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Revisions in Need of Revising: The Uniform Disclaimer of Property Interests Act

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REVISIONS IN NEED OF REVISING:
THE UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT

Adam J. Hirsch

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REVISIONS IN NEED OF REVISING:
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OF PROPERTY INTERESTS ACT

ADAM J. HIRSCH*

INTRODUCTION.....	109
I. EXCLUSIVITY	112
A. <i>UDPIA and the Common Law</i>	112
B. <i>UDPIA and the Internal Revenue Code</i>	116
II. TIMELINESS.....	123
III. STANDING.....	130
A. <i>Heirs</i>	130
B. <i>Fiduciaries</i>	132
1. <i>Status</i>	136
a. <i>Competent Beneficiaries</i>	136
b. <i>Minor Beneficiaries</i>	137
c. <i>Incapacitated Beneficiaries</i>	138
d. <i>Deceased Beneficiaries</i>	138
e. <i>Charitable Trusts</i>	138
2. <i>Administrative Standard</i>	140
3. <i>Oversight</i>	145
4. <i>Default Rule</i>	148
IV. FORMALITIES.....	149
V. CREDITORS' RIGHTS	154
A. <i>General Creditors</i>	154
B. <i>Judicial Sales</i>	161
VI. DEVOLUTION	163
A. <i>Present Interests</i>	163
B. <i>Future Interests</i>	170
1. <i>Preceding Interests</i>	170
2. <i>Succeeding Interests</i>	175
CONCLUSION: BEYOND UDPIA	178

*As the births of living creatures at first are ill shapen: so are all innovations, which are the births of time.*¹

INTRODUCTION

In the usual course of events, most persons are inclined to accept any bequests of property that a testator has the good grace to leave them. However nobler it is to give than to receive, receiving also has its charms. Still, some beneficiaries do find occasion to re-

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1. FRANCIS BACON, *THE ESSAYS OR COUNSELS, CIVILL AND MORALL* 77 (Christopher Morley ed., Heritage Press 1944) (1597).

fuse, or “disclaim,” an inheritance. Our law has long regulated a beneficiary’s power to do so.

In 1999, the Commissioners promulgated a new Uniform Act covering disclaimers of gratuitous transfers, the Uniform Disclaimer of Property Interests Act (UDPIA).² Although not the first model act to address the subject, UDPIA does represent the first full-blown effort to rework the law of disclaimers in over twenty years³—and it promises to be a popular product, having gained enactment in its first four states⁴ and having come under consideration in at least three others.⁵ Once it is grafted into the Uniform Probate Code (as is imminent),⁶ UDPIA will in all likelihood proliferate rapidly among the jurisdictions that have already committed themselves to that larger project.⁷

Much skill and effort go into the assembly of every Uniform Act, and this one is no exception. Ironically, therein lies both its strength

2. UNIF. DISCLAIMER OF PROP. INTERESTS ACT, 8A U.L.A. 32 (Supp. 2000) [hereinafter UDPIA]. The Reporter for the Act was Professor William LaPiana.

3. UDPIA replaces three older Uniform Acts: the Uniform Disclaimer of Property Interests Act of 1978, together with two other Uniform Acts promulgated simultaneously and amalgamated in the first one, the Uniform Disclaimer of Transfers by Will, Intestacy or Appointment Act, and the Uniform Disclaimer of Transfers Under Nontestamentary Instruments Act. UNIF. DISCLAIMER OF PROP. INTERESTS ACT, 8A U.L.A. 149 (1978); UNIF. DISCLAIMER OF TRANSFERS BY WILL, INTESTACY OR APPOINTMENT ACT, 8A U.L.A. 161 (1978); UNIF. DISCLAIMER OF TRANSFERS UNDER NONTESTAMENTARY INSTRUMENTS ACT, 8A U.L.A. 179 (1978). Prior versions of each of these three acts were first promulgated in 1973. A provision based largely but not entirely on the language of the Uniform Disclaimer of Property Interests Act of 1978 also appears in the Uniform Probate Code. UNIF. PROBATE CODE § 2-801 (amended 1997). This provision is unpacked in S. Alan Medlin, *An Examination of Disclaimers Under UPC Section 2-801*, 55 ALB. L. REV. 1233 (1992). The Restators have yet to develop a comprehensive judicial framework for disclaimer law. See RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 34.2 cmt. d (1992). For earlier model disclaimer statutes, see MODEL PROBATE CODE § 58 (1946), in LEWIS M. SIMES & PAUL E. BASYE, PROBLEMS IN PROBATE LAW (Hessel E. Yntema ed., Univ. of Mich. Press 1946) [hereinafter MODEL PROBATE CODE]; *Disclaimer of Testamentary and Nontestamentary Dispositions—Suggestions for a Model Act*, 3 REAL PROP. PROB. & TR. J. 131 (1968) (Report of Special Committee of the A.B.A. on Disclaimer Legislation, upon which the original Uniform Acts on disclaimers were substantially based) [hereinafter *Suggestions for a Model Act*].

4. HAW. REV. STAT. § 526 (1993 & Supp. 2000); 2001 N.M. Laws ch. 290; 2001 Or. Laws ch. 245; 2001 N.D. Laws ch. 301.

5. Drafting committees in Florida, North Carolina, and Virginia are presently considering the Act. Letter from Richard Gans, esq., to Adam J. Hirsch, Professor of Law, Florida State University (Aug. 11, 2001) (on file with author); Letter from James McLaughlin, esq., to Adam J. Hirsch, Professor of Law, Florida State University (July 10, 2000) (on file with author); Letter from E. Diane Thompson, esq., to Adam J. Hirsch, Professor of Law, Florida State University (Sept. 8, 2000) (on file with author).

6. UDPIA, *supra* note 2, prefatory note. UDPIA will replace the Uniform Probate Code’s current section on disclaimers of inheritances, wherein the Commissioners acknowledged the need for revision of the existing provision. UNIF. PROBATE CODE § 2-801 prefatory note (amended 1997).

7. Eleven jurisdictions have thus far enacted the revised Article 2 of the Uniform Probate Code, where UDPIA is due to appear. The project comes within the context of an omnibus reappraisal of trusts and estates doctrines currently underway by the model lawmaking bodies. See generally Edward C. Halbach, Jr., *Uniform Acts, Restatements, and Trends in American Trust Law at Century’s End*, 88 CAL. L. REV. 1881 (2000).

and its weakness. Skill and effort are supposed to lead toward superiority of design. Naturally, they often do. But because state legislators also engage in this supposition, they tend to adopt a Uniform Act—and may now be inclined to adopt UDPIA—with less thorough review, and with less forethought as to substantive policy, than when they craft a statute from scratch.

And that spells trouble. For all their dedication, the Commissioners are, alas, inescapably human and, as a consequence, perfectly fallible. They strive mightily to root out the errors and glitches that have a way of creeping into complex legislation—but creep in they still do. And because Uniform Acts are marketed as models—as templates—they run the risk of blind replication. Very like defective genes, defective Uniform Acts have the potential to spread havoc among the states.

Accordingly, it behooves us to take a long, hard, skeptical look at UDPIA—preferably before it becomes widely enacted. That is the task I shall set about in this Article. In so doing, I hope to offer guidance to the Commissioners, who may find occasion to amend their product. More immediately, however, I hope to guide state legislators who are contemplating adopting it.

Let me observe, preliminarily, that the participants in the UDPIA project and its gifted Reporter—himself the co-author of a treatise devoted to disclaimer law⁸—have accomplished much, and they deserve to be praised for a job well done. That said, I have nonetheless found aspects of UDPIA that, in my judgment, invite criticism and revision.⁹ I shall offer those criticisms in a frank spirit, without sugarcoating, on the assumption that (however distasteful the task) it is better to ventilate one's objections to an undertaking forthrightly, and surely better not to suppress perceived problems with a Uniform Act.¹⁰ Let me emphasize that the problems in this instance are

8. RONALD A. BRAND & WILLIAM P. LAPIANA, *DISCLAIMERS IN ESTATE PLANNING: A GUIDE TO THEIR EFFECTIVE USE* (1990).

9. The subject of disclaimer law reform is one upon which I have declaimed before. For my prior foray into this field (whose richness has yet to be fully appreciated), see Adam J. Hirsch, *The Problem of the Insolvent Heir*, 74 *CORNELL L. REV.* 587 (1989).

10. Commissioners with a professional stake in these products may tend to view the matter differently, and I have been urged in private correspondence to cease and desist from exposés of this kind. Yet, I remain convinced that the task needs doing—and in taking on the part of Uniform Law controversialist, I find myself in superb company. See, e.g., James Barr Ames, *The Negotiable Instruments Law*, 14 *HARV. L. REV.* 32 (1900); Arthur Allen Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115 *U. PA. L. REV.* 485 (1967). For my own prior attempts to stir up trouble in the Uniform Probate Code, see Adam J. Hirsch, *Inheritance and Inconsistency*, 57 *OHIO ST. L.J.* 1057, 1059, 1161 & *passim* (1996) [hereinafter Hirsch, *Inheritance and Inconsistency*]; Adam J. Hirsch, *Inheritance Law, Legal Contraptions, and the Problem of Doctrinal Change*, 79 *OR. L. REV.* 527, 568-71, 573 (2000) [hereinafter Hirsch, *Legal Contraptions*]; Adam J. Hirsch, *Trusts for Purposes: Policy, Ambiguity, and Anomaly in the Uniform Laws*, 26 *FLA. ST. U. L. REV.* 913 & *passim* (1999) [hereinafter Hirsch, *Trusts for Purposes*]; see also *infra* note 366 (citing to other critics of the Uniform Probate Code).

hardly fatal; they do not reach to the heart of UDPIA, which I, for one, am convinced is sound. By and large, it is a matter of tidying up. But legislators who adopt UDPIA verbatim will find themselves saddled with an imperfect product, and they need to reflect before doing so.

Before we launch into the critique, one final word as to its structure. This Article is not intended as a comprehensive survey of the virtues and vices of UDPIA. Rather, I view my role as that of troubleshooter, probing a legal product for defects and shortcomings. In the pages following, I shall endeavor to identify and explore the problem areas only, without tarrying long in UDPIA's greener pastures. Some elements of its treatment of disclaimer law I shall ignore altogether. Readers preferring a more thorough substantive review of UDPIA need seek no further than the already-published explanatory article by its Reporter.¹¹ The present Article is designed to reveal another side of the picture—and thus, perhaps for purposes of overall evaluation (if there is any point in that),¹² achieve a kind of balance.

In the Conclusion, I will offer some additional thoughts about how Commissioners might in general better approach the law-modeling process, with an eye toward avoiding structural difficulties that have arisen before and that crop up again in connection with UDPIA.

I. EXCLUSIVITY

A. UDPIA and the Common Law

The right to disclaim has deep historical roots in English and American common law, which worked out—albeit in a trickle of cases¹³—the rules and circumstances under which a beneficiary could decline an inheritance to which she would otherwise succeed.¹⁴ Every American jurisdiction today has enacted a disclaimer statute superseding (to a greater or lesser extent) the common law that hitherto

11. William P. LaPiana, *Uniform Disclaimer of Property Interests*, PROB. & PROP., Jan.-Feb. 2000, at 57; see also Richard V. Wellman, *New Uniform Act on Disclaimers Compared with Earlier Models and Ohio Legislation*, PROB. L.J. OHIO, Mar.-Apr. 2000, at 45.

12. Overall assessment seems largely beside the point, since state legislators need not adopt UDPIA as an all-or-nothing package of provisions. To the extent this Uniform Act represents a mixed blessing, lawmakers can remix it, separating out its problematic aspects and enacting improved, amended versions of UDPIA.

13. As one court put the matter dryly: "There is a paucity of case law on the question before us. The vast bulk of the law of decedents' estates involves persons attempting to gain a share . . . rather than to divest themselves of their interest." *In re Estate of Burmeister*, 594 P.2d 226, 229 (Kan. 1979); see also *In re Estate of Fleenor*, 17 P.3d 520, 523-24 (Or. Ct. App. 2000); *Peckham v. Newton*, 4 A. 758, 761 (R.I. 1886).

14. "The right to renounce a devise . . . is a natural one and needs no statutory authorization." *Perkins v. Isley*, 32 S.E.2d 588, 590-91 (N.C. 1945). For a brief recitation of the common law history, with particular emphasis on creditors' rights against the beneficiary, see Hirsch, *supra* note 9, at 591-96.

had governed the subject.¹⁵ UDPIA would replace these statutes. What then is UDPIA's relation to the common law? Does it supersede it, or merely supplement it—and to what degree?

Here one discovers the single most troubling—and doubtless unintentional¹⁶—characteristic of UDPIA. Under previous Uniform Acts addressing the subject, the rights therein created to disclaim an inheritance are nonexclusive, although they do at least partially preempt the common law. What these Uniform Acts indicate is that they do “not abridge the right of . . . person[s] to . . . disclaim . . . property or an interest therein under any other statute.”¹⁷ Notice the use of the words *not abridge*—that is, *not subtract from*—and the limitation of nonabridgement to *other statutes*. By negative inference, these Acts *do* supplant the beneficiary's common law rights to disclaim an inheritance.¹⁸ To the extent, then, that the common law grants rights to disclaim with which these Uniform Acts conflict, they operate to curtail the common law. On the other hand, the language just quoted says nothing about additional *restrictions* on the right to disclaim, imposed either by statute or by common law. The possibility remains that these Uniform Acts can be interpreted to permit further restrictions on the right to disclaim not expressly contradicted by the Acts' plain language.¹⁹

UDPIA uses different language which, read literally, leads to absurdity. There are three provisions on point. First, UDPIA reproduces a clause long found in many Uniform Acts, stating that “[u]nless displaced by a provision of this [Act], the principles of law and equity supplement this [Act].”²⁰ Although the meaning of this rusty boilerplate is not entirely clear, it appears to receive state

15. The last two bastions of the common law of disclaimer were Mississippi and New Hampshire, which enacted their first disclaimer statutes in 1994 and 1996, respectively. MISS. CODE ANN. § 89-21-1 (1999); N.H. REV. STAT. ANN. § 563-B (1997).

16. As we shall see, a good number of the sequelae of UDPIA that I shall criticize in this Article were inadvertent and hence fall into the category of *glitches*, as opposed to objectionable policy decisions.

17. UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 6, 8A U.L.A. 149, 157 (1978); UNIF. DISCLAIMER OF TRANSFERS BY WILL, INTESTACY OR APPOINTMENT ACT § 5 & cmt., 8A U.L.A. 161, 176 (1978); UNIF. DISCLAIMER OF TRANSFERS UNDER NONTESTAMENTARY INSTRUMENTS ACT § 5, 8A U.L.A. 179, 187 (1978); UNIF. PROBATE CODE § 2-801(f) (amended 1997).

18. The point is clarified by a comment: “Being a codification of the common law in regard to the renunciation of the property, the Act is intended to constitute an *exclusive remedy* for the disclaimer of testamentary successions apart from those provided by other statutes, and supplants the common law right to disclaim.” UNIF. DISCLAIMER OF TRANSFERS BY WILL, INTESTACY OR APPOINTMENT ACT § 5 cmt., 8A U.L.A. 161, 176 (1978). The same language appeared in the comment accompanying the original Uniform Probate Code but was dropped from the revised Code, although the text of the revised Code did not change on this point. Compare UNIF. PROBATE CODE § 2-801(f) & cmt. (amended 1997), with UNIF. PROBATE CODE § 2-801(e) & cmt. (West 6th ed. 1983).

19. This inference would be particularly strong within the Uniform Probate Code. See *infra* note 215.

20. UDPIA, *supra* note 2, § 4(a). No comment accompanies this section.

common law into the interstices of UDPIA.²¹ Second, UDPIA contains a clause somewhat like the one found in the prior Uniform Acts on disclaimer: “This [Act] does not limit any right of a person to . . . disclaim . . . an interest in . . . property under a law other than this [Act].”²² Note well, this clause supplements the rights to disclaim granted by UDPIA with those found in other *law*, not other *statutes* (as prior Uniform Acts had done). The word *law* in its plain meaning,²³ and as construed in cases,²⁴ includes both common and statutory law. This standard definition is nowhere contradicted (and, indeed, is elsewhere affirmed) in UDPIA.²⁵ Accordingly, we must conclude that UDPIA creates wholly nonexclusive, safe-harbor remedies—beneficiaries remain free to disclaim whenever that right exists under either UDPIA or the common law.

But that is not all. UDPIA also includes a third relevant clause. It reads in its entirety: “A disclaimer is barred or limited if so provided by law other than this [Act].”²⁶ Note well, once again, the text refers to other law, not to other statutory law.²⁷ So, whenever the common law *restricts* the right to disclaim, that restriction *also* supplements UDPIA.

But what, then, is left of UDPIA? Assembling the three clauses together, one finds that the Act is supplemented both by all further extensions of rights and by all further restrictions of rights—along with all interstitial rights—contained within the common law. Accordingly, one cannot easily avoid the conclusion that nothing is left of UDPIA! The Act proves a mirage: To enact UDPIA is to enact the

21. For a discussion of the history, ambiguities, and prior interpretation of this phrase in earlier Uniform Acts, such as the Uniform Commercial Code and the Uniform Probate Code (and which traces back as far as the Uniform Negotiable Instruments Law of 1896!), see Hirsch, *Trusts for Purposes*, *supra* note 10, at 916-17 & n.18.

22. UDPIA, *supra* note 2, § 4(b).

23. BLACK'S LAW DICTIONARY 889 (7th ed. 1999).

24. *E.g.*, Estate of Dauer v. Zabel, 156 N.W.2d 34, 36-37 (Mich. Ct. App. 1967) (construing the word *law* as used within a state constitution).

25. See *infra* note 27. No comment accompanies the provision either to justify it or to clarify its meaning. This interpretation is, however, confirmed by the drafting history of UDPIA and by comments attached to prior drafts. See *infra* note 28. A number of state disclaimer statutes had long included equivalent (if sometimes more definitive) provisions, *e.g.*, MINN. STAT. ANN. § 525.532(c)(8) (West 1975 & Supp. 2001) (“This section shall not abridge the right [to disclaim] . . . under any existing or future statute or rule of law.”), which I have criticized on a prior occasion. Hirsch, *supra* note 9, at 597-98 & n.55. For cases applying one of those nonexclusive statutes and giving effect to disclaimers under the common law that would have been invalid under the letter of the statute had it operated exclusively, see *In re* Estate of Stephens, 676 N.Y.S.2d 422, 427-29 (Sur. Ct. 1998); Will of Heffner, 503 N.Y.S.2d 669, 669-70 (Sur. Ct. 1986); Estate of Von Ripper, 408 N.Y.S.2d 686, 689-90 (Sur. Ct. 1978).

26. UDPIA, *supra* note 2, § 13(e).

27. Here, the accompanying comment implies incontrovertibly that the word *law* refers, *inter alia*, to case law, for bars established by cases (where creditors' claims were at issue) are offered by way of illustration. See *id.* § 13 cmt.

common law. A state that replaces its existing disclaimer statute with UDPIA will unknowingly *decodify* its law on that subject.

Needless to say, this last point is proclaimed tongue in cheek. Decodification cannot possibly have been the intention of the drafters of this extensive Uniform Act. Manifestly, the language comes as a result of imperfect drafting, some of it performed at the eleventh hour.²⁸ Deceptively innocuous, these provisions occasioned no recorded debate among the Commissioners.²⁹

When the plain language of a statute is absurd, such as by rendering the statute meaningless or superfluous, the canons of construction dictate that we must construe it in a way that avoids the absurdity.³⁰ In the instant case, we can, with only slight embellishment, construe the last-mentioned clause to mean that “[a] disclaimer is

28. The provision for interstitial supplementation of the act with common law, *see supra* note 20 and accompanying text, did not appear in the draft submitted for approval in 1999 and was only then added into the draft approved at the 1999 Conference of Commissioners. *Compare* UNIF. DISCLAIMER OF PROP. INTERESTS ACT (Draft for Approval 1999), *with* UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 14 (Approved Draft 1999). The first two drafts of UDPIA expressly abolished the common law right of disclaimer; only additional statutory rights of disclaimer and statutory bars on disclaimer were acknowledged under these drafts. UNIF. DISCLAIMER OF PROP. INTERESTS ACT §§ 11(b), 12 (Discussion Draft 1995); UNIF. DISCLAIMER OF PROP. INTERESTS ACT §§ 14(b), 15 (Discussion Draft 1996). The provision abolishing common law disclaimer was then stricken from the third draft and provisions acknowledging both rights to disclaim and bars on disclaimer arising out of other *law*, not merely statutory law—equivalent to the language found in the final, approved version of UDPIA—appeared for the first time. UNIF. DISCLAIMER OF PROP. INTERESTS ACT §§ 2(e), 9(b) (Discussion Draft 1997). This linguistic change was intentional, but went without explanation. The accompanying draft comment stated simply that the wording “broadens the provisions of prior Uniform Acts to preserve the right to disclaim under any other law.” *Id.* § 2 cmt.; *see also id.* § 9 cmt. Another note accompanying UDPIA may allude to this provision when it asserts that the Act “is designed to allow every sort of disclaimer In short, the new Act is an enabling statute.” UDPIA, *supra* note 2, prefatory note.

29. At the second plenary reading of UDPIA, the chairperson stated that “These are fairly standard provisions.” PROCEEDINGS OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT, PROCEEDINGS OF THE COMMITTEE OF THE WHOLE 93 (July 23-30, 1999) [hereinafter Plenary Reading, 1999]. At the first reading of the Act, Commissioners had indicated that a provision incorporating bars on disclaimer under local statutory and common law was necessary in order to receive into UDPIA each state’s individual rule concerning the permissibility of disclaimer by an insolvent beneficiary—an issue which in some jurisdictions has been resolved by case law. PROCEEDINGS OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM DISCLAIMER OF PROPERTY INTERESTS ACT, PROCEEDINGS OF THE COMMITTEE OF THE WHOLE 41-42, 76-77 (July 24-31, 1998) [hereinafter Plenary Reading, 1998]. Without question, that was the intended purpose of the provision. *See* UDPIA, *supra* note 2, § 13 cmt. (indicating that the provision gives effect to the local law of disclaimer to avoid creditors’ claims and related sorts of liability); *see also* Plenary Reading, 1998, *supra*, at 87 (comment by the Reporter); *infra* Part V.A. The difficulty, however—as we shall see—is that the expansive language of the provision has additional implications that the Commissioners failed to appreciate. And the same is true of the safe-harbor provision allowing a beneficiary to disclaim under the common law, as we shall also see.

30. 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 46:06, at 181-86, 190-92, § 46:07, at 194-99 (6th ed. 2000).

barred or limited if so provided by law other than this [Act],”³¹ *so long as any such bar or limit does not conflict with rights to disclaim expressly created by this Act.*

This interpretation appears true to the meaning of the drafters. And, so construed, UDPIA’s impact is no longer vanishingly small. The difficulty, however, is that it is still plainly, and painfully, smaller than UDPIA’s drafters intended it to be. We are not out of the woods yet, as we shall presently see.³²

B. UDPIA and the Internal Revenue Code

UDPIA also stands beside, and interacts with, the Internal Revenue Code. One of the cardinal virtues of disclaiming is that it can serve to save taxes within a family. By consulting the will or the intestacy statute, a beneficiary can predetermine who will take in her place should she choose to disclaim—often a close relative.³³ Assuming she has ties of benevolence to that person, she may calculate that a direct transfer from the benefactor to that alternative beneficiary, accomplished via a disclaimer, is from the standpoint of the family as a whole more tax efficient than, and possibly therefore preferable to, the transfer that would otherwise occur from the benefactor to herself.³⁴

This prospect raises an immediate question of public policy: Why, we may fairly ask, should lawmakers give effect to a disclaimer executed for no other reason than to deprive the government of tax revenues? The common law of disclaimer first developed in Great Britain to *stymie* renunciations of inheritance that would have operated to deprive medieval tax collectors of *relivium* (or relief)—the

31. UDPIA, *supra* note 2, § 13(e).

32. *But cf.* Medlin, *supra* note 3, at 1276 n.266 (briefly suggesting in connection with the Uniform Probate Code’s disclaimer provision that “[W]hether supersession or supplementation is preferable depends on which policy a legislature follows: Increased certainty of proving effective disclaimers versus the freedom of the disclaimant to refuse acceptance”).

33. On the devolution of disclaimed property, see *infra* Part VI.

34. For discussions of the use of disclaimers in tax planning, see BRAND & LAPIANA, *supra* note 8, at 121-55; LAWRENCE NEWMAN & ALBERT KALTER, *POSTMORTEM ESTATE PLANNING* 1-29 (2d ed. 1993); MARY MOERS WENIG, *TAX MANAGEMENT, ESTATES, GIFTS, AND TRUSTS: DISCLAIMERS*, at A-8 to A-20 (Tax Management Portfolio No. 848, 1992); JOHN R. PRICE, *ON CONTEMPORARY ESTATE PLANNING* § 12.33-.37 (2d ed. 2000); Jeff Y. Bae & David M. Maloney, *Disclaimers: The Last Line of Defense When Wrestling with Estate Planning Problems*, TR. & EST., Dec. 2000, at 40; Virginia F. Coleman, *Disclaimers—New Developments, Opportunities and Unsettled Areas*, 33 INST. ON EST. PLAN. 15-1 (1999); Shannon M. Connelly, *Constructing Qualified Disclaimers*, PROB. & PROP., July-Aug. 1997, at 47; Kenneth A. Hansen, *Disclaiming Joint Marital Property to Fund a Deceased Spouse’s Unified Estate Tax Credit*, TAXES, Sept. 2000, at 39; Don W. Llewellyn et al., *Disclaimers by a Surviving Spouse: The Trend of Increased Opportunities for Post Mortem Tax Planning Continues*, 35 REAL PROP. PROB. & TR. J. 1 (2000); Bruce D. Steiner, *Disclaimers: Post-Mortem Creativity*, PROB. & PROP., Nov.-Dec. 1990, at 43; Conrad Teitell, *Disclaimers: A Wise Estate Planning Tool*, TR. & EST., May 2000, at 73.

feudal incident payable by the heir at each generation upon intestate succession to real property. Only later, after the feudal incidents were abolished, did British courts come to allow disclaimers by devisees, for the very different purpose of permitting beneficiaries to escape bequests that might be “clothed in trust,” or otherwise entail burdensome responsibilities.³⁵ In spite of this history, American courts almost universally have extended the right of disclaimer to cases in which the disclaiming party was motivated by tax considerations—with scarcely a word about public policy—on the theory that tax statutes have failed to preclude this legal stratagem.³⁶

Considered theoretically, the issue has (at least) two sides.³⁷ Examined from the perspective of the beneficiary, granting a right of

35. *Townson v. Tickell*, 106 Eng. Rep. 575, 576-77 (K.B. 1819).

Prima facie, every estate . . . is supposed to be beneficial to the party to whom it is so given. Of that, however, he is the best judge, and if it turn out that the party to whom the gift is made does not consider it beneficial, the law will certainly . . . allow him to renounce or refuse the gift.

Id. at 577. The rule forbidding an heir to renounce an inheritance developed prior to the Statute of Wills (1540), making land devisable for the first time, and the rule remained in effect even after the abolition of the feudal incidents, and even after courts began to allow a devisee (by comparison) to disclaim. On the common law history, see Hirsch, *supra* note 9, at 591-92; Christian M. Lauritzen, Jr., *Only God Can Make an Heir*, 48 NW. U. L. REV. 568, 569-73 (1953). The feudal incidents were abolished upon the Stuart Restoration in 1660. J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 218 (2d ed. 1979).

36. *In re Wolfe's Estate*, 85 N.Y.S. 949, 953 (App. Div. 1903).

There need be no reasonable apprehension that the . . . government will be seriously embarrassed by renunciations of legacies made in evasion of the law; but, aside from that consideration, it must be borne in mind that the judicial function is essentially expository, and not creative, and that the Legislature can readily provide against the possibility of such evasion if existing laws are not deemed adequate.

Id.; see also *Brown v. Routzahn*, 63 F.2d 914, 916-17 (6th Cir. 1933); *In re Bute's Estate*, 49 A.2d 339, 341-42 (Pa. 1946); *Bouse v. Hull*, 176 A. 645, 646-48 (Md. 1935); *Tax Comm'n of Ohio v. Glass*, 164 N.E. 425, 426 (Ohio 1928); *People v. Flanagan*, 162 N.E. 848, 851 (Ill. 1928); *In re Stone's Estate*, 109 N.W. 455, 457 (Iowa 1906).

37. Dominion theory provides a third perspective on the problem: The fact that the taxpayer has the power (by not disclaiming) to capture the bequeathed property could be deemed definitive of ownership for tax purposes, although the fact that the taxpayer does not control the devolution of any property that she chooses to disclaim could just as well be considered definitive of nonownership. Precisely the same compound of power-to-capture and lack-of-control-over-devolution exists in the case of a general power of appointment which the holder of the power declines to exercise—it too could have been captured and now goes instead to whomever the benefactor had decreed to be the taker in lieu of appointment. Although under the Internal Revenue Code an unexercised power is deemed to be owned by the holder of the power, disclaimed property is deemed not to be owned by the disclaimant. *Compare* I.R.C. § 2041(a)(2) (1989) *with id.* § 2518(a). Dominion theory suggests that these results are inconsistent—an inconsistency rendered all the more dramatic by the law's acknowledgment that the holder of a power of appointment can disclaim the power, rather than accept and not exercise it, and thereby avoid ownership! *Treas. Reg.* § 20.2041-3(d)(6) (1982). This still leaves us to determine, however, whether tax policy demands consistent treatment of property interests from the standpoint of dominion theory and, assuming so, which element(s) of dominion ought to define ownership. For a discussion of this problem in a related context, see Hirsch, *supra* note 9, at 605-10; *cf.* Walter E. Black, Jr., *The Effect of Renunciations and Compromises on Death and*

disclaimer to reduce taxes appears to disserve the cause of vertical equity, for only the relatively affluent beneficiary could afford to avail herself of that right, whatever the tax benefits.³⁸ On the other hand, from the perspective of the benefactor, a right of disclaimer promotes vertical, as well as horizontal, equity: For a postmortem disclaimer accomplishes nothing more in the way of tax avoidance than the benefactor could have achieved by more careful pre-mortem estate planning, which may have been inaccessible either due to the high cost of counsel or because of sudden infirmity.³⁹ A disclaimer can thus be said to uphold what one scholar has dubbed the principle of “equal planning under the law”⁴⁰—a principle also reflected within a host of other modern trusts and estates doctrines.⁴¹

From a structural perspective, at any rate, all of this is beside the point. The decision to acknowledge *vel non* the effectiveness of a disclaimer for purposes of federal taxation lies exclusively within the jurisdiction of Congress, which has expressed its will on the subject in the Internal Revenue Code.⁴² State disclaimer statutes—and UDPIA—can speak only to the substantive effectiveness of a disclaimer for purposes of local law; they cannot intrude on the issue of

Gift Taxes, 3 VAND. L. REV. 241, 269 (1950); John H. Martin, *Perspectives on Federal Disclaimer Legislation*, 46 U. CHI. L. REV. 316, 357-59 (1979).

38. On this basis, one commentator argues that disclaimers should be ineffective per se under the Internal Revenue Code and treated instead as subsequent transfers for federal tax purposes. Martin, *supra* note 37, at 362-69. Historically, several state inheritance tax statutes have taken this approach. *Id.* at 320 n.15.

39. On this basis, Professor Halbach advocates a liberal approach to tax-motivated disclaimers:

The present [tax] rule unduly restricts postmortem clean up and places an unwarranted and unrealistic demand for wills to be perfected and updated before a testator's death. Most graphically, the objectionable net effect of the [tax rule] is to require that a seriously ill property owner see his lawyer before seeing his doctor if his family is to receive the same treatment that under our tax policies is perfectly permissible for other families through an updated will.

Edward C. Halbach, Jr., *Curing Deficiencies in Tax and Property Law: Effects on Justice and Legal Service Costs*, 65 MINN. L. REV. 89, 120 (1980).

40. Mary L. Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 613 (1988). I remain skeptical, however, that the Supreme Court will discover this principle within the emanations of the penumbra of the Fourteenth Amendment.

41. In the same spirit, the Restators advocate allowing the court itself, with still greater flexibility, to reform defective estate plans so as to carry out the testator's intent to minimize taxes. RESTATEMENT (THIRD) OF PROP.: DONATIVE TRANSFERS § 12.2 & cmt. b (Tentative Draft No. 1, 1995). A number of courts have claimed this power. For a recent example, see *In re Estate of Tuthill*, 754 A.2d 272 (D.C. 2000). Whether the power will be acknowledged in turn by the Tax Commissioner is, however, very far from clear. See David R. Hodgman & David C. Blickenstaff, *Judicial Reformation of Trusts—The Drafting Tool of Last Resort*, 28 EST. PLAN. 287, 289 (2001).

42. I.R.C. § 2518 (1989). A disclaimer deemed effective for purposes of federal estate taxation is known technically (if obscurely) as a “qualified disclaimer.” Hereinafter, I shall refer to a qualified disclaimer as a “tax-qualified” disclaimer, on the assumption that this phraseology will be clearer to most readers, even if it offends a few *aficionados*.

whether a disclaimer is tax-qualified. What, then, should be the relationship between these two, parallel bodies of rules?

In theory, there need be none: The substantive ramifications and the tax ramifications of estate planning choices often differ under the law,⁴³ and because the public policies underlying each of these spheres is distinct, one finds no structural reason legally to conjoin them.⁴⁴ Indeed, Congress enacted the modern Internal Revenue Code provision on disclaimers, § 2518, to ensure, inter alia, that “a refusal to accept property . . . [will] be given effect for federal estate and gift tax purposes even if the applicable local law does not technically characterize the refusal as a ‘disclaimer’”⁴⁵

Vice versa, the drafters of UDPIA recognize that “disclaimers can be used for more than tax planning.”⁴⁶ Their explicit aim was “to allow every sort of disclaimer, *including* those that are useful for tax planning purposes.”⁴⁷ In the end, however, the drafters take an inconsistent approach to the structural independence of UDPIA, “de-coupl[ing]”⁴⁸ the Act from the tax code in some respects—notably in connection with its time limit (on which, more later)⁴⁹—while simultaneously “coordinat[ing]”⁵⁰ UDPIA with the code in other respects.

One provision of the second sort governs disclaimers of jointly held property.⁵¹ This provision responds to new Treasury Regulations issued in 1997⁵² (following which, the discussion drafts of UDPIA were amended).⁵³ As the Reporter observes, the section “was drafted

43. Thus, for example, revocable “living” trusts are treated as complete transfers upon their creation for substantive purposes but as incomplete transfers until death for tax purposes. Compare UNIF. PROBATE CODE § 6-101 (amended 1998), with I.R.C. § 676(a) (1988). For another area of trust law in which this same duality exists, see Adam J. Hirsch, *Bequests for Purposes: A Unified Theory*, 56 WASH. & LEE L. REV. 33, 49-50 (1999).

44. The point is noted in Grayson M.P. McCouch, *Timely Disclaimers and Taxable Transfers*, 47 U. MIAMI L. REV. 1043, 1045 (1993).

45. H.R. REP. NO. 94-1380, at 67 (1976).

46. UDPIA, *supra* note 2, prefatory note.

47. *Id.* (emphasis added).

48. *Id.*

49. See *infra* Part II.

50. UDPIA, *supra* note 2, § 14 cmt.

51. For prior Uniform Acts on point, see UNIF. PROBATE CODE § 2-801(b)(3) (amended 1997); UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 2(d), 8A U.L.A. 149, 153 (1978); UNIF. DISCLAIMER OF TRANSFERS UNDER NONTESTAMENTARY INSTRUMENTS ACT § 1, 8A U.L.A. 179, 181 (1978). For case law, see *id.* § 1 cmt., at 182-83; Prod. Credit Ass’n v. Mater, 8 P.3d 1274, 1280-81 (Kan. Ct. App. 2000); UDPIA, *supra* note 2, § 7 cmt.; WILLIAM M. MCGOVERN, JR., ET AL., WILLS, TRUSTS AND ESTATES § 2.5, at 82-83 (1st ed. 1988) (in the 1st ed. only). For criticism of the Uniform Probate Code’s provision, see Grayson M.P. McCouch, *Will Substitutes Under the Revised Uniform Probate Code*, 58 BROOK. L. REV. 1123, 1171-72 (1993); Medlin, *supra* note 3, at 1270-71.

52. Treas. Reg. § 25.2518-2(c)(4), (c)(5) (as amended in 1997). For discussions of those Regulations, see Coleman, *supra* note 34, at 16-17 to 16-19; Hansen, *supra* note 34, at 39.

53. For the original provision, included in a discussion draft of UDPIA issued prior to the appearance of the new Regulations, see UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 10 (Discussion Draft 1996).

to allow every sort of qualified disclaimer of jointly held property possible under the Treasury Regulations.”⁵⁴ In this instance, by the drafters’ own admission, the tax tail wagged the legal dog.

Whether that was an appropriate course can be questioned: Tax policy and substantive disclaimer policy are not one and the same; and the substantive rules of UDPIA govern all disclaimers of joint tenancies, irrespective of whether the estates in question are sizable enough to implicate estate taxation. What is more, in their eagerness to ensure that any tax-qualified disclaimer of jointly held property would take effect under UDPIA, the drafters went overboard, promulgating a provision that transcends the limits of the Treasury Regulations.

Under UDPIA, a joint tenant can disclaim either the decedent’s equal fractional share of the jointly held property⁵⁵ or all of the jointly held property other than the part contributed by the disclaimant, whichever is greater.⁵⁶ The Regulations, however, are more refined. Following local law,⁵⁷ the Regulations allocate jointly held property by net contribution in the case of joint bank (and other investment) accounts, but generally by equal shares in the case of joint tenancies in real property, on the theory that an inter vivos gift equalizing ownership has already occurred.⁵⁸

UDPIA’s failure to take account of local law in this connection is troubling. Assume for the sake of argument that UDPIA allows insolvent beneficiaries to disclaim property.⁵⁹ Under the foregoing provision, an insolvent who had contributed all of the funds in a joint bank account could still, upon the death of the other joint tenant, disclaim one-half of the account, despite the fact that creditors of the insolvent could have levied execution against the entire joint account prior to the death of the other joint tenant. By the same token, an insolvent who had contributed nothing to a joint interest in real property could effectively disclaim the entire joint interest under UDPIA, despite the fact that creditors of the insolvent could have reached

54. LaPiana, *supra* note 11, at 58; *see also* UDPIA, *supra* note 2, § 7 cmt. (“These developments in the tax law of disclaimers are reflected in [§ 7].”).

55. That is to say, the share “determined by dividing the number one by the number of joint holders alive immediately before the death of the holder to whose death the disclaimer relates.” UDPIA, *supra* note 2, § 7(a)(1). In a typical joint tenancy of husband and wife, the fractional share is one-half of the jointly held property.

56. *Id.* § 7(a).

57. For a discussion, see JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 325-46 (3d ed. 1993).

58. Treas. Reg. § 25.2518-2(c)(4)-(5) (as amended in 1997). For a minor exception to the real property rule, see *infra* note 62. Under these Regulations, the tax consequences of disclaiming an interest in a joint bank account can depend on whether the account was or was not a joint account of U.S. citizen spouses. Treas. Reg. § 25.2518-2(c)(5), exs. 12-14 (as amended in 1997).

59. Which it very well may. *See infra* Part V.A.

one-half of the joint interest prior to the death of the other joint tenant (assuming it was not a tenancy by the entirety).⁶⁰ The only conceivable reason one might adduce for such a rule is that it offers disclaimants a choice between a simple procedure for establishing their interest in a joint tenancy and cumbersome tracing—but whether that is reason enough is very far from clear.⁶¹ The drafters of UDPIA, at any rate, make no such claim; the only justification they advance for the provision is the assurance it provides that all tax-qualified disclaimers are substantively effective.⁶² Coordination with the local law of joint ownership would have better served public policy.

UDPIA also includes a broader provision, creating another—as it were, federal—safe harbor: “if as a result of a disclaimer or transfer the disclaimed or transferred interest is treated pursuant to the [Internal Revenue Code], as now or hereafter amended, . . . and the regulations promulgated thereunder, as never having been transferred to the disclaimant, then the disclaimer or transfer is effective as a disclaimer” under UDPIA.⁶³

At a theoretical level, this provision is impure. It delegates authority to establish the substantive validity of a disclaimer to two federal bodies—Congress (responsible for the Code) and the Treasury Department (which issues the Regulations)—whose sole concern in the matter is tax policy. The drafters’ purpose in so doing was to ensure that “[a]ny disclaimer which is qualified for estate and gift tax purposes is a valid disclaimer under this Act even if it[] does not otherwise meet the Act’s more specific requirements.”⁶⁴ Once again, given the disconnection between substantive disclaimer policy and tax policy, this purpose is conceptually dubious. But the instant provision is doubly dubious, in that (again) it overshoots its stated goal: Under UDPIA, any disclaimer that satisfies the substantive accessories of the tax code is valid, *even if the disclaimer at issue has no tax*

60. Permissible in some states, a tenancy by the entirety in a husband and wife is not unilaterally severable and hence is exempt from creditors’ claims against one party, so long as both parties are alive. *DUKEMINIER & KRIER, supra* note 57, at 327, 375.

61. The potential for manipulation—whereby an insolvent might establish and fully fund a joint account with a terminally ill family member in order to disclaim half of the account in short order, without thereby making a fraudulent conveyance—is particularly troubling here. Such a disclaimer could not even be challenged on the ground of actual fraud, because under UDPIA “[a] disclaimer . . . is not a transfer.” UDPIA, *supra* note 2, § 5(f).

62. *See supra* note 54 and accompanying text. The drafters’ decision to unify the treatment of disclaimers of joint interests in real property and bank accounts may well have stemmed from the fact that the Regulations do treat joint tenancies in real property like a joint account *in one minor instance*: Where the disclaimant was married to the deceased joint tenant, was not an American citizen, and the interest was created after July 14, 1988. *Treas. Reg. § 25.2518-2(c)(4)(ii)* (as amended in 1997). *See UDPIA, supra* note 2, § 7 cmt. (pointing out that UDPIA was drafted to allow the disclaimant to take advantage of this Regulation).

63. UDPIA, *supra* note 2, § 14. A few states have similar provisions. *E.g.*, CAL. PROB. CODE § 295 (West 1991).

64. UDPIA, *supra* note 2, § 14 cmt.

implications.⁶⁵ Such a delegation is not even defensible as a unifying measure. What is more, UDPIA's delegation extends explicitly to subsequent *amendments* to the Internal Revenue Code and its Regulations. Any state that signs on to UDPIA is simultaneously signing a legislative blank check.

In practice, however, this provision is likely to be of small consequence.⁶⁶ Given the priority of generating revenue, Congress has not set, and is not about to set, substantively licentious standards for a tax-qualified disclaimer; and in the improbable event that Congress were to relax its current standards, state legislators could respond by canceling their blank check. Furthermore, despite Congress's intent to sever the tax code from the moorings of local law,⁶⁷ it has never done so completely. In some respects, the validity of a disclaimer for tax purposes still hinges on its validity under state law⁶⁸ (and hence, in an adopting state, under UDPIA); and, to that extent, UDPIA's provision recognizing any disclaimer that satisfies § 2518 dissolves into a superfluous circularity.⁶⁹

65. It is not absolutely clear that this extension was intended, but nothing in the language of § 14 restricts its application to transfers that would be subject to tax unless the disclaimer at issue were tax-qualified. *See supra* text accompanying note 63; *cf. infra* note 79 (citing to prior Uniform Acts that, in a related context, included language explicitly making special provisions for disclaimers with tax consequences). But compare a comment by the Reporter for UDPIA: "Section 14 is perhaps the most important part of the UDPIA because [it] in some ways makes the rest of the UDPIA unnecessary, at least for disclaimers intended to be qualified for tax purposes." Memorandum from William LaPiana for ABA Presentation 20 (July 10, 2000) (on file with author) [hereinafter LaPiana, Memorandum].

66. *But cf.* LaPiana, Memorandum, *supra* note 65, at 20, quoted *supra* note 65.

67. Prior to the enactment of § 2518 in 1976 (and as still concerns taxable transfers made prior thereto), a disclaimer was ineffective for tax purposes unless it was effective in all respects under local law. Treas. Reg. § 25.2511-1(c)(2) (as amended in 1986). Legislative history indicates that Congress enacted § 2518, *inter alia*, in order to develop a uniform law of tax-qualified disclaimers, unfettered by local law. H.R. REP. NO. 94-1380, at 66-67 (1976). Still, § 2518 requires that, in order to be tax-qualified, a disclaimer must pass property to the alternative beneficiary "without any direction on the part of the [disclaimant]"—which can only occur if the disclaimer actually takes effect under local law. I.R.C. § 2518(b)(4) (1989). So, in a second bid to achieve tax uniformity, Congress amended § 2518 in 1981 to treat as tax-qualified a directed transfer that meets requirements "similar to" those set out in federal disclaimer law, but that, because it fails to meet local requirements, cannot qualify as a disclaimer under local law—so long as the directed transfer is to the same alternative beneficiary who would have taken if the disclaimer had been effective under local law. *Id.* § 2518(c)(3). Disclaimers made under § 2518(c)(3) are known as "transfer disclaimers."

68. For example, the question of whether a disclaimer that thwarts creditors is tax-qualified continues to turn on its effectiveness under local law. Treas. Reg. § 25.2518-1(c)(2) (as amended in 1997). For discussions observing lingering uncertainties regarding the extent of federal concessions to local law, see BRAND & LAPIANA, *supra* note 8, at 108-15; WENIG, *supra* note 34, at A-55 to A-56; Coleman, *supra* note 34, at 16-29 to 16-31; Joan B. Ellsworth, *On Disclaimers: Let's Renounce I.R.C. Section 2518*, 38 VILL. L. REV. 693, 744-49 (1993).

69. *But cf. infra* notes 105-06 and accompanying text.

II. TIMELINESS

Easily the most striking departure of UDPIA involves the time limit for disclaiming. The Internal Revenue Code requires beneficiaries who seek to make a tax-qualified disclaimer to refuse the inheritance no later than nine months after the death of the benefactor.⁷⁰ As currently drafted, the Uniform Probate Code mirrors this deadline imprecisely, requiring beneficiaries to refuse inheritances of present interests in property within nine months, but establishing a separate deadline for disclaimers of contingent interests.⁷¹ UDPIA, on the other hand, fixes no deadline whatsoever for making a disclaimer.⁷² In this respect, the Commissioners quite deliberately distinguished UDPIA from the tax rules of § 2518.⁷³

The drafters' justification for this decision is to "reduce confusion."⁷⁴ Because rules establishing the time limit for a disclaimer under the Uniform Probate Code bore only a superficial resemblance to those found in the tax code, UDPIA's drafters conceive them to lay "a trap" for the unwary attorney.⁷⁵ By eliminating all mention of any time limit in UDPIA, they aim "clearly [to] signal the practitioner that the requirements for a tax qualified disclaimer are set by different law."⁷⁶

70. I.R.C. § 2518(b)(2)(A) (1989). In the case of beneficiaries who are still minors following this nine-month period, the deadline is extended until the day they attain the age of twenty-one. *Id.* § 2518(b)(2)(B). A small possibility exists that courts will construe § 2518 to permit transfer disclaimers delayed beyond nine months. By its plain language, § 2518 requires that a transfer disclaimer comply with requirements that are (merely) "similar to" those found in its subsection setting the nine-month time limit. *Id.* § 2518(c)(3). Nevertheless, no such interpretation is supported by the legislative history or United States Treasury Department rulings or memoranda. S. REP. NO. 97-144, at 142 (1981); H.R. CONF. REP. NO. 97-215, at 255-56 (1981); H.R. REP. NO. 97-201, at 190-91 (1981); *see also* H.R. REP. NO. 105-148, at 1387-88 (1997); Tech. Adv. Mem. 96-10-004 (Mar. 8, 1996); Priv. Ltr. Rul. 94-37-042 (Sept. 16, 1994); Priv. Ltr. Rul. 91-35-043 (Aug. 30, 1991).

71. UNIF. PROBATE CODE § 2-801(b) (amended 1997). Likewise other antecedent Uniform Acts. UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 2(a), 8A U.L.A. 149, 152 (1978); UNIF. DISCLAIMER OF TRANSFERS BY WILL, INTESTACY OR APPOINTMENT ACT § 2(a), 8A U.L.A. 161, 169 (1978); *cf.* UNIF. DISCLAIMER OF TRANSFERS UNDER NONTESTAMENTARY INSTRUMENTS ACT § 2(a) & cmt., 8A U.L.A. 179, 184 (1978).

72. UDPIA is not the first disclaimer statute to take this approach. The Model Probate Code did not refer to a time limit, and neither do several existing state statutes. MODEL PROBATE CODE, *supra* note 3, § 58; *e.g.*, 755 ILL. COMP. STAT. 5/2-7 (West 1992). One state statute declares the proposition affirmatively: "A disclaimer may be made at any time before acceptance." 20 PA. CONS. STAT. § 6206(a) (1975 & Supp. 2000).

73. UDPIA, *supra* note 2, prefatory note. *See also* UNIF. DISCLAIMER OF PROP. INTERESTS ACT prefatory note (Discussion Draft 1997) ("This provision . . . magnifies the difference between the property law of disclaimers and the tax law pertaining thereto. Not every disclaimer, however, is made for tax purposes, and this Act allows the greatest possib[le] flexibility for non-tax qualified disclaimers.").

74. UDPIA, *supra* note 2, prefatory note.

75. *Id.*

76. *Id.*

One may question briefly whether this rationale is the most persuasive one that can be announced on UDPIA's behalf. Have the Commissioners here truly identified a problem—and, assuming so, a solution? Estate planners are pretty well aware that the federal tax code fails to correspond in all respects with state law. If they harbor any doubts in the matter, the comment accompanying the Uniform Probate Code provision on disclaimers makes a point of highlighting the disparity.⁷⁷ What is more, one might suppose that any estate planner credulous enough to assume parallelism would likewise entertain the notion that if UDPIA contains no time limit for a disclaimer, then the tax code must not either. In this respect, the pitfall (such as it is) identified by the Commissioners appears, if anything, to be widened by their product. Surely, a better way to cover over this pitfall would be to write into UDPIA a time limit that coincides precisely with the one established by § 2518. In that event, no possible confusion could ever result. A few existing state statutes take this approach,⁷⁸ and prior Uniform Acts adopted a strategy very like it.⁷⁹

But that would have been a bad idea; one can, in fact, justify UDPIA's innovation with more cogent arguments than the one offered up by the Commissioners. Put aside the quirky notion of the naïve professional, and consider the all-too-common spectacle of the naïve, uncounseled beneficiary. A layperson contemplating a disclaimer is unlikely to consult either state statutes or the Internal Revenue Code, so inconsistencies between them should rarely lead her astray. Rather, the benefit of UDPIA's innovation is one of *simplification*: By eliminating the time limit found in the Uniform Probate Code and other prior Uniform Acts, the Commissioners increase the probability that the beneficiary will disclaim effectively, at least for purposes of state law.⁸⁰ Because better-heeled beneficiaries are more likely to retain counsel, and hence to comply with any formal requirements that legislators lay down, UDPIA's innovation func-

77. UNIF. PROBATE CODE § 2-801 cmt. (amended 1997).

It should be noted that there may be a discrepancy between the time allowed for filing a disclaimer under this section . . . and the time allowed for filing a qualified disclaimer under the Internal Revenue Code § 2518. Lawyers are cautioned to check both the state and federal disclaimer statutes before advising clients

Id.

78. *E.g.*, TENN. CODE ANN. § 31-1-103(b) (1984 & Supp. 2000).

79. Under the text of the original Uniform Disclaimer of Property Interests Act of 1978 and related Uniform Acts, any disclaimer intended to be tax-qualified had to comply strictly with the time limit of § 2518, but otherwise did not. UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 2(c), 8A U.L.A. 149, 153 (1978); UNIF. DISCLAIMER OF TRANSFERS BY WILL, INTESTACY OR APPOINTMENT ACT § 2(a) prefatory note, 8A U.L.A. 161, 163, 169 (1978); UNIF. DISCLAIMER OF TRANSFERS UNDER NONTESTAMENTARY INSTRUMENTS ACT § 2(a), 8A U.L.A. 179, 184 (1978).

80. Of course, there is nothing the Commissioners can do about the complexities of compliance with the Internal Revenue Code.

tions (once again) to place all estate plans on a more equal legal footing.⁸¹ In addition, a will contest—or simply delays in discovering and probating a will (or a will-substitute)—can prolong determination of the dispositive estate plan beyond any death-triggered deadline for disclaimer by the beneficiaries.⁸²

Still and all, these considerations might have to yield to substantive justifications for a time limit, were those manifest. But they are not. Within the tax sphere, a short deadline on disclaimers serves the purpose of maintaining the fiscal integrity of the estate tax, by ensuring that the beneficiary's opportunity to engage in postmortem tax planning does not exceed those that the benefactor could have exploited at the time of death.⁸³ But the policies extant within that sphere need not guide us when we establish substantive disclaimer law at the state level.⁸⁴

Non-tax rationales for a deadline on disclaimers, articulated or hinted at by courts and commentators over the years, fail to stand up to analysis. One phantom policy can be dismissed out of hand: "The justification . . . consists . . . of the fact that the failure to make a reasonably prompt disclaimer . . . is an implicit acceptance. *Qui tacet, consentire videtur* [the silence of a party implies consent]."⁸⁵ Yet, the behavior that signals "acceptance," either implicitly or explicitly, depends entirely on the law's own dictates: The later the deadline, the longer silence can persist without implying anything!⁸⁶ Law, then,

81. See *supra* notes 39-40 and accompanying text.

82. WILLIAM M. MCGOVERN, JR. & SHELDON F. KURTZ, *WILLS, TRUSTS AND ESTATES* § 2.8, at 77 (2d ed. 2001); Wellman, *supra* note 11, at 46; see also *infra* note 87. For a recent case in which a will contest caused an attempted disclaimer to be delayed for some twenty-three years, see *In re Estate of Hamill*, 866 S.W.2d 339, 341-42, 344 (Tex. App. 1993).

83. *United States v. Irvine*, 511 U.S. 224, 234-36, 240 (1994) (Souter, J.).

While a decision to disclaim even at the earliest opportunity may be made with appreciation of potential estate tax consequences, the passage of time puts the prospective disclaimant in a correspondingly superior position to determine whether her need to enjoy the property . . . outweighs the favorable estate and gift tax consequences of a disclaimer.

Id. at 235; see also *Jewett v. Comm'r*, 455 U.S. 305, 316 n.17 (1982); *Gahagan v. Whitney*, 194 N.E. 581, 582 (Ill. 1935); *McCouch*, *supra* note 44, at 1054-55; *supra* note 39 and accompanying text.

84. See *supra* notes 43-47 and accompanying text.

85. *Irvine*, 511 U.S. at 242 (Scalia, J., concurring); see also *Strom v. Wood*, 164 P. 1100, 1102 (Kan. 1917) ("[Acceptance] being the sensible and practical presumption, it would naturally be expected that if the devisee should desire to renounce he would do so at least within a reasonable time."); *In re Wilson's Estate*, 83 N.E.2d 852, 857 (N.Y. 1949) (Fuld, J., dissenting) ("[T]hat power to renounce may be lost after passage of time [is] another way of saying that an acceptance had occurred.").

86. Possibly in the absence of law, social norms would establish some benchmark for implied acceptance. Respecting preexisting norms within the law avoids the short-term confusion that could follow when lawmakers deviate from those norms. But any change in the law confounding prior legal or normative expectations will entail secondary transition costs. For discussions of this problem in other contexts, see Hirsch, *Inheritance and Inconsistency*, *supra* note 10, at 1088 n.88, 1109 & n.154; Hirsch, *Legal Contraptions*, *supra* note 10, at 532-33;

sets the standard, and the only relevant question is whether allowing a beneficiary to postpone the decision to disclaim does anyone any harm. But the argument ventured here is not tied to any notion of utility; and, wanting such a foundation, it collapses into tautology.

A second, more substantial argument sometimes made for a deadline on disclaimers is the imperative to settle decedents' estates expeditiously.⁸⁷ If beneficiaries procrastinate over the question of whether or not to accept an inheritance, the personal representative will have to hold the estate open until they come to a decision.⁸⁸ Yet, on reflection, the costs thereby occasioned appear inconsequential, for the personal representative can proceed with dispatch to distribute the balance of the estate; the only persons inconvenienced by the delay are the undecided beneficiaries themselves. And when the cost of further delay outweighs the benefit of indecision, then presumably they will make their election.⁸⁹

The final argument sometimes made for a time limit on disclaimers is the need to protect creditors' rights.⁹⁰ One can, of course, debate the issue of whether beneficiaries should have any right of disclaimer to the detriment of creditors; we shall return to that subject directly.⁹¹ Assuming, however, that lawmakers do grant beneficiaries the right to defeat their preexisting creditors by way of a disclaimer,

Adam J. Hirsch, *Inheritance and Bankruptcy: The Meaning of the "Fresh Start"*, 45 HASTINGS L.J. 175, 192-93 (1994) [hereinafter Hirsch, *Inheritance and Bankruptcy*].

87. UNIF. DISCLAIMER OF TRANSFERS BY WILL, INTESTACY OR APPOINTMENT ACT § 2 cmt., 8A U.L.A. 161, 170 (1978).

The time allowed should overlast the time for filing claims and contesting the will and enable the executor . . . to know with certainty who the takers of the estate will be. On the other hand, it should not be so long as to work against an early determination of . . . succession to an estate.

Id.; see also *id.* § 1 cmt., 8 U.L.A. at 168 ("[T]he expeditious administration of estates makes definiteness desirable in this area."); *In re Howe's Estate*, 163 A. 234, 237 (N.J. Prerog. Ct. 1932) ("[I]f such [a] donee . . . fails to reject [an inheritance] within a reasonable time, he must be deemed to have accepted it. The title to property cannot be left uncertain indefinitely . . .").

88. Actually, this prospect raises an interesting issue of how to read a disclaimer statute tolerating prolonged indecision *in pari materia* with state statutes simultaneously *enjoining* a personal representative to carry out her office without delay. *E.g.*, UNIF. PROBATE CODE § 3-704 (amended 1997) ("A personal representative shall proceed expeditiously with the settlement and distribution of a decedent's estate . . ."). Which rule takes priority? Can a personal representative force the issue, citing her statutory obligation to close the estate, or do beneficiaries have the right to hold the estate open indefinitely? To avoid litigation, UDPIA should resolve this statutory conflict explicitly.

89. One might argue that alternative beneficiaries also bear part of the cost of the delay, although anything they gain from a disclaimer is, from their perspective, a windfall.

90. *In re Wilson's Estate*, 83 N.E.2d at 855 ("Since . . . equity and good conscience require[s] that a man pay his contract obligations, the time allowed for action should be shorter when the effect of renunciation will be to prevent satisfaction of a judgment . . ."); *Oliver v. Wells*, 173 N.E. 676, 679 (N.Y. 1930) (Cardozo, C.J.); Note, *Disclaimers in Federal Taxation*, 63 HARV. L. REV. 1047, 1048-49 (1950); see also Hirsch, *supra* note 9, at 594.

91. See *infra* Part V.A.

is there any reason to set a *temporal* limit on that right? It would seem not. The justice underlying the beneficiaries' right, *vel non*, is purely a substantive one: If they can with fairness and efficiency disclaim now in spite of creditors, then the same is equally true later. Promptness has no apparent bearing on the public policy of the beneficiaries' right.

The only conceivable justification for requiring prompt disclaimer in this context involves the potential harm to *subsequent* creditors, assessing a beneficiary's creditworthiness in the wake of her benefactor's death. Does inheritance entail an "ostensible ownership" problem,⁹² creating an appearance of affluence sufficient to fool lenders into extending credit to an otherwise impecunious beneficiary—who can then proceed to disclaim and laugh at her bill collectors?⁹³ If so, the efficiency of the market for consumer credit would demand the shortest possible period during which the inheritance remained in limbo. But, in truth, no ostensible ownership problem exists in this case: Prior to disclaimer, the inheritance remains in the possession of the personal representative, not the beneficiary. Once the beneficiary accepts possession, thereby becoming the apparent owner of inherited property, under both the common law and UDPIA she forfeits whatever right of disclaimer she otherwise would have had.⁹⁴ The rule that acceptance of possession is final suffices to cure the ostensible ownership problem.⁹⁵ Meanwhile, so long as—and for however

92. See generally Douglas G. Baird & Thomas H. Jackson, *Possession and Ownership: An Examination of the Scope of Article 9*, 35 STAN. L. REV. 175 (1983).

93. For an examination of the ostensible ownership problem in a related context, see Adam J. Hirsch, *Spendthrift Trusts and Public Policy: Economic and Cognitive Perspectives*, 73 WASH. U. L.Q. 1, 63-66 (1995).

94. UDPIA, *supra* note 2, § 13(b)(1). Likewise under prior Uniform Acts, see UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 5, 8A U.L.A. 149, 157 (1978); UNIF. DISCLAIMER OF TRANSFERS BY WILL, INTESTACY OR APPOINTMENT ACT § 4(a), 8A U.L.A. 161, 174 (1978); UNIF. DISCLAIMER OF TRANSFERS UNDER NONTESTAMENTARY INSTRUMENTS ACT § 4(a), 8A U.L.A. 179, 186 (1978); UNIF. PROBATE CODE § 2-801(e) (amended 1997). See also I.R.C. § 2518(b)(3) (1989). For common law cases, see *In re Popkin & Stern*, 223 F.3d 764, 767-68 (8th Cir. 2000) (*dicta*); *Leipham v. Adams*, 894 P.2d 576, 581-82 (Wash. Ct. App. 1995); 3 AMERICAN LAW OF PROPERTY § 14.15, at 630 (A. James Casner ed., 1952); THOMAS E. ATKINSON, HANDBOOK OF THE LAW OF WILLS § 139, at 775 (2d ed. 1953); MCGOVERN & KURTZ, *supra* note 82, § 2.8, at 77; 6 WILLIAM H. PAGE, ON THE LAW OF WILLS § 49.11, at 52-53 (William J. Bowe & Douglas H. Parker eds., rev. ed., 1960 & Supp., Jeffrey A. Schoenblum ed., 2001); C. P. Jhong, Annotation, *What Constitutes or Establishes Beneficiary's Acceptance or Renunciation of Devise or Bequest*, 93 A.L.R.2d 8, 39-42 (1964).

95. The common law rule developed with this concern in mind. See *Crumpler v. Barfield & Wilson Co.*, 40 S.E. 808, 810 (Ga. 1902) (asserting that under the law, a beneficiary could not "go into possession of . . . land, remain thereon, contract debts, and [then] express her dissatisfaction with the devise, turn the property over to the executor of the will, and thus defeat her creditors . . ."); *McGarry v. Mathis*, 282 N.W. 786, 789-90 (Iowa 1938); *Lehr v. Switzer*, 239 N.W. 564, 566 (Iowa 1931); see also *Daniel v. Frost*, 62 Ga. 697, 705-10 (1879) (addressing disclaimer by an ostensible owner in a related context). In a more recent case, decided under a statute codifying the common law rule, the court concluded that a disclaimant had not yet accepted an inherited automobile, even though he had taken temporary possession of the vehicle,

long as—a beneficiary decides to keep her option of disclaimer open, she will remain the ostensible *nonowner* of the property.

In sum, state lawmakers have no reason to place a time limit on the exercise of a right of disclaimer, and the Commissioners were right to leave such a deadline out of UDPIA. But there remains, alas, one further difficulty with UDPIA's treatment of this problem: By its plain language, UDPIA fails to have the effect that its drafters suppose it to have. Recall that UDPIA does not affirmatively validate a disclaimer made at any time prior to acceptance of the inheritance. Rather, UDPIA affects the law by process of omission, erasing any and all reference to the existence of a time limit. By "not . . . includ[ing] a specific time limit" in UDPIA, the Commissioners believe that "the only bar to a disclaimer" under the Act is "acceptance of the offer."⁹⁶ But that conclusion neglects the impact of the section, earlier quoted, preventing a disclaimer whenever it is "barred or limited . . . by law other than this [Act]."⁹⁷ Even under a liberal construction of that caveat, restricting common law bars to matters not explicitly dealt with by UDPIA,⁹⁸ any extrastatutory bar on disclaimer based on timeliness should still remain in force by implication because UDPIA is altogether silent on the subject.

And under the common law, such a bar does exist: In order to refuse an inheritance effectively under the common law, the beneficiary must disclaim within a reasonable time.⁹⁹ As drafted, UDPIA resurrects that deadline.¹⁰⁰ That is contrary to the drafters' intent, however, and—as earlier argued—is bad policy.¹⁰¹ Indeed, it is potentially worse policy than that implemented by the Uniform Probate Code. At least the Uniform Probate Code provides beneficiaries with

in light of the fact, inter alia, that "[a]t no time did [the disclaimant] take title to the automobile, [or] use it as collateral for a loan." *Mapes v. United States*, 15 F.3d 138, 141 (9th Cir. 1994); see also *Seifner v. Weller*, 171 S.W.2d 617, 623 (Mo. 1943) (allowing a beneficiary to disclaim fourteen years after the benefactor's death, "it appearing that no interested person has altered his position because of mere lapse of time").

96. UDPIA, *supra* note 2, prefatory note. See also UNIF. DISCLAIMER OF PROP. INTERESTS ACT prefatory note & § 9 cmt. (Discussion Draft 1997) ("Under the common law an effective disclaimer had to be made only within a 'reasonable' time. This act specifically rejects a time requirement for making a disclaimer . . . Only events occurring after the right to disclaim has arisen will act as a bar."); LaPiana, *supra* note 11, at 57; LaPiana, Memorandum, *supra* note 65, at 1; Plenary Reading, 1998, *supra* note 29, at 15, 48, 52-53.

97. UDPIA, *supra* note 2, § 13(e). The provision receiving common law into the interstices of UDPIA might also apply here. *Id.* § 4(a).

98. See *supra* text accompanying notes 31-32.

99. MCGOVERN & KURTZ, *supra* note 82, § 2.8, at 77; see also 6 PAGE, *supra* note 94, § 49.8 at 46-48; 3 AMERICAN LAW OF PROPERTY, *supra* note 94, § 14.15, at 630-31.

100. The vague reasonable time standard is codified in a few states, e.g., CAL. PROB. CODE § 279 (West 2001) (adding a conclusive presumption that nine months constitutes a reasonable time), and, prior to the enactment of § 2518, a Regulation also set this standard for tax-qualifying a disclaimer. Treas. Reg. § 25.2511-1(c)(2) (as amended in 1997) (applicable to transfers creating interests prior to 1977, after which § 2518 applies).

101. See *supra* notes 80-95 and accompanying text.

a bright-line rule, to wit, the fixed nine-month deadline.¹⁰² In its place, UDPIA restores a fuzzier “standard”¹⁰³ that by its nature is more difficult to plan for and that inevitably will stir up additional litigation over whether or not the standard has been met in any given case.¹⁰⁴

Fortunately, however, UDPIA’s safe harbor for tax-qualified disclaimers here may lend a helping hand. Keep in mind, any disclaimer that satisfies the substantive requirements of the tax code satisfies UDPIA.¹⁰⁵ Accordingly, beneficiaries operating under UDPIA can with great, although not complete, assurance continue to rely on the nine-month deadline found in § 2518 as a benchmark.¹⁰⁶ That dead-

102. See *supra* note 71.

103. Under the common law test for the timeliness of a disclaimer, “[w]hat is a reasonable time must depend on all the facts and circumstances.” *Coleman v. Burns*, 171 A.2d 33, 35 (N.H. 1961); *accord, e.g., Keinath v. Comm’r*, 480 F.2d 57, 61-62 (8th Cir. 1973); *In re Wilson’s Estate*, 83 N.E.2d 852, 854-55 (N.Y. 1949). Given the dearth and inconsistency of common law cases, the operative standard in this instance may be fuzzier than most: “A review of the state court cases is of limited assistance in defining ‘reasonable time.’” *Keinath*, 480 F.2d at 62. One can identify some common law cases requiring beneficiaries to disclaim within *less* time than the nine months allowed under prior Uniform Acts. *In re Howe’s Estate*, 163 A. 234, 237-38 (N.J. Prerog. Ct. 1932); see also *Keinath*, 480 F.2d at 62 (asserting that a Minnesota statute fixing a six month time limit is “of some relevancy and probative value” in determining the reasonable time standard under the state’s common law); *In re Wilson’s Estate*, 83 N.E.2d at 854-55 (reducing the time limit at common law when a disclaimer would thwart creditors’ claims). If a state’s common law standard were found to run short of nine months under some or all circumstances, UDPIA could have the perverse consequence of compressing a deadline its drafters intended to enlarge! *But cf. infra* notes 105-06 and accompanying text.

104. The Commissioners who drafted the first generation of Uniform Acts on disclaimer concluded that a fixed deadline was preferable to a vague standard. See UNIF. DISCLAIMER OF TRANSFERS BY WILL, INTESTACY OR APPOINTMENT ACT prefatory note, 8A U.L.A. 161, 163 (1978). For a modern policy analysis of the ancient tension between rules and standards, see Louis Kaplow, *Rules Versus Standards: An Economic Analysis*, 42 DUKE L.J. 557 (1992).

105. UDPIA, *supra* note 2, § 14. This provision operates “[n]otwithstanding any other provision of this [Act],” including *id.* § 13(e), which otherwise reintroduces the common law bar.

106. Assume that under state common law a beneficiary might have to disclaim within a space of time less than nine months. If she were to disclaim within a time that meets the nine-month deadline for a tax-qualified disclaimer but fails to meet the state common law deadline for disclaimer, is the disclaimer still tax-qualified? If the answer is *no*—if, in other words, tax qualification hinges on the beneficiary *also* meeting the deadline for disclaimer set by state law—then § 14 of UDPIA, deeming effective any disclaimer that is tax-qualified, would be circular and unhelpful in this context. But if the answer is *yes*—if, in other words, a late disclaimer under state law will still be tax-qualified provided it is timely under the Internal Revenue Code—then § 14 of UDPIA provides beneficiaries with a safe harbor deadline of nine months.

Section 2518 of the Internal Revenue Code fails to answer this question explicitly. Private letter rulings issued prior to the amendment to the Code in 1981 giving effect to transfer disclaimers, see *supra* note 67, held that the answer was *no*. Priv. Ltr. Rul. 80-22-021 (Feb. 26, 1980); Priv. Ltr. Rul. 78-20-022 (Feb. 15, 1978). Nonetheless, the Treasury Regulation subsequently issued governing disclaimers of interests created prior to 1982 asserts without explanation that the answer is *yes*, if state law treats an untimely disclaimer as an assignment to the alternative beneficiary, which UDPIA does. Treas. Reg. § 25.2518-1(c)(3) (examples 1 & 2) (as amended in 1997); UDPIA, *supra* note 2, § 13(e), (f). This assertion appears inconsistent with I.R.C. § 2518(b)(4) (1989), see *supra* note 67, but the fact that the interpretive Regulations lack the force of law is irrelevant here; by express language, UDPIA acknowledges as valid any

line, at least, should serve to diminish the flow of litigation resulting from UDPIA's inadvertent restoration of the "reasonable time" standard. Even so, because that restoration itself conflicts with the drafters' expectations, an initial round of litigation will inevitably be necessary to resolve that UDPIA does indeed mean what its text implies.

The situation can scarcely be described as optimal.

III. STANDING

A. *Heirs*

Similar difficulties arise in connection with UDPIA's treatment of the problem of eligibility to disclaim. Under the common law, for reasons that have not a jot of modern relevance, only beneficiaries under a will or an instrument of gift have the right to disclaim. Heirs taking under the intestacy statute have no right to renounce an inheritance, which vests in them *eo instanti* by operation of law.¹⁰⁷ The signal accomplishment of statutory disclaimer law enacted in the last

disclaimer found to be tax-qualified under the Code "and the regulations promulgated thereunder." UDPIA, *supra* note 2, § 14. Thus, UDPIA assuredly provides a safe harbor deadline of nine months for disclaimers of interests created prior to 1982. *See also* UDPIA, *supra* note 2, § 16.

The section of the Regulations governing disclaimers of interests created after 1981 is, however, reserved for subsequent release, and inexplicably the Treasury Department has closed this Regulations project. Treas. Reg. § 25.2518-1(c)(1)(ii) (as amended in 1997); *see also* WENIG, *supra* note 34, at A-56. Although the 1981 amendments to the Code suggest no reason why the interpretation found in the Regulation pertaining to interests created theretofore would merit revision, no Regulation is explicitly on point, and UDPIA's safe harbor for disclaimers qualified, *inter alia*, by the Regulations fails to cover logical extensions of the Regulations. Concerning disclaimers of interests created after 1981, the Regulations must be judged irrelevant, and only UDPIA's safe harbor for disclaimers qualified by the Code itself is germane. The question, then, hinges on judicial interpretation of the Code (which may be influenced by the Regulations), and whereas the cases to date strongly suggest that the answer will be *yes*, an untimely disclaimer at state law after 1981 can still be tax-qualified if the disclaimer meets the Code's nine-month deadline—hence providing beneficiaries with a safe harbor under UDPIA—no case has yet raised this issue directly. The issue that remains quite unclear is whether beneficiaries can tax-qualify an untimely disclaimer at state law, and thus enjoy the safe harbor, without having recourse to a transfer disclaimer. *See* *Delaune v. United States*, 143 F.3d 995, 1001 & n.3 (5th Cir. 1998) (stating in dicta that a transfer disclaimer complying with federal law need not meet state law requirements for a disclaimer); *Estate of Dancy v. Comm'r*, 872 F.2d 84, 85 & n.1 (4th Cir. 1989) (same); *Estate of Lute v. United States*, 19 F. Supp. 2d 1047, 1057-58 (D. Neb. 1998) (same); *In re Estate of Lee*, 589 N.Y.S.2d 753 (Sur. Ct. 1992) (holding a disclaimer tax-qualified as a transfer disclaimer despite failing to meet a filing requirement under state law); *Estate of Bennett v. Comm'r*, 100 T.C. 42, 68, 74-76 (1993) (holding a disclaimer unqualified as a transfer disclaimer for want of an actual written transfer in lieu of an effective disclaimer at state law). Transfer disclaimers clearly come within UDPIA's safe harbor provision, which deems effective as a disclaimer under UDPIA any "disclaimer or transfer" found to be tax-qualified. UDPIA, *supra* note 2, § 14.

107. *E.g.*, *In re Meyer's Estate*, 238 P.2d 597, 605 (Cal. Dist. Ct. App. 1951). For a brief historical discussion, see Hirsch, *supra* note 9, at 591-93; *supra* note 35 and accompanying text.

century has been to eradicate this hoary distinction.¹⁰⁸ Under American statutes, heirs and devisees alike are free to refuse their inheritances.

Which brings us to UDPIA. Without peradventure, the Commissioners intend to perpetuate this reform: several of the Act's provisions presuppose that an heir can disclaim.¹⁰⁹ But again, under UDPIA's plain text, the issue is doubtful. Prior Uniform Acts had indicated by express language that the right of disclaimer extended to an heir.¹¹⁰ UDPIA has only this to say: "A person may disclaim, in whole or in part, any interest in or power over property,"¹¹¹ without adding anything about the manner of devolution whereby the person may have acquired that interest. Another provision is equally terse: "This [Act] applies to disclaimers of any interest in or power over property, whenever created,"¹¹² not *however* created. Nor do the definitions of the words *person* and *disclaimer* established in UDPIA elaborate that a person may be an heir or that a disclaimer may follow intestate succession.¹¹³

The drafters' economy of expression here is damaging because, once again, it must be interpreted in conjunction with the caveat that disclaimers under UDPIA are "barred . . . if so provided by law other than this [Act]."¹¹⁴ The common law bars disclaimer by an heir, and the language of UDPIA nowhere explicitly overturns that result. In light of the venerable, universal statutory rejection of the common law rule, coupled with the drafters' presupposition that they had followed suit, only an obstinately textualist court would read UDPIA

108. Hirsch, *supra* note 9, at 596. Commentators had long criticized the distinction, and they had urged its statutory abolition. 3 AMERICAN LAW OF PROPERTY, *supra* note 94, § 14.15, at 628-29; ATKINSON, *supra* note 94, § 139, at 776; 6 PAGE, *supra* note 94, § 49.1, at 37; Lauritzen, *supra* note 35, at 569, 587.

109. See UDPIA, *supra* note 2, §§ 6(b)(1) & cmt., 12(c) (specifying when a disclaimer of an intestate interest would take effect and specifying to whom such a disclaimer would have to be delivered); see also LaPiana, *supra* note 11, at 60 (offering a hypothetical example of the devolution of inherited property when an heir disclaims under UDPIA, thereby assuming without analysis that such a disclaimer is effective).

110. "A person . . . who is an heir, next of kin, devisee, [or] legatee, . . . may disclaim . . ." UNIF. DISCLAIMER OF TRANSFERS BY WILL, INTESTACY OR APPOINTMENT ACT § 1, 8A U.L.A. 161, 166 (1978). "A person . . . to whom any property or interest therein devolves, by whatever means, may disclaim . . ." UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 1, 8A U.L.A. 151, 151 (1978). See also UNIF. PROBATE CODE § 2-801(a) (amended 1997).

111. UDPIA, *supra* note 2, § 5(a).

112. *Id.* § 3.

113. "Disclaimer" means the refusal to accept . . . property." *Id.* § 2(3). "Person" means an individual, [or] corporation . . ." *Id.* § 2(6). The terms *property* and *interest in property* are not defined in UDPIA.

114. *Id.* § 13(e); see also *id.* §4(a) (supplementing UDPIA with the common law "[u]nless displaced by a provision of this [Act]").

literally in this respect.¹¹⁵ Nevertheless, UDPIA's potential to provoke needless litigation over so fundamental an issue is once again troubling.

B. *Fiduciaries*

Assuming a right of disclaimer exists, who has authority to exercise it? The beneficiary can do so herself, of course. But what of fiduciaries—trustees and other representatives—exercising their judgment on her behalf?

Given the paucity of precedents, the common law failed to disclose clearly whether representatives could disclaim on behalf of deceased, incapacitated, or minor (and unborn) beneficiaries.¹¹⁶ On the other hand, trustees under the common law could disclaim only their own legal title, not the beneficiary's equitable title; disclaimer by a trustee did not cause a trust to fail, but rather triggered the disclaimant's replacement by a successor trustee.¹¹⁷ Whereas prior Uniform Acts

115. But, needless to add, resolute—if not obstinate—textualism is today an increasingly common judicial philosophy. For the textualist manifesto, see ANTONIN SCALIA, *A MATTER OF INTERPRETATION* (1997).

116. See *In re Estate of Morgan*, 411 N.E.2d 213, 215 (Ill. 1980) (remarking on the uncertainty of the issue). Observing that it was a case of first impression, one common law court acknowledged the right of a personal representative to disclaim on behalf of a deceased beneficiary. In dicta, the court extended the right to guardians of living beneficiaries. *In re Howe's Estate*, 163 A. 234, 236-37 (N.J. Prerog. Ct. 1932) (adding that "the fiduciary must exercise that right in accordance with his honest judgment as to what is best for the benefit of the person in whose shoes he stands"); see also *Estate of Hoenig v. Comm'r*, 66 T.C. 471, 475-76 (1976) (citing *Howe's Estate* for authority); 6 PAGE, *supra* note 94, § 49.5, at 42 (same). *But cf.* UNIF. PROBATE CODE § 2-801(a) cmt. (West 6th ed. 1983) (asserting that "absent a statute, the general rule is that the right to disclaim is personal to the person entitled to exercise it, and dies with him . . . even though the time within which the right might have been utilized has not expired . . ."; citing, however, not to a disclaimer case, but to a spousal-election case). Unborn beneficiaries exercise rights independent of others and are not bound by other beneficiaries' decisions to disclaim. *In re Estate of Burmeister*, 594 P.2d 226, 229 (Kan. 1979). Rights of a fiduciary to disclaim benefits on behalf of the beneficiary of a pension plan depend on the terms of the pension contract itself rather than state law. *Nickel v. Estate of Estes*, 122 F.3d 294, 298-99 (5th Cir. 1997).

117. Tech. Adv. Mem. 85-49-004 (Aug. 30, 1985).

[The trustee's] function is to gather the trust assets, invest and preserve them [A]ny action by the [trustee] to defeat the trust would be in derogation of its duties imposed by the trust. Consequently, the [trustee] had no authority to unilaterally renounce a portion of the property otherwise receivable by the trust or to execute a disclaimer of the property.

Id.; Priv. Ltr. Rul. 88-04-004 (Oct. 22, 1987) ("Once a trustee has chosen to reject all or a portion of a transfer to trust, the general rule is that without the joinder of the trust beneficiaries, the rejection does not cause the trust to fail as to such property."); RESTATEMENT (SECOND) OF TRUSTS §§ 35 & cmt. b, 102 & cmt. g (1959); see also *id.* § 190 cmt. n (ordinarily barring gifts of trust property by trustees, although "[a] gift may be proper where it is advantageous to the trust estate"); 6 PAGE, *supra* note 94, § 49.5, at 43. See, e.g., *Davis v. Davis*, 494 So. 2d 393, 394, 397 (Ala. 1986) (where beneficiaries themselves disclaimed at the trustee's request); *In re Estate of Horowitz*, 531 A.2d 1364, 1366 (N.J. Super. Ct. Law Div. 1987) (where the trustee of a minor applied to be appointed guardian of the minor on the assumption that she could not otherwise disclaim on behalf of the minor); *but cf.*

failed to treat the problem of disclaimer by a trustee (and hence did not impinge on the common law), the rules they provided for disclaimers by other representatives were mercurial: Over time, the Uniform Probate Code has taken three different approaches to this issue, without articulating any policy rationales for its perturbations.¹¹⁸

UDPIA alters course once again, introducing into the law of disclaimer notable innovations. Under UDPIA, a “fiduciary” has power to disclaim “any interest in or power over property . . . whether acting in a personal or representative capacity.”¹¹⁹ The Act defines “fiduciary” sweepingly to include “a personal representative, trustee, agent acting under a power of attorney, or other person authorized to act as a fiduciary with respect to the property of another person,”¹²⁰ which would include guardians ad litem of minor—but not necessarily unborn¹²¹—beneficiaries, together with guardians and conservators of incapacitated beneficiaries. Neither the Act nor the accompanying comment elaborates the administrative standard under which fiduciaries exercise this authority.¹²² Nor does UDPIA provide for judicial oversight; under the Act, a fiduciary can disclaim on behalf of

McClintock v. Scahill, 530 N.E.2d 164, 165-66 (Mass. 1988) (interpreting the state’s disclaimer statute to permit disclaimer by a trustee).

118. Under the original version of the Code, representatives could disclaim only on behalf of deceased beneficiaries. UNIF. PROBATE CODE § 2-801(a) (West 1st ed. 1970). In 1973, the Code was amended to permit representatives to disclaim on behalf of incapacitated or minor beneficiaries but not on behalf of deceased beneficiaries. UNIF. PROBATE CODE § 2-801(a) & cmt. (West 6th ed. 1983). Finally, in 1990, the Code was amended again to grant representatives the right to disclaim on behalf of all sorts of beneficiaries. UNIF. PROBATE CODE § 2-801(a) & cmt. (West 9th ed. 1991). For a synopsis of the historical development of this section of the Uniform Probate Code, see Medlin, *supra* note 3, at 1238 n.26, 1251 n.101. Other Uniform Acts failed to treat the matter consistently: Whereas the Uniform Disclaimer of Transfers by Will, Intestacy, or Appointment Act of 1978 and the Uniform Disclaimer of Transfers Under Nontestamentary Instruments Act of 1978 each permitted representatives to disclaim on behalf of deceased, incapacitated, or minor beneficiaries, the Uniform Disclaimer of Property Interests Act, also of 1978, allowed representatives to disclaim only on behalf of incapacitated or minor beneficiaries, not deceased beneficiaries. UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 1, 8A U.L.A. 149, 151 (1978); *cf.* UNIF. DISCLAIMER OF TRANSFERS BY WILL, INTESTACY OR APPOINTMENT ACT § 1 & cmt., 8A U.L.A. 161, 166-68 (1978); UNIF. DISCLAIMER OF TRANSFERS UNDER NONTESTAMENTARY INSTRUMENTS ACT § 1, 8A U.L.A. 179, 181 (1978). No accompanying comment explained this inconsistency. *See also* MODEL PROBATE CODE, *supra* note 3, § 58 (failing to address the issue).

119. UDPIA, *supra* note 2, § 5(b); *see also id.* § 8. A corollary provision further gives trustees power to disclaim fiduciary powers, which may grant them discretion to make distributions to particular beneficiaries, without disclaiming the trust as a whole. *Id.* §§ 11, 13(c).

120. *Id.* § 2(4). The cross-reference in the accompanying comment is inaccurate. *See id.* § 2 cmt.

121. UDPIA defines “person” to refer to “an individual,” *id.* § 2(6), which on strict reading would seem to exclude the unborn. Such an interpretation is, however, out of step with UDPIA’s liberal approach to disclaimers. Here we confront another ambiguity, which is again bound to breed needless litigation. *Cf.* MONT. CODE ANN. § 72-2-811(1)(c) (1999) (expressly permitting disclaimer on behalf of an unborn beneficiary).

122. *See infra* note 128, item #1.

beneficiaries without a court's approval.¹²³ On the other hand, UDPIA does allow an instrument creating the fiduciary relationship expressly to "restrict[] or limit[]" a fiduciary's power of disclaimer.¹²⁴ The instant provision thus creates a default rule of construction, not a rule of law.

Putting aside for a moment the substantive merits of what these provisions of UDPIA have to say, they may trouble us for what they don't say. The accompanying comments contain scarcely any policy analysis to justify their innovative qualities.¹²⁵ What is worse, the comments do not even call attention to their innovative qualities. To invest a trustee with the right to disclaim as representative for a competent beneficiary without notice or consent is a revolutionary legal development.¹²⁶ One would never guess that from UDPIA, which asserts that "[t]his Act . . . gives fiduciaries broad powers to disclaim"¹²⁷ without placing that assertion in any sort of historical context.

123. See *infra* note 128, item #2; note 171 and accompanying text.

124. UDPIA, *supra* note 2, § 5(b). On the other hand, "[a] fiduciary may disclaim the interest . . . even if . . . an instrument other than the instrument that created the fiduciary relationship imposed a . . . limitation on the right to disclaim." *Id.*

125. See *id.* §§ 5 cmt., 8 cmt., 11 cmt. Nor did UDPIA's plenary debates occasion any policy discussion. These provisions elicited only a single comment from the floor, an inquiry concerning a matter of construction. Plenary Reading, 1999, *supra* note 29, at 51-52. Legislative history is scarcely more informative. An early draft of UDPIA found inspiration in prior Uniform Acts: "In recognizing the disclaimer by fiduciary, this section conforms to the UPC [Uniform Probate Code] and extends that rationale to analogous situations." UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 8 cmt. (Discussion Draft 1997). The suggestion that trustees of competent beneficiaries are truly analogous to other fiduciaries from a policy perspective will be disputed hereinafter. UDPIA's Reporter has also noted the importance of clarifying the substantive law of fiduciary disclaimer: "The ability of a trustee to disclaim property that would otherwise pass to the trust is not universally recognized, and one of the goals of the UDPIA was to remove any doubt about the validity of such disclaimers." LaPiana, Memorandum, *supra* note 65, at 10. Of course, the same doubt (to the extent that it exists) could have been removed by an express rule restricting disclaimers by trustees of competent beneficiaries.

126. On the common law, see *supra* note 117. Only a small minority of state statutes at present allow a trustee to disclaim without the benefactor's authorization under the governing instrument or without the co-signature of the trust beneficiary. CONN. GEN. STAT. ANN. § 45a-579(a), (b)(1) (West 1993 & Supp. 2001) (requiring prior court approval); MASS. GEN. LAWS ANN. ch. 91A §§ 1, 2 (West 1990), construed in *McClintock v. Scahill*, 530 N.E.2d 164, 165-66 (Mass. 1988) (requiring no prior court approval); N.H. REV. STAT. ANN. § 563-B:1 (1997) (same); OR. REV. STAT. § 112.652 (1999) (same); S.C. CODE ANN. § 62-2-801(a) (Law. Co-op 1987 & Supp. 2000) (same); TENN. CODE ANN. § 31-1-103(a) (1984 & Supp. 1999) (same). Other expansive state statutes notably omit trustees for competent beneficiaries from the list of fiduciaries empowered to disclaim. *E.g.*, IND. CODE ANN. § 32-3-2-2 (Michie 1995) (permitting disclaimer by a personal representative, guardian, or conservator); 20 PA. CONS. STAT. § 6202 (1975 & Supp. 2000) (permitting disclaimer by a personal representative or by the fiduciary of a minor or incapacitated person); see also *In re Estate of Newell*, 408 N.E.2d 552, 556-58 (Ind. Ct. App. 1980) (construing Indiana statutory law).

127. UDPIA, *supra* note 2, § 5 cmt. A corollary section of UDPIA allowing a trustee to disclaim fiduciary powers is affirmatively deceptive in this respect: Far from indicating its innovative character, the accompanying comment cites to a case in which "[t]he use of a disclaimer in just that situation was approved." *Id.* § 11 cmt. (citing *Cleaveland v. United States*, 62

Considered substantively, these provisions suffer from several minor but lingering technical ambiguities.¹²⁸ As a policy matter, they are a mouthful, which we had best proceed to digest piecemeal.¹²⁹

A.F.T.R.2d (RIA) 88-5992 (D.C. Ill. 1988)). But in truth, “[u]nder the law of most jurisdictions, a trustee cannot make a unilateral disclaimer of a fiduciary power that affects the rights of a beneficiary unless the trust instrument expressly authorizes such a disclaimer or the affected beneficiary consents to the disclaimer.” Rev. Rul. 90-110, 1990-2 C.B. 209. *Accord* Estate of Bennett v. Comm’r, 100 T.C. 42, 50-52, 58-66 (1993); *In re* Estate of Witz, 406 N.Y.S.2d 671, 673 (Sur. Ct. 1978); Tech. Adv. Mem. 98-18-005 (Jan. 6, 1998); Tech. Adv. Mem. 86-05-004 (Sept. 30, 1985); Tech. Adv. Mem. 85-27-009 (Mar. 21, 1985); RESTATEMENT (SECOND) OF TRUSTS § 102(4) (1959). What is more, the case cited in UDPIA’s comment allowed a disclaimer of a fiduciary power only where the affected beneficiaries of the trust “received notice of the trustee’s disclaimer and did not object.” *Cleaveland*, 62 A.F.T.R.2d (RIA) at 88-5994. That requirement does not appear in UDPIA, although the trustee’s action “must be compatible with the fiduciary’s duties.” UDPIA, *supra* note 2, § 11 & cmt. At any rate, “the case [*Cleaveland*] was a very sympathetic one . . . and one may readily surmise why the . . . Court came out as it did. Thus the result is an aberration and should not be relied on.” Coleman, *supra* note 34, at 16-11. Existing statutes in a small minority of states do grant trustees power to disclaim fiduciary powers, however, although all but one of these require prior approval by the court, unlike UDPIA. CONN. GEN. STAT. ANN. § 45a-579 (b)(1), (e)(2)(F) (West 1993 & Supp. 2001); IDAHO CODE § 15-2-801(a)(3) (Michie 1979 & Supp. 2000); NEB. REV. STAT. § 30-2352(a)(3) (1995); S.C. CODE ANN. § 62-2-801(b) (Law. Co-op 1987 & Supp. 2000); TENN. CODE ANN. § 31-1-103(a) (1984 & Supp. 1999) (no prior court order required); *see also* Estate of Ware v. Comm’r, 480 F.2d 444 (7th Cir. 1973) (the holding of this case is construed in Tech. Adv. Mem. 85-27-009 (Mar. 21, 1985)).

128. *Item #1*: Whereas the comments accompanying provisions devoted specifically to disclaimers by trustees observe (vaguely) that “[e]very disclaimer by a trustee must be compatible with the trustee’s fiduciary obligations” and direct us to look elsewhere for rules pertinent to other representatives, UDPIA, *supra* note 2, §§ 8 cmt., 11 cmt., the comment accompanying the provision relevant to disclaimer by fiduciaries in general includes no analogous qualification, stating simply that “[t]his act . . . gives fiduciaries broad powers to disclaim . . .” *Id.* § 5 cmt. Must fiduciaries other than trustees disclaim in a manner that is compatible with their fiduciary obligations? A rigid application of *inclusio unius* could lead to the conclusion that they need not disclaim in such a manner, although other laws fixing their duties would contradict this conclusion.

Item #2: UDPIA’s provision for disclaimer by fiduciaries is subject to “express[]” limitations imposed “by another statute of this State.” *Id.* § 5(b). Accordingly, if a state statute requires court approval before a fiduciary can disclaim, that requirement is read into UDPIA. But what if that same requirement derives merely from the common law of the jurisdiction? Does UDPIA override that common law requirement, or is it still read into UDPIA via its other provision restricting any right of disclaimer that is “limited . . . by law other than this [Act]?” *Id.* § 13(e). Presumably, the particular language of the first provision supersedes the general language of the second provision, although the point remains to be clarified.

Item #3: UDPIA provides that “[e]xcept to the extent a fiduciary’s right to disclaim is expressly restricted . . . by the instrument creating the fiduciary relationship, a fiduciary may disclaim, . . . whether acting in a personal or representative capacity.” *Id.* § 5(b). Read literally, this language suggests that a governing instrument could restrict a fiduciary’s power to disclaim in a *personal* capacity, that is, prevent a trustee, et al., from refusing to assume the burdens of office. Such a result would, of course, be absurd, and for that reason the language should not be construed strictly.

Item #4: UDPIA defines a “person,” to include, inter alia, an “estate” and a “trust.” *Id.* § 2(6). Under UDPIA, a “person” can disclaim despite any restriction on the right of disclaimer contained in the governing instrument. *Id.* § 5(a). Suppose, then, a governing instrument denies a personal representative or a trustee the right to disclaim. Disclaimer by the trustee or personal representative acting as a “fiduciary” is now barred by UDPIA. *Id.* § 5(b). But can the personal representative or trustee still disclaim, regardless of the governing instrument, on behalf of the “person” comprising the “estate” or “trust”? *Id.* §§ 2(6), 5(a). These provisions are in appar-

1. Status

UDPIA's provision allowing disclaimer by a fiduciary is inclusive. Yet beneficiaries may have come to be represented by others for a number of alternative reasons and under a variety of very different circumstances, each of which requires separate analysis.

a. Competent Beneficiaries.—The decision to appoint a fiduciary may not relate to a beneficiary's competency. Benefactors often create testamentary trusts for adult, competent beneficiaries in order to exercise dead hand control over the inheritance or to ensure professional management of the principal. In such a case, any right of disclaimer that exists in the fiduciary will supplement, rather than substitute for, the beneficiary's right to disclaim on her own behalf.

A right of disclaimer by a fiduciary under these circumstances appears superfluous. The beneficiary can make the choice to disclaim for herself, and nothing is gained by extending the choice to another.¹³⁰ If there is any potential merit in a supplemental right of disclaimer here, it arises in the special case of a trust for a group of beneficiaries, where tax efficiency will follow only if the trust is disclaimed as a whole. In that event, engineering a useful disclaimer requires cooperation among the beneficiaries, which could be ham-

ent conflict, and no accompanying comment clarifies what it means for an estate or trust to disclaim as a "person." See *id.* § 2 cmt.

Item #5: The section of UDPIA relevant to disclaimers by joint tenants provides that "[u]pon the death of a holder of jointly held property, a *surviving* holder may disclaim." *Id.* § 7(a) (emphasis added). Does this language preclude disclaimer by the personal representative of a joint tenant who outlives the first joint tenant but who dies thereafter without having yet disclaimed? Surely, the drafters do not intend that result, although the comment fails to clarify the section's meaning in this regard. See *id.* § 7 cmt.

129. For prior commentary, see BRAND & LAPIANA, *supra* note 8, at 7-12; MCGOVERN & KURTZ, *supra* note 82, at 78-79; Coleman, *supra* note 34, at 16-10 to 16-17; Ellsworth, *supra* note 68, at 714-19; Gregory L. Fullerton, *When Can a Fiduciary Disclaim Property on Behalf of Another?*, 17 EST. PLAN. 272 (1990). For a related policy discussion of the doctrine of substituted judgment, see Fellows, *supra* note 40, at 622-30; see also Robert McLeod, *What Are the Limitations to an Attorney-in-Fact's Power to Gift and to Change a Dispositive (Estate) Plan?*, 27 WM. MITCHELL L. REV. 1143 (2000).

130. Cf. *In re Estate of Suter*, 142 N.Y.S.2d 353, 355-56 (Sur. Ct. 1955) (where the beneficiary of a trust was permitted to disclaim over the objection of the trustees), *rev'd on reh'g*, 172 N.Y.S.2d 100 (Sur. Ct. 1958) (rescinding on grounds that beneficiary was incompetent at time of disclaimer). This analysis applies whether a trustee seeks to disclaim the trust as a whole or seeks merely to disclaim a fiduciary power to make distributions to particular beneficiaries, which a trustee is also empowered to do under UDPIA. *Id.* §§ 11, 13(c). As the drafters point out, a disclaimer of a fiduciary power may produce tax efficiencies, for example, by operating to qualify a trust for the marital deduction, *id.* § 11 cmt., or the charitable deduction. But the same result can be achieved if the beneficiaries affected by the power themselves disclaim their interest in the trust (or in that aspect of the trust), which they remain free to do under UDPIA. *Id.* § 5(a) (allowing disclaimer, or partial disclaimer, of any sort of beneficial interest in property). *E.g.*, *Estate of Nicely v. Nat'l Found. for Infantile Paralysis*, 44 Cal. Rptr. 804, 806, 810-11 (Dist. Ct. App. 1965); Priv. Ltr. Rul. 85-43-009; see also *Estate of Witz*, 406 N.Y.S.2d at 672 (noting this strategy and citing to additional cases in which beneficiaries disclaimed interests stemming from trust powers).

pered by emotional disharmony or by the existence here of a Prisoner's Dilemma.¹³¹ Either way, discretionary trust beneficiaries might then rejoice if a trustee had authority to execute a "collective" disclaimer that the parties, if left to themselves, could not readily have negotiated.¹³²

That said, granting fiduciaries the general right to disclaim on behalf of competent beneficiaries entails the obvious danger that a trustee might decide to disclaim without first consulting a beneficiary or even to disclaim against her wishes. Of course, for a professional trustee to execute a disclaimer without the approval of the affected party seems virtually inconceivable. If the trustee is an unsophisticated family member, however, such an action becomes much easier to conceive. Extending the power of disclaimer beyond the competent beneficiary under these conditions is an invitation to litigation after the fact.¹³³ The game simply is not worth the candle.

b. Minor Beneficiaries.—In the case of a minor (or unborn) beneficiary, the problem differs. Here we do not have a beneficiary who is competent to decide the matter of disclaimer for herself. *But we will:*

131. The problem raised in the text arises, however, whenever multiple parties will benefit only by disclaiming in unison, as is often true where marital deduction planning is concerned, *e.g.*, *Hunt v. United States* 566 F. Supp. 356, 356-58 (E.D. Ark. 1983); *In re Guardianship of Kramer*, 421 N.Y.S.2d 975, 976 (Sur. Ct. 1979), irrespective of whether their interests all happen to be contained within a single trust. A Prisoner's Dilemma arises in game theory when parties must cooperate in order to obtain a benefit, but when they also know that if other parties act in a cooperative way while they themselves do not, they can exploit the other parties' unilateral cooperation. In that situation, all parties may decline to be cooperative, fearing exploitation by the rest. DOUGLAS G. BAIRD ET AL., *GAME THEORY AND THE LAW* 31-35 (1994). Here, the beneficiaries of a trust know that if they all disclaim they can engage in an act of collective altruism that may produce benefits for the family as a whole, but they also know that if any one beneficiary breaks her promise to disclaim, she may be able to capture the entire trust for herself. RESTATEMENT (SECOND) OF TRUSTS § 143 (1959). Under those conditions, external intervention might be necessary to facilitate cooperation. On the other hand, beneficiaries can overcome the Prisoner's Dilemma and cooperate effectively if they have a preexisting relationship of "trust," which often does develop within the confines of a family. For theoretical discussions, see BERNARD BARBER, *THE LOGIC AND LIMITS OF TRUST* 26-44 (1983); BARBARA A. MISZTAL, *TRUST IN MODERN SOCIETIES* 157-76 (1996); Bernard Williams, *Formal Structures and Social Reality*, in *TRUST* 3, 3-9 (Diego Gambetta ed. 1988); *see generally* Symposium, *Trust Relationships* (pts. 1-2), 81 B.U. L. REV. 321, 479 (2001).

132. The instant problem could be overcome without the assistance of a trustee as an instrument of collective action if a disclaimer can be executed *conditionally*—here, the disclaimer by each member of the group would be made upon the express condition that all other members of the group also disclaim. Indeed, this alternative strategy may be the only option if the interests of group members do not happen to be held in a single trust. Unfortunately, however, the effectiveness of a conditional disclaimer is not dealt with under UDPIA. *Cf.* UDPIA, *supra* note 2, § 5(e) & cmt. (rendering a disclaimer irrevocable). For a case giving effect to a conditional disclaimer, see *Palmer v. White*, 784 P.2d 449, 451 (Or. Ct. App. 1989); *but cf.* *Northwestern Nat'l Cas. Co. v. Doucette*, 817 S.W.2d 396, 401 (Tex. App. 1991) (where the condition was not unequivocal).

133. A disclaimer executed against the beneficiary's will might be challenged as a breach of trust.

We simply have to wait until the beneficiary reaches the age of majority.

Is there any harm in waiting? None is apparent unless delay would cause the beneficiary to lose her right to disclaim, which should not occur under the substantive law of UDPIA.¹³⁴ Nor, incidentally, would it occur under the Internal Revenue Code, which suspends the usual nine-month deadline for a tax-qualified disclaimer until a minor beneficiary's twenty-first birthday.¹³⁵ Accordingly, as a matter of public policy, we can safely consolidate the problem of adult disclaimants with that of adults-to-be.

c. Incapacitated Beneficiaries.—Incapacitated beneficiaries stand in a different situation. In light of their incapacity—which, unlike a minor's, may continue indefinitely—some surrogate must step in to make decisions for them, and a fiduciary typically assumes that role. Conceivably, we could require fiduciaries to put off disclaiming until such time as a doctor certifies that the beneficiary cannot conceivably recover her competence (and then decide for herself), but the tax code makes no allowance for such a delay.¹³⁶ Here, permitting an immediate disclaimer by a fiduciary makes sense.

d. Deceased Beneficiaries.—The case for permitting disclaimer by a fiduciary is strongest in connection with a beneficiary who dies before she has decided whether to accept or disclaim her inheritance. Here, no matter how long we wait, the beneficiary will never recover her competence, and a surrogate has to be called upon to wind up her affairs. Indeed, in this situation, all of the decedent's property will go to others in any event, and a disclaimer, if made, would simply comprise one aspect of that larger distributive process.

e. Charitable Trusts.—Finally, we have the problem of a beneficiary who is not a human person at all. Some benefactors leave funds in trust for the accomplishment of a purpose or cause rather than for a named beneficiary.¹³⁷ If the law deems the purpose one that subserves the public interest, the trust is a "charitable trust," and the

134. See *supra* Part II.

135. I.R.C. § 2518(b)(2)(B) (1989). The one exception to this analysis is the case where tax efficiencies will ensue only if multiple beneficiaries coordinate their disclaimers and different deadlines apply to different beneficiaries. In that event, fiduciary disclaimer on behalf of a minor could be appropriate. See, e.g., *In re Guardianship of Kramer*, 421 N.Y.S.2d 975, 976 (Sur. Ct. 1979) (where both parent and minor child had to disclaim in order to derive a tax benefit, and the parent declined to disclaim within the nine-month deadline without assurance that the child would follow suit).

136. See I.R.C. § 2518(b)(2).

137. See generally Hirsch, *Trusts for Purposes*, *supra* note 10; Hirsch, *supra* note 43.

state attorney general has standing to enforce it against the trustee.¹³⁸

Can the trustee of a charitable trust—as fiduciary for the public at large—disclaim the inheritance? Under UDPIA, the answer is *yes*: Charitable trusts fall within the Act’s broad definition of a disclaimable trust.¹³⁹

This outcome is without precedent. Trustees have never had the power to terminate via disclaimer a charitable trust.¹⁴⁰ Indeed, this want of authority has long constituted one of the principal distinctions between a charitable trust and an honorary trust for a non-charitable purpose, which a trustee traditionally has been free to terminate (or, one might say, to disclaim).¹⁴¹ UDPIA blurs the distinction, making charitable trusts in this respect more like honorary trusts.¹⁴²

The drafters present no policy argument for this innovation, convincing or otherwise,¹⁴³ and none is apparent: Tried and tested rules already exist to handle potential difficulties with charitable trusts. Obviously, the usual motives for a disclaimer lose all trace of relevance when we come to consider this sort of beneficiary. Unlike private beneficiaries, a charitable trust has no cause to engage in tax planning or any other sort of estate planning, for the greater good of

138. RESTATEMENT (SECOND) OF TRUSTS §§ 348, 391 (1959). Charitable trustees can disclaim in their personal capacity as trustees, of course, just as trustees of private trusts can do. *Id.* §§ 354 & cmt. a, 397.

139. Under UDPIA, a “person” may disclaim. UDPIA, *supra* note 2, § 5(a). UDPIA defines a “trust” to be a “person,” *id.* § 2(6), and it further defines a “charitable trust” to be a “trust.” *Id.* §§ 2(8)(A). Ergo, a charitable trust is a person eligible to disclaim under UDPIA. Furthermore, under UDPIA, a “fiduciary” may disclaim. *Id.* § 5(b). UDPIA defines a “trustee” to be a “fiduciary.” Although UDPIA does not define “trustee,” it does define a “trust” (as already indicated) to include a charitable trust. *Id.* § 2(8)(A).

140. *E.g.*, *Mfrs. Nat’l Bank v. Woodward*, 21 A.2d 705, 708 (Me. 1941); *Read v. Willard Hosp.*, 102 N.E. 95, 95 (Mass. 1913). In contradistinction to a charitable trust, a charitable organization may disclaim a bequest. Typically, a charitable organization will choose to disclaim because it objects to the use stipulated for the bequest. The bequest will then fail on the theory that by bequeathing to the organization, the benefactor implicitly intends the bequest to take effect only if the named organization agrees to serve as the intermediary for carrying out the charitable purpose. *E.g.*, *Roseberry v. Moncure*, 429 S.E.2d 4, 5 (Va. 1993); *Watson v. Wall*, 93 S.E.2d 918, 925 (S.C. 1956) (disclaimer of bequest to the state by resolution of the General Assembly); *Nicholson’s Estate v. City of Denver*, 93 P.2d 880, 888 (Colo. 1939); *Dare v. New Brunswick Trust Co.*, 194 A. 61, 62 (N.J. Ch. 1937); *Albany Hosp. v. Hanson*, 108 N.E. 812, 813-15 (N.Y. 1915); *see also* RESTATEMENT (SECOND) OF TRUSTS § 399 cmt. o (1959). By contrast, a charitable trustee appointed for the purpose of effectuating the stipulated use has a fiduciary obligation to do so and is only free to decline the office of trustee, following which the court will appoint a successor trustee. *See supra* note 138.

141. RESTATEMENT (SECOND) OF TRUSTS § 124 & cmts. c, e, & illus. 1-4 (1959); *see also id.* § 123.

142. The two remain different, in that the trustee of a charitable trust can only disclaim within the scope of his fiduciary duties. UDPIA, *supra* note 2, § 8 cmt.

143. *See id.* §§ 5 cmt., 8 cmt.

a family.¹⁴⁴ If a charitable trust could not operate effectively to accomplish the testator's stated purpose, and for that reason might as well not go into effect, the cy pres doctrine already functions to allow modification or termination of the trust.¹⁴⁵ If property bequeathed to a charitable trust proved worthless or burdensome (a "white elephant"), and for that reason might as well not be accepted by the entity,¹⁴⁶ the doctrine of administrative deviation and associated rules already apply.¹⁴⁷ UDPIA serves merely to muddy the doctrinal waters; it offers a solution in search of a problem.

2. Administrative Standard

The problem of the administration of a power of disclaimer held by a third party is not dealt with in UDPIA. In the case of a trustee, the problem is subsumed: According to an accompanying comment, "[e]very disclaimer by a trustee must be compatible with the trustee's fiduciary obligations."¹⁴⁸ What a trustee's fiduciary obligations would entail in this connection UDPIA leaves unexplored. In the case of fiduciaries other than a trustee, the problem is ignored: UDPIA says not so much as a word about the administrative constraints under which they operate.¹⁴⁹ Of course, we cannot expect the drafters of a Uniform Act to resolve every last issue arising out of its rules. The one identified here is far from trivial, however, and the laws of physics dictate that matter(s) left up in the air must eventually descend—in this instance expensively, into a courtroom.¹⁵⁰

144. See *supra* note 34 and accompanying text. For potential uses of disclaimers other than tax planning, see *infra* notes 217-18 and accompanying text. For a case in which a charitable organization nonetheless disclaimed a small bequest in order to generate a tax benefit for the family of the benefactor, see *Leigh v. Commonwealth*, 648 A.2d 1346, 1347-49 (Pa. Commw. Ct. 1994).

145. RESTATEMENT (SECOND) OF TRUSTS § 399 (1959).

146. In plenary debate, one Commissioner applauded the instant rule, citing to that scenario. Plenary Reading, 1998, *supra* note 29, at 37-38; see also *id.* at 3-4. Thus far it has arisen only in popular fiction, not in published cases. See O. HENRY, *The Ransom of Red Chief*, in BEST STORIES OF O. HENRY 188 (Bennett Cerf & Van H. Cartmell eds., 1945) (1907).

147. See *In re McNeel's Trust*, 282 N.Y.S.2d 103, 106 (Sup. Ct. 1967); *In re Emberson's Estate*, 43 N.Y.S.2d 782, 785 (Sur. Ct. 1943); RESTATEMENT (SECOND) OF TRUSTS § 167 (1959); see also *id.* § 240. Under the Uniform Trust Powers Act, a trustee can abandon a trust asset. UNIF. TRUST POWERS ACT § 3(c)(7), 7C U.L.A. 396, 401 (1964).

148. UDPIA, *supra* note 2, §§ 8 cmt., 11 cmt.

149. See *id.* § 5 cmt.

150. Presumably, the drafters considered these issues too complex to deal with in a brief statute. Prior Uniform Acts are scarcely more communicative on the subject. See UNIF. DISCLAIMER OF TRANSFERS BY WILL, INTESTACY OR APPOINTMENT ACT § 1 cmt., 8A U.L.A. 161, 167 (1978) ("Section 1 extends the right to disclaim to the representative of an incapacitated or protected person . . . when it is in the ward's interest to do so."). Few of the existing state statutes expand on the issue. For one somewhat more detailed statutory provision, see WASH. REV. CODE ANN. § 11.92.140 (West 1998 & Supp. 2001). Still, the comments that accompany UDPIA are infinitely elastic, and these could have served to elaborate the statutory text.

Viewed in the abstract as a policy issue, the problem of fiduciary administration of a disclaimer once again demands more refined analysis. Here the key point to notice is that the circumstance giving rise to the fiduciary relationship itself affects the calculus of disclaimer and hence should play a role in determining the administrative regime that applies.

Consider the personal representative of a deceased beneficiary. The circumstance of a beneficiary's demise is uniquely auspicious for a disclaimer because death removes the principal obstacle to turning down property, namely, its effect on the beneficiary's own financial well-being. A deceased beneficiary has transcended such concerns, so a personal representative can focus solely on the tax and distributive ramifications of disclaiming. What is more, the fact of a beneficiary's death itself affects those ramifications: If a personal representative disclaims, the amount of property available for distribution should increase because it will not flow immediately through a second probate estate.¹⁵¹ All of this may suggest the suitability of a disclaimer that a needy or greedy beneficiary would never have contemplated had she survived.

There still remains the intractable problem of how those ramifications should be assessed. Of course, if the succeeding beneficiary—she who would take if the decedent beneficiary's estate doesn't disclaim—will still inherit, and more efficiently so, if the estate does disclaim, the case is easy, and the personal representative should carry out the disclaimer.¹⁵² Likewise, if a disclaimer would divert the inheritance away from the succeeding beneficiary, but she nonetheless consents to that outcome, the problem disappears. Disclaimer by the personal representative then becomes akin to a family settlement.¹⁵³ If, on the other hand, the succeeding beneficiary objects to a disclaimer, we face a more difficult question: Whom does the personal representative represent?

151. Ordinarily in such a case the property will not face double taxation, see I.R.C. § 2013 (1989), but it could still face unnecessary taxation in the beneficiary's estate if the benefactor's estate was not taxable and, at any rate, the property will be twice subjected to the costs of administration.

152. For examples of this scenario, where a disclaimer by the estate did follow, see *Rolin v. Comm'r*, 588 F.2d 368, 369 (2d Cir. 1978); *In re Estate of Kirk*, 591 N.W.2d 630, 632 (Iowa 1999); *In re Estate of Estes*, 718 P.2d 298, 299-300 (Kan. 1986); *In re Estate of Deitch*, 435 N.Y.S.2d 244, 245 (Sur. Ct. 1981). The situation differs, however, if disclaimer by the estate causes property to flow outright to succeeding beneficiaries, as opposed to in trust. See *infra* note 159. Creditors' claims present a further complication. Compare *Estate of Schiffman*, 430 N.Y.S.2d 229, 230 (Sur. Ct. 1980) (holding that the personal representative of an estate could disclaim in order to avoid creditors' claims against the estate) with *Estate of Heater v. Dep't of Pub. Aid*, 640 N.E.2d 654, 656-67 (Ill. App. Ct. 1994) (holding the reverse).

153. On family settlement agreements, see ATKINSON, *supra* note 94, at 566-67.

Historically, the answer to the question was clear. “The executor represents the person of his testator”¹⁵⁴ More recently, however, courts have hedged on this issue, asserting more vaguely that “[t]he execut[or] represents the testat[or] *and* to a very great extent the heirs, legatees or distributees, for whose benefit probate proceedings are had.”¹⁵⁵ Although the testator has exclusive power to appoint by will the personal representative, a court may take into consideration the beneficiaries’ objections to the personal representative’s administrative decisions and even, in unusual circumstances, their objections to the testator’s choice of person to hold the office.¹⁵⁶

At any rate, if disclaimer by the decedent beneficiary would alter her estate plan, even viewing the personal representative as solely the testator’s fiduciary leaves us uncomfortably rudderless. Trying to divine how the decedent beneficiary would have acted in these circumstances is impossible: To ask as a thought-experiment how she would have approached a problem that she never actually confronted (that is, her own premature death, affording the opportunity for an efficient disclaimer), and so expressed no intent about, is the iffiest of iffy questions.¹⁵⁷ But neither can we approach the question objectively: How she *should* have acted is hardly less iffy, for an election between the efficiency of a one-step transfer (via disclaimer) to a new beneficiary (or a new class of beneficiaries) who, although not named in the decedent beneficiary’s will, may still be a close relative (or a class of relatives, possibly overlapping with the ones named in the will), and the inefficiency of a two-step transfer (via non-disclaimer) that accords precisely with the decedent beneficiary’s will, involves a trade-off between incommensurables.

Under these conditions, we face an unhappy choice between making an arbitrary guess about the testator’s preference and following an arbitrary rule establishing a presumption about that preference.

154. *Fox Film Corp. v. Knowles*, 261 U.S. 326, 330 (1922) (Holmes, J.) (citing *Coke on Littleton*).

155. *Lucas v. Mannering*, 745 S.W.2d 654, 656 (Ky. Ct. App. 1987).

156. *Id.* at 656 (“The record reveals no compelling evidence that it was [the testator’s] intent to have the property sold,” as the executor sought but the beneficiaries opposed. “The record, however, certainly does reflect the beneficiaries’ desire to take the property in-kind rather than the proceeds from a sale of it.” Thus, the executor owed a “duty as fiduciary to the testat[or] and the beneficiaries” not to sell the property); *see also, e.g., In re Petty’s Estate*, 608 P.2d 987, 995 (Kan. 1980) (concerning the relevance of beneficiaries’ objections to the choice of personal representative).

157. As a court once opined in a different context: “We would not encourage the suggestion that a court may wander . . . into the region of conjecture as to what it is reasonable to suppose the testat[or] would have done had she contemplated a certain event happening. A court is not free to roam such unfenced fields of speculation.” *Estate of Graves v. Holland*, 457 P.2d 71, 77 (Kan. 1969). Almost certainly, an inference of subjective intent founded on the decedent beneficiary’s prior decisions would be impossible here: The opportunity to disclaim an inheritance of a particular sum, resulting in devolution to particular alternative beneficiaries, is *sui generis*.

In what appears the only recorded case to address the question directly, the court asserted that authorization of a disclaimer by a personal representative lay in the court's discretion,¹⁵⁸ and it refused to permit a disclaimer that would have altered the estate plan laid out in the decedent beneficiary's will. In light of "the testamentary intent of the decedent . . . tax advantages [are] not the overriding consideration," opined the court.¹⁵⁹ In truth, we cannot know what the testator's overriding consideration would have been, although the court's position does accord with the modern estate planner's credo that tax efficiency is best cast aside as a be-all and end-all.¹⁶⁰ Still, no clear resolution to this policy issue presents itself.

158. *In re Estate of Morgan*, 393 N.E.2d 692, 696 (Ill. App. Ct. 1979), *aff'd* 411 N.E.2d 213 (Ill. 1980). By contrast, in many situations where a testator's intent has become ambiguous on account of changed circumstances, the law imposes inflexible default rules, precisely on account of the difficulty of reconstructing probable intent and to reduce litigation. See *Flannery v. McNamara*, 738 N.E.2d 739, 746 (Mass. 2000); Hirsch, *Inheritance and Inconsistency*, *supra* note 10, at 1125-35.

159. *Estate of Morgan*, 393 N.E.2d at 696. The minority in *Morgan* would have deferred to the personal representative's judgment concerning the decedent beneficiary's probable intent, so long as that judgment was "reasonable." *Id.* at 697-98 (Jiganti, J., dissenting). In this case, incidentally, the succeeding beneficiaries would have been the same whether or not the decedent beneficiary disclaimed. But with a disclaimer, the succeeding beneficiaries would have taken the inheritance outright; whereas, without a disclaimer, they would have taken it in a trust limiting their access to, and control over, the corpus, which would have been subject to a testamentary special power of appointment, requiring them to bequeath the corpus remaining at their deaths among their descendants. The affirming court considered this estate plan to differ substantially from outright inheritance. *Estate of Morgan*, 411 N.E.2d at 215. See also *In re Estate of Schock*, 543 A.2d 488, 489-90 (N.J. Super. Ct. Law Div. 1988) (approving disclaimer by a decedent's estate to save taxes on the condition that those who benefitted from the disclaimer fully compensated those who would have taken shares of the disclaimed property under the decedent's will—although that condition should have rendered the disclaimer unqualified for federal tax purposes, per I.R.C. § 2518(b) (1989); see in this regard *In re Estate of Domenico*, 418 N.Y.S.2d 1012, 1013-14 (Sur. Ct. 1979)); *Guardianship of Hougard v. Borden*, 321 N.W.2d 313, 314-15 (Wis. Ct. App. 1982) (ruling that the court could not approve a disclaimer in the name of an incapacitated beneficiary unless his estate plan were consulted and compared with the devolution that would result from a disclaimer, observing that "[i]t is in [the beneficiary's] best interest . . . that his testamentary disposition is respected"). Very few existing state statutes address the issue. Compare, e.g., 755 ILL. COMP. STAT. 5/2-7 (1992) (liberally allowing the court to approve "if it finds that the disclaimer benefits the estate as a whole and those interested in the estate generally even if the disclaimer alters the distribution of the property . . . disclaimed") with, e.g., OHIO REV. CODE ANN. § 1339.68(B)(4)(a), (b) (Anderson 1993 & Supp. 2000) (more strictly allowing the court to approve if disclaimer "would not materially, adversely affect . . . the beneficiaries of the estate of the decedent").

160. David R. Frazer, *Five Myths of Estate Planning*, TR. & EST., Dec. 1985, at 16, 16. Addressing a related problem, the tentative draft of the Restatement (Third) of Property grants courts discretion to modify a testator's estate plan to achieve tax objectives without the consent of the affected beneficiaries if such modification would not violate his "probable intention." RESTATEMENT (THIRD) OF PROP.: DONATIVE TRANSFERS § 12.2 & cmt. f (Tentative Draft No. 1, 1995). If the proposed modification would require the court to alter the beneficial interests under the estate plan, the testator's "non-tax as well as tax objectives are to be considered. The greater the proposed alteration, the more rigorous the court should be in measuring the requested modification against the donor's probable intention." *Id.* § 12.2 cmt. f. For contested cases applying this doctrine, see *Griffin v. Griffin*, 832 P.2d 810, 813-14 (Okla. 1992); *Shawmut Bank v. Buckley*, 665 N.E.2d 29, 32-35 (Mass. 1996) (under the guise of construction); see also

When we turn to the fiduciary of a minor (or unborn) beneficiary, we face a very different case. Now the fiduciary most assuredly must take the beneficiary's interests into account. With her whole life ahead of her, the beneficiary's needs are difficult if not impossible to anticipate; under the circumstances, a per se rule barring a disclaimer in her name appears justifiable,¹⁶¹ unless the disclaimer literally costs her nothing.¹⁶²

That may not be so, however, in the case of an incapacitated beneficiary. The very fact of her incapacity, occasioning the intervention of a fiduciary, may place upper limits on her personal consumption.¹⁶³ In that event, a disclaimer that is otherwise efficient would be justifiable if (and only if) the resources already at the fiduciary's disposal suffice to meet the beneficiary's needs and if the devolution of the

Pond v. Pond, 678 N.E.2d 1321, 1323-24 (Mass. 1997) (same); Simches v. Simches, 671 N.E.2d 1226, 1229-30 (Mass. 1996) (guardian ad litem consented to modification on behalf of affected minor and unborn beneficiaries). But other courts have declined to alter estate plans to achieve tax benefits. *E.g.*, Fifth Third Bank v. Simpson, 730 N.E.2d 406, 408-09 (Ohio Ct. App. 1999). *See also supra* note 41. Another related line of cases addresses the right of a fiduciary to alter the estate plan of an incapacitated person in light of changed circumstances. Some of the cases are discussed in Fellows, *supra* note 40, at 622-30.

161. *See Domenico*, 418 N.Y.S.2d at 1013-14 (holding that the court would not authorize a disclaimer by a guardian-parent on behalf of minor beneficiary-children to derive tax efficiencies for the family unit unless the disclaimer "would be directly advantageous to [them]"); *but cf. McClintock v. Scahill*, 530 N.E.2d 164, 165-66 (Mass. 1988) (authorizing a trustee to disclaim on behalf of "grandchildren," not indicating whether or not they had reached the age of majority, where the trustee "believed that the beneficiaries . . . would benefit in the long run from the estate tax savings the disclaimer would yield," but where their eventual opportunity to re-inherit was not assured, but also where "[n]o claim that . . . [the] disclaimer was improvident" was presented to the court); *Estate of Goree v. Comm'r*, 68 T.C.M. (CCH) 123 (1994), *nonacq.* 1996-1 C.B. 1 (where a probate court authorized as "in the best interest of the protected person[s]" a disclaimer by a conservator on behalf of her minor children of part of their inheritance from their father, in order to exploit the marital deduction, where the guardian ad litem representing the children before the court withdrew his objection; the federal tax court ruled this decision was not "plainly and palpably erroneous" under the state standard for appellate review, but the Commissioner ruled on appeal that the issue should have been reviewed de novo). Once again, existing state statutes fail to elaborate on the issue.

162. *See, e.g., In re Guardianship of Kramer*, 421 N.Y.S.2d 975, 977 (Sur. Ct. 1979) (permitting fiduciary disclaimer on behalf of a minor to minimize taxes where the minor would receive an inheritance only if her parent first disclaimed that inheritance, and the parent was willing to disclaim only if the minor-child also disclaimed); *but see In re Estate of Horowitz*, 531 A.2d 1364, 1367 (N.J. Super. Ct. Law Div. 1987) (refusing to permit fiduciary disclaimer on behalf of a minor under similar facts on the theory that if the minor failed to disclaim, and his parent accordingly refused to do so, then the minor-child would still get some benefit despite the increased tax burden from his parent's increased wealth, which would be less certain if both the parent and the minor-child disclaimed). *See also In re Kochman*, 53 A.F.T.R.2d (RIA) 84-1640 (N.Y. Sur. Ct. 1984).

163. This assumes, however, that the beneficiary's condition has been professionally diagnosed as irreversible, and that the fiduciary can insure her (or has sufficient means to self-insure) against the costs associated with any potential deterioration of her condition. *See, e.g., Guardianship of Hougard*, 321 N.W.2d at 314 (where the disputed allegation was made that the incapacitated beneficiary was "permanently incompetent," and that "he has sufficient assets for his present and future needs").

disclaimed property coincides with her estate plan.¹⁶⁴ If, on the other hand, they do not coincide, then we are back to square one.¹⁶⁵

Finally, when we come to the competent beneficiary, the exercise of independent discretion by a fiduciary over the matter of disclaimer appears unnecessary and, indeed, as earlier argued, potentially disruptive. Here, the trustee's fiduciary duty should be to defer to the beneficiary's preference, be it however selfish or selfless, as an extension of the trustee's traditional duty of loyalty.¹⁶⁶

3. Oversight

One of the fundamental difficulties with any fiduciary relationship is that the economic interests of the beneficiary and of the fiduciary differ: Lacking a beneficial stake in the corpus, the fiduciary has a mercenary incentive to shirk or steal, occasioning what are commonly known as *agency costs*.¹⁶⁷ A power of fiduciary disclaimer implicates agency costs. The fiduciary can benefit directly from a disclaimer by colluding with those who will receive an inheritance if it is declined in the beneficiary's name; the fiduciary could offer to exercise the power in exchange for a share of the spoils under the table.¹⁶⁸

164. This again assumes that the beneficiary's condition has been adjudged irreversible, and hence that she could not subsequently alter her estate plan. *E.g.*, *Guardianship of Hougard*, 321 N.W.2d at 314; *In re Baird*, 634 N.Y.S.2d 971, 975 (Sup. Ct. 1995). In *Baird*, the fiduciary "carefully calculated" the beneficiary's needs and determined upon a partial disclaimer as a result. *Id.* at 974. Medicaid adds a further complication: In some states, a guardian can disclaim on behalf of an incapacitated beneficiary without sacrificing her eligibility for state support. *E.g.*, *In re Estate of Kirk*, 591 N.W.2d 630, 634 (Iowa 1999) (dicta). In other states, the reverse is true. *E.g.*, *In re Scrivani*, 455 N.Y.S.2d 505, 509-10 (Sup. Ct. 1982). See also *infra* note 212. In states that follow the first rule, a guardian should be allowed to disclaim if the property foregone would be a perfect substitute (or less than a perfect substitute) for state support. If, however, the inheritance would make possible better care than that provided by Medicaid, a guardian should not be allowed to disclaim (at least to that extent, a partial disclaimer still remaining a possibility for superfluity). Of course, in states where a disclaimer would (or might) cause a beneficiary to lose her eligibility for state support, her guardian should not be allowed to disclaim an inheritance.

165. Or, more precisely, back to *supra* notes 157-60 and accompanying text. Again, the extant state statutes offer little guidance on the matter.

166. RESTATEMENT (SECOND) OF TRUSTS § 170. It may be that a trust has multiple beneficiaries, but if those beneficiaries disagree about the matter, they remain free to disclaim *vel non* their individual interests in the trust. In the one relevant case, where a court construed a state statute to permit disclaimer by a trustee (and where the beneficiaries were grandchildren, but the opinion failed to indicate whether or not they had reached the age of majority), the court noted simply that "the trustee's fiduciary status requires any decision to disclaim be made in good faith with the best interests of the trust's beneficiaries in mind," and also that "[n]o claim that . . . [the] disclaimer was improvident is presented in this case." *McClintock*, 530 N.E.2d at 166.

167. For the seminal discussion, see Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

168. Collusion will not even be necessary if the fiduciary happens to be the alternative beneficiary in the event of disclaimer or would be a beneficiary of that beneficiary. *E.g.*, *Estate*

And the fiduciary can also benefit indirectly by *not* disclaiming if (as is typical) his fees depend upon the size of the corpus that he administers; his decision could rest on these, rather than on legitimate, considerations.

Agency costs can be minimized by monitoring: So long as the fiduciary knows he is under surveillance, he cannot misbehave with impunity. A competent beneficiary can do her own monitoring and can sound the alarm if she ever takes exception to a fiduciary's acts, revealed in mandatory periodic accountings. Other beneficiaries incapable of monitoring—whether due to youth, infirmity, or prior death—must rely on the state to stand in for them.¹⁶⁹

Current law provides for different levels of judicial oversight—requiring either *ex ante* approval or an accounting *ex post*—depending on the sort of action a fiduciary wishes to take and the type of fiduciary relationship involved.¹⁷⁰ UDPIA should take its cue from this preexisting body of law, extrapolating where necessary from the rules applicable to judicial oversight of gifts by a fiduciary, the closest relevant analogy in this context (given the equivalent risk of fiduciary collusion with a gift donee). Instead, without positing any independent rules for judicial oversight of fiduciary disclaimers, and without any explanation, the drafters of UDPIA saw fit at this juncture to narrow the reception of local fiduciary law. Under UDPIA, “a fiduciary’s right to disclaim is . . . limited” by other law only to the extent that the limitation is “expressly” set down in “another statute of this State.”¹⁷¹ Accordingly, no requirement of prior court approval can be read by implication into a fiduciary oversight statute that neglects to cover disclaimers, and any explicit requirement of prior court approval found within local common law is extinguished by UDPIA.¹⁷²

of Kunkis, 618 N.Y.S.2d 488, 490 (Sur. Ct. 1994) (finding a conflict of interest in these circumstances); *In re Scrivani*, 455 N.Y.S.2d at 510-11 (same).

169. In light of the fact that personal interest may motivate a fiduciary to disclaim *or to forebear from disclaiming*, the court should monitor both the fiduciary's acts and omissions in this connection.

170. Under the Uniform Probate Code, for example, personal representatives can proceed in all matters without a court order (although the right to disclaim is not expressly authorized and a party in interest can seek a restraining order), but they have a duty to account *ex post*. UNIF. PROBATE CODE §§ 3-607, 3-704, 3-711, 3-715, 3-1003 (amended 1997). On the other hand, guardians of a minor or an incapacitated person must seek a court order before they can disclaim. *Id.* § 5-407(c)(2). Local laws (in some instances codified) vary on these points. See generally JESSE DUKEMINIER & STANLEY M. JOHANSON, WILLS, TRUSTS, AND ESTATES 132-34, 396-97 (6th ed. 2000); William M. McGovern, Jr., *Trusts, Custodianships, and Durable Powers of Attorney*, 27 REAL PROP. PROB. & TR. J. 1 (1992).

171. UDPIA, *supra* note 2, § 5(b). The accompanying comment offers no justification for this provision. See *id.* § 5 cmt.

172. *But cf. supra* note 128, item #2 (noting another general provision of UDPIA that conflicts with this one; presumably, the provision specifically dealing with fiduciary disclaimers supersedes the general provision).

This provision could operate to undercut prevailing oversight rules, some of which remain uncodified.¹⁷³ Consider, for example, a trustee's powers over a charitable trust. Under UDPIA, the trustee could disclaim property bequeathed to the trust back to the testator's probate estate, whence it would flow to the residuary legatee or heirs. The risk thus exists of a conspiracy between those parties to lay hold of valuable property that the testator intended to devote to the public interest—a risk heightened by the notorious laxity of the state attorneys general who monitor charitable trusts.¹⁷⁴ The agency cost identified here is not merely theoretical: In at least one reported case, an interested party connived to bring about the failure of a charitable trust.¹⁷⁵ Under the common law doctrine of administrative deviation, a court must authorize an administrative power (such as disclaiming or abandoning trust property) not granted by the trust instrument before a trustee can exercise the power.¹⁷⁶ Under this provision of UDPIA, however, a trustee would have to seek court approval of a disclaimer only in the minority of states that have codified rules governing trustees' powers.¹⁷⁷

Could we posit any justification for relaxing the general rules of judicial oversight of fiduciaries in the particular context of a disclaimer? If such a justification exists, it must be the independent deadline pressure for a tax-qualified disclaimer, over which UDPIA of course has no control.¹⁷⁸ The prerequisite of a court order to carry out a disclaimer could cause fiduciaries to miss the deadline. But this difficulty is one that common law courts have anticipated. Under the doctrine of administrative deviation, trustees remain free to act—indeed they have a duty to act—without a prior court order if compelled to do so by an emergency.¹⁷⁹ So long as this exception exists

173. *E.g.*, *In re Estate of Lamson*, 662 A.2d 287, 288 (N.H. 1995) (permitting a personal representative to disclaim only with the court's prior approval and premising this requirement on the court's general equitable power rather than an express provision in a state statute); *Guardianship of Hougard v. Borden*, 321 N.W.2d 313, 314-15 (Wis. Ct. App. 1982) (Dean, J., concurring) (noting the proposition that, in the absence of an express statutory grant, a court enjoyed plenary power over disclaimer by a guardian).

174. For a recent discussion, see Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 U. HAW. L. REV. 593 (1999).

175. *Mfrs. Nat'l Bank v. Woodward*, 21 A.2d 705, 709 (Me. 1941).

176. RESTATEMENT (SECOND) OF TRUSTS § 167 & cmt. d (1959).

177. *E.g.*, N.J. STAT. ANN. §§ 3B:14-62 to 65 (West 1983) (permitting a fiduciary to abandon real property if the court approves); 20 PA. CONS. STAT. ANN. § 7132 (West 1975) (permitting a trustee to renounce a transfer of burdensome property if the court approves); *but cf.* OKLA. STAT. ANN. tit. 60, § 175.24(A)(5) (West Supp. 2001) (permitting a trustee to abandon burdensome or valueless property without a court order); UNIF. TRUST POWERS ACT §§ 3(c)(7), 5(a), 7C U.L.A. 396, 401, 426 (1964) (same; and also codifying the doctrine of court-ordered administrative deviation).

178. *See supra* note 70 and accompanying text.

179. RESTATEMENT (SECOND) OF TRUSTS § 167(2) (1959). If the trustee acts in an emergency without a court order, the court can ratify the action retroactively. *Id.* § 167 cmts. e-h.

within the law, there appears no reason to depart from traditional rules concerning fiduciary supervision in connection with a disclaimer. UDPIA's decision to the contrary merits reconsideration.

4. *Default Rule*

Under UDPIA, as we have noticed, the power of a fiduciary to disclaim on the beneficiary's behalf is subject to the will of the creator of the fiduciary relationship.¹⁸⁰ Therefore, the settlor of a trust remains free to dictate whether or not the trustee possesses that power. This conclusion accords with the traditional law of trusts, under which a settlor can define the trustee's administrative prerogatives.¹⁸¹ But we are still left with a question to ponder: Assuming that the right of fiduciary disclaimer comprises a default rule of construction, what then should the default rule be? Should we presume that the settlor intended to extend the right *unless* the trust instrument says otherwise (as UDPIA does)?¹⁸² Or the reverse?

Under orthodox policy analysis, default rules are supposed to correspond with the intent of the typical relevant party (here the settlor) to minimize that party's transaction costs.¹⁸³ The question then becomes one of empirical inquiry or, *faute de mieux*, inference: Would most settlors prefer to create a right of fiduciary disclaimer or not? Conceivably, the answer could again depend upon the sort of beneficiary covered by the trust instrument. If the beneficiary in question is a competent individual, then a supplementary power of fiduciary disclaimer is unlikely to be of assistance to her.¹⁸⁴ We might expect most settlors to prefer to withhold the power. On the other hand, if the beneficiary is an incompetent person, some settlors plausibly might prefer to create a power of disclaimer in their own trustee, concurrent with the powers of a guardian or conservator appointed by others. Troublingly, the comment accompanying this provision of UDPIA fails to disclose that its counterintuitive default rule—presuming a general preference for a fiduciary power of disclaimer in all cases—was premised on any sort of inferential analysis of testamentary intent, let alone an empirical investigation of the matter.¹⁸⁵

180. See *supra* note 124 and accompanying text.

181. RESTATEMENT (SECOND) OF TRUSTS § 164 (1959).

182. See *supra* notes 119-20, 124 and accompanying text.

183. ROBERT COOTER & THOMAS ULEN, LAW AND ECONOMICS 199-205 (3d ed. 2000); see also Hirsch, *supra* note 9, at 612; Hirsch, *Inheritance and Inconsistency*, *supra* note 10, at 1096-97.

184. See *supra* notes 131-33 and accompanying text. Likewise, we can reasonably infer that most testators would prefer not to grant the trustee of a charitable trust the right to disclaim and thereby to render stillborn the trust itself. See *supra* notes 140-47 and accompanying text.

185. The comment is silent on the issue. See UDPIA, *supra* note 2, § 5 cmt.

In short, UDPIA's approach to the whole problem of fiduciary disclaimer appears insufficiently substantiated and insufficiently thought-through. The provisions need to be reexamined and refined.

IV. FORMALITIES

Assuming a beneficiary (or a fiduciary) wishes to exercise a right of disclaimer, how exactly can that be accomplished? Under the common law, a beneficiary could effect a binding disclaimer by mere oral declaration.¹⁸⁶ Statutory law in every state has tightened that rule, insisting that a beneficiary disclaim in writing.¹⁸⁷ UDPIA, in turn, takes a novel approach: It requires beneficiaries to execute a binding disclaimer either by writing *or by electronic record*, thereby allowing them recourse to modern Internet technology.¹⁸⁸

This provision helps to give UDPIA a progressive feel.¹⁸⁹ At the same time, the drafters invite criticism for creating precisely the sort

186. This, at least, was the general rule. *E.g.*, *Coleman v. Burns*, 171 A.2d 33, 35 (N.H. 1961) ("By the great weight of authority a writing is not necessary."). For an early discussion, see 4 JAMES KENT, COMMENTARIES ON AMERICAN LAW *533-34 (Oliver Wendell Holmes, Jr., ed., 12th ed. 1873) (1826). For modern collections of cases, see 3 AMERICAN LAW OF PROPERTY, *supra* note 94, § 14.15, at 630; 6 PAGE, *supra* note 94, § 49.6, at 44; Jhong, *supra* note 94, at 71-72 (noting several decisions to the contrary involving disclaimers of devises of real property). See also *Estate of Von Ripper*, 408 N.Y.S.2d 686, 689-90 (Sur. Ct. 1978) (asserting that under the common law disclaimer "could be a very informal matter" accomplished by oral declaration or even by implication of the beneficiary's conduct). On the irrevocability of a disclaimer, see also *supra* notes 94-95.

187. Most states require a signed writing, and several states require still greater formality. *E.g.*, CONN. GEN. STAT. ANN. § 45a-579(c) (West 1993 & Supp. 2001) (disclaimer must be "executed . . . in the manner provided for the execution of deeds of real property," which in Connecticut requires a signed writing attested by two witnesses, together with an oral acknowledgement, *id.* § 47-5); TEX. PROB. CODE ANN. § 37A(a) (Vernon 1980 & Supp. 2000) (disclaimer by "written memorandum, acknowledged before a notary public"); *cf.* LA. CIV. CODE ANN. art. 963 (West 2000) (requiring a writing, but not a signature). State statutes also mandate either that beneficiaries file a written disclaimer with the court, or that they deliver it to the personal representative, or they are permitted to do either, or they are required to do both. *Cf.* LA. CIV. CODE ANN. art. 963 (West 2000) (specifying no delivery requirement). For modern cases enforcing local statutory formalities for an effective, binding disclaimer, see, for example, *Estate of Murphy v. Murphy*, 154 Cal. Rptr. 859, 865 (Ct. App. 1979); *In re Estate of Griffin*, 812 P.2d 1256, 1257-58 (Mont. 1991); *Faught v. Estate of Faught*, 730 S.W.2d 323, 324-25 (Tenn. 1987); *cf. In re Nistler*, 259 B.R. 723, 727-28 (Bankr. D. Or. 2001) (excusing a harmless error in formality).

188. UDPIA, *supra* note 2, § 5(c), (e). The writing or electronic record must be signed (in pen or electronically) and either delivered (physically or electronically) to the personal representative or filed with the court if no personal representative is then serving, when disclaiming probate assets not in trust. *Id.* §§ 5(c), 12(b), (c). Different (but consistent) delivery requirements apply to disclaimers of testamentary trusts and disclaimers of nonprobate assets. *Id.* § 12(d)-(l) & cmt.

189. The Commissioners offer no justification for the provision in the accompanying comment, except to say that it "recognizes that a disclaimer may be prepared in forms other than typewritten pages with a signature in pen"—seemingly an allusion to the objective of modernity. *Id.* § 5(c) cmt. c. No further discussion of the public policy of the formality of a disclaimer appears anywhere in the comments accompanying UDPIA. Compare the Federal Electronic Records and Signatures in Commerce Act, 15 U.S.C.A. §§ 7001(a), 7003(a)(1) (Supp. 2001),

of tax-compliance trap about which they expressed concern in the related context of a disclaimer's timeliness.¹⁹⁰ To satisfy the Tax Commissioner, beneficiaries must continue to disclaim in writing.¹⁹¹ And whereas prior Uniform Acts dovetailed with that requirement,¹⁹² UDPIA now deviates from it—but only slightly, and (perhaps more significantly) without any warning either in text or comment about the resulting disparity.¹⁹³ One may question (as we did earlier)¹⁹⁴ whether that disjunction presents a significant hazard to beneficiaries or their attorneys: How many will blindly assume that if UDPIA permits them to disclaim electronically, so must the tax code? Whatever our answer, the fact remains that the same Commissioners who earlier emphasized this concern in the context of time-requirements now proceed in the context of formalization-requirements to ignore it.¹⁹⁵ To that extent, the policies ostensibly reflected in UDPIA are not reflected comprehensively.

Consistency of analysis to one side, UDPIA here is also technically flawed; once again, it does not achieve the result its drafters intended to achieve. The provision governing formalization of a disclaimer under UDPIA has to be read *in pari materia* with the rule that “[t]his [Act] does not limit any right of a person to . . . disclaim . . . under a law other than this [Act].”¹⁹⁶ The common law permits

validating electronic signatures in transactions affecting interstate commerce but explicitly excepting records and contracts involving wills and trusts, and compare also the Uniform Electronic Transactions Act of 1999, § 3(b)(1), 7A pt. 1 U.L.A. 21, 34 (Supp. 2001), carving out a similar exception.

190. See *supra* notes 74-76 and accompanying text.

191. I.R.C. § 2518(b)(1) (2001). No signature is required, but the beneficiary must deliver the writing to the personal representative or other “holder of the legal title to the property.” *Id.* § 2518(b)(2).

192. UNIF. DISCLAIMER OF PROP. INTERESTS ACT §§ 2(a), 4, 8A U.L.A. 149, 152, 155 (1978) (requiring a signed writing and delivery to the personal representative, with optional court filing); UNIF. DISCLAIMER OF TRANSFERS BY WILL, INTESTACY OR APPOINTMENT ACT §§ 1, 2(b) & cmt., 8A U.L.A. 161, 166, 169, 171 (1978) (same; comment notes the provision's conformity with the requirements of the Internal Revenue Code); UNIF. DISCLAIMER OF TRANSFERS UNDER NONTESTAMENTARY INSTRUMENTS ACT §§ 1, 2(b) & cmt., 8A U.L.A. 179, 181, 184 (1978); UNIF. PROBATE CODE § 2-801(b), (c) (amended 1997) (requiring a signed writing, together with mandatory court filing and delivery to the personal representative when disclaiming probate assets, but permitting the signed writing to be filed or delivered when disclaiming nonprobate assets); see also Medlin, *supra* note 3, at 1250-51 (identifying an ambiguity in the Uniform Probate Code's language).

193. See UDPIA, *supra* note 2, § 5(c) & cmt.

194. See *supra* notes 77-79 and accompanying text.

195. In point of fact, the Commissioners were not unmindful of the disparity—but they anticipated that the Internal Revenue Code might in due course be amended to permit electronic disclaimer. In plenary debate, the Reporter stated that “[w]e did consider language that would prevent the use of electronic means [of disclaiming]. The committee rejected that simply with the thought that everything was still developing The committee had generally decided that we would leave it open hoping to allow the law to develop. A statute, for instance, that prevents should the service eventually recognize that kind of electronic filing that prevents that [sic].” Plenary Reading, 1998, *supra* note 29, at 33-35.

196. UDPIA, *supra* note 2, § 4(b).

beneficiaries under wills to disclaim by oral declaration¹⁹⁷—and so, by extension, does UDPIA. Courts can avoid this conclusion only by shutting their eyes to plain language.

Assuming courts read this language with open eyes, UDPIA does something else: It indirectly restores a distinction between disclaimers by heirs and devisees. Because heirs cannot renounce an inheritance at common law,¹⁹⁸ they will certainly have no choice but to disclaim under the formal guidelines of UDPIA. Beneficiaries under wills, however, will have the additional option of disclaiming with less formality under the common law. Prior Uniform Acts had sought explicitly to equate the treatment of heirs and devisees with regard to disclaimers.¹⁹⁹ UDPIA undoes that equation—and, what is worse, its atavism in this respect is (once again) wholly accidental.

As a matter of public policy, what degree of formality should the law require for a binding disclaimer? Our starting point for such an analysis is the recognition that, in its substantive attributes, a disclaimer is itself a kind of gratuitous transfer: Although the beneficiary does not control who will receive the bequest in lieu of herself when she disclaims it, she *can* ascertain who the alternative beneficiary will be.²⁰⁰ Typically, that knowledge informs her decision to accept or reject; her desire to enrich the alternative beneficiary is, in most instances, a prerequisite to rejection.²⁰¹ Accordingly, the principles governing formalization of a gift would appear pertinent.

Examined in that context, the common law rule permitting disclaimer by parole is aberrant: Declarations of gift unaccompanied by any sort of delivery are unenforceable.²⁰² If the corpus is not susceptible to manual delivery, the donor can instead accomplish the gift by delivering a writing describing it (known as symbolic delivery). An inheritance that a beneficiary would disclaim likewise cannot be manually delivered, since it has yet to be received;²⁰³ by analogy to the law of gifts, the beneficiary should have to deliver a writing instead.

197. See *supra* note 186.

198. See *supra* note 107 and accompanying text.

199. UNIF. DISCLAIMER OF TRANSFERS BY WILL, INTESTACY OR APPOINTMENT ACT § 1 cmt., 8A U.L.A. 161, 167 (1978). Commentators had also argued for such an equation. See *supra* note 108.

200. The distributive consequences of a disclaimer are addressed *infra* Part VI. For a further discussion of the extent of a beneficiary's dominion over a disclaimed inheritance, see Hirsch, *supra* note 9, at 605-10.

201. This is not invariably true, however. See *infra* note 218.

202. For a modern discussion of gift formalities, see MCGOVERN & KURTZ, *supra* note 82, § 4.5.

203. If she has already accepted possession of the inheritance, the beneficiary cannot disclaim it, although she can of course assign it. See *supra* notes 94-95.

The policies articulated to justify these formal requirements within the law of gifts are farsighted—and far-reaching.²⁰⁴ To begin with, lawmakers wish to distinguish communications intended as legally performative from those intended (merely) as expressive. Persons who orally declare a gift may (or may not) mean to bind themselves to it as a matter of law. Requiring persons to formalize their declarations in some way when they do mean to bind themselves serves to forestall both accidental gifts and costly litigation over equivocal declarations. What is more, formalized communication by its nature takes somewhat longer to accomplish than does informal communication. Prospective donors who must go to the trouble of formalizing a gift will have an added breathing space to ponder its advisability; were they able to make enforceable gifts merely by blurring out words, donors would run a higher risk of acting on impulse and so might come to regret their decisions more frequently.²⁰⁵ Finally, if gifts required nothing beyond a parole, lawmakers would render their enforcement vulnerable to fraud.

Each of these policies is equally apropos to declarations of disclaimer.²⁰⁶ If anything, modern psychological research suggests that persons may be even more prone to rash disclaimers than to impulsive gifts. Because individuals experience a sense of endowment in

204. For the classic discussions, see Lon L. Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941); Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 1-5, 15-17 (1941); Philip Mechem, *The Requirement of Delivery in Gifts of Chattels and of Choses in Action Evidenced by Commercial Instruments*, 21 ILL. L. REV. 341 (1926). For a modern treatment, see Melvin Aron Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1 (1979). For a broader look at the problem of gratuitous transfer formality, see Hirsch, *Inheritance and Inconsistency*, *supra* note 10, at 1060-69. The remainder of this paragraph distills these analyses.

205. As Professor Eisenberg emphasizes, declarations of gift are often made while the would-be donor is moved by transient emotion. Eisenberg, *supra* note 204, at 5. The policy of forestalling donor regret is, of course, a paternalistic one, but paternalism pervades the law of transactions, including the law of gratuitous transfers. See generally Hirsch, *supra* note 93, at 19-23 and *passim*; Adam J. Hirsch & William K.S. Wang, *A Qualitative Theory of the Dead Hand*, 68 IND. L.J. 1, 24-27 (1992); Anthony T. Kronman, *Paternalism and the Law of Contracts*, 92 YALE L.J. 763 (1983).

206. One early court, focusing on the problem of fraud, observed the incongruousness of a rule validating oral disclaimers: "The law requires wills to be executed with certain solemnities; and it would present a strange anomaly, if a devise, required to be in writing and executed with such solemnities, could be defeated, and in effect abrogated, by the testimony of a single witness proving some verbal disclaimer." *Bryan v. Hyre*, 40 Va. (1 Rob.) 101, 113 (1842). In addition, the same court astutely observed the problem of deliberation: If an oral disclaimer were binding, "testimony of some loose expression, carelessly uttered and imperfectly remembered, forgotten by the devisee as soon as pronounced, might defeat his estate." *Id.* The first generation of Commissioners endorsing the writing requirement adverted simply to the problem of evidentiary clarity: "[C]ertainty of titles and the expeditious administration of estates makes definiteness desirable in this area." UNIF. DISCLAIMER OF TRANSFERS BY WILL, INTESTACY OR APPOINTMENT ACT § 1 cmt., 8A U.L.A. 161, 168 (1978). Compare the technical argument for a writing requirement for disclaimers of real property asserted in *Pournelle v. Baxter*, 9 So. 2d 162, 164 (Fla. 1942), parried in 3 AMERICAN LAW OF PROPERTY, *supra* note 94, § 14.15, at 630.

the property they possess, they tend to value what they consider to be already theirs more than the prospect of gaining equivalent amounts of property in the future.²⁰⁷ When a person makes a gift, she gives up her “own” property, but when she disclaims a bequest, she may not regard it in the same way. Because she has not yet taken possession, a disclaiming beneficiary may well view the transaction not as a (painful) loss, but rather as a (relatively painless) forgoing of a gain.²⁰⁸ In consequence, the possibility that she will disclaim without due deliberation looms larger, underscoring the importance of formal requirements such as a writing that tend to promote reflection.²⁰⁹

What, then, of an electronically communicated disclaimer? Is a disclaimer delivered via computer closer to informal speech or a solemnized writing? That is an interesting question, worthy of psychological study—as we see here, the issue is pertinent to legal policy.

207. This phenomenon is referred to in the field of economic psychology variously as the “endowment effect,” “loss-aversion,” “status quo bias,” and the “offer-ask disparity.” For a recent discussion, citing to some of the prior literature, see Gwendolyn C. Morrison, *The Endowment Effect and Expected Utility*, 47 SCOT. J. POL. ECON. 183 (2000). For an early observation, see DAVID HUME, A TREATISE OF HUMAN NATURE 482 (P.H. Nidditch ed., Oxford Univ. Press 1978) (1739-40) (“Men generally fix their affections more on what they are possess’d of, than on what they never enjoy’d: For this reason, it wou’d be greater cruelty to dispossess a man of any thing, than not to give it [to] him.”). The phenomenon is understood intuitively by laypersons—and can be seen parodied in popular culture. In the delightful feature film *TRADING PLACES* (Paramount Pictures 1983), a homeless beggar (played by Eddie Murphy) is given a luxurious home by the wealthy Duke brothers as part of a cruel social experiment they are conducting. On the first day, Murphy is careless with his new belongings and breaks a vase. But by the *second* day, when he throws a party, he becomes so enraged at guests who mistreat “his” possessions that he throws the whole lot out of his house!

208. The process whereby, and the rapidity with which, a person develops a sense of endowment in inherited property have not been studied systematically. For a discussion endeavoring to marshal the extant evidence, see Hirsch, *supra* note 93, at 35-38.

209. Needless to add, disclaimers are contemplated at a time when the beneficiary is often gripped with emotions—in this case, grief brought on by her benefactor’s death, or even feelings of guilt over receiving the inheritance—at least as powerful as those experienced by the prospective donor of a gift. *Cf. supra* note 205. This fact serves further to justify paternalistic intervention to protect the transiently vulnerable beneficiary. For a discussion in a related context, citing to psychological studies, see Hirsch, *supra* note 93, at 38-40. At least one court has flirted with an even more invasive form of paternalism. Faced with a beneficiary who sought to disclaim his interests under a trust, the court observed that “[i]t is not impossible that more mature reflection . . . or unforeseen circumstances might impel the donee to regret his renunciation Not even the donee is clairvoyant enough to penetrate his future. The good that this wealth could accomplish is too manifest for emphasis.” The court was persuaded that to “allow the income to accumulate in the hands of the trustees, to provide for eventualities, seems prudent and farsighted.” Still, “[i]t must be assumed . . . that the donee has weighed his decision and is prepared to take the consequences. His act of renunciation does not evidence impetuosity or lack of deliberation.” Accordingly, the court ruled, albeit “[r]eluctantly,” that “[h]is adamant determination . . . must prevail even though to the trustees, and, doubtless, to others, it be ‘folly.’” *In re Estate of Suter*, 142 N.Y.S.2d 353, 355-56 (Sur. Ct. 1955) *rev’d on reh’g*, 172 N.Y.S.2d 100 (Sur. Ct. 1958) (rescinding on grounds that beneficiary was incompetent at time of disclaimer).

Addressing the problem in a different context, one commentator observes that

[a]lthough Internet communications are almost invariably “written” communications, they lack the formal characteristics of written communications in the “real world.” In the real world, the author is separated from her audience by both space and time, and this separation interposes a formal distance between author and audience, a distance reinforced by the conventions of written communication. Internet communications lack this formal distance. Because communications can occur almost instantaneously, participants . . . place a premium on speed. Indeed, in many fora, speed takes precedence over all other values, including not just accuracy but even grammar, spelling, and punctuation. . . . “[V]enting” is at least as common as careful and considered argumentation.²¹⁰

This analysis is perceptive and suggests the impolicy of allowing a beneficiary to disclaim electronically.²¹¹ To ensure deliberate, unequivocal decisions, lawmakers should require more of a disclaimant than just an oral or electronic declaration. They should take “no” for an answer only when it is communicated in a formalized writing.

V. CREDITORS’ RIGHTS

A. *General Creditors*

Whether creditors should have it in their power to prevent an insolvent beneficiary from disclaiming, and thereby thwarting levies of execution by her creditors, is the single greatest controversy—and most underdeveloped subdivision—within modern disclaimer law. Common law cases have divided on the question, and so have those disclaimer statutes that speak explicitly to the issue—many of which are poorly drafted, saddling local law with numerous uncertainties.²¹²

210. Lyrisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 49 DUKE L.J. 855, 862-63 (2000) (footnotes omitted); see also HENRY H. PERRITT, JR., LAW AND THE INFORMATION SUPERHIGHWAY §§ 9.06, 9.06(A) (2d ed., Aspen Publishers 2001).

211. Giving effect to electronically transmitted disclaimers would also add somewhat to the (presumably remote) danger of fraud perpetrated against the beneficiary. Perhaps more significantly, a beneficiary who disclaimed electronically and then had second thoughts could plausibly deny having sent the communication. Authentication of the communication could then present evidentiary problems, assuming the beneficiary did not have exclusive access to her computer. See generally PERRITT, *supra* note 210, §§ 9.06[D], 9.10, at 605, 12.11[B].

212. The majority rule—at least within those jurisdictions that have addressed the issue expressly—permits an insolvent beneficiary to disclaim, in spite of her creditors. For a discussion of state common and statutory law circa 1989, see Hirsch, *supra* note 9, at 591-603; see also Ellsworth, *supra* note 68, at 719-26. For more recent cases, see *Popkin v. Lurie*, 223 F.3d 764 (8th Cir. 2000) (decided under Missouri law); *In re Nistler*, 259 B.R. 723 (Bankr. D. Or. 2001) (decided under North Dakota law); *Pennington v. Bingham*, 512 So. 2d 1344 (Ala. 1987); *Estate of Heater v. Dep’t of Pub. Aid*, 640 N.E.2d 654 (Ill. App. Ct. 1994); *Tompkins State Bank v. Niles*, 537 N.E.2d 274 (Ill. 1989); *Frances Slocum Bank & Trust Co. v. Martin*, 666 N.E.2d 411 (Ind. Ct. App. 1996); *Nat’l City Bank v. Oldham*, 537 N.E.2d 1193 (Ind. Ct. App.

But the legal landscape is even bleaker elsewhere: In nearly half the states, neither an enactment nor a single published opinion has ever addressed disclaimer by an insolvent beneficiary.²¹³

That is a vacuum which the Commissioners ought to abhor. UDPIA, however, fails to speak to the matter. Instead of proposing a rule to govern these cases, UDPIA expressly relegates the issue of insolvent disclaimer to local law.²¹⁴

Despite adopting this agnostic stance, UDPIA still represents an improvement over the Uniform Probate Code. Remarkably, the Code failed even to clarify whether it was intended to cover creditors' rights, and hence left everything to be desired.²¹⁵ UDPIA at least re-

1989); Succession of Wagner, 746 So. 2d 696 (La. Ct. App. 1999); Succession of Andrews, 604 So. 2d 194 (La. Ct. App. 1992); Baltrusaitis v. Cook, 435 N.W.2d 417 (Mich. Ct. App. 1988); *In re Estate of Abesy*, 470 N.W.2d 713 (Minn. Ct. App. 1991); *Essen v. Gilmore*, 607 N.W.2d 829 (Neb. 2000); *Trew v. Trew*, 558 N.W.2d 314 (Neb. Ct. App. 1996), *rev'd on other grounds* 567 N.W.2d 284 (Neb. 1997); *In re Estate of Opatz*, 554 N.W.2d 813 (N.D. 1996); *Parks v. Parker*, 957 S.W.2d 666 (Tex. App. 1997); *Dyer v. Eckols*, 808 S.W.2d 531 (Tex. App. 1991); *Abbott v. Willey*, 479 S.E.2d 528 (Va. 1997); *In re Estate of Baird*, 933 P.2d 1031 (Wash. 1997) (dicta); *In re Estate of Goldammer*, 405 N.W.2d 693 (Wis. Ct. App. 1987), *review denied*, 407 N.W.2d 560 (1987). On attempted disclaimers by incapacitated beneficiaries at the expense of Medicaid authorities, see *Hoesly v. Nebraska Dep't Soc. Servs.*, 498 N.W.2d 571 (Neb. 1993); *In re Baird*, 634 N.Y.S.2d 971 (Sup. Ct. 1995), together with the cases cited in UDPIA, *supra* note 2, § 13 cmt. On attempted disclaimers by debtors in a federal bankruptcy proceeding, compare *Nistler*, 259 B.R. at 725-27, with *In re Kloubec*, 247 B.R. 246, 253-56 (Bankr. N.D. Iowa 2000); see also Coleman, *supra* note 34, at 16-38 to 16-39; Hirsch, *Inheritance and Bankruptcy*, *supra* note 86, at 183 n.25; Gregory M. McCoskey, *Death and Debtors: What Every Probate Lawyer Should Know About Bankruptcy*, 34 REAL PROP. PROB. & TR. J. 669, 683-90 (2000); Stephen E. Parker, *Can Debtors Disclaim Inheritances to the Detriment of Their Creditors?*, 25 LOY. U. CHI. L.J. 31 (1993). On attempted disclaimers by debtors subject to a federal tax lien, see *Drye v. United States*, 528 U.S. 49 (1999); for discussions of this case and its broader legal implications, see Edward Kessel & Steven R. Klammer, *Supreme Court Finds Disclaimer Ineffective to Avoid Federal Tax Lien*, 92 J. TAX'N 118 (2000); Steve R. Johnson, *After Drye: The Likely Attachment of the Federal Tax Lien to Tenancy-by-the-Entireties Interests*, 75 IND. L.J. 1163 (2000); Claudia M. Osorio, *Disclaimer of Intestate's Estate under Arkansas Law Cannot Prevent Attachment of Federal Tax Lien: Drye v. United States*, 53 TAX LAW. 951 (2000).

213. Common law cases (including those decided only by lower courts), cases construing ambiguous statutes, and statutes explicitly resolving the issue of insolvent disclaimer can be found in some twenty-eight jurisdictions today. In the remaining moiety of states, the issue remains wholly enigmatic. The states that do have law on point are Alabama, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New York, North Dakota, Ohio, Pennsylvania, Tennessee, Texas, Virginia, Washington, Wisconsin, and Wyoming.

214. UDPIA, *supra* note 2, § 13(e) & cmt.

215. The text of the Uniform Probate Code does not explicitly address the rights of general creditors against a disclaimant; nor is the subject addressed in the current version of the accompanying comment. See UNIF. PROBATE CODE § 2-801 & cmt. (amended 1997). This tends to suggest that the issue is left to local common law, which (apparently) fills in gaps in the Code. See *id.* § 1-103; see also *supra* notes 20-21 and accompanying text. A prior edition of the Uniform Probate Code (which also incorporated no explicit textual provision on point) included a comment addressed to the issue, however:

As regards creditors . . . the provision for "relation back" has the legal effect of preventing a succession from becoming operative in favor of the disclaimant. The relation back is "for all purposes" [quoting language currently found in *id.* § 2-

moves the issue unambiguously from its purview.²¹⁶ Yet, the Commissioners' reluctance to tackle the problem of insolvent disclaimer is disappointing, if only because it is so central. There exist, after all, just two significant reasons to disclaim property—either to avoid estate and gift taxes or to avoid creditors' claims.²¹⁷ A beneficiary who is prompted to disclaim by virtually any other motive can achieve the same result by accepting and then assigning away inherited property.²¹⁸ As the estate tax dwindles in significance,²¹⁹ creditors' claims

801(d)(1) which would include . . . rights of creditors. . . . [N]umerous cases have held that a devisee . . . can disclaim a devise . . . despite the claims of creditors. UNIF. PROBATE CODE § 2-801(c) cmt. (West 6th ed. 1983). A string cite of common law cases follows. This comment could be interpreted to incorporate implicitly into the Code the rule that creditors cannot defeat a disclaimer, although it could also be read to indicate that local case law governs the issue. Notice also that several discussion drafts of the Uniform Probate Code had included express provisions stating that creditors were powerless to prevent a disclaimer, but this language was omitted from the final draft. *E.g.*, UNIF. PROBATE CODE § 2-801 (Second Tentative Draft 1968). *But cf.* UNIF. DISCLAIMER OF TRANSFERS BY WILL, INTESACY OR APPOINTMENT ACT prefatory note, § 3 & cmt., 8A U.L.A. 161, 163, 172-73 (1978) (featuring equivalent text and comment, but also including a prefatory note indicating more strongly that the Act supersedes local law). By contrast, the earlier Model Probate Code barred insolvent disclaimer without ambiguity. MODEL PROBATE CODE, *supra* note 3, § 58 & cmt.

216. Cases resolving the law of insolvent disclaimer in states whose disclaimer statutes provide that "[a] disclaimer relates back for all purposes to the date of death of the decedent," or similar language, as appears in the Uniform Probate Code, UNIF. PROBATE CODE § 2-801(d)(1) (amended 1997), have come out both ways: Although a majority of courts have interpreted that language to dispose of the issue and hence to allow an insolvent beneficiary to disclaim, several courts have disagreed. *Compare Niles*, 537 N.E.2d at 279-80 (allowing insolvent disclaimer on the basis of that language); *and Martin*, 666 N.E.2d at 415 (same); *and Oldham*, 537 N.E.2d at 1195-97 (same); *and Baltrusaitis*, 435 N.W.2d at 420 (same); *and Essen*, 607 N.W.2d at 834 (same); *and Trew*, 558 N.W.2d at 317-19 (same); *and Estate of Opatz*, 554 N.W.2d at 815-17 (same); *and Nielsen v. Cass County Soc. Servs. Bd.*, 395 N.W.2d 157, 159 (N.D. 1986) (same); *and Abbott*, 479 S.E.2d at 529-30 (same); *and Estate of Goldammer*, 405 N.W.2d at 694 (same), *with Pennington*, 512 So. 2d. at 1345-46 (not holding that language dispositive and forbidding insolvent disclaimer); *and Stein v. Brown*, 480 N.E.2d 1121, 1122-24 (Ohio 1985) (same); *and Estate of Baird*, 933 P.2d at 1034-35 (same) (*dicta*).

217. For a judicial recognition, see, for example, *In re Estate of Schiffman*, 430 N.Y.S.2d 229, 230 (Sur. Ct. 1980). Thus, quite unusually, if not uniquely, disclaimers are a useful planning tool mainly at the two socioeconomic poles: extreme wealth and extreme poverty!

218. A beneficiary may, for example, have religious reasons to disclaim, *In re Estate of Gilbert*, 592 N.Y.S.2d 224, 225 (Sur. Ct. 1992), or "moral and political reasons" for doing so, *In re Estate of Suter*, 142 N.Y.S.2d 353, 354-55 (Sur. Ct. 1955), *rev'd on reh'g*, 172 N.Y.S.2d 100 (Sur. Ct. 1958), or—in a surprising number of cases—a beneficiary may seek to bring about a distribution that better accords with her understanding of what the testator wished but failed to accomplish, due to intestacy or a failure to update the will. *Hardenbergh v. Comm'r*, 198 F.2d 63, 65 (8th Cir. 1952); *Myers v. Smith*, 16 N.W.2d 628, 629-30 (Iowa 1944); *In re Estate of Estes*, 718 P.2d 298, 301 (Kan. 1986); *see also Jordan v. Trower*, 431 S.E.2d 160, 163 (Ga. Ct. App. 1993). Likewise, a disclaimer that generates income tax efficiencies could equally be accomplished by assignment. Of course, all of these motives might be mixed with a desire to avoid incurring a gift tax in the process of redistributing the property, in which case disclaimer law will again prove significant. Furthermore, if the bequest is conditional, the beneficiary must have recourse to disclaimer law in order to avoid an enforceable obligation to carry out the condition. *E.g.*, *Balson v. Balson*, 515 N.W.2d 474, 475-76 (Wis. Ct. App. 1994). And in the rare case where a bequest comprises property of negative value, the alternative of subsequent

grow correspondingly more salient. Troublingly, the Commissioners here shrank from their own ambition “to deal with all the different situations the [disclaimer] statutes have not addressed before.”²²⁰ If UDPIA represents “the most comprehensive disclaimer statute ever written,”²²¹ it remains less comprehensive than it could be.

On top of that, one finds no structural justification for reserving this issue for local resolution. Some legal questions resist policy generalization because local conditions pertinent to the outcome vary dramatically. In such instances, legal disharmony becomes desirable. Within the field of inheritance law, arguably, homestead and set-aside provisions are best established locally, in light of substantial differences in the cost of living and in life-style between one jurisdiction and another.²²² No equivalent rationale for decentralized policy-making presents itself here, however.

I have elsewhere offered my own reflections on the public policy of insolvent disclaimer.²²³ Put briefly, the strongest argument in favor of allowing an indebted beneficiary to disclaim in order to avoid creditors’ claims is that her benefactor had no obligation to bequeath to her in the first place and quite probably would have agreed to divert the inheritance away from her, had the beneficiary expressed that preference prior to the benefactor’s death.²²⁴ Execution of a dis-

assignment may not exist, because no one will agree to take the property off the beneficiary’s hands! See *supra* note 146 and accompanying text.

219. Passage of the Generation-Skipping Transfer Tax in 1986 had already reduced substantially the opportunities for tax-motivated disclaimers. DUKEMINIER & JOHANSON, *supra* note 170, at 726. The Taxpayer Relief Act of 1997 further inaugurated a phased-in increase in the estate tax exemption (over a ten year period, thereafter to be indexed for inflation), thereby reducing the number of estates that are subject to the tax. *Id.* at 982-83. And the estate tax (but not the gift tax) now stands on the brink of total repeal. On the bizarre form of the Economic Growth and Tax Relief Reconciliation Act of 2001, see Paul Krugman, *Reckonings, Bad Heir Day*, N.Y. TIMES, May 30, 2001, at A23. On the utility of disclaimers under the 2001 Act, see Howard M. Zaritsky, *Disclaimer-Based Estate Planning—A Question of Suitability*, 28 EST. PLAN. 400 (2001). For recent discussions of the movement to repeal estate taxes, see Ronald D. Aucutt, *The Campaign to Repeal the Estate Tax: What a Splendid Little War It Was*, 27 EST. PLAN. 493 (2000); Jonathan G. Blattmachr & Mitchell M. Gans, *Wealth Transfer Tax Repeal: Some Thoughts on Policy and Planning*, TR. & EST., Feb. 2001, at 49; William G. Gale & Joel B. Slemrod, *Death Watch for the Estate Tax?*, 15 J. ECON. PERSP. 205 (2001). On the concurrent decline of state inheritance taxes, see Robert M. Brucken, *The State of Death Taxes*, 26 ACTEC NOTES 157 (2000).

220. Plenary Reading, 1998, *supra* note 29, at 16.

221. UDPIA, *supra* note 2, prefatory note.

222. The Uniform Probate Code nonetheless includes such provisions, although it acknowledges implicitly the potential desirability of local variation by bracketing the dollar amount of the homestead allowance. UNIF. PROBATE CODE §§ 2-402, 2-403 (amended 1997).

223. I have devoted an article to the subject. Hirsch, *supra* note 9. On a related subject, see Hirsch, *Inheritance and Bankruptcy*, *supra* note 86. This paragraph adumbrates my analysis in those articles. For other discussions, see Hirsch, *supra* note 9, at 603-04 (citing to previous notes and articles).

224. A rather striking illustration is presented by a recent case in which an heir did not have the heart to inform his aged mother that he was insolvent. Eventually, a will disinheriting him in favor of his daughter was drafted, but the intestate died just hours before her ap-

claimer serves to cure a defective estate plan; and, inevitably, the likelihood of poor estate planning increases in inverse proportion to the wealth of the benefactor.²²⁵ Granting a right of insolvent disclaimer thus once more fulfills the goal of providing families with legal means to compensate for a relative lack of financial means.²²⁶ In addition, voluntary creditors almost certainly will not have relied on a debtor's prospects of inheritance when they set the price of credit.²²⁷ At the same time, a case can be made for carving out an exception for involuntary creditors—tort victims, alimony and child support creditors, and so on—whose claims rest upon a stronger moral foundation. What is more, disclaimers to thwart the claims of vulnerable involuntary creditors could have adverse economic consequences.

One cannot say that the Commissioners' attitude toward this issue was indifferent. On the contrary, they recognized its importance, and in plenary session they debated insolvent disclaimer at length.²²⁸ Some Commissioners expressed disquiet over omitting so essential a topic from the scope of UDPIA.²²⁹ The majority nonetheless preferred that course.²³⁰ The Commissioners on the winning side voiced a variety of concerns: Several felt that the issue lay within the province of the Uniform Fraudulent Transfer Act;²³¹ others warned that a rule intervening to bar insolvent disclaimer would create a theoretical anomaly endangering the coherence of the Act as a whole;²³² others indicated that the issue required additional study;²³³ others considered the body of Commissioners to be hopelessly deadlocked on the issue;²³⁴ and the Reporter himself maintained that "[t]he National Conference of Commissioners believed it was inappropriate for the

pointment with the attorney to execute the will. Transcript of Oral Argument at 14, *Drye v. United States*, 1999 WL 1050103.

225. By analogy, *see supra* note 39.

226. *See supra* note 40 and accompanying text.

227. In the unusual case where that is not so, debtor and creditor can enter into an enforceable contract under which the debtor promises not to disclaim. *See Badouh v. Hale*, 22 S.W.3d 392, 396-97 (Tex. 2000) (holding that where debtor pledged an expectancy of inheritance to a creditor she thereby disabled herself from subsequently disclaiming the inheritance).

228. Plenary Reading, 1998, *supra* note 29, at 16, 31-32, 37-42, 48-51, 77-85; Plenary Reading, 1999, *supra* note 29, at 35-47, 59-78, 92.

229. Plenary Reading, 1999, *supra* note 29, at 35-47, 59-78, 92. *But compare id.* at 85 (suggesting that the issue typically arises in a federal bankruptcy proceeding, where UDPIA is irrelevant).

230. A motion from the floor to amend UDPIA to provide that a disclaimer would not defeat a pre- or post-judgment judicial lien on inherited property obtained by a creditor of the beneficiary was defeated on a voice vote. *Id.* at 59-62, 76-78.

231. Plenary Reading, 1998, *supra* note 29, at 39-40; Plenary Reading, 1999, *supra* note 29, at 70, 74.

232. *See infra* notes 238-39 and accompanying text.

233. Plenary Reading, 1999, *supra* note 29, at 72.

234. Plenary Reading, 1998, *supra* note 29, at 84-85.

UDPIA to set policy in this area, especially given the lack of agreement among the states.”²³⁵

None of these arguments for inaction is terribly convincing. To suggest that insolvent disclaimer falls singularly within the category of fraudulent conveyance law is simply wrong: Insolvent disclaimer is a *borderline* issue, overlapping two legal realms.²³⁶ Unless one set of drafters takes the lead, the Commissioners risk imitating Alphonse and Gaston and succumbing to the paralysis of bilateral deference.²³⁷

Theoretical coherence presents an equally frivolous concern. The Commissioners reasoned that disclaimer law “rests on a fiction that [the beneficiary doesn’t] get the property”²³⁸—in other words, because of the disclaimer, her title to the inherited property vanishes retroactively. “And without that fiction, this act won’t work. The minute you start toying with that fiction by saying that creditors should have some right, you might thereby destroy the entire act.”²³⁹ This assertion is reminiscent of Learned Hand’s famous defense of the formal logic of future interests law: “I am quite aware that this is all largely [a] matter of words, but . . . unless we treat such formal distinctions as real, [the] law will melt away and leave not a rack behind.”²⁴⁰ The fallacy underlying both statements is that law depends on abstract precepts such as those provided by title theories (or vesting theories). It does not. The abstractions of title serve no greater purpose than to summarize the substantive right of disclaimer, and we may complaisantly twist them out of shape as public policy dictates—or, for that matter, dispense with them entirely.²⁴¹ In fact, UDPIA wisely does dispense with them, rendering the instant concern moot, as well as formalistic.²⁴²

Of course, as some Commissioners thought, the issue of insolvent disclaimer merits further study—in the same way that every legal issue does. The subject is not a new one, having already been explored

235. LaPiana, Memorandum, *supra* note 65, at 20.

236. See the discussion in Hirsch, *supra* note 9, at 588-91, 652-53.

237. That may have happened before within the Uniform Acts. Hirsch, *Trusts for Purposes*, *supra* note 10, at 947 n.149; see also *id.* at 936 n.104.

238. Plenary Reading, 1999, *supra* note 29, at 70, 92 (quotation at 70).

239. *Id.*

240. *Comm’r v. City Bank Farmers’ Trust Co.*, 74 F.2d 242, 247 (2d Cir. 1934), *rev’d on other grounds*, 296 U.S. 85 (1935).

241. Hirsch, *supra* note 9, at 604-05. I am not the first to take a dim view of the “confusing and unnecessary fictions” of title theory. HERBERT T. TIFFANY, *LAW OF REAL PROPERTY* § 1058, at 463 (Basil Jones ed., 3d ed., Callaghan & Co. 1939).

242. UDPIA, *supra* note 2, §§ 5(f) & cmt., 6 cmt. (“This Act continues the effect of the relation back doctrine, not by using the specific words, but by directly stating what the relation back doctrine has been interpreted to mean.”); LaPiana, *supra* note 11, at 57-58. Prior Uniform Acts were more formalistic in this respect. *E.g.*, UNIF. PROBATE CODE § 2-801(d)(1), (2) (amended 1997).

a good deal.²⁴³ And while the plenary debates certainly substantiate the want of consensus among the Commissioners on the issue, they operate (at least at sessions of the National Conference) on the principle of majority vote; consensus is unnecessary. Finally, the Reporter's assertion that "the lack of agreement among the states"²⁴⁴ justified a hands-off policy seems a rather surprising one for a Uniform Law Commissioner to make.

The upshot is that a golden opportunity to clarify a key issue—one that, when raised, will present a case of first impression in about half the states—was missed. If the Commissioners could reach no agreement on the matter, if they wavered over the optimal course to take, one wishes they had kept at it, even if that meant delaying UDPIA's promulgation for a spell. In light of the costs of local litigation, their indecision comes at a price. As Justice Noah Swayne opined long ago, "It is almost as important that the law should be settled . . . as that it should be settled correctly."²⁴⁵ And the price may be higher, even, than the Commissioners realized: For any state that simply replaces its current disclaimer statute with UDPIA will simultaneously wipe away whatever statutory law it already has on the subject of insolvent disclaimer (whether that law be explicit or the product of judicial construction).²⁴⁶ Accordingly, the proliferation of UDPIA could very well occasion a net decline in legal certainty, multiplying the number of states where the law of insolvent disclaimer is unresolved.

The Commissioners could have avoided this last difficulty by promulgating—at the very least—alternative model provisions, thereby ensuring that legislators who enact UDPIA would not over-

243. See *supra* note 223.

244. See *supra* note 235 and accompanying text.

245. *Gilman v. Philadelphia*, 70 U.S. 713, 724 (1865). See also *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406 (Brandeis, J., dissenting) (paraphrasing Swayne without reference).

246. For example, in seven jurisdictions (Illinois, Indiana, Michigan, Nebraska, North Dakota, Virginia, and Wisconsin), courts have construed statutory language similar to that found in the Uniform Probate Code ("a disclaimer relates back for all purposes") to permit insolvent disclaimer. See *supra* note 216. Enactment of UDPIA would overturn those decisions, because they construe statutes that would thereby be repealed, and because UDPIA contains no equivalent language. In all but one of those seven states, there exist no prior common law cases on point—and even in the exceptional state, the common law rule is doubtful! See *In re Estate of Hansen*, 248 N.E.2d 709, 712-13 (Ill. App. Ct. 1969). Having recently enacted UDPIA, North Dakota now finds itself in this predicament. UDPIA has overturned the state's construction cases, *In re Nistler*, 259 B.R. 723, 727 (Bankr. D. Or. 2001); *In re Estate of Opatz*, 554 N.W.2d 813, 815-17 (N.D. 1996); *Nielsen v. Cass County Soc. Servs. Bd.*, 395 N.W.2d 157, 159-60 (N.D. 1986), without substituting any law in their place, and there are no state common law cases on point. In other states with explicit statutory provisions on point, e.g., MINN. STAT. ANN. § 525.532(C)(6) (West 1975 & Supp. 2001), passage of UDPIA verbatim would also decodify the law on point, again in many instances leaving behind a common law void. Of the four states that have enacted UDPIA thus far, see *supra* note 4, only one has added to the Act a provision covering creditors' claims, which bars disclaimers frustrating the claims of public assistance creditors. 2001 Or. Laws ch. 245, § 17.

look the issue of insolvent disclaimer.²⁴⁷ Unfortunately, the Commissioners omitted to do even that much.

B. *Judicial Sales*

Having shied away from the main issue of insolvent disclaimer, the Commissioners did dip into it in one particular: Irrespective of how a state otherwise treats the subject, UDPIA provides that a judicial sale of inherited property to satisfy a creditor's claim thereafter bars disclaimer of the property.²⁴⁸ The comment that accompanies this provision is confusing: The limitation ostensibly "ensures that title gained from a judicial sale by a personal representative will not be clouded by a possible disclaimer."²⁴⁹ The oddity here is the reference to sale *by a personal representative*; ordinarily it is the sheriff who conducts a judicial sale.²⁵⁰ If the drafters mean to refer to judicial sales prompted *by the acts* of a personal representative—that is, foreclosures on property of the probate estate mortgaged by a personal representative²⁵¹—then the provision appears unnecessary: Once property becomes subject to a mortgage, the mortgagee holds a proprietary interest in it, at which point the beneficiary can only disclaim the proceeds.²⁵² On the other hand, in some jurisdictions an unsecured creditor of the beneficiary can garnish or levy execution directly against her interest in a probate estate,²⁵³ and the property thus seized could be liquidated thereafter at a judicial sale, all without any involvement by the personal representative. By its plain language, the text of UDPIA applies in this situation as well,²⁵⁴ but the accompanying comment creates some doubt about the matter. At any rate, we may readily conclude that the reference in the comment to

247. Commissioners charged with drafting other Uniform Acts have had occasional recourse to this technique. *E.g.*, U.C.C. § 2-318 (amended 1999).

248. UDPIA, *supra* note 2, § 13(b)(3) ("A disclaimer . . . is barred if . . . a judicial sale of the interest sought to be disclaimed occurs."). Prior Uniform Acts and some forty state statutes include similar language. UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 5, 8A U.L.A. 149, 157 (1978); UNIF. DISCLAIMER OF TRANSFERS BY WILL, INTESTACY OR APPOINTMENT ACT § 4(a), 8A U.L.A. 161, 174 (1978); UNIF. DISCLAIMER OF TRANSFERS UNDER NONTESTAMENTARY INSTRUMENTS ACT § 4(a), 8A U.L.A. 179, 186 (1978); UNIF. PROBATE CODE § 2-801(e) (amended 1997); Hirsch, *supra* note 9, at 597 n.54. For a case interpreting one of these statutes, see *Citizens State Bank v. Kaiser*, 750 P.2d 422 (Kan. Ct. App. 1988).

249. UDPIA, *supra* note 2, § 13 cmt.

250. DOUGLAS G. BAIRD ET AL., *CASES PROBLEMS AND MATERIALS ON BANKRUPTCY* 8-9 (3d rev. ed., Foundation Press 2001).

251. Existing Uniform Acts grant personal representatives power to enter into such a transaction. UNIF. PROBATE CODE § 3-715(23) (amended 1997).

252. See *Schmidt v. Collins*, 556 N.E.2d 933, 935 (Ind. Ct. App. 1990) (holding that personal representative's liquidation of a corporation, part of which was bequeathed to a beneficiary, did not preclude that beneficiary from subsequently disclaiming her share of the proceeds).

253. 6 PAGE, *supra* note 94, § 59.20, at 438-40; D.L.A. Kerson, *Creditors and the Will Contest*, 14 HASTINGS L.J. 18, 25-27 (1962).

254. See *supra* note 248.

the personal representative was not intended to limit the scope of the text, since the drafters also indicate in the comment that the text “continues a provision from the earlier [Uniform] Acts,”²⁵⁵ and those Acts clearly barred disclaimers following judicial sales conducted on behalf of unsecured creditors.²⁵⁶

The question remains whether this rule represents good policy. Analysis suggests that it does not. If a state forbids insolvent disclaimer, of course, the rule preventing disclaimer following a judicial sale merges into the broader bar. Only if a state otherwise permits insolvent disclaimer is the rule significant, for it then forms an exception to the general principle that a beneficiary’s disclaimer will succeed in thwarting creditors.

But what justifies that exception? The rationales for permitting insolvent disclaimer—implicit testamentary intent and the lack of creditor reliance—apply irrespective of whether the disclaimer precedes or follows a judicial sale. UDPIA sets off a race of diligence between creditors and the beneficiary, giving creditors an opportunity to exploit a beneficiary’s dilatoriness in individual cases.

The drafters’ stated concern is that, without this bar, title gained at a judicial sale would be “clouded by a possible disclaimer.”²⁵⁷ In other words, the risk of a post-sale disclaimer would discourage buyers and thereby reduce the sums fetched for the property sold at auction to satisfy creditors.

That, of course, causes no injustice or inefficiency from the perspective of the buyers, who know that any property acquired at a judicial sale comes without warranty of title.²⁵⁸ Nor does depressed bidding harm the interests of a beneficiary who does proceed to disclaim, for then the sale renders neither her nor her creditor worse off than they were before the sale. But if a beneficiary has no intention of disclaiming, the risk of disclaimer that nonetheless exists can chill bidding and thereby prove inefficient: The creditor will realize less from the sale than it would otherwise, and the infamous prospect of a liquidation of valuable property for a peppercorn, leaving the creditor with a sizable deficiency judgment, looms.

If this was the image that frightened the Commissioners, it is a bugaboo. A beneficiary who does not intend to disclaim can ensure more robust bidding at a judicial sale through the simple expedient of executing a waiver of her right to disclaim.²⁵⁹ In that event, the

255. UDPIA, *supra* note 2, § 13 cmt.

256. UNIF. DISCLAIMER OF TRANSFERS BY WILL, INTESTACY OR APPOINTMENT ACT § 4 cmt., 8A U.L.A. 161, 175 (1978).

257. *See supra* note 249 and accompanying text.

258. BAIRD ET AL., *supra* note 250, at 9.

259. UDPIA expressly gives effect to waivers, which have always been effective under state law. UDPIA, *supra* note 2, § 13(a); Hirsch, *supra* note 9, at 617 & n.146.

buyer's risk of disclaimer disappears and liquidation value is preserved.

In sum, one finds no policy justification for UDPIA's rule concerning judicial sales. But the ultimate irony is that UDPIA's drafters failed inadvertently even to implement the unfortunate rule they had intended! Recall that under the safe-harbor provision of UDPIA, a beneficiary retains the right to disclaim "under a law other than this [Act]."²⁶⁰ This provision neutralizes the bar on disclaimer following a judicial sale, because under the common law in jurisdictions that permit insolvent disclaimer, no such bar exists.²⁶¹

VI. DEVOLUTION

A. *Present Interests*

Which brings us finally to the substantive consequences of a disclaimer. Once a beneficiary disclaims an inheritance, who takes the property in her stead?

The answer given in UDPIA is the same one found in prior Uniform Acts, which in turn developed out of the common law: In the absence of testamentary instructions, disclaimed property goes to whomever would have received it had the disclaimant predeceased the benefactor, as determined by the state's antilapse and intestacy statutes;²⁶² but if a will does anticipate this contingency by naming a substitute beneficiary in the event that the primary beneficiary disclaims, that stipulation controls the devolution of the property.²⁶³ In

260. UDPIA, *supra* note 2, § 4(b).

261. The common law decisions are few, but unanimous on this point. *Lehr v. Switzer*, 239 N.W. 564, 566 (Iowa 1931); *Tarr v. Robinson*, 27 A. 859, 860 (Pa. 1893); *see also* *Kearney v. Crawford*, 151 So. 293, 294 (Fla. 1933) (refusing to enjoin an execution sale because it would not affect the beneficiary's rights). Notice, however, that this safe harbor only applies to disclaimer by a devisee, since an heir cannot disclaim at common law. *See supra* note 107 and accompanying text.

262. UDPIA, *supra* note 2, § 6(b)(3). On the application of UDPIA to disclaimer by an heir, *see infra* note 296. For similar provisions in prior Uniform Acts, *see* UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 4, 8A U.L.A. 149, 155 (1978); UNIF. DISCLAIMER OF TRANSFERS BY WILL, INTESTACY OR APPOINTMENT ACT § 3, 8A U.L.A. 161, 172 (1978); UNIF. DISCLAIMER OF TRANSFERS UNDER NONTESTAMENTARY INSTRUMENTS ACT § 3, 8A U.L.A. 179, 185 (1978); UNIF. PROBATE CODE § 2-801(d) (amended 1997). Virtually every state statute has adopted this approach. *E.g.*, TEX. PROB. CODE ANN. § 37A (Vernon 1980 & Supp. 2001); *Ernst v. Shaw*, 783 S.W.2d 400, 401 (Ky. Ct. App. 1990) (reading the state disclaimer statute *in pari materia* with the antilapse statute); *Estate of Cooper*, 342 N.Y.S.2d 995, 998 (Sur. Ct. 1973) (same). *Cf.* LA. CIV. CODE ANN. art. 965 (West 2000) (discussed *infra* note 266); MD. CODE ANN., EST. & TRUSTS § 9-204(a)(1) (1991) (applying a slightly different rule, in light of the state's unusual antilapse statute, *see infra* note 274). On the common law, *see infra* note 288.

263. UDPIA, *supra* note 2, § 6(b)(2). For equivalent provisions in prior Uniform Acts, *see supra* note 262. Again, this is the universal statutory rule. For an early common law case, *see* *Luques v. Dresden*, 77 Me. 186, 188-93 (1885); *see also* *Dare v. New Brunswick Trust Co.*, 194 A. 61, 63 (N.J. Ch. 1937) (*dicta*). Under UDPIA, a contingency clause specifying how a bequest will devolve in the event the beneficiary predeceases is broadly construed to govern the devolution of a bequest a surviving beneficiary disclaims. UDPIA, *supra* note 2, § 6(b)(2) & (3)(A) &

short, UDPIA declines to innovate here,²⁶⁴ and the finished product is superficially uncontroversial. Within the Uniform Law Commission, however, no provision of UDPIA elicited greater controversy.

For the drafters of UDPIA had had quite a different provision in mind. Under the version of the Act submitted for approval to the National Conference of Commissioners, a disclaimed bequest went (in default of testamentary provision) to the descendants of the disclaimant; and if there were none, the bequest devolved instead to whomever constituted the disclaimant's heirs.²⁶⁵

This proposal was anything but conventional.²⁶⁶ Considered structurally, it would have distinguished the problem of disclaimer from the problem of lapse, despite their abiding theoretical association.²⁶⁷ The drafters defended their position on two grounds. First, and primarily, as to substance: Under most antilapse statutes, when a beneficiary under a will predeceases, the descendants of that beneficiary take in her place only if the beneficiary was a blood relative; otherwise, the bequest flows into the residue. This framework proceeds from the assumption that most testators have ties extending to the whole family of a blood relative; the one named in the will simply takes precedence over her children, whom the testator would probably wish to benefit were she unavailable to enjoy the bequest. But the

cmt., ex. 1(c). For early common law cases, *see infra* note 288. This rule of construction is unlikely to reflect the typical benefactor's intent. For a criticism of the rule, see Richard V. Wellman, *Disclaimer Talk*, PROB. L.J. OHIO, Sept.-Oct. 2000, at 5, 6.

264. UDPIA helpfully omits two unfortunate bits of verbiage found in previous Uniform Acts that had spawned needless litigation in the past: provisions indicating that a disclaimer relates back to the death of the benefactor "for all purposes" and "is binding upon . . . all persons claiming through or under him." UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 4(a), (c), 8A U.L.A. 149, 155-56 (1978); UNIF. DISCLAIMER OF TRANSFERS BY WILL, INTESTACY OR APPOINTMENT ACT §§ 3, 4(c), 8A U.L.A. 161, 172, 174 (1978); UNIF. DISCLAIMER OF TRANSFERS UNDER NONTESTAMENTARY INSTRUMENTS ACT §§ 3, 4(c), 8A U.L.A. 179, 185-86 (1978); UNIF. PROBATE CODE § 2-801(d)(1), (d)(3) (amended 1997). *See, e.g.*, *Hunt v. United States*, 566 F. Supp. 356, 357-58 (E.D. Ark. 1983); *Estate of Bryant v. Bryant*, 196 Cal. Rptr. 856, 862 (Ct. App. 1983); *In re Estate of Estes*, 718 P.2d 298, 301-02 (Kan. 1986); *In re Estate of Burmeister*, 594 P.2d 226, 229 (Kan. 1979); *Ernst*, 783 S.W.2d at 401; *In re Estate of McCutcheon*, 699 A.2d 746, 750 (Pa. Super. Ct. 1997).

265. Plenary Reading, 1999, *supra* note 29, at 25-26. The idea was proposed by Professor Richard Wellman. *Id.* at 30. The provision appeared on an errata sheet accompanying the Uniform Disclaimer of Property Interests Act, Draft for Approval, July 23-30, 1999.

266. One jurisdiction nevertheless has enacted a very similar provision that beat UDPIA's drafters to the punch: Under revisions to the Louisiana Civil Code introduced in 1997, a disclaimed bequest goes to the descendants (but not other heirs) of the disclaimant; only if there are no descendants is the disclaimed bequest then treated as having lapsed. LA. CIV. CODE ANN. art. 965 (West 2000). Surprisingly, one finds no discussion of this statute in the records of the plenary debate, or in other materials prepared by UDPIA's drafters. For a brief criticism of the statute, see Cynthia Ann Samuel, *The 1997 Successions and Donations Revision—A Critique in Honor of A.N. Yiannopoulos*, 73 TUL. L. REV. 1041, 1060-61 (1999).

267. "It has been generally thought that devolution in the case of disclaimer should be the same as in the case of lapse." UNIF. DISCLAIMER OF TRANSFERS BY WILL, INTESTACY OR APPOINTMENT ACT prefatory note, § 3 cmt., 8A U.L.A. 161, 163, 172 (1978); *see also Suggestions for a Model Act*, *supra* note 3, at 136-37.

ties binding the testator to other beneficiaries (typically a spouse, employee or friend) are more likely to be narrow, not necessarily including their kin (*viz.* a stepchild, the child of an acquaintance); if they are unavailable to enjoy their bequest, then the typical testator probably would prefer to substitute other takers under the will.²⁶⁸ Disclaimer, the drafters argued, presents a different issue: Here, the beneficiary *is* available to enjoy the bequest, and she will choose to decline it only if by so doing the property devolves in a manner that suits her—by hypothesis, to her own close relatives. Presumably, the typical benefactor intends to give effect to the beneficiary's own preference regarding the property's devolution, for the benefactor thereby facilitates a disclaimer and expands the beneficiary's options.²⁶⁹

Second, and secondarily, as to clarity: A disclaimer of valuable property serves the purpose of postmortem estate planning only if the beneficiary can calculate with certainty who would be next in line to receive it. Although the existing statutes governing redistribution of property bequeathed to a predeceasing beneficiary under a will are clear, that may not be so where the governing instrument is instead a will-substitute. Many antilapse statutes fail to cover will-substitutes explicitly, and the breadth of their application often remains to be construed.²⁷⁰ By linking the rules of disclaimer to those of lapse, prior Uniform Acts had imported this undesirable element of doctrinal uncertainty.²⁷¹

Both of these arguments are persuasive, by and large. As always in inheritance law, testamentary intent is key; we should honor the actual or imputed intent of the benefactor when we determine the disposition of disclaimed property. Here, however, we may reasonably conclude that, had they consulted about the matter, the benefactor would have agreed to empower the beneficiary to redirect her inheritance to someone else—not so much a delegation of authority (as when appointing a trustee) as a recognition on the part of the benefactor that the power to donate (or, more precisely in this context, the power to donate free from taxes and creditors' claims) is one of the ways a person whom the benefactor wishes to enrich can derive utility out of her inheritance. Disclaimed property should devolve to whomever the named beneficiary would prefer because that is what the benefactor in turn prefers.

268. For discussions of the policies underlying lapse and traditional antilapse statutes, see Susan F. French, *Antilapse Statutes Are Blunt Instruments: A Blueprint for Reform*, 37 HASTINGS L.J. 335, 336-44 (1985); Philip Mechem, *Some Problems Arising Under Anti-Lapse Statutes*, 19 IOWA L. REV. 1, 1-3 (1933); Patricia J. Roberts, *Lapse Statutes: Recurring Construction Problems*, 37 EMORY L.J. 323, 328-39 (1988).

269. Plenary Reading, 1999, *supra* note 29, at 31-33, 83-85, 88-90.

270. The few construction cases have come out both ways. MCGOVERN & KURTZ, *supra* note 82, § 8.3, at 304, 306-07.

271. Plenary Reading, 1999, *supra* note 29, at 33-34, 78-79, 82-85, 87-90.

This analysis initially suggests an even more radical solution to the devolution problem. Instead of adopting a fixed rule, lawmakers could allow a disclaimer to take the form of an *assignment* by the beneficiary to whomever she chooses in each case and thereby effectuate her preference precisely. Judged purely as a matter of theory, such a rule has much to recommend it. It represents the logical culmination of the concept of a disclaimer as a surrogate for pre-mortem estate planning,²⁷² for the distribution resulting from an assigned disclaimer would also have resulted from an ideal, hypothetical estate plan executed on consultation with the beneficiary at the moment before the benefactor's death. Considered practically, of course, the Internal Revenue Code refuses to acknowledge directed disclaimers as tax-qualified,²⁷³ irrespective of the benefactor's wishes, even if state legislators could be persuaded to render them effective under local fraudulent conveyance law.²⁷⁴ At least in cases where federal taxes hang in the balance, UDPIA must provide a fixed default rule specifying the devolution of disclaimed property.

Given, then, that a default rule governing devolution must come into play, which one is most likely to comport with the typical beneficiary's (and hence the benefactor's) preferences? Like all questions concerning default rules, this one cries out for empirical inquiry—without evidence, we can only offer unsubstantiated conjectures about probable intent. Undoubtedly, the answer will vary from case to case. Many beneficiaries, for example, disclaim for purposes of marital deduction planning, which can only proceed if the disclaimed property will devolve to the benefactor's spouse rather than to the beneficiary's descendants.²⁷⁵ Still, we may surmise that, considered in the aggregate, beneficiaries are most likely to want their descendants or other heirs to receive disclaimed property²⁷⁶—just as the drafters of UDPIA had proposed.

272. See *supra* notes 39-40 and accompanying text.

273. I.R.C. § 2518(b)(4) (1989).

274. State law has always distinguished disclaimers from assignments and has never given effect to a disclaimer, as such, where the disclaimant names the alternative beneficiary. *E.g.*, *In re Estate of Lyng*, 608 N.W.2d 316, 318-20 (S.D. 2000); see also UNIF. FRAUDULENT TRANSFER ACT §§ 1(12), 4(a), 7A pt. 2 U.L.A. 266, 276, 301 (1984). Compare the law of Maryland, where—uniquely—the state antilapse statute passes bequests to a predeceasing beneficiary instead to the heirs or devisees of that beneficiary, thereby allowing the predeceasing beneficiary to control the devolution of a lapsed bequest. MD. CODE ANN., EST. & TRUSTS § 4-403(b) (1983). Were Maryland's disclaimer statute to treat a disclaimed bequest as the equivalent of a lapsed bequest, disclaimants in Maryland would be able to control the devolution of disclaimed property as well. To forestall that result, the local disclaimer statute passes a disclaimed bequest to whomever would receive it if the disclaimant had died intestate immediately before the death of the benefactor. *Id.* § 9-204(a)(1).

275. BRAND & LAPIANA, *supra* note 8, at 126-29; NEWMAN & KALTER, *supra* note 34, at 4-7; WENIG, *supra* note 34, at A-8 to A-11; Llewellyn et al., *supra* note 34, at 44.

276. At least one court has made this inference (albeit prior to passage of the federal Generation Skipping Transfer Tax). *In re Estate of Fienga*, 347 N.Y.S.2d 150, 152 (Sur. Ct. 1973)

Of course, the drafters were also right to favor a clear rule of devolution. The need for clarity, however, is here magnified by a larger problem that also needs attention—to wit, the want of relief for a mistaken disclaimer, one induced by a misunderstanding concerning the distribution of property that results from this Act. Under universal state law, a disclaimant cannot (absent fraud) rescind a disclaimer on the ground of mistake.²⁷⁷ By contrast, under the closely analogous law of gifts, courts allow a donor to rescind an inter vivos transfer induced by similar sorts of mistake, when proven by clear and convincing evidence, to prevent unjust enrichment.²⁷⁸ This aspect of disclaimer law calls for reform, but UDPIA sidesteps the issue, leaving it to be sorted out locally.²⁷⁹

At any rate, even the drafters' reform proposal proved too reformist for the Commissioners.²⁸⁰ At the instance of the National Confer-

(“Those renunciations . . . most frequently encountered are purposed to pass the share of the . . . devisee to his own issue.”).

277. For the most recent cases, see *In re Estate of Fleenor*, 17 P.3d 520, 524-26 (Or. Ct. App. 2000); *In re Estate of Holden*, 539 S.E.2d 703, 709-10 (S.C. 2000); see also, e.g., *Northwestern Nat'l Cas. Co. v. Doucette*, 817 S.W.2d 396, 400-01 (Tex. App. 1991); *Webb v. Webb*, 301 S.E.2d 570, 574-77 (W. Va. 1983); WENIG, *supra* note 34, at A-57 to A-58, A-65 to A-66; E. Diane Thompson & Christine H. Buchanan, *The Law of Unintended Consequences Applied to Disclaimers*, PROB. PRAC. REP., Mar. 2000, at 1, 4-6.

278. 4 GEORGE E. PALMER, THE LAW OF RESTITUTION § 18.6, at 26-28 (1978); 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, 524-28 (1982); see also RESTATEMENT (THIRD) OF PROP.: DONATIVE TRANSFERS § 12.1 (Tentative Draft No. 1, 1995) (extending the same principle to the law of wills).

279. For the brief discussion of this issue in the plenary debate over UDPIA, see Plenary Reading, 1998, *supra* note 29, at 38-39. UDPIA contains no general provision devoted to the issue of mistaken disclaimers; nor had Prior Uniform Acts. The one aspect of the law of mistakes relating to disclaimers dealt with under UDPIA is disposed of with notable harshness. If a disclaimer the beneficiary mistakenly believes to be valid is barred under UDPIA, the disclaimer still “takes effect as a transfer,” and hence “the person attempting the disclaimer will bear any transfer tax consequences.” UDPIA, *supra* note 2 § 13(f) & cmt. Hence, for example, if the beneficiary attempts to disclaim after taking an action deemed to constitute acceptance of the inheritance, the disclaimer is barred, *id.* § 13(b)(1), yet a taxable transfer to the alternative beneficiary still occurs—almost certainly not the result that the beneficiary would prefer at this point! The Commissioners justify this outcome simply by stating that “[t]his provision removes the ambiguity that would otherwise be caused by an ineffectual refusal to accept property,” an ambiguity they could equally have avoided by rendering the attempted disclaimer void—the outcome that UDPIA dictates, seemingly inconsistently, when a disclaimer is not barred, but rather is improperly formalized. *Cf. id.* § 5(c).

In light of the grave risks of mistaken disclaimers, beneficiaries might seek to disclaim conditionally, the condition being that the disclaimed property devolve in the manner that the disclaimant anticipates, and that the disclaimer itself be fully effective. Unfortunately, however, UDPIA also neglects to resolve the effectiveness of conditional disclaimers. See *supra* note 132.

280. Opponents of the defeated provision had argued that it made disclaiming *too* attractive, and on that account “maybe Internal Revenue might have some problem with the [A]ct.” Plenary Reading, 1999, *supra* note 29, at 36, 73, 79-80. Given that the benefactor could have achieved the same result via better tax planning, that fear seems groundless. Certainly, the effectiveness of a disclaimer executed solely to derive tax efficiencies is unquestioned. *E.g., In re*

ence, the provision was deleted and the orthodox rule, remarked earlier,²⁸¹ was reinstated.²⁸² Looking back on the matter, the architect of the abandoned provision concludes that “the proposal failed because it appeared to depart too sharply from the [traditional] theory of disclaimers with which most lawyers are comfortable In retrospect, it is good that the proposal failed,” he adds, because “the proposed change would make the new law controversial in state and local bar circles, reducing if not eliminating prospects for enactment.”²⁸³ To which the only adequate response is one that was made by a Commissioner during the plenary debate, whose words fairly deserve to be hoisted on a banner at every proceeding of the National Conference: “[I]f we are just going to regurgitate . . . bad law, then what are we doing here?”²⁸⁴ Quite so: The point of the exercise is to improve the law, and legislators will either grasp that opportunity or they will not. Nor should one controversial provision endanger UDPIA’s passage, since legislators who find it objectionable can always enact UDPIA with modifications—precisely what they should now prepare to do in reverse!²⁸⁵ If the defeat of this proposal was a blessing in disguise, I dare say, it was a pretty good disguise.²⁸⁶

Public policy to one side, the instant provision of UDPIA (as finally adopted) also suffers from a technical problem. That problem arises when the provision is combined with another one that we have wrestled with before: namely, the section rendering UDPIA a nonex-

Estate of Schock, 543 A.2d 488, 490 (N.J. Super. Ct. Law Div. 1988) (“One must be just in paying taxes due under the law; one need not be generous.”); *In re Guardianship of Kramer*, 421 N.Y.S.2d 975, 977-78 (Sur. Ct. 1979). In the same vein, opponents argued that the provision made disclaiming to avoid creditors’ claims too easy, again ignoring that better estate planning would have achieved that result as well. Plenary Reading, 1999 *supra* note 29, at 35-39, 79-80. Finally, opponents argued that lawyers had relied on the traditional rule when drafting existing wills—although one may question how many wills actually anticipate the (unlikely) event of a disclaimer and hence how great the transition costs to a new rule would be. *Id.* at 39, 73, 80-82, 84-86, 91-92. *See also* Samuel, *supra* note 266, at 1060-61 (criticizing the new Louisiana statute, *see* LA. CIV. CODE ANN. art. 965 (West 2000), which is similar to the UDPIA proposal, *see supra* note 266, as violative of probably testamentary intent).

281. *See supra* note 262 and accompanying text.

282. The motion to remove the reform proposal carried by a vote of 72 to 56. Plenary Reading, 1999, *supra* note 29, at 93.

283. Wellman, *supra* note 263, at 7.

284. Plenary Reading, 1999, *supra* note 29, at 67 (Commissioner Ossen, discussing the issue of creditors’ claims and ascribing the slogan to Professor Curtis Reitz).

285. Having recanted and given his blessing to UDPIA’s traditional rule of devolution as finally adopted, Professor Wellman urges estate planners to draft around it by including in testamentary instruments clauses specifying that disclaimed bequests go to the descendants or heirs of the disclaimant. “The survivors of clients will appreciate the resulting clarity of the plan and the usefulness of the options involved.” Wellman, *supra* note 263, at 7 & *passim*. But there is something very wrong with a default rule that everyone is advised to supersede! Surely, the point is to craft desirable default rules that reduce transaction costs and stand in for poor planning.

286. To paraphrase one of history’s wittiest politicians. *See* RICHARD HOUGH, WINSTON AND CLEMENTINE 520 (1990).

clusive safe harbor, hence allowing persons operating under the Act to disclaim in the alternative under the common law.²⁸⁷ Common law rules governing the devolution of disclaimed property were never terribly clear, but it remains entirely possible that a state court, when compelled to blow the dust off ancient precedents, will find them to mandate rules differing from those set out in the statutory language of UDPIA.²⁸⁸ Were that ever to happen, two conclusions would follow.

287. UDPIA, *supra* note 2, § 4(b). See *supra* notes 22-25 and accompanying text.

288. The common law cases were inconsistent and frequently vague on the question of whether a disclaimed bequest should be treated as the equivalent of a *lapsed* bequest (i.e., where the beneficiary dies between the time when the will is executed and the testator's death) or of a *void* bequest (i.e., a bequest ineffective for other reasons, for instance because the beneficiary was already dead when the will was executed). See, e.g., *McNeely v. McNeely*, 186 S.E.2d 105, 108 (Ga. 1971) (disclaimer "has the same legal effect as a lapse"); *In re Estate of Rohn*, 175 N.W.2d 419, 422 (Iowa 1970) (by virtue of a disclaimer, "[t]here is no lapsed devise, for [the beneficiary] has . . . extinguished the devise"); *Greely v. Houston*, 114 So. 740, 742 (Miss. 1927) ("when a devise . . . refuses to accept a devise . . . , the property devised . . . to him will be dealt with as if the devise . . . had not been made"); *Albany Hosp. v. Hanson*, 108 N.E. 812, 815 (N.Y. 1915) ("As the result of the rejection by the [beneficiary] of the devise . . . that devise lapsed."); *Perkins v. Isley*, 32 S.E.2d 588, 591 (N.C. 1945) (upon disclaimer "the devise . . . is lapsed or void, and the gift passes . . . to the heirs at law"); *Peckham v. Newton*, 4 A. 758, 761 (R.I. 1886) (equating disclaimed bequest with "lapsed and void . . . legacies"); *Watson v. Wall*, 93 S.E.2d 918, 926 (S.C. 1956) (disclaimed bequest devolves "like one that has lapsed . . . or is void . . . or otherwise ineffectual"); *Bradford v. Leake*, 137 S.W. 96, 100 (Tenn. 1911) (disclaimed bequest "stood in the category of a lapsed or void devise"); *Milligan v. Greeneville Coll.*, 2 S.W.2d 90, 93 (Tenn. 1928) (equating disclaimed bequest with one that "lapses, [or] turns out invalid"); see also RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 34.2 cmt. d (1992) (equating disclaimer with lapse); 3 AMERICAN LAW OF PROPERTY, *supra* note 94, § 14.15 at 631 & n.24 (noting conflicting lines of early cases). The devolution of lapsed and void bequests can differ under the common and/or statutory law of some states, rendering the distinction potentially significant. *ATKINSON*, *supra* note 94, at 786; 4 *PAGE*, *supra* note 94, §§ 33.54-55; 6 *id.* §§ 50.21-22; see also, e.g., MD. CODE ANN., EST. & TRUSTS §§ 4-403, 4-404 (1991). For example, whereas UDPIA indicates clearly that the state antilapse statute will operate to dictate the devolution of a disclaimed bequest, UDPIA, *supra* note 2, § 6(b)(3) & cmt., exs. 1(a) & 1(b), that may not be the exclusive outcome if local common law deems a disclaimed bequest to be void rather than to lapse. See *Howland v. Stone Found.*, 243 N.E.2d 892, 893-96 (Ohio Prob. Ct. 1969) (holding that a bequest disclaimed by the child of the benefactor devolved at common law to the residuary legatees despite the fact that the disclaiming child had children and would have come within the purview of the state's antilapse statute had it applied; but without expressly addressing the potential application of the antilapse statute to the case at issue); see also Robert C. Bensing, *The Ohio Anti-Lapse Statute*, 28 U. CIN. L. REV. 1 (1959) Margaret V. Turano, *Practice Commentaries*, in N.Y. EST. POWERS & TRUSTS § 2-1.11, at 241, 243 (McKinney 1998) (asserting that the antilapse statute would not govern devolution of property disclaimed under the common law). Furthermore, courts divided over how narrowly to construe contingencies triggering substitute bequests. Compare *Featherstone v. Pass*, 60 S.E.2d 236, 237-38 (N.C. 1950) (holding that a clause naming a substitute beneficiary in the event that the primary beneficiary failed to fulfill a condition controlled the devolution of the property when instead the primary beneficiary disclaimed the bequest); and *In re White's Estate*, 34 A. 321, 321-23 (Pa. 1896) (same); and *Brown v. Momar, Inc.*, 411 S.E.2d 718, 720-23 (Ga. Ct. App. 1991) (holding under a statute that a clause naming a substitute beneficiary in the event that the primary beneficiary died controlled the devolution of the property when instead the primary beneficiary disclaimed the bequest), with *In re Waring's Will*, 56 N.E.2d 543, 545 (N.Y. 1944) (holding that a clause naming a substitute beneficiary in the event that the primary beneficiary died did *not* control the devolution of the property when instead the primary beneficiary disclaimed the bequest); and *Howland*, 243 N.E.2d at 894-96 (same). See also MCGOVERN & KURTZ, *supra* note 82, § 8.3, at 312 (remarking a related line of inconsistent

First, disclaimants in a jurisdiction that enacts UDPIA will discover that they have a limited choice to make between the rules of devolution contained within and without the Act. Second, any such disclaimant will very likely forfeit the ability to make a tax-qualified disclaimer under the Internal Revenue Code.²⁸⁹ Needless to add, the drafters of UDPIA cannot have intended that result. They simply failed to appreciate the combustibility of these two, independently benign legal elements when they react to form a compound. The irony is that by conceiving UDPIA as an “enabling statute,” which is “designed to allow every sort of disclaimer,” the drafters went a step too far and in consequence may have *disabled* the Act as a vehicle for tax planning.²⁹⁰

B. Future Interests

The problem of devolution grows trickier still in connection with future interests. Suppose, to take the simplest of simple cases, the benefactor’s will creates a testamentary trust “to **A** for life, remainder to **B**.” Notice that we now have more than one scenario to ponder. The beneficiary of the preceding life estate may disclaim, or, in the alternative, the beneficiary of the succeeding remainder may disclaim. Each possibility raises distinct (albeit related) problems.

1. Preceding Interests

Let us begin with disclaimer of the life estate. Should lawmakers now accelerate the remainder so that **B** takes the interest immediately upon the benefactor’s death (thus, in effect, granting the disclaimed life estate to **B**)? Or should lawmakers sequester **A**’s life estate until **A**’s actual (and not constructive) death for the benefit of the testator’s residuary legatees (if any) or heirs—thus, granting the disclaimed life estate to them, *pur autre vie*?

cases). The local common law rule of construction could differ from UDPIA’s rule, thus again rendering the scheme of devolution under UDPIA nonexclusive. *See supra* note 263.

289. *See* I.R.C. § 2518(b)(4) (1989) (requiring that a disclaimer be made “without any direction on the part of the person making the disclaimer” in order for it to be tax-qualified).

290. UDPIA, *supra* note 2, prefatory note. Perhaps I am being an alarmist here: A number of state statutes have included safe-harbor provisions for some time, *see supra* note 25, without provoking a challenge by the Tax Commissioner. On the other hand, the fact that no such challenge has yet occurred does not mean that it will never occur, after the issue is brought to light. One may add that the problem raised here would have been even more acute under the reform provision proposed by UDPIA’s drafters but overturned by the National Conference; that provision unquestionably deviated from the rules of devolution found in the common law. *See supra* note 265 and accompanying text. The problem can best be avoided by revising the safe-harbor provision, rather than by modifying the devolution provision. Once UDPIA is amended to bar disclaimer under the common law, drafters are free to reform further the rules of statutory devolution without endangering a disclaimer’s tax qualification under the Internal Revenue Code.

Prior Uniform Acts called for acceleration (although without clarifying whether this principle constitutes a rule of law or a default rule), and UDPIA adopts the same principle (unfortunately, together with the same ambiguity): “[u]pon the disclaimer of a preceding interest, a future interest . . . takes effect as if the disclaimant had died . . . immediately before the time of distribution,” which in the case of a present life estate is the benefactor’s death.²⁹¹ Thus, in our last example, if **A** disclaims the life estate, **B**’s remainder accelerates, providing **B** with immediate possession. It is unclear whether the benefactor can avoid this outcome, even by express provision in the governing instrument.

Apart from this last oddity, the result appears sound—at least in the trivial case where **B**’s remainder is not a contingent interest. The relevant issue, as always, is what result the typical benefactor would prefer. In this case, the benefactor has designated a taker to follow

291. UDPIA, *supra* note 2, § 6(b)(4). To the same effect, see UNIF. DISCLAIMER OF TRANSFERS BY WILL, INTESTACY OR APPOINTMENT ACT § 3 & cmt., 8A U.L.A. 161, 172 (1978); UNIF. PROBATE CODE § 2-801(d)(1) (amended 1997). Like prior Uniform Acts, UDPIA is flawed in that it fails to indicate whether the benefactor remains free to supersede the principle of acceleration. The caveat for testamentary override of the statutory rule that governs other aspects of devolution is *omitted* from the subsection setting out the statutory rule of acceleration. Inclusion *unius*? Compare UDPIA, *supra* note 2, § 6(b)(3), with *id.* § 6(b)(4). The accompanying comment also fails to clarify this point. See *id.* § 6 cmt. The result will be needless litigation. For an observation of the same ambiguity in the Uniform Probate Code, see Medlin, *supra* note 3, at 1257-58. Cf. OHIO REV. CODE ANN. § 1339.68(G) (Anderson 1993 & Supp. 2000) (“Unless the donative instrument expressly provides that, if there is a disclaimer, there shall not be any acceleration of remainders or other interests, the . . . future interest . . . shall be accelerated.”). The Reporter for UDPIA has suggested independently that the omission of the caveat for testamentary override of the rule of acceleration was a conscious drafting decision intended to ensure that courts do not suspend acceleration on the basis of findings of implicit testamentary intent. LaPiana, Memorandum, *supra* note 65, at 6-7. Still, UDPIA’s language can be read even to foreclose *explicit* testamentary nullification of the rule of acceleration, contrary to the fundamental principle of freedom of testation! Courts had often imposed a common law rule of acceleration, but only as a default rule. *E.g.*, *Greely*, 114 So. at 742 (“unless it is manifest from the provisions of the will that the testator intended otherwise”); *cf.*, *e.g.*, *Blacque v. Kalman*, 30 N.W.2d 599, 606 (Minn. 1948) (declining to accelerate a remainder on the ground that acceleration would contradict “the purposes and objects of the trust”); *Aberg v. First Nat’l Bank in Dallas*, 450 S.W.2d 403, 407-11 (Tex. Civ. App. 1970) (indicating that implicit intent should be effectuated in each case and citing to much prior case law); see also RESTATEMENT OF PROP. §§ 231-33 & cmts. (1936); LEWIS M. SIMES & ALLAN F. SMITH, THE LAW OF FUTURE INTERESTS §§ 796-99 (2d ed. & Supp., John A. Borron, Jr., ed., 2001); Annotation, *Relinquishment of Interest by Life Beneficiary in Possession as Accelerating Remainder of Which There is Substitutional Gift In Case Primary Remainderman Does Not Survive Life Beneficiary*, 7 A.L.R.4th 1084 (1981). For additional cases decided under statutes, see *infra* note 302. In one respect, UDPIA deviates from prior Uniform Acts: namely, when the disclaimed interest comprises an intermediate estate. Suppose the bequest goes “to **A** for life, then to **B** for life, then to **B**’s issue,” and **B** disclaims. Under both UDPIA and prior Uniform Acts, the remainder accelerates; but whereas under prior Uniform Acts, it accelerates to the benefactor’s death and hence goes to **B**’s issue at that time, under UDPIA the remainder accelerates only to the time when the disclaimed interest becomes possessory, here at **A**’s death, and goes to **B**’s issue at that time—a rule more closely analogous to the rule of convenience. Compare UNIF. PROBATE CODE § 2-801(d)(1) (amended 1997), with UDPIA, *supra* note 2, § 6(a)(1), (b)(4).

the life tenant, and we may readily infer that the testator's usual motive for delaying the remainderman's interest is nothing other than to give priority to the life tenant's interest.²⁹² The need for that priority having disappeared, the benefactor would likely choose to give effect to the remainder immediately.

So far, so good. But what if the remainderman's interest is contingent on events existing as of the death of the life tenant? Consider another simple case contemplated by UDPIA's drafters: "to **A** for life, remainder to **A**'s descendants." Under UDPIA, if **A** disclaims, the remainder accelerates, cutting out the afterborn children of **A**. Is it truly probable that the life tenant (and hence the benefactor) would prefer a result that fails to treat the life tenant's children equally?²⁹³

And we face another problem. Notice preliminarily that, as a general principle, lawmakers have sought to limit the effect of a disclaimer to its subject matter and have not allowed it to alter other aspects of the benefactor's estate plan.²⁹⁴ This principle serves to remove opportunities for a disclaiming beneficiary (paradoxically) to improve her position and thus, by colluding with others whose rights a disclaimer otherwise would affect, garner a larger inheritance than the benefactor intended.²⁹⁵ UDPIA implicitly endorses this policy,

292. *Greely*, 114 So. at 742 ("The testator's manifest purpose in postponing the enjoyment of the property by the [remainderman] . . . was that [the disclaiming life tenants] might receive the income thereof . . ."). Some testators do harbor as an independent motive for delaying a remainderman's inheritance the desire to ensure that she is mature enough to manage property prudently at the time of its receipt. That motive is, however, typically effectuated by way of either an age contingency or a provision creating a vested interest with possession delayed until a specified age. Empirical confirmation of all this would still remain helpful.

293. UDPIA, *supra* note 2, § 6 cmt., ex. 5(a). In the analogous context of a disclaimer of a remainder, the drafters of UDPIA describe a result that fails to treat the remainderman's children equally as an "anomaly." *Id.* § 6 cmt., ex. 3. *See also infra* note 313.

294. *E.g.*, *Estate of Parsons*, 163 Cal. Rptr. 70, 74 (Ct. App. 1980) (not allowing a disclaimer by an interested witness to the benefactor's will to reinstate the purged bequest of another interested witness under the supernumerary rule); *cf.* *Succession of Mitchell*, 524 So. 2d 150, 152 (La. Ct. App. 1988) (dicta that disclaimer by an interested witness might serve as an appropriate means to give effect to an otherwise improperly executed will). Most courts have also construed disclaimer statutes to limit the effect of a disclaimer by an heir to redistribution of that heir's share, rather than to a redistribution of the entire intestate estate (including other shares) on the assumption that the disclaiming heir predeceased the decedent. *In re Estate of Fienga*, 347 N.Y.S.2d 150, 155-57 (Sur. Ct. 1973); *In re Estate of McCutcheon*, 699 A.2d 746, 750 (Pa. Super. Ct. 1997) (dicta); *Welder v. Hitchcock*, 617 S.W.2d 294, 298-99 (Tex. App. 1981); *but see Estate of Bryant v. Bryant*, 196 Cal. Rptr. 856, 862-63 (Ct. App. 1983).

295. Similarly, some courts have barred a disclaimer that would operate to improve the disclaimant's position without collusion. If, by disclaiming a bequest subject to testamentary restrictions, the beneficiary would gain the same property without restrictions as the benefactor's residuary legatee or heir, some courts have held the disclaimer fraudulent, despite the general rule, *e.g.*, *Levin v. Dep't of Hous. Pres. & Dev.*, 529 N.Y.S.2d 973, 974 (Sup. Ct. 1988), *modified*, 543 N.Y.S.2d 897 (App. Div. 1989), that the motive for a disclaimer is irrelevant. *Estate of Nicely*, 44 Cal Rptr. 804, 810 (Ct. App. 1965) ("That is not a renunciation; it is only an evasion of the trust's restrictions."); *see also In re Estate of Aylsworth*, 219 N.E.2d 779, 783 (Ill. App. Ct. 1966) (where collusion was involved); *but see Luques v. Dresden*, 77 Me. 186, 192

which is reflected in a number of its provisions.²⁹⁶ In respect of disclaimers of preceding interests, however, the Act incongruously opens the door to manipulation.

Consider the following bequest: “to **A** for life, and then to **B** if **B** survives **A**, otherwise to **C**.” Here, **A**’s life estate is followed by alternative contingent remainders. Under UDPIA, once again, if **A** disclaims, the future interest “takes effect as if the disclaimant had died . . . immediately before” the benefactor,²⁹⁷ in which case **B**’s remainder becomes vested and **C**’s is extinguished. Accordingly, **A** stands in a position to dictate the outcome of the contingency. In quiet collusion with **B** (who might be old or ill and unlikely actually to outlive **A**), **A** can ensure **B**’s inheritance by disclaiming, thereby effecting **A**’s immediate constructive death.²⁹⁸ Indeed, even without collusion, **A**’s opportunities for self-aggrandizement are magnified under UDPIA, which sets no time limit for a disclaimer.²⁹⁹ So long as **A** refuses to accept payments under the life estate³⁰⁰ and insists that the personal representative accumulate the income that would otherwise be paid to **A**, pending a decision to accept or reject the life estate, **A** can sit back and await events, deciding whether a distribution-altering disclaimer is or is not in **A**’s interest down the road. Suppose, for example, in the course of things **B** does predecease **A** and happens to name **A** (or a close relative) as residuary legatee under **B**’s will. By dis-

(1885) (holding the disclaimer effective); *Palmer v. White*, 784 P.2d 449, 451 (Or. Ct. App. 1989) (same).

296. UDPIA, *supra* note 2, § 6(b)(3)(A), (b)(4) & cmt., exs. 2(b), 5(b). As the drafters of the Uniform Probate Code put the matter, “[t]he desired effect . . . is to prevent [the disclaiming beneficiary] from affecting the basic division of . . . [the] estate by this maneuver.” UNIF. PROBATE CODE § 2-801 cmt. (amended 1997). Likewise, UDPIA “[p]revent[s] the use of a disclaimer to alter the shares of an intestate estate or of a multigenerational gift by limiting the effect of the disclaimer to the disclaimed interest.” LaPiana, *supra* note 11, at 59-60. On the other hand, UDPIA neglects to address the question of whether a beneficiary—or her fiduciary—of a bequest or trust subject to restrictions can disclaim where she will thereby gain the same property outright. *See supra* note 295. UDPIA grants beneficiaries and fiduciaries the right to disclaim restricted bequests and trusts without any stated qualification. UDPIA, *supra* note 2, § 5(a) & (b). Could such a qualification found in the common law be read into UDPIA via its provision receiving common law bars, *id.* § 13 (e); *see also id.* § 4(a), or does its language preempt the common law on this point? The matter is ambiguous and invites litigation.

297. UDPIA, *supra* note 2, § 6(b)(4).

298. Although disclaimers executed in the presence of collusion between the disclaimant and the alternative beneficiary are fraudulent per se, Hirsch, *supra* note 9, at 594, 624-26, collusion is difficult in practice to prove. *See Drye v. United States*, 152 F.3d 892, 900 (8th Cir. 1998) (observing simply that the alternative beneficiary’s decision to create a trust for the disclaimant funded with the disclaimed property “gives us considerable pause”); *Estate of Monroe v. Comm’r*, 124 F.3d 699, 710 (5th Cir. 1997) (“[T]he question . . . is whether the decision to disclaim was part of [a] mutually-bargained-for consideration or a mere unenforceable hope of future benefit [for the disclaimant] . . . that . . . springs from family ties”); *Davis v. Davis*, 494 So. 2d 393, 394-99 (Ala. 1986) (disclaimants themselves were unable to prove collusion).

299. *See supra* notes 72-73 and accompanying text.

300. Were **A** to accept a payment, **A** would forfeit her right to disclaim. UDPIA, *supra* note 2, § 13(b)(1).

claiming, **A** can now ensure that (in spite of reality) **B** is deemed constructively to have survived **A**, with the result that **B**'s estate takes the remainder after all, which in turn permits **A** (or a close relative) to inherit the accelerated remainder from **B**! No provision of UDPIA functions to avert this outcome.³⁰¹

Similar strategic opportunities exist in connection with a remainder to a class that is subject to open. By disclaiming under UDPIA, the life tenant can close the class at will. Thus, if the benefactor bequeaths "to **A** for life, remainder to the children of **A** and **B**," and, let us say, at the benefactor's death **A** already has children but **B** as yet does not, under UDPIA **A** can disclaim the life estate and thereby ensure that the remainder goes only to her own offspring—presumably not what the typical benefactor would have intended had the possibility of a disclaimer been anticipated.³⁰² Barring a case-by-case exploration of intent, which would inject damaging uncertainty into the process of determining the distributive effect of a disclaimer, a default rule rendering disclaimers inoperative to resolve contingencies appears preferable.³⁰³

301. UDPIA provides as the one exception to the doctrine of acceleration that a remainder "held by the disclaimant is not accelerated in possession or enjoyment." UDPIA, *supra* note 2, § 6(4). Here, however, the remainder is "held" by **B**, not by **A**. And even if we could argue that **A** holds the remainder through **B**'s estate, the only consequence of this provision is to delay possession or enjoyment, not to delay the resolution of contingencies. Plainly, this scenario was not what the drafters contemplated as the application of this provision. *See id.* § 6 cmt., ex. 5(b). And if **B**'s residuary legatee was not **A** herself but rather a close relative of **A**, no court could possibly stretch this provision to apply to the instant scenario. (I assume here and in the text that the remainder flows through the residue of **B**'s estate, although it could just as easily be the subject of a specific bequest under **B**'s will.) The possibility remains, however, that a court would find a disclaimer in these circumstances to be void as an extension of the common law principle, enunciated in some (but not all) cases, that a disclaimer executed to improve the disclaimant's position is fraudulent, *see supra* note 295, and would then read that principle into UDPIA via either its provision receiving the common law into its interstices or its provision importing all common law bars on disclaimer. *Id.* §§ 4(a), 13(3).

302. For a case nonetheless reaching this result on these facts under a disclaimer statute, *see Pate v. Ford*, 376 S.E.2d 775, 776-77 (S.C. 1989); *see also Commerce Trust Co. v. Fast*, 396 S.W.2d 683, 686, 688-80 (Mo. 1965) (statutory disclaimer resulted in acceleration that extinguished contingent remainders); *In re Thomson*, 642 N.Y.S.2d 32, 32-33 (App. Div. 1996) (same); *In re Estate of Gilbert*, 592 N.Y.S.2d 224, 227-28 (Sur. Ct. 1992) (same); *but cf. Linkous v. Candler*, 508 S.E.2d 657, 658-59 (Ga. 1998) (declining to accelerate a remainder via a statutory disclaimer where the effect was to resolve contingencies, on the ground that to do so would violate the testator's implicit intent); *Wetherbee v. First State Bank & Trust Co.*, 466 S.E.2d 835, 836-37 (Ga. 1996) (same); *Stewart v. Johnson*, 362 S.E.2d 849, 850-51 (N.C. Ct. App. 1987) (same); *In re Estate of Vainio*, 583 N.Y.S.2d 896, 898-900 (Sur. Ct. 1992) (citing also the need to "protect the interests of people who could be damaged by a renunciation over which they had no control," an apparent reference to manipulation), *modified*, 595 N.Y.S.2d 567, 568-69 (App. Div. 1993) (finding on appeal that acceleration and immediate resolution of the contingency under the facts of the case "accurately reflects decedent's intent").

303. Under such a rule, a disclaimed life estate could either be returned to the benefactor's estate, or sequestered for the benefit of the remaindermen awaiting resolution of the contingency, or distributed immediately to remaindermen with vested interests pending potential divestment by occurrence of the contingency. *See, e.g., Blacque v. Kalman*, 30 N.W.2d 599, 606 (Minn. 1948).

Of course, this same difficulty existed under the prior Uniform Acts that UDPIA's drafters decided to parrot. Those prior Acts had come under criticism, however.³⁰⁴ The drafters either chose to ignore the criticism or were oblivious to the issue. The comment accompanying this provision of UDPIA has not a word to say about the underlying public policies, and it offers no justification whatsoever for the decision to leave bad enough alone.³⁰⁵

2. *Succeeding Interests*

Now put the alternative case: "to **A** for life, remainder to **B**," and **B** disclaims the remainder. How does **B**'s interest devolve?

Under prior Uniform Acts and the common law, the same analysis applied: **B**'s interest went to whomever would have received it if **B** had predeceased the benefactor. Hence, **B**'s interest went either to the benefactor's residuary legatees or heirs by virtue of lapse, or to **B**'s descendants (if any) assuming they were entitled to take under the local antilapse statute.³⁰⁶ UDPIA, however, dictates a different result: "the disclaimed interest passes as if the disclaimant had died immediately before the time of distribution," in this case at the life tenant's death.³⁰⁷

Now, who takes in that event under local law? In the vast majority of states where the common law of future interests remains in

304. Patricia J. Roberts, *The Acceleration of Remainders: Manipulating the Identity of the Remaindermen*, 42 S.C. L. REV. 295, 298-99, 295-311, 318-22 (1991). But compare Professor Ellsworth, who defended the rule found in prior Uniform Acts (and now UDPIA) as consistent with the rule of convenience. "To do otherwise would create endless waiting, complexity and confusion." Ellsworth, *supra* note 68, at 729-30. No more waiting is required, however, than if the life tenant had not disclaimed. What is more, the rule of convenience typically has the convenient effect of allowing immediate distribution of a class gift to the existing members of a class that would *not*, in practice, further grow in membership because the preceding life estate typically terminates only after the passage of some time. What the rule of convenience usefully serves to do is to counteract the absolute presumption of fertility that would otherwise needlessly delay closing the class! See the illuminating discussion in Edward C. Halbach, Jr., *Issues About Issue: Some Recurrent Class Gift Problems*, 48 MO. L. REV. 333, 358-61 (1983); *cf.* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS ch. 26, introductory note, at 131-32 (1988). Here, however, the disclaimer will cause a premature resolution of contingencies and is subject to manipulation that could not otherwise occur under the rule of convenience.

305. "It is immaterial under the statute that the actual situation at the [life tenant's] death might be different with different [persons] entitled to the remainder" than if the life tenant disclaims. UDPIA, *supra* note 2, § 6 cmt., ex. 5(a). *Why should it be immaterial?* one aches to reply to the lifeless comment. Ultimately, the issue of acceleration can only be resolved definitively by recourse to empirical evidence of testamentary intent, which, as usual, is absent from the commentary of UDPIA.

306. UNIF. PROBATE CODE § 2-801(d)(1) (amended 1997); *cf.* UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 4(a), 8A U.L.A. 149, 155 (1978); UNIF. DISCLAIMER OF TRANSFERS BY WILL, INTESTACY OR APPOINTMENT ACT § 3 & cmt., 8A U.L.A. 161, 172 (1978). For a common law case, see *Dare v. New Brunswick Trust Co.*, 194 A. 61, 63 (N.J. Ch. 1937). Whether the antilapse statute would apply to a disclaimer under the common law is unclear. See *supra* note 288.

307. UDPIA, *supra* note 2, § 6(b)(3)(A). On the purpose of this change, see *infra* note 313.

force, the answer is crystal clear. The remainder in this case is vested, not contingent on surviving the life tenant, and accordingly it is transmissible so long as **B** survived the benefactor, as UDPIA would have us presume. If **B** were to survive the benefactor but predecease the life tenant, **B**'s remainder would go either to any devisee to whom **B** specifically bequeathed it, or to **B**'s residuary legatee in the absence of a specific bequest, or to **B**'s heirs in the absence of a will.³⁰⁸ Remarkably, we cannot escape the conclusion that if **B** instead disclaims the remainder under UDPIA and subsequently survives **A**, **B**'s remainder goes in the absence of a will to whomever comprise **B**'s heirs-apparent at **A**'s death, but if **B** has executed a will, the remainder goes instead to whomever would be entitled to claim it under **B**'s will—the “devisee-apparent,” so to say.³⁰⁹ By executing a will the remainderman can functionally assign the disclaimed interest, yet it still comprises a disclaimer under UDPIA.³¹⁰

308. *E.g.*, *Goldenberg v. Golden*, 769 So. 2d 1144, 1145-46 (Fla. Dist. Ct. App. 2000); *In re Estate of Zucker*, 761 A.2d 148, 151-53 (Pa. 2000); *see also* SIMES & SMITH, *supra* note 291, § 585; Jesse Dukeminier, *The Uniform Probate Code Upends the Law of Remainders*, 94 MICH. L. REV. 148, 148 (1995). Under the Uniform Probate Code, on the other hand, a remainder is construed to be contingent on surviving the life tenant. UNIF. PROBATE CODE § 707(b) (amended 1997). But this provision of the Code has been sparsely adopted and will have an impact on the application of UDPIA only in a handful of states.

309. Similarly, if **B** disclaims and subsequently predeceases **A**, the remainder goes either to the devisee named under **B**'s will or, in the absence of a will, to **B**'s heirs determined as of **A**'s death (not as of **B**'s death). *See* UDPIA, *supra* note 2, § 6(b)(3)(A) & cmt., ex. 4(a). On the operation of UDPIA in those few jurisdictions that have adopted the Uniform Probate Code provision construing all remainders to be contingent on surviving the life tenant, *see id.*

310. This same result obtains in connection with the disclaimer of certain types of will substitutes under UDPIA. In most states, a revocable inter vivos “living trust” is technically treated as a life estate in the settlor followed by a vested remainder (subject to divestment by revocation) in the beneficiary; if the beneficiary predeceases the settlor/life tenant—or, by analogy, disclaims and thereby constructively predeceases the settlor/life tenant—the interest does not lapse, but rather is transmissible by the beneficiary. *E.g.*, *In re Estate of Capocy*, 430 N.E.2d 1131, 1134 (Ill. App. Ct. 1981); *Hinds v. McNair*, 413 N.E.2d 586, 596-99 (Ind. Ct. App. 1980). Hence, in such a state under UDPIA, a disclaimed interest in a living trust goes to the disclaimant's heirs-apparent or devisees-apparent. *But cf. infra* note 314 and accompanying text. On the other hand, in most states Totten trusts and revocable life insurance trusts include an implicit survival requirement and so are not transmissible if the beneficiary predeceases the settlor or the insured. *E.g.*, *Estate of Capocy*, 430 N.E.2d at 1133 (dicta); GEORGE J. COUCH, *ENCYCLOPEDIA OF INSURANCE LAW* § 27:132, at 815-16 (Mark S. Rhodes ed., rev. 2d ed., 1984 & Supp. 1996); Hirsch, *Legal Contraptions*, *supra* note 10, at 546 n.67. Hence, in such a state under UDPIA, a disclaimed interest in a Totten trust or life insurance trust devolves to the settlor's or insured's residuary legatee or heirs. By comparison, under prior Uniform Acts, disclaimed interests under all will substitutes lapse (although under the Uniform Probate Code, the descendants of the disclaimant can take under its unusual antilapse provisions for future interests and will substitutes). UNIF. DISCLAIMER OF PROP. INTERESTS ACT § 4(b), 8A U.L.A. 149, 156 (1978); UNIF. DISCLAIMER OF TRANSFERS UNDER NONTESTAMENTARY INSTRUMENTS ACT § 3, 8A U.L.A. 179, 185 (1978); *cf.* UNIF. PROBATE CODE §§ 2-706, 2-707, 2-801(d)(2) (amended 1997); *see also* Edward C. Halbach, Jr., & Lawrence W. Waggoner, *The UPC's New Survivorship and Antilapse Provisions*, 55 ALB. L. REV. 1091, 1125-26, 1139-40 (1992); McCouch, *supra* note 51, at 1168-71; Medlin, *supra* note 3, at 1268-69.

As a matter of theory, that is a reasonable—if unprecedented—outcome, as I argued earlier.³¹¹ Unfortunately, however, it is not an outcome compatible with tax-qualifying a disclaimer under the Internal Revenue Code.³¹² Nor is it an outcome that the drafters of UDPIA anticipate.³¹³ As the accompanying comment indicates, the drafters assume that the disclaimed remainder “should pass to [the remainderman’s] heirs determined as of [the life tenant’s] death”—that is, (only?) to the heirs-apparent.³¹⁴ On what analytical basis do the drafters draw that conclusion? The comment fails to elaborate on the point.

So, we are confronted with a contradiction between the text and the comment. How should a court resolve that contradiction? On the one hand, many courts have looked to the comments appended to Uniform Acts to resolve textual ambiguities.³¹⁵ Nevertheless, as a technical matter, an adopting state enacts only the text, not the

311. See *supra* note 272 and accompanying text. Certainly, it would be unprecedented to allow an insolvent beneficiary to assign an inheritance, because the assignment would constitute a transfer under fraudulent conveyance law in every jurisdiction. Hirsch, *supra* note 9, at 607. Yet, any disclaimer made under UDPIA—even one that is functionally assignable—is by definition “not a transfer, assignment, or release,” UDPIA, *supra* note 2, § 5(f), and so will be avoidable only if local law otherwise forbids insolvent disclaimer. See *supra* Part V.A.

312. At least not if the remainderman produces a will that would dispose of the remainder. See *supra* note 289 and accompanying text. But even if the disclaimant does not do so, it remains possible that the tax Commissioner will challenge all disclaimers of remainders on the theory that the disclaimant directs the devolution of the remainder by *not* executing a will! Once the formal distinction between a disclaimer and an assignment blurs within state law, and a disclaimer becomes functionally assignable, the substantive distinction between an act of control and an omission of control within the parameters of a disclaimer becomes ever more elusive.

313. By dialing forward the time of the disclaimant’s constructive death from the death of the benefactor to the death of the life tenant, the drafters of UDPIA had an entirely different concern in mind. The drafters sought to ensure that the disclaimer of a *contingent* remainder would devolve according to circumstances as they existed at the death of the life tenant, rather than circumstances as they had existed at the benefactor’s death. See UDPIA, *supra* note 2, § 6 cmt., ex. 3; see also Lawrence Newman & Albert Kalter, *Disclaimers of Future Interests: Continuing Problems and Suggested Solutions*, 49 NOTRE DAME LAW. 827, 842 (1974) (observing that issue). The drafters simply failed to pay adequate regard to the ramifications of the provision in connection with vested remainders. But, in addition to that oversight, doesn’t the policy concern expressed by the drafters at this juncture conflict with their approach to the acceleration of remainders? Cf. *supra* note 293 and accompanying text. Compare UDPIA, *supra* note 2, § 6 cmt., ex. 3, with *id.* § 6 cmt., ex. 5(a).

314. See UDPIA, *supra* note 2, § 6 cmt., ex. 4(a) (hypothesizing a revocable trust, which technically creates a future interest in the beneficiary).

315. Courts on a number of occasions have explored the comments accompanying Uniform Acts to assist in construing the local law of disclaimers. *Mapes v. United States*, 15 F.3d 138, 141 (9th Cir. 1994); *Estate of Bryant*, 196 Cal. Rptr. 856, 861 (Ct. App. 1983); *Brown v. Momar, Inc.*, 411 S.E.2d 718, 721 (Ga. Ct. App. 1991); *In re Estate of Opatz*, 554 N.W.2d 813, 815-16 (N.D. 1996); *In re Estate of Fleenor*, 17 P.3d 520, 524 (Or. Ct. App. 2000); *In re Estate of Balson*, 515 N.W.2d 474, 477-78 (Wis. Ct. App. 1994).

comments,³¹⁶ and at any rate orthodox rules of construction forbid a court to disturb plain text that admits of another interpretation only in light of the comment.³¹⁷ Although a comment may tell us what the drafters meant to say, it cannot change what they did say. The language at issue here had already gone through manifold changes in the various drafts of UDPIA, and it was still undergoing amendment at the eleventh hour.³¹⁸

Even if the Commissioners had drafted this provision more carefully to conform with the comment, we face a further problem. Once more, the statutory rule under UDPIA differs from the common law rule received into the Act by its safe-harbor provision³¹⁹—thus again giving the disclaimant a choice of outcomes, either by disclaiming under the Act or at common law, and thereby again raising the specter that, whichever choice the remainderman makes, her disclaimer will be denied tax-qualification by a different commissioner.³²⁰

CONCLUSION: BEYOND UDPIA

UDPIA may yet come to merit enactment as a product “vastly better than most existing disclaimer legislation,” as one of its promoters proclaims,³²¹ but not before it has undergone repairs. Most fundamentally, the Act’s over-reception of common law threatens to sink the entire legal vessel; unless the relevant provisions are amended, we cannot even rescue the small goods.³²² But UDPIA is riddled with other glitches, ambiguities, and misjudgments too numerous to recapitulate, all of which require attention before the Act can safely be passed into law by state legislatures.

Although the thrust of our analysis has been technical criticism, designed to assist legislators and Commissioners in patching up

316. *Miller v. Preitz*, 221 A.2d 320, 325 (Pa. 1966) (making the point to justify judicial disregard of a comment); Julian B. McDonnell, *Purposive Interpretation of the Uniform Commercial Code: Some Implications for Jurisprudence*, 126 U. PA. L. REV. 795, 806 n.52 (1978).

317. “[I]f the statutory provisions adopted by the legislature contradict or fail to support the Comments, the Comments must be rejected.” Robert H. Skilton, *Some Comments on the Comments to the Uniform Commercial Code*, 1966 WIS. L. REV. 597, 604, 614, 628 (quoting Professor Honnald). *E.g.*, *Burk v. Emmick*, 637 F.2d 1172, 1175 n.5 (8th Cir. 1980) (holding that a comment cannot “impose restrictions unwarranted by the statutory language”); *see also* U.C.C. § 1-102(3)(f) (1952) (amended 1957) (“The Comments . . . may be consulted in the construction and application of this Act but if text and comment conflict, text controls.”).

318. Compare the last two drafts preceding the final draft. UNIF. DISCLAIMER OF PROP. INTERESTS ACT §§ 3-4 (Discussion Draft 1999); UNIF. DISCLAIMER OF PROP. INTERESTS ACT §§ 3-4 (Discussion Draft 1998).

319. UDPIA, *supra* note 2, § 4(b); *see supra* note 22-25 and accompanying text. The same difficulty may arise in connection with UDPIA’s rule governing the devolution of a disclaimed life estate or other preceding interest. *See supra* note 291.

320. *See supra* note 289.

321. Wellman, *supra* note 263, at 7.

322. *See supra* notes 20-32, 96-104, 114-15, 128 item #2, 196-97, 260-61, 287-90, 296, 319-20 and accompanying text.

UDPIA, an observer always has more to learn by adjusting his field of vision. Accordingly, before closing the book on this Act, let us step back from the trees and have at least a moment's regard of the forest. Are there any larger lessons to glean from the story of UDPIA?

Surely, the principal disclosure has been a point I postulated at the start: to wit, the simple capacity of drafters of Uniform Acts to err. The observation would seem a truism, hardly worth mentioning, were it not for the claims made by Commissioners who market their products. Uniform Acts, we are assured, benefit from "multiple levels of expertise," bestowed through "a deliberative process that is measured and lengthy" and that ultimately attains a "depth of review" that the "the state enacting process seldom achieves" by way of comparison.³²³

The hard fact remains that, whatever their gifts and exertions, Commissioners are busy persons who must budget their time and meet deadlines—just like other lawmakers. Although some provisions of Uniform Acts are the fruits of extended, expert effort, others—especially peripheral provisions—may receive cursory attention. Amendments are added at the last minute, sometimes with insufficient forethought, just as can happen in the legislative process.³²⁴ UDPIA suffers from its share of flaws and slapdash revisions, as we have seen—and UDPIA is hardly unique among Uniform Acts in this respect. But Commissioners could never have been expected to lavish equally painstaking attention on every last detail of their projects. That at least one late-crafted (and ill-crafted) provision of the Uniform Probate Code includes language copied out of a draft proffered to the Commissioners by a layperson is indication enough that their drafting protocols can go awry.³²⁵

It is therefore incumbent upon state legislators to take stock of UDPIA, and of any other proposed Uniform Act, as I have endeavored to do here—which is to say, critically. That is not the path of least resistance, however. Lawmakers—like decision makers generally—have a natural proclivity to free-ride on the intellectual travails

323. John H. Langbein & Lawrence W. Waggoner, *Reforming the Law of Gratuitous Transfers: The New Uniform Probate Code*, 55 ALB. L. REV. 871, 877-79 (1992).

324. Even the Commissioners' plenary debates suffer from deadline pressures. Plenary discussion of the revised Uniform Probate Code was called to an abrupt halt: "We have got about five more minutes before we are going to quit. A lot of people come to this parade, it's a big parade, so we don't want to be late." PROCEEDINGS OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, UNIFORM PROBATE CODE ARTICLE II, PROCEEDINGS OF THE COMMITTEE OF THE WHOLE 132 (Fifth Session, July 15, 1999) [hereinafter Plenary Reading, Uniform Probate Code].

325. Hirsch, *Trusts for Purposes*, *supra* note 10, at 952. For an extended critical review of the section in question, which is concerned with the problem of trusts for noncharitable purposes, and which fairly bristles with troublesome glitches, see *id. passim*.

of others.³²⁶ The easiest course for state legislators is always to enact a Uniform Act as it stands, on the assumption that its drafters have performed the heavy lifting for them.³²⁷ Most unfortunately, Commissioners of late have done their utmost to nourish that assumption. “I hope that . . . we can train the legislatures to realize that they do not have the time or the competence to interfere with ‘lawyers’ law,’ and they should be willing to accept almost automatically . . . original statutes . . . put forth by highly qualified select drafting groups,” one of them has lectured.³²⁸ With only a trifle less bravado, the drafters of the revised Uniform Probate Code cautioned their legislative audience that it “would be wise to indulge in a moderate presumption” of their product’s superiority,³²⁹ and they were quick to dismiss local tinkering with a gibe:

[I]t is quite likely that someone’s bright idea is not as bright as it seems—that there are reasons why the uniform law draft did not go down the different path that occurs to someone who examines the final product afresh. Our experience is that most variations that are introduced into uniform laws at the local level are proposals that were considered and rejected for good cause in the uniform law drafting process.³³⁰

Such rhetoric could succeed in awing legislators who contemplate UDPIA into a dangerous, thoughtless conformity, precisely when they need to be tugged in the direction of active scrutiny.³³¹

In fairness, the position taken by the last-quoted Commissioners included a second component, rendering their overall posture more modest. They were prepared to concede that their product might suffer from imperfections,³³² but they preferred that local critics funnel proposed corrections to and through the Uniform Law Commission, which could then revise the prototypical Code itself: “In asking that local variations be resisted, we are speaking to a process value. We

326. The phenomenon is known within cognitive psychology as an information cascade. For a recent discussion (citing to earlier studies), see Steffen Huck & Jörg Oechssler, *Information Cascades in the Laboratory: Do They Occur for the Right Reasons?*, 21 J. ECON. PSYCH. 661 (2000).

327. I am not the first to notice this tendency. Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons from the Uniform Commercial Code*, 78 MINN. L. REV. 83, 139-41 (1993).

328. Homer Kripke, *Reflections of a Drafter*, 43 OHIO ST. L.J. 577, 584 (1982).

329. Langbein & Waggoner, *supra* note 323, at 879.

330. *Id.* at 878.

331. Legislators are already falling into this trap: In the four jurisdictions that have thus far enacted UDPIA, the Act was adopted essentially verbatim. *See supra* note 4; *see also supra* note 246.

332. “We do not mean to say that proposed uniform laws are always perfect. There is indeed the possibility that despite all the safeguards and all the deliberations, a uniform act overlooks some manifestly superior alternative,” although “the possibility that some fundamental flaw infects a uniform act is in any particular case not very likely.” Langbein & Waggoner, *supra* note 323, at 878-79.

believe that the careful, open deliberative process of the uniform law revision cycle is a better way to deal with . . . perceived defects . . . than is local variation.”³³³ Modern cognitive theory argues for the opposite process value, however: Perversely, the original drafters have a psychological stake in their work product that can cause them to lose objectivity; evidence suggests that when persons are placed in charge of correcting themselves, they tend to dig in their heels, irrationally resisting a reversal of prior decisions.³³⁴ The Uniform Probate Code’s recent history may well reflect this cognitive tropism.³³⁵ Rightly or wrongly, the drafters of the revised Code have stoutly defended, rather than amended, their product in the face of criticism.³³⁶ Whether the same fate awaits UDPIA remains to be seen.

The Commissioners’ case would be stronger, of course, if the aspiration of uniformity stood at the forefront of their efforts. But legal uniformity is not today a vital concern. That is particularly true in an area like inheritance law—including disclaimer law—where the intrinsic merits of interjurisdictional consistency are relatively scant.³³⁷ And even were those merits more considerable, the Commissioners’ uniformity ideal has long since proven a chimera; with the notable exception of commercial law, nothing approaching universal adoption has ever been achieved.³³⁸ Surely, uniformity can no longer stand as a sacred altar on which to sacrifice doctrinal quality. Indeed, observers have detected a gradual shift in emphasis among the Commissioners away from the uniformity ideal and toward the more pragmatic ob-

333. *Id.* at 879.

334. This phenomenon is known theoretically as “escalation of commitment,” an aspect of the sunk-cost fallacy. “People want to believe that they are good decision makers, so they persist in believing that an initial decision was a good one, even when it appears not to be.” JONATHAN BARON, THINKING AND DECIDING 468-70 (3d ed. 2000) (citing to studies).

335. The drafters themselves confessed their psychological commitment: “Because we were so deeply involved in the drafting and deliberative process that led to the new UPC [Uniform Probate Code] . . . we are not the best candidates to pass judgment on our own handiwork.” Langbein & Waggoner, *supra* note 323, at 890.

336. When judgments on individual provisions of the Code were negative, reaction was swift. *E.g.*, Dukeminier, *supra* note 308. This article elicited a rebuttal. Lawrence W. Waggoner, *The Uniform Probate Code Extends Antilapse-Type Protection to Poorly Drafted Trusts*, 94 MICH. L. REV. 2309 (1996). Although the revised Uniform Probate Code has undergone a number of technical amendments since it was first promulgated in 1990, I am unable to identify a single revision prompted by legislative variations or academic criticism. Nonetheless, the drafters promised that “scholars and practitioners will find a warm welcome when they bring needed repairs to the attention of the [Commissioners].” Langbein & Waggoner, *supra* note 323, at 890.

337. Hirsch, *Trusts for Purposes*, *supra* note 10, at 955-57. But compare the drafters of the revised Uniform Probate Code, who aver with a straight face that the need for uniformity in the area of inheritance law is comparable to the need for uniformity within commercial law. Langbein & Waggoner, *supra* note 323, at 878.

338. Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislation*, 143 U. PA. L. REV. 595, 602 (1995).

ject of law *reform*³³⁹—a realm of pursuit within which legislators have no reason to defer to anybody, or any body.

Today's Commissioners pressing for legislative deference could learn a thing or two from their predecessors, whose approach to model lawmaking was rather more relaxed and open-minded. The Reporter for the original Uniform Probate Code encouraged state legislatures to introduce local variations, and the Code eventually incorporated some of them.³⁴⁰ Similarly, the Uniform Commercial Code gained widespread enactment only after a state law revision commission prompted its overhaul.³⁴¹ The Commissioners need all the "bright ideas" they can get, and state legislators had better take the lead in implementing them.³⁴² UDPIA too will profit by these initiatives, assuming legislators are emboldened to try and Commissioners thereafter are prepared to listen. At any rate, the myth of Uniform Law superiority must be dispelled once and for all.

Considered as a whole, UPDIA also highlights a number of systemic flaws in the Uniform Law drafting process that demand attention.³⁴³ Like other areas of inheritance law, disclaimer law is primarily composed of default rules of construction.³⁴⁴ If those default rules are truly to reflect the will of the typical benefactor, they have to be established on the basis of empirical investigation.³⁴⁵ Unfortunately, the Uniform Law Commission has failed thus far to provide resources to its drafting committees to conduct such investigations. That is a signal deficiency which seriously impairs the quality of its products—and palpably so in the case of UDPIA.³⁴⁶

339. *E.g.*, William E. Hogan, *The NCCUSL: With a Name Like That It Must Be Useful*, CORNELL L.F., June 1979, at 2, 4.

340. UNIF. PROBATE CODE, at ix (amended 1997) (commentary on 1975 Technical Amendments); Lawrence H. Averill, Jr., *An Eclectic History and Analysis of the 1990 Uniform Probate Code*, 55 ALB. L. REV. 891, 898 (1992); Richard V. Wellman, *A Reaction to the Chicago Commentary*, 1970 U. ILL. L.F. 536, 542.

341. Larry T. Garvin, *The Changed (and Changing?) Uniform Commercial Code*, 26 FLA. ST. U. L. REV. 285, 357 (1999). On a number of occasions "state law revision commissions have figured prominently in reshaping uniform statutes." *Id.*

342. For an instance in which the state legislature of Colorado made distinct improvements on a section of the revised Uniform Probate Code (which was never amended in response), see Hirsch, *Trusts for Purposes*, *supra* note 10, at 924 n.59, 927 n.69, 950 n.165.

343. For some additional recent observations along these lines by a perspicacious observer, see Garvin, *supra* note 341, at 351-58. For some prior related reflections of mine, see Hirsch, *Trusts for Purposes*, *supra* note 10, at 951-57.

344. For an observation of the predominance of default rules within inheritance law generally, see Halbach, *supra* note 7, at 1921.

345. On the theoretical significance of empirical evidence in connection with the setting of default rules, see *supra* note 183 and accompanying text.

346. See *supra* notes 185, 275, 292, 305 and accompanying text. I am not the first to call for empirical investigation within the process of drafting Uniform Acts. Averill, *supra* note 340, at 912-18; see also Dukeminier, *supra* note 308, at 149-50. Nevertheless, seemingly determined to build themselves into a glass house, the drafters of the revised Uniform Probate Code char-

This difficulty is, however, one that the Reporter for the revised Uniform Probate Code would prefer to downplay. While admitting the want of funding for empirical research, he insists that the drafters were able to make up for it by including among their number “nationally known estate planners of considerable insight and experience . . . [whose] cumulative experience suggests that they have a pretty good idea of what most clients want.”³⁴⁷ If only it were that simple! As any statistician knows, informal polling of this sort is notoriously prone to error—not least, in this instance, from the exposure of highly successful attorneys to clients who form an unrepresentative sample of the population as a whole³⁴⁸—and a number of cognitive biases will also tend to corrupt such an inquiry.³⁴⁹ The melancholy fact is that, deprived of an empirical foundation, the default rules found within the Uniform Probate Code float precariously on a stream of intelligent guesses—buoyed on occasion by specious argumentation.³⁵⁰ The drafters of UDPIA now find themselves in the

acterize local *deviations* from their product as “[a]ll too often . . . the result of less well informed persons acting on scant investigation.” Langbein & Waggoner, *supra* note 323, at 878-79.

347. Waggoner, *supra* note 336, at 2337-38. “[R]equiring a systematic empirical study before any reform can be put into place would paralyze the law-reform process.” *Id.* at 2337. At the same time, the drafters of the Uniform Probate Code made good use of those published empirical studies that, fortuitously, scholars had undertaken independently. See UNIF. PROBATE CODE §§ 2-102 cmt., 2-106 cmt., 2-302 cmt. (amended 1997).

348. See FLOYD J. FOWLER, SURVEY RESEARCH METHODS 12-13 (2d ed. 1993).

349. People tend to recall vivid experiences more easily than the mundane. Accordingly, they often overestimate the frequency of unusual events (say, estate planning clients who harbor atypical preferences) precisely because experience with those events—or clients—spring more easily to mind. This phenomenon is known theoretically as the availability heuristic. For a discussion, see SCOTT PLOUS, THE PSYCHOLOGY OF JUDGMENT AND DECISION MAKING 121-30 (1993). For the classic study, see Amos Tversky & Daniel Kahneman, *Availability: A Heuristic for Judging Frequency and Probability*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES 163 (Daniel Kahneman et al. eds., 1982). People also tend to extrapolate on the basis of limited experience. Thus, an estate planner who has encountered only a few clients having to deal with an unusual issue will tend to assume that their resolution of that issue is representative of clients generally, whereas a statistician would have less confidence in that conclusion and would insist on taking a larger sample. This phenomenon has been dubbed (playfully) the law of small numbers; it derives from the representativeness heuristic. PLOUS, *supra*, at 112-113. For the seminal discussion, see Amos Tversky & Daniel Kahneman, *Belief in the Law of Small Numbers*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra*, at 23. Finally, persons tend to ascribe to others their own attitudes—they “see their own behavioral choices and judgments as relatively common and appropriate . . . while viewing alternative responses as uncommon, deviant, and inappropriate,” a phenomenon known as the false consensus bias or egocentric attribution bias. Lee Ross & Craig A. Anderson, *Shortcomings in the Attribution Process: On the Origins and Maintenance of Erroneous Social Assessments*, in JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES, *supra*, at 129, 140. For a recent discussion, see Raymond S. Nickerson, *How We Know—and Sometimes Misjudge—What Others Know: Imputing One’s Own Knowledge to Others*, 125 PSYCHOL. BULL. 737 (1999).

350. See UNIF. PROBATE CODE § 2-509 cmt. (justifying a default rule on the ground that the testator “knows (or should know)” what the default rule is!). For a further discussion, see Hirsch, *Inheritance and Inconsistency*, *supra* note 10, at 1097 n.117. Other default rules are justified simply by unsubstantiated findings. *E.g.*, UNIF. PROBATE CODE § 2-109 cmt. (“Most inter-vivos transfers today are intended to be absolute gifts or are carefully integrated into a total estate plan.”).

same boat—through no fault of their own, to be sure. The problem stems from budget constraints, which need urgently to be addressed.³⁵¹

No less troubling is the Commissioners' penchant for *ipse dixit* commentary. Too many of the comments that accompany UDPIA fail to explicate policy rationales for the provisions they elaborate—a failure also evident in other Uniform Acts.³⁵² Of course, apart from the occasional terse preamble, statutory laws rarely stipulate their justifications; they are pure exercises in authority. But Uniform Acts are mere statutory *proposals*, and as such they call for philosophical (along with interpretive) commentary.³⁵³

The most obvious reason for giving reasons is that they provide state legislators with something tangible to think about. Legislators can then decide whether they agree with the Commissioners' philosophy and, if so, whether they are satisfied that it is best accomplished by the rule the Commissioners have put forward as its embodiment.³⁵⁴ If, as we observed the drafters of the revised Uniform Probate Code to assert, there probably were "reasons why the uniform law . . . did not go down the different path that occurs to" an imaginative state legislator,³⁵⁵ ought the Commissioners not disclose what those reasons were? Well, legislators who would raise such questions can "contact the relevant Uniform Law Commission personnel to learn the reasons why a drafting committee took the path that was ultimately chosen."³⁵⁶ Surely the comments can provide the information needed to assess the merits of Uniform Acts with far greater efficiency.

More subtly, giving reasons would serve to benefit the Commissioners themselves. Uniform lawmaking is an ongoing process, and subsequent Commissioners will need to weigh whether UDPIA has grown philosophically anachronistic to the point that it requires revision. Perhaps more significantly, insisting that Commissioners give

351. Were funding made available, it might also yield a fringe benefit: Had they been armed with empirical evidence, the drafters of UDPIA would have stood in a stronger position to overcome the innate conservatism of the National Conference of Commissioners when the drafters sought to implement radical reforms. See *supra* notes 275-76, 280-82 and accompanying text. The same would be true of future drafting committees.

352. See *supra* notes 125, 143, 185, 189, 305 and accompanying text. For an observation of the unevenness of the comments accompanying the Uniform Probate Code, see Averill, *supra* note 340, at 908-10.

353. For a discerning jurisprudential discussion, see Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633 (1995).

354. Down the road, a statement of the rationales underlying Uniform Acts that legislators choose to enact will also assist courts when they are called upon to interpret a Uniform Act's meaning.

355. Langbein & Waggoner, *supra* note 323, at 878. See *supra* text accompanying note 330.

356. *Id.* at 879.

reasons would instill in them a salutary discipline. Put simply, the more Commissioners have to say about what they think, the more they have to think about what they say. Like other cognitive chores, crafting rules is hard work, and lawmakers (like other mortals) are forever on the lookout for heuristic processes to simplify mental tasks. Reflexive resort to precedent is one example.³⁵⁷ Resort to intuition or whim, if tolerated, would be another. Alas, Commissioners are perfectly human in this respect. One can point to concrete examples of arbitrary rules found within Uniform Acts.³⁵⁸ Whether UDPIA includes rules that were arrived at without rationalization cannot be determined from the extant record³⁵⁹—although they are the ineluctable byproduct of a drafting protocol that fails, as of yet, to insist on comprehensive policy substantiation in the accompanying comments.³⁶⁰

Along with becoming less cryptic, the Commissioners' commentary also needs to be more candid, a difficulty again apparent in connection with UDPIA. Obviously, the whole point of law reform is to propose innovations.³⁶¹ Yet legislators typically hesitate to subject their law to rapid change.³⁶² Commissioners can breast that tide by pointing out the inadequacies of existing rules and the virtues of their proposed alternatives. In some instances, however, whether consciously or unconsciously, Commissioners seemingly prefer to encourage adoption of novel provisions by de-emphasizing their originality. UDPIA's commentary accompanying its radical revision of fiduciary disclaimer law, in particular, arouses criticism in this re-

357. See Hirsch, *Inheritance and Inconsistency*, *supra* note 10, at 1161 n.303 (citing to discussions).

358. The Reporter for the revised Uniform Probate Code, Professor Lawrence Waggoner, admitted in the plenary debate over the section covering trusts for noncharitable purposes that the provision included an arbitrary durational limitation: "We used 21 years for no particular reason, frankly." Plenary Reading, Uniform Probate Code, *supra* note 324, at 133-34. Needless to add, no such admission appears in the published comment, which fails to rationalize its durational limitation (although it was ultimately bracketed to indicate its tentativeness). See UNIF. PROBATE CODE § 2-907 & cmt. (amended 1997).

359. The provisions establishing the default rule for a power of fiduciary disclaimer and the rule for accelerating future interests are two plausible candidates. See *supra* notes 185, 304-05 and accompanying text.

360. The Uniform Law Commission Style Manual insists that drafters omit purpose clauses from the text of Uniform Acts, but it adds that in "[a] well drafted Act, . . . [c]omments and annotations supply this detail to aid in its passage and interpretation." NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS, PROCEDURAL AND DRAFTING MANUAL at 26 (1997) (rule 22 & cmt.) (unpublished document on file with author).

361. See *supra* note 284 and accompanying text.

362. Legal change implicates costs by virtue of the expenditures already made in reliance on the continuation of preexisting rules. These costs can create what is theoretically referred to as "path dependence." For discussions in connection with inheritance law, citing in turn to broader theoretical treatments, see Hirsch, *Legal Contraptions*, *supra* note 10, at 532-33; Hirsch, *Inheritance and Inconsistency*, *supra* note 10, at 1157-58 (also noting political constraints on rapid change).

gard.³⁶³ Legislators cannot rely on the commentary to identify all of UDPIA's novelties, although that information is certainly pertinent when they ponder the Act's enactment or amendment. But, once again, UDPIA's drafters are following an unfortunate example set by other recent Commissioners.³⁶⁴

Here as well, today's Commissioners might draw inspiration from their more distant forbears. For Grant Gilmore and the other authors of Article Nine of the Uniform Commercial Code, revolution was the object. And revolution was right: Article Nine comprised nothing less than a breathtaking exercise in legal simplification. Far from trying to soften that fact, the drafters reveled in it—and Article Nine's reception before state legislatures ultimately proved no worse for the Commissioners' boldness in the matter.³⁶⁵ Let the Commissioners make their case for change, and then let the chips fall where they may.

Finally, in the same vein—and, in UDPIA's case, on a forward looking note—Commissioners need to acknowledge more forthrightly the controversies stirred up by their proposals. Although the Uniform Probate Code's commentary (for example) includes frequent "Reference" or "Law Review and Journal Commentaries" citations attached to individual sections, these prove on examination to be selective. Sharply critical articles, even those focused exclusively on correcting perceived flaws in the Code, are nowhere to be found in its reference materials.³⁶⁶ If, as its drafters predicted, "[t]ime will reveal that the

363. See *supra* notes 126-27 and accompanying text. On the other hand, UDPIA's commentary does highlight its abandonment of a time limit on disclaiming as a break with the past. UDPIA, *supra* note 2, prefatory note.

364. For instance, arguably the most radical—and most welcome—provision of the revised Uniform Probate Code is its dispensing power, abandoning the law's longstanding, intent-defeating insistence on strict compliance with the formalities of will execution. UNIF. PROBATE CODE § 2-503 (amended 1997). The accompanying comment fails to illuminate, or even to acknowledge, the dispensing power's unconventionality. See *id.* § 2-503 cmt. Instead, the comment emphasizes legislative precedents for the power, discovered in Manitoba, South Australia, and Israel. *Id.*; see also, e.g., *id.* § 2-907 & cmt. (rendering honorary trusts functionally enforceable, an innovation that goes unremarked in the comment).

365. "The aim of this Article is to provide a simple and unified structure within which the immense variety of present-day secured financing transactions can go forward," thereby accomplishing "a radical simplification" of the law. U.C.C. § 9-101 cmt. (1972) (amended 2000).

366. See Mark L. Ascher, *The 1990 Uniform Probate Code: Older and Better, or More Like the Internal Revenue Code?*, 77 MINN. L. REV. 639 (1993); David M. Becker, *Uniform Probate Code Section 2-707 and the Experienced Estate Planner: Unexpected Disasters and How to Avoid Them*, 47 UCLA L. REV. 339 (1999); Dukeminier, *supra* note 308; Hirsch, *Trusts for Purposes*, *supra* note 10; Medlin, *supra* note 3; Patricia G. Roberts, *Adopted and Nonmarital Children—Exploring the 1990 Uniform Probate Code's Intestacy and Class Gift Provisions*, 32 REAL PROP. PROB. & TR. J. 539 (1998); Jeffrey A. Schoenblum, *Multijurisdictional Estates and Article II of the Uniform Probate Code*, 55 ALB. L. REV. 1291 (1992). None of these critical essays are cited in the commentary accompanying the Code sections to which they are directed. These omissions cannot be inadvertent. An entire issue of the Albany Law Review was devoted to a symposium on the revised Code, and whereas favorable articles within that symposium appear in the Code's commentary, unfavorable ones do not. See 55 ALB. L. REV. 871, 871-1414

1990 [Uniform Probate Code] had its share of oversights and mistakes,³⁶⁷ one might also have expected subsequent editions of the Code to reveal them. But legislators who would consult critical assessments of the Code must take pains to conduct a wider search.

This reluctance to call attention to dissent is in some sense understandable. Nothing succeeds like the appearance of success, and some Commissioners may prefer to turn a blind eye to criticism, lest naysayers plant doubts in the minds of legislators and thereby threaten local enactment of their products. But, once again, legislators need to know which Uniform Acts or provisions within Uniform Acts require a harder look. Ultimately, this *modus operandi* can only undermine the Commissioners' credibility.³⁶⁸ One can only hope that the Commissioners who exercise continuing responsibility over UDPIA will have the wisdom to break with this tradition.

In a word, Commissioners need to treat the law reform process as something wholly distinct from a public relations operation.³⁶⁹ Independent review is an indispensable aspect of the process.³⁷⁰ In this constructive spirit, I have put forward the criticisms and suggestions contained in the foregoing pages. It is fervently to be wished that those criticisms, when filtered into the nacre of UDPIA, will stimulate its able drafters to produce pearls—not merely irritation.

(1992). A more recent critical article drew sufficient attention as to elicit a published response from the Reporter, and both were omitted from the commentary accompanying the Code! Waggoner, *supra* note 336 (answering Dukeminier, *supra* note 308).

367. Langbein & Waggoner, *supra* note 323, at 879.

368. It could also be taken to signify an aversion to criticism that is unhealthy, to say the least, in a model lawmaking body.

369. *But cf.* Averill, *supra* note 340, at 901-06 (“Whether the 1990 [Uniform Probate Code] will have a greater or lesser influence on state legislation . . . depends largely upon the quality and scope of its promotion program. . . . [L]egislative adoption is the name of the game for uniform laws.”).

370. The observation remains as apt today as it was a century ago. *See* Ames, *supra* note 10, at 257.