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Mark Glover

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RESTRAINING LIVE HAND CONTROL OF INHERITANCE

MARK GLOVER*

ABSTRACT

Inheritance law generally defers to the donor's decisions regarding what property should be distributed to which donees. Because these decisions are carried out after the donor's death, the law's deference to the donor has become known as "dead hand control." But just as the inheritance process is guided by the decisions of the dead, it is also influenced by the choices of the living. When the donor names a donee in their estate plan, the donee must decide whether to accept or reject the gift. If the donee accepts the gift, the property becomes theirs, but if the donee rejects the gift, the property is distributed to an alternate donee. Thus, inheritance law grants control not only to the dead hand of the donor but also to the live hand of the donee. This latter deference to the donee has become known as "live hand control."

Although the law grants the donee broad freedom to accept or reject inheritances, it restrains the donee's ability to reject a gift under some scenarios, and it restrains their ability to accept a gift under others. Legal scholars have devoted considerable attention to the study of each type of live hand restraint, but they typically have focused on one type or the other without exploring possible connections between the two. To fill this analytical void, this Article will bring together the law's restraints of acceptance and rejection and seek to develop a unifying theoretical framework that can guide policymakers in deciding when and how to restrain the donee's discretion to accept or reject a gift.

Specifically, this Article will argue that the law's live hand restraints, whether of rejection or acceptance, are primarily founded upon the concern that the donee's decisions to accept or reject a gift will impose costs on others that the donee likely does not take into account when making their decisions. In these situations, deference to the donee might not be socially beneficial,

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and, consequently, the law restricts their decision-making ability. Ultimately, informed by the insights gleaned from a comparative analysis of the two types of live hand restraints, this Article will explore specific reform proposals that can increase the social welfare generated by the inheritance process.

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INTRODUCTION

Inheritance law relies upon autonomous individuals to decide how property should be distributed upon death. Policymakers have neither crafted a mandatory estate plan that governs the disposition of every estate nor given probate courts the authority to question the merits of particular bequests.¹ Instead, the law generally defers to the donor’s decisions regarding what property should be distributed to which donees.² By granting the donor this broad freedom of disposition, the law attributes considerable weight to the preferences of someone who is inevitably dead at the time those preferences are honored.³ The law’s deference to the donor’s decisions regarding the

1. See Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications*, 82 *FORDHAM L. REV.* 1125, 1136–37 (2013) (“[L]egislatures must rely on general rules governing the succession of property (e.g., the first child inherits everything or each child receives an equal share), which can be overinclusive, underinclusive, or both. Typically, courts have neither the time nor the institutional capacity to investigate the circumstances of each decedent to determine the optimal distribution.”).

2. See *RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS* § 10.1 cmt. c (AM. LAW INST. 2003) (“American law does not grant courts any general authority to question the wisdom, fairness, or reasonableness of the donor’s decisions about how to allocate his or her property.”); see also *infra* Section I.A.

3. See John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remedying Wrongful Interference with Inheritance*, 65 *STAN. L. REV.* 335, 342 (2013) (“The interest of a prospective beneficiary under a will or will substitute does not ripen into a cognizable legal right until the

disposition of property after death has consequently become known as dead hand control.⁴

But just as the inheritance process is guided by the decisions of the dead, it is also influenced by the choices of the living. When the donor names a donee in their estate plan, that donee is not a passive participant in the distribution of the donor's property. To the contrary, the donee must affirmatively decide whether to accept or reject the gift from the donor.⁵ If the donee accepts the gift, the property becomes theirs, but if the donee rejects the gift, the property is distributed to an alternate donee.⁶ Thus, the law of succession grants control not only to the *dead hand* of the donor but also to the *live hand* of the donee.⁷

The rationale underlying the law's deference to individual decisionmakers is that donors and donees are in the best position to evaluate their own specific circumstances, and they can, therefore, make estate-planning decisions that generate the greatest utility from the transfer of the donor's estate.⁸ The donor can choose the donees that they believe will benefit the most,⁹ and the donee can decide whether a particular gift would truly be beneficial.¹⁰ In this way, inheritance law seeks to maximize social welfare.¹¹ However, despite this social welfare rationale of the law's deferential approach to inheritance, the law restrains both the donor's and the donee's freedom to make estate-planning decisions in various

donor's death. Until then, a prospective beneficiary has a mere 'expectancy' that is subject to defeasance at the donor's whim.").

4. See *Mountain Brow Lodge No. 82, Indep. Order of Odd Fellows v. Toscano*, 64 Cal. Rptr. 816, 820 n.* (Cal. Ct. App. 1967) ("[D]ead hand control [is] the right of the individual to control property after death . . ."); Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 643–44 (2014) ("The American law of succession embraces freedom of disposition, authorizing *dead hand* control, to an extent that is unique among modern legal systems.").

5. See Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 CORNELL L. REV. 587, 588 (1989) ("The beneficiary of a gratuity may accept or reject it at his discretion."); see also UNIF. DISCLAIMER OF PROP. INTERESTS ACTS, prefatory note (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2002) (explaining that the donee's ability to accept or reject a testamentary gift is "comprehensive" and that the law is generally "designed to allow every sort of disclaimer").

6. See JESSE DUKEMINIER & ROBERT H. SITKOFF, *WILLS, TRUSTS AND ESTATES* 140 (9th ed. 2013).

7. The term "live hand control" has been used previously to describe the trustee's authority to make decisions regarding property held in trust. Keith L. Butler, Comment, *Long Live the Dead Hand: A Case for Repeal of the Rule Against Perpetuities in Washington*, 75 WASH. L. REV. 1237, 1257 (2000).

8. See Kelly, *supra* note 1, at 1135; see also *infra* Part I.

9. See Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 12–13 (1992); Kelly, *supra* note 1, at 1136; see also *infra* Section I.A.

10. See Mark Glover, *Freedom of Inheritance*, 2017 UTAH L. REV. 283, 295–97 (2017); see also *infra* Section I.B.

11. See Glover, *supra* note 10, at 295; Kelly, *supra* note 1, at 1135.

circumstances.¹² Put simply, there are some decisions that the law does not rely upon donors and donees to make.

This Article will focus on the restraints the law places on the donee's freedom to decide whether to accept or reject a gift from the donor's estate.¹³ These live hand restraints can be classified into two general types: one type restrains the donee's ability to *accept* a gift,¹⁴ and the other type restrains the donee's ability to *reject* a gift.¹⁵ Although legal scholars have devoted considerable attention to the study of each type of live hand restraint, they typically have focused on one type or the other without exploring possible connections between the two.¹⁶

This inattention to the relationship between the two types of live hand restraints has left inconsistencies in the law to go unnoticed and has perhaps stalled reforms that are consistent with the law's effort to maximize social welfare. This Article therefore will analyze the law's restraints of acceptance and its restraints of rejection in tandem and explain how they address similar social welfare concerns. Moreover, by bringing together the two general types of live hand restraints, this Article will seek to develop a unifying theoretical framework that can guide policymakers in deciding when and how to restrain the donee's discretion to accept or reject a gift. Ultimately, informed by the insights gleaned from a comparative analysis of the two types of live hand restraints, this Article will explore specific reform proposals that can increase the social welfare generated by the inheritance process.

12. For example, the law typically requires the donor to transfer a portion of their estate to their surviving spouse, thereby preventing the donor from transferring the property to other donees. See DUKEMINIER & SITKOFF, *supra* note 6, at 512–16; see, e.g., UNIF. PROB. CODE § 2-202 (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010). Similarly, the law denies the donee the ability to avoid federal tax liens by rejecting a gift from the donor. DUKEMINIER & SITKOFF, *supra* note 6, at 142–43; see, e.g., *Drye v. United States*, 528 U.S. 49 (1999); see also *infra* notes 94–100 and accompanying text.

13. For scholarship focusing on the restrictions that the law places on the donor's freedom of disposition, see Mark Glover, *A Social Welfare Theory of Inheritance Regulation*, 2018 UTAH L. REV. 411 (2018); Adam J. Hirsch, *Freedom of Testation / Freedom of Contract*, 95 MINN. L. REV. 2180 (2011); Kelly, *supra* note 1.

14. See *infra* Section II.A.1.

15. See *infra* Section II.A.2.

16. For scholarship focusing on restraints of the donee's ability to accept, see, for example, Richard Lewis Brown, *Undeserving Heirs?—The Case of the “Terminated” Parent*, 40 U. RICH. L. REV. 547 (2006); Karen J. Sneddon, *Should Cain's Children Inherit Abel's Property?: Wading Into the Extended Slayer Rule Quagmire*, 76 UMKC L. REV. 101 (2007); Carla Spivack, *Killers Shouldn't Inherit from Their Victims—Or Should They?*, 48 GA. L. REV. 145, 194 (2013). For scholarship focusing on restraints of the donee's ability to reject a gift, see, for example, Adam J. Hirsch, *Disclaimers and Federalism*, 67 VAND. L. REV. 1871, 1872 (2014); Reid Kress Weisbord, *The Governmental Stake in Private Wealth Transfer*, 98 B.U. L. REV. 1229, 1245 (2018). In some instances, connections between the two types of live hand restraints have been made. See, e.g., DUKEMINIER & SITKOFF, *supra* note 6, at 127–40 (discussing both the slayer rule and disclaimers under a common heading of “BARS TO SUCCESSION”).

This Article will proceed in four Parts. Part I will describe the law's general deference to both the dead hand of the donor and the live hand of the donee. In particular, it will explain how the law attempts to maximize social welfare through deference to individual decisionmakers. Part II will identify the restraints that the law places on the donee's ability to accept or reject testamentary gifts and analyze how such restraints of the live hand can further the law's goal of maximizing social welfare. Part III then will compare and contrast the two general types of live hand restraints and argue that inconsistencies between the two types undermine the law's social welfare goals. Finally, Part IV will identify opportunities for policymakers to reform live hand restraints that both harmonize these inconsistencies and maximize social welfare.

I. INHERITANCE AUTONOMY AND SOCIAL WELFARE

The autonomous decisionmakers regarding inheritance include both the donor and the donee.¹⁷ To be sure, the donor must make the initial decisions concerning how they would like their property distributed upon death.¹⁸ But the donee is not a passive actor within the process of inheritance; indeed, after the donor's death, the donee must decide whether to accept or reject a gift from the donor.¹⁹ The law generally does not require the donee to accept a transfer from the donor's estate. Instead, the law grants the donee the discretion to decide for themselves whether to accept the gift.²⁰ Whereas the donor's autonomy to freely decide how to dispose of property is referred to as "freedom of disposition,"²¹ the donee's autonomy to decide whether to accept or reject an inheritance is referred to as "freedom of inheritance."²²

A. *Dead Hand Control*

The *Restatement (Third) of Property* (the "Restatement") places freedom of disposition at the center of the modern law of succession when it states, "The organizing principle of the American law of donative transfers is freedom of disposition. Property owners have the nearly unrestricted right

17. See generally Glover, *supra* note 10.

18. See Weisbord, *supra* note 16, at 1245 (explaining that donors have "a broad power to determine *who gets what*"); see also *infra* Section I.A.

19. See Hirsch, *supra* note 5, at 588; see also *infra* Section I.B.

20. See UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 5 cmt. (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2002) (explaining "the principle behind all disclaimers," and therefore the donee's discretion to accept or reject a gift from the donor, is that "no one can be forced to accept property"); see also *infra* notes 46–47 and accompanying text.

21. See RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. a (AM. LAW INST. 2003); Sitkoff, *supra* note 4, at 643.

22. See generally Glover, *supra* note 10. For other uses of the term "freedom of inheritance" see *id.* at 284 n.5.

to dispose of their property as they please.”²³ Thus, the law grants the donor the ability to make estate-planning decisions, and it generally does not second-guess those decisions.²⁴ The underlying rationale of the law’s deferential approach to inheritance is that such a system maximizes social welfare.²⁵ As Professor Daniel Kelly explains, “[m]ost scholars today” view testamentary freedom from a “functional perspective [that] emphasizes the ‘social welfare’ of the parties and seeks to determine how the law can create the best incentives for the donor, donees, and other parties that a donor’s disposition of property may affect.”²⁶ Professor Kelly’s explanation suggests freedom of disposition can increase social welfare in a number of ways, including by increasing the individual welfare of both the donor and potential donees and by implementing incentives that encourage socially beneficial behavior.

First, freedom of disposition maximizes the individual welfare of the donor.²⁷ Autonomy over the distribution of property at death can be a source

23. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. a; *see also In re Estate of Malloy*, 949 P.2d 804, 806 (Wash. 1998) (“A basic principle underlying any discussion of the law of wills is that an individual has the right and the freedom to dispose of his or her property, upon death, according to the dictates of his or her own desires.”); THOMAS P. GALLANIS, *FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS* 349 (5th ed. 2011) (“Freedom of disposition is a hallmark of the American law of succession.”); Mark Glover, *A Taxonomy of Testamentary Intent*, 23 *GEO. MASON L. REV.* 569, 569 (2016) (“[A] will’s validity and the ultimate disposition of the decedent’s estate . . . turn upon the decedent’s testamentary intent.”); Hirsch, *supra* note 5, at 632 (“[C]ourts traditionally exalt freedom of testation and the fulfillment of testamentary intent as central to gratuitous transfers policy.”); Paula A. Monopoli, *Toward Equality: Nonmarital Children and the Uniform Probate Code*, 45 *U. MICH. J.L. REFORM* 995, 1010 n.94 (2012) (“Freedom of testation and testator’s intent are frequently identified as paramount jurisprudential touchstones in the area of trusts and estates.”); E. Gary Spitko, *Gone But Not Conforming: Protecting the Abhorrent Testator from Majoritarian Cultural Norms Through Minority-Culture Arbitration*, 49 *CASE W. RES. L. REV.* 275, 278 (1999) (“The ideal of testamentary freedom grounds the law of testation.”).

24. *See Cantrell v. Cantrell*, No. M2002-02883-COA-R3-CV, 2004 WL 3044907, at *5 (Tenn. Ct. App. Dec. 30, 2004) (“A fundamental principle of the law of wills is that a testator is entitled to dispose of the testator’s property as [they] see[] fit, regardless of any perceived injustice that may result from such a choice.”); Sitkoff, *supra* note 4, 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.”); Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 *B.C. L. REV.* 877, 882 (2012) (“The most fundamental guiding principle of American inheritance law is testamentary freedom—that the person who owns property during life has the power to direct its disposition at death.”).

25. *See Pamela R. Champine, My Will Be Done: Accommodating the Erring and the Atypical Testator*, 80 *NEB. L. REV.* 387, 432 (2001) (“The most prevalent justification for testamentary freedom is the utilitarian view which posits that testamentary freedom is not a right but rather a privilege offered for the purpose of motivating socially desirable behavior.”); Eva E. Subotnik, *Copyright and the Living Dead?: Succession Law and the Postmortem Term*, 29 *HARV. J.L. & TECH.* 77, 96 (2015) (“Support for a system of testamentary freedom—whether one focuses on the right of testation or of inheritance—is often based on utilitarian goals of promoting happiness.”).

26. Kelly, *supra* note 1, at 1135.

27. *See id.* at 1135–36.

of happiness to the donor during their life,²⁸ especially when the donor knows that they can take care of close family and friends through the distribution of their estate.²⁹ If the law substantially curtailed dead hand control, then the donor would lose this source of comfort and satisfaction; their individual welfare would decrease; and consequently social welfare as a whole would decline.³⁰ Thus, by maximizing the donor's individual welfare through its deferential approach to inheritance, the law seeks to maximize overall social welfare.

Second, the donor's freedom of disposition maximizes the individual welfare of donees.³¹ The law's deferential approach to inheritance allows the donor to examine the needs and circumstances of potential donees and to place property in the hands of those who will benefit the most.³² If the law did not defer to dead hand control, state legislators and probate judges would have to make decisions regarding the distribution of the donor's estate. These legislators and judges are not as well positioned as the donor to compare the needs of all potential donees and to gauge the relative merits of the vast array of possible dispositions of property.³³ Consequently, their estate planning

28. See Mark Glover, *A Therapeutic Jurisprudential Framework of Estate Planning*, 35 SEATTLE U. L. REV. 427, 445 (2012) ("The most basic therapeutic consequence of the autonomous decision-making permitted by testamentary freedom is the testators' satisfaction of knowing that they have wide latitude to prepare an estate plan that best fulfills their preferences."); Hirsch & Wang, *supra* note 9, at 8 (explaining that "modern social scientists" assume "that persons derive satisfaction out of bequeathing property to others"); Hirsch, *supra* note 13, at 2187 ("Gratuitous transfers . . . gratify a benefactor, whose happiness depends on [the recipients' happiness]."); Subotnik, *supra* note 25, at 96 ("In its simplest incarnation, the intuition is that the ability to leave property to the persons of one's choosing provides a sense of comfort and happiness.").

29. See Glover, *supra* note 28, at 445 ("Of the various preferences that testators can satisfy through freedom of testation, perhaps the most urgent and universal is the care of their families after the testators' own deaths."); Edward C. Halbach, Jr., *An Introduction to Chapters 1-4, in DEATH, TAXES AND FAMILY PROPERTY* 3, 5 (Edward C. Halbach, Jr. ed., 1977) ("[A] society should be concerned with the total amount of happiness it can offer, and to many of its members it is a great comfort and satisfaction to know during life that, even after death, those whom one cares about can be provided for and may be able to enjoy better lives because of the inheritance that can be left to them.").

30. See STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 65 (2004) (explaining that "[i]n an important sense, bequeathing property is simply one way of using property. And therefore society should not interfere with bequests" because "this tends to reduce individuals' utility directly (a person will derive less utility from property if he wants to bequeath it but is prevented from doing so)"); see Hirsch & Wang, *supra* note 9, at 8 ("To the extent that lawmakers deny persons the opportunity to bequeath freely, the subjective value of property will drop, for one of its potential uses will have disappeared."); Gordon Tullock, *Inheritance Justified*, 14 U. CHI. J.L. & ECON. 465, 474 (1971) ("Individuals before their death would be injured if they are prohibited from passing on their estate to their heirs because it eliminates one possible alternative which they might otherwise choose.").

31. See Hirsch, *supra* note 13, at 2187 ("Gratuitous transfers obviously benefit recipients . . .").

32. See Hirsch & Wang, *supra* note 9, at 12; Kelly, *supra* note 1, at 1136-37.

33. See Kelly, *supra* note 1, at 1136-37.

decisions likely would not put the donor's property to its best use.³⁴ The law's grant of freedom of disposition, by contrast, maximizes social welfare by allowing the donor to engage in "intelligent estate planning,"³⁵ which more likely places property in the hands of donees who will benefit the most.³⁶

Finally, freedom of disposition maximizes social welfare by incentivizing socially beneficial behavior both by the donor and by potential donees. With respect to the donor, the law's deference to the dead hand encourages them to generate wealth during life.³⁷ By contrast, if the law did not defer to the donor's estate planning decisions, then the donor might not find it as worthwhile to engage in productive activities,³⁸ and overall societal wealth might decline.³⁹ With respect to potential donees, freedom of disposition encourages them to care for the donor during times of ill health or old age.⁴⁰ If donees know that the donor has the ability either to punish them through disinheritance or reward them with a handsome bequest, then they will more likely cater to the donor's needs.⁴¹ This incentive increases

34. *See id.*

35. Hirsch & Wang, *supra* note 9, at 12.

36. *See* Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 WASH. U. L.Q. 1, 44 (1995) ("Certainly, benefactors can be expected to possess the information and insight into their families' affairs necessary to distribute their wealth in a rational manner."); Michael Rosenblum, *Give Me Liberty and Give Me Death: The Conflict Between Copyright Law and Estates Law*, 4 J. INTELL. PROP. L. 163, 177 (1996) ("Testamentary freedom . . . allows the testator to weigh the varying needs of his family."); Joshua C. Tate, *Conditional Love: Incentive Trusts and the Inflexibility Problem*, 41 REAL PROP. PROB. & TR. J. 445, 484 (2006) ("[T]he testator . . . can distribute property in accordance [with] each family member's needs.").

37. *See* Hirsch & Wang, *supra* note 9, at 8 ("[F]reedom of testation creates an incentive to industry and saving."); Hirsch, *supra* note 13, at 2187 ("Giving persons the right to make a will . . . encourages them to produce and to save more wealth, . . . adding to the sum of capital stock." (footnote omitted)); Jeffrey E. Stake, *Darwin, Donations, and the Illusion of Dead Hand Control*, 64 TUL. L. REV. 705, 749 (1990) ("Allowing owners to give their assets and money to others, whether at death or inter vivos, creates an incentive for productive activities."); Subotnik, *supra* note 25, at 96–97 ("[Some] commentators have focused . . . on the . . . notion that testamentary freedom generates a more productive citizenry, since individuals have motivations not just to save, but also to produce wealth in the first place.").

38. *See* SHAVELL, *supra* note 30, at 65 (explaining that restricting freedom of disposition "lowers [individuals'] incentives to work (a person will not work as hard to accumulate property if he cannot then bequeath it as he pleases)").

39. *See* Hirsch & Wang, *supra* note 9, at 8 ("[T]hwarted testators will choose to accumulate less property, and the total stock of wealth existing at any given time will shrink."); *see also* Subotnik, *supra* note 25, at 96 ("Such incentives promote wealth maximization—a gauge of utility maximization for some—since individuals have reasons to accumulate wealth over and above that which is needed during their own lifetimes." (footnote omitted)).

40. *See* Hirsch, *supra* note 13, at 2187–88; Kelly, *supra* note 1, at 1137.

41. *See* Joshua C. Tate, *Caregiving and the Case for Testamentary Freedom*, 42 U.C. DAVIS L. REV. 129, 179 (2008) (explaining that "[t]he U.S. rule" of broad freedom of disposition "allows a parent to punish a child for failing to provide care, but it also allows a parent to reward a child . . . who does provide care"); *see also* Hirsch, *supra* note 13, at 2235 (suggesting that "the behaviors

social welfare because, as Professors Adam Hirsch and William Wang explain, it “supports . . . a market for the provision of social services” and “encourages . . . beneficiaries to provide [the donor] with care and comfort—services that add to the total economic ‘pie.’”⁴² Therefore, by granting the donor broad freedom of disposition, the law seeks not only to increase the individual welfare of donors and donees but also to incentivize donors and donees in socially beneficial ways, all of which maximizes overall social welfare.

B. Live Hand Control

Just as the law grants the donor broad freedom of disposition, it also grants the donee broad freedom of inheritance.⁴³ Thus, when the donor names a donee as a beneficiary of their estate, the donee has the option either to accept the gift or reject it.⁴⁴ As Professor Hirsch explains, “Most beneficiaries accept inheritances with open arms; other ones prefer, for whatever reason, to reject them. Under most circumstances today, beneficiaries are free to accept or reject an inheritance as they see fit.”⁴⁵ In the terminology of inheritance law, the donee exercises their discretion to reject a gift by “disclaiming” their interest in the donor’s property.⁴⁶ When the donee disclaims an inheritance, the donee is treated as having predeceased the donor, and the disclaimed property is distributed to alternate donees.⁴⁷ The law therefore generally defers not only to the dead hand of the donor regarding how property should be distributed but also to the live hand of the donee regarding whether property is accepted or rejected.

parents might seek to elicit” through the exercise of freedom of disposition “take many forms, but one of them now looms in importance,” namely “end-of-life care giving”).

42. Hirsch & Wang, *supra* note 9, at 9–10; *see* Hirsch, *supra* note 13, at 2234 (explaining that “[g]ranted parents leeway to vary or deny bequests to children produces economic benefits of the sort that freedom of testation ideally achieves”).

43. *See* Glover, *supra* note 10, at 292; *see also supra* Section I.A.

44. *See* Hirsch, *supra* note 5, at 588.

45. Hirsch, *supra* note 16, at 1872 (footnote omitted).

46. *See* DUKEMINIER & SITKOFF, *supra* note 6, at 140. “By traditional usage, an heir *renounces*; a beneficiary under a will *disclaims*. Today, the two words are used interchangeably as synonyms. The term disclaimer is the one more commonly used to describe the formal refusal to take by an heir or a beneficiary.” *Id.* at 140 n.81.

47. *See* Adam J. Hirsch, *Revisions in Need of Revising: The Uniform Disclaimer of Property Interests Act*, 29 FLA. ST. U. L. REV. 109, 163 (2001) (“In the absence of testamentary instructions, disclaimed property goes to whomever would have received it had the disclaimant predeceased the benefactor, as determined by the state’s antilapse and intestacy statutes; but if a will does anticipate this contingency by naming a substitute beneficiary in the event that the primary beneficiary disclaims, that stipulation controls the devolution of the property.” (footnote omitted)). “Under UDPIA, a contingency clause specifying how a bequest will devolve in the event the beneficiary predeceases is broadly construed to govern the devolution of a bequest a surviving beneficiary disclaims.” *Id.* at 163 n.263.

As explained above, the law's deference to the dead hand has social welfare benefits,⁴⁸ and, in various ways, so too does the law's deference to the live hand. First, freedom of inheritance maximizes the donee's individual welfare.⁴⁹ Although the donor is in a better position than state legislators or probate judges to assess the utility of the donor's estate plan,⁵⁰ the donee is perhaps in the best position to evaluate the benefit that they would receive from a specific transfer from the donor's estate. By granting the donee freedom of inheritance, the law allows the donee to evaluate a gift from the donor and to accept it only if it will increase their individual welfare.⁵¹ As the Supreme Court of Georgia explained, "Property is a burden as well as a benefit, and whoever is unwilling to bear the burden for the sake of the benefit, is at liberty to decline both."⁵² Thus, if a gift from the donor will increase the donee's individual welfare, the donee will accept it, but if the burdens of the gift outweigh its benefits, the donee will disclaim the gift. In this way, the law's grant of freedom of inheritance and its consequent respect for the donee's autonomy maximizes social welfare.

Second, the donee's freedom of inheritance maximizes most donor's individual welfare.⁵³ As explained previously, the donor's ability to select what property should go to which beneficiaries can be a source of comfort and satisfaction for the donor.⁵⁴ And although the donee's ability to reject a gift would seem to undermine the donor's intent, freedom of inheritance actually increases the social welfare benefits of freedom of disposition because most donors likely want the donee to have the option to accept or reject a gift. By naming a donee as a beneficiary of the donor's estate, the donor likely intends to confer a benefit to the donee, and therefore the welfare of the donor is linked to the welfare of the donee.⁵⁵ Put simply, the donor's

48. See *supra* Section I.A.

49. See Glover, *supra* note 10, at 295–97.

50. See *supra* notes 32–33 and accompanying text.

51. See Hirsch, *supra* note 47, at 117 ("Only later, after the feudal incidents were abolished, did British courts come to allow disclaimers by devisees, for the very different purpose of permitting beneficiaries to escape bequests that might be 'clothed in trust,' or otherwise entail burdensome responsibilities."); Andrew S. Bender, Note, *Disclaimer Law: A Call for Statutory Reform*, 2001 U. ILL. L. REV. 887, 898 (2001) ("[T]he belief prevails that the disclaimant should not be forced to accept a gift if doing so would impose too great a burden on her. Essentially, there is a general agreement and recognition that any individual using a disclaimer in this manner possesses a valid motive." (footnote omitted)).

52. *Daniel v. Frost*, 62 Ga. 697, 706 (1879).

53. See Glover, *supra* note 10, at 297–99.

54. See *supra* notes 27–30 and accompanying text.

55. See SHAVELL, *supra* note 30, at 58 ("A major motivation for giving a gift is pure altruism: The donor cares about the well-being of the donee; that is, the donor obtains utility from the utility of the donee."); Louis Kaplow, *On the Taxation of Private Transfers*, 63 TAX L. REV. 159, 176 (2009) ("One possibility is that donors are to an extent altruistic, which is to say that raising the utility of their donees increases their own utility. Altruism seems to be evidenced, for example, by parents' hard work aimed to improve their children's prospects in life.").

welfare increases from their knowledge that the donee's welfare will increase as a result of the gift.⁵⁶ Under this line of reasoning, the donor would not want the donee to accept property that is more burdensome than beneficial. Freedom of inheritance consequently increases the donor's welfare by providing them the peace of mind that the donee's welfare will not decrease as a result of a gift.⁵⁷

Finally, freedom of inheritance maximizes social welfare by allowing the donee to engage in postmortem estate planning.⁵⁸ Although the donor is in the best position to evaluate the utility of their estate plan and consequently the law generally relies upon the donor to make decisions regarding the distribution of their property,⁵⁹ there is no guarantee that the donor will exercise their freedom of disposition in a way that maximizes social welfare.⁶⁰ Indeed, for various reasons, the donor might die with an estate plan that is suboptimal from a social welfare perspective.⁶¹ For instance, the donor might make poor decisions because they have imperfect information at the time they craft their estate plan.⁶² The donor makes estate-planning

56. See Hirsch, *supra* note 13, at 2187 (“Although benefactors cannot share in a beneficiary’s utility from an inheritance at the time of its receipt, they can envision it, and derive present utility from its anticipation.”); Kelly, *supra* note 1, at 1148–49 (“A gift . . . may increase the donor’s happiness due to altruism. If a donor is altruistic, the donor’s utility is a function of the donees’ utility, i.e., the preferences of the donor incorporate the well-being of the donees.” (footnote omitted)).

57. Of course, a donor’s motivations for giving are not limited to pure altruism (for example, self-interest or feelings of obligation); however, even if the donor is motivated by other concerns, the donee’s freedom of inheritance likely does not undermine freedom of disposition’s social welfare benefits. See Glover, *supra* note 10, at 297–99.

58. See *id.* at 299–311.

59. See *supra* notes 32–36 and accompanying text.

60. See Hirsch & Wang, *supra* note 9, at 13 (“[T]he assumption that [donors] will in general use freedom of [disposition] to craft thoughtful schemes of distribution is not unproblematic. . . . [The donor] may know best; but, alas, we have no assurance that in practice he will do what is best.” (emphases omitted)); see also Kelly, *supra* note 1, at 1138 (“Effectuating a donor’s ex ante interests is not necessarily equivalent to maximizing social welfare.”).

61. In addition to the problem of imperfect information that is discussed in this Section, moral hazard concerns and transaction costs might cause the donor to leave behind a suboptimal estate plan, and the donor’s freedom of inheritance can address these concerns. See Glover, *supra* note 10, at 297–310.

62. See Richard C. Ausness, *Sherlock Holmes and the Problem of the Dead Hand: The Modification and Termination of “Irrevocable” Trusts*, 28 QUINNIPIAC PROB. L.J. 237, 295 (2015) (“According to one school of thought, imperfect information, particularly about future events and circumstances, may cause donors to make dispositions of their property that they would not have made had they been better prognosticators. Unfortunately, once the donor is dead, such decisions cannot be reversed.”) (footnote omitted)); Hirsch, *supra* note 13, at 2239 (“When providing for existing family members, a testator brings to the estate-planning process a depth of knowledge gleaned from a lifetime of interaction with them. But the same temporal horizon that obstructs tacit bargains between a testator and future generations clouds his or her ability to see—and hence to see to—their needs.” (emphasis omitted)); Kelly, *supra* note 1, at 1158 (“Future events are difficult to foresee and unanticipated contingencies may arise. As a result, a donor may dispose of property in a way that contradicts what the donor would have wanted with complete information.”).

decisions during their lifetime, but those decisions have no effect until some point in the future when they die. Because the donor plans for the future based only upon their presently known information, circumstances might change in ways that render their estate plan ineffective in maximizing social welfare.⁶³

The donee's freedom of inheritance, however, partially addresses this problem of imperfect information. Because the donee makes their decision whether to accept or reject a gift after the donor dies, the donee has better information regarding the circumstances that exist when the donor's estate plan becomes effective.⁶⁴ As such, the donee can reassess the donor's decision to leave property to them with a better understanding of the utility that the transfer will produce. If the donee determines that the property is put to its best use in their own hands, they can accept the gift. But if the donee determines that the alternate taker would benefit more, they can increase the welfare generated by the donor's estate by disclaiming the gift. In sum, with the benefit of better information, the donee can maximize the utility of the donor's estate plan. Therefore, freedom of inheritance maximizes social welfare by not only increasing the individual welfare of both the donor and the donee but also by allowing the donee to engage in postmortem estate planning.

II. RESTRAINING THE LIVE HAND

While the law typically defers to the donee's discretion regarding whether to accept or reject a gift from the donor,⁶⁵ freedom of inheritance has limits. Although the donee's discretion to accept or reject a transfer from the donor's estate has been described as an "absolute right,"⁶⁶ Professor Hirsch explains that "[n]either history nor current theory supports the notion that citizens must enjoy complete transactional liberty."⁶⁷ Professor Hirsch points out that the law restricts an individual's transactional liberty in a variety of contexts,⁶⁸ which include limiting both freedom of contract and freedom of disposition. The law's treatment of freedom of inheritance is no different. It grants the donee discretion to accept or reject testamentary

63. See David Horton, *Unconscionability in the Law of Trusts*, 84 NOTRE DAME L. REV. 1675, 1703 (2009) ("Even the savviest investor cannot predict how to allocate assets efficiently in the distant future."); see also Reid Kress Weisbord, *Federalizing Principles of Donative Intent and Unanticipated Circumstances*, 67 VAND. L. REV. 1931, 1936 (2014) ("Had the donor known of circumstances causing the original beneficiary to disclaim, the donor presumably would have skipped the original beneficiary altogether in favor of the next eligible beneficiary.").

64. See Glover, *supra* note 10, at 302–06.

65. See *supra* Section I.B.

66. Dean David Gamin, Note, *Renunciation of Testamentary Benefit as Fraudulent Transfer*, 37 CASE W. RES. L. REV. 148, 159 (1986).

67. Hirsch, *supra* note 5, at 627 (footnote omitted).

68. *Id.*

transfers; but, in certain situations, it restricts the donee's discretion. In other words, just as the law restrains the dead hand of the donor, it also restrains the live hand of the donee.

A. *Restraints*

The restraints that the law places on the donee's freedom of inheritance can be separated into two categories: (1) restraints of acceptance and (2) restraints of rejection. Restraints of acceptance deny the donee the ability to accept property from the donor's estate under certain circumstances.⁶⁹ Conversely, restraints of rejection limit the donee's freedom of inheritance by eliminating beneficial consequences of a donee's decision to disclaim property under some scenarios.⁷⁰ Whereas restraints of acceptance force the donee to reject a transfer from the donor, restraints of rejection increase the likelihood that the donee will accept a transfer from the donor.

1. *Restraints of Acceptance*

Restraints of acceptance limit the donee's ability to accept a transfer by requiring them to disclaim it. Although in recent years other such restraints have emerged,⁷¹ the slayer rule is the traditional example of a restraint that the law places on the donee's ability to accept a transfer from the donor. The details of the rule vary from state to state,⁷² but, in general, the slayer rule prevents a donee who intentionally kills the donor from benefiting from their victim.⁷³ The killer cannot take from their victim regardless of whether the donor names the killer as a donee in a will or a non-probate will substitute or whether the transfer is the result of the donor dying intestate.⁷⁴ Moreover,

69. See *infra* Section II.A.1.

70. See *infra* Section II.A.2.

71. See DUKEMINIER & SITKOFF, *supra* note 6, at 139–40; see also *infra* notes 87–89 and accompanying text.

72. See DUKEMINIER & SITKOFF, *supra* note 6, at 137–39.

73. See UNIF. PROB. CODE § 2-803(b) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010) (“An individual who feloniously and intentionally kills the decedent forfeits all benefits . . . with respect to the decedent's estate . . .”). One area of variation amongst the states relates to how the court determines that the donee killed the donor. See DUKEMINIER & SITKOFF, *supra* note 6, at 138. Additionally, in some states, the slayer rule does not merely prevent the murderous donee from accepting a gift from their victim. Instead, under certain circumstances, the rule also prohibits the slayer's descendants from accepting a gift from the victim. See DUKEMINIER & SITKOFF, *supra* note 6, at 138 (explaining “[s]ome states extend the bar by statute to the killer's descendants,” and “[o]ther states limit the right of the killer's descendants to take by case law”); see generally Sneddon, *supra* note 16.

74. See UNIF. PROB. CODE § 2-803(b) (explaining the killer “forfeits all benefits . . . with respect to the decedent's estate, including an intestate share, an elective share, an omitted spouse's or child's share, a homestead allowance, exempt property, and a family allowance”). Although it is well established that the slayer rule bars the killer from taking from the donor's probate estate, there may still be some uncertainty as to whether the slayer rule applies to nonprobate will substitutes. See DUKEMINIER & SITKOFF, *supra* note 6, at 137.

with one or two exceptions,⁷⁵ all states bar the killer from inheriting even when the donor expressly provides that a donee should benefit regardless of whether the donee kills them.⁷⁶

The slayer rule need not be characterized as a restraint of the donee's freedom of inheritance. Instead, the rule could be framed as a majoritarian default rule that is designed to fulfill the donor's probable intent.⁷⁷ Under this characterization, because most donors would not want their killers to benefit from their estates,⁷⁸ the law revokes their gifts, thereby achieving a result that most likely comports with the donor's intent. Alternatively, the slayer rule could be framed as a restraint of the donor's freedom of disposition.⁷⁹ Under this characterization, the donor should not be able to give property to their killer because the exercise of freedom of disposition in this way would undermine the law's social welfare goals.⁸⁰

Despite the slayer rule's characterization as either a majoritarian default rule that implements the donor's probable intent or a restraint of the donor's freedom of disposition that limits dead hand control, the Restatement makes clear that the object of the rule's focus is the donee and not the donor. It explains, "The [slayer rule] is sometimes described as [a rule] that 'revokes' any provision in the testator's will in favor of the killer."⁸¹ However, the rule's "governing principle is the supervening public policy that prevents a wrongdoer from profiting from the wrong, and not revocation by the testator."⁸²

Under this characterization, which emphasizes the conduct of the donee, the slayer rule can be framed as a limitation on freedom of inheritance that denies the killer the discretion to accept a transfer from the donor's estate by requiring them to reject it. Simply put, the slayer rule forces the killer to

75. See DUKEMINIER & SITKOFF, *supra* note 6, at 137 (identifying Wisconsin and Louisiana as two possible exceptions).

76. See *id.* ("Suppose *H*, aware of *W*'s psychological instability, provides in his will for the creation of a trust for the benefit of *W* even if *W* kills him. *W* then kills *H*. Does *W* take? . . . In [the vast majority of] states, the answer appears to be No.").

77. See Thomas E. Simmons, *A Chinese Inheritance*, 30 QUINNIPIAC PROB. L.J. 124, 131 (2017) ("Still another potential rationale for the slayer rule is simply presumed majoritarian intent . . ."). Professor Hirsch suggests that this rationale is not the primary justification of the slayer rule. See Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609, 621 (2009) ("The rule's alternative justification as a means of effectuating testators' probable wishes has not gone unnoticed, but it is plainly subordinate." (footnote omitted)).

78. See Hirsch, *supra* note 13, at 2214 ("This rule adjusts the estate plan to the probable intent of the victim in most instances, for testators rarely wish to provide for their assassins . . .").

79. See *id.* (describing the slayer rule as a "restriction on freedom of testation").

80. *But see* Glover, *supra* note 13, at 445–54 (arguing that, when characterized as a restraint of the donor's freedom of disposition, the traditional slayer rule does not maximize social welfare and proposing reforms).

81. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 4.1 cmt. r (AM. LAW. INST. 1999).

82. *Id.*

disclaim their interest in the donor's property. The connection between a voluntary disclaimer and an involuntary disclaimer through the application of the slayer rule is evident in how the law disposes the donor's property in both contexts. When the donee voluntarily disclaims a transfer, the law directs the donee's gift to the alternate donee who would have benefited from the transfer had the primary donee died before the donor.⁸³ Likewise, when the slayer rule requires the donee to disclaim a transfer, the law distributes the donor's property as though the killer predeceased the donor.⁸⁴ In fact, the Uniform Probate Code makes this connection explicit by simply treating the killer as if they disclaimed their interest in the donor's estate.⁸⁵ The slayer rule can therefore be seen as restraining the donee's freedom of inheritance by denying the killer the discretion to accept a transfer from the donor's estate.

In addition to the traditional slayer rule, other restraints of acceptance have recently emerged in a few states that prevent the donee from taking from the donor's estate based upon some type of misconduct.⁸⁶ For example, some states bar a donee who physically abuses the donor from accepting a gift from their victim.⁸⁷ Similarly, others bar a donee who engages in certain types of financial misconduct from taking from their victim's estate.⁸⁸ The donees who are barred from taking a gift from the donor, whether by the traditional

83. See DUKEMINIER & SITKOFF, *supra* note 6, at 140; Hirsch, *supra* note 47, at 163.

84. See DUKEMINIER & SITKOFF, *supra* note 6, at 138 ("The prevailing view is that the killer is treated as having predeceased the victim.").

85. UNIF. PROB. CODE § 2-803(b) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010) (explaining that "[i]f the decedent died intestate, the decedent's intestate estate passes as if the killer disclaimed his [or her] intestate share"); *id.* § 2-803(e) (explaining that "[p]rovisions of a governing instrument . . . are given effect as if the killer disclaimed").

86. See DUKEMINIER & SITKOFF, *supra* note 6, at 139 ("In the United States, unworthy heirs—whose conduct bars inheritance—are usually limited to killers. In nearly all other situations, intestate succession is fixed by status: bloodline kinship, marriage, or adoption. But some exceptions for *unworthy heirs* are developing."); Anne-Marie Rhodes, *Blood and Behavior*, 36 AM. C. TR. & EST. COUNS. J. 143, 170–75 (2010) ("[L]egislatures responding to public outcry over egregious cases have enacted new statutes disinheriting heirs because of their misconduct. These disinheritance statutes generally fall into three categories: slayers, child abandonment, and elder abuse.").

87. DUKEMINIER & SITKOFF, *supra* note 6, at 139 ("A handful of states—including California, Pennsylvania, and Illinois—have statutes that deny inheritance from children or elderly relatives who were abused by the heir."); *see, e.g.*, CAL. PROB. CODE § 259 (West 2002); OR. REV. STAT. § 112.465 (2015). Statutes barring inheritance due to abuse often restrict the situations in which inheritance barred based upon the vulnerability of the donor. *See* Anne-Marie Rhodes, *Consequences of Heirs' Misconduct: Moving from Rules to Discretion*, 33 OHIO N.U. L. REV. 975, 986 (2007) ("These specific statutes on abuse distinguish based on the victim, that is, abuse of a child and abuse of an adult or elderly decedent . . ." (footnote omitted)). For a proposal that spousal abuse should bar inheritance, *see* Carla Spivack, *Let's Get Serious: Spousal Abuse Should Bar Inheritance*, 90 OR. L. REV. 247 (2011).

88. *See* Rhodes, *supra* note 87, at 986 ("The triggering conduct of abuse varies among . . . jurisdictions, some including financial exploitation as well as physical abuse."); *see, e.g.*, ARIZ. REV. STAT. ANN. § 46-456 (2017); WASH. REV. CODE ANN. § 11.84.020 (West 2006).

slayer rule or the newer statutes that focus on conduct other than killing, have become known as “unworthy heirs.”⁸⁹ Although the rules barring inheritance by these unworthy heirs can be characterized as either majoritarian default rules or rules that restrict the donor’s freedom of disposition,⁹⁰ they can also be framed as restrictions of live hand control.⁹¹ In particular, these rules represent restraints of acceptance that limit the donee’s freedom of inheritance by requiring them to reject their interest in the donor’s estate.

2. Restraints of Rejection

In contrast to restraints of acceptance, which limit the donee’s ability to accept a transfer from the donor, restraints of rejection limit the consequences of the donee’s decision to disclaim a transfer.⁹² Two particular contexts illustrate how restraints of rejection operate: (1) a restraint involving an insolvent donee; and (2) a restraint involving Medicaid eligibility.

First, an insolvent donee generally can disclaim a transfer from the donor’s estate and prevent their creditors from taking the donor’s property to satisfy their debts.⁹³ However, the United States Supreme Court has held that a donee cannot disclaim a transfer from the donor’s estate in order to avoid federal tax liens.⁹⁴ In *Drye v. United States*,⁹⁵ a donor died leaving \$233,000 to her son.⁹⁶ Prior to his mother’s death, the son had amassed \$325,000 in back taxes, and the Internal Revenue Service (“IRS”) had filed tax liens against the son’s property.⁹⁷ Wanting to avoid the seizure of his mother’s property and knowing that his daughter would take the gift if he did not, the son disclaimed the transfer from his mother’s estate.⁹⁸ Recognizing that under state law the donee’s disclaimer could remove the donor’s property

89. *In re Estate of Haviland*, 301 P.3d 31, 41 (Wash. 2013) (Chambers, J., dissenting) (“It is plain to me that the true evil the legislature wished to end was elder abuse, not inheritance by unworthy heirs.”); DUKEMINIER & SITKOFF, *supra* note 6, at 139 (“In the United States, unworthy heirs—whose conduct bars inheritance—are usually limited to killers.”); Frances H. Foster, *Towards a Behavior-Based Model of Inheritance?: The Chinese Experiment*, 32 U.C. DAVIS L. REV. 77, 80 (1998) (“U.S. legislatures, courts, and scholars have . . . expand[ed] the category of so-called ‘unworthy heirs’—those heirs whose conduct toward the decedent is deemed so ‘reprehensible’ that they are disqualified from inheritance.”).

90. *See supra* notes 77–80 and accompanying text.

91. *See supra* notes 81–85 and accompanying text.

92. *See* Weisbord, *supra* note 16, at 1255 (explaining that “[c]onstraining the power to disclaim . . . alters the consequences of a donee’s choice to renounce”).

93. *See* DUKEMINIER & SITKOFF, *supra* note 6, at 142.

94. *See id.* at 142–43; Hirsch, *supra* note 16, at 1885–87.

95. 528 U.S. 49 (1999).

96. *Id.* at 52–53 (explaining that “\$158,000 was personalty and \$75,000 was realty located in Pulaski County, Arkansas”).

97. *Id.* at 53.

98. *Id.*

from the reach of ordinary creditors,⁹⁹ the Supreme Court nevertheless held that “the disclaimer did not defeat the federal tax liens.”¹⁰⁰

Although the Court did not prevent the donee from disclaiming his interest in the donor’s estate, it did eliminate the benefit that the donee sought to enjoy by disclaiming, namely the removal of property from the reach of the IRS. Indeed, after *Drye*, the IRS can reach property that is in the hands of the donee, and it can reach gifted property that is in the hands of others because the donee has disclaimed it. Thus, the holding in *Drye* does not represent an absolute restraint of rejection because the donee maintains the ability to disclaim, yet it can still be seen as a restraint of rejection because it limits the consequences of the donee’s decision to disclaim.

The second context in which the law places a restraint of rejection on the donee’s freedom of inheritance involves Medicaid eligibility. Medicaid is a governmental assistance program that provides healthcare benefits to individuals with limited financial resources.¹⁰¹ To qualify for these benefits, an individual must meet certain income and resource qualifications.¹⁰² When a Medicaid recipient is entitled to a transfer from a donor’s estate, courts have grappled with the issue of how the donee’s disclaimer of the transfer should affect their Medicaid eligibility.¹⁰³

For instance, *Troy v. Hart*¹⁰⁴ involved a Medicaid recipient who was entitled to \$100,000 from his sister’s estate.¹⁰⁵ If the donee accepted the transfer, he would have been ineligible for Medicaid, and he would have been required to use his inheritance to pay for his medical care.¹⁰⁶ However, he disclaimed the transfer; the \$100,000 was split amongst his surviving sisters; and his financial resources remained at a level that qualified him for Medicaid assistance.¹⁰⁷

The Maryland Court of Special Appeals found the donee’s exercise of freedom of inheritance within this context troubling. The court admonished

99. *Id.* (“The disavowing heir’s creditors, Arkansas law provides, may not reach property thus disclaimed.”).

100. *Id.* at 52.

101. See John A. Miller, *Medicaid Spend Down, Estate Recovery and Divorce: Doctrine, Planning and Policy*, 23 ELDER L.J. 41, 46–47 (2015).

102. See *id.* at 47–56.

103. See Hirsch, *supra* note 16, at 1897 (“With few exceptions, state courts testing the issue . . . have judged disclaimers ineffective to render beneficiaries eligible for Medicaid. Wherever courts have allowed them, state legislators have reacted promptly to overturn the decisions. No federal court has yet spoken to the matter.” (footnotes omitted)).

104. 116 Md. App. 468, 697 A.2d 113 (Md. Ct. Spec. App. 1997).

105. *Id.* at 472, 697 A.2d at 115.

106. See *id.* at 480, 697 A.2d at 118.

107. See *id.* at 472–73, 697 A.2d at 115. Professor Hirsch describes the general scenario of a disclaimer affecting Medicaid eligibility: “Medicaid provides medical benefits to citizens in financial distress. An inheritance relieves that distress and can cause a citizen to become ineligible for Medicaid. In turn, a beneficiary might disclaim an inheritance in an effort to maintain his or her eligibility.” Hirsch, *supra* note 16, at 1896.

the use of a disclaimer to maintain Medicaid eligibility by stating: “What is ludicrous, if not repugnant, to public policy is that one who is able to regain the ability to be financially self-sufficient, albeit for a temporary or even brief period of time, may voluntarily relinquish his windfall.”¹⁰⁸ To avoid this result, the court held, “If a recipient renounces an inheritance that would cause him to be financially disqualified from receiving benefits, the renunciation should incur the same penalty of disqualification that acceptance would have brought about, and should render the recipient liable for any payments incorrectly paid by the State in consequence.”¹⁰⁹

While the court did not directly restrain the donee’s freedom of inheritance by rendering his disclaimer ineffective, it indirectly imposed a restraint of rejection by extinguishing the benefit that he received from disclaiming.¹¹⁰ Put simply, the court held that the donee maintains the ability to disclaim but the donee’s Medicaid eligibility should be calculated as if they had accepted the transfer from the donor’s estate.¹¹¹ Medicaid eligibility therefore represents a second scenario in which the law restrains a donee’s freedom of inheritance by limiting the consequences of rejection.

In sum, although the donee generally enjoys broad freedom of inheritance,¹¹² the law restrains this freedom in various ways. These live hand restraints fall within one of two general categories: (1) restraints of acceptance; and (2) restraints of rejection. Restraints of acceptance, such as the slayer rule, bar the donee from accepting a gift and therefore require the donee to reject a transfer from the donor’s estate.¹¹³ By contrast, restraints of rejection, such as the rules that prevent the donee from avoiding federal tax liens and maintaining Medicaid eligibility by disclaiming a gift, limit the

108. *Troy*, 116 Md. App at 478, 697 A.2d at 117–18.

109. *Id.* at 479, 697 A.2d at 118.

110. See *DUKEMINIER & SITKOFF*, *supra* note 6, at 157 (“Although the court held the disclaimer valid, it suggested that the amounts passing to the sisters could be subject to a claim by the state for reimbursement of [the donee’s] Medicaid expenses.”); *Hirsch*, *supra* note 16, at 1899 (“The would-be disclaimant in a Medicaid case *retains the right to disclaim*. The question instead concerns the consequences of his or her disclaimer. Lawmakers can concede the right to disclaim . . . but at the same time insist that the scope of government obligations . . . is instead up to the will of the people.”); *Hirsch*, *supra* note 5, at 602–03 (“Though the competent disclaimant remains ‘free’ to act, her eligibility for future benefits will be determined *as if* the disclaimer had not occurred. Thus, the disclaimant winds up in essentially the same position as under a rule denying her the right to disclaim in the first place.”).

111. For a list of cases holding similarly, see *Hirsch*, *supra* note 16, at 1897 n.134. See, e.g., *In re Molloy v. Bane*, 631 N.Y.S.2d 910, 911 (N.Y. App. Div. 1995) (“The instant appeal presents a collision of two irreconcilable rules of law. On the one hand, there is a generally recognized right to renounce any and all testamentary or intestate distributions, even when to do so would frustrate one’s creditors. On the other hand, public aid is limited and should be spent only on the truly needy. Here, we hold that the policy considerations underlying the latter rule are of paramount importance. Accordingly, while one may renounce a testamentary or intestate disposition, such a renunciation is not without its consequences for purpose of calculating eligibility for Medicaid.”).

112. See *supra* Section I.B.

113. See *supra* notes 70–83 and accompanying text.

consequences of the donee's decision to reject a gift and therefore, make it more likely that the donee will accept a transfer from the donor's estate.¹¹⁴ Thus, both restraints of acceptance and restraints of rejection limit live hand control of inheritance.

B. Rationales

As explained previously, freedom of inheritance promotes the socially optimal distribution of property.¹¹⁵ However, under certain conditions, it is possible that the donee might exercise their discretion to accept or reject a transfer in a way that undermines this social welfare goal. Therefore, while the law generally grants the donee broad freedom of inheritance, it places restraints on this freedom that can be characterized as potentially addressing three general concerns that might result in the socially suboptimal distribution of the donor's estate: (1) the concern that the donee might not accurately assess the benefit of a gift from the donor because of the endowment effect;¹¹⁶ (2) the concern that broad freedom of inheritance might incentivize socially detrimental behavior;¹¹⁷ and (3) the concern that the donee might exercise their freedom of inheritance in a way that produces negative externalities.¹¹⁸

1. Endowment Effect

First, some live hand restrictions might be founded upon concerns regarding the endowment effect.¹¹⁹ One assumption that underlies the law's grant of freedom of inheritance is that the donee can accurately evaluate the utility of either accepting a gift or rejecting it.¹²⁰ Indeed, the overarching rationale of freedom of inheritance holds that with the benefit of the information known at the time the donor dies, the donee can compare the utility that would be generated from their acceptance of a gift with the utility that would result from their rejection of it.¹²¹ If the donee decides that they will receive utility from the property, then they will accept the gift.¹²² Conversely, if the donee decides that the gift would be better placed in the hands of an alternate donee, then they will disclaim it.¹²³

114. *See supra* notes 92–111 and accompanying text.

115. *See supra* Section I.B.

116. *See infra* Section II.B.1.

117. *See infra* Section II.B.2.

118. *See infra* Section II.B.3.

119. *See infra* notes 124–127 and accompanying text.

120. *See supra* Section I.B.

121. *See supra* Section I.B.

122. *See supra* Section I.B.

123. *See supra* Section I.B.

Although the donee can maximize social welfare by exercising their freedom of inheritance, they may not necessarily accurately value the utility of a gift. Due to the psychological phenomenon known as the endowment effect, the donee may undervalue the benefit that they will receive from their acceptance of the donor's gift.¹²⁴ The endowment effect refers to the idea that people tend to value things that they possess differently than identical things that they do not.¹²⁵ Specifically, people tend to value property more highly when they possess it than when they do not,¹²⁶ and as a result, they typically undervalue property that they do not own.¹²⁷

The distorted reasoning that the endowment effect causes might interfere with the underlying rationale of freedom of inheritance. Because the donee does not yet possess the property that is the subject of the donor's gift, the donee might underestimate the utility that they would receive from accepting the gift.¹²⁸ If the donee does not accurately assess the relative utility of accepting and rejecting a transfer from the donor, then their exercise of freedom of inheritance might not increase social welfare, and in fact, it might actually decrease social welfare.¹²⁹ As such, some inheritance

124. See Hirsch, *supra* note 47, at 152–53.

125. See generally WARD FARNSWORTH, *THE LEGAL ANALYST: A TOOLKIT FOR THINKING ABOUT THE LAW* 209–17 (2007).

126. See Russell Korobkin, *The Endowment Effect and Legal Analysis*, 97 NW. U. L. REV. 1227, 1228 (2003) (“The much studied ‘endowment effect’ stands for the principal that people tend to value goods more when they own them than when they do not. Move a person from a city house to a country house and, low and behold, he is quite likely to prefer the country house more than he did when he resided in the city. A consequence of the endowment effect is the ‘offer-asking gap,’ which is the empirically observed phenomenon that people will often demand a higher price to sell a good that they possess than they would pay for the same good if they did not possess it at present.” (footnotes omitted)); Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129, 1150 (1986) (“Social psychologists have demonstrated that people sometimes value things once they have them much more highly than they value the same things when they are owned by others.”).

127. See Charles B. Craver, *The Negotiation Process*, 27 AM. J. TRIAL ADVOC. 271, 286 (2003) (“People who own goods that others wish to purchase tend to overvalue those items, while individuals who are thinking of buying goods possessed by others tend to undervalue those items.”); Debra Pogrud Stark, et al., *Complex Decision-Making and Cognitive Aging Call for Enhanced Protection of Seniors Contemplating Reverse Mortgages*, 46 ARIZ. ST. L.J. 299, 338 (2014) (explaining that “endowment effects” occur when “consumers overvalue things that they already own and undervalue things that they do not”).

128. See Hirsch, *supra* note 47, at 153 (“Because [they have] not yet taken possession, a disclaiming beneficiary may well view the transaction not as a (painful) loss, but rather as a (relatively painless) forgoing of a gain. In consequence, the possibility that [they] will disclaim without due deliberation looms large[.] . . .” (footnote omitted)); Hirsch, *supra* note 36, at 36 (“How might the endowment effect affect the treatment of inherited wealth? Well, that depends. If the beneficiary fails to conceptualize an inheritance as really being [their]’ property, [they] might be less averse to risking or dissipating it This phenomenon, I suspect, may help explain the high frequency of disclaimers of inheritances.” (emphasis omitted)).

129. See Adam J. Hirsch, *Formalizing Gratuitous and Contractual Transfers: A Situational Theory*, 91 WASH. U. L. REV. 797, 834 n.179 (“[D]onors’ rights to future interests and expectancies

regulations might be based, in part, upon the idea that the law should not defer to the donee's decision to accept or reject a transfer when their decision-making process is distorted by the endowment effect.

Of course, the endowment effect does not provide a full explanation of all live hand restrictions.¹³⁰ Firstly, the endowment effect can only be used to justify restraints of rejection, which, as explained previously, limit the consequences of the donee's decision to disclaim a gift.¹³¹ The endowment effect suggests that the donee will too easily reject a gift because they undervalue the benefit of acceptance.¹³² Restraints of rejection therefore directly address the concerns that the endowment effect raises. By contrast, the endowment effect cannot explain restraints of acceptance, which require the donee to reject a gift,¹³³ as mandatory rejection does not address concerns regarding the donee's undervaluation of a gift from the donor.

Secondly, the endowment effect theoretically affects the donee's ability to accurately evaluate the utility of accepting or rejecting a gift in all situations. The law, nevertheless, neither requires the donee to accept all gifts nor limits the consequences of the donee's decision to disclaim in all situations.¹³⁴ Instead, the law generally defers to the donee's decisions to disclaim,¹³⁵ and its restrictions of live hand control are limited.¹³⁶ Consequently, the restraints that the law does place on the live hand cannot be explained solely by the endowment effect, and therefore they must be founded upon additional policy rationales.

2. Incentives

In addition to the concern that the rationality of the donee's decision-making process might be distorted by the endowment effect,¹³⁷ some restraints of live hand control could be founded upon the basis of incentivizing socially beneficial behavior. Under this rationale, a restraint of the donee's freedom of inheritance is designed, not to ensure that the donee's decision maximizes social welfare, but to encourage others to conduct themselves in ways that maximize social welfare. Consider, for example, the slayer rule. As explained previously, the slayer rule prevents a killer from

may hold less subjective value, making them readier objects of donors' generosity, or overgenerosity.").

130. In fact, the endowment effect might not be a meaningful explanation of restraints of live hand control at all. *See id.* ("[R]ecent experimental studies have called into question the endowment effect.").

131. *See supra* Section II.A.2.

132. *See supra* notes 124–128 and accompanying text.

133. *See supra* Section II.A.1.

134. *See supra* Section I.B.

135. *See supra* Section I.B.

136. *See supra* Section II.A.

137. *See supra* Section II.B.1.

benefiting from their victim's estate, which means the killer essentially is required to disclaim any gift from the slain donor.¹³⁸ Although this restraint of acceptance could be founded upon other rationales,¹³⁹ it might be designed to incentivize socially beneficial conduct.

In particular, the slayer rule could be designed to deter killings.¹⁴⁰ If a prospective donee knows they will not benefit from the donor's estate if they were to kill the donor, then the prospective donee might be less likely to engage in the slaying.¹⁴¹ As Professor Mary Louise Fellows explains, "[D]enying succession rights to slayers . . . reinforces criminal punishments for a felonious killing because the denial deters a person from killing to succeed to another person's property."¹⁴² Thus, the slayer rule could be justified on the same grounds as the law's criminal punishment of murder,¹⁴³ namely that the killing of another is socially undesirable and consequently such behavior should be deterred.¹⁴⁴

In addition to the slayer rule, other restraints of live hand control could be justified on the grounds of incentives. Consider, for instance, the restraint of rejection that denies the donee the ability to avoid federal tax liens by disclaiming a gift.¹⁴⁵ Under a rationale of incentives, a prospective donee might be more likely to pay their taxes if they know that the IRS will be able to reach gifted property regardless of whether they accept or reject the gift. The increased likelihood of voluntary tax compliance is socially beneficial

138. See *supra* notes 71–84 and accompanying text.

139. See *infra* notes 193–200 and accompanying text.

140. See Kevin Bennardo, *Slaying Contingent Beneficiaries*, 24 U. MIAMI 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 paramount importance to life's integrity and in striving to prevent any incentive to commit what appears to be a profitable crime.").

141. See 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. MIAMI L. REV. 257, 275 (1994) ("[T]he slayer rule not only punishes, but presumably deters as well."); Sneddon, *supra* note 16, at 103 ("To the extent that a potential killer is aware of the possible application of the slayer rule, he or she may be deterred from committing an economically motivated killing.").

142. Mary Louise Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 IOWA L. REV. 489, 493 (1986); see Hirsch, *supra* note 77, at 621 (explaining that deterrence is one policy of the slayer rule).

143. See Manuel A. Utset, *Digital Surveillance and Preventive Policing*, 49 CONN. L. REV. 1453, 1459–60 (2017) ("Under the economics approach, the goal of the criminal justice system is to maximize social welfare. . . . Some crimes, like murder, . . . require total deterrence because they produce harm that is so serious in nature that it trumps any plausible legitimate benefits to criminals.").

144. See Hirsch, *supra* note 13, at 2214 ("[B]y insistently rewarding behavior that the state deems criminal, the testator's choice of bequest itself causes social harm, operating perversely to encourage that behavior. Allowing a testator to override the bar would tend to undermine deterrence.").

145. See *supra* notes 93–99 and accompanying text.

because it reduces the enforcement costs that the government must bear to meet its revenue goals.¹⁴⁶ Thus, a restraint of live hand control that encourages the donee to pay their taxes is socially beneficial.

However, like the endowment effect,¹⁴⁷ several considerations suggest that the incentives rationale does not adequately explain the law's restraints of the live hand. First, for the law to successfully encourage or deter specific conduct, those whose behavior the law seeks to influence must be aware of the law.¹⁴⁸ Whereas other areas of law are squarely concerned with deterrence of undesirable conduct,¹⁴⁹ inheritance law is not. As Professor Carla Spivack explains, "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."¹⁵⁰ Because inheritance law is not specifically designed to deter, a donee is less likely to understand and consider the consequences of the law's restraints of freedom of inheritance when deciding to engage in the conduct that could possibly be deterred by these restraints.¹⁵¹

146. See J. T. Manhire, *There is No Spoon: Reconsidering the Tax Compliance Puzzle*, 17 FLA. TAX REV. 623, 624–25 (2015) ("Voluntary compliance is fundamental to a government with a self-reporting tax administration policy enforced by a relatively small number of audits. . . . By design, a self-report or audit tax policy seeks to minimize the number of audits and maximize taxpayer compliance; that is, the government seeks to spend the minimum amount necessary on audit enforcement and maximize the level of voluntary tax compliance.").

147. See *supra* Section II.B.1.

148. 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."). Some scholars have made this point directly with respect to the slayer rule. See Bennardo, *supra* note 140, at 39 ("In order for the rule to deter, the would-be slayer would have to know about the slayer rule and its effect."); Sneddon, *supra* note 16, at 103 (explaining that the slayer rule deters only "[t]o the extent that a potential killer is aware of the possible application of the slayer rule").

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

150. Spivack, *supra* note 16, at 194; see RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003) ("The main function of the law in this field is to facilitate rather than regulate. The law serves this function by establishing rules under which sufficiently reliable determinations can be made regarding the content of the donor's intention."); DUKEMINIER & SITKOFF, *supra* note 6, at 1 ("Most of the law of succession is concerned with enabling posthumous enforcement of the actual intent of the decedent or, failing this, giving effect to the decedent's probable intent.").

151. Several scholars have recognized that the law of succession generally, and specific aspects of it, are obscure and not widely known or understood. See, e.g., Alexander A. Boni-Saenz, *Distributive Justice and Donative Intent*, 65 UCLA L. REV. 324, 338–39 (2018) ("One may have the motivation to engage in estate planning but lack the resources to do so effectively One

Consider, for instance, the slayer rule.¹⁵² While most individuals likely understand that criminal law imposes penalties on the act of killing, fewer likely know that inheritance law also imposes penalties on the same conduct. Similarly, one who fails to satisfy their tax obligations to the federal government might be aware that such failure has consequences imposed by both tax law and criminal law. It seems much less likely, however, that they would independently know that inheritance law imposes additional consequences to tax delinquency when a federal lien attaches to their property.

Second, assuming that the donee is aware of the law, live hand restraints will not influence the donee's conduct if they do not consider their consequences when making decisions.¹⁵³ For instance, the effect of the slayer rule is to deprive the donee of the economic advantage of killing the donor,¹⁵⁴ and therefore, to the extent the killer is motivated by monetary benefit, the slayer rule could have some deterrent effect.¹⁵⁵ However, not all killers are motivated by pecuniary gain,¹⁵⁶ and in these instances, the loss of a monetary benefit likely does not significantly influence the slayer's decision to kill.¹⁵⁷

important resource is the specialized legal knowledge about formalistic inheritance law doctrines. This includes not only substantive knowledge of the body of law in a given state but also knowledge of how to communicate one's donative preferences in a way that is intelligible to the state's probate system. . . . [B]ecause donors are one-time players in the game of life and death, . . . this type of knowledge is likely to be rare in the population."); Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 12 (1941) ("It is extremely improbable that laymen would be aware of the legal rules concerning the competency of attesting witnesses without legal advice . . ."); Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1055 (2004) ("Intestacy law is . . . relatively obscure."); Weisbord, *supra* note 24, at 906 ("[T]he testamentary process is obscure, unfamiliar, and complex.").

152. See *supra* Section II.A.1.

153. See Charles P. Trumbull IV, *Giving Amnesties a Second Chance*, 25 BERKELEY J. INT'L L. 283, 309 (2007) ("The deterrence theory rests on [an] assumption[[that] . . . criminals weigh the costs and the benefits of their actions before committing a crime." (citing Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 953 (2003))).

154. See *supra* Section II.A.1.

155. See Sneddon, *supra* note 16, at 103 (explaining that, if the donee is aware of the slayer rule, the donee "may be deterred from committing an economically motivated killing").

156. For example, instances of mercy killings and assisted suicide likely do not entail motivations of monetary gain. See generally Jeffrey G. Sherman, *Mercy Killing and the Right to Inherit*, 61 U. CIN. L. REV. 803 (1993).

157. See Bennardo, *supra* note 140, at 39 ("[M]any slayers do not have inheritance on the mind; the slayer rule would not act as a strong deterrent on those killers."); Sherman, *supra* note 156, at 873 ("[T]he slayer rule can have a deterrent effect, but only with respect to a person contemplating homicide for the purpose of inheriting from the victim; a potential killer with a different motive would not be deterred by the thought of losing an inheritance."). "Note, however, that the slayer rule could still have some deterrent effect in cases of non-greed killings, just as any negative consequence carries some measure of deterrence regardless of whether it is related to the motive for the crime." Bennardo, *supra* note 140, at 39 n.39.

While the slayer rule might have some deterrent effect for a prospective killer who is motivated by money, the law's restraint of rejection in the context of federal tax liens likely produces an even weaker incentive because the inability to disclaim would seem to be of little concern to a donee at the time they decide whether to satisfy their tax obligations. To begin with, the inability to disclaim would only affect the donee's tax payment if they truly are deciding whether to pay. If the donee's failure to pay tax is due to mistake or ignorance of their obligations, then the potential negative consequence of restrained freedom of inheritance likely has no effect on the donee's conduct. Likewise, if the donee's failure to pay is due to financial inability, then the threat of attachment of federal tax liens to a future inheritance likely does not increase the likelihood of payment. If, however, the donee is considering whether to intentionally evade paying their taxes, then the law's restraint of freedom of inheritance could potentially serve as an incentive to pay.

Nevertheless, even for a donee who is affirmatively contemplating tax evasion, the inability to disclaim an inheritance likely is not a meaningful consideration due to the general uncertainty of a future inheritance. Because the donor can change their estate plan at any time during life,¹⁵⁸ a prospective tax evader has no guarantee that they will be entitled to an inheritance at the time of the donor's death. The donee's inheritance therefore remains uncertain after the donee's decision either to pay tax or to evade it.¹⁵⁹ Because a prospective tax evader will not necessarily experience the negative consequences of restrained freedom of inheritance, such restraint likely does not serve as a meaningful incentive to make tax payments.

Finally, even if the donee is aware of the law and considers its consequences, their conduct will not be significantly influenced by live hand restraints if the law imposes other, more effective, disincentives. In this regard, the criminal law already strongly disincentivizes the conduct that is the focus of the slayer rule, namely the killing of the donor by the donee.¹⁶⁰ If the donee is not deterred from killing by the threat of extended incarceration or even potential execution, then they likely will not be deterred by the possibility of losing an inheritance. Similarly, federal law already

158. See Goldberg & Sitkoff, *supra* note 3, at 342; Hirsch, *supra* note 5, at 613.

159. This uncertainty stands in contrast to the certainty of the donee's inheritance in situations that the slayer rule applies. The slayer's act of killing the donor is the event that triggers the slayer's inheritance, and therefore the donor has no opportunity to change their estate plan after the donee's actions. See Hirsch, *supra* note 13, at 2214 ("[T]he speed of the assault typically stymies formal disinheritance of the slayer."); Hirsch, *supra* note 77, at 620 (explaining that the slayer rule "impute[s] a change of intent that did come about, . . . but that the testator had no opportunity to express").

160. See Bennardo, *supra* note 140, at 39 ("The criminal law establishes harsh penalties to deter intentional killings, and these punishments likely already have a strong deterrent effect on would-be killers."); see also Sherman, *supra* note 156, at 873 ("[W]ith respect to mercy killing, the slayer rule affords no additional deterrence, and, should society think deterrence necessary for such cases, the criminal law is surely adequate.").

disincentivizes the intentional nonpayment of tax by threat of monetary fines and imprisonment.¹⁶¹ If one contemplating tax evasion is not deterred by the possibility of these criminal sanctions, then they might not be deterred by their inability to avoid federal tax liens through the disclaimer of future inheritances.

In sum, although live hand restraints might have some deterrent effect,¹⁶² the incentives rationale alone does not adequately justify them. Some scholars have expressly recognized the subordinate nature of the incentives rationale in the context of the slayer rule.¹⁶³ For example, Professor Kevin Bennardo explains that one cannot “say that the slayer rule never deters,” but “the deterrent effect of the rule is so weak that it cannot and should not be the primary justification for the rule.”¹⁶⁴ The same considerations that indicate deterrence is a collateral consequence and not a primary justification of the slayer rule also suggest that an incentives rationale is not an adequate justification of other live hand restraints. Thus, the law’s restraints of freedom of inheritance must be founded upon additional policy concerns.

3. *Negative Externalities*

Finally, the law’s restraints of the live hand could be designed to address concerns regarding negative externalities.¹⁶⁵ The donee’s freedom of inheritance is founded upon the rationale that the donee can evaluate the costs and benefits of accepting or rejecting a gift from the donor, and the donee can make the decision that produces the greatest utility.¹⁶⁶ In some situations, however, the donee’s decision to accept or reject a gift from the donor imposes costs on others that are not borne by the donee. If the donee does not consider these costs, then they will not accurately weigh the costs and benefits of their decision, and, consequently, their decision to accept or reject a gift might not maximize social welfare.

The costs of a decision that are not borne by the decisionmaker are known as negative externalities, and the paradigmatic example of how

161. I.R.C. § 7201 (2012) (“Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$100,000 (\$500,000 in the case of a corporation), or imprisoned not more than [five] years, or both, together with the costs of prosecution.”).

162. See *supra* notes 140–146 and accompanying text.

163. See Bennardo, *supra* note 140, at 39 (“The slayer rule produces some measure of deterrence, albeit likely a small one. . . . Deterrence . . . fits better as a collateral benefit of the slayer rule than a justification for it.”); Sneddon, *supra* note 16, at 103 (“Deterrence of criminal behavior is often listed as a public policy goal of the slayer rule. Yet, deterrence is only a side effect of the slayer rule rather than a policy goal.”).

164. Bennardo, *supra* note 140, at 40.

165. See *infra* note 172.

166. See *supra* Section I.B.

negative externalities can render an individual's decision suboptimal from a social welfare standpoint involves pollution.¹⁶⁷ When a businessperson decides to continue producing goods at their manufacturing plant, they will weigh the private costs—namely the costs of labor and materials—with the private benefits—specifically the revenue generated from production.¹⁶⁸ If these private benefits outweigh the private costs, then the businessperson will make the decision to continue operations.¹⁶⁹

However, just because the decision to continue production is best for the businessperson as an individual does not mean the decision maximizes social welfare. This discrepancy stems from the possibility that the decision to continue production might impose costs on others that the businessperson does not necessarily factor into their decision. Specifically, production at the manufacturing plant could result in negative externalities in the form of pollution.¹⁷⁰ When the social costs of pollution are factored into the analysis, the socially optimal decision might be to close the manufacturing plant, despite the private benefits of production outweighing the private costs.¹⁷¹ Therefore, as exemplified by the pollution producing business, negative externalities can cause socially detrimental activity to occur when individual decisionmakers do not internalize all societal costs.

Like the businessperson's decision to continue manufacturing operations, the donee's decision to accept or reject a gift from the donor could have societal costs that render their decision suboptimal from a social welfare

167. See Brett M. Frischmann & Mark A. Lemley, *Spillovers*, 107 COLUM. L. REV. 257, 300 (2007) ("Environmental pollution is an archetypal example of an externality. Acme Factory produces widgets and in doing so emits pollutants into the environment. People living downstream or downwind from Acme receive the pollutants and bear some costs as a result. These costs are external to Acme's decision to produce widgets . . .").

168. See Daniel B. Kelly, *Strategic Spillovers*, 111 COLUM. L. REV. 1641, 1650 (2011) ("In deciding whether to open a factory or increase production, a firm will compare its private benefits and costs but may ignore the social costs of pollution on local residents, other countries, or future generations.").

169. See *id.*

170. See *id.* at 1649–50 ("[S]elf-interested individuals and profit-maximizing firms use their property for various purposes, and, in doing so, these individuals and firms may impose external effects on others. That is, a party may undertake an activity that has not only private benefits and costs, which directly affect the party engaging in the activity, but also social effects, which affect the welfare of other parties. If these social effects are beneficial, the activity entails *positive externalities*; if these social effects are harmful, the activity entails *negative externalities*." (footnote omitted)).

171. See *id.* at 1651 ("Operating the factory may be *socially undesirable*, even if the firm has a private incentive to operate the factory, if the social costs of operating the factory, including the external costs of the pollution, exceed the social benefits of manufacturing . . ."). It is important to note that just because an activity produces negative externalities does not mean that the activity is socially undesirable. See *id.* ("[O]perating the factory may be *socially desirable*, despite the external costs of the pollution, if the social benefits of manufacturing . . . exceed the social costs of operating the factory, including the external costs of the pollution.").

perspective.¹⁷² One particular context in which the donor might exercise their freedom of inheritance without considering the societal costs of their decision involves federal tax liens. Indeed, a donee's decision to disclaim gifts in order to avoid the federal government's seizure of the gifted property in satisfaction of their tax liabilities might produce negative externalities that warrant the law's restriction of their ability to do so.¹⁷³ However, before one can understand why a donor's avoidance of federal tax liens through the exercise of freedom of inheritance might produce negative externalities, one must first understand why the donor's decision to disclaim property in order to avoid the claims of ordinary creditors does not produce negative externalities.

Although the law restricts the donee's ability to avoid federal tax liens through the exercise of freedom of inheritance,¹⁷⁴ it allows the donee to disclaim gifts to avoid the claims of ordinary creditors.¹⁷⁵ The law allows the donee to divert gifted property away from ordinary creditors because the donee's decision to do so does not produce negative externalities. When a creditor decides to extend credit, the price it charges reflects the risk of default,¹⁷⁶ which depends upon a variety of factors including the debtor's credit history, their available resources, and any collateral pledged as

172. See Hirsch, *supra* note 16, at 1881 (suggesting that federal regulation of the donee's ability to disclaim might be appropriate in instances in which "disclaimers . . . leave citizens impecunious" and consequently "could damage the financial interests of the federal government"); Weisbord, *supra* note 16, at 1252–61 (recognizing harms to governmental interests as potential externalities that are addressed by restrictions on the donee's ability to disclaim to avoid federal tax liens and to maintain Medicaid eligibility). The idea that the donee's exercise of freedom of inheritance could produce negative externalities is an extension of the notion that the donor's exercise of freedom of disposition could do so. See Glover, *supra* note 10, at 328 ("[T]he decision-maker, whether the donor or the donee, might not make decisions that maximize social welfare, and the law therefore restricts both freedom of disposition and freedom of inheritance in ways that are designed to limit the negative externalities that are produced by the exercise of these freedoms."); see also Hirsch, *supra* note 13, at 2204 ("[E]conomic analysis—applicable . . . to . . . freedom of testation—potentially justifies nullification only of conditions that involve irreversible choices or that entail tangible spillover costs."); Kelly, *supra* note 1, at 1161 ("Externalities . . . may arise because of a disposition of property at death."); Weisbord, *supra* note 16, at 1230 ("Mandatory restrictions on dispositional freedom are minimal and mostly confined to transfers that generate contexts where regulation is necessary to minimize spillover costs or harm to private, non-consenting third parties.").

173. See *infra* notes 181–185 and accompanying text.

174. See *supra* notes 93–100 and accompanying text.

175. See *DUKEMINIER & SITKOFF*, *supra* note 6, at 142 ("Suppose A disclaims her interest in O's estate. Most cases have held that A's ordinary creditors cannot reach the disclaimed property.").

176. See Hirsch, *supra* note 16, at 1883 ("Commercial lenders are *voluntary* creditors. They extend credit to borrowers or offer purchase-money credit fully aware of the risk of incidental default—but by maintaining a portfolio of debt, voluntary creditors can spread risk. The interest rates they charge reflect the risk of default, ensuring (within an acceptable margin of error) that they will profit in the aggregate.").

security.¹⁷⁷ Notably absent from the creditor's consideration is the donee's inheritance prospects.

Because it is subject to the whims and solvency of the donor,¹⁷⁸ an inheritance is so uncertain that a creditor will not consider it as a possible source of satisfaction of debts, and the prospect of an inheritance will therefore not be reflected in the price of credit.¹⁷⁹ As such, the donee's decision to disclaim and shift gifted property away from ordinary creditors does not impose a cost upon these creditors because they have been compensated for bearing the risk that the donee will inherit nothing from the donor. As Professor Hirsch puts differently, because "[t]he expectancy of inheritance [is] not [] reflected in the price of credit," creditors "would receive, literally, more than they bargained for" if they "stood in a position to prevent disclaimers by insolvents."¹⁸⁰

Because freedom of inheritance does not raise negative externality concerns for most insolvent donees, the law typically allows the donee to reject a transfer from the donor and divert the gift away from their creditors. However, one exception to this general rule involves a donee who owes back taxes to the federal government.¹⁸¹ As explained previously, the Supreme Court has held that, even when the donee effectively exercises their right to reject a gift under state law, "the disclaimer d[oes] not defeat . . . federal tax liens."¹⁸² Although it did not frame its decision in this way, the Supreme Court essentially ruled that federal tax law places a restraint of rejection on the donee's freedom of inheritance that limits the consequences of their decision to disclaim.

177. See Hirsch, *supra* note 5, at 614 ("Consumer credit dossiers normally report the debtor's credit history, income, assets, debts and obligations. Creditors who finance large purchases generally protect themselves by demanding a security interest in collateral and consequently can disregard the debtor's other resources." (footnote omitted)).

178. See *id.* at 613 ("A will is ambulatory, and while the life-span of the testator can be actuarially estimated, thereby indicating the extent to which interests created under the will must be discounted, the probability that the testator will revoke his will before it 'matures' depends upon idiosyncrasy, and hence is indeterminate."). In addition to the uncertainty of an inheritance, other considerations might dissuade creditors from considering a debtor's inheritance prospects. See *id.* ("Few debtors have the requisite information at their fingertips; efforts to obtain the information would be inefficient, significantly increasing transaction costs.").

179. See Hirsch, *supra* note 16, at 1883 ("[V]oluntary lenders seldom rely on debtors' prospects of inheritance when they set the price of credit."); Hirsch, *supra* note 47, at 158 ("[V]oluntary creditors almost certainly will not have relied on a debtor's prospects of inheritance when they set the price of credit."); Hirsch, *supra* note 5, at 614. ("[E]vidence indicates that creditors ordinarily show little interest in their debtors' expectancies.").

180. Hirsch, *supra* note 5, at 614.

181. See DUKEMINIER & SITKOFF, *supra* note 6, at 142–43.

182. *Drye v. United States*, 528 U.S. 49, 52 (1999); see *supra* notes 93–100 and accompanying text.

A potential rationale for this restraint of rejection is that the use of a disclaimer to avoid federal tax liens generates negative externalities.¹⁸³ Specifically, the donee likely does not consider that their avoidance of federal tax liens through their exercise of freedom of inheritance might increase the tax burden of all taxpayers. Professor Hirsch explains that “[t]he federal Joint Committee on Taxation takes the incidence of expected tax delinquency into account when estimating revenues from a given tax and its rate structure, allowing Congress to meet its revenue goals regardless of delinquency.”¹⁸⁴ Under this line of reasoning, when tax authorities have greater ability to enforce individual tax obligations, the tax rate can be lowered and revenue goals will still be met. Conversely, when tax authorities have lesser ability to enforce individual tax obligations, the tax rate must be raised to meet revenue goals.

If tax rates increase because of donees’ decisions to disclaim inheritances, the additional tax liability of others required to meet Congress’s revenue goals represents a negative externality flowing from the exercise of freedom of inheritance. Within this context, the prohibition on the use of disclaimers to avoid federal tax liens can be seen as an enforcement tool for tax authorities that increases the amount of tax collected and therefore reduces the tax rate that must be imposed on others.¹⁸⁵ Put differently, a restraint of live hand control in the context of federal tax liens can be founded upon the rationale that it minimizes the costs of the donee’s decision that are borne, not by the donee, but by others.

In addition to the situation in which a donee attempts to avoid federal tax liens by disclaiming an inheritance, another situation in which restraint of the live hand might be justified on negative externality grounds involves Medicaid eligibility. Medicaid is a governmental assistance program that provides healthcare benefits to individuals with limited financial resources.¹⁸⁶ Because the donee’s Medicaid eligibility is dependent upon their ability to pay for their own medical expenses, an inheritance could affect their eligibility for assistance. Indeed, the possibility arises that a donee will

183. See Weisbord, *supra* note 16, at 1258 (“Tax lien disclaimers undermine the government’s financial interest by allowing disclaimants to protect inherited property from tax collection.”).

184. Hirsch, *supra* note 16, at 1884 (footnote omitted); see JOINT COMM. ON TAXATION, ABOUT THE JOINT COMMITTEE ON TAXATION 10, <https://www.jct.gov/publications.html?func=startdown&id=1174> (last accessed Sept. 5, 2019) (“The Joint Committee . . . examine[s] compliance, administration, and enforcement issues that could affect the timing or amounts of revenues collected as part of the process of understanding how a proposal would operate. When these issues are likely to be important to a proposal, the Joint Committee staff accounts for their effects in the revenue estimate.”).

185. See Bender, *supra* note 51, at 901 (“When they avoid tax liens, disclaimants frustrate the government’s ability to collect outstanding tax obligations.”); Weisbord, *supra* note 16, at 1259 (“[T]he failure of state law disclaimer statutes to protect the governmental interest in tax collection . . . forced federal courts to find ways to override state wealth transfer law.”).

186. See Miller, *supra* note 101, at 46–47.

maintain Medicaid eligibility if they were to disclaim an inheritance but lose eligibility if they were to accept the gift from the donor's estate.¹⁸⁷

The law generally tolerates broad live hand control of inheritance, but, as explained previously, it restricts freedom of inheritance in the context of Medicaid eligibility.¹⁸⁸ More particularly, it does so indirectly, as the donee can reject a gift while receiving Medicaid benefits.¹⁸⁹ However, the disclaimed property is considered when the donee's Medicaid eligibility is calculated.¹⁹⁰ Thus, the law does not directly restrain live hand control in this situation because the donee can still decide to reject a gift. Instead, the law indirectly restrains freedom of inheritance by eliminating some of the consequences of the donee's decision to disclaim.

The rationale underlying this restraint of rejection is similar to the rationale of the restraint of the live hand in the context of federal tax liens, as both are designed to address a problem of negative externalities.¹⁹¹ As explained previously, if donees were able to avoid federal tax liens by disclaiming, the general public would have to contribute more in order for the government to meet its budgetary goals.¹⁹² Likewise, if donees were able to maintain Medicaid eligibility by disclaiming, the general public's tax burden would have to increase in order to cover the increased cost of Medicaid programs.¹⁹³ Under either scenario, the cost of the donee's

187. See Hirsch, *supra* note 16, at 1896 ("Medicaid provides medical benefits to citizens in financial distress. An inheritance relieves that distress and can cause a citizen to become ineligible for Medicaid. In turn, a beneficiary might disclaim an inheritance in an effort to maintain his or her eligibility.").

188. See *supra* notes 101–111 and accompanying text.

189. See Hirsch, *supra* note 16, at 1897 n.110.

190. See *id.* at 1897 n.134.

191. See *id.* at 1896 (noting the scenario of a donee disclaiming an inheritance to maintain Medicaid eligibility "resembles the problem of disclaimers thwarting the tax commissioner, in that they can function to create (as opposed to leave unsatisfied) a government liability. Either way, disclaimers would take a toll on the public fisc"); Weisbord, *supra* note 16, at 1255 ("Two contexts implicate the governmental interest in disclaimer law: (1) where the government provides public assistance (Medicaid, in particular) . . . and (2) where a disclaimant has outstanding tax liens Disclaimers [in these contexts] interfere with the government's allocation and collection of public financial resources" (footnotes omitted)).

192. See *supra* notes 184–185 and accompanying text.

193. See Hirsch, *supra* note 5, at 602 ("[D]isclaimer by the devisee would have resulted in her continued dependence upon Medicaid payments, whereas 'the purpose of [Medicaid is] to aid only economically disadvantaged persons; the economic viability of the Medicaid program itself can be maintained only if eligibility requirements are diligently observed.'" (second alteration in original)); Hirsch, *supra* note 16, at 1898 ("In crafting that law, the rationale for suppression of Medicaid planning is clear. The program exists to benefit the 'truly needy,' not those who 'created their own need,' as one court has put it. If allowed to determine Medicaid eligibility, disclaimers would impose an 'unnecessar[y] . . . burden' on taxpayers." (alteration in original) (footnote omitted)); Weisbord, *supra* note 16, at 1257 ("From the governmental interest perspective, states should be proactive in enacting mandatory rules that prohibit Medicaid disclaimers because allowing individuals with access to private resources increases the cost of a Medicaid program already threatened by the possibility of significant long-term budget cuts.").

decision falls on society as a whole, rather than on the individual decisionmaker. As a result, the donee might not make a decision that maximizes social welfare, and the law therefore restricts their ability to maintain Medicaid eligibility through the exercise of freedom of inheritance.

In addition to the restraints of rejection that the law places on the donee's freedom of inheritance, the law's primary restraint of acceptance, known as the slayer rule, could also be founded upon negative externality concerns. As explained above, the slayer rule prevents a donee from accepting a gift from a donor whom the donee kills, and it therefore essentially requires the slayer to disclaim any interest in their victim's estate.¹⁹⁴ Scholars generally do not describe the slayer rule as addressing the problem of the donee imposing costs on others,¹⁹⁵ but instead they typically explain that the slayer rule prevents the killer from enjoying an undeserved benefit. Put differently, the slayer rule is typically explained as preventing the killer's unjust enrichment.¹⁹⁶

Consider, for example, the justification of the slayer rule found in the Restatement. It explains, "The rationale for the slayer rule is the prevention of unjust enrichment, in accord with the maxim that a wrongdoer cannot profit from [their] wrong. Any enrichment accruing to a slayer from the wrong is unjust and is not allowed."¹⁹⁷ From the Restatement's perspective, the inheritance a slayer receives flows directly from their act of killing, and it would therefore be unjust for the slayer to benefit from their wrongful

194. See *supra* Section II.A.1.

195. In addition to focusing on potential negative externalities generated by the donee's exercise of freedom of inheritance, an analysis of the slayer rule can also focus on potential negative externalities generated by the donor's exercise of freedom of disposition. See Glover, *supra* note 13, at 449.

196. See, e.g., DUKEMINIER & SITKOFF, *supra* note 6, at 136 ("The slayer rule . . . is an application of the law of restitution and unjust enrichment."); William M. McGovern, Jr., *supra* note 141, at 65 ("Today, most jurisdictions bar a killer from succeeding to his victim's property. The traditional rationale for that result is that a criminal should not be allowed to enrich himself by his crime."); Doug Rendleman, *Restating Restitution: The Restatement and Its Critics*, 65 WASH. & LEE L. REV. 933, 937 (2008) ("This blackletter rule is a broad statement that the unjust enrichment principle overrides the victim's testamentary disposition or the intestacy statute in order to prevent the slayer from profiting from his wrong. Today its major point is not controversial." (footnote omitted)).

197. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.4 cmt. b (AM. LAW INST. 2003). The Uniform Probate Code also suggests that the rationale of the slayer rule is founded upon unjust enrichment concerns. See UNIF. PROB. CODE § 2-803(f) (NAT'L CONFERENCE OF COMM'RS ON UNIF. STATE LAWS 2010) ("A wrongful acquisition of property or interest by a killer not covered by this section must be treated in accordance with the principle that a killer cannot profit from his [or her] wrong."). Likewise, the Restatement of Restitution explains that the slayer rule prevents unjust enrichment. See RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 45(2) (AM. LAW INST. 2011) ("A slayer's acquisition, enlargement, or accelerated possession of an interest in property as a result of the victim's death constitutes unjust enrichment that the slayer will not be allowed to retain.").

conduct. Consequently, the law prevents the killer from benefiting from their victim.

Unjust enrichment is the typical explanation of the slayer rule, but it is not the only conceivable explanation. Indeed, the slayer rule's unjust enrichment rationale can be reframed as a rationale based upon negative externalities. From this alternate perspective, the slayer's benefit should not be characterized as resulting from their act of killing, but instead it should be seen as flowing from the donor's estate-planning decisions. After all, if the donor did not exercise their freedom of disposition in favor of the slayer, then the slayer would receive nothing from the victim's estate regardless of the victim's cause of death. When reframed in this way, the problem with the slayer's benefit is not that it is the result of wrongful conduct and therefore unjust.¹⁹⁸ Instead, the problem is that the slayer's gift might be contrary to the donor's actual intent.¹⁹⁹ The slayer's act of killing the donor raises questions regarding whether the donor truly intended to benefit the slayer despite that the intent expressed through their estate-planning decisions suggests that they did.²⁰⁰

More particularly, if the donor had known that the slayer would kill them, then the donor might not have made estate-planning decisions that benefited the slayer.²⁰¹ The donor instead might have preferred to benefit others. If the donor indeed did not intend to benefit their killer, then the slayer's acceptance of the gift generates negative externalities because the donor's intended beneficiaries are deprived of the gift. The deprivation of an intended benefit can be seen as a cost of the donee's exercise of freedom of inheritance that is borne by the donor's intended beneficiaries and not by the slayer. More broadly, the disposition of the donor's property in ways contrary to their intent also imposes costs on society as a whole because the law in this area is founded upon the idea that freedom of disposition and, in

198. See Sherman, *supra* note 156, at 861 ("When one examines the[] . . . untoward effects produced by a slayer's actions, one sees that they are not morally objectionable except insofar as they frustrate intentions we are otherwise disposed to honor.").

199. See Fellows, *supra* note 142, at 493–94 ("Only if the law denies slayers the right to succeed to their victims' property can the law ameliorate potential disruptions to property transfers and protect donative freedom . . ."); Sherman, *supra* note 156, at 860–62 ("[T]he [slayer] rule is designed to preserve the integrity of our property-transfer system by preventing a person from altering, by means of a wrongful slaying, the course of property succession as intended by the source of the property. . . . In other words, [the donor's] intent is the key.").

200. See Cohen, *supra* note 140, at 799 ("The murderer's illegal act creates an extreme change of circumstances regarding the order of succession. The testator's intention to benefit the slayer . . . now seems detached from reality. Another distribution of assets is needed." (footnote omitted)); Simmons, *supra* note 77, at 131 ("Legislators might reasonably assume that most people would not desire that their killer inherit part or all of their estate.").

201. See Hirsch, *supra* note 13, at 2214 (explaining that the slayer rule "adjusts the estate plan to the probable intent of the victim in most instances, for testators rarely wish to provide for their assassins; only the speed of the assault typically stymies formal disinheritance of the slayer").

turn, fulfillment of the donor's intent, is socially beneficial.²⁰² Thus, when framed in this way, the slayer rule can be characterized, not as preventing the unjust enrichment of the slayer, but as minimizing the costs imposed on the donor's intended beneficiaries and upon society as a whole.

In sum, the law grants the donee freedom of inheritance because the donee's ability to decide for themselves whether to accept or reject a gift is seen as maximizing social welfare.²⁰³ Nonetheless, the law restrains the live hand in certain circumstances,²⁰⁴ and, like the law's general deference to live hand control, these restrictions can be analyzed from a social welfare perspective.²⁰⁵ In this regard, the law's live hand restraints can be seen as limiting freedom of inheritance in situations that raise particular concerns regarding the donee's ability to evaluate the costs and benefits of their decision to accept or reject a gift. In particular, the law's restraints of freedom of inheritance primarily can be seen as addressing concerns regarding negative externalities.²⁰⁶ Additionally, some of the law's restraints of live hand control could also have collateral consequences that are socially desirable, such as combatting the endowment effect and incentivizing socially beneficial behavior.²⁰⁷ From this perspective, the law's restraints of freedom of inheritance can be viewed as mechanisms that maximize social welfare.

III. INCONSISTENCY IN THE DEGREE OF RESTRAINT

Two important observations should be gleaned from the foregoing social welfare analysis of the law's live hand restraints. First, both the law's restraints of acceptance and its restraints of rejection are primarily justified as minimizing negative externalities.²⁰⁸ Under this rationale, the donee should not be able to decide whether to accept a gift or to reject it when such a decision imposes costs on others that the donee likely does not consider when making their decision.²⁰⁹ If the donee does not consider all of the costs that their exercise of freedom of inheritance might generate, then the law should not presume that the donee will make decisions that maximize social welfare and therefore restraint of live hand control is warranted.

While this first important takeaway focuses on the similarities between the law's restraints of acceptance and its restraints of rejection, the second focuses on inconsistencies between the two, specifically in the degree to

202. *See supra* Section I.A.

203. *See supra* Section I.B.

204. *See supra* Section II.A.

205. *See supra* Section II.B.

206. *See supra* Section II.B.3.

207. *See supra* Sections II.B.1–2.

208. *See supra* Section II.B.

209. *See supra* Section II.B.3.

which they restrain live hand control. Although all live hand restraints primarily pursue the same policy objectives, the way in which the law implements restraints of acceptance differs significantly from the way in which it implements restraints of rejection. On the one hand, the law's restraints of rejection leave the donee's freedom of inheritance largely intact but place limited restraints on the donee's ability to disclaim that are precisely designed to address negative externality concerns.²¹⁰ On the other hand, the law's traditional restraint of acceptance, namely the slayer rule, broadly limits the donee's freedom of inheritance by completely denying the donee the ability to accept a gift.²¹¹ In other words, the law's restraints of rejection are partial, but the law's primary restraint of acceptance is absolute.

A. *Partial Restraints*

Partial restraints of rejection maximize social welfare because they are narrowly tailored to maintain the donee's freedom of inheritance while at the same time minimizing negative externalities. Consider the law's restraints of rejection that limit the donee's ability to disclaim to avoid federal tax liens and to maintain Medicaid eligibility.²¹² In both contexts, the donee's rejection of a gift imposes costs on taxpayers who must contribute more in order for the government to meet its budgetary goals.²¹³ Despite this possibility of negative externalities, the law does not absolutely bar the donee from disclaiming. Instead, the donee can exercise their freedom of inheritance by rejecting the gift, but the consequences of that decision are altered to address the externality concerns.²¹⁴

For example, when the donee's property is subject to federal tax liens, the law allows the donee to disclaim their interest in the donor's estate, but the liens remain with the disclaimed property.²¹⁵ Because the donee's disclaimer does not affect federal tax liens, the IRS can seek recourse for the donee's unpaid taxes from property that is not owned by the donee.²¹⁶ This partial restraint of rejection maximizes social welfare because it is specifically designed to address negative externality concerns while leaving the donee's freedom of inheritance otherwise intact.

210. See *supra* Sections II.A.2, II.B.3.

211. See *supra* Section II.A.1.

212. See *supra* notes 93–111 and accompanying text.

213. See Hirsch, *supra* note 16, at 1898; Weisbord, *supra* note 16, at 1252–61.

214. See *supra* Section II.A.2.

215. See DUKEMINIER & SITKOFF, *supra* note 6, at 142–43; Hirsch, *supra* note 16, at 1885–87.

216. See Jasper L. Cummings, Jr., *Nationwide Uniformity and the Common Law of Federal Taxation*, 66 TAX LAW. 1, 47 (2012) (summarizing the holding in *Drye* and stating “[e]ven though the heir never owned the disclaimed inheritance so far as creditors were concerned under state law, the Court ruled that the Service was entitled to the property in preference to the recipients under the disclaimer”).

Imagine a scenario in which the donee's outstanding tax liability is \$100,000, and the IRS has levied tax liens against the donee's property. If the donor dies leaving \$50,000 to the donee, the law's restraint of rejection is effectively absolute because the IRS can seek satisfaction of the donee's outstanding tax liability up to the full amount of the gifted property regardless of whether the donee accepts or rejects the gift. Under either scenario, the gifted property is subject to the IRS's claims, and the property will benefit neither the donee nor the alternate donee. This result maximizes social welfare because the potential cost imposed on the tax paying public by the donee's decision to disclaim is equal to the amount of the gifted property.

By contrast, if instead of leaving the donee \$50,000, the donor leaves the donee \$200,000, then the donee has a real choice whether to accept or reject a portion of the gift. If the donee accepts the gift, the IRS can seek recourse for the \$100,000 tax liability from the accepted property, but the donee is left with the remaining \$100,000. Likewise, if the donee rejects the gift, the IRS can seek recourse from the property up to the \$100,000 tax liability, but the alternate donee is left with \$100,000 after the IRS exercises its remedies. Thus, the IRS's ability to seek recourse for the donee's outstanding tax liability against gifted property regardless of whether the donee accepts or rejects the gift addresses negative externality concerns, but the donee retains the ability to exercise freedom of inheritance over property above and beyond their tax delinquency. By maintaining the donee's freedom of inheritance in this partially restrained fashion, the law allows the donee to make the decision to accept or reject at least a portion of the gifted property.

Similarly, when the donee is eligible for Medicaid benefits, the law allows the donee to disclaim gifts from the donor's estate, but if the donee does in fact disclaim those gifts, their Medicaid eligibility is calculated as if they accepted the gift.²¹⁷ Thus, like the IRS can seek recourse from disclaimed property owned by someone other than the donee when that property is subject to federal tax liens, disclaimed property that is not owned by the donee can affect the donee's eligibility for Medicaid assistance.²¹⁸ This partial restraint of rejection increases social welfare because it largely leaves the donee's freedom of inheritance in place while at the same time addressing negative externality concerns. Because the donee's Medicaid eligibility is affected regardless of whether the donee accepts or rejects the gift, their decision to disclaim will not require the taxpaying public to

217. See Hirsch, *supra* note 5, at 602–03, *see also supra* notes 101–111 and accompanying text.

218. See *Troy v. Hart*, 116 Md. App. 468, 476–80, 697 A.2d 113, 117–18 (Md. Ct. Spec. App. 1997).

contribute more to fund Medicaid programs.²¹⁹ Moreover, after considering the effect of the gifted property on their Medicaid eligibility, the donee can evaluate whether they or the alternate donee will receive greater utility from gifted property.

In sum, the law's restraints of rejection are not absolute. In the contexts described above, the donee can exercise freedom of inheritance by disclaiming their interest in the donor's estate, but the law places partial restraints of rejection that alter the consequences of the donee's decision. These alterations to the effect of a disclaimer specifically address negative externality concerns, and the donee's freedom of inheritance remains otherwise intact. In this way, partial restraints of rejection maximize social welfare.

B. Absolute Restraints

The limited nature of the law's restraints of rejection stands in stark contrast to the absoluteness of its restraint of acceptance in the context of a murderous donee. As explained previously, the law's primary restraint of acceptance is the slayer rule, which prohibits a donee who intentionally kills the donor from benefiting from the donor's estate.²²⁰ Like the law's restraints of rejection, this restraint of acceptance primarily is designed to minimize negative externalities.²²¹ However, unlike the law's restraints of rejection, the traditional slayer rule is absolute, denying the donee the freedom to accept in all situations in which the donee intentionally kills the donor. Once the absolute character of the slayer rule is recognized, the issue becomes whether an absolute restraint of acceptance can be justified upon externality concerns.

The externalities that the slayer rule attempts to avoid stem from the probable intent of the donor.²²² Although the donor made estate-planning decisions that benefited their killer, the donor might have preferred to benefit others had the donor known that their chosen beneficiary would kill them.²²³ If the donor would have preferred to benefit beneficiaries other than their killer, the killer's exercise of freedom of inheritance by accepting the gift from their victim deprives the donor's intended beneficiaries of a portion of their estate. The deprivation of an intended beneficiary's gift represents a cost of the killer's decision to accept a gift from their victim that is borne by the donor's intended beneficiary.²²⁴ More broadly, by undermining the

219. Even if the donee incorrectly receives Medicaid benefits after a disclaimer, the recipient of the disclaimed property may be liable for reimbursement of the improper benefits received by the donee. See *DUKEMINIER & SITKOFF*, *supra* note 6, at 144–45.

220. See *supra* Section II.A.1.

221. See *supra* Section II.B.3.

222. See *supra* notes 199–202 and accompanying text.

223. See Cohen, *supra* note 140, at 799; Hirsch, *supra* note 13, at 2214.

224. See *supra* notes 201–202 and accompanying text.

donor's freedom of disposition, the donee's decision to accept in this context also imposes costs on society as a whole because the societal benefit of honoring the donor's intent is not realized.²²⁵

Thus, whether the killer's acceptance of a gift from their victim generates negative externalities depends upon the donor's probable intent. If the donor did not intend their killer to take a portion of their estate, then the killer's acceptance of the gift produces negative externalities. Alternatively, if the donor intended to benefit their killer despite the killer's wrongdoing, the killer's acceptance of the gift does not produce negative externalities. Nevertheless, the application of the traditional slayer rule does not depend upon the donor's intent; it simply applies to all situations in which the donee intentionally kills the donor, regardless of what the circumstances suggest about the donor's intent to benefit their killer.²²⁶ Indeed, in the vast majority of states, the slayer rule is absolute, barring the donee from taking even if the donor expressly provides in their will that the donee should take in the event that the donee kills them.²²⁷

Proponents of the mandatory nature of the slayer rule might argue that the vast majority of donors do not want their killers to benefit from their estates, and therefore a broad prohibition of killers taking from their victims is justified. The suggestion that the slayer rule reflects majoritarian preferences is likely correct,²²⁸ but the suggestion that it reflects a universal preference is undoubtedly false. Although they are the exception, some donors likely want to benefit their killers.²²⁹ Yet, under the traditional law, the killer is barred from accepting the gift in all situations, even those

225. See *supra* Section I.A.

226. See *DUKEMINIER & SITKOFF, supra* note 6, at 137.

227. See *id.*

228. See *Simmons, supra* note 77, at 131.

229. See Ryan Konsdorf & Scott Alden Prulhiere, *Killing Your Chances of Inheriting: The Problem with the Application of the Slayer Statute to Cases of Assisted Suicide*, 39 AM. C. TR. & EST. COUNS. L.J. 399, 413 (2013) ("One of the . . . main purposes behind the slayer statute is the presumption that a deceased testator would most likely not wish or intend for the murderous actor to continue to inherit, either by intestacy or by will. This is a logical presumption and one that would seem to apply in most, if not all, cases of a murdered testator. However, this presumption does not hold weight when the factual circumstances of a particular case shift from that of a murder to that of assisted suicide."); Spivack, *supra* note 16, at 160–62 (suggesting situations in which "it seems less than clear that the victim's intent would necessarily be to disinherit the killer," specifically those involving killings between family members). Even if proponents of a mandatory slayer rule concede that some donors intend to benefit their killers, they might still argue that restraint of the killer's freedom of inheritance is warranted because the killer's intended benefit is accelerated. See *Monopoli, supra* note 141, at 275 ("Society does not want to encourage people to kill to accelerate their inheritances."). If the donor does not intend their killer to receive an accelerated benefit, then a restraint of acceptance might be warranted in this context. However, if the donor intends their killer to benefit despite the killer's act of killing, then the donor also likely understands that the killer's benefit is accelerated by the act of killing, and consequently the donor likely also intends the killer to receive the accelerated benefit.

situations that present no negative externality concerns because the donor intends to benefit the killer.²³⁰

Therefore, unlike the law's partial restraints of rejection, which are narrowly tailored to address the problem of negative externalities,²³¹ the traditional slayer rule is overly broad because it restrains the exercise of freedom of inheritance in situations that do not raise negative externality concerns. The overinclusiveness of this live hand restraint is socially detrimental because it forestalls the beneficial exercise of freedom of inheritance in situations in which the donor truly intended to benefit their killer. Thus, although the slayer rule can be explained as preventing a murderous donee from making decisions that generate negative externalities, a closer analysis reveals that this rationale does not justify the rule's universal application and that social welfare might be maximized through reforms that permit a killer to inherit from their victim in some situations.

IV. HARMONIZING RESTRAINTS THROUGH REFORM

This Article's comparative analysis of the law's restraints of acceptance and its restraints of rejection suggests that the slayer rule should not be a mandatory rule that prevents the slayer from taking from their victim's estate in all cases. Instead, it suggests that the slayer rule should be changed from a mandatory rule to a default rule. Because most people would not want their killers to benefit from their estates, the law should presume that slayers are barred from inheriting from their victims.²³² However, no externalities are generated from the slayer's exercise of freedom of inheritance in situations where the victim intended the slayer to exercise such freedom.²³³ Consequently, the rule should not bar inheritance by the slayer when the decedent intended the killer to inherit despite the killer's conduct.²³⁴ Although a social welfare analysis suggests that the slayer rule should be a default rule, questions remain regarding how the law should identify the donor's intent to opt out of the rule's application.

Professor Jeffrey Sherman has proposed one possible method for identifying the donor's intent that their killer should inherit. Specifically, he argued that a killer should take from their victim's estate when objective evidence suggests that the donor's death was the result of a mercy killing.²³⁵ As Professor Sherman summarizes:

230. See DUKEMINIER & SITKOFF, *supra* note 6, at 137.

231. See *supra* Section III.A.

232. See *supra* notes 77–78 and accompanying text.

233. See *supra* Section II.B.3.

234. See *supra* Section III.B.

235. See Sherman, *supra* note 156, at 808 (“In this article, I shall argue that the slayer rule should not be applied in cases of mercy killing or assisted suicide, even if the criminal law continues to regard such actions as unlawful.” (footnote omitted)).

Sometimes killing can be a kindness and death a consummation devoutly to be wished. While the retributive purposes of the criminal law may be well served by continuing to punish mercy killings and assisted suicides, the dispositive purposes of the slayer rule are not well served by applying it in those instances. An exception to the slayer rule should [therefore] be found whenever the slaying was an assisted suicide or was carried out to relieve the suffering of one afflicted with a permanent and incurable illness that would ultimately have caused his death or with a permanent and irreversible incapacity that imposed severe physiological or psychological pain on the victim.²³⁶

In addition to Professor Sherman's proposal that focuses on mercy killings, the slayer statutes in the two states that allow the donor to opt out of the rule provide other possible ways in which the donor's intent can be identified.²³⁷ One of these allows the killer to inherit only under limited circumstances. In particular, Louisiana's slayer rule does not bar the killer from taking if the killer "proves reconciliation with or forgiveness by the decedent."²³⁸ This language would seem to limit a killer's ability to inherit from their victim to situations in which the killer mortally wounds the donor but the donor forgives the beneficiary's conduct prior to death.²³⁹

Wisconsin, the other state that allows a decedent to opt out of the slayer rule, provides two additional methods for identifying the donor's intent.²⁴⁰ First, a killer can inherit from their victim if "[t]he court finds that, under the factual situation created by the killing, the decedent's wishes would best be carried out by means of another disposition of the property."²⁴¹ Second, Wisconsin's slayer rule does not bar a killer from inheriting if the victim "provide[s] in . . . [their] will, . . . that th[e] [rule] does not apply."²⁴² Thus,

236. *See id.* at 874.

237. *See supra* note 75 and accompanying text.

238. LA. CIV. CODE ANN. art. 943 (2018).

239. This scenario is not impossible to imagine. *See Hirsch, supra* note 13, at 2214 ("A mortally wounded testator might linger for a time, and in the aftermath forgive his or her slayer . . ."). The Louisiana rule applies both to completed killings and attempted killings. *See LA. CIV. CODE ANN. art. 941.* Thus, the forgiveness exception might only apply to attempted killings. *See Rhodes, supra* note 87, at 980–81 ("Reconciliation appears to be possible only with cases of attempted murder, where the victim and heir would have the time and opportunity to reconcile after the failed attempt."). However, it is at least arguable that Louisiana's forgiveness exception applies to mercy killings or other scenarios in which the killer consents to the beneficiary's conduct. *See DUKEMINIER & SITKOFF, supra* note 6, at 137 (suggesting that reconciliation or forgiveness "perhaps can be shown by proof of the decedent's consent to the slaying"); Cohen, *supra* note 140, at 799 n.46 (listing Louisiana as a jurisdiction "allowing mercy killers to inherit").

240. *See WIS. STAT. § 854.14(6)* (2018).

241. *Id.* § 854.14(6)(a).

242. *Id.* § 854.14(6)(b). Professor Sherman suggests a similar exception to the slayer rule. *See Sherman, supra* note 156, at 866 ("Suppose a testator's will provides: 'I devise and bequeath my estate to A, even if A should kill me.' . . . [S]uch a testamentary instruction *should* insulate A from

Wisconsin's probate courts can identify the donor's intent to benefit their killer by either looking for an express statement in the donor's will or by considering any extrinsic evidence of the donor's intent.

As Professor Sherman's proposal and the Louisiana and Wisconsin statutes illustrate, a donor's ability to opt out of the slayer rule is broadened or narrowed depending on the type of evidence that a probate court can consider. The narrowest default slayer rule would allow the donor to opt out only by an express provision in their will.²⁴³ Under this approach, the probate court could not look beyond the four corners of the donor's will to identify any intent that the donor's killer should inherit. The broadest default slayer rule would not prescribe how the donor can communicate their intent but would instead allow the probate court to consider any evidence of the donor's intent to opt out of the rule's application.²⁴⁴

Between these two extremes lie methods of identifying the donor's intent to opt out of the slayer rule that require the court to consider specific extrinsic evidence. Louisiana's slayer rule is one example of this middle ground approach in that the killer cannot establish the victim's intent by any and all evidence; instead, the killer must present evidence that specifically establishes forgiveness by or reconciliation with the decedent.²⁴⁵ Likewise, under Sherman's mercy killing exception, the killer inherits only if the donor's intent is established through circumstantial evidence regarding the manner of the donor's death.²⁴⁶ Under both of these approaches, only extrinsic evidence of a specific type can establish the donor's intent to opt out of the slayer rule's operation.

Recognizing that probate courts can consider various types of evidence of the donor's intent leads to the question of which method will maximize social welfare. Two variables should be considered when deciding which method of identifying the donor's intent should be used in the context of the slayer rule: (1) accuracy and (2) efficiency. First, because the law of succession's primary goal is to carry out the donor's intended estate plan, the law should strive to make accurate determinations of that intent.²⁴⁷ A mandatory slayer rule is undoubtedly deficient in this regard because the donor cannot opt out of its application.²⁴⁸ In every case that a donor prefers

the operation of the slayer rule. The rule is founded on our concern for the testator's intent." (footnote omitted)).

243. *See, e.g.*, WIS. STAT. § 854.14(6)(b).

244. *See, e.g., id.* § 854.14(6)(a).

245. *See* LA. CIV. CODE ANN. art. 943 (2018). The comment to this article, however, makes clear that "[t]he measure of sufficient conduct to conclude that reconciliation has occurred or that forgiveness has occurred has been intentionally left to the courts." *Id.* art. 943 cmt.

246. *See* Sherman, *supra* note 156, at 874.

247. *See supra* note 150.

248. *See supra* note 227 and accompanying text.

to benefit their killer, the traditional slayer rule reaches the incorrect outcome.²⁴⁹

Second, the law should strive to make efficient determinations of the donor's intent to opt out of the slayer rule.²⁵⁰ The probate system's task of carrying out the donor's intended estate plan can generate decision costs because when questions arise regarding the donor's intent, they must be litigated. Consequently, the court and interested parties must expend time, money, and effort producing and considering evidence in order to answer these questions.²⁵¹ Social welfare is maximized by a default slayer rule only if the benefits of increased accuracy regarding the donor's intent outweigh the decision costs of making more accurate determinations of intent.²⁵² If the costs of determining the donor's intent to opt out of the slayer rule outweigh the benefit of increased accuracy, then a default rule will not maximize social welfare.

Although the traditional slayer rule does not always result in accurate determinations of the donor's intent,²⁵³ it does minimize the decision costs associated with such determinations. Because the traditional slayer rule is mandatory, the parties need not produce and the probate court will never consider evidence that might suggest the donor intended to opt out of the

249. See *supra* notes 228–230 and accompanying text.

250. See Peter T. Wendel, *Wills Act Compliance and the Harmless Error Approach: Flawed Narrative Equals Flawed Analysis?*, 95 OR. L. REV. 337, 382 (2017) (explaining “that one of the important public policy considerations . . . is . . . the costs of administration associated with ascertaining and giving effect to testator’s intent”); see also Adam J. Hirsch, *Testation and the Mind*, 74 WASH. & LEE L. REV. 285, 367 (2017) (“Like other landscapes, the legal landscape is an environment of scarce resources. The success and even wisdom of a rule depends in no small measure on its frugality.”).

251. See Adam M. Samaha, *Undue Process*, 59 STAN. L. REV. 601, 616 (2006) (“Decision costs’ . . . means any burden, such as a resource expenditure or opportunity cost, associated with reaching decision. This covers time, money, and emotional distress from uncertainty, conflict, worry, and the like. And it reaches everyone who bears these costs, whether public or private actors.” (emphasis omitted) (footnote omitted)); Adrian Vermeule, *Interpretative Choice*, 75 N.Y.U. L. REV. 74, 111 (2000) (“‘Decision costs’ is a broad rubric that might encompass direct (out-of-pocket) costs of litigation to litigants and the judicial bureaucracy, including the costs of supplying judges with information needed to decide the case at hand and formulate doctrines to govern future cases; the opportunity costs of litigation to litigants and judges (that is, the time spent on a case that could be spent on other cases); and the costs to lower courts of implementing and applying doctrines developed at higher levels.”). The emotional cost of probate litigation may be particularly high because the process occurs “during a time when [the parties] are still grieving the loss of a loved one.” Mark Glover, *The Therapeutic Function of Testamentary Formality*, 61 U. KAN. L. REV. 139, 146 (2012).

252. The same type of analysis has been suggested in the context of will-authentication. See James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009, 1033 (1992) (“[W]e should ask . . . whether [a method of will-authentication] promotes the intent of the testator at an acceptable administrative cost.”); Wendel, *supra* note 250, at 390 (“The challenge in creating and applying a Wills Act is how to balance the competing public policy considerations of testator’s intent, costs of administration, and potential for misconduct.”).

253. See *supra* notes 248–249 and accompanying text.

rule.²⁵⁴ Thus, a mandatory slayer rule is relatively easy for probate courts to apply. But again, this does not mean that such a rule maximizes social welfare. As previously explained, a default slayer rule will maximize social welfare if more accurate outcomes regarding the donor's intent to benefit their killer can be reached without generating offsetting decision costs.

Professor Sherman did not expressly frame his analysis of the slayer rule in this way, but he intuitively understood that the different methods by which probate courts can identify the donor's intent might affect social welfare to varying degrees. In particular, when advocating for his proposed mercy killing exception, Professor Sherman rejected Louisiana's approach to the slayer rule because of the difficulties of assessing evidence of forgiveness or reconciliation.²⁵⁵ He explained, "[T]he slayer rule should [not] be disregarded whenever the victim has 'forgiven' the slayer. Evidence of the victim's forgiveness may be too easily manufactured or the forgiveness itself coerced."²⁵⁶ These problems that Professor Sherman identified with an approach to opting out of the slayer rule that focuses on the donor's forgiveness fit squarely within this Article's social welfare framework.

With respect to accuracy, Professor Sherman seems to have recognized that determining the donor's subjective intent is a difficult task. For instance, he suggests that probate courts should not be concerned with the issue of the donor's forgiveness because evidence of this subjective issue has an increased risk of being "manufactured."²⁵⁷ Although Professor Sherman does not fully explain his concerns, the problem could be that any suggestion that the donor spoke forgivingly of their slayer or made any type of sympathetic gesture toward them could be used to establish the donor's forgiveness. As Professor Sherman suggests, this type of evidence could be fabricated with the intent to mislead the probate court, or it could also be innocently introduced but equivocal in nature.²⁵⁸ If probate courts rely on spurious or ambiguous claims of reconciliation, then they will make incorrect determinations of the donor's intent, and social welfare will be decreased because the accuracy of the probate process is diminished.

The difficulty in determining subjective issues of intent, such as whether the donor forgave their killer, is exacerbated by the reality that probate courts are charged with determining the intent of someone who is inevitably dead. Because probate occurs after the donor's death,²⁵⁹ the best evidence of the donor's intent is unavailable, as the donor cannot simply appear in court and

254. See *supra* note 227 and accompanying text.

255. See Sherman, *supra* note 156, at 865–66.

256. *Id.* at 865 (footnote omitted).

257. *Id.*

258. See *id.*

259. In a few states, probate may occur prior to the testator's death. See DUKEMINIER & SITKOFF, *supra* note 6, at 312.

testify regarding what they intended.²⁶⁰ Because the donor is dead, they cannot provide context to the statements or actions that are introduced as evidence of their intent, and as such, there is no assurance that probate courts can accurately make determinations of the donor's subjective intent.²⁶¹

The same criticism that Professor Sherman levied against Louisiana's approach to the slayer rule can be directed toward one of Wisconsin's approaches. Whereas Louisiana directs probate courts to focus solely upon evidence of forgiveness,²⁶² Wisconsin allows courts to consider any and all evidence of the donor's intent to opt out the slayer rule.²⁶³ By expanding the scope of evidence that courts can consider, the Wisconsin approach presents an even greater possibility for ambiguous or manufactured evidence of the donor's subjective intent. With this authority to assess a potentially broad and contradictory collection of evidence, Wisconsin's probate courts might exercise their discretion incorrectly and determine that slayers should inherit when in reality their victims intended them to be barred from taking.

In addition to accuracy, efficiency is the second consideration that should inform how the law identifies the donor's intent to opt out of the slayer rule. As explained above, the task of making accurate determinations of the donor's intent can be costly, as the parties and the court must produce and assess relevant evidence.²⁶⁴ A default slayer rule will maximize social welfare only if the benefits of making accurate determinations of the donor's intent outweigh the costs of making those determinations. While Professor Sherman's critique of Louisiana's forgiveness exception to the slayer rule raises concerns regarding accuracy,²⁶⁵ it also raises efficiency concerns.

In particular, the risk that evidence of forgiveness can be readily manufactured may lead to higher rates of litigation regarding the donor's intent. With the opportunity to present any evidence of the donor's forgiveness, killers might fabricate such evidence, thereby inflating the number of disputes that probate courts must resolve. Similar concerns regarding increased litigation rates arise when one considers Wisconsin's approach that allows probate courts to consider, not just evidence of forgiveness, but any extrinsic evidence of the donor's intent.²⁶⁶ Under this

260. See Sitkoff, *supra* note 4, at 646–47 (“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.” (footnote omitted)).

261. See Hirsch, *supra* note 250, at 287 (“The mind of a testator teems with data, but data that is difficult to access, and assess, without risk of inaccuracy or misrepresentation. Death compounds those risks.”).

262. See LA. CIV. CODE ANN. art. 943 (2018).

263. See WIS. STAT. § 854.14(6)(a) (2018).

264. See *supra* notes 250–252 and accompanying text.

265. See *supra* notes 257–261 and accompanying text.

266. See WIS. STAT. § 854.14(6)(a).

approach, the possibility of increased litigation rates stems not only from the opportunity for manufactured evidence but also from the reality that some legitimate evidence might exist in many cases. Killers would likely present evidence of any stray comment or act by their victim that could conceivably suggest the slayer rule should not apply. By opening the door for courts to consider the donor's subjective intent in these ways, Louisiana's and Wisconsin's approach to the slayer rule run the risk of increasing litigation rates, which in turn raises concerns that a default slayer rule does not maximize social welfare.²⁶⁷

Because of the difficulties of accurately and efficiently deciding issues regarding the donor's subjective intent, the law sometimes directs probate courts to decide objective issues that serve as proxies for the donor's intent.²⁶⁸ For example, the law of most states does not task probate courts with determining whether a donor subjectively intended a particular document to constitute a legally effective will; instead, the conventional law directs courts to consider the objective issue of whether the donor complied with prescribed will-execution formalities.²⁶⁹ Although the particularities of these formalities vary from state to state, they generally require that a will be written, signed by the donor, and attested by two witnesses.²⁷⁰ If the probate court determines that a will complies with these formalities, the law presumes that the donor intended the will to be legally effective,²⁷¹ and if the court decides that the will does not comply, the law presumes that the donor did not intend the will to be legally effective.²⁷² In short, the law substitutes the objective issue of formal compliance for the subjective issue of the donor's intent.²⁷³

267. See Hirsch, *supra* note 250, at 296 ("By calling on courts to judge a testator's volitional state of mind, we would impose on courts an evidentiary burden that raises their decision costs. By barring such evidence, we would lessen those costs.").

268. See generally Hirsch, *supra* note 250; see also *infra* note 276.

269. See Mark Glover, *Minimizing Probate-Error Risk*, 49 U. MICH. J.L. REFORM 335, 337 (2016) ("The classification of a will as authentic or inauthentic is . . . made using indirect evidence of the decedent's intent. Specifically, the law relies upon the decedent's compliance with the formalities of will-execution to serve as an easily recognizable proxy for the intent that a will be legally effective."); Hirsch, *supra* note 250, at 290 ("The essence of a will is testamentary intent. This volitional attribute defines the category, distinguishing wills from other transfers of property. Lawmakers need not, however, rely on a state-of-mind rule to discover intent. The protocols accompanying a transfer could serve as an external standard to determine its character." (footnote omitted)).

270. See DUKEMINIER & SITKOFF, *supra* note 6, at 148–50.

271. See John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 500 (1975) (explaining that the "fundamental requisite[]" of "testamentary intent [is] presumed from due execution").

272. See *id.* at 489 ("[O]nce a formal defect is found, Anglo-American courts . . . conclud[e] that the attempted will fails.").

273. See Kevin Bennardo & Mark Glover, *The Location of Holographic Wills*, 97 N.C. L. REV. 1625, 1649–50 (2019).

This type of substitution, one that replaces a subjective issue of intent with an objective factual issue, simplifies the probate court's task. Whereas deciding issues of testamentary intent are relatively difficult because direct observation of one's subjective intent is impossible,²⁷⁴ and because the testator is unavailable to testify regarding their intent,²⁷⁵ factual determinations are typically easier for probate courts to decide.²⁷⁶ For instance, when a probate court focuses on the testator's compliance with will-execution formalities, they need not consider any and all evidence that might be relevant to the testator's intent that a will be legally effective, but instead the court must simply look to the face of the will and determine the factual issue of whether the will satisfies the formal requirements. This focus, not on subjective intent, but on objective fact, makes the court's task easier,²⁷⁷ and it minimizes the expense of making accurate decisions regarding testamentary intent.²⁷⁸

Again, although Professor Sherman did not expressly frame his mercy killing exception within this Article's framework, he understood the potential benefit of directing courts to consider an objective proxy of the donor's intent, rather than directing the probate court to directly decide the subjective issue of intent. He explains, "The proposed [mercy killing] exception is . . .

274. See Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 656 (1988) (referencing "the impossible search for subjective intent"); Jan Klabbbers, *How to Defeat a Treaty's Object and Purpose Pending Entry Into Force: Toward Manifest Intent*, 34 VAND. J. TRANSNAT'L L. 283, 303 (2001) ("[A]s a philosophical truism, it may be well-nigh 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.").

275. See *supra* note 260 and accompanying text.

276. See Hirsch, *supra* note 250, at 363–64 ("Thoughts cost more than a proverbial penny, but so too do other items of evidence. Lawmakers can compare recourse to an external standard with a related state-of-mind rule and decide which provides greater value (i.e., accuracy) for money. . . . When might we expect a state-of-mind rule to prove comparatively efficient? The question could hinge on the scope of the factual inquiry required to carry out objective policy. Where that inquiry is narrow, an external standard becomes more reliable and cheaper to apply.").

277. See Langbein, *supra* note 271, at 494 ("Compliance with the Wills Act formalities for executing witnessed wills results in considerable uniformity in the organization, language, and content of most wills. Courts are seldom left to puzzle whether the document was meant to be a will." (footnote omitted)); James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 544 (1990) ("[F]ormalities channel almost all wills into the same patterns, letting well-counseled testators know what they must do to execute a valid will, reducing the administrative costs of determining which documents are wills, and thus increasing the reliability of our system of testation."); see also Mark Glover, *Decoupling the Law of Will-Execution*, 88 ST. JOHN'S L. REV. 597, 630 (2014) ("This standardization is a product of the strict compliance requirement, which requires the court to indiscriminately invalidate all formally deficient documents.").

278. See Hirsch, *supra* note 129, at 804 ("In economic terms, . . . we can justify the imposition of expensive formalities on parties as functioning to avoid spillover costs—internalizing the negative externality created by state-supported construction proceedings for transfers formulated in ambiguous ways."); David Horton, *Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism*, 58 B.C. L. REV. 539, 577 (2017) ("[T]he need to prevent spillover costs—not the desire to carry out the decedent's intent—furnishes the most forceful reasons to take the Wills Act at its letter.").

confined to cases where the inference of the victim's consent may to some extent be *objectively substantiated*, either by the victim's physical condition prior to the homicide or by the fact that the victim was the agent of her own destruction."²⁷⁹ By turning the court's focus to the objective fact of the donor's physical condition prior to death, Professor Sherman's mercy killing exception removes from the court's purview the potentially broad and contradictory set of evidence that could bear on the issue of the donor's subjective intent.²⁸⁰ In doing so, Professor Sherman steers probate courts to questions that they can more easily and more accurately answer.

Although the objective nature of Professor Sherman's mercy killing exception should provide policymakers some assurance that such a default slayer rule would increase social welfare, his proposal does raise one concern that Louisiana's default slayer rule does not. In particular, there might be questions regarding the link between the objective issue of the donor's condition prior to the killing and the subjective issue of the donor's intent to benefit their killer. Whereas there is a clear connection between a donor's forgiveness of their killer and their intent that their killer inherit, it is not as clear that a donor who is suffering from an incurable terminal illness or is permanently incapacitated would want their killer to inherit. It is reasonable to assume that some, if not most, donors in these situations would want their killers to inherit but not necessarily all. Professor Sherman's mercy killing exception, therefore, might result in a probate court correctly determining that the donor's death was the result of a mercy killing, while at the same time incorrectly determining that the donor intended their killer to inherit. This possibility for incorrect determinations of the donor's intent to opt out of the slayer rule raises concerns that a mercy killing exception might not increase social welfare.

While Professor Sherman's mercy killing exception raises some uncertainty regarding whether it will increase social welfare, Wisconsin's second approach to the slayer rule almost certainly results in a net societal benefit. As described above, Wisconsin allows a donor to opt out of the slayer rule by expressly stating their intent to do so in their will.²⁸¹ If the court identifies an explicit statement in the donor's will that the slayer rule should not apply, then there is little uncertainty regarding the donor's intent, and as such, policymakers should have confidence that such a default slayer

279. Sherman, *supra* note 156, at 865–66 (emphasis added).

280. While Sherman's proposal does not focus on the subjective intent of the donor to benefit their killer, it does turn the court's attention to the subjective intent of the killer. Specifically, the mercy killing exception would allow a killer to inherit only "if the killer proves . . . that he killed the decedent with the *intention* of relieving the decedent's suffering." *Id.* at 875 (emphasis added). This aspect of the mercy killing exception could raise concerns regarding the court's ability to accurately and efficiently determine the killer's motive.

281. *See* WIS. STAT. § 854.14(6)(b) (2018).

rule will produce accurate outcomes.²⁸² Moreover, from an efficiency standpoint, there is little concern that an express statement exception to the slayer rule will generate significant decision costs because the court is not authorized to consider extrinsic evidence of the donor's intent. Either the will contains a provision that expressly opts out of the slayer rule, or it does not.²⁸³ Litigation rates regarding the donor's intent would therefore likely not increase under this type of default slayer rule.²⁸⁴

Because an express statement exception to the slayer rule would result in more accurate determinations of the donor's intent while not significantly increasing the costs of identifying that intent, policymakers around the country should follow the lead of their Wisconsin counterparts and transform the traditional mandatory slayer rule into a default rule from which the donor can expressly opt out. Allowing a donor to expressly opt out of the slayer rule's application through a testamentary provision would facilitate the exercise of freedom of disposition and increase social welfare. However, whether policymakers should adopt Professor Sherman's mercy killing exception or Wisconsin's alternative approach that allows the court to consider extrinsic evidence of the donor's intent is unclear because difficult theoretical and empirical questions remain regarding the accuracy and efficiency of such approaches.

V. CONCLUSION

Although the law grants donees broad freedom to accept or reject inheritances,²⁸⁵ it restricts this freedom in various ways. Indeed, the law restrains the donee's ability to reject a gift under some scenarios,²⁸⁶ and it restrains their ability to accept a gift under others.²⁸⁷ A social welfare analysis suggests that these restraints, whether of rejection or acceptance, are

282. This is the rationale for the law's general directive that courts should identify the testator's intent by attributing the plain meaning to a will's words. See *Tinnin v. First United Bank of Miss.*, 502 So. 2d 659, 663 (Miss. 1987) ("The surest guide to testamentary intent is the wording employed by the maker of the will."); Champine, *supra* note 25, at 401 (explaining that the plain meaning rule "offers predictability to all testators, assuring them that their wishes, if expressed unambiguously, will be respected").

283. In some situations, a provision in a will might be ambiguous regarding whether the testator intended to opt out of the slayer rule. If policymakers consider this to be a legitimate concern, the law could require the testator to expressly reference the statutory provision authorizing them to opt out of the slayer rule's application. Indeed, this is the approach authorized in Wisconsin. See WIS. STAT. § 854.14(6)(b).

284. While there might not be significant increases in litigation rates regarding the meaning of the testator's expressed intent, there might be concern that a default slayer rule would increase claims of fraud, duress, and undue influence. This concern might be particularly acute if the testator executes their will very close to death. See Mark Glover, *The Timing of Testation*, 107 KY. L.J. 221, 244–48 (2019); Hirsch, *supra* note 129, at 845.

285. See *supra* Section I.B.

286. See *supra* Section II.A.2.

287. See *supra* Section II.A.1.

primarily founded upon the concern that the donee's exercise of freedom of inheritance will impose costs on others that the donee likely does not take into account when making their decision to accept or reject a gift.²⁸⁸ In these situations, the donee's exercise of freedom of inheritance might not be socially beneficial, and, consequently, the law restricts the donee's decision-making capacity.

Furthermore, a comparative analysis of the law's two types of live hand restraints reveals that the law's restraints of rejection are narrowly tailored to minimize negative externalities, while keeping the donee's freedom of inheritance largely intact.²⁸⁹ By contrast, the law's primary restraint of acceptance, namely the slayer rule, is overly broad and restricts the donee's freedom of inheritance even in situations that do not raise externality concerns.²⁹⁰ Based on this analysis, reform of the slayer rule is needed in order to harmonize the law's restraints of live hand control and to ensure that social welfare is maximized through the disposition of property upon death.²⁹¹

288. *See supra* Section II.B.

289. *See supra* Part III.

290. *See supra* Part III.

291. *See supra* Part IV.