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OVER MY DEAD BODY: A NEW APPROACH TO TESTAMENTARY RESTRAINTS ON MARRIAGE

Ruth Sarah Lee*

I. INTRODUCTION

Money is a tool that can be wielded from the grave. The dead-hand may attempt to distribute money to shape the affairs, and influence the choices of the living. It is not uncommon to find deeds or wills that try to shape the behavior of the beneficiary by conditioning a grant, devise, or bequest on a potential beneficiary's conduct. While not every conditional gift is designed to influence the beneficiary's behavior, many are devised for that very purpose. Behind these gifts are different motives from different testators – whether it is a desire for control, benevolent paternalism, or even revenge.¹ This article, specifically, turns to the problem of restraints on marriage. Testators (usually parents) write wills prohibiting, penalizing, or requiring marriage to one of a particular religious faith or ethnicity as an attempt to shape the beneficiary's (usually the child's) romantic decisions.

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1. See, e.g., JESSE DUKEMINIER, ROBERT H. SITKOFF & JAMES LINDGREN, WILLS, TRUSTS, AND ESTATES 35 n. 11 (8th ed. 2009) (noting a 1993 Associated Press story from Romania about how a “man who was nagged by his wife to stop smoking has left her everything—but only if she takes up his habit as punishment for 40 years of ‘hell.’”).

In addressing these restraints on marriage, many courts have taken a “reasonableness” approach.² Even cases that do not explicitly take a “reasonableness” approach—but argue purely in terms of balancing public policy goals—tend to use language shaded with “reasonableness” rhetoric.³ A complete (total or general) restraint of marriage is a restraint that prohibits the beneficiary to benefit from the will if he marries anyone at any time.⁴ A partial restraint of marriage is, in contrast, limited in time or applicable to a specific class of persons.⁵

2. See *infra* Section II.B.

3. See, e.g., *In re Estate of Feinberg*, 919 N.E.2d 888, 899 (Ill. 2009) [hereinafter *Feinberg II*]

([W]hoever will take the trouble to examine this branch of the law attentively, will find that the testator may impose *reasonable and prudent restraints* upon the marriage of the objects of his bounty, by means of conditions precedent, or subsequent, or by limitations, while he may not, with one single exception, impose perpetual celibacy upon the objects of his bounty, by means of conditions subsequent or limitations.

(emphasis added) (quoting *Shackelford v. Hall*, 19 Ill. 212, 215 (1857))).

The Illinois Supreme Court in *Feinberg II* reversed the state appellate court decision. *Id.* at 903. The appellate court ruled that a trust provision providing that a descendant “who marries outside the Jewish faith (unless the spouse of such descendant has converted or converts within one year of the marriage to the Jewish faith) and his or her descendants shall be deemed to be deceased,” *In re Estate of Feinberg*, 891 N.E.2d 549, 550 (Ill. App. Ct. 2008) [hereinafter *Feinberg I*], *rev’d*, 919 N.E.2d 888 (Ill. 2009), was invalid without discussion of whether the clause was reasonable or not. *Feinberg I*, 891 N.E.2d at 552. Instead, the appellate court had ruled simply that “the provision in the case before us is invalid because it seriously interferes with and limits the right of individuals to marry a person of their own choosing.” *Id.* Furthermore, the concurring opinion for the appellate decision of *Feinberg I* referred to the reasonableness test. *Id.* at 555 (Quinn, J., concurring) (“While the Restatement (First) and (Second) of Trusts explained that restraints such as the instant ‘Jewish Clause’ were once considered reasonable, the Restatement (Third) of Trusts now provides that they are no longer reasonable.”). The dissent in *Feinberg I* also refers to the reasonableness test. *Id.* at 555 (Greiman, J., dissenting) (“It is generally held in this country that partial restraints on marriage are valid unless unreasonable.” (quoting *Gordon v. Gordon*, 124 N.E.2d 228, 234 (Mass. 1955))). Although *Feinberg I*’s facts included a trust provision, the Illinois Supreme Court interpreted the case as examining a testamentary provision. *Feinberg II*, 919 N.E.2d at 902.

4. An example of this is a will that leaves property to a beneficiary “provided he never marries.”

5. See, e.g., *Gordon*, 124 N.E.2d at 234

(It is generally held in this country that partial restraints on marriage are valid unless unreasonable. Am.Law of Property, § 27.15; Scott on Trusts, § 62.6; Restatement: Property, § 425; 122 A.L.R. 7. Thus testamentary gifts conditioned on the beneficiary not marrying a specified individual have been upheld. *Turner v. Evans*, 134 Md. 238, 241, 106 A. 617; Graydon’s

However, the “reasonableness” approach has several serious shortcomings, and fundamentally focuses on the incorrect issue. The test suffers from at least four major problems: (1) it ostensibly questions the testator’s intent while ingenuously claiming that it does not;⁶ (2) it is empirically unsound;⁷ (3) it fails to take into account whether the restraint is actually consequential to the beneficiary;⁸ and (4) it produces unjustifiably inconsistent results based on geography and time.⁹

Given these four problems with the “reasonableness” approach, a discussion and recommendation of a new approach is warranted. Thus, four principle alternative approaches are considered in this article: (1) a blanket prohibition of all marital restraints, most noticeably promulgated by Professor Jeffrey G. Sherman;¹⁰ (2) a blanket allowance of all marital restraints centered on the value of honoring testator intent;¹¹ (3) a case-by-case balancing approach used by the court in *In re Estate of Feinberg*, 919 N.E.2d 888 (Ill. 2009)[hereinafter *Feinberg II*];¹² and (4) the possibility of pursuing a new test that does not suffer

Executors v. Graydon, 23 N.J.Eq. 229, 237-238; *Matter of Seaman's Will*, 218 N.Y. 77, 81, 112 N.E. 576, L.R.A.1917A, 40; *In re Osborne's Petition*, 21 Pa. Dist. & Co. R., 293, 295. A similar result has been reached where the condition was against marrying into a named family. *Phillips v. Ferguson*, 85 Va. 509, 513, 8 S.E. 241, 1 L.R.A. 837. In *Pacholder v. Rosenheim*, 129 Md. 455, 99 A. 672, L.R.A.1917D, 464, a requirement that a niece marry with the consent of her parents was held to be good, and there was an added statement, 129 Md. at pages 462-463, 99 A. 672, that a second requirement of not mar[r]ying outside the Jewish faith was also good.).

See also *In re Harris' Will*, 143 N.Y.S.2d 746, 748 (N.Y. Surr. Ct. 1955)

(Conditions in general restraint of marriage were regarded at common law as contrary to public policy, and therefore void. . . . However, conditions in partial restraint of marriage, which merely impose reasonable restrictions upon marriage, are not against public policy. Whether a condition in restraint of marriage is reasonable depends, not upon the form of the condition, but upon its purpose and effect under the circumstances of the particular case.)

6. See *infra* Section III.A.

7. See *infra* Section III.B.

8. See *infra* Section III.C.

9. See *infra* Section III.D.

10. See *infra* Sections IV.A, V.B.1.

11. See *infra* Sections IV.B, V.B.2.

12. See *Feinberg II*, 919 N.E.2d 888 (Ill. 2009); see also *infra* Sections IV.C, V.B.3.

from the same shortcomings as the Reasonableness Test¹³

This article proposes a new test—the Coercion Test—as a possible alternative for courts to consider in handling testamentary restraints on marriage.¹⁴ If we are worried that the deed or will forces the donee to surrender to an “unreasonable” marriage or a life of loneliness, we should examine the extent to which the donee is actually *influenced* by the grant. In other words, instead of focusing on the *donor's* “reasonableness”, courts should focus on the *donee's* need. The donee’s need—the juxtaposition of his current financial position, how much he would stand to gain, and how much he needs the gain, with how much he would have received under intestacy— will show how much coercion or pressure the donee is actually experiencing from the will.

The discussion closes with a comparison between the proposed Coercion Test and the other alternative methods. The article concludes that the Coercion Test will maintain the advantages found in the other alternatives, while avoiding many of the disadvantages, and is therefore one of the most sensible approaches to marital restraints. The Coercion Test is a sensible approach because it avoids all four of the major problems with the Reasonableness Test, provides more respect for testator’s intent than a blanket prohibition, is more protective of public policy than a blanket allowance, and provides more consistent results than a case-by-case balancing approach. Most importantly, the Coercion Test addresses the crux of the public policy problem: whether an individual is being *forced* into, or out of, marriage.

13. See *infra* Section IV.D.

14. See *infra* Sections V.A – B.

II. THE REASONABLENESS TEST

A. WHY MARITAL RESTRAINT PROVISIONS DO NOT IMPLICATE CONSTITUTIONAL CONCERNS

In some of the cases involving the validity of a will provision curtailing marriage choices, it has been argued that the provisions are unconstitutional because enforcing them would violate constitutional rights. This argument has been systematically rejected for partial restraints on marriage.

In *United States National Bank v. Snodgrass*, 275 P.2d 860 (Or. 1954),¹⁵ the testator's will provided that when his daughter turned thirty-two, she would receive a trust fund if she could prove to the trustee that she had not converted to Catholicism, or married a Catholic man.¹⁶ The daughter argued that the will violated her First and Fourteenth Amendment rights embedded in the United States Constitution. However, the Court disagreed, finding that the First Amendment "is a limitation upon the power of Congress. It has no effect upon the transactions of individual citizens and has been so interpreted."¹⁷ The Court also stated that the Fourteenth Amendment did not regulate individual conduct, so that the

15. The United States National Bank of Portland (Oregon) was the trustee under the will, and brought the lawsuit against the decedent's married daughter. It sought a declaratory judgment to ensure that the trust had been set up properly, and the interpretations made correctly. *United States Nat'l Bank v. Snodgrass*, 275 P.2d 860, 861 (Or. 1954). It sought a declaratory judgment to ensure that the trust had been set up properly, and the interpretations made correctly. *Id.*

16. *Id.* at 862. The relevant part of the will stated:

When my said daughter shall have attained the age of thirty-two years and upon my death, that is to say, when these two events occur, my trustee is authorized and directed to transfer, assign and/or pay over to my said daughter Merle the whole of the trust fund of Fifteen Thousand (\$15,000.00) Dollars, or the one-half (1/2) of the entire estate if sum is more than Thirty Thousand (\$30,000.00) Dollars, provided she shall have proved conclusively to my trustee and to its entire satisfaction that she has not embraced, nor become a member of, the Catholic faith nor ever married to a man of such faith.

Id. The will provided that if Merle became "ineligible to receive the trust," the money would go to other family members. *Id.*

17. *Id.* at 866.

amendments “in no way bear on a transaction of the character now before us.”¹⁸ Furthermore, the Court distinguished the present case from *Shelley v. Kraemer*, 334 U.S. 1 (1948),¹⁹ interpreting *Shelley* narrowly to be:

authority only for the proposition that the enforcement by state courts of a covenant in a deed restricting the use and occupancy of real property to persons of the Caucasian race falls within the purview of the Fourteenth Amendment as a violation of the equal protection clause, but, said the court, “That Amendment [Fourteenth] erects no shield against merely private conduct, however discriminatory or wrongful.”²⁰

Courts have decided similarly for wills revoking gifts of beneficiaries who should “marry a person not born in the Hebrew faith”²¹ or for offering a bequest only if a beneficiary marries “a Jewish girl whose both parents were Jewish”²² within seven years of the testator’s death.²³

These decisions are correct. In *Shelley*, the Court issued an *order* to enforce the racial covenant and affirmatively compelled the Shelley family to vacate their home.²⁴ In these restraints on marriage cases, the courts are not ordering the beneficiaries to never marry.²⁵ Furthermore, to argue that the facilitation of

18. *Id.* (“Neither does the Fourteenth Amendment relate to individual conduct.”)

19. In *Shelley*, the Supreme Court ruled that it would be unconstitutional for a state court to enforce restrictive covenants against occupancy or ownership of property by African Americans. *Shelley v. Kraemer*, 334 U.S. 1, 23 (1948).

20. *Snodgrass*, 275 P.2d at 866 (citing *Shelley*, 334 U.S. at 23).

21. *Gordon v. Gordon*, 124 N.E.2d 228, 230 (Mass. 1955).

22. *Shapira v. Union Nat’l Bank*, 315 N.E.2d 825, 826 (Ohio Ct. Com. Pl. 1974).

23. *Id.* at 827–28 (holding that while

[m]arriage is one of the ‘basic civil rights of man,’ fundamental to our very existence and survival . . . [that] [i]n the case at bar, this court is not being asked to enforce any restriction upon Daniel Jacob Shapira’s constitutional right to marry. Rather, this court is being asked to enforce the testator’s restriction upon his son’s inheritance. If the facts and circumstances of this case were such that the aid of this court were sought to enjoin Daniel’s marrying a non-Jewish girl, then the doctrine of *Shelley v. Kraemer* would be applicable, but not, it is believed, upon the facts as they are.).

24. *Shelley*, 334 U.S. at 4, 6.

25. *See, e.g., Shapira*, 315 N.E.2d at 827 (“In the case at bar, this court is not

probate is subject to all Fourteenth Amendment restrictions would automatically invalidate any testamentary donation to religious organizations by private individuals. This would be an absurd result. Constitutionality is a poor way to challenge restraints on marriage because they are almost certainly constitutional. Most courts have turned, instead, to a test of “reasonableness”.

B. WHAT IT MEANS FOR A MARITAL RESTRAINT TO BE REASONABLE

Complete restraints of marriage—restraints that prohibit the beneficiary from marrying any person ever—are considered *per se* “unreasonable”, and thus void.²⁶ However, partial restraints may be valid and “not contrary to public policy”²⁷ if they impose “only reasonable restrictions.”²⁸ Not every court applies the Reasonableness Test,²⁹ but many do.³⁰

being asked to enforce any restriction upon Daniel Jacob Shapira’s constitutional right to marry. Rather, this court is being asked to enforce the testator’s restriction upon his son’s inheritance.”).

26. *Id.* at 829 (“If the condition were that the beneficiary not marry anyone, the restraint would be general or total, and, at least in the case of a first marriage, would be held to be contrary to public policy and void.”).

27. *Id.*

28. *Id.*

29. *DUKEMINIER, ET AL., supra* note 1, at 34.

30. *See, e.g., Gordon v. Gordon*, 124 N.E.2d 228, 234 (Mass. 1955)

(It is generally held in this country that partial restraints on marriage are valid unless unreasonable. Am.Law of Property, § 27.15; Scott on Trusts, § 62.6; Restatement: Property, § 425; 122 A.L.R. 7. Thus testamentary gifts conditioned on the beneficiary not marrying a specified individual have been upheld. *Turner v. Evans*, 134 Md. 238, 241, 106 A. 617; *Graydon’s Executors v. Graydon*, 23 N.J.Eq. 229, 237-238; *Matter of Seaman’s Will*, 218 N.Y. 77, 81, 112 N.E. 576, L.R.A.1917A, 40; *In re Osborne’s Petition*, 21 Pa.Dist. & Co. R., 293, 295. A similar result has been reached where the condition was against marrying into a named family. *Phillips v. Ferguson*, 85 Va. 509, 513, 8 S.E. 241, 1 L.R.A. 837.);

see also In re Harris’ Will, 143 N.Y.S.2d 746, 748 (N.Y. Surr. Ct. 1955)

(Conditions in general restraint of marriage were regarded at common law as contrary to public policy, and therefore void. . . . However, conditions in partial restraint of marriage, which merely impose reasonable restrictions upon marriage, are not against public policy. Whether a condition in restraint of marriage is reasonable depends, not upon the form of the condition, but upon its purpose and effect under the circumstances of the

An example of a partial restraint can be found in *Gordon v. Gordon*, 124 N.E.2d 228 (Mass. 1955), where the decedent's will provided:

If any of my said children shall marry a person not born in the Hebrew faith then I hereby revoke the gift or gifts and the provision or provisions herein made to or for such child, and I direct that the portion or portions of my estate, and the interest or interests therein which I have by this will given to such child so marrying a person not born in the Hebrew faith shall be paid and made over to that person or persons who would have been entitled thereto under this will if such beneficiary had died before becoming entitled by the provisions hereof to such portion or portions, interest or interests, without leaving lawful issue.³¹

In *Gordon*, the beneficiary in question married a woman whose parents were Roman Catholic, but after the testator's death, she "undertook religious instruction under rabbis . . . became a convert to Judaism and received a certificate recognizing her conversion [and] went through a rabbinical ceremony of marriage."³² However, the Court affirmed the trial judge's finding that at the time of marriage, the wife "was not in any sense Jewish or Hebrew and it could not then be said that she was born in the Hebrew faith."³³

Furthermore, the Court found that the restraint was reasonable, noting that the

particular case.);

Shapira, 315 N.E.2d at 827; 6 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 44.25 (Rev. Ed. 2005); 52 AM. JUR. 2D *Marriage* § 118 (2011); *United States Nat'l Bank v. Snodgrass*, 275 P.2d 860, 866 (Or. 1954); *In re Silverstein's Will*, 155 N.Y.S.2d 598, 599 (N.Y. Surr. Ct. 1956); *Pacholder v. Rosenheim*, 99 A. 672, 675 (Md. 1916); Jeremy Macklin, *The Puzzling Case of Max Feinberg: An Analysis of Conditions in Partial Restraint of Marriage*, 43 J. MARSHALL L. REV. 265, 271 (2009) ("A partial restraint is subject to a reasonableness test; the restraint will be 'valid or invalid according to whether it is reasonable or unreasonable.'" (quoting E. LeFevre, Annotation, *Validity of Provisions of Will or Deed Prohibiting, Penalizing, or Requiring Marriage to One of a Particular Religious Faith*, 50 A.L.R. 2D 740, § 2 at 740 (1956))).

31. *Gordon*, 124 N.E.2d at 230.

32. *Id.*

33. *Id.* (The court also insisted that "born in the Jewish faith" referred to the ordinary sense of the word "born", not the spiritual sense.)

only American case which might be said to hold a testamentary condition against marrying outside a certain religion to be unreasonable could rest on the ground that in the circumstances the restriction of the beneficiary's choice of spouse to the Society of Friends would operate as a complete prohibition of marriage.³⁴

The Court did not expand much further on the "reasonableness" analysis beyond this distinction.³⁵ Similarly, other cases use the Reasonableness Test with little to no explanation as to why it is preferred.³⁶

Restatement (Second) of Property reflects this in that, "[t]he restraint unreasonably limits the transferee's opportunity to marry if a marriage permitted by the restraint is not likely to occur. The likelihood of marriage is a factual question, to be answered from the circumstances of the particular case."³⁷

The test of "reasonableness" becomes, then, a temporal and geographical test of how many viable marriage candidates are accessible to the beneficiary.³⁸ For example, the *Gordon* Court

34. *Id.* at 234.

35. *Id.*

(The contention is made that a restriction conditioned upon the religious faith of the parents of the prospective wife at the time of her birth is unreasonable. The question is not whether the testator used good judgment in including paragraph 14 in his will or whether we should approve or disapprove his action. What we have to decide is whether he was prevented from doing as he did by any rule of law. We are unable to discover that he was.)

36. *See, e.g., In re Rosenthal's Estate*, 123 N.Y.S.2d 326, 333 (N.Y. Surr. Ct. 1953) (noting that "conditions in partial restraint of marriage, which merely impose reasonable restrictions upon marriage, are not against public policy." (quoting *Matter of Liberman*, 18 N.E.2d 658, 660 (1939))); *In re Harris' Will*, 143 N.Y.S.2d 746, 748 (N.Y. Surr. Ct. 1955) (holding valid a provision for the distribution of the corpus of a trust after the death of the life beneficiary, which stipulated that any beneficiary "at the time of my death be married to any person born or begotten of parents other than of the Hebrew religion and faith", *id.*, will not receive the bequest.); *In re Weil's Estate*, 124 Misc. 692, 695 (N.Y. Surr. Ct. 1925) *aff'd sub nom.* *In the Matter of Weil*, 213 N.Y.S. 933 (1926) ("On the other hand, however, a clause in special restraint of marriage, such as prohibition of marriage to a person outside of a particular faith, or to a designated person, is in the ordinary course valid.")

37. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 6.2 cmt. a (1983).

38. Jeffrey G. Sherman, *Posthumous Meddling: An Instrumentalist Theory of Testamentary Restraints on Conjugal and Religious Choices*, 1999 U. ILL. L. REV. 1273, 1319–20 (1999)

(When considering partial restraints on marriage, courts often, though not consistently, direct their attention not to the arbitrariness of a restraint's

noted:

Joseph Gordon was an orthodox Jew, and his children were brought up in the tenets of that faith. About 50 Jewish families lived in the city of Attleboro and the town of North Attleboro. There was an orthodox synagogue in Attleboro. Harold was not limited in the choice of a wife to a resident of that city.³⁹

The court in *Shapira v. Union National Bank*, 315 N.E.2d 825, (Ohio Ct. Com. Pl. 1974) conducted a similar analysis:

[C]ounsel for the plaintiff asserts that the number of eligible Jewish females in this county would be an extremely small minority of the total population especially as compared with the comparatively much greater number in New York, whence have come many of the cases comprising the weight of authority upholding the validity of such clauses. There are no census figures in evidence. While this court could probably take judicial notice of the fact that the Jewish community is a minor, though important segment of our total local population, nevertheless the court is by no means justified in judicial knowledge that there is an insufficient number of eligible young ladies of Jewish parentage in this area from which Daniel would have a reasonable latitude of choice. And of course, Daniel is not at all confined in his choice to residents of this county, which is a very different circumstance in this day of travel by plane and freeway and communication by telephone, from the horse and buggy days.⁴⁰

Thus, judges who apply the Reasonableness Test have to operate as generalists in the extremity. They must determine not only issues of law, but also the number and availability of compatible companions for the beneficiary.

content but to the extent of its reach. If a will conditions a bequest on the legatee's marrying a certain kind of person, and if the number of 'qualifying' potential spouses in the legatee's geographic area is so small that it would be difficult if not impossible for the legatee to secure such a spouse, the condition will be held void because, in operation, it amounts to a virtual prohibition of marriage. But if the number of qualifying potential spouses is high enough, the condition will be upheld as a reasonable partial restraint.)

39. *Gordon*, 124 N.E.2d at 230.

40. *Shapira v. Union Nat'l Bank*, 315 N.E.2d 825, 831 (Ohio Ct. Com. Pl. 1974).

III. FOUR MAJOR PROBLEMS WITH THE REASONABLENESS TEST

A. QUESTIONING THE TESTATOR'S JUDGMENT

It is insincere to claim, on the one hand, that it is not within the purview of the court to question whether the testator used good judgment in structuring the provisions of his will,⁴¹ but on the other hand, judging the “reasonableness” of that provision. In fact, courts are very careful to highlight this distinction by explicitly stating, in the opinion, that the question is not whether the testator used good judgment.⁴²

In reality, the courts *are* making judgments about the testator's judgment. When a testator's explicit restraint is pronounced “unreasonable”—so “unreasonable” that the court refuses to enforce it—that pronouncement is in of itself a statement about the testator's judgment. The effect of the Reasonableness Test is that testators—regardless of what their actual intention is—cannot condition gifts on marital conditions that are not likely to exist.

Suppose a testator writes a will that states, “I give everything to Daughter if she is accepted to Harvard University; otherwise, I give everything to charity.” Even if the condition is very unlikely to be fulfilled—that is, Daughter has bad grades and test scores—it is unlikely that this provision would be struck down for public policy reasons. The testator is free to distribute his money based on whatever conditions he desires, regardless of the probability that the condition will be fulfilled.

41. See, e.g., *id.* at 832. (“His unmistakable testamentary plan was that his possessions be used to encourage the preservation of the Jewish faith and blood, hopefully through his sons, but, if not, then through the State of Israel. Whether this judgment was wise is not for this court to determine.”).

42. *Gordon*, 124 N.E.2d at 234 (“The question is not whether the testator used good judgment in including paragraph 14 in his will or whether we should approve or disapprove his action.”); *Shapira*, 315 N.E.2d at 832 (“His unmistakable testamentary plan was that his possessions be used to encourage the preservation of the Jewish faith and blood, hopefully through his sons, but, if not, then through the State of Israel. Whether this judgment was wise is not for this court to determine.”). This language notwithstanding, the courts in both *Gordon* and *Shapira* proceeded to analyze the reasonableness of the wills' provisions, as discussed *supra* Section II.B.

Given the general emphasis on respecting the testator's intent,⁴³ why are marital restraints the exception? If a testator wishes to condition a gift on an event that has a low probability of occurring, as in the Harvard example, the gift, on its face, does not contravene public policy. Thus, there is very little support for why—in the cases of marital restraints—the courts and the Restatement determine that gifts conditioned on an unlikely event always violate public policy.⁴⁴

B. EMPIRICAL PROBLEMS WITH THE FACTUAL QUESTION OF REASONABLENESS

The Reasonableness Test is questionable not only as an issue of law, but it is also problematic as applied. As applied, “reasonableness” is a factual test.⁴⁵ This puts judges in the position of estimating the probability that a marriage permitted by the restraint will occur. For example, the court in *Shapira* admitted that there was “no census figures in evidence.”⁴⁶ However, it went on to speculate the sufficiency of the “number of eligible young ladies of Jewish parentage in this area from which [the plaintiff] would have a reasonable latitude of choice.”⁴⁷

The first empirical problem with the factual inquiry is that it is by no means clear that judges are equipped, or that they ought, to estimate the racial or cultural make-up of the beneficiary's city. Professor Sherman has argued that courts don't even conduct this analysis “although it is easy enough to find courts willing at least to pay lip service to this distinction

43. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 (2003) (“The controlling consideration in determining the meaning of a donative document is the donor's intention. The donor's intention is *given effect to the maximum extent allowed by law.*” (emphasis added)).

44. *See supra* text accompanying notes 37–40.

45. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 6.2 cmt. a (1983) (“A restraint unreasonably limits the transferee's opportunity to marry if a marriage permitted by the restraint is not likely to occur. The likelihood of marriage is a factual question, to be answered from the circumstances of the particular case.”)

46. *Shapira*, 315 N.E.2d at 831.

47. *Id.*

between reasonable and unreasonable partial restraints.”⁴⁸

The bigger problem is that geographic census data is a sloppy proxy for the actual issue in question—the likelihood of marriage. Merely because a city has a sizeable population of eligible spouses does not mean that this population contains members that would actually be willing to marry the beneficiary, even if the beneficiary is willing. The population of eligible spouses is only one of many factors in determining the likelihood of marriage—other factors include social skills, level of education and income, age, and physical attractiveness.⁴⁹ There is also a persistent social myth that older women are more likely to be killed by a terrorist than to get married.⁵⁰ If there is any truth to this myth at all, it follows that *any* marital restraint on a female beneficiary over 40-years old is “unreasonable”.

If courts genuinely want to calculate the likelihood of a permissive marriage, they need to consider the above facts as well. Otherwise, it is not clear why geographic population should be the chosen proxy for likelihood of marriage. It would be inappropriate, and possibly offensive, for courts to make a genuine effort at figuring out the factual question of likelihood of marriage. However, this does not mean that automatically presuming that geographic census data—or a speculative estimation thereof—is an appropriate proxy for “reasonableness.”

48. Sherman, *supra* note 38, at 1321.

49. There is a wealth of literature in both scholarship and popular media speculating on the factors that make marriage more likely. See generally Lloyd Cohen, *Marriage, Divorce, and Quasi Rents; Or, “I Gave Him the Best Years of My Life”*, 16 J. LEGAL STUD. 267 (1987). There are also prominent social theories about the affect of age on likelihood of marriage, especially for older women. See, e.g., Tara Parker-Pope, *Marriage and Women Over 40*, N.Y. TIMES, Jan. 26, 2010, <http://well.blogs.nytimes.com/2010/01/26/marriage-and-women-over-40/>.

50. See, e.g., THE HOLIDAY (Columbia/Universal Pictures 2006) (“Single women over the age of 35 are more likely to be killed by a terrorist than get married.”); ADDICTED TO HIS LOVE (Green/Epstein Productions 1988) (“A woman at 40 is more likely to get shot by a terrorist than get married.”); SLEEPLESS IN SEATTLE (TriStar Pictures 1993) (“It’s easier to be killed by a terrorist than it is to find a husband over the age of 40!”).

C. FAILING TO TAKE INTO ACCOUNT ACTUAL INFLUENCE ON BENEFICIARY

The court in *Shapira*, in declining to invalidate the marital condition provision of the decedent's will, held that the beneficiary "is no more being 'blackmailed into a marriage by immediate financial gain,' as suggested by counsel, than would be the beneficiary of a living gift or conveyance upon consideration of a future marriage—an arrangement which has long been sanctioned by the courts of this state."⁵¹ Of course, the Court was correct in one aspect: there was no blackmail in this case.

Blackmail, by definition, is the crime of threatening to reveal embarrassing, disgraceful, or damaging facts or rumors about a person unless paid off not to carry out the threat.⁵² In *Shapira*, the provision in the will was not threatening to take the plaintiff's money if he did not comply with the restraint; rather, it was threatening to withhold a gratuitous gift.⁵³ As the Court noted, it "is a fundamental rule of law in Ohio that a testator may legally entirely disinherit his children."⁵⁴

In other words, the plaintiff had no entitlement, or right, to the decedent's money in the first place, so the threat of withholding the gift is not blackmail. Notably, however, this is true of any condition that withholds the gift, whether or not the condition is "reasonable", there is a massive, willing, and eager population of permitted potential spouses in the plaintiff's vicinity, and the plaintiff has a slim chance of marrying the decedent's choice.

51. *Shapira*, 315 N.E.2d at 832.

52. BLACK'S LAW DICTIONARY 192 (9th ed. 2009). Perhaps the counsel quoted by the *Shapira* court chose to use the term "blackmail" rhetorically and did not intend for it to be taken as an actual legal argument. However, the Court chose to quote it and explicitly rejected the notion as wrong.

53. *See Shapira*, 315 N.E.2d at 831 – 32.

54. *Id.* at 828. Ohio is not unique. As a matter of fact, in "all states except Louisiana, a child or other descendant has no statutory protection against intentional disinheritance by a parent. There is no requirement that a testator leave any property to a child, not even the proverbial one dollar." DUKEMINIER, ET AL., *supra* note 1, at 519.

Even if we do not go so far as to say that the provision is invalidated on grounds of blackmail—even if we merely disallow marital restraint provisions because public policy favors freedom of choice for marriage⁵⁵—the question becomes whether the marital restraint actually restricts the beneficiary’s freedom of choice of marriage. It, almost certainly, does not.⁵⁶ For example, if someone offers another fifty dollars to wear a red shirt, he is certainly not infringing on the other’s freedom to wear a shirt of any other color. The provision in the will is similar—it is an inducement, not an order.

D. INCONSISTENT RESULTS

As discussed in Section III.A.3, *supra*, “reasonableness” is applied as a factual test. “[A] restraint unreasonably limits the transferee’s opportunity to marry if a marriage permitted by the restraint is not likely to occur. The likelihood of marriage is a factual question, to be answered from the circumstances of the particular case.”⁵⁷ This has been noted as an ostensibly arbitrary test that yields inconsistent and somewhat counter-intuitive results. As Professor Sherman points out:

[T]he approach seems unprincipled in that its results turn on the fortuities of geographic and demographic factors. By this reasoning, a bequest conditioned on the legatee’s marrying a Jewish person stands more likely to be upheld in New York than in Wyoming, and a bequest conditioned on the legatee’s marrying a Christian probably could withstand attack everywhere in the country, while a bequest conditioned on the legatee’s marrying a Taoist probably could not survive anywhere.⁵⁸

In addition to the problems discussed by Professor Sherman, is the need to consider the future plans of the

55. See, e.g., *Shapira*, 315 N.E.2d at 829.

56. There is perhaps one exception, if one subscribes to the notion of economic coercion. See *supra* Section III.B.

57. RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 6.2 cmt. a (1983).

58. Sherman, *supra* note 38, at 1320–21.

beneficiary. For example, if the testator conditioned his gift on the beneficiary marrying a Jewish person who lives in New York, but the beneficiary decided to move to Wyoming the Reasonableness Test would turn on these plans. However, this severely destroys the consistency of the analyses across cases.

IV. ALTERNATIVE APPROACHES TO MARITAL RESTRAINTS

Given the shortcomings of the Reasonableness Test,⁵⁹ the apparent task is to find a suitable replacement. The general options are to (A) prohibit all marital restraints, (B) allow all marital restraints, (C) balance the public policy factors on a case-by-case basis, or (D) prescribe a new test.

A. PROHIBITING ALL MARITAL RESTRAINTS (SHERMAN)

Although, when it comes to testamentary writings, there is a general emphasis on the testator's intent,⁶⁰ Professor Sherman has argued that testation is only allowed to the extent "to avoid the harms that the abolition of testation would produce. To avoid those harms it is crucial to allow property owners to designate their successors, but it is not necessary to allow them also to superintend their successors' behavior."⁶¹

The following logic would

invalidate *all* testamentary conditions calculated to restrain or induce particular personal conduct on the part of the legatees, even if the conduct in question has nothing to do with marriage or religion and even if the conduct sought to be induced is "good" or the conduct sought to be restrained is "bad".⁶²

To Professor Sherman, "even if under a testamentary

59. See *supra* Sections III.A.1–3 (discussing the shortcomings and problems of the reasonableness test).

60. E.g., RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 (2003) ("The controlling consideration in determining the meaning of a donative document is the donor's intention. The donor's intention is *given effect to the maximum extent allowed by law.*" (emphasis added)).

61. Sherman, *supra* note 38, at 1329.

62. *Id.*

condition the class of permissible spouses includes all human beings except one, the condition should be held invalid.”⁶³ As a result, he proposes a “blanket rule invalidating *all* testamentary restraints that condition bounty on the legatee’s ‘proper’ choice of spouse[.] . . . [This rule] is simpler and more predictable in its application, and more principled in its foundation.”⁶⁴ Sherman’s proposition would invalidate not only marital restraint provisions, but also all testator attempts at behavior-shaping.⁶⁵

B. ALLOWING ALL MARITAL RESTRAINTS (TESTATOR’S INTENT)

Restatement (Third) of Property states that “[t]he controlling consideration in determining the meaning of a donative document is the donor’s intention. The donor’s intention is *given effect to the maximum extent allowed by law.*”⁶⁶ Following this line of thought, Professor Krecizer-Levy has noted that:

[t]estamentary freedom is a pivotal value in the Anglo-American legal tradition. The property owner is conceived as holding the power to make free choices regarding the allocation of his property after death.

63. *Id.* at 1322.

64. *Id.* (emphasis added). See also Shelly Krecizer-Levy, *Religiously Inspired Gender-Bias Disinheritance—What’s Law Got To Do With It?*, 43 CREIGHTON L. REV. 669, 689 (2010). Although Krecizer-Levy, unlike Sherman, does not argue for the flat-out prohibition on marital restraint provisions, she does note in her analysis that as a general matter, it is important to figure out

whether disinheriting a woman because she is a woman, following a religious belief, indeed demeans her. First of all, it is hardly controversial that women as a group have a history of mistreatment. Now, the next step would be to assess the meaning of the act of disinheritance from the estate. This brings us back to our former discussion of inheritance as reaffirming a child’s position in the family. The law in British Columbia and New Zealand suggests that occasionally a decision to disinherit a child would be unacceptable. There is a moral perception that is backed by social expectations that inheritance says something about the relationship between the child and the parent, that inheritance means something about a child’s path in life, and that inheritance means something about the child’s position in the family.

Id.

65. Sherman, *supra* note 38, at 1329.

66. RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 (2003) (emphasis added).

Inheritance law is thus usually conceived, almost intuitively, as part of the testator's prerogative. A massive part of the law naturally flows from this basic fact. Reviewing the case law, testamentary freedom in one form or another, is frequently assumed. In other words, the testator is at the focus of inheritance both in theory and in practice. The freedom to choose one's receivers is even more expansive and includes the testator's ability to control his receivers' lives through making conditions or by creating a trust.

Testamentary freedom also points to an easy solution to our dilemma, an opposite one to forced heirship rules. The testator is free to disinherit his daughters on whatever grounds he sees fit. He can disinherit her even out of pure spite or vindictive spirit. Why then should the law interfere with a religiously inspired motive, even considering it is gender-bias? The testator is not bound by the principle of equality.⁶⁷

The testator-intent-centered argument, of allowing all marital restraint provisions, is bolstered by the fact that "[i]n all states except Louisiana, a child or other descendant has no statutory protection against intentional disinheritance by a parent. There is no requirement that a testator leave any property to a child, not even the proverbial one dollar."⁶⁸ Thus, there is a fairly strong argument that because decedents enjoy the right to withhold all gifts from potential beneficiaries, conditional gifts are but a subset of this general right.

C. CASE BY CASE BALANCING (*FEINBERG II*)

In the recent *Feinberg II* case, the Supreme Court of Illinois

67. Kreiczler-Levy, *supra* note 64, at 686. Notably, although Kreiczler-Levy summarizes the testator intent argument very well, she proposes a different approach. *Id.* at 686–87

(This is indeed a strong argument. I suggest a different one. Inheritance law can, through the public policy doctrine, invalidate such a provision. I do not argue the law should immediately endorse such a rule. My goal here is much more modest. I show that the question is intricate, and requires some deliberation. I strive to show that even in a country that does not directly protect the family, it does not mean that any disinheritance is automatically morally accepted.)

68. *DUKEMINIER, ET AL.*, *supra* note 1, at 519.

was faced with a will provision that stated,⁶⁹

[a] descendant of mine other than a child of mine who marries outside the Jewish faith (unless the spouse of such descendant has converted or converts within one year of the marriage to the Jewish faith) and his or her descendants shall be deemed to be deceased for all purposes of this instrument as of the date of such marriage.⁷⁰

In *Feinberg I*, the Illinois Court of Appeals had voided the provision, ruling that “[t]he condition is an invalid restraint on marriage.”⁷¹ Although the *Feinberg I* majority did not apply the Reasonableness Test the concurring and dissenting opinions did, with differing results. The *Feinberg I* concurrence held that the restraint was considered unreasonable in modern times.⁷² The *Feinberg I* dissenting opinion found that the restraint was reasonable.⁷³ The Illinois Supreme Court reversed the invalidation of the provision, without articulating the Reasonableness Test; instead, it weighed the public policy concerns of freedom of testation against terms regarding marriage and divorce.⁷⁴

69. Technically, the provision was written as a condition for a conditional trust. However, the actual marital restraint was adopted by the decedent’s wife’s will, which was at issue in the case. *Feinberg II*, 919 N.E.2d 888, 902 (Ill. 2009)

(The validity of a trust provision is not at issue, as the distribution provision of Max’s trust was revoked when Erla exercised her power of appointment. Her distribution scheme was in the nature of a testamentary provision, which operated at the time of her death to determine who would be entitled to a \$250,000 distribution.)

70. *Feinberg I*, 891 N.E.2d 549, 550 (Ill. App. Ct. 2008).

71. *Id.* at 552.

72. *Id.* at 555 (Quinn, J., concurring) (“While the Restatement (First) and (Second) of Trusts explained that restraints such as the instant ‘Jewish Clause’ were once considered reasonable, the Restatement (Third) of Trusts now provides that they are no longer reasonable.”).

73. *Id.* at 558 (Greiman, J., dissenting)

(Accordingly, the great weight of authority as to cases which have considered this subject have held such provisions as it appears in the case at bar to be reasonable and not contrary to the state’s public policy. The majority places us in the minority of jurisdictions that have considered this issue.)

74. *Feinberg II*, 919 N.E.2d at 894 (“When we determine that our answer to a question of law must be based on public policy, it is not our role to make such policy. Rather, we must discern the public policy of the state of Illinois as expressed in the constitution, statutes, and long-standing case law.”).

The *Feinberg II* court ruled, on the one hand, that the public policy of the state of Illinois is “one of broad testamentary freedom, constrained only by the rights granted to a surviving spouse and the need to expressly disinherit a child born after execution of the will if that is the testator’s desire.”⁷⁵ On the other hand, it stated that there is a “long-standing rule that conditions annexed to a gift that have the tendency to induce spouses to divorce . . . are void on grounds of public policy.”⁷⁶

Looking to the facts, the *Feinberg II* court found that the provision

does not implicate the principle that trust provisions that encourage divorce violate public policy . . . [because it was not] “capable of exerting . . . a disruptive influence upon an otherwise normally harmonious marriage” by causing the beneficiary to choose between his or her spouse and the distribution . . . [because the provision] involves the decision to marry, not an incentive to divorce.⁷⁷

Furthermore, the *Feinberg II* court noted that it had “considered the validity of restrictions affecting marriage in cases going back as far as 1857.”⁷⁸

This is notably *not* an application of the classical Reasonableness Test—the *Feinberg II* court made no effort to answer the factual question of how many eligible spouses live in the city.⁷⁹ Instead, the court balanced the policy factors—

75. *Id.* at 895.

76. *Id.* at 897. See also Orly Henry, *If You Will It, It Is No Dream: Balancing Public Policy and Testamentary Freedom*, 6 NW. J. L. & SOC. POL'Y 215, 216 (2011)

(Public policy in Illinois is to support, encourage, and safeguard the institution of marriage, and to promote marital harmony where possible. However, the state of Illinois also supports broad testamentary freedom, meaning that testators are generally given wide latitude to do as they please within the limits of the law and the state's public policy.

(citing *Feinberg II*, 919 N.E.2d at 897 & 895, respectively)).

77. *Feinberg II*, 919 N.E.2d at 899 (quoting *In re Gerbing's Estate*, 377 N.E.2d 29, 33 (Ill. 1975) (omission in original)).

78. *Id.*

79. *Contra* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 6.2 cmt. a (1983) (“[A] restraint unreasonably limits the transferee’s opportunity to marry if a marriage permitted by the restraint is not likely to occur. The likelihood of marriage is a factual question, to be answered from the circumstances of the

testamentary freedom and discouragement of marriage.⁸⁰

D. ALTERNATIVE TESTS

As an alternative to (A) prohibiting all marital restraints, (B) allowing all marital restraints, and (C) ad hoc case-by-case balancing, this article suggest a new test. The new test should offer advantages beyond those of the other alternative methods, as well as address the problems inherent in the Reasonableness Test. This article intends to do just that in its offer of the Coercion Test. The next section will discuss the new test, and the advantages of the new test over the first three options.

V. THE COERCION TEST AND ITS ADVANTAGES

If the freedom of choice of marriage is a great enough public policy reason to curtail the testator's intent, which it appears to be,⁸¹ then the testator's intent should be circumvented *only* when that freedom is threatened. The Reasonableness Test fails to address this—it is both over and under inclusive. The reader should consider a new test that measures the actual *influence* that the provision has on the beneficiary. This new test will be called the Coercion Test, which invalidates a will provision only when the court finds that it is coercive.

A. THE TEST FOR COERCION

In a testamentary restraint on marriage the testator

particular case.”)

80. *Feinberg II*, 919 N.E.2d at 894.

81. See, e.g., RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 (2003) (“The controlling consideration in determining the meaning of a donative document is the donor’s intention. The donor’s intention is given effect to the maximum extent allowed by law.” (emphasis added)). See also Henry, *supra* note 76, at 216

(Beneficiary restriction clauses and other similar testamentary provisions can present an issue of public policy because these clauses may be disruptive to marital harmony, whether or not the testator intended such an effect. These clauses can be construed as coercive, forcing potential beneficiaries to choose between an inheritance and a love that does not meet the conditions of the clause.)

threatens to withhold a gratuitous gift, not harm the beneficiary. Can this ever amount to coercion? Perhaps the closest analogy can be found in the academic literature concerning coercive wage offers. Since the controversy is longstanding in contemporary western economies, a thorough discussion is beyond the scope of this article. However, the general question is whether, "the wage bargain in a capitalist labor market [is] coercive if the worker is limited to a choice between unpalatable alternatives, for example, working at a low-paying job and starving?"⁸²

This question is analogous to the issue in this article, because the analysis is the same, replacing the "low-paying job" with an "undesirable marriage." In both cases, the party holding the money has no obligation to pay the beneficiary, but chooses to condition the payment on the beneficiary doing something he would rather not. Some argue that when the beneficiary is in a time of true economic distress, coercion exists.⁸³ Others entertain a narrower conception of coercion.⁸⁴ For example if,

Z is faced with working or starving; the choices and actions of all other persons do not add up to providing Z with some other option. . . . Does Z choose to work voluntarily? (Does someone on a desert island who must work to survive?) Z does choose voluntarily if the other individuals A through Y each acted voluntarily and within their rights. . . . A person's choice among differing degrees of unpalatable alternatives is not rendered nonvoluntary by the fact that others voluntarily chose and acted *within their rights* in a way that did not provide him with a more palatable alternative.⁸⁵

82. David Zimmerman, *Coercive Wage Offers*, 10 PHIL. & PUB. AFF. 121, 121 (1981).

83. See, e.g., C. B. MACPHERSON, *Elegant Tombstones: A Note on Friedman's Freedom*, in DEMOCRATIC THEORY: ESSAYS IN RETRIEVAL 143, 146 (1973) (noting that "the existence of a labour force *without its own sufficient capital [is] . . . therefore without a choice* as to whether to put its labour in the market or not." (emphasis added)).

84. See, e.g., ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 263—64 (1974).

85. *Id.* (emphasis added). Nozick also gives the following example: "Suppose

Others have argued that this emphasis on prior rights and wrongs is misplaced, that instead, “wage proposals generally do count as genuine offers, because workers generally do want to make the move from actual pre-proposal situations . . . to the proposal situations capitalists make available.”⁸⁶ Therefore, an offer is “coercive if and only if (1) an alternative pre-proposal situation workers would strongly prefer to the actual one is technologically and economically feasible when the offer is made, and (2) capitalists prevent workers from having at least one of these feasible alternative pre-proposal situations.”⁸⁷ An example of this is if a beneficiary is kidnapped, brought to an island where there is only one factory, and he has to work there in order not to starve. This is a case where the beneficiary is actively prevented “from being in the alternative pre-proposal situation [he] strongly prefers.”⁸⁸ Yet, another view is that an offer of money is coercive if the beneficiary’s “dependency and need”⁸⁹ is exploited.⁹⁰

This has only been a brief glimpse at the arguments about wage coercion, but it gives us some elementary tools with which to approach the marital restraint problem. Conditional offers of money are only coercive in very specific, and limited situations where “*not helping* is just as bad as *harming*.”⁹¹ Most of the literature agrees that coercion requires—at the minimum—that the coerced party is in a situation of economic distress, which is

there are twenty-six women and twenty-six men each wanting to be married. For each sex, all of that sex agree on the same ranking of the twenty-six members of the opposite sex in terms of desirability as marriage partners.” *Id.* at 263. The most desirable woman will marry the most desirable man. *Id.* When the second most desirable man marries the second most desirable woman, “their choices are not made nonvoluntary merely by the fact that there is something else they each would rather do. This other most preferred option requires the cooperation of others who have chosen, *as is their right*, not to cooperate.” *Id.* (emphasis added).

86. Zimmerman, *supra* note 82, at 144.

87. *Id.* at 144–45.

88. *Id.* at 133 (emphasis removed).

89. HARRY G. FRANKFURT, THE IMPORTANCE OF WHAT WE CARE ABOUT: PHILOSOPHICAL ESSAYS 33 (1988).

90. *Id.*

91. Zimmerman, *supra* note 82, at 135.

exploited.⁹² Others require substantively more than exploitation in that “*the person who does the coercing [must] undermine[], or limit[] the freedom of the person who is coerced.*”⁹³

A different approach—one that does not focus on economic need—is given by a very recent empirical study, which found that 82% of respondents felt that an offer of payment is coercive if the offer of payment causes them to feel that they have no reasonable alternative but to participate.⁹⁴ This modern account is not an entire departure from the academic theories; if the induced party feels enough economic need, it follows that he will consider there to be no reasonable alternatives.

At the very least, though, the consensus is that if a will provision is coercive, it must require the coerced party be in a situation economically desperate enough to choose the unpalatable choice, or otherwise have no alternative. Any less, and there is no coercion, and no limitation on the beneficiary's freedom.

B. ADVANTAGES OF THE COERCION TEST OVER ALTERNATIVE APPROACHES

1. PROHIBITING ALL MARITAL RESTRAINTS VERSUS THE COERCION TEST

The argument for prohibiting all marital restraints assumes that testation is only allowed “to the extent necessary to avoid the harms that the abolition of testation would produce.”⁹⁵ However, this approach seems somewhat at odds with the testator's ability to completely disinherit.⁹⁶ A blanket

92. See, e.g., Macpherson, *supra* note 83, at 146; FRANKFURT, *supra* note 89, at 33.

93. Zimmerman, *supra* note 82, at 134.

94. Emily A. Largent, et al., *Money, Coercion, and Undue Inducement: Attitudes about Payments to Research Participants*, IRB: ETHICS & HUM. RES., Jan.—Feb. 2012, at Table 3.

95. Sherman, *supra* note 38, at 1329.

96. DUKEMINIER, ET AL., *supra* note 1, at 519 (As a matter of fact, “[i]n all states except Louisiana, a child or other descendant has no statutory protection against intentional disinheritance by a parent. There is no requirement that a testator leave any property to a child, not even the proverbial one dollar.”).

prohibition on all marital restraints would put testators (who know the law) in the position of deciding whether it would be better to completely disinherit his child, out of anticipation that the child will not marry someone suitable, or give an unconditional gift. This seems like an extremely uncomfortable position.

Sherman's main concern, in promulgating the blanket prohibition approach, is opposition to excessive dead-hand control. According to Sherman, "it is not necessary to allow [testators] . . . to superintend their successors' behavior."⁹⁷ Sherman also notes that "it's nearly time we had a little less respect for the dead, an' a little more regard for the livin'."⁹⁸ The beauty of the Coercion Test is that it should not arouse Professor Sherman's concerns about dead-hand control, because the crux of the Coercion Test is ensuring that the living beneficiaries are *not* coerced into changing their behavior.⁹⁹ If a provision is found to be coercive, it would be invalidated under the Coercion Test. Thus, the Coercion Test will result in similar "regard" for the living, as a blanket prohibition on all marital restraints, but also pay more homage to testator intent.

2. ALLOWING ALL MARITAL RESTRAINTS VERSUS THE COERCION TEST

There are two obvious problems with allowing all marital restraints to be enforced. First, it allows the dead-hand an inordinate amount of power. Allowing all marital restraints is an unpopular argument because it always places testator intent over the priorities of the living.¹⁰⁰ Second, it disregards *any* public policy concerns. Courts have long held that provisions contrary to public policy should be voided.¹⁰¹

97. Sherman, *supra* note 38, at 1329.

98. *Id.* at 1330 (quoting SEAN O'CASEY, *Juno and the Paycock*, in THREE PLAYS 49 (1968)).

99. See *supra* Section V.A.

100. See, e.g., Sherman, *supra* note 38, at 1329.

101. Almost all marital restraint cases consider public policy as a value that is important enough to offset testator intent. See, e.g., *Shapira v. Union Nat'l Bank*, 315

First, the Coercion Test properly limits the dead-hand in situations where it tries to *coerce* the living. In situations where the living is not coerced by the provision, the dead-hand has no power. There is no need to fear the dead-hand in situations where it has no power over the living.

Second, the Coercion Test is built on the crux of the public policy concern for freedom of choice of marriage. This means that, unlike a blanket allowance on all marital restraints, it will take the public policy concern of freedom of choice of marriage into account and void provisions that harm this interest.

3. CASE-BY-CASE BALANCING VERSUS THE COERCION TEST

This case-by-case balancing approach offers some of the benefits that the Reasonableness Test does not offer. Most notably, it does not yield the absurdities or legal inconsistencies discussed in Sections III.A.1–3, *supra*. However, some have argued that the Illinois Supreme Court's case-by-case balancing approach in "*Feinberg* does not provide clear guidance because the court carefully narrowed the issue to the facts before it,"¹⁰² and that it should "have established a more clear precedent rather than potentially limiting the precedent established in *Feinberg* to the case's particular facts."¹⁰³ This is, essentially, a complaint about the case-by-case approach. When the court endeavors to balance the public policies invoked by the *facts* of a case, *of course* their holding will be limited to the case's particular facts—this is inevitable.

The Coercion Test would be a less ad-hoc method of approaching marital restraint provisions than case-by-case

N.E.2d 825, 829 (Ohio Ct. Com. Pl. 1974) ("A partial restraint of marriage which imposes only reasonable restrictions is valid, and not contrary to public policy"); *In re Harris' Will*, 143 N.Y.S.2d 746, 748 (N.Y. Surr. Ct. 1955); 6 WILLIAM J. BOWE & DOUGLAS H. PARKER, PAGE ON THE LAW OF WILLS § 44.25 (Rev. Ed. 2005); 52 AM. JUR. 2D *Marriage* § 117 (2011); *United States Nat'l Bank v. Snodgrass*, 275 P.2d 860, 866 (Or. 1954); *In re Silverstein's Will*, 155 N.Y.S.2d 598, 599 (N.Y. Surr. Ct. 1956); *Pacholder v. Rosenheim*, 99 A. 672, 675 (Md. 1916).

102. See Henry, *supra* note 76, at 236.

103. *Id.* at 233.

balancing. Courts could develop clear factors used to consider whether the provision is coercive, and they could benefit from the established literature on economic coercion.¹⁰⁴ Therefore, the Coercion Test would offer the sensitivity to public policy and testator intent that case-by-case balancing would offer, while ensuring smoother and more consistent application in courts.

4. REASONABLENESS TEST VERSUS THE COERCION TEST

The Coercion Test avoids many of the pitfalls of the Reasonableness Test described in Section III.¹⁰⁵ First, the Reasonableness Test perpetuates judgment of testator's judgment along with claims that the judgment is based on "reasonableness", not the testator's judgment. But, as discussed in Section III.A, *supra*, this is fundamentally duplicitous because any judgment that the testator's chosen condition is "unreasonable" is essentially a conclusion of the testator's judgment on what the suitable condition on the gift is. The Coercion Test circumvents this problem because it shifts the focus from the "reasonableness" of the donor's condition, to the control the provision has over the donor. Under the Coercion Test, it does not matter what the donor wants—so the donor's intention is not judged—rather, what matters is how desperate or exploited the donee is by the condition.

Second, it would be empirically easier for courts to determine factors of the Coercion Test than those of the Reasonableness Test.¹⁰⁶ Instead of acting as a census taker and speculating as to how likely the beneficiary is to attract an eligible spouse given the local population of women or men, the court applying the Coercion Test can examine factors like, the amount of money offered by the will, the economic condition of the beneficiary, and the alternative options open to the donee. Much of this evidence will be readily available to the court.

104. See *supra* Section V.A.

105. See *supra* Section III.

106. See *supra* Section III.B (discussing empirical problems with the reasonableness test).

The Coercion Test will also provide more consistent results. Professor Sherman's concern that the Reasonableness Test's "results turn on the fortuities of geographic and demographic factors"¹⁰⁷ will be sufficiently addressed by the Coercion Test. This is because, in the Coercion Test, the results no longer turn on the geographic population in the state in which the beneficiary lives; instead, they turn on the actual pressure the provision places on the beneficiary.

Lastly, the Coercion Test will attack the crux of the public policy problem – that the dead shall wrongly restrict the freedom of choice of marriage of the living. As discussed in Section III, the Reasonableness Test is both over and under inclusive in addressing this problem.

Scenario	Facts	Reasonableness Test	Coercion Test
1	<p><u>Background</u>: Son has fallen on hard times and is in desperate need of cash for food and clothes.</p> <p><u>Will Provision</u>: I hereby give Son my fortune of one million dollars, but only if he marries a woman of Catholic faith.</p>	Provision Upheld.	Provision Voided.
2	<p><u>Background</u>: Son makes enough money to support himself, although – like everyone else – would welcome extra money.</p> <p><u>Will Provision</u>: I hereby give Son my fortune of one million dollars, but only if he marries a woman of Catholic faith.</p>	Provision Upheld.	Provision Upheld.

107. Sherman, *supra* note 38, at 1320–21. See also *supra* Section III.B.

3	<p><u>Background:</u> Son has fallen on hard times and is in desperate need of cash for food and clothes.</p> <p><u>Will Provision:</u> I hereby give Son my fortune of one million dollars, but only if he marries a woman of Baloch descent.¹⁰⁸</p>	Provision Voided.	Provision Voided.
4	<p><u>Background:</u> Son makes enough money to support himself, although — like everyone else — would welcome extra money.</p> <p><u>Will Provision:</u> I hereby give Son my fortune of one million dollars, but only if he marries a woman of Baloch descent.</p>	Provision Voided.	Provision Upheld.

Table 1. Comparing the Reasonableness with Coercion in Testamentary Restraints on Marriage.

The Coercion Test addresses public policy concerns better than the Reasonableness Test. Consider Table 1. Table 1 poses four hypothetical cases, and also whether courts would uphold the provisions applying tests of reasonableness, as contrasted with tests of coercion. In Scenarios 2 and 3, the two tests yield the same result. In Scenarios 1 and 4, the tests yield differing results. In Scenario 1, Son desperately needs money. Assume that his situation is bad enough for economic coercion to be a

108. Baloch is a small ethnic group that makes up 2% of the population of Afghanistan, 2% of the population of Iran, and 3.57% the population of Pakistan. CENTRAL INTELLIGENCE AGENCY, THE WORLD FACTBOOK (Jan. 25, 2012), <https://www.cia.gov/library/publicatons/the-world-factbook/fields/2075.html>. Let us assume that the beneficiary is living in the United States and has a very small chance of successfully locating such a woman.

true threat. Now, no matter how reasonable the provision is—that is, no longer how likely it is that he will be able to find a permitted spouse—he will, more or less, be forced to seek out and marry her if he actually needs the money. In Scenario 4, Son does not need money so badly that the offer of money would be considered economic coercion. He is free to decide whether or not to accept the conditional gift.

If the public policy concern is protecting the freedom of choice of marriage, it *must* be that the provision in Scenario 1 is more harmful than the provision in Scenario 4. Although the Scenario 4 condition is unreasonable, it in no way infringes upon Son's freedom. It might frustrate him to know that he is foregoing a large fortune because he cannot find a permitted mate; but, he is no more bound to the marital restraint than any student who is offered money to do a research project.

In contrast, if Son in Scenario 1 feels that he needs the money in order to afford the bare requirements of survival, he is bound to the marital restraint no matter how easy or difficult it is to carry out. His freedom of choice of marriage is curtailed, no matter what the condition is. If the balance to be made here is between the testator's intent (which is traditionally favored in the making of wills) and public policy (which centers on encouraging marriage and freedom of choice thereof), a test of whether the beneficiary was actually coerced by the will provision is the better test for courts.

VI. CONCLUSION

This article began by examining how courts have approached marital restraint provisions in wills by using the Reasonableness Test, but finding that it has several fatal shortcomings.

Next, the article discussed possible alternative approaches to testamentary marital restraints. The four most prominent approaches were: (1) a blanket prohibition of all marital restraints, most noticeably promulgated by Professor Jeffrey G. Sherman; (2) a blanket allowance of all marital restraints centered on the value of honoring testator intent; (3) a case-by-

case balancing approach used by the *Feinberg II* court in a recent case; and (4) the possibility of pursuing a new test that does not suffer from the same shortcomings as the Reasonableness Test. Table 2 is included for convenience, summarizing the different approaches to testamentary restraints on marriage.

Approach	Internal Reference
Reasonableness Test	Section II.A–B (Summary), Section III (Problems), Section V.B.4 (as compared to the Coercion Test)
Prohibition of All Marital Restraints	Section IV.A (Summary), Section V.B.1 (as compared to the Coercion Test)
Allowance of All Marital Restraints	Section IV.B (Summary), Section V.B.2 (as compared to the Coercion Test)
Case-By-Case Balancing	Section IV.C (Summary), Section V.B.3 (as compared to the Coercion Test)
Coercion Test	Section V.A (Summary), Section V.B (as compared to other approaches)

Table 2. Possible Approaches for Testamentary Restraints on Marriage

The new test that this article has proposed—the Coercion Test—is a sensible approach to testamentary restraints on marriage. It avoids all four of the major problems with the Reasonableness Test, it provides more respect for testator’s intent than a blanket prohibition, it is more protective of public policy than a blanket allowance, and it provides more consistent results than a case-by-case balancing approach. Most importantly, the Coercion Test addresses the crux of the public policy problem: whether an individual is being *forced* into, or out of, marriage.