THE SLAYER RULE

NILI COHEN*

I. A TIMELESS AND UNIVERSAL DILEMMA

The slayer rule is the subject of the detailed and thoughtful section 45 of the *Restatement (Third) of Restitution and Unjust Enrichment*, which states, "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."[1] The slayer rule is no stranger to the Restatement project. It is covered also by section 8 of the *Restatement (Third) of Property: Wills and Other Donative Transfers*, with some differences.[2] This

* Benno Gitter Chair for Comparative Contract Law, Tel-Aviv University, Faculty of Law. I am grateful to Andrew Kull for his excellent remarks and to the Beverly and Raymond Sackler Fund for Human Rights in Private Law for their wonderful support. I thank Ashley Siegel and the editors of the *Boston University Law Review* for their excellent editorial assistance.

[1] RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 45(2) (2011).

[2] *See* RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.4 (2003). The most significant difference relates to the problem of survivorship. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.4 cmt. l adopted the rule in the UNIFORM PROBATE CODE § 2-803, which provides that the slaying severs the co-tenancy and the killer and the victim's estate each own a half-interest in the property. Under the *Restatement (Third) of Restitution and Unjust Enrichment* rule, the whole property belongs to the estate of the victim subject to the slayer's preexisting life interest in one half. RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 45 cmt. h. For support of the *Restatement (Third)*, see Doug Rendleman, *Restating Restitution:*

now universal principle has stirred a lively legal discussion. The still vivid discussion currently is focused not on the very recognition of the principle, but rather on its scope, and it revolves around several partially overlapping tensions: law and morality; text and context; rules and standards; public and private; civil and criminal liability; courts and legislators.

II. TWO BIBLICAL STORIES – TO KILL AND INHERIT

The problem is timeless and universal, as exemplified by two biblical stories: the story of David and Bat-Sheba[3] and the story of Naboth's vineyard, which gave birth to the expression "to kill and inherit."[4] In the first story King David desired Bat-Sheba and brought about the death of her husband Uriah in battle.[5] Later David married Bat-Sheba.[6] In the second, no less dramatic, story King Ahab desired Naboth's vineyard, but upon Naboth's refusal to sell his patrimony, a false trial (orchestrated by Queen Jezebel) was arranged. Naboth was convicted of heresy and executed, and the vineyard passed to the king as a legal heir.[7]

From a moral point of view, both kings were grave sinners and should not have reaped the fruits of their crimes. In practice, however, both retained the profits of their crime: David kept Bat-Sheba, Ahab the vineyard.[8]

Nowadays the slayer rule is regarded as universal and applies in almost every known system of law, but these stories served as precedents for the rejection of its application in Jewish law. Being an heir was conceived as a status which could not be denied.[9] Practically, the slayer could not benefit

The Restatement Process and Its Critics, 65 WASH. & LEE L. REV. 933, 937-939 (2008). In the same vein, see Kathleen Reilly, Note, *Making a Killing in Real Estate: Solving the Mystery of Murder's Effect on Tenancy by the Entirety in New York – A Legislative Solution*, 82 ST. JOHN'S L. REV. 1203, 1208-17 (2008).

[3] 2 *Samuel* 11:12.

[4] 1 *Kings* 21:19.

[5] 2 *Samuel* 11:14-17.

[6] 2 *Samuel* 11:27. Nathan the prophet reprimanded him: "You have smitten Uriah the Hittite with the sword, and have taken his wife to be your wife." 2 *Samuel* 12:9.

[7] 1 *Kings* 21:13-16. Compare the doctrine of attainder under which the property of a criminal convicted for a capital offense, including murder, was forfeited to the king. Alison Reppy, *The Slayer's Bounty – History of Problem in Anglo-American Law*, 19 N.Y.U. L.Q. REV. 229, 231-33 (1942). The doctrine of attainder was abolished in the American constitution. U.S. CONST. art. I, § 9, cl. 3; *id.* art. III, § 3, cl. 2. Robert F. Hennessy, *Property – The Limits of Equity: Forfeiture, Double Jeopardy, and the Massachusetts "Slayer Statute,"* 31 W. NEW. ENG. L. REV. 159, 162-65 (2009). Ideological traits of the rule of attainder can be found in modern laws of forfeiture.

[8] 2 *Samuel* 12:11-13; 1 *Kings* 21:29; *see* DANIEL FRIEDMANN, TO KILL AND TAKE POSSESSION 75-107 (2002).

[9] JOSEPH RIVLIN, SUCCESSION AND WILL IN JEWISH LAW 121, 123, 125 (1999) (Hebrew).

from the inheritance. He might in fact be executed or imprisoned.[10] But his status and line of inheritance were not impaired: his children succeeded him.[11]

III. *RIGGS V. PALMER* – TO KILL AND DISINHERIT

The Israeli Law of Succession rejected that approach and adopted an expanded version of the slayer rule.[12] But the rule of Jewish law reflected in the biblical stories is a reminder of the ideological debate that predated the adoption of the slayer rule in American law. That debate was dramatically exposed in the famous case of *Riggs v. Palmer*,[13] which ignited the legal imagination and served as probably the most conspicuous example of the dilemma of the limits of law, the tension between law and morality, and the relations between statutory law and case law.[14]

In *Riggs*, a grandfather was poisoned to death by his sixteen-year-old grandson, who was nominated as heir in the grandfather's will.[15] The murder was designed to prevent the grandfather from changing his will.[16] Under the New York probate statute, an heir named in the will was to succeed the testator.[17] The claim to disinherit the grandson failed in the first instance, following the strict statutory rule.[18] The appellate court was divided and eventually reversed the decision.[19] The minority stated that to disinherit would be overstepping the bounds of a proper judicial role and imposing upon the

[10] *Id.* at 122.

[11] Jewish law allows the imposition of monetary sanctions on the murderous heir, but his status as heir is not thereby challenged. *Id.* at 120-27.

[12] Section 5 of the Law of Succession states as follows:

(a) The following are incapable of succeeding the deceased:

(1) A person who has been convicted of intentionally causing or attempting to cause the death of the deceased;

(2) A person who has been convicted of concealing, destroying or forging the last will of the deceased, or of claiming under a forged will.

(b) A person who has been convicted of attempting to cause the death of the deceased but has been forgiven by the deceased in writing or by making of a will in his favor, again becomes capable of succeeding the deceased.

Law of Succession, 5725-1965, SH No. 446, § 5 (Isr.); *see also* Israeli Insurance Law, 5741-1981, SH No. 1005, § 26, 102 (Isr.) ("If the incident of insurance was intentionally caused by the insured or beneficiary, the insurer is exempt from liability.").

[13] 22 N.E. 188, 189 (N.Y. 1889).

[14] HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 68-102 (1994).

[15] *Riggs*, 22 N.E. at 188-89.

[16] *Id.*

[17] *Id.*

[18] *Id.* at 189-91. For a similar approach in cases that preceded *Riggs* and cases decided after *Riggs*, see Hennessy, *supra* note 7, at 165-66, 168.

[19] *Riggs*, 22 N.E. at 191.

heir a punishment not authorized by law.[20] The majority held that allowing the murderer to inherit was inconceivable; all laws as well as all contracts are governed by fundamental maxims of the common law under which "[n]o one shall be permitted to . . . take advantage of his own wrong, or to . . . acquire property by his own crime."[21] Rejecting the view that disinheritance was punishment, and supported by a case disqualifying a murderous beneficiary under an insurance contract,[22] the majority ruled the grandson was barred from inheriting from his grandfather.[23]

In *The Nature of the Judicial Process*, Benjamin Cardozo remarks that *Riggs*, demonstrates three principles: first, full approval is to be given to the will in conformity with the law; second, civil courts are not empowered to impose criminal sanctions; third, a person may not be allowed to benefit from his own wrong.[24] The first two principles formed the basis of the minority view (and that of Jewish law); the last principle formed the basis of the now prevailing majority view disinheriting the slayer.[25] Social justice was hence considered of greater value than the preservation of property.[26]

In an attempt to somewhat reconcile the conflicting policies, an intermediate approach was adopted and presented in *Restatement of Restitution: Quasi Contracts and Constructive Trusts*.[27] This approach, which led to the same result as the slayer rule, formally approved the legal title of the murderous heir (preservation of the slayer's property) but made the property subject to constructive trust for those entitled to it (denial of the slayer's beneficial interest).[28]

[20] *Id.* at 191-93 (Gray, J., dissenting).

[21] *Id.* at 190 (majority opinion).

[22] New York Mut. Life Ins. Co. v. Armstrong, 117 U.S. 591, 600 (1886) (deciding the case solely on contractual common law).

[23] *Riggs*, 22 N.E. at 190. For the argument that the impact of *Riggs* was inspirational and was not followed by the majority of courts, see Gregory C. Blackwell, Comment, *Property: Creating a Slayer Statute Oklahomans Can Live With*, 57 OKLA. L. REV. 143, 148 (2004).

[24] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 40-41 (1949); Kim Lane Scheppele, *Facing Facts in Legal Interpretation*, *in* LAW AND THE ORDER OF CULTURE 47-48 (Robert Post ed., 1991).

[25] CARDOZO, *supra* note 24, at 41.

[26] *Id.*

[27] RESTATEMENT OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS §§ 187-89 (1937).

[28] RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 45 reporter's note cmt. c (2011); RESTATEMENT OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS §§ 187-89; *see also* John W. Wade, *Acquisition of Property by Willfully Killing Another – A Statutory Solution*, 49 HARV. L. REV. 715, 715-20 (1936). The current approach of the RESTATEMENT (THIRD) is the immediate denial of the slayer's property. *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 45 reporter's note cmt. c.

The nature of the principle behind the slayer rule – moral or legal, external or internal – has stirred a lively debate. For Hart, the principle that a slayer cannot reap the fruits of his crime is external to the law and serves as a vehicle for filling a lacuna in the law.[29] The judge acts as a legislator to create a new norm.[30] For Ronald Dworkin, this principle, though unwritten, is embedded in law and serves as an interpretive tool within the inherent discretion exercised by courts.[31]

The theoretical-normative ground of the rule is controversial, but the rule itself is not. It has been legislated in most U.S. jurisdictions and in the few others it has been applied by common-law doctrines.[32] The slayer rule has long been adopted in European codes.[33] It applies to any grant *mortis causa* by virtue of succession, wills, survivorship rights, pension plans, or life insurance. Some jurisdictions have expanded it to cases such as forgery of a will by an heir.[34] The current debate is not concerned with the existence of the slayer rule, but with its boundaries. The basic tensions encountered in its application – text and context, rules and standards, courts and legislators, civil and criminal liability, public and private – have not dissipated; they still accompany the development of the rule. I will explore this first in relation to the two theoretical underpinnings of the rule that represent the public-private and the civil-criminal dichotomy: public policy and autonomy.

IV. PUBLIC POLICY – CIVIL AND CRIMINAL SANCTIONS

The rationale of the slayer rule lies in the principle that no one shall take advantage of his own wrong. Is there a sound basis for the fear of double jeopardy raised as an objection to the rule?[35] The majority in *Riggs* clearly

[29] Hart, *supra* note 14, at 68-102.

[30] *Id.* at 132.

[31] RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 28-29 (1978). For further analysis, see Daniel A. Farber, *Courts, Statutes and Public Policy: The Case of the Murderous Heir*, 53 S.M.U. L. REV. 31, 32 (2000) (analyzing *Riggs* in the context of the Hart and Dworkin debate).

[32] The rule is currently found in forty-eight states and also in the UNIFORM PROBATE CODE § 2-803 (2006). *See* Anne-Marie Rhodes, *Consequences of Heirs' Misconduct: Moving from Rules to Discretion*, 33 OHIO N.U. L. REV. 975, 980 (2007).

[33] In Germany, see BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Jan. 2, 2002, BUNDESGESETZBLATT [BGBL.] I p. 42, 2909; 2003 I p. 738, as amended, § 2339, para. 1, sentence 1 (Ger.); in France, see CODE CIVIL [C. CIV.] art. 727 (Fr.). English law has transformed the common-law slayer rule stated in *Cleaver v. Mut. Reserve Fund Life Ass'n.*, [1892] 1 Q.B. 147 (A.C.) at 151-52 (Eng.), into a statutory provision in the Forfeiture Act, 1982, c. 34 (Eng.). *See* 1 W. J. WILLIAMS, WILLIAMS ON WILLS 102-10 (Christopher Sherrin et al. eds., 9th ed. 2008); Nicola Peart, *Reforming the Forfeiture Rule: Comparing New Zealand, England and Australia*, 31 COMM. L. WORLD REV. 1, 5-7 (2002).

[34] *See, e.g.*, Law of Succession, 1965, SH No. 446, § 5(a)(2) (Isr.); *cf. infra* note 62 and accompanying text.

[35] *See* Riggs v. Palmer, 22 N.E. 188, 193 (N.Y. 1889).

stated that its decision "does not inflict . . . any greater or other punishment for his crime than the law specifies. It takes from him no property, but simply holds that he shall not acquire property by his crime . . . ."[36] But this could hardly be reconciled with the rule that the slayer takes property subject to constructive trust.[37]

Exposing a criminal to double sanctions in criminal and civil law is common. A thief is subject not only to punitive sanctions for the theft but also to civil liability for conversion. Yet the case of the murderous heir is different. The issue is not the civil liability of the heir for the deadly assault, but the denial of an existing right the heir has in the patrimony of the victim (though the testator might have divested him). Yet no doubt the sanction is fully justifiable: the slayer illegally predated the accrual of his right and violated the victim's right to enjoy the victim's property and to control its transfer. And though the property issue is incidental to the bodily injury, from the point of view of the murderer the proprietary element is primary.[38]

The forfeiture of the heir's property is thus a sanction on the borderline between private civil law and public criminal law.[39] Historically the slayer rule has converted the public sanction of attainder, where the property was forfeited by the state, into a private forfeiture, but the criminal-public attributes are salient.[40] 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.[41]

Disinheriting the victim is not only a proper sanction based upon a universal moral sentiment that the sinner should not benefit from his sin but also a partial correction of the loss caused to the victim (though obviously the estate can bring an independent civil claim for the damages directly caused by the deadly assault). These considerations of corrective and retributive justice are accompanied by ideas of distributive justice, which I shall now discuss.

[36] *Id.* at 190.

[37] RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 45 cmt. c (2011); RESTATEMENT OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS §§ 187-89 (1937); *see supra* note 28 and accompanying text.

[38] Mary Louise Fellows, *The Slayer Rule: Not Solely a Matter of Equity*, 71 IOWA L. REV. 489, 493-94 (1986).

[39] The relations between criminal and civil sanctions are not dealt with by the *Restatement (Third) of Restitution and Unjust Enrichment*, which refers to the RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.4(b) cmts. d-h (2003). *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 45 cmt. a (citing DWORKIN, *supra* note 31, at 28-29).

[40] Hennessy, *supra* note 7, at 163-65; Reppy, *supra* note 7, at 231-33 (explaining the development of attainder in England).

[41] Kuren J. Sneddon, *Should Cain's Children Inherit Abel's Property?: Wading into the Extended Slayer Rule Quagmire*, 76 UMKC L. REV. 101, 102-03 (2007).

V. AUTONOMY – THE TESTATOR'S PRESUMED INTENTION

The murderer's illegal act creates an extreme change of circumstances regarding the order of succession.[42] The testator's intention to benefit the slayer, as reflected in the will (or by the legislative provision which she presumably adopted), now seems detached from reality. Another distribution of assets is needed. It is highly conceivable that if the testator had been asked, she would have expressed an absolute objection to being succeeded by her murderer and would have disinherited him (though it is not clear who would have been the substitute heir). This presumed intention stems from the sense of contempt and aversion towards the heir's conduct, and apparently it represents the real intention of most testators, had it been possible to ask them.

But is autonomy subject to public policy? The question arises in cases where the presumed, or even the real, intention of the victim is not to divest the slayer. These are some of the intriguing questions: Could the testator forgive the slayer before her death?[43] What about mercy killing, in particular where the testator expressly pronounced her wish to benefit the mercy killer?[44] Under the Israeli Succession Law, forgiveness in writing by the testator operates only when the heir has been convicted of attempting to cause her death, not otherwise.[45] Forgiveness in the case of mercy killing raises doubts as to the proper application of the rule from considerations of both public policy and autonomy.[46] This raises the recurring theme in statutory interpretation, namely over- and under-inclusion and the dilemma of rules and standards.

VI. TEXT: OVER- AND UNDER-INCLUSION

The slayer rule has numerous legislative versions. The guideline of the *Restatement (Third) of Restitution and Unjust Enrichment* with regard to the relation to statutory law is the following: "Except to the extent that a local

[42] For the general question of change of circumstances and its impact on the testator's will, see Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609, 620-24 (2009) (explaining that the slayer rule is not always compatible with the testator's intention and that legislators should base their regulation regarding possible will amendments on empirical data).

[43] For an argument that public policy calls for disinheritance even where the deceased wished to forgive the slayer, see Andrew Simester, *Unworthy but Forgiven Heirs*, 10 EST. & TR. J. 217, 225-20 (1990-1991).

[44] *See* Rhodes, *supra* note 32, at 980-981.

[45] Law of Succession, 5725-1965, SH No. 446, § 5(a)(1) (Isr.).

[46] For systems allowing mercy killers to inherit, see LA. CIV. CODE ANN. arts. 941, 943, 945 (1999), and BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Jan. 2, 2002, BUNDESGESETZBLATT [BGBL.] I p. 42, 2909; 2003 I p. 738, as amended, § 2343, para. 1, sentence 1 (Ger.). In Wisconsin, the judge is given discretion according to the deceased's wishes. WIS. STAT. ANN. § 854.14(6)(a)(b) (West 2007); *see* Adam J. Hirsch, *Freedom of Testation / Freedom of Contract*, 95 MINN. L. REV. 2180, 2213-15 (2011).

statute dictates a different result, every form of enrichment by homicide is subject to the rule of the present section."[47]

Section 45(1) of the *Restatement (Third)* states a rule of civil (not criminal) law based on the preponderance of the evidence.[48] Some states (including Israel)[49] require conviction of the slayer. The requirement for conviction guarantees security and reliance,[50] but it raises difficulties: Should we allow a person who was criminally acquitted to inherit the testator, even though in the civil proceeding it was decided that that person had intentionally committed the act?[51] Is a slayer who committed suicide after the slaying entitled to inherit? What would be the case with one that cannot stand trial because of insanity[52] or infancy?[53] Should a slayer inherit his victim following a plea bargain, under which he was convicted of a minor charge? What about a criminal who flees to a country with which there is no extradition treaty? The policies behind criminal law are not always compatible with those of the law of inheritance; apparently the victim's presumed intention would not support the slayer's right to inherit in these cases.

The *Restatement (Third)* avoided these dilemmas by dismissing the requirement for criminal conviction, but doubts still remain.[54] Take the case where the slayer successfully claims self-defense. Under *Restatement (Third)*, the slayer inherits (as relying on "legal excuse or justification").[55] But could one not infer that following a deadly battle between the two, the victim would have changed the entitlement of this heir?[56]

[47] RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 45 cmt. b (2011).

[48] *Id.*

[49] Not in the insurance context. Israeli Insurance Law, § 26, 5741-1981, SH No. 1005 p. 102 (Isr.).

[50] And reduces the risk of payors. *See* Alissa Macomber, *To Pay or Not to Pay: The Nevada Slayer Statute and the Insurance Companies' Dilemma*, 9 NEV. L.J. 475, 484 (2009).

[51] *See* Gareth Jones, *Stripping a Criminal of the Profits of Crime*, 1 THEORETICAL INQ. L. 59, 66 n.36 (2000) (presenting Gray v. Barr, [1971] 2 Q.B. 554 (A.C.) (Eng.), where, notwithstanding the criminal acquittal, it was held that the murder could be proved in the civil proceeding).

[52] Peter Arant, In Re Ests. of Swansons: *The Slayer Statute and the Impact of a Guilty Plea on Collateral Estoppel in Montana*, 71 MONT. L. REV. 217, 217 (2010) (analyzing *In re* Estates of Swansons, 187 P.3d 631 (Mont. 2008), which recognized the right of an insane mother who had killed her children to inherit them). For the various approaches in U.S. states, see Sara M. Gregory, *Paved with Good 'Intentions': The Latent Ambiguities in New Jersey's Slayer Statute*, 62 RUTGERS L. REV. 821, 837-40 (2010).

[53] For a flexible interpretation, see *In re Estates of Josephson*, 297 N.W.2d 444, 448-49 (N.D. 1980) (holding that the North Dakota slayer statute bars inheritance by a child too young to be prosecuted for a felony).

[54] RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 45(1) (2011).

[55] *Id.*

[56] See Hirsch, *supra* note 42, at 622.

The nature of the criminal offenses subject to disinheritance has been expanded since the *Restatement of Restitution: Quasi Contracts and Constructive Trusts* (murder only),[57] but some doubts remain: Unintentional killing is outside the scope of the rule, but what about assisted suicide[58] and mercy killing? Why limit the rule to homicide? Is it reasonable to recognize the right of an heir who assaulted the testator, thereby seriously injuring the testator?[59] And what about an heir who neglected taking care of the testator?

These gray areas are always coupled with the risk of uncertainty, raising the dilemma whether to replace strict rules with court discretion.[60] In the succession arena, where certainty is of paramount importance, legislating through the operation of court discretion is undesirable. Yet in some cases, such as mercy killings, it might be justifiable to leave some room for discretion within the legislative provisions.[61] One option some legislatures have embraced is to expand the rule to other categories, such as forging a will or incapacitating the testator.[62]

[57] RESTATEMENT OF RESTITUTION: QUASI CONTRACTS AND CONSTRUCTIVE TRUSTS §§ 187-89 (1937).

[58] For a critical review of the approach under which assisted suicide is not subject to the slayer rule, see Matthew Barry Reisig, *O to A, for Helping Kill O: Wisconsin's Decision Not to Bar Inheritance to Individuals Who Assist a Decedent in Suicide*, 17 AM. U. J. GENDER SOC. POL'Y & L. 785, 786-87 (2009).

[59] In Oregon, a beneficiary convicted of physically or financially abusing the testator is barred if the testator dies within five years of the conviction. OR. REV. STAT. ANN. §§ 112.455(1), 112.455(2)(b), 112.465(1) (West 2011).

[60] The guidance of the *Restatement (Third) of Restitution and Unjust Enrichment* with regard to statutory law is the following: "If a case is not covered by a particular statute, it must not be supposed that the enrichment of the slayer is therefore to be allowed. Except to the extent that a local statute dictates a different result, every form of enrichment by homicide is subject to the rule of the present section." RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 45 cmt. b.

[61] Under English law, courts have discretion to modify the effect of forfeiture, but not in a case of murder. Forfeiture Act, 1982, c. 34, §§ 2(3), 5 (Eng.); Jones, *supra* note 51, at 66.

[62] *See* Law of Succession, 5725-1965, SH No. 446, § 5(a)(2) (Isr.). Additional categories of disinheritance are the following: the heir filed a malicious criminal prosecution against the testator, *see* CODE CIVIL [C. CIV.] art. 727(3) (Fr.); abstained from notifying the authorities who caused the death of the testator, *see id.* art. 727(4); has put the deceased in a state as a result of which he was incapable until his death of making a disposition *mortis causa*, or prevented the deceased from making or revoking a disposition *mortis causa*, *see* BÜRGERLICHES GESETZBUCH [BGB] [CIVIL CODE], Jan. 2, 2002, BUNDESGESETZBLATT [BGBL.] I p. 42, 2909; 2003 I p. 738, as amended, § 2339, para. 1, sentence 2 (Ger.).

VII. EXPANDING THE RULE

A. *Example – Undeserved Heir*

The slayer rule is historically and normatively connected with homicide. Some proposals call for expanding the grounds for disinheritance and applying them to abusive heirs.[63]

The Israeli case *Kenig v. Cohen*[64] might serve as an illustration. After leaving several notes, a woman committed suicide by jumping from the top floor of a building with her child.[65] In one of the notes, she wrote that she was committing suicide because she could not obtain a divorce and saw no way out.[66] In another note she explained that she was taking her daughter because her husband would not leave the child in peace.[67] In a different note, she asked that her husband not be permitted to participate in the funeral.[68] In a note entitled as "will," she wrote that her property should go to her brothers.[69] The court assumed that this note (like all the others) was authentic and written by the woman but nevertheless could not be regarded as a valid will because, bearing no signature or date, it did not comply with the formal requirements set by the Israeli Law of Succession.[70] As a result, even though the wife's intention was to disinherit the husband, the latter did in fact inherit as her legal heir. From the wife's point of view, her suicide was a direct consequence of the husband's conduct towards her, but now despite her clear intention he has inherited her.

Like the issues raised by the slayer rule, this case also exemplifies the dilemmas of law and morality, form and substance, courts and legislators, rules and standards. In *Kenig*, the majority gave precedence to the legislative provision, to the formal rule, and to the value of certainty, holding that the note could not be considered a will.[71] The minority ruled the note constituted a valid will, thereby granting precedence to morality, substance, and the testator's autonomy.[72]

[63] *See* OR. REV. STAT. ANN. §§ 112.455(1), 112.455(2)(b), 112.465(1) (West 2011).

[64] CA 86/79, 35 PD(1) 176 (1980); FH 40/80, 36 PD(3) 701 (1982) (Isr.).

[65] *Id.* at 706.

[66] *Id.*

[67] *Id.*

[68] *Id.*

[69] *Id.*

[70] Later on, the Law of Succession, 5725-1965, SH No. 446 p. 204 (Isr.), was amended to enable the court to validate such a defective will.

[71] *Kenig*, 36 PD(3) at 714-715 (Levin, J.), 729 (Beisky, J.), 743 (Landau, J.).

[72] *Id.* at 715ff (Barak, J., dissenting). Another view gave effect to the note as a deathbed will. *Id.* at 729ff (Elon, J., dissenting,). For a critical discussion favoring the minority decision, see Celia Wasserstein Fassberg, *Form and Formalism: A Case Study*, 31 AM. J. COMP. L. 627, 635 (1983), and John H. Langbein, *Excusing Harmless Errors in the Execution of Wills: A Report on Australia's Tranquil Revolution in Probate Law*, 87 COLUM. L. REV. 1, 49-50 (1987).

Though the factual and legal dilemmas of the slayer rule and *Kenig* bear a resemblance, there are striking differences between the two. As emphasized above, two factors play a decisive role in shaping the slayer rule: public policy and autonomy. With regard to public policy, *Kenig* is far weaker: with all due sympathy to the wife, it seems far-fetched to legally attribute her death to the husband. But with regard to autonomy and the testator's intention, *Kenig* is much stronger: whereas in a regular case of the slayer rule hypothetical intention serves as a ground for disinheritance, the assumption in *Kenig* was that the wife's actual intention was to disinherit her estranged husband.[73] The majority decision thus created a gap between certainty and truth which could not be rectified by resorting to other doctrines of incapacitating heirs, such as the slayer rule.

B. *Intervention vs. Non-Intervention in Domestic Affairs*

The ensuing question, then, is what direction should the slayer rule take? Should abusive spouses be disinherited? Recent proposals have sought to enlarge the scope of the rule, free it from its formal restraints, disentangle it from homicide, and employ it as a regulatory device within the family, to which the court might resort when deciding whether to disinherit undeserving heirs.[74] Is this a desirable direction? I shall shortly present the controversy.

In the paradigmatic case of the slayer rule, there is a clear causal connection between the criminal conduct and the status of heir. The heir gains his status due to his shameful conduct, which has brought about the death of the testator. In the case of an abusive heir, such a causal connection is remote and does not always exist. The question is whether to provide a disinheritance rule that is grounded in the heir's misbehavior towards the deceased. The ongoing debate over whether policy considerations support further involvement of the state in family conflicts focuses on criminal law, but the same ideological tension also exists in our context.[75] The competing values, apart from privacy and the protection of weak groups, include the testator's autonomy, respect for the rule of law, preservation of property, certainty, and the administration of justice.

The non-interventionists point at the potential threatening impact on family relations and the costs of administering justice.[76] Interference by a court could

[73] *Kenig*, 36 PD(3) at 706.

[74] As suggested by Rhodes, *supra* note 32, at 987-89.

[75] Proponents of state interference include Dan Markel, Ethan Leib & Jennifer Collins, *Rethinking Criminal Law and Family Status*, 119 YALE L.J. 1864, 1874 (2010). For non-intervention, see Alice Ristroph & Melissa Murray, *Disestablishing the Family*, 119 YALE L.J. 1236, 1270-78 (2010). The debate followed the approach taken in DAN MARKEL, JENNIFER COLLINS & ETHAN LEIB, PRIVILEGE OR PUNISH: CRIMINAL JUSTICE AND THE CHALLENGE OF FAMILY TIES, at xii-xiii (2009).

[76] *See* Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 U. MICH. J.L. REFORM 835, 858-61 (1985).

complicate and intensify intricate domestic conflicts which might otherwise be rectified and resolved.[77] As to the administration of justice, courts in general seem to be better equipped to deal with concrete actions rather than with ongoing relations that may span many years and innumerable events. It is also not easy to draw the substantive line: When does misbehavior, misconduct, or ingratitude amount to abuse? What would be the presumed intention of the testator in particular where she left a will? Inquiry into problematic, or even undeserving, conduct as a ground for disinheritance is likely to be destructive to the integrity of the family, stimulate litigation, and jeopardize the urgent need to secure certainty in the area of succession.

The proponents of state involvement in the family claim that non-involvement is involvement de facto leading to the perpetuation of domestic violence.[78] Within the domestic sphere, the abused testators presumably were not in a position either to change the testament or to derogate from the regular order of succession.[79] The state should therefore act on their behalf after death and investigate their presumed intentions. Legislative interference aimed at the disinheritance of abusive heirs might contribute to the eradication of desertion and violence and operate for the protection of elderly people, women, and children.[80]

VIII. CONTEXT – *EX TURPI CAUSA*

A. *The Broad Application of* Ex Turpi Causa

The slayer rule involves two conceptual difficulties, the first of which relates to the limits of judicial discretion. A recurring theme is whether a court should apply this rule in the absence of a specific provision, and if specific legislation does exist, how far a court can deviate from it, either by expanding disinheritance or by limiting it. This places the focus on the proper administration of law and the institutional division between courts and legislators.

The second difficulty is substantive. It concerns the proper balance between conflicting interests. At the jurisprudential level, the slayer rule is an application of a wider rule not necessarily limited to restitution. The

[77] *See id.*

[78] For the classic article criticizing the non-intervention of the state in family affairs, see *id.* at 852-55.

[79] *See id.*

[80] For the incompatibility between succession regime (being an undeserved heir is not a ground for preventing succession rights) and regulatory regime of parents and children (being an undeserved parent is a ground for abolishing parental rights), see Richard Lewis Brown, *Undeserved Heirs? – The Case of the "Terminated" Parent*, 40 U. RICH. L. REV. 547, 547 (2006). For support of expanding the disinheritance rule to abusive conduct against elders, see Lisa C. Dumond, Note, *The Undeserving Heir: Domestic Elder Abuser's Right To Inherit*, 23 QUINNIPIAC PROB. L.J. 214, 215 (2010).

disinheritance initially bars the heir from enforcing a property right. It is no wonder the slayer rule is part of the *Restatement (Third) of Property*.[81] The restitution problem arises where the murderous heir collects his share before it has been established that he committed the crime.[82] The question of those entitled to succeed the disinherited heir is another aspect of the problem that the *Restatement (Third) of Restitution and Unjust Enrichment* addresses thoroughly.[83] But restitution is ancillary to the basic problem of the entitlement as clarified in section 45(4) of the *Restatement (Third)*: "The purposes of this section may frequently be achieved, without the need for an action in restitution, by declaratory judgment, interpleader, or similar means."[84]

The slayer rule rejects the heir's cause of action from the outset.[85] Hence the analytical ground of the rule lies in the maxim *ex turpi causa non oritur actio*, a principle that bars sinners from enforcing their rights stemming from any cause of action in contracts, torts, property, or restitution.[86] In tort the question is, for example, whether a burglar can bring a claim against a homeowner who shot the burglar while defending the homeowner's property; in contracts the question is whether a partner can claim from his co-partner profits illegally earned. Rejecting these kind of claims often results in the enrichment of the other party at the expense of the claimant (in the case of the illegal partner), but not always (in the case of the homeowner).[87]

Within the broad application of the principle of *ex turpi causa*, the slayer rule serves as a unique example. The sin is the gravest; the victim is innocent; the criminal acted unilaterally to benefit from the crime; there is usually a severe breach of confidence by the slayer towards the victim; the beneficiary (the one who substitutes the slayer) is not involved at all and lacks any initial

[81] RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 8.4 (2003).

[82] On the issue of equities between the slayer's transferee and other heirs of the deceased, see Mark Adam Silver, Note, *Vesting Title in a Murderer: Where is the Equity in the Georgia Supreme Court's Interpretation of the Slayer Statute in* Levenson?, 45 GA. L. REV. 877, 882-83 (2011) (arguing that the court unjustifiably upheld the transferee's title, though as the slayer's attorney (after her arrest and before conviction), he should have been aware of her defective title, and thus the court should have applied a constructive trust for the benefit of the heirs).

[83] RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 45(3) cmt. c (2011).

[84] *Id.* § 45(4).

[85] *Id.*

[86] Robert A. Prentice, *Of Tort Reform and Millionaire Muggers: Should an Obscure Equitable Doctrine Be Revived to Dent the Litigation Crisis?*, 32 SAN DIEGO L. REV. 53, 54-66 (1995).

[87] *See* RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 63 cmt. b. Immunity might be conceptually regarded as enrichment, but here the claim is initially prevented.

entitlement. In the past the issue was dealt with by public law, and the state was the beneficiary.[88] The current rule located in private law searches for a close enough substitute, an imputed beneficiary, in the private sphere.[89]

The strict application of the principle of *ex turpi causa* has proven not to be sufficiently reconcilable with the intricacies of fact and policy.[90] Over the years it has turned into a discretionary principle whereby the court may bar the claim but is not bound to do so, taking into account multiple factors: the severity of the crime; the degree of cooperation between the sinner and the victim; the nature of their relations; the severity of the violation of the claimant's right; and in the context of restitution, the extent of the contribution of the crime to the enrichment.[91]

The key concept is the balancing of conflicting interests. In our context, for example, how should the balance be achieved in the case of a criminal who publishes a book about the murder he committed? How do we reconcile the concern for legality, the interest of the victim, freedom of expression, and the public interest in rehabilitating criminals? Illustration 20 of the *Restatement (Third) of Restitution and Unjust Enrichment* states that the profits from the book should inure to the victim's estate as unjust enrichment at the slayer's expense, without any need to prove damages from the victim's wrongful death.[92] But in the very next sentence the *Restatement (Third)* clarifies that it does not deal with the constitutional freedom of expression.[93] Son of Sam laws regulate the matter in the federal arena and in many states.[94] This kind of legislation has been subjected to intense judicial review in an attempt to balance it with freedom of expression.[95]

The application of *ex turpi causa* has not been limited to private law. It has frequently arisen with regard to the admissibility of evidence that was illegally obtained by the police.[96] What should be the proper equilibrium between the interest in prosecuting and convicting criminals and that of having law enforcement agencies abide by the law? The doctrine of the fruits of the poisonous tree gives precedence to the rule of law, but this has not been

[88] Reppy, *supra* note 7, at 231-33.

[89] RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 45(3).

[90] *See* Prentice, *supra* note 86, at 88-105.

[91] Ori J. Herstein, *A Normative Theory of the Clean Hands Defense*, 17 LEGAL THEORY 9 (2011).

[92] RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 45 cmt. i, illus. 20.

[93] *Id.*

[94] Orly Nosrati, Note, *Son of Sam Laws: Killing Free Speech or Promoting Killer Profits?*, 20 WHITTIER L. REV. 949, 955 (1999).

[95] Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 116-18 (1991); Nosrati, *supra* note 94, at 954.

[96] *See, e.g.*, Binyamin Blum, Note, *Doctrines Without Borders: The "New" Israeli Exclusionary Rule and the Dangers of Legal Transplantation*, 60 STAN. L. REV. 2131, 2136-37 (2008).

universally adopted, and public security is often considered superior.[97] The following example dealing with *ex turpi causa* refers to an Israeli case on the borderline between private and public law.

B. *Example – To Illegally Give Life and Retain Fatherhood*

This case was not concerned with death but rather with life, in a conflict between adoption and fatherhood.[98] A husband and wife were married for many years but had no children.[99] The husband seduced his young neighbor, a fifteen-year-old orphan, whose mother had died a short time earlier.[100] The girl found warmth and comfort with the neighbor who was twenty years her elder.[101] When she told him about her pregnancy, he comforted her with contradictory messages: either he would divorce his wife and marry her, or he and his wife would adopt the child.[102] Following the birth of her son, the girl expressed her objection to having his father raise him and signed a document with the welfare authorities granting her consent to the adoption of her child.[103] The father objected to the adoption, claiming he should be allowed to raise his son.[104]

The Israeli Law of Adoption enumerates several causes whereby a child becomes adoptable. Two relevant causes are the following: first, the parent cannot properly take care of the child due to his conduct or situation;[105] second, the objection to adoption is immoral or motivated by an illegal purpose.[106] The case under consideration did not squarely fit with these causes: the relations with the young mother were indeed immoral, but the father's objection to the adoption was not motivated by immorality or designated for any illegal purpose. His parental capacity was a factual issue. An expert testified that the father was not capable of taking care of the child, a testimony that was based on the circumstances that led to the birth.[107] Accordingly, three of the five judges held that the father did not have parental capability, concluding that the child was adoptable.[108] Two other judges arrived at the same result but by different reasoning. They ruled that much as a

[97] The inadmissibility rule of *Miranda v. Arizona*, 384 U.S. 436 (1966), has been scarcely applied in Israel. The rule in Israel leaves much discretion to the court. Blum, *supra* note 96, at 2136.

[98] CA 3798/94 Ploni v. Plonit, PD 50(3) 1, 5 [1996] (Isr.).

[99] *Id.*

[100] *Id.*

[101] *Id.*

[102] *Id.*

[103] *Id.* at 6.

[104] *Id.*

[105] Law of Adoption, 5741-1981, § 13(a)(7) (Isr.).

[106] *Id.* § 13(a)(8).

[107] *Ploni*, PD 50(3) at 6.

[108] *Id.* at 12, 65, 70.

slayer cannot inherit from the testator he murdered, the father cannot claim his son who was illegally conceived.[109] This cause for taking a child from his biological father is not expressly grounded in the Law of Adoption, but – so the judges emphasized – it is grounded in universal principles of morality, which nourish the law much as a pond of pure water nourishes its water-lilies.[110]

This colorful water-lilies fable reiterates the majority opinion in *Riggs v. Palmer*: not allowing a sinner to reap the fruits of his sin is a universal moral and legal principle that need not be expressly pronounced.[111] This time its application brought about the creation of a new ground for adoption, which served as a cause for denying fatherhood. And again the same questions recur: What are the boundaries of judicial discretion? What are the super-principles governing law and how are they to be applied? Was the slayer-rule analogy justifiably employed to prevent fatherhood? Would this rule have been applicable to prevent David from marrying Bat-Sheba?[112]

IX. BALANCING INTERESTS THROUGH RULES AND STANDARDS

Claims based upon illegality usually involve perplexing dilemmas. The case of the father whose child was illegally conceived presents the difficulty of balancing the *ex turpi causa* principle with the father's right to parenthood.

The *Restatement (Third) of Restitution and Unjust Enrichment* does not include a rigid principle of *ex turpi causa*. Section 3 states, "A person is not permitted to profit by his own wrong."[113] Section 3 applies directly to the slayer case, but its application to the case of fatherhood is more problematic.

Another relevant rule is embodied in section 32 of the *Restatement (Third)*, which sets out the limits of restitution of an illegal contract.[114] The section allows restitution to prevent unjust enrichment, subject to a number of qualifications.[115] Thus, restitution is denied in the case in which it defeats the policy underlying the prohibition infringed by the contract[116] or if it is foreclosed by the claimant's inequitable conduct.[117] Hence we may conclude

[109] *Id.* at 24; *id.* at 64 (Cheshin, J., concurring).

[110] *Id.* at 64.

[111] *See* Riggs v. Palmer, 22 N.E. 188, 188 (N.Y. 1889) ("[A] widow should not, for the purpose of acquiring, as such, property rights, be permitted to allege a widowhood which she has wickedly and intentionally created.").

[112] Under Jewish law, which developed at a later stage, David could not have married her. An adulterous woman is prohibited to both her husband and the adulterer. *See* Paul Finkelman, *A Bad Marriage: Jewish Divorce and the First Amendment*, 2 CARDOZO WOMEN'S L.J. 131, 143 (1995).

[113] RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 3 (2011).

[114] *Id.* § 32.

[115] *Id.*

[116] *Id.* § 32(2).

[117] *Id.* § 32(3).

that in the category in which restitution is allowed, the principle against unjust enrichment overcomes the resentment against illegality. An opposite result ensues where the objection against the claimant's illegal conduct is sufficiently strong to overcome the principle against unjust enrichment.

An illegal contract is by definition unenforceable, yet it is subjected to the principle of unjust enrichment (though with qualifications).[118] This result can be regarded as another example of an attenuated regime of the principle of *ex turpi causa*. But this does not fully exhaust the sphere of *ex turpi causa* even in the contractual arena as it does not cover, for example, the case of a life insurance beneficiary who murdered the insured. The contractual right of the beneficiary should be barred under section 45 of the *Restatement (Third)*, but the insurance contract which was lawfully made by the insured should be enforceable, and its benefits should inure to the next beneficiary or to the insured's estate.[119]

Due to the complexity of the concept of illegality and the very numerous conflicting interests to be balanced, the maxim of *ex turpi causa* is justifiably applied in a discretionary manner in the context of restitution. With regard to the murderous heir, matters are less complicated. Could we think of a stronger case in which section 3 should apply? And if so, does it make the slayer rule superfluous? Back to the problem of rules and standards: section 3 is a standard leaving room for much discretion. Section 45 is included in chapter 5, the title of which is "Restitution for Wrongs."[120] This chapter creates a set of specific rules. Indeed, the slayer case raises intriguing questions of corrective, distributive, and retributive justice which need to be regulated by rules.

Section 45, which departs from the *Restatement of Restitution: Quasi-Contracts and Constructive Trusts*, provides for the unequivocal annulment of an existing property right. But the matter is not exhausted by the question of whether the slayer should be permitted to inherit. The slayer rule applies to wills, insurance contracts, and pension plans. The question regarding who is to succeed the slayer is complicated and needs elaboration. The *Restatement*

[118] RESTATEMENT (SECOND) OF CONTRACTS ch. 8 (1981). Other related rules include section 51, which sets out the principle of disgorgement in cases of enrichment by misconduct, and finally section 63, which deals with the equitable disqualification of unclean hands and provides for illegality as a defense. *Id.* §§ 51, 63.

[119] RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 45 cmt. f (2011) ("When the slayer is the owner of insurance on the life of the victim, the proceeds will not be paid to the slayer nor to any other person whom the slayer may have designated as a beneficiary. If the slayer acquired the policy in contemplation of killing the insured, the resulting contract is fraudulent and illegal, and the insurer will be relieved of liability. If by contrast the insurance was validly contracted, and the death of the insured under these circumstances is within the insured risk, there is no reason to excuse payment by the insurer. In such a case the estate of the victim may have a recognizable equitable claim to the proceeds.").

[120] *Id.*

(Third) does not cut off the slayer line. Thus it omits the difficulty raised in English law, which not long ago brought about a statutory change.[121] A detailed arrangement should strive to implement the proper relevant policies and guarantee stability and security in the field of succession and related areas. The guidelines of section 45 seem to have successfully achieved this goal.

[121] The Estates of Deceased Persons (Forfeiture Rule and Law of Succession) Act of 2011 was passed following a recommendation of a Law Commission established after the stormy case of *In re DWS*. Estates of Deceased Persons (Forfeiture Rule and Laws of Succession) Act, 2011, c. 7, §§ 1-4 (Eng.). In that case a person murdered his parents who had left no will. The court reluctantly held the grandson could not inherit, so that the property was transferred to other relatives. *In re* DWS, [2001] A.C. 568 at 570-72 (Eng.). The amendment states that the slayer is to be considered as having predeceased the deceased so that the line of the slayer is not cut and his descendants, the victim's grandchildren, could inherit (subject to the court's discretion).