

2014

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Recommended Citation

Lance Liebman, *Law Reform Agenda as ALI Approaches Its Centennial: "Restatement of.." Symposium Afterward*, 79 Brook. L. Rev. (2014).

Available at: <https://brooklynworks.brooklaw.edu/blr/vol79/iss2/16>

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Law Reform Agenda as ALI Approaches Its Centennial

“RESTATEMENT OF...” SYMPOSIUM AFTERWORD

Lance Liebman[†]

The American Law Institute and I are happy and proud that the Brooklyn Law School and its *Law Review* chose to hold an important conference about ALI work, to persuade such an outstanding group of scholars to write such varied and interesting papers, and now to publish their work. I am especially happy because, as I near the end of my service as ALI Director, these papers give me an opportunity to reflect on the projects, perfect and imperfect, that the ALI accomplished (or attempted and failed to accomplish) in our effort to improve the American legal system.

When I was asked to succeed Geoff Hazard and become the fifth ALI Director in 1999, I had already enjoyed a long relationship with the Institute. I had been engaged as a member for more than 20 years, had attended several annual meetings, and had played a minor role as a Reporter on the Enterprise Responsibility for Personal Injury project. As the new Director, I started learning a great deal about this organization and rather quickly saw three overriding themes: how the ALI should pick its new projects, the ALI's process for recommending law reform, and to what extent the ALI should go international. Now, when I can look back at what will be my 15-year tenure as director—the same length as Geoff's, but shorter than the directorships of William Draper Lewis, Judge Herbert Goodrich, and Herb Wechsler—these still seem to be the challenging issues for my successor. And each of them gets serious attention from the articles in this symposium. The ALI leadership, including President Roberta Ramo and Deputy

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Director Stephanie Middleton, will get helpful ideas and warnings from these articles, but the issues will remain alive.

I. WHAT SUBJECTS ARE APPROPRIATE FOR ALI PROJECTS?

Like that of some religions, cults, and cabals, the ALI's existence and work revolve around a single, but nebulous, word; in our case, Restatement. I remain astonished that our founders used that word and am equally astonished that it has been applied to so many different ways of recommending improved legal principles. Judge Learned Hand wrote:

We think that the time has come to study critically these rules which we have so clearly stated. Such a study should indicate (1) what rules are founded upon historical accident, misconception of other cases and the like; (2) what rules are unjustified by any principle of justice, but are unimportant or harmless and may be left as they are because of the desirability of certainty; (3) what rules are unsupported in principle and evil in action; (4) what rules are functionally or otherwise desirable, but have been established upon grounds that are unsound or inapplicable and which may lead in later cases to erroneous or unjust applications of the rule.¹

Professor Wechsler supplied his thoughts about ALI recommendations that have no support in current law:

I pointed out that the official statements in our records always have affirmed some scope for such a judgment and suggested as a working formula we should feel obliged in our deliberations to give weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs.²

He later pronounced:

In judging what was "right," a preponderating balance of authority would normally be given weight, as it no doubt would generally weigh with courts, but it has not been thought to be conclusive. And when the Institute's adoption of the view of a minority of courts has helped to shift the balance of authority, it is quite clear that this has been regarded as a vindication of our judgment and a proper cause for exultation.³

Some ALI work identifies general statements of law in the decisions of appellate courts. Some work reports disagreements

¹ A.L.I., REPORT OF SPECIAL COMMITTEE ON FUTURE PROGRAM 304 (submitted to the ALI Council, Mar. 18, 1947).

² Herbert Wechsler, *Report of the Director to the ALI Membership*, 1966 A.L.I. ANN. REP. 5.

³ Herbert Wechsler, *Report of the Director to the ALI Membership*, 1967 A.L.I. ANN. REP. 6.

about legal doctrine and explains why a doctrinal position, one not necessarily endorsed by a majority of states or courts, is the right one. Some work goes outside and beyond what courts now do. Two extreme positions are both wrong: that law is permanent and can be found in the heavens; and that the ALI can sit in a dark room (actually, our meeting room has been reconstructed to let in natural light) and simply invent doctrine without paying attention to what occurs in the real world of law.

In 1947, with a substantial portion of appropriate Restatement topics complete, Judge Learned Hand's committee recommended moving toward statutory drafting. Results of this expansion of the ALI's agenda included the Model Penal Code and (in partnership with the organization now called the Uniform Law Commission) the Uniform Commercial Code. Later came work on corporate governance, a project hard to call a Restatement (though perhaps it should have been) because it was making recommendations to Delaware and other state courts, to federal courts, to Congress, and to the Securities and Exchange Commission. The work was called *Principles of Corporate Governance*. Soon after came work on family law called *Principles of the Law of Family Dissolution*, a fancy title that fit because it covered the legal consequences of separations between unmarried pairs of adults as well as conventional divorces. During my years as ALI Director, the Institute characterized about half of its ongoing projects as Principles and the other half as Restatements. Despite the different naming conventions, it is hard to see a difference in methodology between, for example, the *Principles of the Law of Liability Insurance* and the *Restatement of the U.S. Law of International Commercial Arbitration*. It seems clear that the word Restatement attracts more attention and citations, so perhaps the next ALI Director will call all ALI projects Restatements. We are, for example, thinking about a title like *Restatement of the Principles of Privacy Law* for one of our newest projects.

Nothing is more challenging for the ALI than starting and completing the right projects. A subject of law must be substantial enough to need several years of intellectual effort to distill it into principles. It must be worthy of review by Advisers who are judges, practicing lawyers, and academics. It must support interesting and constructive debate by the ALI Council and at annual meetings of the ALI membership. And finally, it must be capable of being debated without descending into political dust-ups. The goal is work that benefits lawyers and judges, whether or not they are persuaded by every sentence.

All of this is relevant to the articles in this issue of the *Brooklyn Law Review*. Authors here have focused on 14 individual subjects of law and have explored whether a subject of law is right for restatement.

A. *Areas of Law*

Some of the ALI's early achievement was accomplished by putting law into boxes where a subject could be considered. Susan Appleton says children and the law is ready to be analyzed and not just considered as a subset of family law.⁴ Marci Hamilton urges work on child sex abuse.⁵ Presumably, that work might attach to or connect with our current work on *Model Penal Code: Sexual Assault Crimes* and the possible project on children and the law recommended by Professor Appleton. Dan Tarlock says there is no such thing as environmental law.⁶ Ann Bartow writes that copyright law could be summarized better by the ALI than by Professor Nimmer and the formulations in his treatise.⁷ Ian Bartrum does not think religion is a proper ALI subject.⁸ Instead, he points in interesting ways to places such as *Servitudes* and *Family Dissolution*, where the Reporters offer limited formulations of doctrinal statements about religion's relevance.⁹ Professors Joslin and Levine take a similar position about laws concerning LGBT people: issues concerning gays and lesbians should be noticed in a wide group of ALI projects, but should not be taken up as a separate law-reform endeavor.¹⁰ David Orentlicher does an amazing job in describing issues for a health law Restatement in a mere 22 pages.¹¹ Perhaps the most general and intellectually stimulating analysis is Larry Solan's Socratic debate about the possible pluses and minuses of creating a *Restatement of Statutory Interpretation*, a work recommended by Gary O'Connor 10

⁴ See Susan Frelich Appleton, *Restating Childhood*, 79 BROOK. L. REV. 525 (2014).

⁵ See Marci A. Hamilton, *The Time Has Come for a Restatement of Child Sex Abuse*, 79 BROOK. L. REV. 397 (2014).

⁶ See Dan Tarlock, *Why There Should Be No Restatement of Environmental Law*, 79 BROOK. L. REV. 663, 663-64 (2014).

⁷ See Ann Bartow, *A Restatement of Copyright Law as More Independent and Stable Treatise*, 79 BROOK. L. REV. 457 (2014).

⁸ See Ian Bartrum, *Religion and the Restatements*, 79 BROOK. L. REV. 579, 579-80 (2014).

⁹ See *id.* at 582-84.

¹⁰ See Courtney G. Joslin & Lawrence C. Levine, *The Restatement of Gay(?)*, 79 BROOK. L. REV. 621, 621-22 (2014).

¹¹ See David Orentlicher, *A Restatement of Health Care Law*, 79 BROOK. L. REV. 435 (2014).

years ago. At the end, Larry says no: such a Restatement “cannot help and may do harm.” He draws on the lack of influence of certain sections of the *Restatement (Second) of Contracts* to conclude that statutory interpretation is about hard cases and that judges would simply cite general statements about interpretation from a Restatement to explain results that would not in fact be influenced by the ALI’s work.

My friends Tom Merrill and Henry Smith present a completely convincing analysis of why the *Restatements of Property* have had so much less influence than the *Restatements of Torts* and *Contracts*.¹² As a professor of property law, I agree with Tom and Henry that some of the property work was not the highest quality ALI accomplishment, but I also see two other explanations. One is that property law is much more a matter of individual state doctrine and practice than torts or contracts. A second explanation relates to a matter that has divided property professors for at least two decades: Is there property law or is property the application of the laws of tort, contract, agency, restitution, and other subjects to particular subfields? Professors Merrill and Smith are leaders in the intellectual movement to declare that there are in fact principles of property law. I, as with so many other legal questions, see more than one side of this argument. Certainly, it is a challenging task to identify themes, much less principles, that apply to and govern landlord–tenant law, the law of wills and trusts, zoning law, patent law, water law, the constitutional law of takings and eminent domain, and at least half a dozen other subjects squeezed into a one-semester, first-year law course.

B. *Influence Outside of Common Law*

Then come questions of how political a subject is and how much influence the ALI will have. Can an organization like the ALI actually come to a consensus, and can it persuade readers that the work it produces is balanced and fair? This subject is discussed well in Larry Zelenak’s article on federal income tax law. Larry shows that the ALI did intellectually excellent work on this subject matter but did not immediately persuade Congress.¹³ Similar questions have arisen when we

¹² See Thomas W. Merrill & Henry E. Smith, *Why Restate the Bundle? The Disintegration of the Restatement of Property*, 79 BROOK. L. REV. 681 (2014).

¹³ See Lawrence Zelenak, *The Almost-Restatement of Income Tax of 1954: When Tax Giants Roamed the Earth*, 79 BROOK. L. REV. 709 (2014).

have discussed whether the ALI could have influence if it undertook work on federal or state administrative law.

I most like articles that say a subject IS appropriate for ALI work. (I do not mean that Dan Tarlock is wrong in saying no to an ALI project on environmental law. He argues well that the U.S. has *no* coherent environmental law to restate.¹⁴) On the other hand, Ronald Krotoszynski makes an excellent case for privacy law, a subject on which we have begun work.¹⁵ Professor Krotoszynski is certain that a project on privacy should cover both government and private-sector relationships to information that has traditionally been seen as private.¹⁶ He is also convinced that national boundaries cannot surround effective privacy protections.¹⁷ He does not ask how an organization with “American” as its first name can tell the world what privacy means in this electronic era.¹⁸

Ned Foley and Steve Huefner describe an ALI project now underway: the *Principles of Election Law*.¹⁹ As they say, a challenging issue with this project is identifying what to cover and what not to cover.²⁰ This concern is guided by where the political context might permit ALI work to have influence. At the outer bounds of an imaginable ALI undertaking, Mae Kuykendall attempts to find ways for the ALI to make principled statements about the law of “place.”²¹ She is right, for example, that our lives have changed in many ways: that automobility can take us great distances, that an office in a skyscraper is not on the street, and that the difference between “work” and “non-work” is no longer whether we are at the factory or the office.²² She is also right that the historic role of geography in determining sovereignty, and thus telling us what agency has the authority to impose law, is in flux.²³

¹⁴ See Tarlock, *supra* note 6, at 664.

¹⁵ See Ronald J. Krotoszynski, Jr., *A Prolegomenon to Any Future Restatement of Privacy*, 79 BROOK. L. REV. 505 (2014).

¹⁶ See *id.* at 511.

¹⁷ See *id.* at 512; see also Mae Kuykendall, *Restatement of Place*, 79 BROOK. L. REV. 757 (2014).

¹⁸ See Krotoszynski, *supra* note 15, at 513.

¹⁹ See 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 (2014).

²⁰ *Id.* at 577.

²¹ See Kuykendall, *supra* note 17, at 757.

²² *Id.* at 773.

²³ *Id.* at 759. For an example of this struggle, see the attempt by the Supreme Court of the United States to keep “place” important in *Kiobel v. Royal Dutch Petroleum*, 133 S. Ct. 1659 (2013). Observe also the relationship of “place” to what law determines who is married to whom and when. See Kuykendall, *supra* note 17.

C. *Internal Consistency*

Keeping consistency in ALI work is important, but it can never be achieved to perfection. Sometimes, a legal rule looks different in the context of one legal subject than it does in another subject. Professor Bartrum shows inconsistency between the treatment of religion in the trusts and wills Restatements.²⁴ Similarly, Professors Joslin and Levine discuss in detail how the *Principles of the Law of Family Dissolution* meets their standards for appropriate consideration of the legal consequences of unmarried partnerships and how the *Restatement (Third) of Torts* on certain issues (for example the emotional harm from seeing a loved one injured) does not offer what they regard as correct and fair legal doctrines.²⁵

Or sometimes we are just imperfect. We miss things and do not persuade our Reporters to come to an agreement. On the other hand, sometimes our process resolves an inconsistency. The best example during my Directorship was when Andrew Kull, from his grounding in the law of restitution and unjust enrichment, persuaded the membership to require Lawrence Waggoner and John Langbein, the Reporters for wills and other donative transfer, to alter their recommendation that a murderer be able to inherit from his or her victim. Indeed, could there be a more unjust enrichment than that?

II. IS OUR PROCESS A GOOD ONE?

Keith Hylton's article explains his view that Restatements are not an efficient form of legal evolution.²⁶ He gives a number of reasons why several dozen judges, lawyers, and professors in a room will not necessarily approve efficient and fair legal rules.²⁷ His preference is for a diversity of state courts to address questions as they see cases, and either apply traditional doctrine or decide that this is the time to change common law rules. In this way, Keith says that the judicial orchestra can gradually accomplish progressive evolution of the law.²⁸ I am of course biased, but my main response to Keith is

²⁴ See Bartrum, *supra* note 8, at 585.

²⁵ See Joslin & Levine, *supra* note 10, at 647-49.

²⁶ See Keith N. Hylton, *The Economics of the Restatement and of the Common Law*, 79 BROOK. L. REV. 595 (2014).

²⁷ See *id.* at 601.

²⁸ See *id.* at 618.

that the ALI has no official authority.²⁹ That is why I have slept so well for the past 14 years. You will not be surprised when I write that Keith has not persuaded me that the process of judicial application and adaptation of law—the common law process—is harmed in any way by the authoring and offering up merely as recommendations the consequences of a careful ALI process of doctrinal reconsideration.

An ALI rule tells members to “leave their clients at the door,” and it is a point of honor among members that they state what they personally believe to be right, not what their clients want them to say. But it is equally important that the ALI make certain that all significant points of view are represented and explained. The *Principles of Corporate Governance* had noisy problems of participants apparently speaking for their clients. The ALI’s leadership, especially President Rod Perkins, fought the battle and was able to achieve a balanced product that has had influence. But leaving clients at the door is not the same as denying entrance to judges who have written opinions taking a position on a question of legal doctrine, to professors who have published their views or been expert witnesses, and not even to practicing lawyers who represent clients with positions. We want these individuals in the room so long as they are transparent about their views and clients.³⁰ And often we can get a result that is somewhere between the extreme positions of those who litigate the cases. We hope that finding this middle ground will be helpful for judges who must make decisions about the right legal rule.

²⁹ But see Arizona, which—by its state supreme court precedent—follows the Restatements on any matter where there is no statute or case law to the contrary. The same policy of adopting Restatements as law exists in the U.S. Virgin Islands, the Republic of Palau, and the Commonwealth of the Northern Marianas Islands, which have all enacted statutes to that effect. In Pennsylvania it is clear that the RESTATEMENT OF TORTS has been adopted, but the federal and state courts there disagree whether the RESTATEMENT SECOND or RESTATEMENT THIRD governs products liability cases because the Pennsylvania Supreme Court has not specifically adopted the RESTATEMENT THIRD.

³⁰ Apparently, when the National Academy of Sciences provides scholarly advice to the FDA and other policy makers, it does not permit scientists paid by drug companies to participate. See Elizabeth Laposata, Richard Barnes & Stanton Glantz, *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, 54-59 (2012). At the ALI, I do not believe we could do our work or have all the necessary information without having experienced legal practitioners engaged in our process.

III. SHOULD OUR PROJECTS GO BEYOND DOMESTIC LAW?

Some ALI work is about American law as it applies to or is affected by international subjects and international law.³¹ Some work is recommended to the U.S. as well as to other countries: the *Transnational Rules of Civil Procedure*; *Transnational Insolvency: Global Principles of Cooperation* (first offered to Mexico, Canada, and the U.S., but now to the world); *Intellectual Property: Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes*, and *Legal and Economic Principles of World Trade Law*. Professor Louis Henkin's magisterial *Restatement Third: The Foreign Relations Law of the United States* recommended domestic law about international matters. His work also laid out principles of international law with, effectively, a recommendation that they be followed by U.S. courts, by domestic courts in other countries, and by international courts and international agencies including the United Nations.

How much of the ALI's work should go beyond domestic law is now an important question. For sure, we have begun *Restatement Fourth: Foreign Relations Law*. We began with analysis of three subjects: sovereign immunity, jurisdiction and enforcement, and treaties. We have many distinguished non-Americans in our group of Reporters, Counselors, and Advisers, and we must decide over time to what extent the project should address matters usually thought of as questions of international law.

CONCLUSION

Before getting the helpful guidance from the authors represented in this issue, we have moved forward on a number of new ALI projects. Ongoing projects include those on employment law, international commercial arbitration, criminal sentencing, the law of nonprofit organizations, and liability insurance. We have recently begun work on privacy, Indian law, consumer contracts, sexual assault crimes, election law, the law of government ethics, foreign relations law, and two torts subjects: intentional torts and economic harm.

³¹ *E.g.*, Lance Liebman, Foreword to RESTATEMENT (THIRD): THE U.S. LAW OF INTERNATIONAL COMMERCIAL ARBITRATION at xi (Tentative Draft No. 3, 2013); A.L.I., RECOGNITION AND ENFORCEMENT OF FOREIGN JUDGMENTS: ANALYSIS AND PROPOSED FEDERAL STATUTE 7-27 (2006).

To me, the most innovative and perhaps therefore the most challenging new project is Indian law. In some ways, the subject begins with decisions by Chief Justice Marshall early in the 19th Century. The United States has a national government and 50 states. The country also has tribes with a degree of sovereignty that descends from treaties. The articles in this law review issue raise valid questions about the sorts of law reform that the ALI can influence. Indian law is constitutional law, the law of federal–state relations, and federal statutory law; all areas surrounded by signs that say “ALI: Be Careful.” Yet Reporter Matthew Fletcher and his two colleagues have put out early drafts and have led initial meetings that have been serious and productive. As of today, I am cautiously optimistic that the ALI can do first-class work that will be good for a nation and for the descendants of those who were here before the Europeans, Asians, Africans, and Latin Americans arrived.

To repeat my opening words, nothing is more challenging for the American Law Institute—the most significant private law-reform organization in the world—than identifying, starting, and completing the right projects. The articles in this issue have taught me a great deal and will help my successor as the new Director. The organization remains significant entering its 91st year. Onward!