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WHY I DO LAW REFORM

Lawrence W. Waggoner*

In this Article, Professor Waggoner, newly retired, provides a retrospective on his career in law reform. He was inspired to write the Article by a number of articles by law professors explaining why they write. He contrasts law-reform work with law-review writing, pointing out that the work product of a law-reform reporter is directed to duly constituted law-making authorities. He notes that before getting into the law-reform business, he had authored or co-authored law review articles that advocated reform, but he also notes that those articles did not move the law a whit. The articles did, however, lead to his selection as reporter, first for the Uniform Law Commission and then for the American Law Institute. Only by becoming a reporter was he able to influence the law. The Article lists a number of reforms in which he played a part, in a career in law reform that spanned nearly three decades. The Article closes by addressing the question in the title. He devoted much of his career to law reform work, he writes, in the hope that the work improved the law. And, he admits, he also did it because he liked doing it.

A number of articles by law professors explaining why they write inspired me to write this Article explaining why I do law reform.¹ By now, it is well known among the law professoriate that most of what is written by law professors today is written for other law professors, not for the legal profession at large.² James Boyd White said that he “[does] not in the main write as professional to professional,

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1. Because of my role in the law reform process, it is especially fitting for me to write this Article for the ACTEC Symposium on “The Uniform Probate Code: Remaking American Succession Law,” which was held at my own law school on October 21, 2011.

2. See Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 MICH. L. REV. 34 (1992); see also WALTER OLSON, *SCHOOLS FOR MISRULE* 39 (2011) (quoting Harold C. Havighurst, *Law Reviews and Legal Education*, 51 Nw. U. L. REV. 22, 24 (1956) (“Whereas most periodicals are published primarily in order that they may be read, the law reviews are published primarily in order that they may be written.”); David Barnhizer, *The Purposes and Methods of American Legal Education* 12 (Cleveland-Marshall Legal Studies, Paper No. 11-205, 2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1773904 (“[I]t is rare for a legal academic’s published output to be read by more than a handful of other academics and it is also the case that those loyal readers tend to be people who are already in agreement with the author.”). Perhaps as a result, the paid circulation of law reviews is in decline. See Joe Palazzolo, *A Year in Law Review*, WALL ST. J., March 5, 2012, at B4 (reporting that *Harvard Law Review*’s paid circulation declined from more than 10,000 in the 1960s and 1970s to 1,896 in 2011).

but as person to person, or mind to mind.”³ Richard Posner acknowledged with some regret that “[l]aw professors used to identify primarily with the legal profession and secondarily with the university. The sequence has been reversed.”⁴ A report of the Carnegie Foundation for the Advancement of Teaching noted, “Like other professional schools, law schools are hybrid institutions. One parent is the historic community of practitioners The other heritage is that of the modern research university [A]s American law schools have developed, their academic genes have become dominant.”⁵ The Carnegie Foundation Report also noted that legal-academic scholarship has become “more like scholarship in the arts-and-sciences disciplines.”⁶ Jonathan Macey described the same phenomenon in slightly different terms:

Something vaguely defined as “doctrinal analysis” traditionally formed the core of legal scholarship. Over the years, this changed as law schools tried to make their way up the hierarchical ladder from the status of trade schools to professional schools and, finally, to the final rung of the academic ladder, the status of full partner in the enterprise of the modern American universities.⁷

One manifestation of the shift from the profession to the academy is that more and more law professors have both a law degree and a Ph.D. in an academic discipline such as economics, history, literature, philosophy, political science, psychology, or sociology. Some law professors have only a Ph.D. in one of these disciplines, but no law degree. “In turn, the scholarship produced by America’s law schools is ever less oriented to the needs of the bar and the judiciary.”⁸ Although most law students will practice in an area of

3. James Boyd White, *Why I Write*, 53 WASH. & LEE L. REV. 1021, 1035 (1996).

4. Richard A. Posner, *In Memoriam: Bernard D. Meltzer (1914–2007)*, 74 U. CHI. L. REV. 435, 435 (2007).

5. WILLIAM M. SULLIVAN ET AL., EDUCATING LAWYERS: PREPARATION FOR THE PROFESSION OF LAW 4 (2007) [hereinafter CARNEGIE FOUNDATION REPORT].

6. *Id.* at 7.

7. Jonathan R. Macey, *Legal Scholarship: A Corporate Scholar’s Perspective*, 41 SAN DIEGO L. REV. 1759, 1760 (2004). For an argument that law schools have not gone far enough in this direction, see Barnhizer, *supra* note 2, *passim*.

8. JOHN H. LANGBEIN ET AL., HISTORY OF THE COMMON LAW 992 (2009) (citing Edwards, *supra* note 2). See also Brent E. Newton, *Law Review Scholarship in the Eyes of the Twenty-First Century Supreme Court Justices: An Empirical Analysis*, 4 DREXEL L. REV. 399 (2012); Editorial, *Legal Education Reform*, N.Y. TIMES, Nov. 26, 2011, at A18, available at http://www.nytimes.com/2011/11/26/opinion/legal-education-reform.html?_r=1&hp; David Segal, *What They Don’t Teach Law Students: Lawyering*, N.Y. TIMES, Nov. 20, 2011, at A1, available at http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?_r=1&hpw.

private law, the law schools of today emphasize public law (primarily federal law) and global law, relegating private law (primarily state law, including my own area of trusts and estates) to second-tier status. Law schools sometimes staff private-law courses with adjuncts from practice.⁹

The shift from professional law school to law and humanities school is partly due to the influence of a few elite law schools,¹⁰ whose graduates dominate the law professoriate.¹¹ These elite law schools largely set the agenda for what type of scholarship is most valued within the legal academic community.¹² In the words of a study of this phenomenon, these law schools have become “intellectual super-spreaders.”¹³

My purpose, though, is not to insert myself into the debate about the direction of law school teaching and scholarship.¹⁴ My purpose is to explain why I do law reform, not to cast aspersions on those who do other things. Largely lost in the shift from professional law school to law-and-humanities school is the function of the law professor as law reformer.¹⁵ Of those who explained why

9. See William L. Reynolds, *Back to the Future in Law Schools*, 70 MD. L. REV. 451, 461 (2011).

10. The move away from the professional law school, derisively called the trade-school model by its critics, began with the legal realist movement (primarily associated with the Columbia and Yale law faculties), followed by the critical legal studies movement (primarily associated with the Harvard law faculty) and its counterweight, the law and economics movement (primarily associated with the University of Chicago law faculty). See generally LANGBEIN ET AL., *supra* note 8, at 982–92. Other movements occurring along the way include the critical race theory movement, the law and literature movement, the storytelling movement, the hermeneutics movement, and the therapeutic jurisprudence movement. On the last, see David B. Wexler, *TJ Across the Law School Curriculum* (Ariz. Legal Studies, Discussion Paper No. 11-27, 2011), available at <http://ssrn.com/abstract=1910742>.

11. See CARNEGIE FOUNDATION REPORT, *supra* note 5, at 89.

12. *Id.* at 89. (“The culture of legal education . . . is shaped by the practices and attitudes of the elite [law] schools; those practices and attitudes are reinforced through a self-replicating circle of faculty and graduates.”). *Id.* at 89. See also Segal, *supra* note 8.

13. See Daniel Martin Katz et al., *Reproduction of Hierarchy? A Social Network Analysis of the American Law Professoriate*, 61 J. LEGAL EDUC. 76, 79 (2011). The authors, who are not members of the American law professoriate, erroneously connected this phenomenon to influencing the path of American law, when in fact it influences the path of American legal scholarship.

14. The new law school at UC Irvine serves as a counter-trend example to the shift from professional law school to law and humanities school. The Founding Dean, Erwin Chemerinsky, set as his central vision for the new law school the preparation of students “for the practice of law at the highest levels of the profession,” a primary objective that “elite law schools have long eschewed.” See Erwin Chemerinsky, *The Ideal Law School for the 21st Century*, 1 U.C. IRVINE L. REV. 1, 13 (2011), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1910049. Dean Chemerinsky also noted, though, and correctly in my view, that interdisciplinary study is an integral part of fulfilling that central vision. See *id.* at 20.

15. At my own law school, judging from the questionnaire that each faculty member must fill out and submit to the dean each year, testifying before a congressional committee is

they write, only Yale Kamisar, who like me is now a member of the older generation of law teachers, said that he usually writes professional to professional and does so to influence the law, or more specifically, judicial decisions.¹⁶ But even Kamisar conceded—too modestly in his case¹⁷—that although a law review article is not likely to alter fundamental beliefs, “the right law review article can have a significant impact on the courts when more ‘incremental’ matters are at issue.”¹⁸ Similarly, Erwin Chemerinsky wrote:

Scholarship is, in a sense, an act of faith that writing can make a difference. Yet, all of us know that the reality is that most of what is written in law reviews is read by relatively few people Occasionally, there is an article . . . that dramatically changes the way an area of the law is regarded and causes a reform in the law. But such articles are rare. Perhaps more common, a body of articles, over a period of time, causes a change in the law. It is impossible to estimate what percentage of legal scholarship has such an impact, but likely the number is relatively small.¹⁹

I experienced this phenomenon firsthand. I got into the business of law reform after about sixteen years of law teaching. My instinct had always been in a reformist direction, in both classroom teaching and scholarship. I became increasingly frustrated by how unresponsive to modern needs the law of trusts and estates had become. Before getting into the law reform business, I authored and coauthored law review articles that advocated reform,²⁰ but

highly prized, but there is no interest in ascertaining whether the position advocated was actually adopted and became law.

16. Yale Kamisar, *Why I Write (And Why I Think Law Professors Generally Should Write)*, 41 SAN DIEGO L. REV. 1747, 1747, 1754 (2004).

17. See Yale Kamisar, *Illegal Searches or Seizures and Contemporaneous Incriminating Statements: A Dialogue on a Neglected Area of Criminal Procedure*, 1961 U. ILL. L.F. 78. The Supreme Court cited this article in *Wong Sun v. United States*, 371 U.S. 471, 485 & n.11 (1963), a decision reversing a former rule that Kamisar had argued was wrong. On this achievement, Kamisar noted, “Of course, this is what many law professors live for.” Kamisar, *supra* note 16, at 1758 n.36.

18. Kamisar, *supra* note 16, at 1754 n.23.

19. Erwin Chemerinsky, *Foreword: Why Write?*, 107 MICH. L. REV. 881, 893 (2009). For an article that did have such an impact, see *supra* note 17.

20. E.g., John H. Langbein & Lawrence W. Waggoner, *Redesigning the Spouse's Forced Share*, 22 REAL PROP. PROB. & TR. J. 303 (1987); John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PA. L. REV. 521 (1982); Lawrence W. Waggoner, *Perpetuity Reform*, 81 MICH. L. REV. 1718 (1983); Lawrence W. Waggoner, *Reformulating the Structure of Estates: A Proposal for Legislative Action*, 85 HARV. L. REV. 729 (1972); Lawrence W. Waggoner, *A Proposed Alternative to the Uniform Probate Code's System for Intestate Distribution Among Descendants*, 66 NW. U. L. REV. 626 (1971).

those articles did not move the law a whit. The articles did, however, get me selected as a reporter, first for the Uniform Law Commission (ULC)²¹ and then for the American Law Institute (ALI).²² Only by becoming a reporter was I able to influence the law.²³ Although the work product of a reporter constitutes a form of legal writing, it differs from the scholarship that has become dominant among the law professoriate, which seldom makes an imprint on the law. The work product of a reporter is directed at duly constituted law-making authorities. In writing uniform statutes, the reporter writes for legislatures. In writing Restatements, the reporter writes for courts. In each case, the reporter also writes for lawyers who have a case whose outcome might be controlled or influenced by what the reporter has written.

WHERE WE STARTED, WHERE WE'VE GONE, AND WHERE WE MIGHT GO IN THE FUTURE

During my professional lifetime, the law of trusts and estates has developed in remarkable ways. When I started teaching in 1968, perpetuity law followed the common-law Rule. Intestacy took no account of the multiple-marriage society. The elective share of the surviving spouse could easily be evaded by shifting assets to will substitutes and, in any event, was not coordinated with the partnership theory of marriage. The strict-compliance approach to will

21. My first role as a Reporter for the ULC was as a Reporter for the Uniform Statutory Rule Against Perpetuities (USRAP), promulgated in 1986. Next, after being appointed as Director of Research and then as Chief Reporter for the Joint Editorial Board for Uniform Trust and Estate Acts, came a major overhaul of the substantive provisions of the Uniform Probate Code (UPC), promulgated in 1990 and revised in part in 2008. Spinoffs from the UPC revision project were the Uniform Testamentary Additions to Trusts Act (1991) and the Uniform Simultaneous Death Act (1993).

22. I served in this latter capacity as the Reporter for the three-volume Restatement (Third) of Property: Wills and Other Donative Transfers, begun in 1990 and completed in 2011.

23. The proposals in the articles cited *supra*, note 20, are now adopted in either or both the UPC and Restatement. On the spouse's forced share, see UNIF. PROBATE CODE §§ 2-201 to -214 (2011), 8 U.L.A. pt. I, at 101-32 (1998), 73-95 (Supp. 2011); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 9.2 (2003). On perpetuity reform, see UNIF. STATUTORY RULE AGAINST PERPETUITIES (1986); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS ch. 27 (2011). On reformation of wills on the ground of mistake, see UNIF. PROBATE CODE § 2-805 (2011) 8 U.L.A. pt. I, at 181 (Supp. 2011); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 (2003). On reformulating the structure of estates, see RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS chs. 24 & 25 (2011). On the proposed alternative to the Uniform Probate Code's system for intestate distribution among descendants, see UNIF. PROBATE CODE § 2-106 (2011), 8 U.L.A. pt. I, at 85 (1998).

execution was the norm.²⁴ Wills could not be reformed, no matter how clear the evidence of mistake. The revocation-on-divorce statutes and the rules of construction only applied to wills and did not extend to will substitutes. And the rules of construction could only be rebutted by language in the will.

A lot has changed since. Both of the premier national law reform organizations—the ULC and the ALI—now have replaced all of these outmoded rules with rules that hopefully are more attuned to contemporary society. My own role has been mainly as reporter for the ULC’s Uniform Probate Code (UPC) and for the ALI’s Restatement (Third) of Property: Wills and Other Donative Transfers.²⁵ Being the reporter for both enabled me to try to make the UPC and the Restatement consistent with one another. In some cases, the UPC incorporated the reform first; in others, the Restatement did. To pick out just a couple of examples, the Restatement led on the reformation of wills and on the treatment of children of assisted reproduction; the UPC caught up later.²⁶ The UPC led on extending the rules of construction and the revocation-on-divorce statutes to will substitutes; the Restatement caught up later.²⁷ The Uniform Statutory Rule Against Perpetuities

24. Largely because of the participation of John Langbein as a member of the Joint Editorial Board for Uniform Trust and Estate Acts, the UPC replaced the strict-compliance approach with the harmless-error rule. See UNIF. PROBATE CODE § 2-503 (1990), 8 U.L.A. pt. I, at 108 (Supp. 2011), later adopted in RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 3.3 (1999). Langbein had previously published an article advocating a substantial-compliance doctrine. See John H. Langbein, *Substantial Compliance With the Wills Act*, 88 HARV. L. REV. 489 (1975). But he later changed his mind, based on the disappointing judicial experience with the substantial compliance doctrine in the Australian state of South Australia, and advocated the harmless error rule instead. See 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 (1987). For application of the UPC’s harmless error rule, see *Estate of Stoker*, 193 Cal. App. 4th 236 (Cal. Ct. App. 2011) (signed but unwitnessed will upheld under California’s enactment of UPC’s harmless error rule); *Estate of Hall*, 51 P.3d 1134 (Mont. 2002) (signed but unwitnessed will upheld under Montana’s enactment of UPC’s harmless error rule).

25. I also served in an advisory role for the Uniform Trust Code and the Restatement (Third) of Trusts.

26. On reformation of wills, see UNIF. PROBATE CODE § 2-805 (2011) 8 U.L.A. pt. I, at 181 (Supp. 2011); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 12.1 (2003); John H. Langbein & Lawrence W. Waggoner, *Curing Execution Errors and Mistaken Terms in Wills* (Univ. of Mich. Pub. Law Working Paper No. 207, 2010), available at <http://ssrn.com/abstract=1653438>. On the treatment of children of assisted reproduction, see UNIF. PROBATE CODE § 2-705 (2011), 8 U.L.A. pt. I, at 141–42 (Supp. 2011); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS §§ 14.8–.9 (2011); Sheldon F. Kurtz & Lawrence W. Waggoner, *The UPC Addresses the Class-Gift and Intestacy Rights of Children of Assisted Reproduction Technologies*, 35 ACTEC J. 30 (2009).

27. See UNIF. PROBATE CODE §§ 2-701 to -711, -804 (2011), 8 U.L.A. pt. I, at 181–205 (1998), 141–69, 177–79 (Supp. 2011); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 4.1(b) (1999); ch. 14 (2011).

(USRAP), later incorporated into the UPC, led on perpetuity reform; the Restatement caught up later and, I hope, improved on the USRAP/UPC version.²⁸

In some cases, when the UPC adopted specific rules whose implementation seemed beyond the power of the courts and achievable only by statute, I did not think that the Restatement could follow suit, even though I favored the UPC position on the merits. The usual approach I took in those cases was to describe the UPC approach, either in the Restatement black letter provisions or commentary or, in some cases, in the Reporter's Note. The UPC's 120-hour requirement of survival is one example.²⁹ Another is the UPC's elective-share schedule.³⁰ Still another is the UPC's requirement that a child of assisted reproduction who is conceived

28. See UNIF. PROBATE CODE §§ 2-901 to -906 (2011), 8 U.L.A. pt. I, at 226-39 (1998) (incorporating the Uniform Statutory Rule Against Perpetuities into the UPC); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS §§ 27.1-.3 (2011); Lawrence W. Waggoner, *The American Law Institute Proposes a New Approach to Perpetuities: Limiting the Dead Hand to Two Younger Generations* (Univ. of Mich. Pub. Law Working Paper No. 200, 2010), available at <http://ssrn.com/abstract=1614936>.

On the perpetual-trust movement, see Lawrence W. Waggoner, *Effectively Curbing the GST Exemption for Perpetual Trusts*, 135 Tax Notes 1267 (June 4, 2012), available at <http://ssrn.com/abstract=2083804>; Lawrence W. Waggoner, *US Perpetual Trusts*, 127 LAW Q. REV. 422 (2011); Lawrence W. Waggoner, *From Here to Eternity: The Folly of Perpetual Trusts* (Univ. of Mich. Pub. Law Working Paper No. 259, 2011, updated 2012), available at <http://ssrn.com/abstract=1975117>; Lawrence W. Waggoner, *Curtailing Dead-Hand Control: The American Law Institute Declares the Perpetual-Trust Movement Ill Advised* (Univ. of Mich. Pub. Law Working Paper No. 199, 2010), available at <http://ssrn.com/abstract=1614934>; Lawrence W. Waggoner, *Message to Congress: Halt the Tax Exemption for Perpetual Trusts* (Univ. of Mich. Pub. Law Working Paper No. 206, 2010), available at <http://ssrn.com/abstract=1652791>. A slightly shortened, less documented, and lightly edited version of this essay appears as *Commentary, Message to Congress: Halt the Tax Exemption for Perpetual Trusts*, 109 MICH. L. REV. FIRST IMPRESSIONS 23 (2010), available at <http://www.michiganlawreview.org/assets/fi/109/waggoner.pdf>. See also RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 76-85 (2010); Mark L. Ascher, *But I Thought the Earth Belonged to the Living*, 89 TEX. L. REV. 1149, 1156-65 (2011) (reviewing LAWRENCE M. FRIEDMAN, *DEAD HANDS: A SOCIAL HISTORY OF WILLS, TRUSTS, AND INHERITANCE LAW* (2009) and describing, at 1160, the perpetual-trust movement as "loony"); Ray D. Madoff, *America Builds an Aristocracy*, N.Y. TIMES, July 12, 2010, at A19; Lawrence W. Waggoner, *Congress Should Impose a Two-Generation Limit on the GST Exemption: Here's Why* (Univ. of Mich. Pub. Law Working Paper No. 205, 2010), available at <http://ssrn.com/abstract=1640742>; Jane Bryant Quinn, *Estate Taxes: Why Congress Needs to Plug the Loophole That Builds Up Dynastic Wealth*, CBSMONEYWATCH.COM (Dec. 1, 2010), <http://moneywatch.bnet.com/investing/blog/make-money/estate-taxes-why-congress-needs-to-plug-the-loophole-that-builds-up-dynastic-wealth/676/?tag=coll;fd-banner-news>; Robert Sitkoff, *Top-Down Versus Bottom-Up Law Reform in Trusts and Estates: Future Interests and Perpetuities*, JOTWELL TRUSTS AND ESTATES (Nov. 22, 2010), <http://trustest.jotwell.com/top-down-versus-bottom-up-law-reform-in-trusts-and-estates-future-interests-and-perpetuities>.

29. See UNIF. PROBATE CODE §§ 2-104, -702 (2011), 8 U.L.A. pt. I, at 182-84 (1998), 42 (Supp. 2011); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 1.2 cmts. d & e (1999).

30. See UNIF. PROBATE CODE § 2-202 (2011), 8 U.L.A. pt. I, at 74-75 (Supp. 2011); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 9.2 (2003).

posthumously must be born within forty-five months of the deceased parent's death (or in utero within thirty-six months of the deceased parent's death) if the distribution date arises at the deceased parent's death.³¹ A third example is the UPC's substitution of the descendants of a beneficiary of a future interest if the beneficiary fails to survive the time of possession.³² Describing the UPC position in this manner is designed to bring that position to the attention of a court dealing with the issue without presenting it as the official Restatement position. Presenting it as the official Restatement position would risk outright rejection by a court, while describing the UPC position opens up the possibility that a more adventurous court might adopt it.

What's in store for the future? The ULC now has two projects in motion: a uniform act on premarital and marital agreements, and one on powers of appointment.³³ Although, as a retiree, I am not directly involved in either project, the Restatement has already addressed both topics,³⁴ and may influence or serve as the model for the uniform acts. On the possible agenda for the future is a uniform act on the simplification of the doctrine of estates and on perpetuities, again using the Restatement as the model.³⁵

No uniform act or Restatement is the sole product of the reporter. Many others contribute to the final product. Unlike the work of academic authors of student-edited law journal articles, leading specialist and non-specialist practitioners, judges, and academics vet the work of the reporter for both organizations many times over before the work sees the light of day as a final product.³⁶

31. See UNIF. PROBATE CODE § 2-705(g)(2) (2011), 8 U.L.A. pt. I, at 142 (Supp. 2011); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS §§ 14.8–9 (2011).

32. See UNIF. PROBATE CODE § 2-707 (2011), 8 U.L.A. pt. I, at 155–57 (Supp. 2011); RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS §§ 15.4 cmt. i, 26.3 cmt. h (2011).

33. Both projects are in good hands. For the makeup of the drafting committee on premarital and marital agreements, see *Committees: Premarital and Marital Agreements*, UNIF. L. COMM'N, <http://www.uniformlaws.org/Committee.aspx?title=Premarital%20and%20Marital%20Agreements> (last visited Jul. 23, 2012), and for the makeup of the drafting committee on powers of appointment, see <http://www.uniformlaws.org/Committee.aspx?title=Powers%20of%20Appointment> (last visited Jul. 23, 2012).

34. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS § 9.4 (2003) (premarital and marital agreements); §§ 17.1–23.1 (2011) (powers of appointment).

35. RESTATEMENT (THIRD) OF PROP.: WILLS AND OTHER DONATIVE TRANSFERS chs. 24, 25, and 27 (2011). See also Lawrence W. Waggoner, *The American Law Institute Proposes Simplifying the Doctrine of Estates* (Univ. of Mich. Pub. Law Working Paper No. 198, 2010), available at <http://ssrn.com/abstract=1612878>.

36. The Restatement is vetted by the Advisers, Consultative Group Members, ALI Council, and the full ALI membership. See *Drafting Cycle*, A.L.I., <http://www.ali.org/index.cfm?fuseaction=projects.drafting> (last visited Mar. 11, 2012). The Uniform Probate Code is drafted by the Drafting Committee, vetted by the Joint Editorial Board for Uniform

The ultimate vetting comes post-promulgation. No uniform act or Restatement automatically becomes law.³⁷ A uniform law in trusts and estates usually has to be vetted first by the relevant section of the state bar, and then, if approved, introduced and enacted by the state legislature. The UPC itself has a greater obstacle to overcome than the Uniform Trust Code (UTC), because all of the states already have a probate code, whereas, in the pre-UTC world, only a couple of states had codified trust law. Filling a vacuum is always easier than replacing law with which lawyers and judges are already familiar. In any event, I have always viewed the UPC as aspirational.

Whether a Restatement becomes law depends on whether it's cited by one of the parties to a lawsuit and then embraced in a published opinion by the state court. Much work still needs to be done here. Enactment of the UPC is far from universal, and the Restatement, being fairly new, has penetrated the law of only a few states. Still, on occasion, the UPC has influenced the law in states that have not enacted it. For example, *Will of Ranney* adopted the UPC position (UPC § 2-503) that a will is treated as if it had been validly executed despite a minor defect in execution.³⁸ Another example is *Ruotolo v. Tietjen*, which adopted the UPC

Trust and Estate Acts, and then vetted by the full ULC membership. See *ULC Drafting Process*, UNIF. L. COMM'N, <http://www.nccusl.org/Narrative.aspx?title=ULC%20Drafting%20Process> (last visited Mar. 11, 2012).

Of course, nothing is perfect, and there are parts of both projects that might have been done differently or better. There also have been articles by legal academics criticizing the approach of one or more sections. Sometimes the author's argument resonated with the Committee; in those cases, the Committee attempted to correct the oversight. See, e.g., Ira Mark Bloom, *The Treatment of Trust and Other Partial Interests of the Surviving Spouse Under the Redesignated Elective-Share System: Some Concerns and Suggestions*, 55 ALB. L. REV. 941, 975-77 (1992) (arguing against the provision that charges the surviving spouse with amounts that would have passed to the surviving spouse but were disclaimed; in response, the ULC deleted the provision in 1993).

37. The Virgin Islands, an exception, provides:

The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.

V.I. CODE ANN., tit. 1, § 4 (1995). The Commonwealth of the Northern Mariana Islands has enacted a similar statute. See 7 N. MAR. I. CODE § 3401 (2004).

38. *Will of Ranney*, 589 A.2d 1339, 1343-44 (N.J. 1991). New Jersey subsequently enacted UPC § 2-503. See 2004 N.J. Sess. Law Serv. ch. 132 (West 2007) (codified at N.J. STAT. ANN. § 3B:3-3). Compare *Estate of Iversen*, 150 S.W.3d 824, 826 (Tex. Ct. App. 2004) (refusing to recognize the harmless error rule judicially), with *Sisson v. Park St. Baptist Church*, 24 E.T.R.2d 18, 18-22 (Ont. Gen. Div. 1998) (adopting the harmless error rule judicially).

position (UPC § 2-603(b)(3)) that survival language does not automatically trump an antilapse statute.³⁹

CONCLUSION

Because my work on the Restatement is completed and I have become the Emeritus Director of Research in the Joint Editorial Board for Uniform Trust and Estate Acts, I probably should have entitled this short Article, “Why I *Did* Law Reform.” But I like the title as it is, and am sticking with it. Nevertheless, the Article is somewhat of a personal retrospective, so I will now slip into the past tense.

Why did I devote such a large portion of my career to law reform? I certainly did not do it for personal recognition. Law reformers are relatively anonymous, even within legal circles. No state enacting a uniform law names the reporter for that uniform law, not even in the bill’s preamble. No court adopting the position of a Restatement identifies the Restatement’s reporter.⁴⁰ Here are some quotes from judicial opinions in which the Property Restatement influenced the court’s decision to make new law:⁴¹ “We adopt the view of the American Law Institute on this issue” (Iowa Supreme Court);⁴² “In sum, we agree with [the Restatement and UPC]” (Connecticut Appellate and Supreme Courts);⁴³ “We adopt

39. Ruotolo v. Tietjen, 890 A.2d 166, 177 (Conn. App. Ct. 2006), *aff’d per curiam*, 916 A.2d 1 (Conn. 2007).

40. In one case, however, in which the court rejected the Restatement view, I was identified as “[t]he member presenting the proposed new section.” Bongaards v. Millen, 793 N.E.2d 335, 351 n.20 (Mass. 2003).

By contrast, the courts in several cases mentioned my name in connection with a uniform law for which I was the reporter, usually by citing an article I wrote about the statute. *See, e.g.*, Stillman v. Teachers Ins. and Annuity Assoc. College Ret. Equities Fund, 343 F.3d 1311, 1319 (10th Cir. 2003); American Gen. Life Ins. Co. v. Jenson, Civ. No. 11-5057-JLV, 2012 WL 848158, (D. S.D. 2012); Allstate Life Ins. Co. v. Hanson, 200 F. Supp. 1012, 1019 (E.D. Wis. 2002); *In re* Estate of Maldonado, 117 P.3d 720, 723 n.16 (Alaska 2005); UNUM Life Ins. Co. v. Craig, 28 P.3d 510, 514 (Ariz. 2001); Ruotolo v. Tietjen, 890 A.2d 166, 177 (Conn. App. Ct. 2006), *aff’d per curiam*, 916 A.2d 1 (Conn. 2007); *In re* Estate of Sprenkle-Hill, 703 N.W.2d 191, 196 n.25 (Mich. Ct. App. 2005); *In re* Will of Ranney, 589 A.2d 1339, 1344 (N.J. 1991); *In re* Estate of Deoneseus, 906 P.2d 922, 923 (Wash. 1995).

41. Many other decisions cite the Restatement in support of existing law. The quotations above are limited to cases in which the court cited the Restatement in support of making new law.

42. Sieh v. Sieh, 713 N.W.2d 194, 198 (Iowa 2006) (adopting the Restatement position that a revocable trust created before the marriage is subject to the forced share of the surviving spouse, even when the forced share statute refers only to the probate estate).

43. Ruotolo v. Tietjen, 890 A.2d 166, 177 (Conn. App. Ct. 2006), *aff’d per curiam*, 916 A.2d 1 (Conn. 2007) (adopting the Restatement position that mere survival language does not trump an antilapse statute).

the Restatement view on this subject” (Indiana Supreme Court);⁴⁴ “We agree with [the Restatement] and [other] authorities that the latent/patent distinction . . . no longer serves any useful purpose” (Indiana Supreme Court);⁴⁵ “The rationale of the Restatement . . . should be applied here . . .” (New York Surrogate Court);⁴⁶ “[I]t seems logical to this court to choose the path . . . recommended by the Restatement . . .” (another New York Surrogate Court);⁴⁷ “On the basis of [the Restatement and other] authorities, we conclude that while [the Michigan statute on no-contest clauses] does not apply to trusts, it reflects the state’s public policy that no-contest clauses in trust agreements are unenforceable if there is probable cause for challenging the trust” (Michigan Court of Appeals);⁴⁸ “We follow the Restatement . . . on this point, for the reasons explained” (Massachusetts Supreme Judicial Court).⁴⁹

Anonymity continues in the casebooks. Although all of the leading trust and estate casebooks cite, quote, or discuss the UPC, the Restatement, or both on just about every issue, the reporter’s name is almost never mentioned.⁵⁰ Whether the reporter is anonymous or not, however, is beside the point: the point is that the work has consequences.

So, again, why did I do it? The answer is pretty simple. I did it for my own self-satisfaction in hoping that my work made a difference for the good and because I liked doing it. I liked the process, from thinking about how the law can be improved, to writing the drafts, to meeting with the oversight committees composed of leading

44. *Carlson v. Sweeney, Dabagia, Donoghue, Thorne, Janes & Pagos*, 895 N.E.2d 1191, 1200 (Ind. 2008) (adopting, in a tax reformation case, the Restatement position that a mistake of law as well as of fact can be the basis for reforming a testamentary trust). The court also cited Langbein & Waggoner, *Reformation of Wills on the Ground of Mistake*, *supra* note 20. See *Carlson*, 895 N.E.2d at 1200.

45. *Univ. of S. Ind. Found. v. Baker*, 843 N.E.2d 528, 535 (Ind. 2006).

46. *In re Martin B.*, 841 N.Y.S.2d 207, 211 (N.Y. Sur. Ct. 2007).

47. *In re Estate of Herceg*, 747 N.Y.S.2d 901, 905 (N.Y. Sur. Ct. 2002) (adopting the position that a will can be reformed on the ground of mistake).

48. *In re Griffin Revocable Grantor Trust*, 760 N.W.2d 318, 322 (Mich. Ct. App. 2008). Later in the opinion, the court adopted the Restatement’s definition of probable cause. *Id.* at 323.

49. *In re Estate of Beauregard*, 921 N.E.2d 954, 958 n.5 (Mass. 2010) (adopting the Restatement position that preponderance of the evidence, not clear and convincing evidence, is the proper standard of proof for rebutting the presumption that a lost will that is traced to the testator’s possession was revoked by act).

50. There is one case known to me that did mention my name, by citing a law review article that Ed Halbach and I coauthored (Edward C. Halbach, Jr. & Lawrence W. Waggoner, *The UPC’s New Survivorship and Antilapse Provisions*, 55 ALB. L. REV. 1091 (1992)). The case is *Ruotolo v. Tietjen*, 890 A.2d 166, 170 & n.4 (Conn. App. Ct. 2006), *aff’d per curiam*, 916 A.2d 1 (Conn. 2007). The casebooks reproduce the case as a principal case, but the casebook editors edited out the citation! See, e.g., THOMAS P. GALLANIS, *FAMILY PROPERTY LAW: CASES AND MATERIALS ON WILLS, TRUSTS, AND FUTURE INTERESTS* 280–85 (5th ed. 2011).

trust and estate academics, practitioners, and judges, to presenting the drafts to the full membership of the ULC or ALI, and finally to seeing the final product enacted by a state legislature or embraced by a court. Overriding all the other reasons, though, is the hope that the work has improved the law.⁵¹ If it has, great, because in one way or another—as survivor, heir, beneficiary, settlor, testator, or intestate—the law of trusts and estates touches just about everyone.

51. One feature of the UPC in which I take some pride is that there has been very little appellate litigation requiring interpretation of the statutory language.