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# SYMPOSIUM

## Onlookers Tell an Extraordinary Entity What to Do

“RESTATEMENT OF...” SYMPOSIUM INTRODUCTION

*Anita Bernstein*<sup>†</sup>

### INTRODUCTION

Differing from most law review symposia, “Restatement Of . . .” takes on more than a dozen fields of law—and butts into someone else’s work. It has the temerity to give advice to a private organization regarding the output it produces in furtherance of its mission.<sup>1</sup> Nobody inside the organization sought this advice until I, acting at only my own behest,<sup>2</sup> began e-mailing and phoning academic experts to invite their participation.<sup>3</sup> The theses of the

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<sup>†</sup> Anita and Stuart Subotnick Professor of Law, Brooklyn Law School. My thanks to the institutions that funded and enhanced this Symposium: Brooklyn Law School, the *Brooklyn Law Review*, and the American Law Institute. Stephanie Middleton, Leslie Griffin, Ron Krotoszynski, Dana Brakman Reiser, Michael Cahill, and Lloyd Carew-Reid gave vital support to the project at an early stage—as did Lance Liebman, who also lent ALI expertise to our planning and aided in the production of this introduction. Thanks also to the *Brooklyn Law Review* editorial staff, especially John Moore and Annie Cataldo, and to the Symposium authors for bringing their big ideas to this collection.

<sup>1</sup> A few other law review symposia that consider the prospect of new ALI restatements do exist. See, e.g., Covey T. Oliver, *Foreword*, 25 VA. J. INT’L L. 1 (1984) (assembling commentary about a new version of the RESTATEMENT OF FOREIGN RELATIONS LAW); Gene Shreve, Introduction to *Symposium: Preparing for the Next Century—A New Restatement of Conflicts?*, 75 IND. L.J. 399 (2000). This one breaks new ground in that it examines the restatements of multiple fields.

<sup>2</sup> In 1995 I joined the American Law Institute and published an essay about its work, Anita Bernstein, *Restatement Redux*, 48 VAND. L. REV. 1663 (1995). I haven’t been especially active in the production of new restatements, and I invited participants to this Symposium before discussing the project with ALI personnel.

<sup>3</sup> Their contributions follow in these pages. Three participants at the live event in January—Ellen Bublick, Jeffrey Rachlinski, and Peter Strauss—were unfortunately unable to join the published version of this Symposium.

14 articles that follow present learned variations on “You might . . .,” “You should . . .,” “You shouldn’t . . .,” “You can’t,” and even “You ought to consider restating something you might not have even thought was a field.” Chutzpah, I admit.

The organization in question could well have said *Who asked you?*, but it instead has reacted with the utmost cooperation. As the afterword from outgoing director Lance Liebman makes clear, the American Law Institute welcomed what it could have written off as officious intermeddling.<sup>4</sup> No ordinary nonprofit, this Institute. Yet at the risk of appearing ungrateful for the support that not only made this Symposium possible but also caused it to flourish, I argue here that external commentary like “Restatement Of . . .” is entitled to a hearing by the ALI. Entitled, because this extraordinary entity has undertaken to listen.

Throughout the near century of its existence, the ALI has been open to reassessing what it does, a stance that suggests stakeholders can—and I argue here should—opine on the possibility of both expansions and contractions in the Restatement agenda. Our authors were charged to consider the “restateability” of their fields of expertise and then recommend to the ALI and their fellow stakeholders whatever they saw fit. As gathered in this volume, their work product endorses new undertakings, new abstentions from established ALI projects, and particular responses to developments in varied corners of the law.

Each of the thoughtful articles in this volume has a place in at least two groupings. The first grouping relates to the peer audience of specialists to whom it speaks. By the authority of its writer, each contribution joins the foundational scholarship of its field, conversing with interlocutors who know its author as a must-read authority. These varied literatures will thrive without “Restatement Of . . .” as a uniter: I leave them here.

The second grouping is this very issue of the *Brooklyn Law Review* which, in the aggregate and through each individual author, speaks to the American Law Institute, giving it advice about what to do. Participants in the Symposium have responded to a call; they join a dialogue that the American Law Institute has invited in its founding and through its work.

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<sup>4</sup> See Gerhard Dannemann, *Is Unjust Enrichment Law an Officious Intermeddler?*, 92 B.U. L. REV. 991, 991 (2012) (describing the officious intermeddler as a “pest”).

## I. THE CALL

It would be irresponsible of me to assert that this Symposium responds to a tacit invitation from the American Law Institute without also explaining what I understand the terms of that offer to be. “You asked for it” can be an accurate assertion, but it has a worrisome provenance.<sup>5</sup> The asserter ought to say who was asked, what was asked for, and what the asker owes in response.

Let me dispatch the last point first: The ALI need do nothing in reaction to the ideas aired in the Symposium. However interesting and pertinent they may be, they are not entitled to be heeded. The first two points—who is invited to weigh in and what the ALI has invited—require more elaboration.

### A. *Who Is Invited*

The ALI has overtly welcomed input from its membership. This group, capped at 3,000 persons (with life, ex officio, and honorary members of the Institute excluded), is “expected to take an active part in the Institute’s activities.”<sup>6</sup> Helping to guide the work of the Institute through the expression of opinions is close to obligatory; individuals may fulfill their membership obligation by alternative means, but their ideas about what to do form an important base of their participation. Most of the authors in this Symposium, as members of the ALI, are delivering on an expectation fixed before “Restatement Of . . .” came together.

The cohort of onlookers who may tell this extraordinary entity what to do extends beyond the membership roster. We can infer as much with reference to the Institute’s mission and operations. The ALI continually reexamines its membership procedures, ever attentive to the challenge of recruiting newer voices and perspectives.<sup>7</sup> Lest anyone think that this practice is recent or even faddish, I note that Learned Hand himself,

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<sup>5</sup> Cf. The “Failure to Protect” Working Group, *Charging Battered Mothers with “Failure to Protect”: Still Blaming the Victim*, 27 *FORDHAM URB. L.J.* 849 (2000).

<sup>6</sup> *Membership Overview*, A.L.I., <http://ali.org/index.cfm?fuseaction=membership.membership> (last visited Oct. 15, 2013).

<sup>7</sup> In a recent newsletter the Institute mused over the prospect of radically overhauling its recruitment of new members. *Changes Coming to ALI Membership Process*, A.L.I. REP. 3 (Spring/Summer 2013), available at [http://www.ali.org/\\_news/reporter/spring-summer-2013/spring-summer-2013.pdf](http://www.ali.org/_news/reporter/spring-summer-2013/spring-summer-2013.pdf).

writing about the future of the Institute in the middle of the twentieth century, shared in it.<sup>8</sup>

Has anyone and everyone been invited to weigh in? Not quite. The ALI is for better or worse an elite entity, expecting participants in the dialogues it establishes to possess “the highest qualifications.”<sup>9</sup> Over the years it has caused hosts of persons to feel excluded.<sup>10</sup> It also unabashedly makes demands. Consistent with the ALI tradition of filtering, when I extended invitations to this Symposium I recalled how the Institute expects willingness to share in its mission, a criterion that though expansive is consistent with a filtering heritage. And so I asked the highly qualified invitees to generate new “scholarly work to clarify, modernize, and otherwise improve the law.”<sup>11</sup> Scholars were not required to be members of the ALI to join “Restatement Of . . .” and thereby make suggestions to the ALI about what it should do, but they were expected to share in an agenda of improvement. As you will see, they lived up to this expectation.

There was another demand. In addition to possessing the highest qualifications and sharing in an agenda to clarify, modernize, and improve the law, persons entitled to tell the Institute what to do must also, in the ALI’s words, leave their clients at the door.<sup>12</sup> By this phrase the Institute—along with me,

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<sup>8</sup> Writing about the Council, in effect the directors of the ALI as a corporation, Hand wrote:

[W]e think that there should be an enlargement of its members, with a consequent infusion of fresh ideas and point of view. We recommend the addition of ten more members with the distinct understanding that they shall come from the forty to fifty age group rather than in the higher brackets where most of the present membership is.

AM. LAW INST., REPORT OF SPECIAL COMMITTEE ON FUTURE PROGRAM 315 (submitted to the ALI Council, Mar. 18, 1947), [hereinafter HAND REPORT].

<sup>9</sup> *ALI Overview*, A.L.I., <http://ali.org/index.cfm?fuseaction=about.overview> (last visited Oct. 15, 2013).

<sup>10</sup> Kristen David Adams, *Blaming the Mirror: The Restatements and the Common Law*, 40 IND. L. REV. 205, 208-10 (2007) (cataloguing “criticisms [that] often center on the membership of the Institute, the scope and goals of Institute projects, the perception that the Restatements have not incorporated the knowledge of other disciplines . . . and the view that the Restatements represent antiquated Formalist thought that is not useful to modern lawyers”).

<sup>11</sup> *ALI Overview*, *supra* note 9.

<sup>12</sup> Quoting *The ALI Reporter*, one distinguished member of the Institute took that stance:

To maintain the Institute’s reputation for thoughtful, disinterested analysis of legal issues, members are expected to leave client interests at the door. Members should speak and vote on the basis of their personal and professional convictions and experience without regard to client interests or self-interest. It is improper under Institute principles for a member to represent a client in Institute proceedings. If, in the consideration of Institute

in this Symposium—has said that advice for ALI action must originate in a disinterested motive to improve the law, with speakers expressing opinions for themselves rather than as anyone's agents.<sup>13</sup>

The articles published here are all written by full-time academics rather than client-focused partisans, and so this point about neutrality may seem tangential to these proceedings. But this Symposium is hardly the first occasion of onlookers telling this extraordinary entity what to do. As the ALI enters its next century, it will not be the last. Would-be advisers ought to know who has received the ALI call. It's you, provided that you possess knowledge about the subject on which you opine and you have left any private or partisan agenda at the door.

### B. *What Is Invited*

Here the ALI welcome grows wide and plenary. This breadth was in place from the start. Adopted on February 23, 1923, the Institute's corporate charter expresses a commitment to "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>14</sup> One of its leaders during this era, the contracts scholar Arthur Corbin, may have had authority to bind the ALI when he welcomed critical assessments of its work product: "The productions of the Institute should receive constant criticism, both destructive and constructive," Corbin wrote a few years after the founding, "from within the membership of the Institute and from without."<sup>15</sup>

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work, a member's statements can be properly assessed only if the client interests of the member or the member's firm are known, the member should make appropriate disclosure, but need not identify clients.

Alex Elson, *The Case for an In-Depth Study of the American Law Institute*, 23 LAW & SOC. INQUIRY 625, 636 (1998) (citation omitted). Compare Elizabeth Laposata et al., *Tobacco Industry Influence on the American Law Institute's Restatements of Torts and Implications for Its Conflict of Interest Policies*, 98 IOWA L. REV. 1 (2012), with Roberta Cooper Ramo & Lance Liebman, *The ALI's Response to the Center for Tobacco Control Research & Education*, 98 IOWA L. REV. BULL. 1 (2013) (debating the application of this conflict of interest policy).

<sup>13</sup> For a worrisome articulation of this point, see Elson, *supra* note 12, at 634 ("I have been told by several members of the [ALI] council that in recent years lobbying pressure upon them has been intense. What impact, if any, does such pressure have?").

<sup>14</sup> *Certificate of Incorporation*, A.L.I., <http://www.ali.org/index.cfm?fuseaction=about.charter> (last visited Oct. 15, 2013).

<sup>15</sup> Arthur L. Corbin, *The Restatement of the Common Law by the American Law Institute*, 15 IOWA L. REV. 19, 29 (1929).

This broad platform has given ALI leaders the space to deliver a variety of responses to the needs of their time. Elsewhere I have argued that “clarification . . . of the law” back in the pre-computer scrivener founding era imposed mechanistic obligations on ALI volunteers.<sup>16</sup> Today, with decisional law produced and stored in reliable electronic form, the work of clarification permits more debate and more choices.

The roster of Restatements shows a policy of expansion. In its first round of work, completed in 1944, the ALI restated common law fields: agency, conflict of laws, contracts, judgments, property, restitution, security, torts, and trusts.<sup>17</sup> The First Restatements of these doctrines created a new form for American law—neither code nor treatise nor monograph.<sup>18</sup> Though divided from the start on the basic question of whether to summarize or change what judges had held in decisional law,<sup>19</sup> each of these new documents was, in hindsight, skillfully crafted to gain influence in a conservative sector. Restatements leveraged the elite pedigrees of their writers to join the American legal establishment with little delay.

The ALI could have rested on these laurels, reading its 1923 charter to identify an agenda completed when *Restatement (First)* was done. It had clarified and simplified the law wherever American judges had disagreed about the substantive common law rights and entitlements of private litigants.<sup>20</sup> Surely “better adaptation to social needs,” “the better administration of justice,” and “scholarly and scientific legal work” would emerge from this base of publications.<sup>21</sup> Enough, no?

No, said the Institute in 1947, in a remarkable report authored by Learned Hand as chairman of a seven-member Special Committee on Future Programs. With its Restatements published and gaining strength, the ALI formed this committee in 1946 to consider what was next for the organization. Hand began the report by quoting himself: “There must be, in the words of the Chairman, several dishes simmering on the back of the stove so

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<sup>16</sup> Bernstein, *supra* note 2, at 1665 (citing N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 LAW & HIST. REV. 55, 81 (1990)).

<sup>17</sup> Jordan Steele, Univ. Pa., *First Restatement of the Law Records*, [http://dla.library.upenn.edu/dla/ead/ead.pdf?id=EAD\\_upenn\\_biddle\\_USPULPULALI04001](http://dla.library.upenn.edu/dla/ead/ead.pdf?id=EAD_upenn_biddle_USPULPULALI04001) (last updated Apr. 28, 2011).

<sup>18</sup> Bernstein, *supra* note 2, at 1668.

<sup>19</sup> *Id.* at 1667.

<sup>20</sup> Dan Tarlock, *Why There Should Be No Restatement of Environmental Law*, 79 BROOK. L. REV. 663, 665 (2014) (making this point about substance not procedure).

<sup>21</sup> See *supra* note 14 and accompanying text.

that when the presently used one is empty there is something to cook and serve for a next course.”<sup>22</sup> The Hand Report endorsed many ideas for new projects: a variety of undertakings in business associations, a criminal law code, continued work in juvenile justice,<sup>23</sup> a critical reexamination of common law rules as found in different fields, an income tax code (on which more anon from Lawrence Zelenak),<sup>24</sup> possible contributions to a United Nations-sponsored code of international law, recommendations for the reform of patent law, more restating of property (more anon on that one too),<sup>25</sup> and attention to continuing legal education. Curiously, the one prospect that Hand and his colleagues abjured was new Restatements. This hesitation aside, the ALI announced an ever-onward initiative in 1947, a stance to which it adheres.

ALI director Lance Liebman, in his afterword to this Symposium, touches on a few highlights of the twenty-first century Institute, of which a move into the transnational has been especially noteworthy.<sup>26</sup> Liebman observes that the ALI has never defined the term restatement.<sup>27</sup> Like him, I read this omission of a definition as inviting multiple views of what might be restated. The diverse contributions to this Symposium do not begin to exhaust what could be on the Restatement horizon.

One caveat on the question of what is invited: In my opinion, the Institute’s attention to “improvement”<sup>28</sup> implicitly

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<sup>22</sup> HAND REPORT, *supra* note 8, at 299. Hand’s comparison of ALI work to what simmers on a kitchen stove is welcome to this reader. See Anita Bernstein, Restatement (Third) of Torts: *General Principles and the Prescription of Masculine Order*, 54 VAND. L. REV. 1367, 1392 n.122 (2001) (praising what a journalist called an “analogy overhaul” away from “retreats and victories, blows delivered and knockouts scored, bulls’-eyes, pilings on, Hail-Mary passes and hat tricks,” and proposing “few fewer penalty boxes and fumbles, saturation bombings, shots across the bow and hits below the belt—wouldn’t this be a pleasure for everyone?” (quoting Geneva Overholser, *Rise of Women Could Change Sound of Power*, ATLANTA J.-CONST., Nov. 27, 2000, at A11)).

<sup>23</sup> Susan Frelich Appleton’s contribution to this Symposium may be read as responsive to this suggestion. Susan Frelich Appleton, *Restating Childhood*, 79 BROOK. L. REV. 525 (2014).

<sup>24</sup> Lawrence Zelenak, *The Almost-Restatement of Income Tax of 1954: When Tax Giants Roamed the Earth*, 79 BROOK. L. REV. 709 (2014).

<sup>25</sup> Thomas W. Merrill & Henry E. Smith, *Why Restate the Bundle? The Disintegration of the Restatement of Property*, 79 BROOK. L. REV. 681 (2014).

<sup>26</sup> Lance Liebman, *Law Reform Agenda as ALI Approaches Its Centennial: “Restatement Of...” Symposium Conclusion*, 79 BROOK. L. REV. 821, 821-23 (2014).

<sup>27</sup> *Id.* at 822. Even the most basic points are open. V. William Scarpato, “Is” v. “Ought,” or *How I Learned to Stop Worrying and Love the Restatement*, 85 TEMP. L. REV. 413, 447 n.331 (2013) (assembling citations on the perennial question of whether ALI restatements ought to say what the law is or what it should be).

<sup>28</sup> See *Part I: Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute*, 1 A.L.I. PROC. 1, 2 (1923).



states a demand that those who respond to its call engage with American legal institutions. Theory and ideology may pervade the responses that onlookers make, but in the end those who speak to the ALI must include action items, something concrete to do.<sup>29</sup> A focus on usefulness is likely part of why we law professors seek to join the organization and look for a project when we sign up. We who publish law review articles have other venues for our less purposeful work. The Institute, aware that sometimes we want to make a difference in the world, invites us to bring analyses and inquiry to discrete projects that we can propose.

## II. THE RESPONSE

In response to the American Law Institute call, scholars in this Symposium have written what might be termed position papers that take an array of normative stances. This Part groups them into five categories.

### A. *Widening the List of Topics*

This first cohort of writers chose to name areas of law that arguably qualify for new Restatements of their own. Readers who expect this section of the Symposium to feature self-interested special pleading—*Pick me and mine! We deserve more attention!*—are in for a happy surprise. Scholars whose work appears here make detailed, citation-filled, substantive cases for the inclusion of three fields.

Leading off is Marci Hamilton, noted for both scholarship and advocacy in a number of domains including her focus in recent years on redress for, and prevention of, the sexual abuse of children. In *The Time Has Come for a Restatement of Child Sex Abuse*,<sup>30</sup> Hamilton announces an imperative for an emerging field. Like most of what the ALI undertakes to restate, the doctrinal source material that Hamilton studies is covered largely in common law, but Hamilton also canvasses statutes on point, such as state-level mandatory reporting laws and crimes codified in Title 18 of the United States Code, before moving to rules of evidence and the First Amendment. Like the ALI's

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<sup>29</sup> See, e.g., A.L.I., Annual Report 2012–2103 at 19 (announcing the Young Scholars Medal, a biennial ALI prize for “early-career law professors whose work is relevant to the real world”). I may be wrong on this point about concreteness but, as one of our contributors notes, I have stated it insistently. Mae Kuykendall, *Restatement of Place*, 79 BROOK. L. REV. 757, 761 (2014).

<sup>30</sup> Marci A. Hamilton, *The Time Has Come for a Restatement of Child Sex Abuse*, 79 BROOK. L. REV. 397 (2014).

*Restatement of the Law Governing Lawyers*, which makes reference to the law of agency, torts, contracts, and evidence, Hamilton's *Restatement of Child Sex Abuse* would bring together a variety of doctrinal inputs in a pertinent new context.<sup>31</sup>

Similar to Hamilton in this respect, David Orentlicher partakes of a range of sources in advocating for *A Restatement of Health Care Law*.<sup>32</sup> Unique biographical credentials inform this work: as a medical doctor and former state legislator as well as a legal scholar, Orentlicher speaks with authority about treatment decisions, informed consent, and state-based insurance regulation. Also like Hamilton, Orentlicher includes constitutional doctrines and federal statutory law in the restatement mix for which he advocates. For any reader who might think that health care law is too eclectic to restate, Orentlicher has a pertinent rejoinder: Courts already treat it as a field unto itself. What Orentlicher calls "health care exceptionalism" has generated a panoply of judicial prohibitions, exceptions, immunities, and other ad hoc responses that fit together poorly.<sup>33</sup> A health care Restatement would give reformers a chance to examine a jumble, learning "the ways in which health care is both different from, and similar to, other sectors of the economy."<sup>34</sup>

The last paper of this section continues the theme of expansion. Copyright scholar Ann Bartow proposes a Restatement of her field of expertise, an area dominated by one federal statute, the Copyright Act.<sup>35</sup> One might have thought that the traditional Restatement attention to state rather than federal law and common law rather than statutes would disqualify copyright from restatability. But as other contributions to this Symposium observe, federal statutory law has long lain in the sights of restaters,<sup>36</sup> and as Bartow shows, copyright is plenty "complicated,"<sup>37</sup> disputed, and refashioned in the courts. Moreover, as Bartow argues, the place that *Restatement of Copyright* could occupy is now held by a for-profit treatise manifesting influences that, as we have seen above, the American

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<sup>31</sup> See *Restatement of the Law Governing Lawyers*, A.L.I., [http://www.ali.org/ali\\_old/a252.htm](http://www.ali.org/ali_old/a252.htm) (last visited Oct. 15, 2013) (noting that "the special context of lawyering" unites "traditional areas").

<sup>32</sup> David Orentlicher, *A Restatement of Health Care Law*, 79 BROOK. L. REV. 435 (2014).

<sup>33</sup> *Id.* at 447-48.

<sup>34</sup> *Id.* at 448.

<sup>35</sup> Ann Bartow, *A Restatement of Copyright Law as More Independent and Stable Treatise*, 79 BROOK. L. REV. 457 (2014).

<sup>36</sup> See Dan Tarlock, *Why There Should Be No Restatement of Environmental Law*, 79 BROOK. L. REV. 663 (2014); Zelenak, *supra* note 24, at 709.

<sup>37</sup> Bartow, *supra* note 35, at 457.

Law Institute eschews.<sup>38</sup> *A Restatement of Copyright Law as More Independent and Stable Treatise* states a claim for the ALI that is consistent with, but also expansive of, the Institute's mission.

### B. *Projects Underway*

Writers in this group elaborate on fields of law that the ALI has already undertaken to restate. In different ways, their three articles explore what it means to restate a new field of law: the first of them provides an alternative perspective on a Principles-in-progress led by two other scholars, while the other two reflect on the priorities and concerns they brought to the ALI in advocating for the restateability of the field they know well.

In the first of these contributions, Ronald Krotoszynski, Jr. complements the anticipated *Principles of Privacy* now under construction by co-reporters Paul Schwartz and Daniel Solove.<sup>39</sup> As Krotoszynski notes, the ALI version of a privacy restatement focuses on data protection, a narrower understanding of privacy than the one Krotoszynski has advanced in numerous monographs and law review articles,<sup>40</sup> and yet even the Schwartz and Solove project “faces serious difficulties.”<sup>41</sup> The wide reach of this issue in American law might commend the application of a “pervasive method”<sup>42</sup> to the problem of privacy, wherein the ALI would answer questions piecemeal as they arise in separate Restatements. But to Krotoszynski this reaction amounts to denial that will not succeed; the concept has settled into our national consciousness. “If we cannot slay the privacy hydra, then we must learn to live with the privacy hydra.”<sup>43</sup> *A Prolegomenon to Any Future Restatement of Privacy* thus presents the subject in full breadth, including an observation that the ALI has led American law reform on the subject of privacy at least

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<sup>38</sup> See *supra* Part I.A. See generally Bartow, *supra* note 35.

<sup>39</sup> Ronald Krotoszynski, Jr., *A Prolegomenon to Any Future Restatement of Privacy*, 79 BROOK. L. REV. 505 (2014).

<sup>40</sup> See RONALD J. KROTOSZYNSKI, JR., PRIVACY REVISITED: A GLOBAL PERSPECTIVE ON THE “RIGHT TO BE LET ALONE” (forthcoming 2014); Ronald J. Krotoszynski, Jr., *The Polysemy of Privacy*, 88 IND. L.J. 881, 882 (2013) (expounding on what the word means); Ronald J. Krotoszynski, Jr., *A Comparative Perspective on the First Amendment: Free Speech, Militant Democracy, and the Primacy of Dignity as a Preferred Constitutional Value in Germany*, 78 TUL. L. REV. 1549 (2004) (endorsing a comparative approach).

<sup>41</sup> Krotoszynski, *supra* note 39, at 507.

<sup>42</sup> See Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31, 32 (1992) (announcing a new pedagogy).

<sup>43</sup> Krotoszynski, *supra* note 39, at 509.

since 1955, when the Model Penal Code boldly proposed to stay out of consenting adults' sex lives.<sup>44</sup>

The other two projects underway are described by ALI participants who speak for themselves, but also advert to restatement plans they have advanced inside the Institute.

In the first of these two articles, Susan Frelich Appleton expounds on *Restating Childhood*.<sup>45</sup> American law regulates and controls childhood, Appleton explains, yet “even beyond predictable divergences in the conclusions reached or balances struck across the range of legal contexts, the underlying premises about children that yield these responses lack consistency.”<sup>46</sup> Appleton is inspired by two past ALI works: the *Principles of the Law of Family Dissolution*, for its prescient embrace of emerging insights, and the *Model Penal Code*, for reformist ambitions that resemble what the law of children needs. As a member of the ALI Council as well as a prominent scholar of family law, Appleton is ideally positioned to guide the Institute through the task of restating childhood; her article is as authoritative on family-law substance as it is on ALI procedure.

The second project underway in the ALI, on election law, occupies comparable breadth. Steven Huefner and Edward Foley observe that election law is “the ‘meta-law’ of representative democracy.”<sup>47</sup> Much depends on its rules and processes, heavily revised and expanded at both the state and federal level in the 14 years since *Bush v. Gore*. These rules and processes tangle the kind of attention the ALI could give them—and yet, as Huefner and Foley suggest in their title, reconciliation and reform are hard to achieve in a field of law so dominated by politics. Focused (as am I) on achieving results on the ground, Huefner and Foley find two areas of election law especially ready for their efforts: principles for resolving disputed elections, and analyses of how to vote when one is away from one's geographic precinct.<sup>48</sup> These specifics give their *Principles of Election Law* a base from which Huefner and Foley can consider the jurisprudence of neutrality, partisanship, and federalism.

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<sup>44</sup> *Id.* at 505.

<sup>45</sup> Appleton, *supra* note 23, at 527.

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

<sup>47</sup> Steven F. Huefner & Edward B. Foley, *The Judicialization of Politics: The Challenge of the ALI Principles of Election Law Project*, 79 BROOK. L. REV. 551, 553 (2014).

<sup>48</sup> *Id.* at 558-60.

C. *Restatements between the Lines*

This third group of responses to the call takes a different approach from the earlier two. Instead of advocating for a new ALI-sponsored text in their field of expertise, they consider where and whether this subject is found in existing Restatements. They find Restatements between the lines.

Religion scholar Ian Bartrum opens this group of contributions by asking and answering the question of how the ALI can helpfully engage with religion in American law.<sup>49</sup> Bartrum starts by noting the prominence of religion in the contemporary United States. For this purpose he reads religion as religious liberty: a “constitutional bedrock,” he says, around which “the common law river sweeps.”<sup>50</sup> Bartrum locates religious liberty in existing doctrinal Restatements, identifies potential conflicts within these instances, and commends to the ALI a short list of religious-liberty themes and issues to examine in future work.

Whereas Bartrum works in the “micro” particulars of Restatement blackletter, the lawyer-economist Keith Hylton considers restating as a macro-activity engaged in by a reporter appointed by the ALI, comparable to common law lawmaking.<sup>51</sup> Every Restatement, Hylton suggests, manifests the incentives and goals of the individual whom the ALI vests with the power to draft the document. *The Economics of the Restatement and of the Common Law* is the only one of these 14 articles that conceives of restating as the output of one person who labors alone. Hylton qualifies this generalization: “of course, the ALI has to approve the Reporter’s work, which constrains the Reporter’s freedom.”<sup>52</sup> Yet these checks, Hylton argues, do not shelter Restatements from the impulse to publish what their drafters want to say, and so they come to contain eccentric blackletter inconsistent with the better-checked common law.<sup>53</sup> Surveying examples from the various *Restatements of Torts*, Hylton educes a meta-restatement of law and economics, a record of how individuals satisfied their preferences at the expense of doctrinal correctness.

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<sup>49</sup> Ian Bartrum, *Religion and the Restatements*, 79 BROOK. L. REV. 579 (2014).

<sup>50</sup> *Id.* at 580.

<sup>51</sup> Keith N. Hylton, *The Economics of the Restatement and of the Common Law*, 79 BROOK. L. REV. 595 (2014).

<sup>52</sup> *Id.* at 603.

<sup>53</sup> *Id.* at 603-04.

A third way to talk about Restatements between the lines is to contrast a hypothetical freestanding new text, advocated above under “A Wider List of Topics” and “Projects Underway,” with an interstitial take on restating. In *The Restatement of Gay(?)*,<sup>54</sup> Courtney Joslin and Lawrence Levine weigh the relative merits of each approach and conclude that what LGBT law should receive from the ALI is the latter rather than the former. Joslin and Levine show that a separate volume about the law pertaining to lesbian, gay, bisexual, and transgender persons risks marginalizing and isolating topics that matter to this vibrant minority. Instead, they argue, the ALI ought to choose “LGBT incorporation.”<sup>55</sup> Building on their expertise in family law and torts respectively, Joslin and Levine give examples of where existing ALI Restatements could modernize American law through expanded LGBT attention.

*D. Unrestateable?*

Contributions in this group answer the ALI call with a response that the field would be challenging, at a minimum, to restate. Their answer is not an unequivocal *No*. Instead, they describe complications that might arise from such attempts to restate the law governing their areas of expertise.

This cohort of articles starts with *Why There Should Be No Restatement of Environmental Law* by A. Dan Tarlock who, before the live event, proffered the useful adjective “unrestateable” to describe a domain of law that he has helped to form.<sup>56</sup> Writing partly in reaction to the recent suggestion that the ALI consider studying two subfields of environmental law,<sup>57</sup> Tarlock concludes that “environmental law needs to be reimagined not restated.” He makes a graceful case against a new Restatement. Acknowledging that the brushoff “Romans didn’t recognize the subject” no longer can toss a Restatement project from the contemporary ALI agenda,<sup>58</sup> Tarlock moves to what really precludes this new document: Environmental law, he explains, is positive law—not common law, where restating fares best. Legislators had to promulgate it because common law

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<sup>54</sup> Courtney G. Joslin & Lawrence C. Levine, *The Restatement of Gay(?)*, 79 BROOK. L. REV. 621 (2014).

<sup>55</sup> *Id.* at 630.

<sup>56</sup> Tarlock, *supra* note 36, at 663.

<sup>57</sup> The subfields are environmental impact analysis and environmental enforcement. *See id.*

<sup>58</sup> *See id.* at 664-66.

antecedents like nuisance do not adequately impede the human tendency to “use . . . air, soil and water as waste sinks.”<sup>59</sup> Moreover, as Tarlock shows, environmental law does not contain enough substantive general-application content to restate.

A related yet distinct difficulty vexes the *Restatement of Property*, a compendium that the ALI has been working on continually for 75 years. If property, like Tarlock’s environmental law, is unrestateable, then 17 published volumes that purport to restate the law of property call for an explanation. Our Symposium contains a definitive account from the persons best qualified to explain this failure, Thomas Merrill and Henry Smith. *Restatements (First), (Second), and (Third) of Property*, according to Merrill and Smith, have had little influence on the courts, manifest several contradictions,<sup>60</sup> and are silent on fundamentals like adverse possession, real estate transfers, recording acts, groundwater and mineral rights, eminent domain, and intellectual property. Seeking to explain this failure, Merrill and Smith travel back to the *First Restatement*, where they find powerful influence in the works of Wesley Newcomb Hohfeld. Property to Hohfeld was “bundle of rights,” or, in Merrill and Smith’s paraphrase, “an ever-mutating institution” that denies an internal architecture and thus cannot be restated. Hohfeld has been dead for almost a hundred years but his conception retains appeal among property scholars who disagree on other points.<sup>61</sup> *Why Restate the Bundle? The Disintegration of the Restatement of Property* tells the ALI that it can have the bundle or a Restatement but it can’t have both.

A more affectionate history in this “Unrestateable” corner of our Symposium details the work of the ALI on federal income tax, which Lawrence Zelenak says was prepared “when tax giants roamed the earth.”<sup>62</sup> Zelenak, a tax giant himself, argues that we have no *Restatement of the Law of Federal Income Taxation* not because the project is too ambitious, but because the challenge of preparing it, at least as envisioned by the ALI in 1948, “was not ambitious enough.”<sup>63</sup> In 1954 the ALI published not a Restatement but a draft federal income tax statute. Consistent

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<sup>59</sup> *Id.* at 667.

<sup>60</sup> Merrill & Smith, *supra* note 25 at 681 (“[S]ignificant portions of the third Restatement consist of repudiating what was done in the first and second Restatements, which can hardly inspire confidence.” (footnote omitted)).

<sup>61</sup> *Id.* at 696-98.

<sup>62</sup> Zelenak, *supra* note 24, at 709.

<sup>63</sup> *Id.*

with what Learned Hand and his special committee had advocated, this two-volume document did not try to set tax rates;<sup>64</sup> it also stayed out of tax procedure and specialized provisions.<sup>65</sup> But it covered almost everything that Congress could want for its revision of the old 1939 Internal Revenue Code. When the 1954 Code came out, it showed the handiwork of the ALI “giants.” One ALI idea that did not appear in the 1954 Code, non-recognition of gain and loss for property transferred in connection with divorce, was simply ahead of its time; it became federal law three decades later.<sup>66</sup> Current federal income tax law is now too complex for the ALI to restate, Zelenak concludes, but discrete smaller projects remain available for its intervention.

The last article in this cluster returns to the “Why There Should Be No Restatement” theme with which it began, but with a different slant on rejection. Statutory interpretation scholar Lawrence Solan urges the ALI to eschew restating statutory interpretation out of a concern broached above by Huefner and Foley: politics.<sup>67</sup> Recall that Huefner and Foley spoke about “the judicialization of politics” as a background condition behind restating election law;<sup>68</sup> to moderate this fact on the ground, they have started to look for relatively neutral principles in a partisan realm. Solan worries that a Restatement of statutory interpretation would have all the politics but not enough of the candor that makes an ALI *Principles of Election Law* so promising to Huefner and Foley. Identifying another difficulty, Solan, who holds a doctorate in linguistics, notes the futility of trying to apply “ordinary meaning” as a rubric to know what words in a statute mean.<sup>69</sup> In order to be restateable, Solan concludes, a field needs its share of easy cases; but statutory interpretation, for better or worse, remains “largely about hard cases.”<sup>70</sup>

### *E. Coda*

At the end of this volume Mae Kuykendall, known primarily for her work on corporate governance but also a pioneering scholar in other fields, proposes a new *Restatement*

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<sup>64</sup> HAND REPORT, *supra* note 8, at 306.

<sup>65</sup> Zelenak, *supra* note 24, at 710.

<sup>66</sup> *Id.* at 722.

<sup>67</sup> Lawrence M. Solan, *Is It Time for a Restatement of Statutory Interpretation?*, 79 BROOK. L. REV. 733, 742 (2014).

<sup>68</sup> Huefner & Foley, *supra* note 47, at 559.

<sup>69</sup> Solan, *supra* note 67, at 753.

<sup>70</sup> *Id.* at 755.



of *Place*.<sup>71</sup> Because this article advocates inclusion of a new field in the Restatement gallery, it has a good potential home in the first part of this book. Yet the meditative, almost elegiac, approach to restating that Kuykendall takes also brackets the entire Symposium.

Suggesting that the ALI prepare a *Restatement of Place*, Kuykendall sets out “to provide demonstrative examples of the presence of place in the construction of law; to suggest how a rigorous analysis of its presence across dimensions of law might proceed; and to suggest the manner in which principles might be shaped to guide law-making or the application of common law.”<sup>72</sup> *Restatement of Place* defines place, distinguishes it from space and territory, and finds it ubiquitous as a legal classification. Place is restatable not as a “set of standard doctrines affecting an activity,” Kuykendall argues, but “the unstated premise of much of law. Places organize the operative parts of a legal question; locutions take forms of place metaphor, or they overtly use measurements of space, to define duties and rights.”<sup>73</sup>

The Symposium thus begins and ends with a theme present both in the ALI’s call and the contributors’ response: the imperative to widen. Its final article urges the Institute to undertake a restatement of one subject for the sake of obtaining “a deeper account” of how it fits within “legal reasoning, the assignment of rights, and the understanding of facts.”<sup>74</sup> The other articles published here—along with the ALI itself, from its founding era through this moment—pursue the same goal.

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<sup>71</sup> Kuykendall, *supra* note 29, at 757.

<sup>72</sup> *Id.* at 763.

<sup>73</sup> *Id.* at 785.

<sup>74</sup> *Id.* at 817.