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## The Restatements of Trust – Revisited

By

Naomi Cahn

University of Virginia School of Law

Deborah Gordon

Drexel University School of Law

Allison Tait

University of Richmond School of Law

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## The Restatements of Trust – Revisited

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*A trust is one of several juridical devices whereby one person is enabled to deal with property for the benefit of another person.*<sup>1</sup>

### INTRODUCTION

The Restatement of Trusts was one of the first of the ALI's projects, and that Restatement, along with its two successors, has profoundly influenced both the common law and statutes in the field. Courts routinely refer to the Restatement in decisions on trusts,<sup>2</sup> and the Restatement has served as a "storehouse for legislative drafters," with provisions incorporated directly into many state statutes.<sup>3</sup> That influence has continued throughout the almost first century since the project started. Indeed, the Uniform Trust Code (UTC), enacted in approximately two-thirds of states in some form, mentions the Restatement over 300 times and, in its prefatory note, observes that the UTC "was drafted in close coordination" with the Restatement (Third).<sup>4</sup> The Restatements have also deeply influenced the Uniform Prudent Investor Act, now in effect in 46 states.<sup>5</sup>

The Carnegie Corporation provided funding to the ALI, with a particular interest in a property Restatement,<sup>6</sup> and the Restatement of Trusts developed directly out of concern for the unwieldy scope of drafting a Restatement of Property. Because trusts were initially developed as a means to transfer real property, when land was the primary form for wealth - and indeed, nineteenth century trust treatises focused on land<sup>7</sup> - the Trusts project was seen as a "branch" of the property project..<sup>8</sup> Indeed,

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<sup>1</sup> RESTATEMENT OF THE LAW, TRUSTS, Introductory Note (AM. LAW INST. 1935).

<sup>2</sup> Robert H. Sitkoff & Max M. Schanzenbach, *Jurisdictional Competition for Trust Funds: An Empirical Analysis of Perpetuities and Taxes*, 115 YALE L.J. 356, 373 (2005) (noting "little variation in state law" before 1986, as states typically cited the Restatement as well as treatises by Scott and Bogert); Lawrence W. Waggoner, *What's in the Third and Final Volume of the New Restatement of Property That Estate Planners Should Know About*, 38 ACTEC L.J. 23, 24 (2012) ("When it comes to litigation, the courts pay attention to the Restatement and usually follow it"); Jeffrey N. Gordon, *The Puzzling Persistence of the Constrained Prudent Man Rule*, 62 N.Y.U. L. REV. 52, 58 (1987) ("Scott's work has played a pivotal role in the legal understanding of the trustee's investment management duties").

<sup>3</sup> John H. Langbein, *Why Did Trust Law Become Statute in the United States?*, 58 ALA. L. REV. 1069, 1081 (2007) [hereinafter *Trust Law*]; see John H. Langbein, *The Uniform Trust Code: Codification of the Law of Trusts in the United States*, 15 TR. L. INT'L 66 (2001).

<sup>4</sup> UNIF. TR. CODE Prefatory Note 4 (UNIF. L. COMM'N 2003), <https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=6bae0bb2-00ea-8080-d084-5be9ef7bbc66>.

<sup>5</sup> UNIF. PRU. INV. ACT (UNIF. L. COMM'N 1994), <https://www.uniformlaws.org/committees/community-home?communitykey=58f87d0a-3617-4635-a2af-9a4d02d119c9>.

<sup>6</sup> Minutes of the Twelfth Meeting of the Council – Dec. 17-20, 1926, 4 A.L.I. PROC. 96105 (out of Property); 103-04 (Carnegie).

<sup>7</sup> Langbein, *Trust Law*, *supra* note \_\_, at 1072.

<sup>8</sup> Proceedings, May 12, 1927, 5 A.L.I. PROC. 82 (1, 110 110; see also 1926 minutes, *supra* note \_\_, at 105 ("while the topic "Trusts" is part of the law of Real Property, it is, from the point of view of the Restatement a related but independent Subject the law of which should be restated by those who have made a special study of it.")).

wills and intestate succession, which are often taught with trusts in law school courses, remained part of the Restatement of Property;<sup>9</sup> there are arguments that it might have been more “systematic”<sup>10</sup> to keep trusts in the property restatement, given that, like wills and intestate succession, they all involve gratuitous, and frequently intergenerational, transfers of property.<sup>11</sup>

As this chapter traces, the three trust Restatements reflect the development of the “modern trust,” whether private or charitable, which holds a variety of financial interests just as they reflect economic, social, and cultural changes that have occurred over the last century. For example, the first Restatement, drafted between 1928-35, did not recognize the modern inter vivos revocable trust. Under that Restatement, a trust could be created by “a declaration by the owner of property that he holds it as trustee for another person.”<sup>12</sup> By the Restatement (Third), the method of creation had become a gender-neutral “declaration by an owner of property that he or she holds that property as trustee for one or more persons.”<sup>13</sup> Not until the third Restatement is there a section on the Creation of Inter Vivos Trusts, along with recognition that they need not comply with the requirements of the Wills Act.<sup>14</sup> This iterative process of understanding the trust, then, demonstrated how the trust generally, and the revocable trust in particular, has become a flexible means of managing property inter vivos.

After providing a brief history of the trust Restatements, this chapter then turns to trace three throughlines: first, it threads together how the three Restatements address the question of shifting social and legal norms, including how diverse populations across the wealth spectrum engage with wealth transfer through trusts; second, the chapter focuses on the “public policy” provision in each of the three trust Restatements and tracks that provision’s focus on gender roles, marriage, religion, and “detriment to community”; third, it traces provisions relating to trustees’ fiduciary responsibilities to beneficiaries, including decisions about distributions and investments. As this chapter celebrates the positive impact of the Restatements of Trusts on the development of trust law, the chapter also provides suggestions for a Restatement (Fourth) of Trusts that, as has been true of the previous Restatements, would reflect contemporary developments in trust law itself and in society. In so doing, this chapter also steps back to provide a tempered critique of the role of trusts in perpetuating

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<sup>9</sup> See [Merrill chapter at 2-4] (“wills and intestate succession are included under the umbrella of the Restatement of Property, whereas trusts are subject to a separate restatement, even though, from the perspective of modern legal practice and law school curricula, it would make more sense to cover both topics in a single restatement, e.g., “Trusts and Estates.””).

<sup>10</sup> See [Gold & Smith chapter at 16-19] (describing systemic or “architectural” approach to law and Restatements). One also might wonder if treating these two subjects together would have provided the ALI with any economic advantage. See [DeMott chapter at 32-33] (describing importance of Restatement sales to ALI funding).

<sup>11</sup> There are arguments in favor of both placements. Wills and trusts do seem to be part of property, given that they dispose of property and definitions of property are integral to what can be disposed of in wills. Intestacy could have been placed with family, given that much of intestacy law depends on definitions of family. In fact, there might well be arguments for a separate Wills and Intestacy Restatement that would deal with disposition of property at death. As discussed below, there were contemporaneous arguments that the Institute should not develop a Restatement of Trusts at all. See *infra* notes \_\_ (Arnold article).

<sup>12</sup> RESTATEMENT (FIRST) OF TRUSTS § 17 (AM. LAW INST. 1935).

<sup>13</sup> RESTATEMENT (THIRD) OF TRUSTS § 10 (AM. LAW INST. 2003).

<sup>14</sup> RESTATEMENT (THIRD) OF TRUSTS, Part 2, Chap. 5; see also RESTATEMENT (THIRD) OF TRUSTS Intro. Note at 25 (“The answer given to that question in this Restatement (and also, now, quite consistently given in the case law, despite often awkward rationale) is “no.”). The Second Restatement includes a Topic on The Creation of Testamentary Trusts (topic 11), but not on the Creation of Inter Vivos trusts.

inequality, albeit with an understanding that the goal of the Restatement is not to transform the law but rather to reflect its development.

Ultimately, the questions raised in this chapter suggest that it is not too early to start envisioning and framing a Restatement (Fourth) of Trusts.

## I. History of Restatements of Trusts

When work on the Restatement of Trusts was undertaken in 1927, it was the seventh such project of the new ALI, and publication of the two volumed Restatement of Trusts in 1935 meant that they were among the first 10 volumes of Restatements issued.<sup>15</sup> The Restatement (First) was issued in two volumes, with 460 sections, and included provisions on whether “married women,” “infants,” and “insane persons” had capacity to hold and administer trust property.<sup>16</sup> Section 62 dealt with when enforcement of a trust would be counter to public policy.<sup>17</sup> Among the examples of when a provision would be invalid were payments to someone “if he should secure a divorce from his spouse by perjury or other improper means” or “if he should violate his duty to support his children”;<sup>18</sup> if enforcement would “encourage immorality” such as giving trust property to someone “if he should have an illegitimate child . . . an intended trust for the benefit of illegitimate children conceived after the creation of the trust may be invalid,” although such invalidity “depends upon the conceptions of public policy which are prevalent in the community at the time of the creation of the trust.”<sup>19</sup>

Austin Wakeman Scott, who taught Felix Frankfurter and many other legal luminaries at Harvard Law School, was the Reporter for the first two Restatements of Trust - as well as the Restatement of Restitution.<sup>20</sup> As Lance Liebman noted in the Foreword to the Restatement (Third) of Trusts, “[f]or half a century, Austin Wakeman Scott was the great American scholar of the law of trusts. Professor Scott was reported to have said: ‘To be great, a law professor must complete a Restatement.’”<sup>21</sup> By his own lights, he is then doubly great, in the Trusts Restatement domain alone.

During the drafting process, Scott described the initial decisionmaking on the scope of the Restatement (First).<sup>22</sup> As he explained, the Reporter and advisers decided to develop a restatement on express trusts first, and then, after the completion of that project, to undertake constructive trusts; he was sensitive to the “confusion” that had resulted from treating express and implied contracts together.<sup>23</sup> Nonetheless, an early draft of the Restatement noted that the “Subject of Trusts” as

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<sup>15</sup> RESTATEMENT (FIRST) OF TRUSTS Intro. (AM. LAW INST. 1935).

<sup>16</sup> *Id.* §§ 90-91. A married woman, in contrast to the other two categories, did have such capacity, and the comment noted that, under statutes giving a woman the right to contract as though she were single, it was irrelevant that whether, pursuant to such statutes, “she may not have capacity to contract with her husband.” *Id.* § 90 Cmt. *b.*

<sup>17</sup> *Id.* § 62 (“Enforcement Against Public Policy”).

<sup>18</sup> *Id.* Cmt. *b.*

<sup>19</sup> *Id.* Cmt. *c.* Comment *d* suggested a provision could be invalid for inducing divorce or refraining from getting married. Again, the Restatement recognized the “changing character of ideas of morality, especially in regard to the relations of the sexes . . .” *Id.* Cmt. *d.* While restraints on marriage could be held invalid, that was not true when it concerned the “remarriage of a widow.” *Id.* Cmt. *g.*

<sup>20</sup> 2008 A.L.I. Proceedings 160 (“He was as important a figure as anyone, and if you want to have the sense of tradition, Professor Scott taught civil procedure to Felix Frankfurter”). As “a law student, [Scott] married the daughter of the President of Harvard University.” 2015 A.L.I. Proceedings 3.

<sup>21</sup> RESTATEMENT (THIRD) OF TRUSTS Foreword (AM. LAW INST. 2003).

<sup>22</sup> See generally Austin W. Scott, *The Restatement of the Law of Trusts*, 31 COLUM. L. REV. 1266 (1931).

<sup>23</sup> *Id.* at 1267.

handled in the Restatement included charitable, resulting, and constructive trusts.<sup>24</sup> And Scott was careful to point out that, notwithstanding the potential broad scope of the term “trust,” the volume would not treat “all kinds of situations where one person deals with property for the benefit of another,” because some such circumstances would be dealt with elsewhere, such as through the already existing project on a Restatement of Agency.<sup>25</sup>

Scott shaped the Restatements in a series of ways. As a first example, he viewed trusts as donative, rather than contractual arrangements; this perspective was not inevitable, given the views of other, contemporaneous scholars.<sup>26</sup> That decision has meant that a trust is viewed by many in the nature of a unilateral transaction, with the donor’s intent controlling, rather than as a bilateral agreement, in which a trustee has some power.<sup>27</sup> Second, even though the original Restatement was slated to include “express private trusts,” charitable trusts, resulting trusts, and, as described above constructive trusts,<sup>28</sup> the last became part of the Restatement of Restitution, courtesy of what was probably a Harvard Law School hallway conversation.<sup>29</sup> The first Restatement did include Chapter 11, “Charitable Trusts,” with more than 50 sections, and Chapter 12, “Resulting Trusts,” with almost 60 sections,<sup>30</sup> although the ALI did not publish its first Restatement on Charitable Organizations until 2021.<sup>31</sup> Third, Scott’s impact as the Reporter meant that commercial trusts were excluded from the Restatement,<sup>32</sup> notwithstanding that the “1920s saw a miniature boom in writings about business trusts in law reviews, practice manuals, and treatises.”<sup>33</sup>

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<sup>24</sup> *Id.* n. 3.

<sup>25</sup> *Id.* at 1267.

<sup>26</sup> John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625, 644 (1995) (observing that Scott “got it wrong” and citing Scott’s earlier discussion of this issue: Austin Wakeman Scott, *Nature of Rights of the Cestui Que Trust*, 17 COLUM. L. REV. 269, 269-270 (1917)).

<sup>27</sup> Langbein, [Contractarian], *supra* note \_\_, at 652 (“On [] matters [relating to the trustee’s role], the trustee’s reasonable understanding of the deal should be as relevant as the settlor’s.”); *id.* at 671 (“The conventional account of the trust that we find in the second Restatement and in the treatises simply does not give due weight to the bedrock elements of contractarian principle that inform the norms of trust law, namely, consensual formation and consensual terms. Trusts are deals.”). Thus, for example, Langbein argues that the duty of loyalty is “overbroad,” given the “deal” the settlor believed they were making. *Id.* at 665.

<sup>28</sup> Austin W. Scott, *The Restatement of the Law of Trusts*, 16 A.B.A. J. 496, 497 (1930). For resulting trusts, see Austin W. Scott, Discussion of Trusts, Tent. Draft No. 5, 11 A.L.I. PROC. 589, 589 (date).

<sup>29</sup> 2000 A.L.I. PROC. 226 (“Austin Scott, who, of course, was at work on the Restatement of Trusts, had planned in his Table of Contents, somewhere way at the end, Chapter 9 or Chapter 10, the last one was going to be called “Constructive Trusts.” Well, at some point—I assume it was chatting with each other in the corridors at the Harvard Law School”). The rules applicable to resulting trusts were set out in Section 404-460 of the first Restatement.

<sup>30</sup> RESTATEMENT (FIRST) OF TRUSTS, Chapters 11, 12, § 358 (AM. LAW INST. 1935).

<sup>31</sup> RESTATEMENT OF THE LAW, CHARITABLE NONPROFIT ORGANIZATIONS (AM. LAW INST. 2021), <https://www.ali.org/publications/show/charitable-nonprofit-organizations/> RESTATEMENT OF THE LAW, CHARITABLE NONPROFIT ORGANIZATIONS Introduction (Tent. Draft No. 3 2019) (“Although some of the American Law Institute’s projects, most notably the Restatements of Trusts, include Sections that address charities or mention nonprofits generally, none addresses the topic in an organized or comprehensive manner.”).

<sup>32</sup> *E.g.*, RESTATEMENT (SECOND) OF TRUSTS § 1 Cmt. *b* (AM. LAW INST. 1959). “Austin W. Scott, the reporter, excluded commercial trusts from the Restatement on the ground that “many of the rules” of trust law are inapplicable in commercial settings.” John H. Langbein, *The Secret Life of the Trust: The Trust As an Instrument of Commerce*, 107 YALE L.J. 165, 166 (1997).

<sup>33</sup> John Morley, *The Common Law Corporation: The Power of the Trust in Anglo-American Business History*, 116 COLUM. L. REV. 2145, 2166 (2016) (citing sources).

Furthermore, in seeking to articulate the law of trusts, the Restatement distinctly pushed the law in certain directions. For example, Scott noted that “[t]here is among the courts a difference of opinion” on whether “the wife or children” of a trust beneficiary can reach into a spendthrift trust.<sup>34</sup> In a 1936 Harvard Law Review article, Scott seemed somewhat skeptical about the ability of a settlor to insulate beneficiaries from all claims, finding spendthrift clauses “hardly applicable” to a wife, and “wholly inapplicable” to children.<sup>35</sup> Indeed, he had expressed similar skepticism long before he became the Reporter, noting that spendthrift trusts allowed the “creat[ion of] a favored class of persons who can live in idleness and in comfort or even in luxury without paying their debts,” and that, rather than a promising “reform,” the spendthrift trust “to the writer it seems to violate the sound principles of personal responsibility upon which the doctrines of the common law are based.”<sup>36</sup>

While the Restatement of Trusts may have been one of the earliest of the Restatement projects, it was not uncontroversial as a project. In a 1931 Columbia Law Review article - published midway through the drafting of the Restatement – Yale law professor Thurman Arnold suggested that, rather than a Restatement of Trusts, the cases might instead be better sorted into a “restatement of the law of future interests, others in a restatement of the law of the administration of insolvent estates, others in a restatement of equitable remedies for fraud.”<sup>37</sup> Moreover, notwithstanding Scott’s “unquestioned skill,” Arnold concluded that it was precisely Scott’s skill that illustrated “the attempt to restate trusts as a philosophy is the best proof that it cannot be done.”<sup>38</sup> Scott quickly responded that, much as he “welcomed Arnold’s criticisms,” all through his article were “to be found certain assumptions as to the Restatement which are not warranted by the Restatement itself.”<sup>39</sup> Arnold’s criticisms did not stop the project. Instead, the First Restatement has profoundly affected American law, and its impact is difficult to overstate. Within two years of its acceptance by the ALI, the Restatement had been either cited or quoted by the Supreme Court of the United States as well as by both supreme and appellate courts in a majority of states.<sup>40</sup>

The Restatement (Second) of Trusts, drafted between 1953-59, was prompted by a second grant from the Mellon Trust, designed to ensure that the Restatements remained current.<sup>41</sup> With Scott once again at the helm, the Restatement (Second) did not make substantial changes to the First Restatement.<sup>42</sup> In his first Council draft in 1953, Scott predicted that “a considerable part of the material [for the second restatement] will not be affected, and the fundamental principles are unchanged.”<sup>43</sup> It did, however, “provide fuller explanations for conclusions reached” so as to “give all possible aid to the practitioner, the judge and the law student.”<sup>44</sup> As the introduction acknowledged, “[t]here will not be very much here which is contrary to what was said in the First Edition. But there is much more said here than was said in the First Edition,” offering recognition that the field of trusts was quickly expanding in new and unanticipated directions.<sup>45</sup> One reason for the Restatement

<sup>34</sup> Austin W. Scott, *Reception by the Courts of the Resettlement of Trusts*, 23 A.B.A. J. 443, 444 (1937).

<sup>35</sup> Austin Wakeman Scott, *Fifty Years of Trusts*, 50 HARV. L. REV. 60, 69 -70 (1936).

<sup>36</sup> Austin W. Scott, *The Trust as an Instrument of Law Reform*, 31 YALE L.J. 457, 466 (1922).

<sup>37</sup> Thurman Arnold, *The Restatement of the Law of Trusts*, 31 COLUM. L. REV. 800, 801 (1931).

<sup>38</sup> *Id.* at 823.

<sup>39</sup> Austin Wakeman Scott, *The Restatement of the Law of Trusts*, 31 COLUM. L. REV. 1266, 1268 (1931).

<sup>40</sup> *Reception*, *supra* note 34, at 443.

<sup>41</sup> Herbert F. Goodrich, *Introduction*, RESTATEMENT (SECOND) OF TRUSTS vii (AM. LAW INST. 1959).

<sup>42</sup> *Id.*

<sup>43</sup> RESTATEMENT, SECOND, TRUSTS COUNCIL DRAFT 1 (Jan. 26, 1953), avail. at [https://heinonline-org.proxy01.its.virginia.edu/HOL/Page?collection=ali&handle=hein.ali/resect1020&id=3&men\\_tab=srchresults](https://heinonline-org.proxy01.its.virginia.edu/HOL/Page?collection=ali&handle=hein.ali/resect1020&id=3&men_tab=srchresults) (Austin W. Scott General Note to the Council).

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

(Second) was to “integrate the material in the Restatement of the various Subjects,” such as the Restatements of Property and Restitution, “neither of which had been adopted at the time of the adoption of the Restatement of Trusts.”<sup>46</sup>

The Restatement (Third) of Trusts was drafted between 1994-2003, a period when United States trust law and other related laws addressing donative transfers were undergoing “rigorous, comprehensive reexamination.”<sup>47</sup> Perhaps due in part to its close association with the new Uniform Trust Code, which was drafted during the same time period, the Restatement (Third) turned out to be more progressive and substantially longer than the previous versions. According to critics, this Restatement, more so than either of the previous Restatements, was often less about clarifying rules than moving them forward.<sup>48</sup> Edward Halbach, described as the “contemporary master of the law of trusts,” inherited (so to speak) the Reporter position held by Scott for the first two Restatements,<sup>49</sup> and he spent approximately twenty years, aided by numerous others, putting together the four volumes that make up the Restatement (Third) of Trusts.<sup>50</sup> The Foreword, written by then director of the ALI Lance Liebman, makes the ALI’s gratitude to Halbach for this enormous undertaking feel palpable.<sup>51</sup> The drafting of the Restatement (Third) officially started in 1994, but from 1987-1992, Halbach also worked on a Restatement of the Prudent Investor Rule, described in its forward as “a project in its own right and . . . a partial revision of the Restatement Second of Trusts.”<sup>52</sup> This volume, which covered modern investing rules and “related rules concerning the conduct of a trustee in the management of a trust,” eventually became part of the main volume of Restatement (Third).<sup>53</sup> Halbach describes the goal of this interim volume as permitting trustees “to act in enlightened ways.”<sup>54</sup>

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<sup>46</sup> *Id.* at 2.

<sup>47</sup> Edward C. Halbach Jr., *Uniform Acts, Restatements, and Trends in American Trust Law at Century's End*, 88 CALIF. L. REV. 1877, 1881 (2000). The Restatement (Third) of Trusts was drafted hand-in-hand with the Uniform Trust Code and with the Restatement (Third) Property: Wills & Other Donative Transfers. See John H. Langbein, *Major Reforms of the Property Restatement and the Uniform Probate Code: Reformation, Harmless Error, and Nonprobate Transfers*, 38 ACTEC L.J. 1, 2 (2012).

<sup>48</sup> For critiques of rules announced in the Third Restatement that deviated from common law, see, e.g., Mark Merric & Steven J. Oshins, *Effect of the UTC on the Asset Protection of Spendthrift Trusts*, 31 EST. PLAN. 375 (2004) (critiquing UTC and Restatement (Third) for eliminating common law distinction between support and discretionary trusts); Frances H. Foster, *Privacy and the Elusive Quest for Uniformity in the Law of Trusts*, 38 ARIZ. ST. L.J. 713, 767 (2006) (criticizing disclosure rules in Restatement and UTC); 12 Del. Code Section 3315(a) (2008) (“Where discretion is conferred upon the fiduciary with respect to the exercise of a power, its exercise by the fiduciary shall be considered to be proper unless the court determines that the discretion has been abused within the meaning of § 187 of the Restatement (Second) of Trusts, not §§ 50 and 60 of the Restatement (Third) of Trusts.”); see also Richard Thomson, *Too Much for Too Little: The Restatement’s Measure of Damages Where the Trustee Sells a Trust Asset for an Insufficient Price*, 96 MINN. L. REV. 2144, 2144 (2012) (criticizing measure of damages in Restatement (Third) Section 205 cmt d for a negligent, albeit authorized, sale of a trust asset as potentially leading to “incongruently large [damages compared with the duty to which the beneficiaries are entitled]”).

<sup>49</sup> Lance Liebman, *Foreword*, RESTATEMENT (THIRD) OF TRUSTS ix (AM. LAW INST. 2003).

<sup>50</sup> See *id.* (“highly qualified Advisers gave the Reporters constructive criticism, as did our committed Members Consultative Group, our Council and our membership”); see also note \_\_\_ *infra* (naming advisers).

<sup>51</sup> Lance Liebman, *Foreword*, RESTATEMENT (THIRD) OF TRUSTS ix-x (AM. LAW INST. 2003).

<sup>52</sup> Geoffrey C. Hazard, Jr., *Foreword*, RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE (AM. LAW INST. 1990).

<sup>53</sup> RESTATEMENT (THIRD) TRUSTS, Chapter 17 (AM. LAW INST. 2003).

<sup>54</sup> Edward C. Halbach Jr., Organizational Meeting, Philadelphia, Dec. 18, Prelim. Draft 1 (Dec. 8, 1987) of the RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE (AM. LAW INST. 1987).



Over time, then, the Restatements did significant work both in describing the state of trust law and providing some aspirational points of focus. Shaped quite dramatically by two men, Scott and Halbach, these first three Restatements reflected the law – both as it was and could be – and also the preferences and philosophies of these two formative authors. In this way, the Restatements were significant for what subjects they discussed as much as for what subjects remained untouched.

## II. Pulling Threads from the First Through the Third Restatements of Trusts

The attempt to provide black-letter law in the trusts context initially spanned more than 450 provisions (reduced by the Restatement (Third) to 111 sections). The remainder of this chapter focuses on three aspects of the Trust Restatements that reflect how economic, social, and cultural developments outside of trust law have profoundly affected trust law and how it was restated over the years.

### A. The Trajectory of Trust Users: Who are the Settlers, Beneficiaries, and Trustees?

Drafted between 1927 and 1935, the Restatement (First) of Trusts reflects its time period in the ways it describes and illustrates how and by whom trusts were created and used. Employing all masculine pronouns,<sup>55</sup> featuring the “prudent man” as trustee,<sup>56</sup> and providing illustrations of its rules that involve primarily male actors,<sup>57</sup> the Restatement showed in multiple ways that trusts were created, used, and administered primarily by and for men.

In the spendthrift trust provisions, for example, the Reporters recognize that “certain classes of claimants” are excepted from the rules that protect property held in a spendthrift trust, but they contemplate that it will always be a husband’s interest in the trust that his “wife or child” might seek for support or “the wife for alimony.”<sup>58</sup> In other words, when marriages ended, the spouse seeking support was imagined as exclusively female and the person from whom support was sought exclusively male. The Restatement (Second) contained the same language and examples,<sup>59</sup> with one anomalous exception.<sup>60</sup> This default to the male as the only relevant property owners and managers

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<sup>55</sup> RESTATEMENT (FIRST) OF TRUSTS, § 2 & cmt. *b* (AM. LAW INST. 1935) (defining a trust, as a “fiduciary relationship with respect to property” and explaining that a person in that fiduciary relation may not delegate “his duties as fiduciary” and “he is under a duty not to profit at the expense of the other [nor] . . . enter into competition with him without his consent.”(emphasis added).

<sup>56</sup> *Id.* § 227 (“In making investments of trust funds the trustee is under a duty to the beneficiary . . . (a) in the absence of provisions in the terms of the trust or of a statute otherwise providing, to make such investments and only such investments as a prudent man would make of his own property having primarily in view the preservation of the estate and the amount and regularity of the income to be derived.”).

<sup>57</sup> In Section 18, “Capacity of Settlor, Declaration of Trust,” “a person” has capacity to create a trust “by declaring himself trustee of property.” *Id.* § 18. Comment *a* explains that “certain classes of human beings,” which includes “married women at common law” together with “infants” and “insane persons,” lack the “full capacity” possessed by “other human beings.” *See also* § 350 cmt. *a* (Creation of a Charitable Trust, Capacity of the Settlor). The illustration shows how a “human being” with “full capacity” manifests that intent. *Id.*, § 24, cmt. *b* (“A, the owner of Blackacre, devises it to B with a direction in the will that B pay the net income thereof to C during C’s life and that on C’s death he convey Blackacre to D.”).

<sup>58</sup> *Id.* § 157.

<sup>59</sup> *See, e.g.*, RESTATEMENT (SECOND) OF TRUSTS § § 2, 18, 24, 41, 43, 44, 45, 74, 157, 350 (AM. LAW INST. 1959).

<sup>60</sup> In the section on “Tentative Trusts of a Savings Deposit,” the surviving spouse claiming an elective share in a (male) depositor’s account is referred to by both genders. *See id.* § 58 cmt. *e* (“e. Restrictions on testamentary



was quite clearly reflective of the economic and social reality of the times in terms of naturalized gender roles and who held and controlled the wealth in families. These assumptions also reflect the legal realities of the relevant time period; it was not until 1979 in *Orr v. Orr* that the Supreme Court found unconstitutional a spousal support statute that granted support only to women upon divorce and not to men.<sup>61</sup> Where this language failed was in any attempt to recognize the idiosyncratic ways in which women inherited and managed wealth even at the time.<sup>62</sup> Instead, the language reflected exclusionary tropes about women and their relationship (or non-relationship) to money.

As is clear from these provisions, women – at least married women – are not completely absent from the first two trust Restatements. Indeed, the Reporters of both volumes include sections that explicitly address married women’s capacity to be trust beneficiaries<sup>63</sup> and to serve as trustees.<sup>64</sup> But women are not the primary actors in any examples, with the exception of provisions on dower, curtesy, and coverture, where they by definition share the stage.<sup>65</sup> And while married women are singled out and widows receive a nod,<sup>66</sup> single women are virtually invisible. Accordingly, while women themselves are mostly background characters, gender is nevertheless omnipresent in the Restatements, being quietly produced with each illustration and each elision.

Produced similarly through absence is race. Any vocabulary relating to race appears to be textually absent from the first two Trust Restatements. The sole exception is a comment in the Cy

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disposition. Although the surviving spouse in claiming *his or her* statutory distributive share of the estate of the decedent is not entitled to include in the estate property transferred during his lifetime by the decedent in trust for himself for life with remainder to others, . . . the surviving spouse of a person who makes a savings deposit upon a tentative trust can include the deposit in computing the share to which such surviving spouse is entitled.”). This change appears first in the 1948 Supplement.

<sup>61</sup> *Orr v. Orr*, 440 U.S. 268, 268 (1979).

<sup>62</sup> See Lena Edlund and Wojciech Kopczuk, *Women, Wealth, and Mobility*, 99 AMERICAN ECONOMIC REVIEW 146, (2009) (describing an empirical study of women and wealth from nineteenth century to present); see also Sarah C. Haan, *Corporate Governance and the Feminization of Capital*, 74 STAN. L. REV. 515, 522 (2022) (noting that by 1929, women owned the majority of shares in some of the country’s largest corporations); see generally MARY SYDNEY BRANCH, *WOMEN AND WEALTH: A STUDY OF THE ECONOMIC STATUS OF AMERICAN WOMEN* (1934) (statistical study showing status of women as taxpayers and controllers of wealth).

<sup>63</sup> RESTATEMENT (FIRST) OF TRUSTS § 118 (“The Beneficiary, Married Women”) (AM. LAW INST. 1935).

<sup>64</sup> *Id.* § 90 & cmt. *b* (“The Trustee, Married Women”) (limiting married woman’s capacity to serve as trustee to property she would have the capacity to deal with if it were owned by her outright, so nothing that would involve “making conveyances and contracts which are neither void nor voidable”).

<sup>65</sup> *Id.* §§ 144, 145, 146.

<sup>66</sup> *Id.* § 25, cmt. *b*, illus. 4 (“A devises and bequeaths all his property to B, his wife, “desiring her to give all her estate at her death to my relations.” Since the expression of desire applies not only to A’s property, but also to B’s property as to which A had no power to create a trust, he does not presumably intend to create a trust as to his property. In the absence of other evidence, B is entitled beneficially to the property and does not take it in trust”) (emphasis added). Although § 57, cmt. *c*, does acknowledge that even if a statute entitles “the wife of a testator” to a portion of the estate, “a married man” could avoid this claim by transferring “his property inter vivos in trust even though he reserves a life estate and power to revoke or modify.” RESTATEMENT (FIRST) OF TRUSTS § 57 (“Restrictions on testamentary disposition”) (AM. LAW INST. 1935).

Pres provisions<sup>67</sup> and some state annotations discussing cases on race.<sup>68</sup> And although the race of the actors in the illustrations is never specified, the vast majority of national wealth was held by white people during the relevant *drafting* periods.<sup>69</sup> This default form of identity in the Restatements, it is worth noting, was reflective of the composition of reporters and advisers for the first two Restatements who were all men and, from what we can tell, mostly white.<sup>70</sup>

In terms of human relationships, the Restatements of Trusts also reflect the prevailing heteronormative vision of a family at the time of drafting. Consequently, both the first and second Restatements contain no references to same-sex relationships. As indicated, the words “wife” and “husband” appear frequently, the words “partner” (as in intimate partner), and “companion,” unsurprisingly, do not<sup>71</sup>; there are several references to “cohabitation” but only in the context of it being illegal.<sup>72</sup> A family in the Restatements of Trusts looks like this:

The “family” of a designated person may be construed to include himself and his wife and children or such children or other relatives or other person as are living with him . . . <sup>73</sup>

Perhaps even more so than with race and gender, the failure to recognize same-sex relationships is to be expected given the underground and illegal nature of same-sex relationships.<sup>74</sup> Nevertheless with probate cases like *In re Will of Kaufmann* in 1965, questions about same-sex partners and inheritance mechanisms were already present on court dockets by the time of the Restatement (Second).<sup>75</sup> Moreover, as with race and gender, the silence around sexual preference in family

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<sup>67</sup> RESTATEMENT (FIRST) OF TRUSTS § 399 (“Cy Pres”), cmt. *b* (AM. LAW INST. 1935) (“Thus, where a testator, who died before slavery was abolished in the United States, bequeathed money in trust to be expended for the circulation of books and delivery of lectures or otherwise as in the judgment of the trustee would create a public sentiment that would put an end to negro slavery in the United States, and slavery in the United States was abolished by an amendment to the Constitution, the court may direct the application of the bequest to the promotion of the interests of former slaves.”).

<sup>68</sup> See, e.g., RESTATEMENT (FIRST) OF TRUSTS, Trust State Annotations: Florida, Maryland, Arkansas.

<sup>69</sup> In 1930, for example, the racial wealth gap was 9-1, and in 1950 it was 7-1. Ellora Derenoncourt, Chi Hyun Kim, Moritz Kuhn & Moritz Schularick, *Wealth of Two Nations: The U.S. Racial Wealth Gap, 1860-2020*, National Bureau of Economic Research, Working Paper 30101 (2022), available at: <https://repec.cepr.org/repec/cpr/ceprdp/DP17328.pdf>. For discussions of the racial wealth gap, and its history, see also, e.g., Danaya C. Wright, *The Demographics of Intergenerational Transmission of Wealth: An Empirical Study of Testacy and Intestacy on Family Property*, 88 U.M.K.C. L. REV. 665, 670-72 (2019); Palma Joy Strand, *Inheriting Inequality: Wealth, Race, and the Laws of Succession*, 89 OR. L. REV. 453, 458-63 (2010).

<sup>70</sup> RESTATEMENT (FIRST) OF TRUSTS x-xi (AM. LAW INST. 1935); RESTATEMENT (SECOND) OF TRUSTS iii (AM. LAW INST. 1959).

<sup>71</sup> Even the word “spouse” appears in only eleven sections in the Restatement (First). See RESTATEMENT (FIRST) OF TRUSTS §§ 62, 74, 144, 145, 146, 170, 238, 239, 289, 407 and 408 (AM. LAW INST. 1935).

<sup>72</sup> *Id.* §§ 290 cmt. *a*, 293 cmt. *c*, 294.

<sup>73</sup> *Id.* § 120 cmt. *b* (“Members of a Definite Class”); see also, e.g., *id.* § 161 (“Inseparable Interests”) illus. 1 (“A bequeaths Blackacre to B in trust to provide a home for C and his family. C has a wife and two children. C’s creditors cannot reach his interest under the trust.”); § 362 cmt. *b* (“Restrictions upon the Creation of Charitable Trusts”) (“Usually the invalidity of the disposition is made dependent on the survival of certain members of his family, such as his wife or child, descendant of a child or parent.”). The first two trust Restatements did recognize that not all families live in harmony and that marriages may end before death. See, e.g., *id.* § 26.

<sup>74</sup> An illegality that persisted in some states until *Lawrence v. Texas*, 539 U.S. 558, 578 (2003), in 2003 with respect to intimate relationships and until *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015), in 2015 with respect to marriage.

<sup>75</sup> *In re Kaufmann’s Will*, 20 A.D.2d 464, 474 (N.Y. App. Div. 1964), *aff’d*, 205 N.E.2d 864 (1965).

formation accomplished substantive work in reflecting - and reifying - the norm of the heterosexual marital family.

The Restatement (Third) reflects a significant shift in how, for, and by whom trusts were used, though some of the social assumptions that pervade the first two Restatements do still exist. For example, the Restatement (Third) is noticeably more inclusive with respect to gender than its predecessors. Starting with the definition of “fiduciary relation” in Section 2, the masculine pronouns are exchanged for a more gender-neutral approach, so that “a person in a fiduciary relation to another is under a duty to act for the benefit of the other” and “not to profit at the expense of the other” or compete “without the latter’s consent.”<sup>76</sup> The Restatement (Third)’s illustrations contemplate a broader array of family members creating, administering, and benefitting from trusts, with “examples of a fairly representative but far from exhaustive array of express private trusts” including male and female settlors, trustees, and beneficiaries.<sup>77</sup> Of course, the families in the illustrations still consist of two different-sex parents. These families seek to keep their property in the family, to give to their children equally, to care for elderly siblings and ancestors suffering from poverty and bad health, and to donate to “worthy charities in the community.”<sup>78</sup> Not only is the couple a hetero-normative one but it is clear that the family is also well-resourced, reflecting upper-middle class values of care for the family legacy and charitable giving.

This is not to say that the drafters and their advisors did not consider changing social and cultural dynamics. John Langbein, who served as an adviser on this volume and also as the Reporter for Restatement (Third) of Property (and an ex officio member of the UTC Drafting Committee), echoed Halbach’s view of the period during which both Restatements and the Uniform laws were drafted as a “cycle of renewal.”<sup>79</sup> Langbein supplied additional reasons for revisions in these volumes as “changes in reproductive technology,” a gerontological revolution, changes in gender relations and concerns about gender equity, and changes in theory and practice of investment.<sup>80</sup> He described the drafting process as “deeply inclusive,”<sup>81</sup> although representation on the drafting committees of women and people of color does not appear to differ significantly from earlier Restatements.<sup>82</sup>

The Restatement (Third)’s major contribution to making trust planning more accessible was to recognize the broader role of revocable trusts and their interplay with other planning.<sup>83</sup> This contribution had less to do with race and gender than it did categories of wealth and class. In a symposium piece about the state of Twentieth Century law, Halbach explained that many of the changes seen in the Restatement (Third) came about because trusts were being used by “broader

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<sup>76</sup> *Obergefell v. Hodges*, 576 U.S. 644, 675 (2015).

<sup>77</sup> RESTATEMENT (THIRD) OF TRUSTS § 2 (AM. LAW INST. 2003); *see also, e.g., id.* § 11 (“a person has capacity to create a revocable inter vivos trust by transfer to another or by declaration to the same extent that the person has capacity to create a trust by will.”); § 17 (a trust is created by “a declaration by an owner of property that he or she holds that property as trustee for one or more persons”).

<sup>78</sup> *Id.* § 13.

<sup>79</sup> Langbein, *Major Reforms*, *supra* note 47, at 5.

<sup>80</sup> Langbein, *Major Reforms*, *supra* note 47, at 5.

<sup>81</sup> Langbein, *Major Reforms*, *supra* note 47, at 6-7.

<sup>82</sup> By the Third Restatement, Halbach was aided by four male associate reporters; three women accompanied the twenty men who served as advisers. *See* RESTATEMENT (THIRD) OF TRUSTS, Vol 1 v-vii (AM. LAW INST. 2003); RESTATEMENT (THIRD) OF TRUSTS Vol. 3 v-ix (AM. LAW INST. 2007); RESTATEMENT (THIRD) OF TRUSTS Vol. 4 v-ix (AM. LAW INST. 2012). Similar demographics attend the 1992 Restatement (Third) of Trusts: Prudent Investor Rule volume, for which Halbach was also the reporter. Both volumes increased participation through large “consultative groups.”

<sup>83</sup> RESTATEMENT (THIRD) OF TRUSTS § 25 cmt. a (AM. LAW INST. 2003); *see also* § 19 (“Pour-Over Disposition by Will”).

segments of society than in the past, and with greater diversity of objectives . . . but increasingly without aid of legal counsel.”<sup>84</sup> Moreover, donors were living longer, and thus experiencing “substantial periods of diminished physical or mental health.”<sup>85</sup> Accordingly, an explicit goal of the Restatement (Third) was to make trusts more “user-friendly” and “flexible,” so accessible to the “ordinary person.”<sup>86</sup> The Reporters explain that “widespread legislative and judicial endorsement” and “popular interest” have together established the revocable trust “in American law as a socially useful and successful device for property management, especially late in life, and for the disposition of property (outright or in further trust) following the settlor’s death.”<sup>87</sup> Section 25 therefore recognizes revocable trusts as nontestamentary<sup>88</sup> but nevertheless “subject to substantive restrictions on testation . . . and other rules applicable to testamentary dispositions,”<sup>89</sup> such as the spousal elective share, claims by estate creditors, and revocation-on-divorce rules.<sup>90</sup> With respect to creditor provisions, the Restatement (Third) substantially reworked the rules on discretionary and spendthrift trusts to address what happens to a beneficiary who is, or may become, a settlor.<sup>91</sup>

As these provisions relate to beneficiary rights—here, the use of trusts to shield beneficiaries from the claims of creditors—the Reporters of the Restatement (Third) sought to strike a balance between the settlor’s powers to control property and creditors’ rights. First, in addition to the long-recognized exception for spousal and child support claims, the Reporters spent time discussing an exception for tort creditors, recognizing that this exception had been recommended early on, had not gained significant traction, but had been recognized in at least one case that “may prove to be influential elsewhere.”<sup>92</sup> Second, the Reporters affirmed the longstanding common law rule that creditors could reach the interests of any beneficiary who was also a settlor of the trust.<sup>93</sup> In both cases, these rules “reflect a general acceptance of a fundamental common-law principle that a property owner, being free either to bestow property rights and benefits upon others or to withhold them, can bestow those rights and benefits through the trust device with the settlor’s chosen conditions and restraints so long as those conditions and restraints are not, in the conventional terminology of trust law, unlawful or contrary to public policy.”<sup>94</sup>

## B. The Trajectory of Public Policy in the Restatements

Within the trust Restatements, the authors traditionally cabined public policy in a separate section, identifying and discussing particular policy issues that have remained remarkably similar over time, albeit with certain modifications and amplifications. The Restatement (First) set forth the parameters that defined public policy in Section 62, stating in broad strokes that a trust or trust provision was invalid if it tended to induce the commission of illegal or immoral acts or acts against

<sup>84</sup> Halbach, *Uniform Acts*, *supra* note 47, at 1883.

<sup>85</sup> *Id.*

<sup>86</sup> Halbach, *Uniform Acts*, *supra* note 47, at 1881, 1883; see also RESTATEMENT (THIRD) OF TRUSTS, Foreword ix (AM. LAW INST. 2003).

<sup>87</sup> *Id.* § 25 cmt. a.

<sup>88</sup> *Id.* § 25 (1) & (2).

<sup>89</sup> *Id.* § 25(2).

<sup>90</sup> *Id.* § 25 cmts. d, e; see also *id.* §§ 34.1(3), 34.3(3), 55.

<sup>91</sup> See *id.* at § 50 cmts. b & c (on judicial review of trustees’ exercise of discretion); § 58 cmts. e & f; § 60 cmts. e & g.

<sup>92</sup> *Id.* § 59 Reporter’s Note to cmt. a at 400 (citing *Sligh v. First Nat’l Bank*, 704 So. 2d 1020 (Miss. 1997)); see Thomas P. Gallanis, *The New Direction of American Trust Law*, 97 IOWA L. REV. 215, 221–22 (2011).

<sup>93</sup> *Id.* §§ 58(2), 60 cmt. f.

<sup>94</sup> RESTATEMENT (THIRD) OF TRUSTS, Intro. Note 4012 (AM. LAW INST. 2003).

“public policy.” The Reporters furnished an example of “tending to induce the commission of illegal acts” in a trust established to pay the fines of a group of people “engaged in the commission of criminal acts.” A private trust, the Reporters explained, might also be invalid on the grounds of inducing the commission of an immoral act if the trust had as its purpose the provisioning of a nonmarital (“illegitimate”) child.<sup>95</sup>

In terms of “public policy,” the Reporters identified two thematic strands in the comments. One strand of public policy concern centered on family relationships and the maintenance of nuclear, marital families.<sup>96</sup> From this perspective, trusts or trust provisions that restrained marriage, encouraged divorce, or encouraged the neglect of parental duties might be judicially determined to be invalid on public policy grounds. The other strand involved trusts and trust provisions that violated perpetuities, or otherwise restrained alienation (discussed above), and therefore facilitated accumulations. The Reporters did not specify or elaborate on the policy objectives that subtended these categories but nevertheless listed such trusts and trust provisions as being against public policy. As with some of the other textual examples given elsewhere, the authors revealed as much through their silence as through their direct explanations, perhaps assuming their objectives to be self-evident.

The Restatement (Second) of Trusts reiterated the same categories in its discussion of public policy,<sup>97</sup> retaining a public policy emphasis on the importance of financial support within the marital family and the role of rules restraining perpetuities. Accordingly, the examples of “inducement of criminal or tortious acts” describes invalid trust provisions as those providing for payment of money to a “person” “if he should secure a divorce from his spouse by perjury or other improper means” or “if he should violate his duty to support his children, or should violate a public duty, such as the duty to serve in the armed forces of the nation if he is conscripted.”<sup>98</sup> Similar language appears in the examples offered for trusts “encouraging immorality.” One example of a trust provision encouraging “immorality” is a provision that encourages the beneficiary to produce “an illegitimate child.”<sup>99</sup> Taking a step away from the self-assuredness of the Restatement (First), however, the Restatement (Second) declined to provide too much specific guidance for fear of treading on particularized “conceptions of public policy which are prevalent in the community”<sup>100</sup>:

Owing to the changing character of ideas of morality, especially in regard to the relations of the sexes and religious matters, and owing to the diversity of ideas in different communities, it is inadvisable, if not impossible, to make categorical statements on these matters.

This nod to the variety and mutability of cultural norms was a shift in direction and tone from the previous Restatement and gestured to an understanding of the difficulties of universal pronouncements in the context of mores and morals, creating space for productive ambiguity in future iterations.

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<sup>95</sup> The Reporters also noted: “Whether such provisions are invalid depends upon the conceptions of public policy which are prevalent in the community at the time of the creation of the trust.”

<sup>96</sup> Two other scenarios the Reporters envisioned as contra public policy were the restraint of religious freedom and restraining a beneficiary from performing public duties.

<sup>97</sup> RESTATEMENT (SECOND) OF TRUSTS § 62 (AM. LAW INST. 1959); RESTATEMENT (THIRD) OF TRUSTS § 29 (AM. LAW INST. 2003).

<sup>98</sup> RESTATEMENT (SECOND) OF TRUSTS § 62 cmt. b (AM. LAW INST. 1959).

<sup>99</sup> *Id.* § 62 cmt. c.

<sup>100</sup> *Id.* § 62 cmt. d.

In addition to the categories culled from the Restatement (First), the Restatement (Second) Reporters added one new category: “Disposition of property detrimental to the community.”<sup>101</sup> Here, the Reporter remarked:

“A provision in the terms of the trust is invalid if performance of the provision would be injurious to the community as well as to the beneficiary. Thus, if a testator devises land in trust for a long period and directs that no building shall be erected upon any part of the land of more than three stories in height, and the land is situated in the heart of the business district of a city, the enforcement of the provision may be so harmful to the community, as well as to the beneficiaries of the trust, that it is against public policy to enforce it.”

The example clearly involves a trust provision that impairs efficient use of the property in a profit-maximization community of business interests and therefore fails to speak to either larger societal interests or inequality concerns. Nevertheless, the new category recognized that there could be interests at stake other than the beneficiaries’ interests, providing a pivot point for future iterations.

Moving to the Restatement (Third), Section 29 (“Purposes and Provisions That Are Unlawful or Against Public Policy”), sounded the same categories and assumptions as previous Restatements.<sup>102</sup> That is to say, Section 29 reiterated that an intended trust or trust provision was invalid if it was “unlawful or its performance calls for the commission of a criminal or tortious act,” if it violates the relevant perpetuities period, or if it is contrary to “public policy.” In the commentary about what kinds of trusts or trust provisions would be invalid on grounds of calling “for the commission of a criminal or tortious act,” the Reporter included a new example concerning fraudulent transfer. The example runs as follows: “[T]he owner of property might transfer it to another who agrees to hold it in trust for the transferor or another with the purpose being to conceal the interest of the transferor or other person, not merely for reasons of privacy but in order to mislead the government or others with respect to the true beneficial interests in the property.”<sup>103</sup> This recognition of the ways in which trusts could be used to “mislead” the government or other creditors is a notable first in the public policy section.

Outside of trusts that deal in and tend to encourage illegality and fraud, the same strands appear in the discussion of public policy: the regulation of family relationships and the violation of perpetuities rules.<sup>104</sup> In the context of family relationships, new commentary identified trusts or trust provisions that discourage “a person from living with or caring for a parent or child or from social interaction with siblings” as being against public policy. In addition, the Reporter also added that trusts or trust provisions were against public policy to the extent they mandated certain career choices and penalized beneficiaries for acting outside of very narrow parameters with respect to career choices. This example was new in the sense that it took work and career choices seriously as something that trust settlors might choose to control and manipulate, something the previous iterations had not done.

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<sup>101</sup> *Id.* § 62.

<sup>102</sup> RESTATEMENT (THIRD) OF TRUSTS § 29 (AM. LAW INST. 2003).

<sup>103</sup> *Id.*

<sup>104</sup> The Restatement (Third) did not directly address the increase in jurisdictions’ recognition of perpetual trusts. See Jesse Dukeminier & James E. Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303, 1343 (2003) (observing that the Restatement (Third) of Trusts, ch. 13, introductory note, “dodges the issue” of perpetual trusts by writing: “It is worth noting, however, that this section [on modification and termination of trusts] applies in the common-law context and that different issues--and different planning and drafting considerations--may arise with respect to trusts of indefinite duration in jurisdictions that have adopted legislation to abolish the rule against perpetuities.”).

More broadly, the “General Comments” to Section 29(c), addressing trusts that are “contrary” to public policy, explained that a trust provision that induces beneficiaries “to exercise or not exercise fundamental rights that seriously affect their personal interests and lives” may be invalid even if a settlor could have made such gifts during life. Speaking broadly to this idea of finding the appropriate level of settlor control within the public policy framework, the Reporter wrote:

The private trust is tolerated, even treasured, in the common-law world for the flexibility it offers to property owners in planning and designing diverse beneficial interests and financial protections over time, individually tailored as the particular property owner deems best to the varied needs, abilities, and circumstances of particular family members and others whom the owner chooses to benefit. Yet these societal and individual advantages are properly to be balanced against other social values and the effects of deadhand control on the subsequent conduct or personal freedoms of others, and also against the burdens a former owner’s unrestrained dispositions might place on courts to interpret and enforce individualized interests and conditions.

The Reporter made no comment on what “other social values” might come into play or factor into the calculus of public policy pertaining to trust regulation and the regulation of dead-hand control. Nevertheless, advertent to such a balancing act and recognizing the possibility of myriad and competing interests was a step towards mitigating settlor control when exercised as a mode of social control over a beneficiary.

### **C. The Trajectory of Trustee Investment and Distribution Duties**

Trustees are required, pursuant to the duty of loyalty, to act in the sole interests of beneficiaries and, pursuant to the duty of care, to manage trust investments prudently; those duties have been consistent themes throughout the trust Restatements. In the Restatement (First), this was phrased as a trustee being “under a duty to the beneficiary to administer the trust solely in the interest of the beneficiary,”<sup>105</sup> and to make investments (in the absence of contrary terms in the trust) “as a prudent man would make of his own property having primarily in view the preservation of the estate and the amount and regularity of the income to be derived.”<sup>106</sup> While the comments noted that out-of-state investments were “not necessarily improper,” the Reporters also noted that purchasing stock was permissible “if prudent men in the community are accustomed to invest in such shares when making an investment of their savings with a view to their safety.”<sup>107</sup> These provisions, remained the same in the Restatement (Second),<sup>108</sup> although the comments recognized that attitudes had changed towards interstate - and international - investments and that states’ statutes had become more likely to allow investments in common stock.<sup>109</sup>

In between the most recent two Restatements was the interim Restatement of the Prudent Investor Rule, which was described as both “a project in its own right” as well as a “partial revision of the Restatement Second of Trusts.”<sup>110</sup> The basic statement of the duty remained the same, although

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<sup>105</sup> RESTATEMENT (FIRST) OF TRUSTS § 170 (AM. LAW INST. 1935).

<sup>106</sup> *Id.* § 227(a).

<sup>107</sup> *Id.* § 227, cmts. *k*, *l*.

<sup>108</sup> RESTATEMENT (SECOND) OF TRUSTS §§ 170, 227 (AM. LAW INST. 1959).

<sup>109</sup> *Id.* § 227, cmts. *l*, *m*.

<sup>110</sup> Hazard, *Foreword*, *supra* note 52, at ix.



the investment standard had become gender neutral; the trustee's duty "to the beneficiaries [is] to invest and manage the funds as a prudent investor would . . ."<sup>111</sup> Yet as the project was being drafted, Halbach noted that he needed "to decide how and where to treat issues about social influence on investment decisions," suggesting that they might be beyond the basic description of loyalty or could be "slipped" into the commentary on loyalty in Section 227.<sup>112</sup> He did, indeed, "slip" them into the commentary on loyalty, noting that the minimal common law involving "social investing" was not helpful.<sup>113</sup> He reminded readers of the importance of acting to further the trust purposes and with a mindset contemplated by the settlor.<sup>114</sup>

In Restatement (Third), a trustee "has a duty to administer the trust solely in the interest of the beneficiaries,"<sup>115</sup> and "to invest and manage the funds of the trust as a prudent investor would, in light of the purposes, terms, distribution requirements, and other circumstances of the trust."<sup>116</sup> The Reporters provide more clarity on the issue of "social investing,"<sup>117</sup> language that did not appear in earlier Restatements.<sup>118</sup> This prohibition on investing in ways that might "advance" a trustee's "personal views concerning social or political issues or causes" could mean that any consideration of factors other than what is in the beneficiary's sole interest - even if consideration of such factors might ultimately benefit the beneficiary - would be impermissible because there would be a "mixed motive."<sup>119</sup> Section 87 provides additional support for that position, as the comments note that a trustee might abuse their power when acting from an "improper," albeit not "dishonest motive, such as when the act is undertaken in good faith but for a purpose other than to further the purposes of the trust."<sup>120</sup> These provisions could be seen as part of the move towards shareholder wealth maximization, also evidenced in instructions to ERISA managers not to consider ESG investing.<sup>121</sup>

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<sup>111</sup> RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 227 (AM. LAW INST. 1987).

<sup>112</sup> *Memo from Edward C. Halbach, Jr., Second Expanded Draft of "Prudent Investor Rule" and Related and Affected Sections for Discussion*, June 2-3, iii, iv, in RESTATEMENT OF THE LAW TRUSTS: PRUDENT INVESTOR RULE Prelim. Draft No. 4 (Aug. 15, 1989).

<sup>113</sup> RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INVESTOR RULE § 227 cmt. c.

<sup>114</sup> *Id.*

<sup>115</sup> RESTATEMENT (THIRD) OF TRUSTS § 78 (AM. LAW INST. 2007).

<sup>116</sup> *Id.* § 90; see Susan Gary, *Best Interests in the Long Term: Fiduciary Duties and ESG Integration*, 90 COLO. L. REV. 731, 785 *et seq.* (2019).

<sup>117</sup> Thus, for example, in managing the investments of a trust, the trustee's decisions ordinarily must not be motivated by a purpose of advancing or expressing the trustee's personal views concerning social or political issues or causes." RESTATEMENT (THIRD) OF TRUSTS § 90 cmt. c (AM. LAW INST. 2007).

<sup>118</sup> For example, it is not in Sec. 170 (Duty of Loyalty), 187 (Control of Discretionary Powers), or 227 (General Standard of Prudent Investment) of the Restatement (Second) of Trusts.

<sup>119</sup> Max M. Schanzenbach & Robert H. Sitkoff, *Reconciling Fiduciary Duty and Social Conscience: The Law and Economics of ESG Investing by a Trustee*, 72 STAN. L. REV. 381, 413 (2020).

<sup>120</sup> RESTATEMENT (THIRD) § 87, cmt. c; see Schanzenbach & Sitkoff, *supra* note 119, at 414 ("If a trustee could not consistent with the terms of the trust make an outright distribution to achieve the same collateral environmental benefit, then the trustee ought not be allowed to circumvent that limit by pursuing the same purpose via the trust's investment program.").

<sup>121</sup> Christopher M. Bruner, *Corporate Governance Reform and the Sustainability Imperative*, 131 YALE L.J. 1217, 1243 (2022); see Quinn Curtis et. al., *Do ESG Mutual Funds Deliver on Their Promises?*, 120 MICH. L. REV. 393, 396 (2021) (noting that the Department of Labor adopted an ERISA rule in late 2020 "that may deter 401(k) plans from offering ESG funds"); Schanzenbach & Sitkoff, *supra* note 119, at 403-404 (noting Supreme Court precedent that ERISA investments must be made by focusing solely on financial benefit). *But see* Abbye Atkinson, *Commodifying Marginalization*, 71 DUKE L.J. 773 (2022) (noting the importance of considering the impact of investments on pension fund beneficiaries); Gary, *supra* note 116, at 798 (a prudent investor is increasingly advised to consider ESG factors).

While the parameters of the Prudent Investor Rule have changed, from an emphasis on preserving the corpus and ensuring income in the first two Restatements to “liberating expert trustees to pursue challenging, rewarding nontraditional strategies, when appropriate to the particular trust, to providing unsophisticated trustees with reasonably clear guidance”<sup>122</sup> in Restatement (Third), the “sole interest” standard and “no further inquiry” rule has remained consistent.<sup>123</sup>

### III. “A Cycle of Renewal”: Envisioning the Fourth Restatement

Moving from one version of the Restatement to the next, what has come into increasingly sharp focus is the extent to which reform is, for the most part, effectuated in response to new developments in social outlook, wealth management, laws outside of the trust area (such as civil rights), and public policy. Part of the “cycle of renewal”<sup>124</sup> is recognizing what was previously absent and making space for such matters within new discussions. Accordingly, the remainder of this chapter focuses on a few potential areas for reform, recognizing that the work of the Reporters will lie in not only keeping pace with public understandings of concepts like family and gender but also in recognizing the ubiquitous presence of public policy concerns throughout the Restatement. Even as the Restatement of Trusts was shaped by its Reporters to be flexible, they recognized the need to draw on court decisions and statutes, “seeking a seamless statement of the best principles of American trust law and offering intellectual guidance” to state legislatures, courts, and estate planners.<sup>125</sup> The following three sets of suggestions, centered on calibrating the interests of trust settlors and beneficiaries with the social and democratic good of the relevant communities and larger collectives, take seriously this charge to state “best principles” and “offer[] intellectual guidance,” although we recognize that some are aspirational, rather than summaries of current developments.

#### A. Recognizing New Populations and Uses

Historically - and in the social imagination - it is clear that trusts have been and continue to be primarily the tools of the wealthy,<sup>126</sup> even as they have come to be easier to create, understand, use,

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<sup>122</sup> Edward C. Halbach, Jr., *Trust Investment Law in the Third Restatement*, 27 REAL PROP. PROB. & TR. J. 407, 411 (first and second Restatements), 415 (1992).

<sup>123</sup> The UTC diverged from the Restatement by changing the “no further inquiry” rule into a presumption, which a trustee could rebut by showing an absence of conflict. See UTC § 802(c); see also John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 944 (2005) (arguing that the “no further inquiry” rule is a relic and prevents trustees from engaging in transactions that will benefit both the trust and its beneficiaries); Melanie B. Leslie, *In Defense of the No Further Inquiry Rule: A Response to Professor John Langbein*, 47 WM. & MARY L. REV. 541 (2005) (arguing that “best interests” standard would impose the risk of serious harm on beneficiaries). Although drafted in tandem and sharing many provisions, the UTC and Restatement (Third) do diverge at times. See, e.g., Philip J. Ruce, *The Trustee and the Remainderman: The Trustee's Duty to Inform*, 46 REAL PROP. TR. & EST. L.J. 173, 185- (2011) (describing differences between UTC and Restatement in defining beneficiaries entitled to information from a trustee); Daniel B. Kelly, *Restricting Testamentary Freedom: Ex Ante Versus Ex Post Justifications*, 82 FORDHAM L. REV. 1125, 1179 (2013) (describing differences in modification and termination provisions).

<sup>124</sup> Langbein, *Major Reforms*, *supra* note 47, at 5; text accompanying note 79 *supra*.

<sup>125</sup> Liebman, *Foreword*, *supra* note 49.

<sup>126</sup> RAY D. MADOFF, IMMORTALITY AND THE LAW: THE RISING POWER OF THE AMERICAN DEAD 80 (2010) (“[A]s a practical matter, [generation-skipping trusts] were *only* available to those families wealthy enough to keep their assets locked up in trust); Stewart E. Sterk, *Trust Decanting: A Critical Perspective*, 38 CARDOZO L. REV. 1993, 1994 (2017) (“Poor people do not create trusts.”); see also Alison A. Tait, *High-Wealth Exceptionalism*, 71 ALA. L. REV. 981, 995-1000 (2020) (describing how private trust companies enhance the wealth of high-net-

and administer. As a result, discussing how a Restatement (Fourth) might address a more diverse set of users is, in itself, a challenge; any discussion of wealth transmission affects a much narrower section of society than does a discussion of wealth generation, for example.<sup>127</sup> Nonetheless, a new Restatement might build on the idea of growing access to revocable trusts as highly utilized estate planning devices by expanding on how trusts are being used as management vehicles for incapacity, for special needs, and even as a way to hold fractionalized property.<sup>128</sup> In addition, a Restatement (Fourth) might take a position on the increase of Domestic Asset Protection Trusts (DAPTs), previously mentioned only in the comments to Restatement (Third), Section 60 (Transfer or Attachment of Discretionary Interests). Since the last Restatement, DAPTs have become even more prevalent as nineteen states have authorized them through new legislation.<sup>129</sup> A Restatement (Fourth) will have to decide how to address these and similar trusts<sup>130</sup> and the enhanced asset protection that they offer, especially when they are self-settled trusts. Related doctrines, such as trust “decanting,” directed trusts, and trust protectors, all of which together tend to increase wealth disparities, have also become pivotal topics in the trust landscape,<sup>131</sup> and it will be crucial for the Reporters to craft appropriate provisions addressing these trust law developments.

Perhaps as an easier task for the future Reporters, there are a number of areas in which a new Restatement could revise material based on the use of gendered language and social constructs, especially around families. For example, by examining and reimagining how gender and race manifest in the rules and illustrations, the Reporters could use their expressive powers to show that diverse populations engage with trusts.<sup>132</sup>

## B. Public Policy Concerns and New Trust Law Developments

Looking ahead and envisioning a Restatement (Fourth), there are multiple ways in which the Reporters could build on the foundations laid out in previous versions, amplifying and expanding the connections between trust regulation and public policy. Even focusing solely on the specific public policy sections found in the previous Restatement – section 62 in the First and Second, section 29 in the Third – there is ample room for expanding to recognize existing developments.

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worth families); Felix Chang, *Asymmetries in the Generation and Transmission of Wealth*, 79 OHIO ST. L.J. 73, 74-75 (2018); Iris J. Goodwin, *How the Rich Stay Rich: Using a Family Trust Company to Secure a Family Fortune*, 40 SETON HALL L. REV. 467, 467-78 (2010); Carla Spivack, *Beware the Asset Protection Trust*, 5 EUR. J. PROP. L. 1-26 (2016); Carla Spivack, *Democracy and Trusts*, 42 ACTEC L.J. 311,339 (2017); Kent Schenkel, *Exposing the Hocus Pocus of Trusts*, 45 AKRON L. REV. 63, 64 (2012).

<sup>127</sup> Naomi Cahn, *Dismantling the Trusts & Estates Canon*, 2019 WISC. L. REV. 165 (2019).

<sup>128</sup> Caitlin Henderson, Note, *Heirs Property in Georgia: Common Issues, Current State of the Law, and Further Solutions*, 55 GA. L. REV. 875, 898 (2021) (discussing family land trusts as a way to remedy heirs property).

<sup>129</sup> David G. Shaftel, *Twelfth ACTEC Comparison of the Domestic Asset Protection Trust Statutes* (2019), <https://www.actec.org/assets/1/6/Shaftel-Comparison-of-the-Domestic-Asset-Protection-Trust-Statutes.pdf?hssc=1>.

<sup>130</sup> See, e.g., 2022 Fla. Sess. Law Serv. Ch. 2022-101 (West) (authorizing spousal limited access trusts (SLATs) that provide substantial asset protection benefits to donor spouse).

<sup>131</sup> See Sterk, *supra* note 126, at 2028-32 (describing social costs of decanting); see generally Tait, *supra* note 126 (describing how high-wealth families use trust and financial rules to preserve their wealth).

<sup>132</sup> See, e.g., E. Gary Spitko, *The Expressive Function of Succession Law and the Merits of Non-Marital Inclusion*, 41 ARIZ. L. REV. 1063, 1077–80 (1999) (describing expressive function of intestacy law); Lee-ford Tritt, *Technical Correction or Tectonic Shift: Competing Default Rule Theories Under the New Uniform Probate Code*, 61 ALA. L. REV. 273, 294–95 (2010) (same).

Consider “illegal” trust terms, such as the fraudulent transfer example given in Restatement (Third). The rules on fraudulent transfer are one of the few tools that govern transfers into trusts, and future Reporters might want to analyze how such rules facilitate public policy goals related to tax collection, creditor rights, and family support debts. This analysis would align with new and continuing developments in trust law across the states, discussed in the previous section.<sup>133</sup> Similarly, with the category of perpetuities, the Reporters should take into account new legislative activity expanding perpetuities periods. Perpetuities violations have been considered a public policy violation in all previous versions of the Restatement, but the Reporters have never explicitly articulated the policy rationales that make the Rule Against Perpetuities so fundamental. With almost a dozen states having fully abolished the Rule Against Perpetuities<sup>134</sup> and even more having extended the perpetuities period to anything from 365 to 1,000 years,<sup>135</sup> Reporters may be called upon, in order to capture these developments, to take a stance on how these developments sit with the traditional framing of perpetuities within the Restatements.<sup>136</sup>

Finally, Reporters for any future Restatement have the capacity to use the public policy power to effectuate anti-discrimination norms. Previous Restatements have all addressed within the public policy section the extent to which trusts or trust provisions may place conditions on a beneficiary’s religious faith and practice.<sup>137</sup> This concern could provide the impetus for amplification around the topic of discriminatory conditions within trusts. Recognizing that these kinds of public policy limits are the only mechanism through which to address and combat discrimination in trusts and trust provisions, the Reporters might include policy statements about other forms of discrimination, such as by stating explicitly that trusts or trust provisions that place conditions based on race, gender, age, ability, or ethnicity presumptively violate public policy. The list might even include gender identity.<sup>138</sup>

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<sup>133</sup> For a sampling of commentary, see John K. Eason, *Home from the Islands: Domestic Asset Protection Trust Alternatives Impact Traditional Estate and Gift Tax Planning Considerations*, 52 FLA. L. REV. 41, 53 (2000); Adam Hirsch, *Fear Not the Asset Protection Trust*, 27 CARDOZO L. REV. 2685 (2005–2006); Stewart Sterk, *Asset Protection Trusts: Trust Law’s Race to the Bottom*, 85 CORNELL L. REV. 1035, 1048 (2000); Ritchie W. Taylor, *Domestic Asset Protection Trusts: The “Estate Planning Tool of the Decade” or a Charlatan?*, 13 BYU J. PUB. L. 163, 167 (2013).

<sup>134</sup> Seventeen states now allow for self-settled Domestic Asset Protection Trusts (“DAPT’s”). Those states are Alaska, Delaware, Hawaii, Michigan, Mississippi, Missouri, Nevada, New Hampshire, Ohio, Oklahoma, Rhode Island, South Dakota, Tennessee, Utah, Virginia, West Virginia, and Wyoming.

<sup>135</sup> Eight states have repealed the rule against perpetuities (Alaska, Delaware, Idaho, Kentucky, New Jersey, Pennsylvania, Rhode Island, and South Dakota). Nine states have adopted longer fixed periods for the rule against perpetuities, sometimes only for certain types of property. These states are Alabama, Arizona, Colorado, Delaware (110 years for real property held in trust), Florida, Nevada, Tennessee, Utah, and Washington. Seventeen states have retained the rule against perpetuities but allowed certain trusts to continue without application of the rule (Arizona, District of Columbia, Hawaii, Illinois, Maine, Maryland, Michigan, Missouri, Nebraska, New Hampshire, New Jersey, North Carolina, North Dakota, Ohio, Oklahoma, Virginia, and Wyoming). Howard Zaritsky, *The Rule Against Perpetuities*, 50-STATE ACTEC Survey, available at [https://www.actec.org/assets/1/6/Zaritsky\\_RAP\\_Survey.pdf?hssc=1](https://www.actec.org/assets/1/6/Zaritsky_RAP_Survey.pdf?hssc=1)

<sup>136</sup> See Jesse Dukeminier & James Krier, *The Rise of the Perpetual Trust*, 50 UCLA L. REV. 1303 (2002–2003); Mary Louise Fellows, *Why the Generation-Skipping Transfer Tax Sparked Perpetual Trusts*, 27 CARDOZO L. REV. 2511 (2005–2006); Max Schanzenbach & Robert Sitkoff, *Perpetuities or Taxes—Explaining the Rise of the Perpetual Trust*, 27 CARDOZO L. REV. 2465 (2005–2006); Lawrence Waggoner, *Effectively Curbing the GST Exemption for Perpetual Trusts*, TAX NOTES, Vol. 135, No. 10, June 2012.

<sup>137</sup> A trust provision is ordinarily invalid if it, “enforcement would tend to restrain the religious freedom of the beneficiary by offering a financial inducement to embrace or reject a particular faith or set of beliefs concerning religion. Illustrative is a provision granting or terminating a beneficial interest only if the beneficiary should adopt or abandon a particular religious faith.” RESTATEMENT (THIRD) OF TRUSTS § 29 (AM. LAW INST. 2003).

<sup>138</sup> See *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).

Developing this more expansive framework in the public policy sections will not only move the Restatement toward a more robust understanding of anti-discrimination, but also will help address concerns, stated elsewhere in this article, about the silence around the production of gender and race within the Restatements.

### C. Reconceptualizing Fiduciary Responsibilities.

While the obligation of a trustee to act in the sole interest of the beneficiaries remains firmly entrenched,<sup>139</sup> the development of ESG investing provides a distinct set of additional challenges to the meaning of “sole interest” and of “prudence.” If a beneficiary’s sole interest is defined as maximizing financial returns, albeit through prudent investing, then any attention to ESG investing might be seen as a distraction (at best) or, as discussed earlier, as a potential violation of the duty of loyalty. Indeed, pressure to engage in ESG investing could be deemed as violating the duty of loyalty in requiring a trustee to consider “collateral benefits to third parties.”<sup>140</sup> Alternative, less draconian views of compliance with the duty of loyalty might make ESG considerations permissible under certain circumstances,<sup>141</sup> given that they are already becoming factors in other types of investment management and so could become part of acting as a prudent investor would.<sup>142</sup> Perhaps ESG considerations “should” be part of any investment analysis.<sup>143</sup> They might even be required, but only when such an investment strategy enhances the long-term value of a company,<sup>144</sup> and can thus be viewed in the beneficiary’s sole interest.

Yet, despite the fact that these debates are heatedly taking place across investment offices, the special demands of ESG investing have not yet been addressed by the Restatement. A Restatement (Fourth) could do so, guided by the efforts of some states to require trustees to consider beneficiaries’ interests in ESG investing as a modification of the Prudent Investor Rule.<sup>145</sup> For example, in

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<sup>139</sup> John H. Langbein, *Questioning the Trust Law Duty of Loyalty: Sole Interest or Best Interest?*, 114 YALE L.J. 929, 943 (2005) (arguing that the sole interest test should be replaced by the best interest test).

<sup>140</sup> Schanzenbach and Sitkoff distinguish between “risk-return ESG,” which focuses on improving returns by using ESG metrics to improve return while minimizing risk (a fossil-fuel share company has stock prices that are artificially inflated because of inadequate accounting for regulatory risks), and “collateral benefits” ESG, which focuses on “providing a benefit to a third party or otherwise for moral or ethical reasons.” Schanzenbach & Sitkoff, *supra* note 119, at 397-398. They agree with the Restatement approach in which “collateral benefits ESG investing would ‘ordinarily’ violate the sole interest rule,” which does not allow for the trustee to be motivated by the trustee’s own views. *Id.* at 412.

<sup>141</sup> “[I]n general, ESG investing is permissible for a trustee of a pension, charity, or trust subject to American trust fiduciary law if: (1) the trustee reasonably concludes that the ESG investment program will benefit the beneficiary directly by improving risk-adjusted return; and (2) the trustee’s exclusive motive for adopting the ESG investment program is to obtain this direct benefit.” *Id.* at 385–86.

<sup>142</sup> Jane Gorham Ditelberg, *Investing in and for the Future: ESG Investing for Trust Assets Under the Prudent Investor Rule*, 47 ACTEC L.J. 23, 24 (2021).

<sup>143</sup> Gary, *supra* note 116, at 799 (“As long as a strategy does not involve sacrificing financial returns, then even if the duty of loyalty is defined as the duty to act solely in the financial interests of the beneficiaries, the duty of loyalty is not compromised by a direction to invest using a strategy that incorporates ESG criteria”).

<sup>144</sup> “[W]e argue that the fiduciary duty (of loyalty) should be extended and declared publicly by our policymakers to require that institutional investors take equality factors into account.” Anat Alon-Beck, et. al., *No More Old Boys’ Club: Institutional Investors’ Fiduciary Duty to Advance Board Gender Diversity*, 55 U.C. DAVIS L. REV. 445, 481 (2021) (advocating such a duty for institutional investors). “We believe that this suggested extension is consistent with a director’s fiduciary duties, as long as the decision positively contributes to the financial growth and overall long-term value creation of the company.” *Id.* at 484.

<sup>145</sup> Ditelberg, *supra* note 142, at 25.

Delaware, the code states: “*when considering the needs of the beneficiaries, the fiduciary may take into account the financial needs of the beneficiaries as well as the beneficiaries' personal values, including the beneficiaries' desire to engage in sustainable investing strategies that align with the beneficiaries' social, environmental, governance or other values or beliefs of the beneficiaries.*”<sup>146</sup> Delaware also provides for the enforceability of a trust term that directs a “sustainable or socially responsible investment strateg[y] ... with or without regard to investment performance;”<sup>147</sup> it allows a trustee to consider an investment that “sacrifices returns to achieve a benefit for a third party or for moral or ethical reasons.”<sup>148</sup> Again, in order to better reflect what is happening within trust companies and what is being discussed among trustees, a Fourth Restatement will want to recognize these developments and fold them into new discussions.

#### IV. Conclusion

The Restatements of Trusts have achieved the goals set forth in the Institute’s 1923 Certificate of Incorporation: “to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.”<sup>149</sup> The Restatements of Trusts helped to institutionalize a relatively new field of law.<sup>150</sup>

Today, while the core elements of trust law are reflected in the Restatement (Third) and the widely-adopted Uniform Trust Code, broader questions about the role of trusts are becoming more important in an era of increasing economic inequality. Norman Dacey’s popularization of the revocable trust,<sup>151</sup> the development of “Totten trusts,”<sup>152</sup> and the growing use of trusts in planning for incapacity show the increasing potential reach of trusts. At the same time, dynasty trusts and domestic asset protection trusts show the increasing uses of trusts to shelter wealth. The role of trusts in both protecting autonomy and fostering economic inequality may not be issues that should be addressed in a Restatement, but they are certainly fundamental questions that are raised by the Restatement’s clarification of the law.

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<sup>146</sup> Del. Code Ann. tit. 12, § 3302(a) (2018)(emphasis is new language); Ditelberg, *supra* note 142, at 25 (noting that Georgia adopts a similar approach); *see also* Schanzenbach & Sitkoff, *supra* note 119, at 387 (noting that Delaware was the first state to address ESG considerations in its trust code).

<sup>147</sup> Del. Code Ann. tit. 12, § 3303(a)(4).

<sup>148</sup> Schanzenbach & Sitkoff, *supra* note 119, at 418.

<sup>149</sup> American Law Institute, *Capturing the Voice of the American Law Institute: A Handbook for ALI Reporters and Those Who Review Their Work* 1 (rev. ed. 2015)(quoting original Certificate).

<sup>150</sup> *See* Scott, *Fifty Years of Trusts*, *supra* note 35, at 60 (Harvard first offered trusts as a course in 1882).

<sup>151</sup> *See* John H. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 HARV. L. REV. 1108, 1113 (1984).

<sup>152</sup> *Id.*