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# RESPONSES

## Correcting the Record Regarding the *Restatement of Property's* Slayer Rule in the *Brooklyn Law Review's* Symposium Issue on Restatements

Lawrence W. Waggoner<sup>†</sup>

John H. Langbein<sup>††</sup>

In 2014, the *Brooklyn Law Review* published a symposium issue on Restatements of the Law.<sup>1</sup> The organizer of the symposium, Professor Anita Bernstein, did not afford an opportunity for Restatement reporters to comment on the articles.<sup>2</sup> The organizer did invite the Director of the American Law Institute, Lance Liebman, to contribute an essay commenting on the symposium as a whole.<sup>3</sup>

Liebman's essay—unintentionally no doubt—misstated the position that we took in formulating the slayer rule for the *Restatement (Third) of Property: Wills and Other Donative Transfers*.<sup>4</sup> Liebman's misstatement—that we recommended that the Institute adopt a rule allowing a murderer to inherit from his or her victim—needs to be corrected.

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<sup>1</sup> Symposium, *Restatement of . . .*, 79 BROOK. L. REV. 381 (2014).

<sup>2</sup> See Anita Bernstein, Symposium Introduction, *Onlookers Tell an Extraordinary Entity What to Do*, 79 BROOK. L. REV. 381 (2014).

<sup>3</sup> See Lance Liebman, Symposium Afterword, *Law Reform Agenda as ALI Approaches Its Centennial*, 79 BROOK. L. REV. 821 (2014).

<sup>4</sup> RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.4 (2003) [hereinafter PROPERTY RESTATEMENT] (“Homicide—The Slayer Rule”).

The passage in question observes that the Institute's deliberative process on occasion "resolves an inconsistency"<sup>5</sup> among the reporters of different Restatements.

The best example during my Directorship was when Andrew Kull, from his grounding in the law of restitution and unjust enrichment, persuaded the membership to require Lawrence Waggoner and John Langbein, the Reporters for wills and other donative transfer[s], to alter *their recommendation that a murderer be able to inherit from his or her victim*. Indeed, could there be a more unjust enrichment than that?<sup>6</sup>

The well-accepted general principle embodied in the slayer rule is that a slayer is not allowed to benefit in any way from his or her crime.<sup>7</sup> We have never questioned that principle, and accordingly, we did not recommend that "a murderer be able to inherit from his or her victim." The position that we recommended and that the Institute approved is that the "victim's intestate estate passes and is administered as if the slayer predeceased the victim."<sup>8</sup> A long-established corollary of the slayer rule is that the rule does not cause the slayer to forfeit his or her own property. If *X* murders *Y*, *X* cannot inherit from *Y*, but *Y*'s estate has no right to *X*'s property (although, of course, in a tort action, *X* may be found liable to *Y*'s estate in a wrongful death action).<sup>9</sup>

The slayer rule has broad application to a number of subsidiary situations.<sup>10</sup> The disagreement between Reporter Kull and us concerned the application of the slayer rule to one of these subsidiary situations: when two persons hold property in joint tenancy, and one slays the other. In a joint tenancy, each tenant has the unilateral right to sever the tenancy and take his or her own fractional interest outright. Our position, strongly supported by the case law and statutes,<sup>11</sup> was (and remains) that because the right to sever was the slayer's own property, that right is not forfeited by the crime. As we explained in the Reporter's Note, that principle "can be implemented either by imposing a constructive trust in favor of the victim's estate of the victim's fractional share that would otherwise pass to the killer by survivorship or (a remedy that

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<sup>5</sup> Liebman, *supra* note 3, at 827.

<sup>6</sup> *Id.* (emphasis added).

<sup>7</sup> See PROPERTY RESTATEMENT, *supra* note 4, at cmts. a, b.

<sup>8</sup> *Id.* at cmt. j; RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 8.4 cmt. j (Tentative Draft No. 3, 2001).

<sup>9</sup> See PROPERTY RESTATEMENT, *supra* note 4, at cmts. o and q.

<sup>10</sup> See *id.* cmts. j-n, p.

<sup>11</sup> See *id.* Reporter's Note No. 8.

yields the same result) by treating the killing as effecting a severance of the joint tenancy.”<sup>12</sup> Kull’s position is to the contrary, or, more specifically, that the victim’s estate takes the whole of the property by right of survivorship (unless there is some further equitable justification for effecting a severance of the joint tenancy).<sup>13</sup>

Our purpose here is not to revisit the merits of the two positions, but to emphasize that we never recommended that the Institute adopt a rule that “a murderer be able to inherit from his or her victim.”<sup>14</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> The Kull motion is reproduced in the Reporter’s Note. *See id.* Reporter’s Note No. 8.

<sup>14</sup> *See supra* note 4 and accompanying text.