



# FROM THE SECOND RESTATEMENTS TO THE PRESENT

THE ALI'S RECENT HISTORY AND  
CURRENT CHALLENGES

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**I**N A 1997 ARTICLE ON THE ORIGINS of the American Law Institute, I concluded with a brief description of the ALI's orientation in the two decades following the Second World War. In those decades, I suggested, the ALI, "[p]erhaps stunned by the wave of critical reviews of the first generation of Restatements,"

quickly commissioned a series of "Restatement Seconds," ostensibly updating the previously published volumes but actually changing their format to include a much greater emphasis on commentary. It began a [set] of statutory projects, such as the Uniform Commercial Code and the Model Penal Code, which were openly designed to be didactic but reformist at the same time. It hired a generation of Realist scholars to work on ALI projects.<sup>1</sup>

The ALI's new emphasis, I concluded, revealed that it had internalized the criticism of its inaugural projects, the First Restatements.

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<sup>1</sup> G. Edward White, "The American Law Institute and the Triumph of Modernist Jurisprudence," 15 *Law & Hist. Rev.* 1, 46 (1997).

I would like to say some more about how that shift in the ALI's orientation came about and whether the shift can still be said to capture the ALI's current posture. But instead of relying on outside scholarly criticism of ALI projects to capture a phase in the Institute's history, I am here making use of comments by "insiders" – members of the ALI involved in its governance. I am seeking to recover the assumptions that lay behind the policy decisions, explicit and implicit, that those members supported.



In one of the earliest reviews of the First Restatements, Charles Clark, then Dean of Yale Law School, noted that the ALI had made a decision simply to list the "black letter" of legal subjects without commentary or interpretation. Clark called that decision "certainly fallacious," adding that "without interpretation . . . the black letter statements are not understandable."<sup>2</sup> Although the President of the ALI described Clark's comments as "charming naivete," the Vice President, Justice Benjamin Cardozo, felt that "the absence of explanatory notes" would "detract greatly from the value of the Restatement[s]."<sup>3</sup> By the close of the Second World War, after nine First Restatements had appeared, it was clear that the members of the Institute generally agreed with Cardozo. A committee chaired by Judge Learned Hand was created to study the First Restatements, and it concluded that a new set of "Second Restatements" was called for, whose authors should evaluate the current social utility and desirability of common law rules as well as "restating" them.<sup>4</sup>

It was perhaps inevitable that by the 1950s the members of the ALI would have recognized that simple restatements of legal rules without accompanying commentary failed to distinguish, as Hand's committee put it, among rules that were "founded on historical

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<sup>2</sup> Charles Clark, "The Restatement of the Law of Contracts," 42 *Yale L.J.* 649, 653, 655 (1933).

<sup>3</sup> Quoted in John P. Frank, "The American Law Institute, 1923-1998," 26 *Hofstra L. Rev.* 615, 622 (1998).

<sup>4</sup> Frank, "The American Law Institute," 623.

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facts,” rules that were “unjustified by any principles of justice, but [were] unimportant or harmless and may be left as they are because of the desirability of certainty,” and rules that were “insupportable in principle and evil in action.”<sup>5</sup> It was less inevitable that in 1968 Herbert Wechsler, the ALI’s Director, would declare that his goal for the Second Restatements was that they serve as “a modest but essential aid in the improved analysis, clarification, unification, growth and adaptation of the common law.”<sup>6</sup>

Wechsler’s comment takes on more significance when it is placed in context. It was one of a series of comments he made in the 1960s about the relationship between the declarative and normative dimensions of Restatements. In his 1966 Director’s Report, under the sub-heading “On Freedom and Restraint in the Restatements,” Wechsler wrote:

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 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.<sup>7</sup>

Then, in his 1967 Report, Wechsler addressed “the old question of how far in the restatement of the law it is appropriate to take account of an opinion as to what the law should be.” His answer was that

the official statements in our records have always affirmed some scope for such a judgment. . . . we should feel obliged in our deliberations to give weight to all the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs.<sup>8</sup>

Wechsler also noted that “the statement of principle has not, at least

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<sup>5</sup> Quoted in *id.*

<sup>6</sup> Herbert Wechsler, “Restatements and Legal Change,” 13 *St. Louis U. L. Rev.* 185, 192 (1968).

<sup>7</sup> American Law Institute, *Annual Report* 6 (1966).

<sup>8</sup> American Law Institute, *Annual Report* 5 (1967).

as yet, provoked dissent.”<sup>9</sup> But in 1968 a memorandum by two ALI members expressed, as Wechsler put it, “grave concern that the Institute is in the process of abandoning the long tradition that it undertakes in the Restatement to express established law, as distinguished from the law that a majority of those attending think ought to be, or will at some time in the future be, established by the courts.”<sup>10</sup> Wechsler responded by stating that “if we ask ourselves what the courts will do,” we could not “divorce our answers wholly from our view of what they ought to do.”<sup>11</sup> In his 1968 remarks Wechsler added that after the “grave concern” memorandum was presented to the ALI Council at a March, 1968 meeting, it had unanimously endorsed his position.<sup>12</sup>

The ALI was confessing, in effect, that by the 1950s its first generation of scholarly compilations had become outmoded, and had possibly been wrongly conceived at the outset.



As the Second Restatements were progressing in the 1960s and 1970s, changes were taking place within the legal profession that would threaten to affect the character of the ALI itself. When the ALI was created in 1923, the dominant conception of its membership was that of independent elite professionals. All of those membership elements, in fact, were crucial to the ALI’s formation: it was seen as a group of lawyers, judges, and legal academics with high professional reputations who were interested in improving the state of the law. There was no suggestion that the ALI’s members were representing clients or engaging in partisan concerns. Their membership was as individuals dedicated to the upgrading of their profession.

For five decades after the Institute’s formation its membership, although expanded, could still be described as composed of independent elite professionals. Mechanisms served to insulate ALI

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<sup>9</sup> Id.

<sup>10</sup> Wechsler, “Restatements and Legal Change,” 191.

<sup>11</sup> Id., 190.

<sup>12</sup> Id., 191.

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members from even their most long-term clients. Those included the cost to clients of frequently switching law firms, which requires educating new lawyers on a client's legal and business affairs; the ALI's limitation of its membership to lawyers, which prevented client organizations from directly monitoring the activities of its members; and the value of professionalism itself, which arguably serves as the basis for clients' seeking legal advice. One scholar has argued that those mechanisms combined to create "professional slack" for ALI members to endorse positions that were not necessarily in the interests of their clients.<sup>13</sup>

Throughout the decade of the 1980s, however, the legal market became more competitive and major clients more sophisticated. As law firms grew rapidly, their sheer size delayed and diminished opportunities for rapid advancement among their ranks, and two spinoff organizations emerged: "boutique" firms, consisting of lawyers who left large firms in order to gain more professional satisfaction, and "in-house counsel," lawyers who left firms to work directly for their clients. The burgeoning economy of the 1980s allowed both sets of organizations to become financially viable, increased competition among law firms, and enhanced the legal expertise of repeat-player clients. Lawyers leaving large firms to join boutiques often took clients with them, and in-house counsel expanded the legal knowledge of their employers.

Initially the ALI did not open its membership to in-house counsel. That practice had changed by the 1980s, and it altered the image of the ALI member as independent professional. Instead of professionalism serving as a way of distancing ALI members from their clients and creating professional slack, membership now included lawyer employees of client companies who were directly involved in the ALI's work. The idea that a sort of professional curtain shielded the work of ALI members from direct scrutiny by their clients had to be qualified: some members were not independent professionals but the officers of corporations.

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<sup>13</sup> Nicholas S. Zeppos, "Reforming a Private Legislature: The Maturation of the American Law Institute as a Legislative Body," 23 *Law & Soc. Inquiry* 657, 662 (1998).

The effects of the change had already been noticed by 1984, when Wechsler retired from the Institute. During Wechsler's tenure the ALI had begun a project on corporate governance, initially with something like a Restatement format in mind. As the project evolved, it became clear that it had a significant policy component, and as such became a lightning rod for various corporate groups. One group, the Business Roundtable, began an active campaign of pressing its views on ALI members. In Wechsler's retirement address he denounced the Business Roundtable's tactics, calling them "a frontal attack on the integrity and objectivity of our Institute" and "a challenge to what I conceive to be the proper standards of the bar." The episode was "the nadir of my long experience in this great organization."<sup>14</sup>

A similar episode occurred in the 1990s, featuring the proposed Products Liability Restatement. The law of defective products had developed rapidly in the 1960s and 1970s, and the Second Restatement of Torts, whose Reporter William Prosser had written influential articles on that development, had endorsed the emergence of strict liability for a whole series of defective products, a position that was in advance of the case law of many states. By the 1980s something of a doctrinal push-back had surfaced. Some corporations, and some insurance companies, believed that strict liability for defective products would create incentives for more lawsuits and not necessarily result in products being made more safely. On the other side, plaintiffs' personal injury lawyers, who had become a discrete bar by the 1980s, believed that strict liability for defective products was the only way in which many injured users and consumers of those products could receive adequate compensation.

The result was intense lobbying of the ALI by both insurance companies and defense and plaintiff lawyers to retain or modify strict liability for defective products in the Products Liability Restatement. The lobbying came to a head in the ALI's 1995 annual meeting. The episode not only revealed that the ALI process had become affected by groups outside the Institute, but also that Re-

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<sup>14</sup> Quoted in Frank, "The American Law Institute," 630.

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statements had come to be regarded as containing distinctly normative dimensions with perceived ideological consequences. It prompted the adoption of a new Council rule in 1996, which provided that “to maintain the Institute’s reputation for thoughtful, disinterested analysis of legal issues, members are expected to leave client interests at the door.”<sup>15</sup> The very fact that the ALI felt obligated to impose such a rule on itself reflected the decline of the conception of lawyers as independent professionals.



In some respects the controversy over the corporate governance and products liability projects confirmed Wechsler’s view that the creation of Restatements inevitably involved judgments about how the law should develop. Those who sought to influence the content of the Principles of Corporate Governance and the Restatement of Products Liability were, from one point of view, simply doing that openly, responding to the conventional techniques of lobbying and advocacy.

In this vein, the ALI’s official responses to the emergence of “outside forces” in its process were revealing. On the one hand it affirmed a principle that for seven decades had apparently been regarded as self-evident: members of the ALI represented themselves, not clients. On the other, however, it continued a differentiation among ALI projects that had begun to emerge in the 1950s, when the Uniform Commercial Code and Model Penal Code projects were launched.

The differentiation sought to respond to the challenge of distinguishing the declarative from the normative dimensions of a project by creating categories of projects with varied aspirations. As the Corporate Governance project evolved, it became clear that the ALI was not simply embarking upon a “restatement” of such doctrines as the “business judgment rule” of agent-principal relationships. It was proposing how corporate enterprises should legally be governed – a question with significant normative dimensions.

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<sup>15</sup> Rule 9.04, *ALI Reporter* 1997, 19 [2]: 1-3.

So as the events that culminated in the 1996 rule barring ALI members from representing client interests were unfolding, the ALI was working its way toward a classification of its projects that signaled the extent to which they were largely declarative, largely aspirational, or a combination of both. In 2005 the Institute issued a handbook for Reporters and advisors of projects entitled *Capturing the Voice of the American Law Institute*. In it the ALI distinguished between four types of projects: Restatements, Legislative Recommendations, Principles, and Studies. The descriptions of each type signaled the relationship between its declarative and normative dimensions. Restatements were “clear formulations of common law and its statutory elements or variations,” reflecting “the law as it presently stands or as it might plausibly be stated by a court.” Legislative Recommendations were “[m]odel or uniform codes or statutes . . . addressed mainly to legislatures, with a view toward legislative enactment.” They “assume the stance of prescribing the law as it shall be.” Studies, a category the ALI had used for much of its history in a generic fashion, were now particularized as projects “that analyze in depth particular areas of the law . . . [so as to lay] the practical and theoretical groundwork for subsequent black-letter propositions.”<sup>16</sup>

Then there was the Principles category. This had not previously been used in ALI terminology, and had clearly been created in connection with the Corporate Governance project and its ramifications. Principles, the *Handbook* announced, “may be addressed to courts, legislatures, or governmental agencies. They assume the stance of expressing the law as it should be, which may or may not reflect the law as it is.”<sup>17</sup> The definition of Principles, taken together with those of the other categories, revealed that the authors of the 2005 *Handbook* were attempting to do precisely what Wechsler had doubted could be done: separate “the law as it is” from “the law as it should be.” While there were some qualifications – Studies were conceived as laying “practical” as well as “theoretical” groundwork

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<sup>16</sup> American Law Institute, *Capturing the Voice of the American Law Institute: A Handbook for ALI Reporters and Those Who Review Their Work* 4, 10, 14 (2005).

<sup>17</sup> *Id.*, 12.



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for subsequent black-letter propositions, and Restatements were conceived as not only reflecting “the law as it presently stands” but “as it might plausibly be stated” – a reader of the *Handbook* could be expected to discern the relationship between declarative and normative content in each of the categories, as well as the posture of the authors of each type of project.

In two respects the *Handbook*'s new project terminology looks like another confession and adaptation response to critics. First, the statutory projects, which had been launched in the 1950s because the ALI had concluded that statutory law was going to be on the increase and wanted to give legislatures the benefit of its expertise on appropriate areas for codification, were re-described in jurisprudential terms: they “assume the stance of prescribing the law as it shall be.” That statement was of course unnecessary, given that the authors of model codes are not members of the legislatures to which they are submitted. It was also largely irrelevant, since the primary purpose of model codes is not to have legislators hear the normative views of ALI authors on issues, but to have experts do work that legislators may be less able to do. Yet the *Handbook* formulation emphasized the normative stance of authors of legislative recommendations.

Second, the fact that the typology of projects emphasized the relationship between their declarative and normative dimensions signaled that those dimensions were present, in differing degrees, in all the ALI's work. That signal seemed particularly pointed with respect to the Principles category. In the context of the controversy generated by the Corporate Governance project, calling the result of that project “Principles,” and describing the stance of such projects as “expressing the law as it should be,” regardless of whether that expression “reflected the law as it is,” may be seen as saying to those exercised by the deliberations over Corporate Governance, “we started this out as a Study which would eventually turn into a Restatement, but your reaction made us realize the degree to which people are normatively invested in any statement of ‘the law’ we might end up making.” That response could be taken as another version of Wechsler's “the critics won the day.” However the responses of outside lobbyists to the Corporate Governance project may have

offended those within the hierarchy of the ALI, those actions had reminded them that being mindful of outcomes and client interests is an important part of the ALI's work.



So one might be tempted to say that the 2005 *Handbook* represents another example of confession and adaptation in the internal history of the ALI. But there are other late twentieth- and twenty-first century developments within the legal profession that, for me, may have significant ramifications for the ALI and have not hitherto been part of its history. Those developments highlight the changing criteria for visibility within the legal academy and elite sectors of the bar. Whereas for most of the ALI's history those criteria can be seen to have overlapped significantly, in recent decades they have diverged.

When the ALI came into being, and work on the First Restatements began, the visibility of elite law professors was a product of three factors: institutional affiliation, treatise writing, and casebook writing. One of the reasons the First Restatements took the form they did – summaries of the state of common law subjects, largely unaccompanied by commentary – was that it was anticipated that the treatises which Reporters had written, or would write, could provide fuller explanations of the summaries. Those treatises were not simply written for legal academics or law students. They were also directed at the judiciary and the practicing bar. That was true of legal scholarship generally: treatises, journal articles, and casebooks were written for (and sometimes by) members of the bar and judges as well as legal academics.

It was thus expected that when the ALI resolved to draw its membership roughly equally from practitioners, on the one hand, and judges and academics, on the other, those branches of the legal profession would share a common ground of exposure to the types of legal scholarship that were being produced. Moreover, the scholarship that was produced was relatively uniform in quality and accessible to each of the groups. It was doctrinally oriented analysis of

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common law subjects, with a smattering of policy thrown in, written exclusively for legal audiences.

When the Second Restatements appeared, the audiences for legal scholarship remained the same, and so did the kinds of scholarship visible legal academics, practitioners, and occasionally judges produced. When I entered law school in the late 1960s the overwhelming number of scholars at elite law schools worked on doctrinally oriented scholarly articles, treatises, and casebooks. They were rewarded for those efforts: to author a leading casebook or treatise was to cement one's scholarly reputation and visibility.<sup>18</sup>

We do not need comments by the Chief Justice of the United States to recognize that a major transformation has taken place in the relationship between scholarship in the legal academy and the practitioner and judicial audiences for that scholarship. Although legal scholars continue to write journal articles which feature doctrinal and policy analysis, many of those articles also contain applications of the work of other disciplines, some of which are unintelligible to persons lacking training in the discipline in question.<sup>19</sup> At the same time, while treatises and casebooks continue to be produced, they are not given the degree of scholarly "credit" they once were, and junior scholars at elite law schools are not encouraged to write them.

In the same time period both the number of contributions by practitioners and judges to law reviews, and the extent to which law

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<sup>18</sup> Lance Liebman, the current ALI Director, tells a story which captures that emphasis. When Liebman joined the Harvard law school faculty in 1970, his office was near that of Austin W. Scott, the legendary trusts scholar, who was then 85, and retired from teaching for nearly a decade, but still actively engaged with scholarship. One day Scott said to Liebman: "Lance, to be great, you need to write a Restatement, a casebook, and a treatise. Seavey wrote a Restatement and a casebook, but he never wrote a treatise." Scott's reference was to Warren A. Seavey, one of the leading torts scholars of his generation, who had been Scott's colleague on the Harvard faculty from 1927 to 1955 and had died in 1966.

<sup>19</sup> The use of "modeling" equations in articles applying the insights of economics to legal questions is possibly the most vivid example. I am occasionally called upon to evaluate such articles, and am aware that one could put almost anything in an equation without my being able to discern whether the insertion carried any probative weight.

reviews are regularly read by members of law firms, has declined. This is not only because of changes in the content of law journal scholarship. It is also because lawyers in elite firms tend to be consumed with paying attention to the needs of their clients. They have very little time left over for reading in academic journals, let alone for producing scholarship of their own. My impression is that treatise literature is still regularly consumed by practitioners and judges, but law review articles are not; and at the same time academics are getting less credit, and less visibility among their peers, for writing for practitioner and judicial audiences. If one notes these changing criteria for success and visibility in the academic and practitioner sectors of the legal profession, one can understand why numerous practitioners and judges have referred to a gap between what academicians are writing and what they find useful to read. In the first two decades of the Institute's existence its scholar, practitioner, and judicial members were reading, and writing about, common topics in common ways, and that sense of a shared body of literature, and of shared intellectual interests and techniques, was still arguably intact throughout the 1960s. But I doubt that today many persons would confidently assert that a common ground of scholarly interest and concern, or a reliance on common modes of inquiry and analysis, unites elite practitioners, scholars and judges.



What implications might a perceived gap between the subject matter interests and techniques of legal academics and those of the other sectors of the profession have for the Institute's future? I want briefly to touch upon three sorts of implications: the membership of the Institute, the recruitment of reporters and advisors for its projects, and the shape those projects might take.

From its origins the ALI has self-consciously attempted to draw approximately half of its membership from the practitioner sector and the other half from academics and judges, with the ratio of academic to judicial members being about 2 to 1. Nonetheless it has chosen persons to play leading roles in the gestation of projects primarily from the academic sector. This is understandable for three

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reasons. Academics have more time than practitioners and judges to devote to projects with a significant scholarly component; for much of the history of the ALI projects such as Restatements and model codes were likely to overlap with the scholarly interests of academics; and since the ALI process provides for significant review of project drafts by designated advisers and members of the Council, opportunities exist for practitioners and judges to participate significantly in the gestation of a project without having to be involved in the laborious stages of generating it from scratch.

The first and third of those reasons would still seem to be apposite for current ALI projects. But the second appears to hearken back to a different professional universe. ALI projects, whatever their category, are at bottom exercises in law reform. On one end of a continuum, they are seeking to capture the state of common law subjects in such a way that emphasizes the capacity of legal doctrine to grow and change over time; on the other end, they are frankly seeking to express the law of a subject “as it should be,” whether or not that expression reflects what it “is.” One might describe the ALI’s overall effort as helping to render change in the law by setting forth the bases and justifications for that change.

If law reform in the sense just described may fairly be said to be the core of the ALI’s work, the question becomes how many members of the contemporary legal profession are attracted to that sort of work, and what sorts of incentives exist within the current legal academy, and the practicing bar, to pursue it. The ALI has made a determined effort to recruit younger academics and practitioners to its ranks, recognizing that it is from those cohorts that directors and advisers on the next generation of ALI projects will emerge. What will those future participants gain professionally from their efforts? What will be the audiences to which their work is directed? I think the possible answers to those questions may be a bit troubling from the ALI’s perspective.

Being chosen a Reporter for an ALI project is a prestigious honor. It demonstrates that one has a scholarly reputation in the subject under consideration, and also that one is expected to perform tasks associated with generating a project – diligence, discipline, enthusi-

asm for the subject matter, the ability to think and write clearly – in a competent fashion.<sup>20</sup>

But there is another signal that accompanies being designated an ALI Reporter. It is that the person in question has made a long commitment to a law reform project whose visibility in the legal academy may not be particularly high. When a new Restatement, or model code, or statement of Principles is issued, that event may be perceived to be of great utility to practitioners, or legislators, or judges. Moreover, some of the provisions of the newly issued project may find their way into casebooks. But it is unlikely that the project will be subjected to scholarly review in the manner of the First Restatements. In short, the Reporter of an ALI project may need to bear in mind the possibility of his or her contribution's largely disappearing from view among peers.

The fact that it is going to be challenging for the ALI to recruit legal academics or practitioners to work on ALI projects, and difficult for those who have been recruited to devote the majority of their scholarly time to ALI work, is not news to those involved with the ALI's internal governance. Efforts are being made to canvass younger practitioners about their prospective interest in the ALI, and to attract younger scholars through the creation of prizes for scholarship ALI members value. The ALI continues to have some success in recruiting new Reporters from the ranks of visible scholars. But the incentives in both the legal academy and large-firm law practice seem to be pointing away from members of those sectors making long-term commitments to law reform projects.

The ALI might consider, for example, commissioning Studies as first efforts on at least some of the projects it is contemplating.<sup>21</sup> The Studies format would have the advantage of allowing participants to survey a field without making the fuller commitment required by a Restatement or a Principles project. Undertaking such a survey might be deemed more manageable by prospective Report-

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<sup>20</sup> Michael Traynor, "The First Restatements and the Vision of the American Law Institute, Then and Now," 32 *So. Ill. U. L. J.* 145, 163 (2007).

<sup>21</sup> *Id.*, 170-71.

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ers. And even if a decision were made not to progress further to a Restatement or statement of Principles, the Study produced might well be valuable to interested audiences.<sup>22</sup>



Looking back to the formative years of the Second Restatements, one gets a sense that ALI projects have consistently struggled to define the relationship between black-letter principles and the policy dimensions of legal synthesis, and between the declarative and normative dimensions of lawmaking. One might be inclined to conclude that this history suggests that the difficulties are endemic and in some sense irreconcilable, and that the ALI should just face that fact and get on with its work.

But the recent changes in the incentive structures of legal academics and practitioners can be seen as adding a complication that was not present in the first fifty years of the ALI. They raise the question whether prospective candidates for Reporterships will ask themselves whether they can reconcile a long-term commitment to ALI work with maintaining scholarly visibility among their peers, or whether they can take the time from their practice to do the project at all. In the end, the ALI needs to rely upon members of the legal academy and elite sectors of the practicing bar to participate in its work. The challenge will be to reconcile its institutional aspirations with the career aspirations of those it seeks to involve deeply in ALI projects.



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<sup>22</sup> The ALI already has in place a “prospectus” stage for projects, where an individual selected by the Director is asked to produce a preliminary appraisal of whether a particular project, identified as potentially promising, might be feasible. Perhaps such prospecti might be routinely asked to consider whether a Study of the area in question should precede any decision to embark upon a Restatement or a Principles format.