rights have been analogized as separate sticks in the bundle of rights that accompany property ownership.[161] Under this analogy, the ability to direct the disposition of property at death is but one stick in the bundle of rights.[162] Because wills have no legal consequence during a testator's life,[163] wrongdoing affecting wills, at worst, deprives a decedent of only this single stick. The

159. *See generally* RESTATEMENT (THIRD) OF PROP.: WILLS AND DONATIVE TRANSFERS § 8.3 (AM. L. INST. 2003) (outlining undue influence, duress, and fraud and the validity of a donative transfer).

160. *See supra* notes 124–26 and accompanying text.

161. Jane B. Baron, *Rescuing the Bundle-of-Rights Metaphor in Property Law*, 82 U. CIN. L. REV. 57, 58 (2013) ("For much of the twentieth century, legal academics conceptualized property as a bundle of rights."); Anna di Robilant, *Property: A Bundle of Sticks or a Tree?*, 66 VAND. L. REV. 869, 871 (2013) ("In the United States, every first-year law student learns that property is a 'bundle of sticks.' [T]he bundle of sticks concept characterizes property as a bundle of entitlements regulating relations among persons concerning a valued resource.").

162. Sitkoff, *supra* note 12, at 644 ("The right of a property owner to dispose of his or her property on terms that he or she chooses has come to be recognized as a separate stick in the bundle of rights called property.").

163. *See id.* at 652.

misconduct does not impair the decedent's ability to consume, sell, mortgage, donate, or otherwise use her property during life. Consequently, wrongdoing affecting wills is, at most, a severely lesser form of property offense than outright theft.

Perhaps acknowledging the deficiencies of conceptualizing wrongdoing affecting wills as harming cognizable property interests, the drafters of the Restatement (Second) of Torts did not place the tort of intentional interference with an inheritance alongside other property offenses, such as conversion and trespass.[164] Instead, the drafters categorized intentional interference with an inheritance as wrongdoing that causes a type of economic harm akin to tortious interference with a commercial expectancy.[165] The Restatement (Third) of Torts maintains this placement alongside other expectancy-based torts, and the accompanying commentary expressly endorses this conception when it states: "This Section recognizes a liability that may be considered a special case of the rule in § 18 (Interference with Economic Expectation)."[166]

To illustrate the similarities between interference with a commercial expectancy and interference with an expected inheritance, consider an example presented by Professors John Goldberg and Robert Sitkoff: "Suppose P has leased commercial space to L through a series of mutual renewals of an annual lease. Then, by fraudulent misrepresentation, D induces L not to renew for the coming year."[167] Professors Goldberg and Sitkoff explained that "in some jurisdictions P can sue D for tortiously interfering with his commercial expectancy," despite that "neither property nor contract law recognizes a right in P to L's renewal."[168] An intended beneficiary whose expected inheritance has been intentionally interfered with is in a similar position as the landlord in Professors Goldberg and Sitkoff's example.[169] The wrongdoer's misconduct did not deprive either of cognizable property rights.[170] Nonetheless, tort law

164. Conversion and trespass appear in Chapter 9, which is entitled *Intentional Invasions of Interests in the Present and Future Possession of Chattels*. RESTATEMENT (SECOND) OF TORTS div. 1, ch. 9 (AM. L. INST. 1979).

165. Intentional Interference with an Inheritance appears in Chapter 37A, which is entitled *Interference with Other Forms of Advantageous Economic Relations*, while other expectancy-based torts appear in Chapter 37, which is entitled *Interference with Contract or Prospective Contractual Relation*. RESTATEMENT (SECOND) OF TORTS div. 9, chs. 37 & 37A (AM. L. INST. 1979).

166. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 19 cmt. a (AM. L. INST. 2020).

167. Goldberg & Sitkoff, *supra* note 1, at 386.

168. *Id*.

169. *See id.* at 387–88.

170. *See id.*

provides them with a remedy.[171] Thus, by placing intentional interference with an expected inheritance alongside other torts that remedy harms to expectancy interests, the Restatement seems to eschew the property-based harm conception on which the existing criminal statutes are founded.

Despite that the Restatement's conceptualization of harm differs from that of the statutes that criminalize forgery and suppression of wills, categorizing the wrongdoing as harming an expectancy interest is similarly tenuous. For instance, consider that some courts frame the tort of intentional interference with an expected inheritance as a mechanism to remedy harm imposed, not upon the donee who is deprived of the expectancy, but upon the donor.[172] These courts characterize the intended donee as bringing a derivative claim on behalf of the donor who cannot bring the claim herself because she is dead.[173] Ignoring the inconsistency with traditional tort doctrine that such a derivative suit conjures,[174] simply framing the donor as the injured party does not explain the nature of the donor's injury that flows from the intended donee's loss of an expected inheritance. Just as the property-based conception of the harm suggests that the donor is only deprived of the ability to dispose of property at death,[175] this expectancy-based conception of the donor's harm naturally points to loss of the ability to posthumously transfer property.[176]

This conception is therefore confounding because, although the Restatement clearly frames the tort as remedying an expectancy-based harm,[177] some courts shift to a property-based conception.[178] When courts frame it this way, the same shortcomings emerge, because again, the

171. *See supra* Section II.A.

172. *See* Goldberg & Sitkoff, *supra* note 1, at 339 ("[S]ome courts have characterized the tort as a means by which an expectant beneficiary can vindicate the donor's right to freedom of disposition.").

173. *See* Whalen v. Prosser, 719 So. 2d 2, 6 (Fla. Dist. Ct. App. 1998) ("Interference with an expectancy is an unusual tort because the beneficiary is authorized to sue to recover damages primarily to protect the testator's interest rather than the disappointed beneficiary's expectations. The fraud, duress, undue influence, or other independent tortious conduct required for this tort is directed at the testator. The beneficiary is not directly defrauded or unduly influenced; the testator is.").

174. *See* Goldberg & Sitkoff, *supra* note 1, at 339 ("[T]he interference-with-inheritance tort runs afoul of the basic principle that a tort claim vindicates the plaintiff's own right not to be mistreated rather than the rights of others.").

175. *See supra* notes 147–63 and accompanying text.

176. *See Whalen*, 719 So. 2d at 6 ("[T]he common law court has created this cause of action not primarily to protect the beneficiary's inchoate rights, but to protect the deceased testator's former right to dispose of property freely and without improper interference.").

177. *See supra* notes 164–66 and accompanying text.

178. *See, e.g.*, *Whalen*, 719 So. 2d at 6 (holding that the intentional interference with an expectancy of inheritance tort protects the property rights of the donor rather than the expectancy interests of the donee).

wrongdoer deprives the donor of merely one stick in the bundle of property rights.[179] The wrongdoing does not deprive the donor of property rights that she enjoys during life. The shortcomings of this conception become clear when one considers that compensatory damages for intentional interference with an inheritance are equal to the full amount of the forgone inheritance.[180] If this tort only remedied the harm imposed upon the donor for the loss of one stick of property rights, then the available remedy should not compensate for the loss of the entire bundle of sticks.

While some courts bewilderingly frame the harm of intentional interference with an inheritance as being borne by the donor, others frame the harm as inflicted upon the intended beneficiary.[181] Pursuant to this view, an intended donee's claim is not derivative of the donor's claim but is instead primary to the donee.[182] This conception is intuitively more appealing than placing the donor in the role of the victim because, after all, the intended beneficiary is the one who missed out on an expectancy. Although remedying an expectancy harm through tort law is well established, and although characterizing the harm as the donee's loss of an expectancy avoids the shortcomings of the property-based framing, questions still plague an expectancy-based conception of the harm of wrongdoing affecting wills.

Consider again Professors Goldberg and Sitkoff's example of the landlord whose commercial expectancy of a renewed lease was disrupted by a wrongdoer's fraudulent misrepresentation.[183] Professors Goldberg and Sitkoff explain tort law's rationale for permitting the landlord's claim even though the misconduct did not impair her property and contractual rights: "[T]he third party intentionally interfered with the landlord's interest in putting his property to commercial use. . . . At stake for . . . the landlord . . . is what might be described as a liberty interest—an interest in pursuing productive activity free from wrongful interference."[184] While the landlord cannot expect freedom from competition for her

179. *See supra* notes 161–63 and accompanying text.

180. *See* RESTATEMENT (SECOND) OF TORTS § 774B cmt. e (AM. L. INST. 1979) ("The normal remedy for the conduct covered by this Section is an action in tort for the loss suffered by the one deprived of the legacy or gift.").

181. *See* Goldberg & Sitkoff, *supra* note 1, at 339 ("Other courts have characterized the interference-with-inheritance claim as alleging that the defendant's interference with the donor's intended disposition is also a violation of a freestanding right of the beneficiary.").

182. *See* Davison v. Feuerherd, 391 So. 2d 799, 802 (Fla. Dist. Ct. App. 1980) ("It is the expectancy status to which this theory of liability applies . . . ."); *see also* Mitchell v. Langley, 85 S.E. 1050, 1052 (Ga. 1915) ("The fact that this status has not ripened into a vested and irrevocable ownership of the beneficial interest, . . . does not authorize a third party to maliciously and fraudulently destroy the status . . . .").

183. *See supra* notes 167–68 and accompanying text.

184. Goldberg & Sitkoff, *supra* note 1, at 387–88.

tenet's business,[185] she does have a justifiable expectancy in that competition being free of wrongful conduct.[186]

Unlike the wrongdoing that interferes with commercial activity, wrongdoing affecting wills does not interfere with anything that can be considered productive activity. As Professors Goldberg and Sitkoff explain, "An expectant beneficiary has no comparable interest. Until the donor's death, the expectant beneficiary awaits a transfer that might—but might not—occur."[187] Thus, although the Restatement seems to treat the harm of interference with an expected inheritance as akin to the harm of interference with a commercial expectancy, there is a meaningful distinction between the two harms. On the one hand, interference with a commercial expectancy impedes the victim's ability to freely compete for advantageous commercial outcomes. On the other hand, interference with an expected inheritance disrupts a donee's passive anticipation of a potential windfall. At best, interference with an expected inheritance inflicts a lesser type of harm than interference with the other types of expectancies that tort law remedies. Thus, like the existing criminal statutes' property-based conception, tort law's expectancy-based conception does not satisfactorily explain the harm of wrongdoing affecting wills.

### C. *Determining Culpability*

Tort law and criminal law's current conceptions of the harm of wrongdoing affecting wills are theoretically unsatisfying and cause doctrinal problems regarding how to assess a wrongdoer's culpability. According to existing conceptions of the harm, the victim of wrongdoing affecting wills is either the donor or the donor's intended beneficiary.[188] By recognizing either as the victim, both tort law and criminal law squarely place the donor's intent at the center of the determination of an alleged wrongdoer's culpability. On one hand, if the donor is the victim, then the harm clearly is the frustration of her intent.[189] On the other hand, if the victim is the donor's intended beneficiary, then the harm is the beneficiary's loss of an expectancy that exists because the donor intended

185. *See* RESTATEMENT (SECOND) OF TORTS § 768 cmt. a (AM. L. INST. 1979) ("[C]ompetition is not an improper basis for interference" with a "prospective contractual relation. If one party is seeking to acquire a prospective contractual relation, the other can seek to acquire it too. Even an option to renew or extend a contract is prospective while not exercised.").

186. *See* Speakers of Sport, Inc. v. ProServe, Inc., 178 F.3d 862, 867 (7th Cir. 1999) ("[T]he tort of interference with business relationships should be confined to cases in which the defendant employed unlawful means to stiff a competitor . . . .").

187. Goldberg & Sitkoff, *supra* note 1, at 388.

188. *See supra* Section III.B.

189. *See supra* notes 161–63 and accompanying text.

to benefit the beneficiary.[190] Under either scenario, there is no harm without the frustration of the donor's intent.

Because the donor's intent is paramount to the current conception of wrongdoing affecting wills, both tort law and criminal law must account for the worst evidence problem. The worst evidence problem arises whenever the donor is unavailable to testify about possible misconduct because she is dead at the time of adjudication.[191] Just as the best evidence of the donor's intent is absent from probate proceedings,[192] it is likewise absent from tort actions and criminal prosecutions.[193] While the worst evidence problem hampers both tort law and criminal law when the alleged misconduct is wrongdoing affecting wills, they have dealt with the problem differently.

Criminal law, to begin with, accounts for the worst evidence problem by skirting holding a wrongdoer accountable for the types of misconduct for which the lack of the testator's testimony poses the greatest difficulties. Recall that the existing criminal statutes that penalize wrongdoing affecting wills primarily punish forgery.[194] Other types of wrongdoing, such as undue influence, duress, and fraud, are left unpunished.[195] The testator's testimony regarding whether she prepared and executed the will that was submitted to probate is the best evidence of whether she intended the will to be legally effective or, instead, whether it is a forgery.[196] However, unlike other types of wrongdoing affecting wills, forgery necessarily involves physical evidence.

When the alleged wrongdoing is undue influence, by contrast, no physical evidence of the misdeed may ever be available. Undue influence can be achieved through subtle pressure and manipulation of minute

190. *See supra* notes 181–87 and accompanying text.

191. *See supra* Section I.A.

192. *See* Sitkoff, *supra* note 12, at 647.

193. *See* Goldberg & Sitkoff, *supra* note 1, at 376 ("[T]he formal difference in remedial structure in a will contest versus a tort action does not touch the underlying 'worst evidence' problem that pertains equally to both."); Horton & Weisbord, *supra* note 1, at 594 (explaining that one "appellate court upheld [a criminal] verdict despite admitting that the case was marred by the worst evidence problem").

194. *See supra* Section II.B.

195. *See* Hosemann, *supra* note 5, at 444.

196. *See* Polley v. Cline's Ex'r, 93 S.W.2d 363, 369 (Ky. 1936) ("The death of [the testator] prevent[s] [the production of] the best evidence that he made [the will], which [is] his testimony that he wrote it . . . ."); Weisbord & Horton, *supra* note 28, at 860–61 ("Forgery was once the great boogeyman of inheritance law. This concern is easy to understand. . . . [T]he succession process suffers from . . . the 'worst evidence' problem: decedents cannot speak up to correct the record, clarify their wishes, or protect their interests. In turn, this informational vacuum creates a window for opportunists.").

family dynamics.[197] Put simply, an undue influencer rarely, if ever, leaves behind an easily discernible paper trail.[198] This is what makes the worst evidence problem so pernicious. With no physical evidence and no testimony from the victim, determining whether a wrongdoer unduly influenced a testator is exceedingly difficult.[199] The worst evidence problem does not so doggedly hamper the task of deciding whether a will is a forgery. Although the testator cannot testify about the absence or presence of wrongdoing, the will itself can speak for her. The court can examine the purported will and assess whether the signature and other handwriting are, in fact, the testator's.[200] While the best evidence of misconduct is unavailable, the physical evidence of the will serves as the next best evidence.

Remember too that some of the existing criminal statutes also punish suppression of an authentic will.[201] Like forgery, this type of wrongdoing does not involve the wrongdoer overcoming the donor's free will through

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197. *See* Knutsen v. Krippendorf, 862 P.2d 509, 515 (Or. Ct. App. 1993) (explaining that undue influence can be achieved "subtly, such as by suggestion or persuasion or by fostering a sense of need and dependence"); *In re* Estate of Olsson, 344 S.W.2d 171, 173–74 (Tex. Ct. App. 1961) ("The exercise of undue influence may be accomplished in many different ways–directly and forcibly, as at the point of a gun; but also by fraud, deceit, artifice and indirection; by subtle and devious, but none-the-less forcible and effective means."); *see also* Horton & Weisbord, *supra* note 1, at 605 ("The doctrine hinges on relationships and interactions that are plagued by evidentiary headaches and intense moral ambiguity.").

198. *See* Reply Brief for Appellant at 3, In re Estate of Woodhouse, 931 A.2d 57 (Pa. Super. Ct. 2006) (No. 2058 WDA 2005), 2006 WL 4589617, at *3 ("[I]t would be rare, if not impossible . . . for . . . anyone . . . challenging the validity of a will on the basis of undue influence[] to possess direct, smoking gun evidence of the subjugation of the mind of a testator."); *see also* SITKOFF & DUKEMINIER, *supra* note 3, at 290 ("[B]ecause direct evidence of undue influence is rare, a contestant must typically rely on circumstantial evidence.").

199. *See* SITKOFF & DUKEMINIER, *supra* note 3, at 290 (explaining the difficulties associated with undue influence).

200. While a forged will might be more easily detectable than one procured by undue influence, the determination of whether a will is a forgery is not necessarily easy. In *Cline v. Wenger*, the court explained:

> The contestant testified that in her opinion the signature on the will is not that of her brother. The only other evidence of forgery is the testimony of a banker and a handwriting expert. These two witnesses also expressed the opinion that the signature on the will is not that of the testator. This testimony is far from convincing and creates no more than a suspicion. Certainly it is not sufficient under the circumstances here shown, to overcome the positive testimony of the four unimpeached witnesses who testified that the will was signed by the testator in their presence.

263 S.W.2d 91, 91 (Ky. Ct. App. 1953); *see also* Weisbord & Horton, *supra* note 28, at 869 ("[T]he evidence in forgery cases was rarely clear. As one attorney put it, forgery is a 'deed[] of darkness' that can be hard to either prove or disprove. Forgery contests usually devolved into a 'great mass of conflicting testimony.'") (citation omitted).

201. *See supra* Section II.B.

lies, threats, or manipulation, but instead involves the wrongdoer's handling of a physical document.[202] Direct evidence of the alleged wrongdoing might therefore exist,[203] which to some degree, alleviates the worst evidence problem.[204] This is perhaps one reason why the existing criminal sanctions typically focus on forgery and suppression of a will and ignore other types of wrongdoing, such as undue influence, duress, and fraud.

While criminal law attempts to avoid the most troubling aspects of the worst evidence problem, tort law tackles them head on. Recall that the conduct that triggers liability under the tort of intentional interference with an inheritance includes the types of wrongdoing that are generally excluded from the existing criminal sanctions, namely undue influence, duress, and fraud.[205] Furthermore, the Restatement makes clear that a necessary element of the tort is that "the plaintiff had a reasonable expectation of receiving an inheritance,"[206] which necessarily depends upon the intent of the donor.[207] But while tort law does not shy away from the worst evidence problem, it is not equipped to handle it.

Like their illustration of tort law's shortcomings regarding the conception of the harm of wrongdoing affecting wills,[208] Professors Goldberg and Sitkoff nicely summarized tort law's shortcomings in handling the worst evidence problem. They explained that "tort, as a general law of wrongful injury, is ill-suited to posthumous reconstruction of the true intent of a decedent" because, unlike inheritance law, "tort law . . . has not been shaped in light of judicial experience with the worst evidence problem, the plasticity of undue influence, or posthumous

202. *See, e.g.*, Davis v. Seavey, 163 P. 35, 36 (Wash. 1917) (involving allegations that the "executrix and sole beneficiary . . . came into possession of all papers" including a "codicil to [the testator's] will" and "did suppress the said codicil"); Kaster v. Kaster, 52 Ind. 531, 533 (1876) (detailing allegations that "two of the defendants . . . 'got access to the papers of the testator, and there found and discovered said will, and got the same into their possession, and concealed and suppressed or destroyed the same'").

203. *See, e.g.*, *In re* Estate of Gardner, 417 P.2d 948, 950 (Wash. 1966) (involving testimony from witnesses who observed the alleged wrongdoer take possession of the testator's will, review the will, and destroy it after learning that the will provided him a nominal gift).

204. The Restatement (Second) of Torts seems to acknowledge this point. *See* RESTATEMENT (SECOND) OF TORTS § 774B cmt. d (AM. L. INST. 1979) ("[T]here must be proof amounting to a reasonable degree of certainty that the bequest or devise would have been in effect at the time of the death of the testator . . . . In many cases this can be shown with complete certainty, as when a will is suppressed or altered after the death . . . of the testator. In many others, as when a will is made, revoked or changed during his lifetime, complete certainty is impossible.").

205. *See supra* notes 93–95 and accompanying text.

206. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR ECON. HARM § 19(1)(a) (AM. L. INST. 2020).

207. *See supra* Part I.

208. *See supra* notes 183–86 and accompanying text.

reconstruction of relationships pertaining to wealth."[209] Tort law simply has not had to grapple with the worst evidence problem in the same way that inheritance law has, and, as Professors Goldberg and Sitkoff explained, it has not "evolved specialized procedures precisely for the[] kinds of cases" that the tort of intentional interference with an inheritance involves.[210] Importantly, Professors Goldberg and Sitkoff's insights are equally applicable to criminal law, which has not grappled with the worst evidence problem as meaningfully as inheritance law has.[211] Thus, if criminal law chose to delve into the realm of undue influence, it would be similarly ill-equipped to navigate the difficulties associated with the worst evidence problem.

Moreover, applying inheritance law's specialized rules and procedures in the context of tort law or criminal law is not straightforward. While inheritance law's strategies to accommodate the worst evidence problem advance its overall objectives and policies, they do not necessarily align with the drastically different goals of tort law and criminal law. Consider inheritance law's unique process of determining whether a will was procured by undue influence. In most states, a plaintiff in a will contest is entitled to a presumption of undue influence if she can establish that the testator and alleged undue influencer were in a confidential relationship and that suspicious circumstances surrounded the execution of the will, such as the alleged wrongdoer's participation in the preparation of the will or the testator executing the will in secrecy and haste.[212] When the plaintiff is entitled to this presumption of undue influence, the alleged wrongdoer has the burden of proving her innocence.[213]

A presumption of wrongdoing works well in a will contest because the goal of inheritance law is to accurately and efficiently carry out the testator's intent. Correctly deciding whether a testator was unduly influenced, however, is not easy. No bright line separates undue influence that overcomes the testator's free will from tolerable persuasion that leaves the testator free to make her own decisions.[214] Furthermore, as explained above, given the nature of the wrongdoing, the court often has no direct evidence of undue influence.[215] The murkiness of undue

209. Goldberg & Sitkoff, *supra* note 1, at 338, 376.

210. *See id.* at 376.

211. *See* Horton & Weisbord, *supra* note 1, at 566 ("[P]robate 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.").

212. *See* SITKOFF & DUKEMINIER, *supra* note 3, at 296–97.

213. *See id*.

214. *See id.* at 290 ("Drawing a line between indelicate but permissible persuasion and influence that is undue can be frustratingly difficult.").

215. *See supra* notes 194–200 and accompanying text.

influence and the lack of direct evidence have forced the law of wills to develop special techniques to overcome these difficulties.

In particular, a presumption of undue influence furthers the goal of probate by putting the burden of proof on the party that has the best opportunity to explain the circumstances of the will's execution.[216] Because the purported victim is dead and thus cannot tell the court whether she was unduly influenced, probate lacks the best evidence of wrongdoing.[217] In this absence, the next best evidence is the alleged wrongdoer, who is most intimately familiar with her relationship with the testator and the circumstances surrounding the execution of the will.[218] By placing the burden to establish the lack of undue influence on the alleged wrongdoer, the law induces her to create a record of information during the testator's lifetime and to divulge the information to which only she has access after the testator's death. If a beneficiary in a confidential relationship with a testator fails to take these steps, she runs the risk of losing the benefit of the will. Inheritance law thus incentivizes the alleged wrongdoer to create and produce evidence to rebut the presumption of undue influence.

While this presumption of wrongdoing functions well within the context of probate, its place in a tort suit or criminal trial is suspect. The objective of these legal proceedings is not solely to resolve the issues presented as accurately and efficiently as possible.[219] Other considerations, such as a defendant's due process rights, play a significant role in shaping how tort law and criminal law adjudicate wrongdoing.[220] As such, a presumption of wrongdoing runs directly counter to how the law typically functions within these contexts. Most obviously, in the criminal law context, it is fundamental that a defendant is presumed innocent, and the prosecution has the burden of establishing guilt beyond a reasonable doubt.[221] Similarly, in the tort context, the plaintiff has the

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216. *See* SITKOFF & DUKEMINIER, *supra* note 3, at 297–98.

217. *See* Sitkoff, *supra* note 12, at 649–50.

218. *See* Cleary v. Cleary, 692 N.E.2d 955, 960 (Mass. 1998) (explaining that, after the presumption of undue influence has been triggered, the alleged wrongdoer "is in the best position after the transaction to explain and justify it").

219. *See, e.g.*, JOSHUA DRESSLER & GEORGE C. THOMAS III, CRIMINAL PROCEDURE: PRINCIPLES, POLICIES AND PERSPECTIVES 36–41 (5th ed. 2013) (identifying accuracy and efficiency as only two of the four norms of the criminal adjudication process).

220. *See, e.g.*, Jane Bambauer & Andrea Roth, *From Damage Caps to Decarceration: Extending Tort Law Safeguards to Criminal Sentencing*, 101 B.U. L. REV. 1667, 1671–72 (2021) (summarizing the substantive due process limits of punitive damages in tort suits); HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 163–73 (1968) (summarizing the due process model of criminal process).

221. *See* Charles R. Nesson, *Reasonable Doubt and Permissive Inferences: The Value of Complexity*, 92 HARV. L. REV. 1187, 1188 (1979) ("[D]ue process requires that the prosecution in a criminal case prove each and every material element of a criminal offense beyond a reasonable doubt.").

burden of establishing each element of a tort claim, including the existence of harm.[222] A presumption of undue influence therefore runs counter to the goals and policies of criminal law and tort law.

In sum, tort law and criminal law have not developed specifically to address the difficulties that the worst evidence problem poses. Moreover, the specialized rules that inheritance law uses to accommodate this problem do not easily transition to tort suits and criminal trials. While inheritance law's lack of focus on punishment has enabled it to adapt to the worst evidence problem by imposing evidentiary burdens on alleged wrongdoers, criminal law and tort law's punishment goals implicate policies that directly limit their ability to accommodate the worst evidence problem. This doctrinal difficulty that tort law and criminal law encounter in adjudicating wrongdoing in light of the worst evidence problem stands alongside the problems of under-deterrence and the flawed conceptions of the harm of wrongdoing affecting wills as the shortcomings of the law's current deterrence efforts.

## IV. REFRAMING WRONGDOING AFFECTING WILLS

Tort law, criminal law, and the law of wills currently form an ill-fitting patchwork of deterrence for wrongdoing affecting wills.[223] The law of wills is most concerned with carrying out the testator's intent at an acceptable administrative cost, and, as such, is largely uninterested in deterrence.[224] Policymakers have developed a new type of tort to address this wrongdoing, but it insufficiently deters and raises thorny doctrinal and theoretical issues.[225] Criminal law is squarely concerned with deterring harmful conduct, but, as currently constituted, it is not calibrated to adequately deter all types of wrongdoing that affect wills.[226] Despite the shortcomings of policymakers' current conception of wrongdoing affecting wills and the resulting failings of existing deterrents, policymakers can reframe this misconduct in a way that provides a clear path forward to adequately deter wrongdoing affecting wills.

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222. *See* Nemeth v. Banhalmi, 425 N.E.2d 1187, 1191 (Ill. App. Ct. 1981) ("In order to recover, . . . plaintiff must sustain her burden of proof. To do that . . . she will have to prove: (1) the existence of her expectancy; (2) that the defendants intentionally interfered with her expectancy; (3) the interference involved conduct tortious in itself such as fraud, duress or undue influence; (4) that there is a reasonable certainty that the devise to plaintiff would have been received but for defendants' interference; and (5) damages.") (citations omitted).

223. *See* discussion *supra* Parts II & III.

224. *See supra* notes 59–81 and accompanying text.

225. *See supra* notes 127–45, 164–87, 205–15 and accompanying text.

226. *See supra* notes 123–26, 150–63, 194–203 and accompanying text.

### A. *Evidentiary Harm, Not Property or Expectancy Harm*

The existing law conceptualizes wrongdoing affecting wills as harming property rights or economic expectations, but this conception is flawed.[227] Should one therefore conclude that interference with a decedent's intended estate plan causes no harm? Should the law indeed tolerate such interference and not treat it as wrongful? Of course not. To the contrary, a wrong occurs whenever someone intentionally interferes with a testator's execution, modification, or revocation of a will. However, the harm is not to the testator who, after all, is dead by the time her estate is probated and arguably cannot suffer any more harms. Moreover, to the extent that the decedent's property rights are impaired, she is deprived of only one stick in the bundle of rights associated with property ownership.[228] Likewise, the harm is not to the decedent's intended beneficiaries, as the wrongdoing merely deprives them of an expected windfall rather than of a legally cognizable property right.[229]

Instead, appropriately characterized, wrongdoing affecting wills is evidentiary misconduct that harms the probate system itself. Recall that the purpose of wills is to serve as evidence.[230] Wills are the byproduct of the worst evidence problem, which removes the best evidence of the decedent's intent from the court's purview.[231] At the time of probate, the decedent is dead and is consequently unavailable to testify regarding her donative preferences.[232] The law then recognizes a decedent's will as the next best evidence of those preferences.[233] In sum, the primary function of a will is to stand as evidence of the decedent's preferences at a time when the decedent herself is unavailable.

When contextualized alongside the worst evidence problem and the evidentiary function of wills, interfering with testation is properly conceptualized as an evidentiary offense. The "wrong" that occurs from forging or suppressing a will or otherwise creating an involuntary or inauthentic will is the harm it inflicts on the functioning of the probate process. While such misconduct may have the effect of property being transferred to one beneficiary rather than another, it is not an offense against property rights or economic expectations. Instead, it is evidentiary misconduct. The proper administration of the probate system is the victim, and the deprivation of reliable evidence of the decedent's intent is the harm.

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227. *See* discussion *supra* Section III.B.
228. *See supra* notes 161–63 and accompanying text.
229. *See supra* notes 150–60 and accompanying text.
230. *See* discussion *supra* Section I.B.
231. *See* discussion *supra* Section I.A.
232. *See* Sitkoff, *supra* note 12, at 647.
233. *See supra* notes 35–37 and accompanying text.

"Proper administration" in this context means the proper administration of the decedent's estate as directed by the law, which is not necessarily the same as the administration of the estate according to the decedent's preferences. As made clear throughout, the primary purpose of the law of wills is to effectuate the decedent's intent.[234] However, in some instances, proper distribution under the law differs from the decedent's preferred distribution. In some scenarios, the sanctity of the decedent's intent is sacrificed in favor of other policy considerations.[235] For example, even when a testator unambiguously expresses the intent to disinherit her surviving spouse in a valid will, the law does not effectuate this intent because public policy dictates that one spouse should provide for the other spouse both during life and after death.[236] Other policy-based limitations on freedom of disposition include prohibitions on bequests for illegal purposes, protections for a testator's creditors, and the rule against perpetuities.[237]

The harm caused by wrongdoing affecting wills is therefore not a harm that is necessarily visited upon the decedent, her preferences, or her intended beneficiaries. The harm is not that less reliable evidence of intent necessarily leads to unintended dispositions of property. Instead, a will's decreased evidentiary value is necessarily a harm inflicted upon the probate court and its function of properly administering estates under the law. With less reliable evidence of the decedent's intent available, the court's job becomes more difficult, more time-consuming, and more costly.

To illustrate that the harm of wrongdoing affecting wills is to the probate process and not the outcome of probate, consider an attempt of undue influence that successfully overcomes the testator's free will but that is detected by the probate court. The wrongdoing does not affect the results of probate because the court ignores the unduly influenced will and carries out the decedent's intent.[238] However, the process of probate is harmed because the evidentiary value of the decedent's will is diminished. The court could not simply take the words of the decedent's

234. *See* discussion *supra* Part I.

235. *See* Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications*, 82 FORDHAM L. REV. 1125, 1138–40 (2013); Adam J. Hirsch, *Freedom of Testation / Freedom of Contract*, 95 MINN. L. REV. 2180, 2213 (2011).

236. *See* Laura A. Rosenbury, *Two Ways to End a Marriage: Divorce or Death*, 2005 UTAH L. REV. 1227, 1245 (2005) ("The power to devise is not complete in the separate property states . . . . In every separate property state, state law gives surviving spouses the right to make claims against their deceased spouses' estates, even if the deceased spouses explicitly disinherited them.").

237. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. L. INST. 2003).

238. *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.3 cmt. D (AM. L. INST. 2003).

will at face value. Instead, the parties had to litigate the issue of undue influence, and the court had to decide the merits of the claim. The additional process that the court undertook to assess the evidentiary value of the decedent's will represents a harm of the attempt of undue influence even if the decedent's estate is not distributed according to the wrongfully procured will.

To further illustrate this point, consider that evidentiary harm is inflicted by misconduct affecting wills even when the wrongdoer has no intention of altering the disposition of the decedent's estate. Imagine a decedent who drafted a will that leaves her assets to further an illegal purpose, such as funding a terrorist organization.[239] After the testator's death, her sibling finds the will. The sibling, wanting to protect the testator's good reputation and knowing that the court will not carry out her sister's expressed intent, burns the will rather than submitting it to probate. Has the sibling's suppression of the will interfered with the testator's dispositive preferences? No, because the court was never going to effectuate the testator's illegal devise.[240] Nonetheless, because the law of wills has developed to accommodate the worst evidence problem, the probate court should have had access to the next best evidence of the decedent's intent in the form of her will, even if the court ultimately declines to effectuate the intent expressed in the will on policy grounds. Put simply, it is the role of the court to decide whether to carry out the testator's expressed intent, not the role of the testator's sibling or any other third party.[241]

Take another, more extreme, example: consider that a wrongdoer might not intend to undermine the decedent's intent but, in fact, might want to ensure that the decedent's intent is carried out. Imagine that a prospective client visits an estate planning lawyer, clearly describes how she wants her estate distributed upon death, and directs the lawyer to prepare a will that reflects her intent. The lawyer agrees to do so and directs her new client to return to her office the next day to execute the will. The lawyer prepares the will, but the client never returns because she died immediately after leaving the lawyer's office.[242] The lawyer knows that, without the will, her client's estate will escheat to the state

239. *See* Hirsch, *supra* note 235, at 2213 n.127.

240. *See id.*

241. *See* Wells v. Odum, 176 S.E. 563, 564 (N.C. 1934) ("It is a crime in this state to fraudulently suppress or conceal a will. Obviously, the basis for making such suppression a crime is the fact that it is the policy of the law that wills should be probated, and that the rights of the parties in cases of dispute should be openly arrived at, according to the orderly processes of law.") (citation omitted).

242. Such scenario is not so farfetched. *See, e.g.*, *In re* Prob. of Will & Codicil of Macool, 3 A.3d 1258, 1261 (N.J. Super. Ct. App. Div. 2010) (involving a woman who died prior to the execution of her will).

because the client has no surviving relatives.[243] Wanting her client's wishes to be honored, the lawyer forges the client's signature.

If the probate court accepts this forged will, the lawyer's client certainly suffers no harm because the lawyer's misconduct better aligned the distribution of the decedent's estate with her preferences. Nevertheless, a wrongdoing occurred and harm resulted because, regardless of the misconduct's effect or the wrongdoer's motives, interference with testation undermines the evidentiary value of wills and disrupts orderly and efficient probate administration under the law. As such, wrongdoing affecting wills is properly characterized as an evidentiary offense and not one against property rights or other economic interests.

### B. *Evidence Tampering, Not Theft*

Reframing the harm of wrongdoing affecting wills as evidentiary in nature points the way toward the appropriate means of deterring such misconduct. Indeed, the law is well familiar with evidentiary misconduct that interferes with all sorts of legal proceedings. For example, the law recognizes the offense of perjury, which occurs when a witness intentionally lies under oath.[244] Additionally, the law recognizes the offense of evidence tampering, which occurs when a wrongdoer alters, suppresses, or fabricates evidence with the intent to impede a legal proceeding.[245] The law typically deters these types of evidentiary misconduct by imposing criminal sanctions on those who lie under oath or tamper with evidence,[246] and the law can do the same with wrongdoing affecting wills. Rather than looking to theft or interference with a commercial expectancy as an analogy for wrongdoing affecting wills,[247] the law should look at these evidentiary crimes for guidance regarding how to deter wrongdoing affecting wills.

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243. *See* SITKOFF & DUKEMINIER, *supra* note 3, at 91.

244. *See* MODEL PENAL CODE § 241.1(1) (AM. L. INST. 1985) ("A person is guilty of perjury . . . if in any official proceeding he makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true.").

245. *See* MODEL PENAL CODE § 241.7 (AM. L. INST. 1985) ("A person commits a misdemeanor if, believing that an official proceeding or investigation is pending or about to be instituted, he: (1) alters, destroys, conceals or removes any record, document or thing with purpose to impair its verity or availability in such proceeding or investigation; or (2) makes, presents or uses any record, document or thing knowing it to be false and with purpose to mislead a public servant who is or may be engaged in such proceeding or investigation.").

246. *See* Kristen M. Blankley, *Lying, Stealing, and Cheating: The Role of Arbitrators as Ethics Enforcers*, 52 U. LOUISVILLE L. REV. 443, 450 (2014) ("For those claims pursued in the public forums (such as court), the criminal laws regarding perjury, tampering, and obstruction of justice serve as valuable backstop to deter wrongdoing and prosecute those who engage in criminal conduct injurious to the process.").

247. *See supra* Section III.B.

To illustrate the similarities between wrongdoing affecting wills and these other types of evidentiary misconduct, consider two related examples. First, imagine that Kevin sells his corn crop to Mark for $100 without a written contract. Kevin then sues Mark for conversion of his corn crop, and they both go to court. Mark truthfully testifies that he purchased the corn crop in exchange for $100. However, Kevin perjures himself by testifying that Mark converted the crop. Unfortunately for Mark, Kevin's misconduct works, as the court erroneously believes Kevin's false testimony and awards him $100 in damages. In this hypothetical, Kevin has not committed a property offense. True, he committed an act that resulted in the court ordering Mark to pay him $100. If Mark complies with the court order, he has been wrongfully deprived of $100, and Kevin has wrongfully benefited by $100. But Kevin did not steal $100 directly from Mark. Rather, he committed perjury, an evidentiary crime against the court that caused the court to rule incorrectly.[248] Even though Mark may bear the financial consequence, the resulting harm is to the administration of justice.[249]

Second, now imagine that Mark and Kevin did, in fact, have a written contract. The document was, regrettably, in Kevin's possession. Anticipating that he would file a complaint against Mark falsely alleging conversion, Kevin burns the contract so that it cannot be used as evidence at trial. Hampered by the absence of the written contract, the court erroneously upholds Kevin's claim and orders Mark to pay $100 to Kevin. Here again, Kevin has not committed a property offense. Instead, by tampering with evidence in a way that impaired the court's ability to accurately find the facts,[250] Kevin committed a crime against the administration of justice.[251]

Interfering with a will is evidentiary misconduct just like the destruction of the written contract in the last example. A written contract serves as evidence of the contractual parties' intent regarding their respective rights and responsibilities.[252] By destroying the written

248. *See, e.g.*, MODEL PENAL CODE § 241.1(1) (defining perjury).

249. *See id.* (located in the "Offenses Against Public Administration" subpart of the Code rather than in the "Offenses Against Property" subpart). If Kevin is convicted of perjury, the court may order him to repay Mark as a part of the restitution component of his sentence. *See, e.g.*, MODEL PENAL CODE: SENT'G § 6.04A (AM. L. INST. Proposed Final Draft Apr. 10, 2017).

250. *E.g.*, MODEL PENAL CODE § 241.7 (tampering with or fabricating physical evidence).

251. Like the offense of perjury, tampering with or fabricating physical evidence is also located in the "Offenses Against Public Administration" subpart of the Model Penal Code. *See id.*

252. *See* Care Tecture, LLC v. Matheson Com. Props., LLC, No. 05-19-00991-CV, 2020 WL 3529517 at *2 (Tex. App. June 30, 2020) ("[T]he terms of the written contract are the best indicator of the parties' intent."); Yair Listokin, *Bayesian Contractual Interpretation*, 39 J. LEGAL STUD. 359, 364 (2010) ("[A] written contract provides evidence about the true intent of the parties."); Keith A. Rowley, *Contract Construction and Interpretation: From the "Four Corners"*

contract, Kevin deprived the court of evidence that would have aided it in its task of resolving the dispute between Mark and Kevin. Similarly, a will serves as evidence of intent. Instead of evidencing the meeting of the minds of contractual parties, a will evidences a testator's donative intent, and probate courts use this evidence in the administration of a decedent's estate.[253] Intentionally depriving a probate court of a will is therefore the equivalent of intentionally depriving a court of a written contract.

To illustrate, simply change the hypothetical involving Mark and Kevin from a contract dispute to an inheritance dispute. Imagine that Mark and Kevin's grandmother died, leaving behind the family farm. During her life, their grandmother executed a will that expressed her intent that Mark take the farm to the exclusion of Kevin. After their grandmother's death, Kevin locates her will and destroys it because he wants to benefit from the farm. Without the will serving as evidence of the grandmother's intent, the probate court rules that she died intestate and consequently orders that the farm descend to both Kevin and Mark in equal shares.[254] Kevin's destruction of the will impeded the probate court's task of administering the decedent's estate by suppressing valuable evidence, just as his destruction of the written contract impeded the court's resolution of his contractual dispute with Mark. Both scenarios entail a wrongdoer's manipulation of evidence that interferes with a court's ability to properly distribute property.

### C. *Criminal Intent, Not Donative Intent*

While treating wrongdoing affecting wills as an evidentiary crime is consistent both with the proper conception of the harm as evidentiary in nature and with the law's treatment of similar types of misconduct,[255] it also alleviates some of the doctrinal problems that arise from the current conception of wrongdoing affecting wills as a property-based or expectation-based offense. By shifting the framing of the harm from the failure to carry out the testator's intent to the increased difficulty of the court's task of evaluating the donor's intent, treating wrongdoing affecting wills as evidentiary misconduct necessarily takes some of the focus away from the donor's intent. Because this harm occurs even when the court fulfills the donor's intent,[256] a wrongdoer's intent to interfere

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*to Parol Evidence (and Everything in Between)*, 69 MISS. L.J. 73, 79–80 (1999) ("In construing and interpreting a written contract, a court's primary concern is to ascertain and give effect to the mutual intent of the parties at the time of contracting.").

253. *See supra* Section I.B.

254. Intestacy is the default estate plan that applies to decedents who die without a legally effective will. *See* Sitkoff, *supra* note 12, at 645–46.

255. *See supra* Sections IV.A–B.

256. *See supra* notes 238–43 and accompanying text.

with probate is sufficiently blameworthy to warrant punishment and sufficiently harmful to warrant deterrence.

Although the donor's intent is still relevant to the criminalization of wrongdoing affecting wills,[257] as explained in greater detail in Part V below, the difficulties of getting inside the head of the donor are eliminated when one considers that the law criminalizes not only completed offenses but also attempted offenses.[258] Thus, even if there is insufficient proof to find that the defendant's conduct undermined the donor's intent, sufficient evidence might be available to establish that the wrongdoer intended to interfere with probate. In this way, by shifting the focus, at least partially, from the testator's donative intent to the wrongdoer's criminal intent, treating wrongdoing affecting wills as an evidentiary crime diminishes the worst evidence problem.

Even with a shift in focus from the testator's donative intent to a defendant's criminal intent, evidentiary problems related to a determination of an individual's subjective intent persist. Why isn't the court's task of determining the defendant's intent equally problematic as the task of determining the donor's intent? To answer this question, it is important to recognize that the very reason criminal law is ill-suited to determine the testator's intent is the same reason why it is well equipped to determine a wrongdoer's intent. The purpose of criminal law is starkly different than the purpose of probate law. Probate law focuses heavily on effectuating the decedent's preferences.[259] The mind of the decedent lies at the heart of probate law.[260] As a result of this focus, probate law cares little for the motivations of others, and consequently, it does little to deter wrongdoing by others.[261]

Criminal law's purpose is very different. The traditional objectives of criminal law are to punish wrongdoing and to incapacitate, deter, and rehabilitate wrongdoers.[262] The focus is on the wrongful act and the guilty mind of the wrongdoer.[263] While a probate court may be primarily interested in whether the free will of the decedent was overcome by undue influence, criminal law primarily interests itself with what is going on in

257. *See infra* Section V.B.

258. *See id.*

259. *See supra* Part I.

260. *See generally* Hirsch, *supra* note 27 (discussing state-of-mind rules in inheritance law).

261. *See supra* notes 59–63 and accompanying text.

262. *See* Ronald J. Allen et al., *Clarifying Entrapment*, 89 J. CRIM. L. & CRIMINOLOGY 407, 415 (1999) ("[T]he primary relevant objectives of the criminal law are to deter (general and specific), to incapacitate, and to rehabilitate . . . .").

263. *See* Anita Bernstein, *Reciprocity, Utility, and the Law of Aggression*, 54 VAND. L. REV. 1, 44 (2001) ("Criminal law prefers to site itself inside the mind of the defendant, emphasizing mens rea as necessary for all traditional crimes."); *see also* State v. Gallagher, 85 A. 207, 208 (N.J. 1912) ("[T]he general doctrine of the criminal law [is] that the intention with which an act is done establishes the legal character of its consequences.").

the mind of the influencer. Thus, a key difference that sets criminal law apart from probate law is the concept of scienter. To be guilty of a crime that interferes with testation, an offender must act intentionally or willfully.[264] Under the probate code, undue influence does not require the influencer to possess any level of malintent. For purposes of inheritance law, an innocent party may accidentally unduly influence a testator.[265] This is not so under criminal law, where only an individual with a guilty mind may be guilty.[266]

Thus, in the criminal law context there is much less urgency to get into the head of the decedent than in the context of probate. Rather, criminal law's challenge is to get inside the head of the defendant.[267] For instance, one element of the offense of perjury is that the defendant intended to give false testimony.[268] Unintentional false testimony does not subject a witness to criminal penalty.[269] Similarly, an element of the offense of evidence tampering is that the defendant intended to impede a legal proceeding.[270] Here again, suppression or alteration of evidence without the intent to disrupt a legal proceeding does not trigger liability for evidence tampering.[271] As these crimes exemplify, a determination of criminal intent is an undertaking of which criminal law is well familiar.

But just as the absence of the donor's testimony hampers the law of wills, criminal law has limited access to the best evidence of the defendant's intent. While a defendant is not necessarily dead at the time of her criminal trial and it is therefore possible for her to testify, she is under no obligation to turn over this evidence.[272] She may stand silent.[273] Criminal law therefore faces a very different type of worst evidence

264. *See supra* Section I.C.

265. *See id.*

266. *See generally* 21 AM. JUR. 2D *Crim. Law* § 112 (noting that a guilty mind is "generally an essential element of any criminal offense").

267. *See supra* note 263 and accompanying text.

268. *See* MODEL PENAL CODE § 241.1(1) (AM. L. INST. 1985) (requiring that the defendant "not believe" their statement "to be true").

269. *See* Samuel R. Gross, *Expert Evidence*, 1991 WIS. L. REV. 1113, 1176 ("Perjury requires a specific intent to deceive . . . .").

270. *See* MODEL PENAL CODE § 241.7 (AM. L. INST. 1985) (requiring that the defendant have the "purpose to impair" evidence's "verity or availability" or have the "purpose to mislead a public servant").

271. *See* Cynthia E. Jones, *Evidence Destroyed, Innocence Lost: The Preservation of Biological Evidence Under Innocence Protection Statutes*, 42 AM. CRIM. L. REV. 1239, 1259 (2005) ("[U]nder the law in nearly every jurisdiction in the country, intentional destruction of evidence . . . constitutes the crime of tampering with evidence.").

272. *See, e.g.*, Johnson v. United States, 228 U.S. 457, 458 (1913) ("A party is privileged from producing the evidence but not from its production."); 98 C.J.S. *Witnesses* § 585 (2022) ("As a broad general rule, a witness cannot be compelled against his or her will to give self-incriminating evidence.").

273. U.S. CONST. amend. V.

problem—the party with the best evidence of whether the defendant acted with a guilty mind has a constitutional right to keep that information to themselves.[274] Just as inheritance law has developed ways to accommodate its worst evidence problem, criminal law has its own ways of responding to this evidentiary problem. One is to draw inferences. Criminal intent need not be proven directly; it may be inferred by actions or circumstances.[275] Second, and critically, criminal law resolves its doubts in favor of the defendant.[276] After all, a criminal conviction requires proof beyond a reasonable doubt.[277] While this high burden does not require the defendant to take the stand and testify under oath that she intended to steal the money that she took from the cash register, it has the effect of resolving ambiguities in favor of the defendant.[278]

In sum, focusing on a wrongdoer's criminal intent rather than on the testator's donative intent does not eliminate the evidentiary difficulties of determining subjective intent. However, just as the law of wills has intentionally developed policy-based techniques to aid probate courts in getting inside the head of a testator, criminal law has intentionally developed rules and procedures that are founded on sound policy considerations to aid courts with getting inside the head of a defendant.[279] Criminal law, therefore, is not only specifically concerned with deterring wrongdoing but also best equipped to accommodate the evidentiary difficulties associated with intentional misconduct. Deterring wrongdoing affecting wills would therefore be best achieved through a new criminal offense akin to evidence tampering but that is specifically tailored to probate proceedings.[280] The devil, of course, is in the details.

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274. *See, e.g.*, 98 C.J.S. *Witnesses* § 585 (2022) ("The immediate and potential evils of compulsory self-incrimination transcend any difficulties that the exercise of the privilege against self-incrimination may impose on society in the detection and prosecution of the crime.").

275. For examples of permissible and impermissible inferences of criminal intent, see JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW § 8.03 (3d ed. 2001) ("Because permissive presumptions, or inferences, do not formally affect the prosecution's constitutional obligation to prove every element of an offense beyond a reasonable doubt, they are not unconstitutional *per se*.").

276. *See, e.g.*, Coffin v. United States, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.").

277. *See, e.g.*, *In re* Winship, 397 U.S. 358, 363 (1970) (noting that "[t]he reasonable-doubt standard plays a vital role in the American scheme of criminal procedure" and "provides concrete substance for the presumption of innocence").

278. *See Coffin*, 156 U.S. at 454 (quoting Roman law for the maxim: "In all cases of doubt, the most merciful construction of facts should be preferred").

279. *See supra* notes 275–78 and accompanying text.

280. That is not to say that a private cause of action for interfering with a will is categorically unavailable. A minority of jurisdictions recognize the tort of spoliation of evidence to recompense litigants who suffer harm as a result of evidence destruction. MARGARET M. KOESEL & TRACEY

## V. CRIMINAL INTERFERENCE WITH PROBATE

As the previous Parts explained, the confused and unsatisfactory conceptions of the harm of wrongdoing affecting wills and the ever-looming worst evidence problem have led to an incohesive deterrent strategy that is strewn across both criminal law and tort law. Reframing the harm of wrongdoing affecting wills as an evidentiary harm not only resolves most of the theoretical and doctrinal shortcomings of existing deterrents but also points to transforming the existing patchwork of attempts at deterrence into a singular evidentiary crime. To that end, this Part proposes a new evidentiary crime, entitled *Intentional or Willful Interference with Probate*. The suggested statutory text reads:

> A person is guilty of the offense of interference with probate if the person:
>
> (a) Intentionally or willfully causes the creation of an inauthentic or involuntary will, or material part thereof, with the knowledge or intention that it be submitted in a probate proceeding, and it is submitted to a probate proceeding; or
>
> (b) Intentionally or willfully prevents the submission of a will to a probate proceeding with the intent of affecting the distribution of an estate.

### A. *Commentary on the Proposed Statute*

First, the statute is crafted to be broad enough to deter various types of wrongdoing but narrow enough to avoid overdeterrence. It is structured around two main scenarios: the submission of a false will to probate and the prevention of a will being submitted to probate. Broader applicability would result in too much vagueness and ambiguity. For example, a statute that broadly criminalized the "intentional and willful interference with a probate proceeding" would risk overdeterrence through its vagueness. If people do not know exactly what behavior is criminal, they may avoid some desirable behaviors out of an abundance

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L. TURNBULL, SPOLIATION OF EVIDENCE: SANCTIONS AND REMEDIES FOR DESTRUCTION OF EVIDENCE IN CIVIL LITIGATION 95–97 (Daniel F. Gourash ed., 3d ed. 2013). This tort has received a mixed reception, largely due to difficulties surrounding causation and damages. *See id.* at 97 n.22 & 114–20. If a jurisdiction decides to recognize a private cause of action for spoliation of evidence in other types of civil litigation, there is no reason why it should not extend to the suppression of a will from probate proceedings as well. While this Article reserves commentary on the general sensibleness of the tort of spoliation of evidence, applying the cause of action to wills in the probate context would at least recognize wills as fundamentally evidentiary in nature and would align the civil liability for destroying a will with the civil liability available for destroying other types of evidence. In the majority of jurisdictions that do not recognize the tort of spoliation in civil cases, however, no private cause of action should lie from interference with a will. This again will treat wills consistently with other types of evidence.

of caution. A well-meaning caretaker may avoid suggesting that a dying individual prepare a holographic will or may refuse to assist with the creation of a will out of concern that she will somehow run afoul of the ambiguous statute prohibiting interference with probate proceedings. Thus, it is necessary to sketch out the offense behavior with a greater degree of specificity than simply creating a blanket offense that criminalizes "interference with probate."

On the other hand, a precise enumeration of every iteration of offense conduct is impracticable. Criminals are creative, and criminal statutes are construed in favor of criminal defendants. Thus, the statute needs to avoid overly specific language. For example, the statute does not focus on forgery by name. Rather, the "creation of an involuntary or inauthentic will" captures a broader range of wrongdoing, including causing someone to create a will through fraud, duress, or undue influence. In this way, the proposed statutory language attempts to convey sufficient specificity to provide adequate notice of what conduct the statute prohibits without hamstringing potential prosecutions with overly specific language.

The proposed statutory language relies on two significant guardrails to protect against over inclusivity. The first guardrail, the high scienter requirement, is patent in the statutory text. The second, the burden of proof, is a latent requirement that operates to protect all criminal defendants. When combined, the high scienter requirement and the high burden of proof create an appropriately high barrier to successful prosecution.

In each of the two iterations of the offense, scienter plays a role in two separate places. For the iteration that covers the creation of false wills, the offender must (1) intentionally or willfully cause the creation of an inauthentic or involuntary will (2) with the knowledge or intention that it be submitted in a probate proceeding. For the iteration that covers the suppression of wills, the offender must (1) intentionally or willfully prevent the submission of a will to a probate proceeding (2) with the intent of affecting the distribution of an estate. In both instances a conviction requires that the offender intend both the act and the consequence. Intending only one or the other is insufficient.

When coupled with the requirement that every element of the offense must be proven beyond a reasonable doubt, the statute's scienter requirement helps ensure that convictions are reserved only for individuals who clearly meant to interfere with a probate proceeding. This should be especially true in prosecutions based on undue influence-type situations. Recall that the boundaries of undue influence in the probate context are not crisply defined.[281] While this lack of clarity has led other commentators to advise against criminalizing undue influence

281. *See supra* Section I.C.

in the probate context,[282] this response is too extreme. Instead of placing interference with wills by undue influence outside of its bounds, the proposed statute criminalizes the behavior but imposes such a high bar to successful prosecution that convictions will be reserved only for the clearest cases of undue influence.

While inheritance law concerns itself with the mind of the testator, criminal law focuses on the mindset of the defendant. In undue influence situations, the two best witnesses to the defendant's mindset will usually be the defendant herself and the decedent. The decedent will necessarily be unavailable to testify, and the defendant presumably will decline to testify. Thus, it will be challenging for the prosecution to marshal evidence to demonstrate beyond a reasonable doubt that the defendant intentionally caused the creation of an inauthentic or involuntary will. Not only must the prosecution show that the defendant's undue influence overcame the testator's free will, but it must also show that the defendant intended that result.

Unlike prosecutions based on undue influence-type situations, physical evidence will usually play a greater role in prosecutions involving the forgery of a will or the suppression of an existing will. The prosecution may, for example, admit a forged or suppressed will into evidence and the factfinder can draw reasonable inferences regarding the defendant's mental state surrounding her actions. Thus, the proposed statute will more readily be used in forgery and suppression situations than in the traditionally murky realm of undue influence-type situations.

When properly conceptualized as an evidentiary offense, a necessary ingredient for completing the offense is a probate proceeding. After all, an evidentiary crime is not complete without a proceeding. Thus, a completed crime under the proposed statute does not arise until a probate proceeding has occurred. This approach is a notable contrast to many of the current forgery-of-a-will and suppression-of-a-will criminal statutes, which do not require a probate proceeding. Rather, for example, the law criminalizes forgery of a will without regard for whether a probate proceeding also occurs and can be prosecuted as a completed offense while the testator is still alive. Such statutes fail to consider the context of the act of forging a will. Wills have no meaning other than as evidence in a probate proceeding; without the proceeding, there is no wrongdoing.

In the proposed statute, both iterations of the offense also require some effect on a probate proceeding. Notably, however, the offender's actions need not alter the outcome of a probate proceeding. The offense is complete when the document is presented to (or suppressed from) the

282. Professors David Horton and Reid Kress Weisbord have argued that criminalizing undue influence as a type of financial exploitation is "profoundly unwise." Horton & Weisbord, *supra* note 1, at 601. Their objections relate to the vagueness of the standard, concerns about selective enforcement, and "evidentiary headaches." *See id.* at 601–07.

probate court. Whether the probate court is fooled by the fake will or sniffs it out and disregards it should be irrelevant to the criminal offense. The harm to the administration of the probate system occurs when either the false evidence is presented or the true evidence is suppressed. As an analogy, perjury is perjury when the perjurer utters the statement, regardless of whether the court believes the statement.

### B. *Attempted Interference*

Incomplete-but-attempted offenses are usually punishable throughout criminal law, and attempts to interfere with the administration of justice are no different. "Success in obstructing justice is usually not an element of the crime, and failure is not a defense."[283] The same should hold true for interference with probate proceedings by intermeddling with a will.

The availability of prosecution of attempted interference with probate is important for a few reasons. First, it permits prosecution of wrongdoing even if no probate proceeding occurs. Recall from the preceding subpart that the completed offense requires a probate proceeding because, after all, the harm is to the administration of the probate system. Imagine, however, an individual who forges a will after the death of a family member. The individual shares the forged will with the rest of the decedent's family with the intent that it will be submitted to probate. However, the decedent's estate is relatively small, and the family decides to settle it informally in accordance with the provisions of the forged will. No probate proceeding takes place. Under the proposed statute, the forger could be prosecuted for attempted interference with probate. The absence of harm to a probate proceeding makes the forger's action an attempt rather than a completed offense.

Second, attempts that are foiled before making their way to probate should be prosecuted as attempts. Here, imagine a scenario in which an individual forges a will of a family member during the family member's lifetime. The family member discovers the forged document and reports it to the police. It is highly unlikely that the forgery will ever make its way to a probate court. The forgery was exposed before it ever had the opportunity to serve as evidence or interfere with the probate process. While no harm is visited on the probate process, the forger could still be prosecuted for attempted interference with a probate proceeding.

Finally, and critically, the availability of prosecutions for attempted interference with probate helps alleviate the worst evidence problem. There will be situations in which the evidence demonstrates that the defendant tried with all of her might to influence a testator but does not demonstrate beyond a reasonable doubt that the resulting will was

283. JAMIE S. GORELICK ET AL., DESTRUCTION OF EVIDENCE § 5.1 & n.3 (current through 2021-3 Cum. Supp.).

involuntary. The best evidence of whether a will was voluntarily made or not lies in the mind of the testator, and the testator is dead. That is the worst evidence problem. However, even if the government cannot establish that the resulting will was actually involuntary, it may be able to demonstrate that the defendant intentionally plotted and tried her hardest to cause the testator to create an involuntary will. That evidence—which focuses on the defendant rather than inside the mind of the testator—would be enough to establish an attempt to interfere with the probate process. While a break from traditional inheritance law, this shift in focus away from the testator's inner thoughts is appropriate in the criminal law context. Instead, it is the culpability of the defendant, as shown through evidence of her intents and deeds, that is paramount.

### C. *Punishment Guidelines*

While this Article does not have an affirmative recommendation for a sentencing range for the proposed offense, it does have two suggestions. First, both iterations of the offense should receive the same punishment range. The harm to the probate system of submitting an inauthentic will and of suppressing an authentic will are equivalent. They both result in burdens on the probate system and create the risk of incorrect determinations.

Second, the punishment range for the proposed offense should be tied to existing punishment ranges for other evidentiary offenses, such as evidence tampering and perjury. These punishment ranges are typically less harsh than those associated with property-related offenses, such as theft. Because crimes against probate are properly conceptualized as evidentiary offenses, they should share similar punishment ranges with other evidentiary offenses rather than with property offenses.

### D. *Statute of Limitations*

Wills are delayed-action documents. There is often a substantial passage of time between the creation of a will and the death of the testator. It follows, then, that there could be a substantial passage of time between a criminal defendant's affirmative acts and the submission (or prevented submission) of a document in a probate proceeding. A forged will may sit for decades before it is presented as evidence at probate. If the statute of limitations period commenced at the time of the defendant's act in such a case, the limitations period would expire before the testator expires.

Under the proposed statute, the offense is an evidentiary crime that is not completed until a probate proceeding occurs. Thus, the statute of limitations should not begin to run until the proceeding occurs. This may, in some instances, result in a defendant facing charges stemming from acts that she allegedly took decades earlier. Again, the scienter requirement and high burden of proof should protect defendants because

it will be difficult for the government to prove a defendant's decades-old intent except in the most egregious cases. If a defendant is prosecuted in 2023 for allegedly forging or destroying a will in 1983, the degradation of available evidence should usually weigh more acutely on the prosecution. However, if the government does possess sufficient evidence, the statute of limitations should not bar prosecution solely because a long stretch of time intervened between the defendant's acts and the decedent's death and subsequent probate proceeding.[284]

### E. *Potential Overlap with Existing Criminal Statutes*

To conclude, this Article reviews the necessity of the proposed statute in relation to existing evidence-tampering offenses. Some jurisdictions may currently have statutes that criminalize evidence tampering in judicial proceedings that are written in such a way to eliminate the need for a statute specifically targeted at interference with probate proceedings. If that is the case, then the proposed statute would be redundant and unnecessary. In those jurisdictions, prosecutors should charge alleged forgery or suppression of a testamentary document under the evidence-tampering offense rather than under some other property-focused offense. Second, if applicable, legislatures in those jurisdictions should repeal any such property-focused offenses that are designed to capture wrongdoings affecting wills. Repealing any property-focused offenses will force prosecutors to proceed with an evidence-tampering charge in cases of wrongdoing affecting wills.[285]

However, it is unlikely whether many, if any, jurisdictions have statutes that criminalize evidence tampering in judicial proceedings that are written in such a way to eliminate the need for a statute specifically targeted at interference with probate proceedings. There is "enormous variation in the regulation of destruction of evidence by the states," and

284. If the government had detected the defendant's acts earlier—for example, in 1993 in the above hypothetical—the government could have prosecuted the defendant for an attempt rather than a completed crime.

285. Like any offense, of course, prosecutors will retain the discretion to decide whether to expend prosecutorial resources on enforcement. *E.g.*, WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 13.2(a) (5th ed. 2009). While prosecutors have historically been reluctant to spend their resources on prosecuting interference with evidence in civil lawsuits, *see* KOESEL & TURNBULL, *supra* note 280, at 131–32, they may balance the costs and benefits differently in the probate context where wrongdoers are less likely to face contempt sanctions directly from the court. In the civil litigation context, interfering with evidence may result in sanctions in the form of a contempt order, and thus prosecutors may feel that invoking the criminal process is less necessary. *See id.* at 132–35. As explained above, however, the only consequence of forging or suppressing or otherwise interfering with a will in the probate context is to deny admitting the will to probate. *See supra* Part II. It is exceedingly unlikely that an individual who interferes with a will would face any direct contempt sanctions from the probate court unless, for example, the interfering party was refusing to comply with an order of the probate court. *See supra* notes 115–16 and accompanying text.

state statutes generally fall into three categories: (1) "statutes that prohibit the obstruction of justice generally"; (2) "statutes that specifically prohibit the destruction of evidence"; and (3) "states which either do not prohibit the destruction of evidence by statute or which have an extremely narrow prohibition."[286]

States in the first grouping rely on criminalizing the obstruction of justice broadly, of which evidence tampering is simply one form.[287] These state statutes generally resemble the federal obstruction-of-justice statute.[288] For example, Maryland provides that "[a] person may not, by threat, force, or corrupt means, obstruct, impede, or try to obstruct or impede the administration of justice in a court of the State."[289] While the "corrupt means" language is broad enough to include wrongdoing such as forging or suppressing a will, it also includes a wide range of other conduct within its compass. Thus, a more narrowly tailored statute would be preferable to ensure that citizens, courts, and prosecutors have a consistent understanding of what behaviors are prohibited, especially in the area of probate where interfering with a will has not historically been regarded as an offense against the administration of justice.

States in the second grouping have evidence-tampering statutes on the books.[290] The concern is whether the scope of these statutes extends to probate proceedings that may not occur until many years after the conduct that interferes with the will. Commentators have long been critical of the short timeframe covered by many jurisdictions' evidence-tampering statutes.[291] Of states with evidence-tampering statutes, the largest subgroup have statutes that are modeled after the Model Penal Code provision, which requires that "an official proceeding or investigation is pending or about to be instituted" at the time of the defendant's conduct.[292] Under this type of statute, someone who forges or suppresses a will years before the testator's death could escape conviction because

286. GORELICK ET AL., *supra* note 283, § 5.6; *see also* KOESEL & TURNBULL, *supra* note 280, at 131 ("[T]here is considerable variation from state to state in the scope of criminal statutes that reach destruction of evidence."); Scott S. Katz & Anne Marie Muscaro, *Spoilage of Evidence – Crimes, Sanctions, Inferences, and Torts*, 29 TORT & INS. L.J. 51, 53–54, 53 n.17 (1993) (listing state statutes).

287. GORELICK ET AL., *supra* note 283, § 5.7.

288. *Id.* The relevant federal statute is 18 U.S.C. § 1503.

289. MD. CODE ANN., CRIM. LAW § 9-306(a) (LexisNexis 2022).

290. GORELICK ET AL., *supra* note 283, § 5.8.

291. Chis William Sanchirico, *Evidence Tampering*, 53 DUKE L.J. 1215, 1247 & n.119 (2004) (collecting sources to support the proposition that "[t]here is general consensus [among scholars] that the law as written . . . is too tightly focused on tampering that occurs far downstream along the litigation flow").

292. GORELICK ET AL., *supra* note 283, § 5.8.

no proceeding was pending or "about to be" pending at the time of the wrongful conduct.[293]

While some states have omitted the "pending or about to be instituted" language from their evidence-tampering statutes, which alleviates the concerns related to the timing of the tampering vis-à-vis probate proceedings, some of these states expressly limit the scope of their statutes only to tampering with evidence relevant to criminal investigations or proceedings.[294] These statutes would clearly be inapplicable to wrongdoing affecting probate proceedings.

Finally, "In seven states, it is not clear that it is a crime to destroy evidence relating to a criminal or civil proceeding unless the act would constitute contempt of court."[295] Some of these states have statutes that are so specifically tailored to make them rarely applicable in any context, and decidedly inapplicable in the probate context.[296]

Thus, the existing obstruction of justice and evidence-tampering statutes (or lack thereof) in a significant number of states would not clearly and adequately criminalize the conduct of interfering with the probate process by forging or destroying a will. That is why this Article proposes this statute. While the proposed statute may not be necessary in every state, it should serve a useful purpose in a significant number of states.

## CONCLUSION

In sum, the probate process is largely uninterested in deterring and punishing wrongdoing involving wills. A mechanism external to the probate process must fill this void. The current hodgepodge of tort and criminal laws designed to fulfill the role are grounded in a flawed conception of the nature of the harm as something akin to a property-based offense, such as theft or conversion. As a result, their implementation has been flawed.

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293. The commentary of the Model Penal Code advises that the "about to be instituted" language is intended to "be construed more in the sense of probability than temporal relation." *Id.*, citing 2 MODEL PENAL CODE COMMENTARIES 178 (1980). However, "probability" is not what is usually meant by the word "about" when it is used in this context, GORELICK ET AL., *supra* note 283, § 5.8 ("Probability is a rather strange definition of 'about.'"), and any ambiguities in criminal statutes are strictly construed in favor of the defendant under the traditional rule of lenity. *Cf.* 82 C.J.S. Statutes § 526 (noting that tax statutes are strictly construed in favor of the tax statute). Thus, "Whether courts will adopt [the Commentary's] proposed construction remains to be seen." GORELICK ET AL., *supra* note 283, § 5.8.

294. GORELICK ET AL., *supra* note 283, § 5.8.

295. *Id.* § 5.9.

296. *Id.* As two examples, North Carolina's statute extends only to evidence in the possession of a law enforcement officer, N.C. GEN. STAT. § 14-221.1 (2022), and Wisconsin's statute only covers evidence that has already been subpoenaed, WIS. STAT. § 946.60 (2022).

This Article has proposed a new conceptualization of wrongdoing involving wills. Wills exist to act as evidence in the probate process. Wrongdoing involving wills is therefore conceptually similar to other evidentiary offenses, such as evidence tampering, which are designed to protect the administration of judicial proceedings. When viewed in this light, the proper vehicle to deter and punish such conduct is criminal law rather than tort law. However, current iterations of criminal law statutes aimed at curtailing wrongdoing involving wills should be reworked to focus on the nature of the offense as an evidentiary crime against the administration of the probate process. To that end, legislators should consider enacting legislation incorporating the proposed offense of *Intentional or Willful Interference with Probate* into their respective jurisdiction's criminal codes.