



# THE AMERICAN LAW INSTITUTE

## A GLIMPSE AT ITS FUTURE

*Bennett Boskey*

**O**N THE OTHER SIDE OF THE ATLANTIC eminent institutions abound that possess a challenging history many centuries long. For example, Exeter College at Oxford University is actively preparing to celebrate its 700th anniversary in 2014. Here at home we are accustomed to much shorter spans. When President Lincoln at Gettysburg talked about “four score and seven years ago,” he was giving eloquent expression to a modest stretch of time that measured basic institutions then and has not multiplied so very much since.

So it is with The American Law Institute, a preeminent law reform organization that was founded in 1923. The Institute has conducted its activities over a continuum that today almost precisely fits into four score and seven years. What were the initial majestic aims of the Institute? What have its principal accomplishments been? How has it been adapting to the everlasting changes in the

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*Bennett Boskey is a practicing lawyer in Washington, DC. He was elected a member of The American Law Institute in 1951; he has been on its Council since 1972, and serving as its Treasurer since 1975. As Treasurer he is also an ex officio member of the Board of Directors of ALI-ABA. Under the revised corporate governance regime adopted for itself by ALI in 2007, he is scheduled to become an emeritus member of the Council and the emeritus Treasurer at the conclusion of the ALI Annual Meeting in May 2010. The views expressed herein are the personal views of the author and not the official views of the Institute.*

needs of society? And, perhaps of even more importance, where is its future heading?

First, a brief word as to the founding.

In western civilizations the need for legal reform is probably perpetual. In the United States this became particularly acute in the period before and after World War I. Bench and bar, as well as the academy, expressed deep dismay over what they regarded as the sad state into which law and legal administration had fallen. Yet the numerous remedies suggested were widely diverse and often conflicting. One particular lament was that the federal system was leading to undue disparities (as well as unseemly error) among the States as to what had been the fundamental and largely common-law areas of the law. In the early 1920s a blue-ribbon committee recommended the establishment of an independent organization to be composed of outstanding practicing lawyers, judges, and academics that might have the stature and the intellectual firepower to be effective in helping to find a better path for developing the law.

Accordingly, the first three signatures on the February 23, 1923, certificate of incorporation of The American Law Institute were William Howard Taft, Charles Evans Hughes, and Elihu Root, and the certificate's statement of purposes said that "The particular business and objects of the society are educational, and are 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." With the help of a generous grant from the Carnegie Corporation, the ALI's project that later became known as the Restatement First was inaugurated.<sup>1</sup>

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<sup>1</sup> Although I am not an enthusiast for footnotes, I feel it may be a service to the reader to be assured that there exists an extensive available literature relating to the origin, the history, and the activities of The American Law Institute. Chief among these, but by no means even a substantial fraction of the full inventory, are: (1) N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 Law and History Review 55 (1990); (2) Herbert F. Goodrich and Paul A. Wolkin, *THE STORY OF THE AMERICAN LAW INSTITUTE 1923-1961* (ALI Publishers 1961); (3) Herbert Wechsler, *Restatements and Legal Change: Problems of Policy in the Restatement Work of the American Law Institute*, 13 St.

## *A Glimpse at the Future of the ALI*

The 19 volumes of the Restatement First,<sup>2</sup> although produced under the guidance of reporters who were recognized leaders in their respective fields, nevertheless turned out to have certain idiosyncrasies. They tended to be cast in terms of stark black-letter rules of law, often without the benefit of supporting comment or even citations by way of explanation or justification. As a result, they attracted severe criticism, particularly from portions of the academy that had not been involved in their production. Some of this reflected the meanness of spirit that all too often can creep into academic controversies between strong-willed protagonists, each convinced that he or she is absolutely right. But some of the criticism was, by any objective standards, well founded. Notwithstanding whatever negative assaults were made, however, the judiciary and the bar welcomed the help of most of the Restatement First (possibly excepting the Restatement of the Conflict of Laws, for which the ideologically-imprisoned Professor Joseph H. Beale had been the reporter). Thus over time the judicial citations of the Restatement First volumes as a source of the better view of the law multiplied with some rapidity.

By the early 1950s it was becoming evident that the needs of society had moved on considerably, that much of the law was changing or needed to be changed in response, and that many new problems had arisen or were arising that had not been contemplated in the era when the Restatement First was being drafted. Thus the Institute embarked on a project that became known as the Restate-

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Louis ULJ 185 (1968); (4) Norris Darrell and Paul A. Wolkin, *American Law Institute*, 52 New York State Bar Journal 99 (February 1980); (5) G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 Law and History Review 1 (1997); (6) THE AMERICAN LAW INSTITUTE SEVENTY-FIFTH ANNIVERSARY 1923-1998 (ALI 1998); (7) Geoffrey C. Hazard, Jr., *The American Law Institute Is Alive and Well*, 26 Hofstra Law Review 661 (1998); (8) Michael Traynor, *The First Restatements and the Vision of the American Law Institute, Then and Now*, 32 Southern Illinois ULJ 145 (2007); (9) Lance Liebman, *The American Law Institute: A Model for the New Europe?*, paper available from ALI (2008).

<sup>2</sup> The initial series of Restatements of the Law when issued were not called Restatement First (it was not then assumed that there would ever be a Restatement Second), but for convenience and simplicity they are so referred to here.

ment Second. The Restatement Second volumes built upon what remained valid from the Restatement First; they sought to endorse what was deemed to be the better view of the law in the light of the changed needs of society; and they overcame some of the structural shortcomings that had hampered the Restatement First. It is fair to say that, on the whole (though of course not 100 percent of the time), the Restatement Second became a benign influence that moved the law along progressively and toward greater certainty but without undue disruption.

Another couple of generations slid by. Although much of the Restatement Second had not become obsolete, the necessity for revising certain of the Restatement Second volumes, starting with the Foreign Relations Law of the United States, made obvious the need to undertake a Restatement Third. The Institute accepted the challenge, and today that work appears to be well past midstream. Some of the areas of law being covered by the Restatement Third volumes are new, representing subject matter additions to what was previously done; and certain of the traditional areas undergoing a revisit are being divided into more manageable discrete segments. Again, what remains valid from the two predecessor series is being preserved. But the willingness to recognize the need for modifications in the law and to enter upon new territory has been guiding the effort to identify the better legal rule to govern changed conditions.

The ALI's efforts at law reform have by no means been confined to Restatement volumes. Much has gone into statutory projects. Perhaps the most influential has been the Model Penal Code adopted by the Institute in 1962, for which Herbert Wechsler was the reporter before he became the Institute's director. The strong influence of this project and its wide acceptability helped to modernize the penal codes of many of the States; and after several decades one segment of it, namely Sentencing, is the subject of a fresh ongoing project aimed to take into account the massive changes that the State sentencing regimes must now confront. To mention another example, an earlier Model Code of Evidence issued by the Institute in 1942 contributed considerably to clarifying and simpli-

## *A Glimpse at the Future of the ALI*

fyng the rules of evidence in actual practice. And a well-executed statutory project aimed at clarifying and codifying the complex federal securities laws failed to win enactment by Congress but nevertheless helped in the judicial interpretation of the network of applicable securities statutes.

Statutory projects, particularly when the subjects are controversial, can face many obstacles, some of them foreseeable and some of them unforeseeable. Thus several scholarly exercises by the Institute aimed at showing a need for modifying certain federal statutes dealing with federal court jurisdictional matters have enlightened the academy but thus far have had virtually no discernible influence on the actual state of the law. And a variety of federal tax projects managed to consume an almost inordinate amount of the Institute's effort without achieving very much in the way of visible practical results. In vivid contrast is the Institute's long-term partnership relating to the Uniform Commercial Code. This has been a hugely successful enterprise whereby the Uniform Commercial Code has been originated and periodically kept current by the joint efforts of the Institute and of NCCUSL (National Conference of the Commissioners on Uniform State Laws), which recently has had the good grace to shorten its popular name to Uniform Laws Commission (ULC).

ALI-ABA is another shared activity. Since 1947 the Institute has had a joint venture with the American Bar Association to conduct what has turned out to be the outstanding national continuing legal education program known as ALI-ABA. ALI-ABA, which is administered by ALI from the headquarters in Philadelphia, has had an interesting history of its own.<sup>3</sup> Currently ALI-ABA has been undergoing an exceptional and sometimes arduous transition in order to (1) take full advantage of the capabilities available to CLE from the electronic revolution, (2) adapt to the shifts in demand as to meth-

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<sup>3</sup> The events of the first 40 years are described in abundant detail in a volume by Paul A. Wolkin, *ALI-ABA . . . XL!* (ALI-ABA 1988). By a 2005 restatement of their memorandum of understanding, the two sponsoring organizations substituted an ALI-ABA Board of Directors for the previous ALI-ABA Committee.

ods of delivery of CLE, and (3) revise its marketing programs accordingly.

The Institute's ability to act collaboratively need not be, and has not been, only in matters that are truly domestic to the United States. Already its value has been demonstrated in projects where the law's globalization has increasingly been injecting a foreign component into ALI's work. An instructive example is the Institute's joint effort over a period of about four years with UNIDROIT (International Institute for the Unification of Private Law), which led to the joint ALI/UNIDROIT adoption and promulgation in 2004 of the ground-breaking Principles of Transnational Civil Procedure, containing recommendations of a fair procedure to facilitate the resolution of disputes arising from transnational commercial transactions, whether the forum is in a common-law or a civil-law jurisdiction.

Another occasional line of ALI work has been the commissioning of legal research and analysis that will be published as useful studies but without bearing endorsement as a position of the Institute. In a way this harks back to the Institute's relatively early days. In 1945, as World War II was winding down, there was published a Statement of Essential Human Rights that had been composed by a distinguished drafting committee appointed by ALI and representing principal cultures of the world; although the document was not deemed appropriate for the imprimatur of the Institute, it was widely distributed by Americans United For World Organization, and had a substantial influence on the later Universal Declaration of Human Rights. As another example, many years later ALI commissioned and was able to publish in 1991, not for adoption by the Institute but to serve as background for work being done on portions of the Restatement Third of Torts, an important Reporters' Study entitled Enterprise Responsibility for Personal Injury.

In connection with this mention of the Restatements, it is fitting to refer to what has turned out to be a major outgrowth of the Restatement work – namely, the Institute's series entitled Principles. When ALI undertook to do much-needed work on corporate governance of for-profit corporations, it soon became evident that re-

## *A Glimpse at the Future of the ALI*

stating the law was only a fraction of what should be done and that prudent arrangements for corporate governance would also require substantive changes in the law beyond what courts would be able to achieve by themselves. This led to a kind of hybrid structure that more suitably could be called Principles of the Law rather than Restatement of the Law. From this experience with the Principles of Corporate Governance, other Principles projects have followed. Two already completed are, first, Family Dissolution; and, second, Intellectual Property – Principles Governing Jurisdiction, Choice of Law, and Judgments in Transnational Disputes. Two more Principles – on Software Contracts; and on Aggregate Litigation – are scheduled to receive final approval at the 2009 ALI Annual Meeting and if approved should be ready for issuance either late in 2009 or early in 2010. In general, the Principles have the advantage of more flexibility; they fit well in areas where the law is somewhat less settled, or more emerging, than in Restatement areas. Thus by concentrating on the cutting edge of the law the Institute can contribute recommendations for sound and useful development in what is often a fast-paced arena.

What then does all this suggest about the road ahead?

1. It is almost certain that the Restatement work will continue, though perhaps at a diminished rate. New Restatement volumes are to be expected either in those areas where serious revision of previous Restatement work is called for or in those additional areas where Restatement work can be seen to have a solid beneficial role, like our current work to develop initial Restatements in Employment Law and in The U.S. Law of International Commercial Arbitration. Breaking up Restatement topics into definable segments, even more so than in the past, is likely to occur, primarily in order to shorten the life span of the project and to enlarge the prospects for finding first-class reporters willing to make the commitment to undertake and complete the task. In due course a body of work can be expected to emerge that will be known as Restatement Fourth.

2. It is also to be expected that the Principles will be an expanding series. Their flexibility is attractive. Their ability to probe into areas where the law is particularly unsettled or even partially un-

known gives them the opportunity to achieve substantial and timely law reform.

3. New statutory projects can be expected to be undertaken by the Institute from time to time. In a world where statutes have become so much the norm in many areas, this seems inevitable. However, it can also be expected that the Institute will tend to refrain from launching statutory projects that would needlessly duplicate work being done by another responsible organization (such as the Uniform Laws Commission) – except where that presents an opportunity for joint effort on a collaborative basis, such as has been the continuing collaboration on the Uniform Commercial Code.

4. During the past decade, largely as a result of the law's globalization, a foreign component has increasingly been reflected in much of the Institute's work. This can be expected to continue and is very likely to accelerate. The novel project now under way to define principles of world trade law, based primarily on representative decisions of the World Trade Organization, is illustrative. The importance of addressing comparative law also presents opportunities for joint efforts with foreign or international organizations, as the UNIDROIT experience has demonstrated. In law, as elsewhere in life, working with a foreign organization that springs from a substantially different culture is not always easy for either party. But the high rewards of successful achievement can make the endeavor worthwhile.

5. The Institute now has slightly over 4,000 members. It is deliberately aiming to attract outstanding younger individuals in the profession – both the academics and the practicing lawyers<sup>4</sup> – who will commit themselves to participating meaningfully in the work of the Institute. It seems likely that the median age of the Institute's membership will be noticeably sliding downward.

6. A vast domain awaits treatment by the Institute in public law areas of consequence to the nation. Typical areas with aspects to be

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<sup>4</sup> For the judges who might be sought to become new members, youthfulness is hardly a factor (many of these judges will have previous distinguished careers in practice or in the academy or both); the Institute must accept whatever ages they happen to be.



## *A Glimpse at the Future of the ALI*

considered might be the legal ramifications of national security matters, or the status of aliens, or the system of federal regulations, or the mandates against conflict of interest, or legal aspects of adapting to climate change. On occasion, shorter projects, rather narrowly focused, may turn out to be both feasible and useful. It seems essential that a vital law reform organization looking forward to its 21st Century agenda would not neglect significant areas of public law. But the controlling considerations in each instance must be how to define the study or project so that it will be doable, how to avoid needless duplication with work being done by others, how to assure reportorial leadership so that the work will be done in a timely fashion, and how to assess the degree of usefulness that the end product can be expected to have. In a general sense, these criteria are applicable to any project the Institute is considering undertaking. Yet they have a special impact on proposals in important areas of public law. It is nevertheless to be expected that the Institute over the next decade will find ways to move ahead in select areas of public law and we can hope that the world will become a better place for the effort.

