

12-15-1985

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### Recommended Citation

W. Noel Keyes *The Restatement (Second): Its Misleading Quality and a Proposal for Its Amelioration*, 13 Pepp. L. Rev. Iss. 1 (1985)

Available at: <https://digitalcommons.pepperdine.edu/plr/vol13/iss1/2>

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# The Restatement (Second): Its Misleading Quality and a Proposal for Its Amelioration

W. NOEL KEYES\*

## I. INTRODUCTION TO THE CURRENT PROBLEM WITH THE RESTATEMENT (SECOND)

The organization of the American Law Institute on February 23, 1923, was a great event in our legal history. It involved the establishment of a permanent organization for the improvement of the law. The response was overwhelmingly favorable. The organizational meeting was attended by the Chief Justice of the United States and other representatives of the Supreme Court, representatives of the United States Circuit Courts of Appeals, the highest courts of a majority of the states, the Association of American Law Schools, the American and State Bar Associations, and the National Conference of Commissioners on Uniform State Laws.

It was recognized then that the ever-increasing volume of court decisions heightened the law's uncertainty and lack of clarity; as noted in the introduction to the *Restatement of Restitution*, this would "force the abandonment of our common-law system of expressing and developing law through judicial application of existing rules to new fact combinations and the adoption in its place of rigid legislative codes, unless a new factor promoting certainty and clarity can be found."<sup>1</sup> Work on the *Restatements* began in the 1920's, and *Restatements* were published in 1932 on the Law of Contracts, in 1933 on the Law of Agency, in 1934 on Conflict of Laws, in 1935 on the Law of Trusts, in 1936 on the Law of Property, and in 1937 on the Law of Restitution. Most of the original *Restatements* contained introductions by William Draper Lewis, the Director of the American Law

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1. *Introduction* to RESTATEMENT OF RESTITUTION at ix (1937).

Institute, on the object and character of the *Restatement*, reiterating that

[t]he object of the Institute in preparing the Restatement is to present an orderly statement of the *general common law of the United States* . . . . The object of the Institute is accomplished in so far as the legal profession accepts the restatement as *prima facie a correct statement of the general law of the United States*.<sup>2</sup>

The goal of the original *Restatements* was to set down a correct statement of the "general law" (or "common law") of the United States; the attempt was made to do so and, with some notable exceptions, the goal was achieved. However, with little fanfare, and to the surprise and disappointment of many, this goal is no longer even being attempted by the American Law Institute in drafting the second *Restatement*. With some exceptions, other goals have been initiated. This is unfortunate, owing to the willful lack of any serious attempt by the Institute to identify the drastic changes in the law it has made and continues to make in the second *Restatements*. When the original *Restatement of Contracts* appeared in 1932, Chief Justice Charles Evans Hughes praised it as a monumental achievement;<sup>3</sup> others did likewise.<sup>4</sup> But we do not hear much similar praise being bestowed by neutral parties upon the second *Restatement of Contracts* or upon most of the other second *Restatements*.<sup>5</sup> Why is this? It is the opinion of the writer that this may be due in some measure to the character of the later so-called "*Restatements*." They no longer even purport to "restate" the law in this manner, yet they continue to use

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2. *Id.* (emphasis added).

3. See Hughes, *Restatement of Contracts is Published by the American Law Institute*, 18 A.B.A. J. 775 (1932).

4. See Goble, *The Restatement of the Law of Contracts*, 21 CALIF. L. REV. 421, 429 (1933); Havinghurst, *The Restatement of the Law of Contracts*, 27 ILL. L. REV. 910, 910 (1933); Patterson, *The Restatement of the Law of Contracts*, 33 COLUM. L. REV. 397, 397 (1933); Whittier, *The Restatement of Contracts and Consideration*, 18 CALIF. L. REV. 611, 637 (1930); Whittier, *The Restatement of Contracts and Mutual Assent*, 17 CALIF. L. REV. 441, 455 (1929).

5. On the contrary, as noted below, the new approach to the *Restatements* has generated much controversy. Erwin N. Griswold has recently written to the Director of the American Law Institute as follows:

For some time, it has seemed to me that the Second Restatement went too far in removing "rules," and in leaving everything to "justice." Of course, "justice" is a great ideal. But when it is looked for entirely post hoc, it eliminates the factors of predictability and uniformity, which are surely an important part of a search for a just system.

In this process, I think that the American Law Institute has had a great and perhaps unfortunate influence. Understandably, courts welcome an establishment-based source which enables them to feel free, and to do what they would like to do, and to feel rather respectable and even rather smug about it in the process.

Letter from Erwin N. Griswold to Geoffrey C. Hazard, Jr. (Sept. 17, 1984) (with copies to John W. Wade and Roswell B. Perkins, Esq.). I wish to thank Mr. Griswold for permission to quote from his letter, and Professor Wade for first bringing the letter to my attention.

the term "*Restatement*" as if they had maintained the goals of the original *Restatements*. For this lack of identification it is difficult to find any redeeming value.

It is unfortunate that many people, including lawyers and judges in this country and other countries, assume that the original goal of *Restatements* continues — that is, that the ALI is attempting to restate the law essentially "as it is" and not as the Institute thinks "it should be." A professor of law at the Institute of European Market Law recently wrote: "The authors of the Restatement can *claim* that they state the existing American Law. In Europe the divergent legal systems prevent any such restatement of law. The Principles of European Contract Law have to be established by a more creative process."<sup>6</sup> He and others do not realize that in fact the authors of the *Restatement* no longer claim that they are writing down existing American law and that today they do not so restate.

A number of my students have asked me why the second *Restatement* is called the "*Restatement*" when so many sections thereof are simply the views of the drafter rather than any real attempt to restate what is the general common law of the United States — in accordance with the expressed intent of the original *Restatement*.<sup>7</sup> They are particularly disturbed that most of their professors do not point out this change in approach, which is quite confusing and often leads to inaccuracy of expression. A change should be made by the American Law Institute so as to make its proposals less deceptive: they should no longer be called *Restatements of the Law*.<sup>8</sup>

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6. Lando, *European Contract Law*, 31 AM. J. COMP. L. 653, 657 (1983) (emphasis added).

7. "After all, the main thing is to dare. 'As at the Olympic games,' says Aristotle, 'as at the Olympic games, it is not the finest and strongest men who are crowned, but they who enter the lists, for out of these the prizemen are selected; so, too, in life . . .'" Cardozo, *Our Lady of the Common Law*, 13 ST. JOHN'S L. REV. 231, 241 (1939).

8. At a recent national meeting of the Association of American Law Schools, some professors who were not happy with the second *Restatement* called it "deceptive," and indicated that it was a shame more had not been written on this point. It was even suggested that upon my return I attempt to do so "if the courage were still there." Upon reflection on this matter, I decided that the raising of such a serious question at this late date might be worthwhile, and took heart in Samuel Johnson's advice that one should not neglect doing a thing immediately good for fear of remote evil.

## II. THE NEED FOR MORE CERTAINTY AND THE PROBLEM OF DYNAMISM IN THE LAW

The American Law Institute was founded to accomplish a primary goal of bringing "certainty and order" to decisional or case law. As stated by a "founding father," Benjamin Cardozo:

The law of our day [1924] faces a twofold need. The first is the need of some restatement that will bring certainty and order out of the wilderness of precedent . . . . The second is the need of a philosophy that will mediate between the conflicting claims of stability and progress and supply a principle of growth. The first need is deeply felt and widely acknowledged. The American Law Institute, recently organized [1923], is an attempt to meet it.<sup>9</sup>

Thus it is clear that "order from the precedents" was the purpose of the Institute when it was first organized; it was not to be "prophecy of what the law ought to be" according to the views of that Institute. At most, the Institute should attempt to bring order from precedent and mediate between stability and progress, as distinguished from any function of devising new law as formed by the Institute itself. It is suggested that Cardozo, were he alive today, would seek that the Institute distinguish between even these two functions by making the mediation completely secondary to its first function of bringing order to precedents, to the extent this is possible. He would not call a minority or new view a "restatement" of the law because he would desire to permit the reader to better judge for himself which path to follow.

Drafters have complained about the original *Restatements* since the middle thirties. One of these drafters, Professor W. Barton Leach of Harvard Law School, noted as a "residual corollary" that a drafter

can never adversely criticize a rule which we find we have to state. Such by-law presents a very unpleasant dilemma to a Reporter. He must either state a good rule which he knows perfectly well is not the law; or he must state a bad rule and by his very statement entrench it further.<sup>10</sup>

Of course, the appellation of a good rule was solely his opinion thereof; this was also true regarding what was a bad rule. Professor Leach stated that drafters may find that "we are stating a rule which we believe to be sound but which is opposed by a substantial body of authority." He illustrated this by noting that although "[w]e have declared in the Property Restatement that legal contingent remainders in land are indestructible, everyone is agreed . . . that the opposite rule exists in many states."<sup>11</sup> He did not know, however, that this

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9. B. CARDOZO, *THE GROWTH OF THE LAW* 1 (1924), reprinted in M. HALL, *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 185 (1947).

Benjamin Nathan Cardozo (1870-1938) practiced in New York City, and served as Judge and Chief Judge of the Court of Appeals of New York. He was appointed Associate Justice of the Supreme Court of the United States in 1932.

10. Leach, *The Restatements As They Were In The Beginning, Are Now, and Perhaps Henceforth Shall Be*, 23 A.B.A. J. 517, 519 (1937).

11. *Id.* at 520.

opposite rule was then the majority rule.<sup>12</sup>

### III. THE CONCEPT OF SOCIAL LAG

It was quite understandable that the professors and others working on a *Restatement of the Law* wished to progress further in the direction they considered to be good. This tendency was noted early on by Dean (later Judge) Herbert F. Goodrich of the University of Pennsylvania Law School, and Advisor on Professional Relations of American Law Institute.<sup>13</sup> Nevertheless, Dean Goodrich pointed out that, after debate on this matter, it was decided that "[t]he *actual Restatement of the Law purports to be*, and is substantially limited to a statement of *the law as it is*."<sup>14</sup>

Even in the first *Restatement*, it has been noted that two lines of authority can sometimes be found on a given point, and the restaters may believe that one of these lines, although not the more generally accepted, is useful in general context or shows a recent trend. "In such situations restatement use of prior authority tends to be less neutral than usual."<sup>15</sup> Of course, the critics of the first *Restatement of Contracts* tend to cite section 90 as "the great exception" to the rule that the original *Restatement* set forth the law "as it is." However, it tended to be the exception which proved that rule.<sup>16</sup>

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12. Professor Leach did state that explanatory notes are needed to help where "the reader of the Restatement in whose state it is settled that the opposite rule applies, finds a statement that is completely untrue in his jurisdiction and obtains no help in solving the problem which his local law presents." *Id.*

13. Many of us in the law, and especially those whose legal work is within the teaching profession, feel that there is a serious social lag between our legal rules and our rapidly shifting society. Being conscious of that lag and being socially minded persons, we are eager to see it grow less. . . . A restatement of existing law, another suggests, does not grapple with the more fundamental problem whether the existing law is adequate to the needs of present day society.

In the same way many of the problems of our substantive law go far beyond questions concerning that body of precedents built up in the course of development in Anglo-American law. They are based upon unsolved questions in economics, sociology, and government. Their solution, if, as, and when we find the solution, will call for many other heads in addition to that of the lawyer. It is likely, too, that the method used for changing law to fit changing times will in some instances need to be more rapid and more drastic than the slow development through judicial precedent.

Goodrich, *What Would Law Teachers Like to See the Institute Do?*, 8 AM. L. SCH. REV. 494, 494-95 (1936).

14. *Id.* at 505 (emphasis added).

15. Oliver, *The American Law Institute's Draft Restatement Of the Foreign Relations Law of the United States*, 55 AM. J. INT'L L. 428, 434 (1961).

16. *Id.*

Section 90 of the *Restatement of Contracts* contains no discussion of case law bearing upon promissory estoppel. Professor Samuel Williston, a *Restatement* Reporter, found that there was some authority in case law that definite and substantial action could be the source of legal obligation in certain situations, even though not supported by consideration.<sup>17</sup> He convinced the American Law Institute, and thus the doctrine of promissory estoppel came into the common law via the *Restatement*. Thereafter, common law courts began to follow the doctrine on the authority of its support by the American Law Institute — a situation which greatly encouraged the ALI to make new rules and exceptions into other rules. Yet, in 1945, the *History of the American Law Institute and the First Restatement of the Law* stated:

The Restatement is an agency tending to promote the clarification and the unification of the law in a form similar to a Code. But it is not a Code or statute. It is designed to help *preserve not to change* the common system of expressing law and adapting it to changing conditions in a changing world.<sup>18</sup>

As late as 1962, Warren A. Seavey, Professor Emeritus at Harvard Law School, describing the duties of each Reporter of the *Restatements*, stated that he “was *not permitted to state a rule supported only by a small minority of jurisdictions*, since the product was to be a statement of the prevailing American law and *not a professional dream*.”<sup>19</sup>

#### IV. A “RESTATEMENT,” SECOND, IS BORN

By 1953, only 30 years after its birth, the ALI found it essential to begin consideration of a second *Restatement*. Warren A. Seavey, a member of the ALI at the inception of both *Restatements*, stated at the beginning of the “Second” that “[i]t was agreed that the *old method of procedure was sound*.”<sup>20</sup> In 1957, Harrison Tweed, a past president of the ALI, compared the *Restatement* to the Supreme Court of the United States, saying:

Of course, the difference in the function of the Court and the function of the Institute calls for a very different method of procedure and of statement. The Court must be alert constantly to make changes, to modify and to alter rules as conditions call for new decisions and new lines of approach. *The Institute, on the other hand, confines itself to stating the law as it is.*<sup>21</sup>

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17. *Id.* at 434 n.6.

18. Lewis, “*How We Did It*,” in *RESTATEMENT IN THE COURTS* 1, 19 (1945) (emphasis added).

19. Seavey, *The Restatement, Second, and Stare Decisis*, 48 A.B.A. J. 317, 318 (1962) (emphasis added). He also stated that “[s]ince the statements were usually in agreement with the rules in a very large percentage of the states, a survey showing something like *ninety percent agreement with decided cases* on contested points, the Restatement was normally cited to support previously existing rules.” *Id.* (emphasis added).

20. *Id.* at 319 (emphasis added).

21. Tweed, *Address to the American Law Institute*, 34 A.L.I. PROC. 38 (1957) (emphasis added). Similarly, Herbert F. Goodrich, former director of the ALI, stated in

As we shall see, the Institute has since changed in order to usurp for itself the function which its former president said was a function of the Supreme Court and *not* of the Institute. However, even in 1964, John G. Buchanan, a former vice president of the ALI, stated that "heretofore the Institute has taken the position that we are not prophet's sons. It would be quite appropriate for Prosser on torts to say what he thought the law ought to be. We are *stating the law as it is* . . . ." <sup>22</sup> But his mention of prophets was itself prophetic at that time. The really effective turning point in ALI policy apparently occurred sometime in the late 1960's — a period which changed a number of things in our society, many of which we later realized were not always changed for the better. <sup>23</sup> Herbert Wechsler of Columbia Law School had become Director of the ALI. In 1969, he attempted to defend the new approach to the second *Restatement* by noting a shift in ALI projects from restating form to legislative form, be it a model act, a proposed code, or the proposed revision of specific legislation, which he greeted with "enthusiasm." <sup>24</sup>

The most successful project of the ALI was the Uniform Commercial Code. It was actually a joint project with the National Conference of Commissioners on Uniform State Laws, whose goal is "legislation," not restating. The Uniform Commercial Code is law in forty-nine states and other jurisdictions. In 1962, both bodies set up a permanent Editorial Board for the Uniform Commercial Code for future legislative changes. Thus the ALI became oriented toward legislation just prior to the initiation of the new approach to the second *Restatement*.

Criticism of this legislative approach occurred early. <sup>25</sup> It might be stated that the ALI has precedent for having ignored to date criti-

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1961 that "[a] judge, a lawyer, a law teacher could then go to one source, find what the law in point was and with confidence state it to be so." H. GOODRICH & P. WOLKIN, *THE STORY OF THE AMERICAN LAW INSTITUTE, 1923-1961* 8 (1961).

22. *Discussion of Restatement of the Law, Second, Torts*, 41 A.L.I. PROC. 349, 371 (1964) (remarks of J. Buchanan) (emphasis added).

23. It is submitted that the second *Restatements*, to a significant extent, represent changes "not always for the better."

24. Wechsler, *The Course of the Restatements*, 55 A.B.A. J. 147, 148 (1969).

25. Thus the late professor William L. Cary noted that "no one has openly ventured to question the basic premise on which [the ALI's Tax Project was] drafted." Cary, *Reflections Upon the American Law Institute Tax Project and the Internal Revenue Code: A Plea for A Moratorium and Reappraisal*, 60 COLUM. L. REV. 259, 259 (1960). In this article, Professor Cary also noted that it has become a biennial custom of the Ways and Means Committee to invite a host of experts and industry spokesmen to testify upon tax policy. It has become equally traditional, however, for Congress to ignore everything which they have suggested. *Id.* at 270.



cisms of its new approach to the *Restatements of Law*. Professor Wechsler's direct "legislative" experience was in connection with the Model Penal Code. He quoted Judge Learned Hand's last words to the American Law Institute, which expressed the belief that "our ventures in law making [legislative projects] will in the end be the most important part of our work."<sup>26</sup>

Apparently imbued with the spirit of these legislative endeavors, Professor Wechsler then belatedly expressed concern about an "attack upon restatement policy."<sup>27</sup> The attack he referred to was an excellent criticism of the ALI's recent approval of section 402A in the *Restatement (Second) of Torts* with respect to product liability because it was a minority rule, unsupported by and inconsistent with the most recent decisions of the highest courts of a majority of states and "an unprecedented departure from [the ALI's] traditional role."<sup>28</sup> He acknowledged the accuracy of the complaint, but stated that the ALI was then "unpersuaded," and said "if we ask ourselves what courts will do in fact within an area, can we divorce our answers wholly from our view of what they ought to do . . . ?"<sup>29</sup> This being a rhetorical question, the answer set forth the new approach: to set down what the law ought to be "and when the institute's adoption of the view of a minority of courts had helped to shift the balance of authority, it was clear that this was taken as a vindication of the judgment of the institute and proper cause of exultation."<sup>30</sup>

This "ends justify the means" approach refused any compromise, or even recognition, of the problem engendered by the new approach. The following year, 1970, Mr. Fred B. Helms, Chairman of the Defense Institute Liaison Committee to the American Law Institute, pointed out that "[t]he adoption by the ALI of this prediction technique has forced the courts to look at law review articles to determine the present majority rule on strict liability."<sup>31</sup> Mr. Helms made the excellent point that the ALI's shift in emphasis was "disguised": "Director Wechsler stated that there has been a shift in emphasis in ALI programs toward legislation. There can be no argument with this. What can be objected to is the *disguising* of model code format within the imposing tradition of the *Restatement*."<sup>32</sup>

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26. Wechsler, *supra* note 24, at 148.

27. *Id.* at 148.

28. *Id.* at 149.

29. *Id.*

30. Director Wechsler apparently assumed that his point of view was affirmed by the ALI Council in 1968. *Id.* at 150.

31. Helms, *The Restatements: Existing Law or Prophecy*, 56 A.B.A. J. 152, 153 (1970) (footnote omitted).

32. *Id.* at 154 (emphasis added).

## V. EXAMPLES FROM THE RESTATEMENT (SECOND)

Perhaps a few examples from the second *Restatements* might further illustrate the problems we are addressing in this paper.

A. *Restatement (Second) of Contracts*

In 1962, Professor Seavey of Harvard noted that the work of the new Reporter for the new *Restatement* (replacing Williston and Corbin) "will be largely in expanding the Comments and supplying notes upon many cases which have cited, or agreed with the first *Restatement*, and noting the few which have disagreed."<sup>33</sup> It is interesting to note how wrong Professor Seavey was to be, largely because of developments just on the horizon at the time he spoke.

For example, debate has long existed on whether the contract price sets an upper limit upon the measure of restitution. Apparently the "overwhelming weight of authority" permits restitutionary recovery to exceed the contract rate or price.<sup>34</sup> It was stated in 1981 that the *Restatement (Second) of Contracts* "audaciously but wisely followed the minority view," limiting restitution for part performance to the sum that would have been due had performance been completed.<sup>35</sup> Professor Perillo gives an example of the unfortunate consequences of the majority rule by citing the extreme California case of *Boomer v. Muir*<sup>36</sup> as follows:

Plaintiff, a construction contractor, justifiably cancelled his contract because of defendant's breach. Had he completed performance he would have been entitled to a final payment of \$20,000. Electing to sue for restitution, plaintiff received a judgment for over \$250,000, which was affirmed on appeal.<sup>37</sup>

I happen to generally concur in this particular minority rule, but not

33. Seavey, *supra* note 19, at 319.

34. 1 G. PALMER, *THE LAW OF RESTITUTION* 389 (1978).

In a recently-conducted exhaustive analysis of cases in all states on whether the cost of correction or diminution of value is the proper measure of damages for breach of construction contracts, it was noted that sections 347 and 348(2) of the *Restatement (Second) of Contracts*, which endorse

the loss in value to the owner . . . as the primary measure of damages for a contractor's breach of a construction contract . . . [do] not have wide application. The second and more widely applied difference-in-value measure is the diminution-in-value-of-market-price measure, under which the owner's damages are measured by the difference in value between the structure as delivered and the structure as contracted for.

Annot., 41 A.L.R.4th 131, 139 (1985).

35. Perillo, *Restitution in the Second Restatement of Contracts*, 81 COLUM. L. REV. 37, 44 (1981).

36. 24 P.2d 570 (Cal. Dist. Ct. App. 1933).

37. Perillo, *supra* note 35, at 44.

in its use as a "restatement of the law." My disapproval is for the same reason Mr. David Simon noted in a comment on the treatment of market damages: "While a change in existing law seems to have been proposed, Restatement (Second) does not acknowledge it."<sup>38</sup> In the *Restatement (Second) of Contracts*, the Reporter's note points out that section 12 of the original *Restatement*, which defined unilateral and bilateral contracts, is deleted "because of doubt as to the utility of the distinction, often treated as fundamental, between the two types."<sup>39</sup> This may or may not be a good idea; however, it represents an explicit attempt to change rather than restate the law.

Perhaps the most shocking testimony of the new approach is that of the Reporter of the *Restatement (Second) of Contracts* himself, who stated that "[i]t is true that in some instances an issue can be simply framed: does the *Restatement (Second)* follow or reject a 'majority' rule?"<sup>40</sup> He then added that "it scarcely behooves the Reporter of a restatement to proclaim too often that he is engaged in innovation."<sup>41</sup> This statement appears to raise a question whether under the new approach honesty should not be the best policy.

The Reporter explicitly states that sections 158 and 272 of second *Restatement* were the result of "[r]elying on the few cases that have fashioned more imaginative solutions [to govern] cases of mistake, impracticability, and frustration."<sup>42</sup> He provides as an example the case of *National Presto Industries v. United States*,<sup>43</sup> which directed that the government and a supplier equally split unexpected costs.<sup>44</sup> But to my knowledge no other appellate court has directed a buyer and supplier to act like Solomon and "equally split the baby." The case itself is an unfortunate and singular example of a judge who decided to do what he wanted, rather than his duty to the law of contracts. As was well-stated in the dissent in the *National Presto* case, "it cannot be claimed that the result reached by the court in this case would be a fair and just one, if the contract between the parties permitted it."<sup>45</sup> The contract in that case did not permit the result chosen by the majority. In similar fashion, the drafters of the second *Restatement* pick and choose the times when they wish to follow the law.

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38. Simon, *A Critique of the Treatment of Market Damages In the Restatement (Second) of Contracts*, 81 COLUM. L. REV. 80, 80 (1981).

39. RESTATEMENT (SECOND) OF CONTRACTS § 1 reporter's notes at 8 (1981).

40. Farnsworth, *Ingredients in the Redaction of the Restatement (Second) of Contracts*, 81 COLUM. L. REV. 1, 6 (1981) (emphasis added).

41. *Id.* at 6 (emphasis added).

42. *Id.* at 8 (emphasis added).

43. 338 F.2d 99 (Ct. Cl. 1964), cert. denied, 380 U.S. 962 (1965).

44. Farnsworth, *supra* note 40, at 8 n.48.

45. *National Presto*, 338 F.2d at 113 (Whitaker, J., dissenting) (emphasis in the original).

*Restatement* drafters have developed a policy of following the Uniform Commercial Code as a detailed *modus operandi*, which the Reporter has described as follows: "the drafters of the *Restatement (Second)* reasoned from the Code by analogy, this time in a series of sections that differ from the Code in their organization but often contain identical language."<sup>46</sup> The fact that this method meant drafting new law (rather than restating the law) gave no reason to pause and reflect on this new methodology. Thus, in describing one example of a section of the so-called "*Restatement*," the Reporter simply stated that "the reliance on the code is greater than in the two previous examples, *since scant support could be found* in pre-Code case law for the rule followed by the *Restatement (Second)*."<sup>47</sup> The Reporter continues to describe his seeming dependence on the Code in some instances (as distinguished from other sources of contract law) by giving blanket approval to the Code without even making any attempt to "restate" current law — a function which the founders of the *Restatement* might have viewed as his chief task. He states that "in some instances the *Restatement (Second)* incorporates by analogy a new rule that depends largely on a Code rule for its authority."<sup>48</sup>

Apparently the Reporter does have some reservations concerning doing something called "restating," which are not reflected in his practice. He has stated that "[a]lthough *Restatement (Second)* may take general positions as to the functions of contract law that may sometimes lend support to one side or the other in these disputes, it was not the function of the Institute, as one of the sponsors of the Code, to annotate its provisions in the *guise of restating*."<sup>49</sup> Thus, on the one hand, in the minds of drafters, no apparent problem exists in setting forth as general contract law in the *Restatement* things that are not; but, on the other hand, they would not annotate the Uniform Commercial Code's provisions under this guise. But a standard question remains: what is the standard for the double standard?

I have previously noted that the original *Restatement of Contracts*

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46. Farnsworth, *supra* note 40, at 10 (footnote omitted).

47. *Id.* (emphasis added). The Reporter was referring to section 277(1), which states: "A written renunciation signed and delivered by the obligee discharges without consideration a duty arising out of a breach of contract." RESTATEMENT (SECOND) OF CONTRACTS § 277(1) (1981).

48. Farnsworth, *supra* note 40, at 11. Other examples include section 208 on unconscionability (extending by analogy the rule of UCC section 2-302), and section 251 concerning when a failure to give assurances may be treated as a repudiation (extending by analogy and with some modification the rule of U.C.C. section 2-609).

49. *Id.* at 12 (emphasis added).

departed from its goal of restating the law principally in one section: namely, section 90, which then had little significant supporting authority beyond one midwestern case.<sup>50</sup> It has been commented with hindsight that “putting section 90’s action-inducing promise in the company of such modest and familiar notions as the promise to pay a debt discharged in bankruptcy was like putting Pavarotti in a barber-shop quartet.”<sup>51</sup> With the post-World War II flood of cases citing section 90 and following it, the restaters perceived that they had considerable support for becoming prognosticators or, in effect, unelected legislators — a position they pursued with words and deeds. The very section number of their success in prognostication was enshrined for posterity: that is, the Reporter has stated that “though the numbers of the sections of the Restatement Second have generally been changed so that they do not follow the first, this change was so contrived that the number of section 90 remains unchanged.”<sup>52</sup> Moreover, other provisions under which reliance may also make a promise enforceable were added. Thus section 87 of the *Restatement (Second) of Contracts*, entitled “Option Contract,” permits reliance on an unaccepted offer to make it irrevocable.<sup>53</sup>

The Reporter characterized an illustration for this section of the second *Restatement* as, “of course, a thinly disguised statement of the facts in *Drennan v. Star Paving Co.*”<sup>54</sup> The opinion in that case, written by Justice Traynor of the Supreme Court of California, was alone in proposing this view — a view contrary to an earlier decision written by Learned Hand.<sup>55</sup> Some years following the publication of section 87, the Reporter was able to celebrate with some euphoria, exclaiming that “Hand’s view still had a few adherents, but the Restatement Second’s endorsement of Traynor’s position has *helped to assure that it will prevail.*”<sup>56</sup> But should the goal of a “Restatement” be to see that a minority view, the view of one judge, prevails?

Similar action has taken place in other settings; thus, it was noted

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50. See *Ricketts v. Scothorn*, 57 Neb. 51, 77 N.W. 365 (1898).

51. Knapp, *Reliance in the Revised Restatement: The Proliferation of Promissory Estoppel*, 81 COLUM. L. REV. 52, 53 (1981). Furthermore, the reporter provided no notes or commentary to section 90.

52. Farnsworth, *Contracts During the Half-Century Between Restatements*, 30 CLEV. ST. L. REV. 374 (1981).

53. One of the illustrations to section 87 is as follows:

A submits a written offer for paving work to be used by B as a partial basis for B’s bid as general contractor on a large building. As A knows, B is required to name his sub-contractor in his general bid. B uses A’s offer and B’s bid is accepted. A’s offer is irrevocable until B has had a reasonable opportunity to notify A of the award and B’s acceptance of A’s offer.

RESTATEMENT (SECOND) OF CONTRACTS §87 comment e, illustration 6 (1981).

54. Farnsworth, *supra* note 52, at 375 (referring to illustration 6, *supra* note 53). See *Drennan v. Star Paving Co.*, 51 Cal. 2d. 409, 333 P.2d 757 (1958).

55. See *James Baird Co. v. Gimbel Bros.*, 64 F.2d 344 (2d Cir. 1933).

56. Farnsworth, *supra* note 52, at 375 (emphasis added).

that only two cases were at the frontier of the development of the law in this area when section 139 was drafted.<sup>57</sup> On the other hand, the Reporter of the *Restatement (Second) of Contracts* has written to the author that he has, on occasion, actually persuaded the Institute to reject attempts to depart from what was the clear majority view.<sup>58</sup>

### B. *Restatement (Second) of Torts*

With the publication in 1977 of Volume Four, the American Law Institute's *Restatement (Second) of Torts* was complete. In commenting on it, the Reporter frankly stated that "volumes 3 and 4 depict the trend toward reform of the common law . . . reflective of recog-

57. *Id.* at 377. The Reporter noted that

[s]ome of the many courts that heard the grain cases give the traditional answer that the Statute of Frauds applied. But others, relying heavily on the broad statement in section 139, held that the farmers were precluded from setting up the statute as a defense. These cases show an *extraordinary influence by the Restatement Second accelerating the recognition of reliance.*

*Id.* (footnotes omitted) (emphasis added). Again, is the purpose of the *Restatements* to "accelerate" the adoption of the views of the drafter or a small minority of courts? In this connection, section 302 of the *Restatement (Second) of Contracts* would eradicate any difference between "creditor" and "donee" beneficiaries, and substitute the term "intended" beneficiary—a major change from the original *Restatement*. The minority nature of this view has been noted in a recent study as follows: "It is notable that in this respect the revised definition does not embody any presumption against third party rights, *contrary to most state rules.*" Prince, *Perfecting the Third Party Beneficiary Standing Rule Under Section 302 of the Restatement (Second) of Contracts*, 25 B.C.L. Rev. 925, 928 (1984) (emphasis added).

58. Letter from E. Allan Farnsworth to W. Noel Keyes (May 21, 1984). The published proceedings of the Institute provide examples of Farnsworth's replies to some of the drastic changes being proposed.

A word of caution. Many of you who have spoken about this since it first came up last summer and I began to consult people on it, have cited the insurance cases. I would be rather wary of restating the law of contracts based on insurance cases. We have never done that anywhere else. We have always said that in a way you cannot mesh the insurance cases. If that is what you have in mind, I think you might have some reservations about enacting insurance cases into law in Section 369 to the extent that the *Restatement* is any kind of law.

*Continuation of Discussion of Restatement of the Law, Second, Contracts, Tentative Draft No. 14*, 56 A.L.I. PROC. 357, 364 (1979) (remarks of Professor E. Allan Farnsworth). Farnsworth also has stated:

There are cases in the insurance field now, particularly California, where insurance companies are being held liable for punitive damages for refusal to honor contractual obligations under their policies. It seems to me that is the trend in the law, and though I don't expect to change the black letter, maybe there ought to be room in the Comments at least for more flexibility so that there can be a logical development of the law in this area, at least where there is manifest bad faith by the breaching party.

I would just like to urge that for consideration.

*Id.* at 361.

nizable trends that *foretell impending developments*.”<sup>59</sup>

Those who advocate the use of the second *Restatement* provisions constituting minority rules have not been uniformly successful.<sup>60</sup> However, as noted above, the second *Restatement of Torts* was prospective in its approach.

### C. *Restatement (Second) of Restitution*

This revised “*Restatement*” is still in its initial stages. But its drafters show that they do not hesitate to ignore precedents.<sup>61</sup> Thus, the comments in the draft of a new section entitled “Discretion to Withhold Specific Restitution” attempt to point out the lack of authority for the section.<sup>62</sup> The drafters then proceed to describe the various divergences of viewpoint without attempting to find a general approach because, presumably, none exists. Yet the Blackletter law re-

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59. Wade, *Second Restatement of Torts Completed*, 65 A.B.A. J. 366, 366 (1979) (emphasis added). Erwin Griswold has noted: “[I]n torts, it seems to me that the Institute may have encouraged some of the courts to go considerably too far.” Letter, *supra* note 5.

60. The following description of a battle over the law of slander is exemplary:

In the early stages there was a major controversy over whether a plaintiff, in an action for libel that did not involve one of the four categories that are grouped together under rubric “slander per se,” had to plead and prove special damages, as is required in all cases of slander not constituting slander per se. The original *Restatement* adopted the position of English law and imposed no such requirements upon the plaintiff. The then Reporter of the *Restatement (Second)*, the late Dean Prosser, argued that the majority of the states did not accept this position. Dean Prosser’s interpretation of the cases was challenged by Lawrence H. Eldredge. . . . At its 1965 and 1966 annual meetings the Institute was unable to resolve these conflicting views, and the protagonists of each position continued the debate in law reviews. The controversy was resolved only after the New York Court of Appeals, in *Hinsdale v. Orange County Publications, Inc.* [17 N.Y.2d 284, 217 N.E.2d 650, 270 N.Y.S.2d 592 (1966)], came down firmly in favor of the position adopted in the original *Restatement* and espoused by Mr. Eldredge. Most other state courts in which issue was litigated adopted the New York view, and that ended the matter.

Christie, *Defamatory Opinions And The Restatement (Second) of Torts*, 75 MICH. L. REV. 1621, 1621-22 (1977) (footnotes omitted).

61. See D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* 1065 (1973). Some *Restatements* are frequently cited by the writers of legal treatises and some are seldom cited by them. For example, of the two major treatises on restitution, George E. Palmer’s treatise, *THE LAW OF RESTITUTION* (1978), is the most extensive and detailed work on the subject yet prepared. It appears in four volumes (each supplemented), and it is being relied on heavily in drafting the second *Restatement* on this subject. Yet it fails even to discuss the original *Restatement* in its introduction and rarely cites it thereafter.

62. See *RESTATEMENT (SECOND) OF RESTITUTION* § 12 reporter’s note (Tent. Draft No. 1, 1983).

This section is new. This subject is not directly addressed in the former *Restatement* of the subject. . . . Clause (a) restricts the remedy in a way apparently at variance with the rules of the *Restatement*. The authorities explicitly supporting consideration of the interest of justice in individual circumstances, as the section permits, are not numerous. Conflicting views of matters within the section are often encountered.

*Id.*

fuses to grant discretion to the courts; in certain cases, it directs that the court either withhold an order for specific performance or make it conditional.

#### *D. Restatement (Second) of Conflict of Laws*

The original *Restatement of Conflict of Laws* claimed to be a statement of the existing state of the common law, as did the other *Restatements*. But, unlike virtually all the other original *Restatements*, this one has been recognized as generally not reaching its stated goal of restating the law.<sup>63</sup>

The Reporter of the first *Restatement*, Professor Joseph Beale of Harvard Law School, characterized its rules as derived from the vested rights doctrine according to which, in lieu of applying foreign law, courts may simply enforce foreign-created rights.<sup>64</sup> This approach was severely criticized by a series of distinguished writers.<sup>65</sup> Hence, most people looked forward to a second *Restatement* which would attain that goal not attained in the original *Restatement*.

Unfortunately, that wish is not to be granted in this century. This is not because it may not have been attainable (although significant problems would have to be overcome), but because of the lack of any desire to attempt to do so. The Reporter went off in a different direction, stating that it was "written from the viewpoint of a neutral

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63. See generally Yntema, *The Restatement of the Law of Conflict of Laws*, 36 COLUM. L. REV. 183 (1936); Cavers, *A Critique of the Choice-of-Law Problem*, 47 HARV. L. REV. 173, 178-79, 208 (1933). This first *Restatement's* approach has been characterized as follows:

[L]ocalizing elements, such as the place of injury or the place of contracting, were chosen in accordance with an overriding principle: the state where the last event necessary to complete a legal relationship happens has "legislative jurisdiction" to attach legal consequences to that relationship. The outstanding characteristic of this approach is its evenhandedness. It accords foreign law the same dignity as local law and makes a selection by reference to objective criteria without regard to the content of the substantive rules that compete for application. In theory, this approach assures application of the same law wherever a particular legal transaction might be litigated. Thus, the traditional method held forth the promise of discouraging forum shopping and of achieving certainty, predictability, and uniformity of result.

Juenger, *Conflict of Laws: A Critique of Interest Analysis*, 32 AM. J. COMP. L. 1, 2 (1984).

64. See J. BEALE, A TREATISE ON THE CONFLICT OF LAWS 1-2, 53, 274-75, 290-91 (1935); Cheatham, *American Theories of Conflict of Laws: Their Role and Utility*, 58 HARV. L. REV. 361 (1945).

65. See, e.g., Cavers, *supra* note 63, at 194; Cook, *The Logical and Legal Bases of the Conflict of Laws*, 33 YALE L.J. 457 (1924); Lorenzen, *Territoriality, Public Policy and the Conflict of Laws*, 33 YALE L.J. 736 (1924); Yntema, *The Hornbook Method and the Conflict of Laws*, 37 YALE L.J. 468 (1928).



*forum* which has no interest of its own to protect and is seeking only to apply *the most appropriate law*.”<sup>66</sup> This was despite the fact that “neutral forums” are rare,<sup>67</sup> and that, in practice, the courts are encouraged to view the interests of their own locale in considering “the most appropriate law,” which is hardly neutral.<sup>68</sup> The new approach, termed “governmental interest analysis,” was embodied in the *Restatement (Second) of Conflict of Laws*, approved in May, 1969 and published in 1971. This analysis places much more emphasis on the type of controversy, policy, and the personal relationships of a party to the subject of the litigation or the forum.<sup>69</sup> Its choice of law provisions are based upon a vague set of values which are almost never referred to by courts.<sup>70</sup> In general, it favors the forum shopper and tort plaintiffs by expanding the flexibility of each forum to apply local law.<sup>71</sup>

Although the new Restatement approach was embraced by several members of the academic community,<sup>72</sup> giants in the field such as Arthur Corbin (whose theories so influenced the Uniform Commercial Code) condemned the new approach.<sup>73</sup> During the period of the

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66. Reese, *Conflict of Laws and the Restatement Second*, 28 LAW & CONTEMP. PROBS. 678, 692 (1963) (emphasis added).

67. *Id.*

68. *Id.*

69. See, e.g., B. CURRIE, SELECTED ESSAYS ON THE CONFLICT OF LAWS (1963); Yntema, *The Objectives of Private International Law*, 35 CANADIAN B. REV. 721, 727 (1957).

70. These values are set forth in section 6 of the *Restatement*, the basic section on choice of law, which reads as follows:

- (1) A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
- (2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include
  - (a) the needs of the interstate and international systems,
  - (b) the relevant policies of the forum,
  - (c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
  - (d) the protection of justified expectations,
  - (e) the basic policies underlying the particular field of law,
  - (f) certainty, predictability and uniformity of result, and
  - (g) ease in the determination and application of the law to be applied.

RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 6 (1971).

71. Although there is little consistency in the case law, the trend is clear: tort plaintiffs win more often when courts cite the second *Restatement* than when they cite the first. The reasons are easy to grasp. Juenger, *supra* note 63, at 20.

72. See, e.g., R. LEFLAR, AMERICAN CONFLICTS LAWS 185-88 (3d ed. 1948); R. WEINTRAUB, COMMENTARY ON THE CONFLICTS OF LAWS 270-275, 318-21 (2d ed. 1980); Cavers, *Contemporary Conflicts Law in American Perspective*, 131 REC. DES COURS 73, 153, 191 (1970); von Mehren, *The Contribution of Comparative Law to the Theory and Practice of Private International Law*, 26 AM. J. COMP. L. 31, 39, 40 (Special Supp. 1978); Sedler, *The Governmental Interest Approach to Choice of Law: An Analysis and a Reformulation*, 25 U.C.L.A. L. REV. 181, 181 (1977).

73. See A. EHRENZWEIG, CONFLICTS IN A NUTSHELL § 8 (1965). Erwin Griswold has noted that in conflicts of law “the Institute may have encouraged some of the courts to go considerably too far.” Letter, *supra* note 5.

early drafts, Brainerd Currie stated that "[a]t this stage we certainly do not need a new Restatement, although we are threatened with one."<sup>74</sup> One expert wrote that the new *Restatement* "may well parallel its predecessor as a hindrance to the sound development of the common law . . . [that] could prove particularly serious abroad and in those American jurisdictions which, lacking precedent, would again be tempted to treat the Institute's announcements as primary authority."<sup>75</sup>

The principal complaint was that, "like its predecessor, [it] does not reflect the 'community opinion' of either courts or scholars."<sup>76</sup> It was recognized that, like other second *Restatements*, although some propositions in the draft reflect judicial practice, others lack supporting authority.<sup>77</sup> Professor Ehrenzweig noted that "those few provisions of the Draft which attempt more tangible solutions, are largely un-

74. Currie, *The Disinterested Third State*, 28 LAW & CONTEMP. PROBS. 754, 755 (1963).

75. Ehrenzweig, *The Second Conflicts Restatement: A Last Appeal for Its Withdrawal*, 113 U. PA. L. REV. 1230, 1231 (1965) (footnotes omitted).

76. *Id.* at 1232.

77. For example, the late Professor Ehrenzweig states that "[s]ection 379k would ordinarily subject malicious prosecution and abuse of process to the 'local law of the state where the proceedings complained of occurred.' But *none* of the cases relied on justifies the proposal . . . ." *Id.* at 1238 (emphasis in the original).

Ever since Justice Holmes' opinion in *Fauntleroy v. Lum*, [210 U.S. 230 (1908)] it has been clear that the forum's public policy cannot be allowed to defeat enforceability of a sister state judgment. And ever since courts have adhered to this hardwon principle of a matured federalism. Yet, the American Law Institute, following the Report's highly controversial theory, is now prepared to scuttle this achievement in more than tenuous reliance on five judicial opinions none of which represents a majority holding . . . . There is thus no authority whatsoever for the startling proposition that "a judgment rendered in one State of the United States need not be recognized or enforced in a sister State if such recognition or enforcement . . . would involve an improper infringement of the interests of the sister State."

*Id.* at 1240 (footnotes omitted) (quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 434c (Tent. Draft No. 10, 1964)).

Section 132 declares that "a marriage is invalid everywhere, even though the requirements of the state where the marriage took place have been complied with, if it is invalid under the law of a state where at least one of the parties is domiciled at the time of the marriage and where both intend to make their home thereafter." According to this rule a marriage validly concluded in Illinois between two Mississippi domiciliaries of different "races" would be invalid in California (which it is not), if at the time of the marriage they had intended to return to Mississippi, although they later decided to make their home in California. In the absence of judicial authority for this startling result we are hard put to explain the Institute's action whose sole support is sought in a novel concept of a "state of paramount interest," and which is so obviously contrary to the mood and spirit of our time.

Ehrenzweig, *supra* note 75, at 1239 (footnotes omitted)(quoting RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 132 (Tent. Draft. No. 4, 1957)).

supported by authority.”<sup>78</sup> He made a “last appeal” to the ALI Council for the appointment of a special commission consisting of particularly qualified judges, lawyers, and scholars who would be asked to reexamine the draft to determine whether, among other things, it should not be revised to respond to current doctrine. The appeal, however, was abortive. As a result, one of my colleagues who has taught Conflict of Laws for many years has characterized the second *Restatement* as a “draft proposal which in truth awaits a third *Restatement* to be more useful in deciding legal cases and controversies.”<sup>79</sup> I agree with him that the sin of the present approach is its refusal to distinguish what the law is from what the ALI thinks it ought to be.

During the fourteen years since its promulgation, one writer, who was self-described as “not an impartial observer” — having “accepted the analytical framework of Currie’s theory”<sup>80</sup>—has found that thirteen states have “adopted the Restatement Second as their guide to choice of law.”<sup>81</sup> But a larger block of seventeen jurisdictions (sixteen states and the District of Columbia) adhered “to the traditional view that looks to the *lex loci delicti* in tort cases.”<sup>82</sup> A majority of the latter jurisdictions considered and rejected adoption of modern theory.<sup>83</sup> Thus the surveyor, who had admitted to bias essentially in favor of the second *Restatement*, was forced to conclude that “an unexpected result of this study of the modern American choice of law cases from the perspective of theory rather than outcome is the discovery that the choice of law theory followed by the largest number

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78. Ehrenzweig, *supra* note 75, at 1241.

79. Remarks of Pepperdine University School of Law Professor Duane Faw, Brigadier General, USMC (Retired). Another somewhat similar predictive statement is as follows: “Because the law of judgments is dynamic and growing, it is fair to guess that a *Restatement (Third) of Judgments* will be as different from and represent as much of an improvement on the *Restatement Second* as does the second *Restatement* in comparison to the first.” Vestal, *The Restatement (Second) of Judgments: A Modest Dissent*, 66 CORNELL L. REV. 464, 465 (1981). However, the context of this statement is unconcerned with the “is” and “ought” in either of the *Restatements* referred to herein.

80. Kay, *Theory into Practice: Choice of Law in the Courts*, 34 MERCER L. REV. 521, 551 (1983) (governmental interest analysis as a choice of law methodology).

81. *Id.* at 556.

However, the mere fact that a state supreme court has endorsed the Second Restatement reveals little about how conflicts problems are in fact handled in a given state. The new Restatement is a mixture of inconsistent approaches. Adoption of its open-ended formulations usually means that the judges cannot agree, or have not thought about, what exactly should replace the rules with which they have become dissatisfied. In effect, the Second Restatement permits judges to practice *ad hoc* jurisprudence while professing allegiance to an authoritative compilation.

Juenger, *supra* note 63, at 20.

82. Kay, *supra* note 80, at 582. BLACK’S LAW DICTIONARY 820 (5th ed. 1979) defines *lex loci delictus* as “the law of the place where the crime or wrong took place.”

83. Kay, *supra* note 80, at 583.

of states is the traditional, vested rights approach."<sup>84</sup> Accordingly, it is here submitted that, in order to avoid misleading tribunals and attorneys in this country and abroad, this publication should not be called a *Restatement of Conflict of Laws* without identifying what is a change in the law.

#### *E. Restatement (Second) of Property*

William Draper Lewis, for many years the Director of the American Law Institute, made the following statement in the introduction to Volume One of the *Restatement of Property* published in 1936: "The object of the Institute is accomplished in so far as the legal profession accepts the Restatement as prima facie a correct statement of the general law of the United States."<sup>85</sup>

Clearly, Mr. Lewis' statement concerning the objective of the Institute restricted the process to determining what the law of property is, or at least attempting to do so. What the law of property ought to be in the opinion of a Reporter of the *Restatement* should not be stated without a clear expression that the ALI took no position on his opinion. It was stated that although "there was some variance from the restrictions on the process of determining what the law is, generally these restrictions were honored in the determination process."<sup>86</sup> However, the Reporter on the *Restatement (Second) of Property* acted quite to the contrary. Thus he has candidly asserted that:

The major difference between the first and second *Restatement of Property* is the process used to determine what the law is that is to be restated. In the *Restatement (Second)*, a minority position may be selected if the Council and the Institute Membership can be convinced that it is the sounder view. . . . This approach leads to the possibility that "Restatement" and "legal reform" could become somewhat synonymous terms.<sup>87</sup>

This Reporter proceeded, not unexpectedly, to resolve the matter in favor of his approach, or, as noted above, as a legislator or a law-giver would normally react to his own legislation. After all, as that Reporter stated:

The possibility of prospective change by judicial decisions in appropriate situations makes it easier for the *Restatement (Second) of Property* to state what

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84. *Id.* at 582. In his appendix, Professor Kay lists fourteen states which have adopted the second *Restatement* in whole or in part and twenty-two states with the traditional approach in whole or in part, or a ratio of 3:2 against the new approach as of 1983. *Id.* at 591-92.

85. *Introduction to RESTATEMENT OF PROPERTY* at viii-ix (1936).

86. Casner, *Restatement (Second) of Property as an Instrument of Law Reform*, 67 IOWA L. REV. 87, 88 (1981).

87. *Id.* at 89-90.

*the law is in terms of what it ought to be.* The adoption of the *Restatement's* view then need not disturb a transaction that was completed prior to the Institute's adoption of a position contrary to the one relied on.<sup>88</sup>

The Reporter has specifically stated that “the *Restatement (Second) of Property* is concerned with law reform . . . regardless of the state of the law as revealed in its prior decision.”<sup>89</sup> He added that “time will tell what impact the *Restatement (Second) of Property* has on the reform of property law.”<sup>90</sup> Obviously the statement is that of a legislator and not a restater.

#### *F. Restatement (Second) of the Law of Foreign Relations of the United States*

The *Restatement of the Foreign Relations Law of the United States* was developed between 1955 and 1962; it was revised and finally issued in 1965. Because it constitutes the only work of its kind on foreign relations law, it is often looked to as the “primary” source of authority in its field of law. In 1980, a new revision process began. The ALI has prepared, promulgated, and voted upon successive drafts since 1981.<sup>91</sup>

Section 102 lists “customary law” as a rule of international law where it results from a “general and consistent practice of states . . . .”<sup>92</sup> Section 135 sets forth the traditional rule that Congress has the authority to override the effect of a treaty by a subsequent act. The latter section does not deal with customary law. Yet the Reporter’s note to section 135 states that, in principle, since customary law and an international agreement have equal authority in international law, “later customary law should be given effect as law of the United States.”<sup>93</sup> However, in the same note, the Reporter acknowledges that there have been “no cases in which a rule of customary international law was challenged on the ground that it was inconsistent with an earlier statute or international agreement of the United States.”<sup>94</sup> In other words, the Reporter is not restating law, but “making” law under the guise of restating that law. A member of the ABA Ad Hoc Committee on this *Restatement* has flatly stated that “[n]o authority — except possibly the Draft *Restatement* — states that subsequent customary international law takes precedence over prior treaty law by virtue of a rule of customary international

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88. *Id.* at 91 (emphasis added).

89. *Id.* at 100.

90. *Id.*

91. See generally *Introduction to RESTATEMENT (SECOND) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* (Tent. Draft No. 1, 1980).

92. *Id.* § 102(2).

93. *Id.* § 135 reporter’s notes at 68.

94. *Id.*

law."<sup>95</sup> Because, as noted above, this *Restatement* has itself become a primary source of law in this area, these "restaters" have again put themselves in a position equivalent to that of legislators.

### G. *The Restatement (Second) of Judgments*

The first *Restatement* sought to rationalize the cases and provide a coherent synthesis of the law.<sup>96</sup> It specifically stated its goal to be "an orderly statement of those basic or especially important subjects of the general common law."<sup>97</sup> It has been noted that, like most other second *Restatements*, "[t]he *Restatement Second of Judgments*, in tentative but approved draft, *inaccurately states the current law*,"<sup>98</sup> and "[t]he *Restatement Second* serves better as a statement of what the law ought to be . . . ."<sup>99</sup> However, another commentator has gone in a different direction, stating that:

[I]n some areas it does not allow for a disclosure of the trends in the law. A restatement lacks a time dimension, a dimension which is extremely important precisely because the law is a growing, dynamic force. The *Restatement (Second) of Judgments* suffers to a very marked degree from this deficiency because the law of judgments is developing rapidly; courts are quickly accepting new concepts and discarding old limitations.<sup>100</sup>

Thus the latter commentator apparently places a certain premium on the speed of changes in *Restatements*, and would argue that it ought to "beat the courts to the punch."

### H. *The Proposal on Corporate Governance*

In 1978, the American Law Institute authorized work on a project involving a proposal for tighter restrictions on corporations by drafting a restatement of corporate law. Intended to expand upon the Model Business Corporation Act which has been enacted by some

95. Chessmen, *On Treaties and Custom: A Commentary on the Draft Restatement*, 18 INT'L LAW. 421, 430 (1984). He also noted that "[t]he only real source, then, for the Draft Restatement is the opinions of international legal scholars. These are not in themselves a source of international law, but are only evidence thereof." *Id.* at 431. "The position of Section 102 on treaties and customary international law may be attractive from a logical standpoint. The Draft Restatement position, however, finds no direct support in treaty law, international customary law or judicial decisions." *Id.* at 437.

96. Moore, *Collateral Attack on Subject Matter Jurisdiction: A Critique of the Restatement (Second) of Judgments*, 66 CORNELL L. REV. 534, 543 (1981).

97. *Introduction to RESTATEMENT OF JUDGMENTS* at v (1942).

98. Vestal, *supra* note 79, at 464. The law referred to concerned territorial jurisdiction.

99. Clermont, *Restating Territorial Jurisdiction and Venue for State and Federal Courts*, 66 CORNELL L. REV. 411, 462 (1981).

100. Vestal, *supra* note 79, at 508.

states,<sup>101</sup> the project is called *Principles of Corporate Governance and Structure: Restatement and Recommendations*.<sup>102</sup> Although the draft was to have been voted on in May of 1982 at the ALI's annual meeting, the ALI postponed the vote until May of 1984 because of opposition. At the 1982 meeting some urged that the entire document be reexamined with an eye toward the "genius of the common law."<sup>103</sup> It was criticized as a statement of what "corporate law should provide," and one critic accused the reporters of introducing "a new standard for corporate conduct."<sup>104</sup>

As an example, the draft would require the majority of directors of a large public company to have "no significant relationships" with major executives, auditing committees (which are composed of such directors), and nominating committees (which are composed of a majority of such directors). The draft was also criticized "for its failure to reflect management literature as well as legal scholarship."<sup>105</sup> Others criticized sections which would establish a new test for liability of directors and urged that such tests be deleted.<sup>106</sup> The draft would curtail the "business judgment rule," which now requires a director to use good faith and holds him liable only for gross negligence.<sup>107</sup> In this connection the ALI has been criticized for departing "from its traditional role of clarifying existing principles of law to recommending what new corporate law should provide."<sup>108</sup>

At the Annual Meeting of the ALI in May, 1984, a second tentative draft was characterized by its Reporter as containing 'aspirational provisions' regarding corporate practice."<sup>109</sup> He also noted that "[m]uch of the debate on Draft No.1 had focused on the attempt not

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101. See ALA. CODE § 10-2A-57 (1980); COLO. REV. STAT. § 7-5-101 (Supp. 1984); CONN. GEN. STAT. ANN. § 33-313(a) (West Supp. 1985); N.J. STAT. ANN. § 14A:6-1 (West Supp. 1985-1986); N.M. STAT. ANN. § 53-11-35 (1983); OKLA. STAT. ANN. tit. 18, § 1.34 (West 1953); S.C. CODE ANN. § 33-13-10 (Law. Co-op Supp. 1984); VA. CODE § 13.1-35 (1978).

102. See AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE AND STRUCTURE: RESTATEMENT AND RECOMMENDATIONS (Tent. Draft No. 1, 1982).

103. *Annual Meeting of American Law Institute*, 50 U.S.L.W. 2701, 2705 (1982).

104. *Id.*

105. *Id.*

106. *Id.*

107. See *Financial Indus. Fund, Inc., v. McDonnell Douglas Corp.*, 474 F.2d 514 (10th Cir.), *cert. denied*, 414 U.S. 874 (1973) (discussing the rationale of the business judgment rule); *Slensky v. Wrigley*, 95 Ill. App. 2d 173, 237 N.E.2d 776 (1968).

108. Comment, *The Proposed Restatement of Corporate Governance: Is Reform Really Necessary?*, 11 PEPPERDINE L. REV. 499, 505 (1984). The author also states: "In general, the courts have not agreed with the ALI's duty of care proposal." *Id.* at 515. He goes on to state that, "under current law, there is no duty of inquiry when there is an adequate presentation made by management through an attorney, accountant, or other professional." *Id.*

109. *Annual Meeting of American Law Institute*, 52 U.S.L.W. 2658, 2658 (1984). The foreword of this draft "calls those who made the criticism 'misinformed' about the aims of the Institute." *Id.*

merely to restate existing law, but to adopt new standards of corporate practice."<sup>110</sup> Apparently, many people still thought that the restaters were restating the law, as was the function of the original *Restatement*. The Reporter, however, thought to "correct" those people by stating in the foreword that the ALI no longer even has these aims in connection with this project.

#### VI. TREATMENT OF THE RESTATEMENT BY THE COURTS — DECLARATIONS OF COURTS CONCERNING THE RESTATEMENTS

Some courts have expressly tied themselves to the *Restatement*. The Supreme Court of Arizona, according to its repeated statement, "has consistently held that it will generally follow the Restatement of Law unless a different rule has been pronounced by the court in prior decisions or by legislative enactment."<sup>111</sup> Other states, such as Pennsylvania, have utilized it as a de facto primary authority.<sup>112</sup>

Of course, courts should not be pushed either to the extreme of a literal commitment to an unconstitutional delegation to the American Law Institute, or to a position that any court would never consider adopting changes from a *Restatement* where a majority of courts have done so. But the situation would be entirely different were a court to informally and generally tie into the second *Restatement*, as it would then be a delegation of the future course of the law to determinations by the ALI. Worse, this course of action would not consider whether this was desirable in a particular jurisdiction. If it were not brought specifically to a court's attention, that court might not even be aware of the radical change in approach by the ALI in connection with a particular second *Restatement*. Moreover, even states without an expressed policy that a second *Restatement* constitutes a primary source of law may be overly impressed with respect to unexamined use of the *Restatement* in decision-making.<sup>113</sup>

The American Law Institute is not an elected body and does not

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110. *Id.*

111. See *Irwin v. Murphey*, 81 Ariz. 148, 152-53, 302 P.2d 534, 537 (1956); *Smith v. Normont*, 51 Ariz. 134, 143, 75 P.2d 38, 42 (1938). See also Byrne, *Reevaluation of the Restatement As A Source Of Law In Arizona*, 15 ARIZ. L. REV. 1021 (1973).

112. See Florey, *The Restatement of Torts in Pennsylvania 1939-1949*, 22 PA. B.A.Q. 79, 81 (1950).

113. A California court has stated that "[t]he rules announced in the Restatement of the Law do not have the force of statutory enactment nor do they supersede judicial decisions." *Janofsky v. Garland*, 42 Cal. App. 2d 655, 658, 109 P.2d 750, 752 (1941). *Accord* *Grand v. McAuliffe*, 41 Cal. 2d 859, 863, 264 P.2d 944, 947 (1953); *Kollburn v. P.J.*



represent the people.<sup>114</sup> But as the courts began to use the original *Restatement* as a virtual if unstated primary source, it then tended to become more like a code. This means that the courts now tend to ignore, or at least examine less, the reasons behind the stated rules. The serious question arises whether it is a good thing to spare courts the trouble of weighing such arguments. In this connection it has been noted that

at least when a scholar formulates a rule, the formulation has no more authority than his arguments or reputation may give it. When a drafter formulates a rule, there is added danger that courts will look for a solution in the direction vaguely indicated by the rule even when, left to their own judgment, these courts would not regard that direction as particularly fruitful.<sup>115</sup>

## VII. DEVELOPMENT OF PHYSICAL AND LEGAL THEORIES AND THE NOTION OF PROGRESS

The development of theories in law is akin to our notion of progress. The word "theory" derives from the Greek word meaning "to see." The interpretations of nature that we call theories help make the material world comprehensible. Legal theories have no less lofty goals and, like those of physicists, they can be valid or quite invalid. But, unlike physicists, most judges express their theoretical developments with greater conviction and sometimes assume great precedence, regardless whether the former is valid or the precedent exists other than as an admired analogy.

In the seventeenth century, Francis Bacon tied science to experiment and introduced the theoretical basis for our scientific age. To-day it is said: "Physical theory without experiment is empty. Experiment without theory is blind. It is the experimentalists who keep the theorists honest."<sup>116</sup> But in law, experimenting is simply

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Walker Co., 38 Cal. App. 2d 545, 550, 101 P.2d 747, 750 (1940). Yet California has cited the *Restatement* more than any other state.

114. 1 A.L.I. PROC. 29 (1933). In 1933, then ALI Director Lewis stated that the original *Restatement* can "speak with authority" without the need "to add individual opinion to support the official statements of the Institute." The Institute acknowledged it would need "an authority greater than that now accorded to any legal treatise, an authority more nearly on a par with that accorded the decisions of the courts." *Id.*

115. Gordley, *European Codes and American Restatements: Some Difficulties*, 81 COLUM. L. REV. 140, 149 (1981).

[T]he rules that judges formulate are usually regarded as tentative approximations: the result they reach in a particular case usually has more authority than the rule they announce. Scholars have no more authority than their arguments and reputation would warrant. But codes and restatements have an authority that attaches to rules, not to arguments or to the results of cases. . . .

. . . .  
. . . [T]here is no reason to expect codifiers or drafters of restatements to be in a better position to make that calculus than judges themselves.

*Id.* at 152-153.

116. H. PAGELS, *THE COSMIC CODE* (1982).

using a new theory, often analogized to an older one. When other courts follow a new theory, they somehow use this as a sort of "prop." This approach suggests that in certain instances the blind may be leading the blind — the first likely remark a physicist might make about such a system.

Theoretical physics must be expressed in the precise language of mathematics or it cannot be proven to be either right or wrong. It must be unambiguous. This is a requirement that can rarely, if ever, be met in the law. Nevertheless, science exercises reason and is thus similar to law in principle. Physicists discover their laws, which have been made by one wiser than their discoverer. But the wise judge or restater takes partial or full credit for promulgation of his theories, or for the extension of theories put forth by other judges or writers — both of whom normally despise the quantification which is the hallmark of physics.

Law is a "social science." A physical law is invariable: action equals reaction; the speed of electromagnetic waves in space is unchanging; total energy is conserved. They are time invariant: gravity is the same on June 1 as it was on January 1, and will be the same on December 1 of any year or century. Neither of these principles applies to social disciplines, and the time invariance in particular appears to conflict with our desired notion of progress.

Many contemporary sociologists explain an enormous number of things by the notion of progress. But one of the most illogical concepts of our time is the implication that because all progress equals change, somehow all change must be progress. How often have we heard comments by individuals who ought to know better that a new decision changing the law shows "progress" — meaning, *sub silentio*, that it is somehow for the better? All biologists recognize that the overwhelming majority of the changes due to mutations are "inheritable errors." Yet many assume that changes resulting from rationalizations must somehow be different.

On Thursday, June 23, 1983, the U.S. Supreme Court held by a seven-to-two vote that the legislative veto, a procedural device that Congress has written into some 200 statutes over the past 50 years, is unconstitutional.<sup>117</sup> In a 39-page opinion, Chief Justice Burger wrote that "[t]he division of Congress into two distinct bodies assures that the legislative power would be exercised only after opportunity for

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117. *INS v. Chadha*, 462 U.S. 919 (1983).

full study and debate in separate settings.”<sup>118</sup> An equally lengthy dissent (which Justice White took the unusual step of delivering from the bench) complained that the Court struck down “in one fell swoop more laws enacted by Congress than the Court has cumulatively invalidated in its history.”<sup>119</sup> Was the development of the legislative veto really progress? Does a return to the constitutional mandate constitute true progress? Like “happiness” — which Solon said could only be determined after one finished living — many if not most social (and hence legal) changes can only be evaluated after they have been lived with for some time.

## VII. RATIONALES FOR THE SECOND RESTATEMENT’S CURRENT APPROACH

There are several rationales for the current approach of the ALI, which is to declare what, in the opinion of the Reporter and the Institute, a court ought to do. These rationales are as follows:

1. That which the ALI now means by the term “restatement” clearly does not generally refer to existing law. By calling it the “*Restatement*,” however, it has more prestige and hence more courts will tend to adopt it with fewer reservations or less in-depth analysis. Apparently, the former Director of the ALI and others believe that this is probably the strongest case for the new and current approach of the ALI, and that it has been successful in changing the law in many instances. However, to base its strongest case on a premise of prestige gained from the original *Restatements*, which had a very different approach, is to base it in significant part upon a deception. This deception is directed toward those courts and attorneys which do not, or cannot, take the time to discover that so many of the Blackletter rules are simply not the law in their jurisdiction, or in a majority of jurisdictions in the United States. Of course, like Humpty Dumpty in Lewis Carroll’s novel, the ALI has a right to call its “prophecies” or its conception of “trend” by whatever term it may desire. But neither the Institute nor the egg has approached an answer to the problem of deception and its consequences — a problem which can be easily solved by generally limiting the Blackletter restatement of the law to those instances where there is a majority rule.

2. Sometimes current members of the ALI rationalize their approach by stating that, in codifying minority and new positions, it is really predicting current law in the sense that “whatever we say is a trend is in fact the law.” Obviously, this is impossible; one group’s view of a trend may be countered by another hopeful predictor of future law. Thus there is no escape from the proposition that the ALI

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118. *Id.* at 951.

119. *Id.* at 1002 (White, J., dissenting).

is simply undertaking to preach to the court what the law should be in the future, when whether or not it is to become the law remains to be seen.

At the turn of this century, Massachusetts Justice Oliver Wendell Holmes, Jr. stated: "It is a great mistake to be frightened by the ever increasing number of reports. The reports of a given jurisdiction in the course of a generation take up pretty much the whole body of the law, and restate it from the present point of view."<sup>120</sup> Thus a "Holmesian Restatement" is accomplished by the courts and not by professors or their advisors. However, it was due to the overwhelming number of those reports in the generation following Holmes' statement that a decision was reached in the 1920's to make some order out of them and thus hopefully to simplify them. Holmes took up "the fundamental question, What constitutes the law?"<sup>121</sup> He answered it from the point of view of the bad man who "does not care two straws for the axioms or deductions, but does want to know what the Massachusetts or English courts are likely to do in fact."<sup>122</sup> He then states that "[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law."<sup>123</sup> It would thus seem that a Holmesian Restatement should be written for that "bad man" and that the change in approach of the second *Restatement* from what courts *do* say to what they *will* say is a prophecy by the ALI of "what constitutes the law." But a prophecy of what courts most likely will do is not always accurate. Furthermore, a prophecy "per se" has nothing to do with what in someone's opinion a court "should do." Unfortunately, the latter is the essence of much of the change in approach made by the second *Restatement*.<sup>124</sup> This approach is that any change which is honestly believed by the majority of the ALI to be a better rule and also represents what these advisers euphemistically refer to as a "trend" (which may or may not in fact someday actually become a majority rule), will now be called a "*Restatement*."

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120. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 458 (1897).

121. *Id.* at 460.

122. *Id.* at 460-61.

123. *Id.* at 461.

124. In the same work Holmes stated:

We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind. No concrete proposition is self-evident, no matter how ready we may be to accept it, not even Mr. Herbert Spencer's Every man has a right to do what he wills, provided he interferes not with a like right on the part of his neighbors.

*Id.* at 466.

3. A rationale of "necessity" points to the fact that in some instances there is no majority rule (or no rule at all); hence, it is argued, the ALI "must" either pick one which it likes or devise a new one. But there is no true basis for this approach because, if there is no majority, the ALI can easily state so in Blackletter. It may then set down a rule preferred by a majority of the ALI, which might be printed in redletter or some other color.

## VIII. SUMMARY

The approach of the immediate past director of the American Law Institute, that the new "*Restatement*" should set forth what the law ought to be rather than what the cases say it is,<sup>125</sup> denigrates the "restate" in "restatement." The "restate" can no longer be taken seriously as it was in the original *Restatement*.<sup>126</sup> Furthermore, as was earlier pointed out, the approach of second *Restatement* is deceptive. One of its Reporters in fact stated, however inadvertently, the actual practice of the Institute when he noted: "*The Restatement (Second) of Property* could be somewhat *misleading* to the average reader if it adopted a *position that had little judicial support and this fact was not apparent.*"<sup>127</sup>

The drafters do adopt positions with little judicial support, and the fact is often far from apparent. It is *never* apparent from the Blackletter "law" set forth by these law-givers. It is true that sometimes it is to some extent disclosed in the notes. However, this is seldom, if ever, done by giving "equal time" to the alternative position so that an impartial judge could reconsider the matter *ab initio* and make an independent determination on the subject. Thus, it appears that the Reporter becomes an "advocate" of his position regarding changes in existing law and the choice of alternatives, often without disclosing that his writing is, in effect, a "brief" for his approach.

All citizens have the right to free speech about virtually anything. This obviously includes prospective improvements in the law. But there are limits to free speech with respect to deceptive or misleading statements. It is even possible to find the new approach to the latent ambiguity in the word "restatement" (what the law "is" versus what it "ought" to be) within the definition of the word "deception" as set forth in *Black's Law Dictionary*: "[I]ntentional misleading by false-

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125. Wechsler, *Restatements and Legal Change: Problems of Policy in the Restatement Work of the American Law Institute*, 13 ST. LOUIS U.L.J. 185, 188-89 (1968) (quoting *Memorandum of the Defense Research Institute's American Law Institute Committee Regarding the Restatement of the Law*, 9 FOR THE DEFENSE, May 1968, No. 5).

126. Helms, *supra* note 31, at 153-54.

127. Casner, *supra* note 86, at 100 (emphasis added).

hood spoken or acted."<sup>128</sup> One might also characterize the same ambiguity as "misleading" — which is defined as "delusive; calculated to lead astray or to lead into error. Of such a nature as . . . to give the wrong impression."<sup>129</sup> Unfortunately, many people do regard the meaning of "restatement" in the second *Restatement* to be the same as that in the first *Restatement*. Therefore they are in fact misled. Knowing the goals of the original *Restatement*, people became "accustomed to her face," and they cannot do without her.<sup>130</sup> Thus it can be argued that, like Professor Higgins, anyone who is deceived by the approach of the second *Restatement* ought to know better. But unfortunately many do not or, like the good professor, they act as if they do not.<sup>131</sup>

It may well be argued that many of the notes in the second *Restatement* suffice to disclose enough to prevent the Blackletter words from being misleading, and that any potential user thereof has equal opportunity for obtaining information which he may be expected to utilize.<sup>132</sup> However, this does not necessarily prove the absence of active misleading. As Prosser emphasizes, "a fraud may be as effectually perpetrated by telling the truth as a falsehood; by calling things by their right names as by their wrong names."<sup>133</sup> *A fortiori*, an am-

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128. BLACK'S LAW DICTIONARY 366 (5th ed. 1979) (emphasis added).

129. *Id.* at 902.

130. This refers to the ending of the musical "My Fair Lady," and not, of course, to "Pygmalion," where George Bernard Shaw concludes his play in a quite different manner. G.B. SHAW, PYGMALION 110-24 (1979).

131. "Statements of law are commonly said to be mere assertions of opinion." W. PROSSER, HANDBOOK OF THE LAW OF TORTS 724 (4th ed. 1971). Where the second *Restatement* is predicting judicial events (which the Reporters hope will occur in the future), these may ordinarily "be regarded as a statement of opinion only, on which the adverse party has no right to rely, [since] one cannot warrant a thing which will happen in the future. . . ." *Id.* at 728 (footnote omitted).

132. *Id.* at 696.

In commenting upon Rule 3.3 of the *Model Rules of Professional Conduct*, adopted by the American Bar Association August 2, 1983, the drafters state: "There are circumstances where failure to make a disclosure is the equivalent of an affirmative misrepresentation." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3 comment (Revised Final Draft 1982). From the small amount of publicity given to the ALI's change from the approach in the first *Restatement* to that in the second *Restatement* in each of its publications, it would appear that this Model Rule might become applicable were a lawyer to render advice regarding the general law and either conceal or fail to disclose that it only represents a minority position among the decided cases in the nation's state tribunals. Cf. *Kath v. Western Media, Inc.*, 684 P.2d 98 (Wyo. 1984). This applicability would no doubt be more pronounced with respect to those thousands of lawyers and judges who were schooled on the approach taken in the original *Restatement* and who may never recall being actually informed concerning the change of approach in the second *Restatement*.

133. *Id.* at 695.

biguous name can be misleading.

The criticism is well-taken that the Institute is attempting to legislate and not restate. One Reporter attempted to rationalize his predictive process by comparing it to the judicial process:

I do not think the process of searching for what the law ought to be in evaluating the soundness of existing judicial decisions and recognizing in appropriate cases that what ought to be is what is, is legislating any more than the procedure adopted by the Supreme Judicial Court of Massachusetts is legislating. It is the judicial process looking forward as well as backward in its quest to resolve problems equitably and fairly.<sup>134</sup>

But courts of common law to a limited degree are lawmakers by definition where the legislature has not spoken.<sup>135</sup> The Institute does not state "we propose" or "we predict" in bold type, but rather proposes or predicts under the guise of "restating."

In his *Nature of Judicial Process*, Justice Cardozo discussed both the limitations on judges and their roles as lawmakers.<sup>136</sup> The prime limitation concerns those areas covered by valid statutes where the judge plays a quite subordinate role. "There the standards or patterns of utility and morals will be found by the judge in the life of the community. They will be found in the same way by the legislator."<sup>137</sup> He noted that the legislator's sources are the same as those of a judge.

If you ask how he is to know when one interest outweighs another, I can only answer that he must get his knowledge just as the legislator gets it, from experience and study and reflection; in brief, from life itself. Here, indeed, is the point of contact between the legislator's work and his. The choice of methods, the appraisal of values, must in the end be guided by like considerations for the one as for the other. Each indeed is legislating within the limits of his competence.<sup>138</sup>

But Cardozo then draws a distinction, stating that "the limits for the

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134. Casner, *supra* note 86, at 96.

135. Today some so-called "active courts" often become lawmakers even after the legislature has spoken. Take, for example, the decision of the California Supreme Court concerning *People v. Fries*, 24 Cal. 3d 222, 594 P.2d 14, 155 Cal. Rptr. 189 (1979). See Keyes, *The Training of Deputy District Attorneys in Los Angeles County as Seen by An Outsider*, 17 BEV. HILLS B.J. 15, 27 (1982).

136. The rule that fits the case may be supplied by the constitution or by statute. If that is so, the judge looks no farther. The correspondence ascertained, his duty to obey. The constitution overrides a statute, but a statute that is consistent with the constitution, overrides the law of judges. In this sense, judge-made law is secondary and subordinate to the law that is made by legislators.

M. HALL, *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 110 (1947).

137. *Id.* at 150. Indeed, Cardozo states that:

My analysis of the judicial process comes then to this, and little more: logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law. Which of these forces shall dominate in any case, must depend largely upon the comparative importance or value of the social interests that will be thereby promoted or impaired.

*Id.* at 153.

138. *Id.* at 154.

judge are narrower. He legislates only between gaps. He fills the open spaces in the law."<sup>139</sup> Furthermore,

[w]hile the legislator is not hampered by any limitations in the appreciation of a general situation, which he regulates in a manner altogether abstract, the judge, who decides in view of particular cases, and with reference to problems absolutely concrete, ought . . . to disengage himself . . . of every influence that is personal.<sup>140</sup>

From the example of legislators, we may identify fundamental distinctions between judges and restaters. Judges must be particular, whereas restaters may be much more general. Restaters can and should help guide judges. Both restaters and judges use their own economic and social philosophies. However, restaters can and do substitute their economic and social philosophy for that of judges in all cases where judges do not independently analyze those extensive "principles" in the second *Restatement* that do not in truth restate the law. The principles of the restaters then become, in effect, legislation by an unelected body rather than judicial legislation of the type to which Cardozo was referring. Cardozo lived to see the inauguration of the first *Restatement*, which generally "restated" the law. It is doubtful that he would have approved of the restaters' Black-letter law which prognosticated principles under the guise of "restating" his beloved common law.<sup>141</sup>

Cardozo's approach to a "mediation" between the courts and the legislators was the establishment of a "Ministry of Justice," which would function more like a modern "Law Revision Commission." The ministry would look at those areas of the law deserving of improvement, "gather these and like recommendations together, and report where change is needed."<sup>142</sup> He emphasized the reporting of changes, noting that "[i]n the end, of course, the recommendations of the Ministry will be recommendations and nothing more,"<sup>143</sup> which

139. *Id.*

140. *Id.* at 156.

141. It cannot be said that he [Cardozo] made any extensive changes in the existing law of contract. To state the facts of the cases, the decision, and the reasoning of his opinion will not show the overthrow of old doctrine or the establishment of new. Instead, it will show the application of existing doctrines with wisdom and discretion; an application that does not leave those doctrines wholly unaffected, but one that carries on their evolution as is reasonably required by the new facts before the court. When Cardozo is through, the law is not exactly as it was before; but there has been no sudden shift or revolutionary change.

Corbin, *Mr. Justice Cardozo And the Law of Contracts*, 39 COLUM. L. REV. 56, 57 (1939).

142. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113, 125 (1921) (emphasis added).

143. *Id.* "[A]t least the lines of communications [between the courts and the legisla-



may be rejected by the *legislature*. The first *Restatement* was, of course, produced by an entirely different process than the second *Restatement*, which has not properly fused the two functions under an accurate title.

It has been noted that Americans, as well as foreigners, recognize a normative *Restatement* as a deceptive one;<sup>144</sup> hence, although the so-called second *Restatement* may represent a substantial contribution in the form of the product of Reporters and advisers, reflecting years of hard work and thoughtful consideration, clearly those thinkers did not adequately separate the "is" from the "ought." But where it can be done, restating law in a particular field can be very beneficial. It reports the state of the law in a particular time frame. Where this is not possible, that fact can be recorded and would be very helpful to lawyers, judges, and legislators alike.<sup>145</sup>

## IX. TO RECAPITULATE

1. It is obvious that the drafters of the second *Restatement* have done thoughtful work. They have, however, substantially changed the goal of the original *Restatement*. This change has been accomplished in a subtle manner, permitting students of the law both in the United States and abroad to remain unaware of the importance of this goal change. Unfortunately, many consider the second *Restatement* essentially to be an attempt to promulgate a statement of the law existing at the time it was drafted or approved, as was the case, with a few exceptions, with virtually all the original *Restatements*.

2. The individual drafters of both the original and the second *Restatements* faced the "urges" growing out of their vision of "social lag" in the law. While those involved with preparing the original *Restatement* generally, but not always, overcame those urges, the drafters of the second *Restatement* generally succumbed and hence prepared documents with different goals.

3. The success of both the exceptions to the goals of the original *Restatement* and many of the provisions in the draft of the second *Restatement* (with its very different goals) encouraged the drafters of

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ture] will be open. The long silence will be broken. The spaces between the planets will at last be bridged." *Id.*

144. Ehrenzweig, *supra* note 75, at 1232-33.

145. No thought attains to its fullest existence unless it is incarnated in a human environment, and by environment I mean something open to the world around, something which is steeped in the surrounding society and is in contact with the whole of it, and not simply a closed circle of disciples around a master. For the lack of such an environment in which to breathe, a superior mind makes a philosophy for itself; but that is a second best and it produces thought of a lesser degree of reality.

S. WEIL, *THE SIMONE WEIL READER* 84 (1977).

the latter to virtually give up the goals of the original *Restatement* and call very little attention to the distinctions between the divergent goals of the two *Restatements*. The drafters of the latter have tended to make the second *Restatement* take on a more "legislative" approach, despite the fact that the ALI is an unelected body.

4. Both the original and second *Restatements* have become primary sources of law for many courts — almost none of which have made comments indicating a recognition of the drastic change in the goals of the two *Restatements*. Furthermore, some courts have tended, either officially or unofficially, to "adopt" the *Restatements*. This can and does occur without analysis of the reasons for or against the differences in the two *Restatements*, or recognition that provisions in the second *Restatement* represent a minority, or altogether new, viewpoint.

5. The use by the bench and bar of the original *Restatement* as a primary source of law was more defensible and appropriate because its goals were generally recognized as stating the law as it was and setting a platform from which the court itself could and would consider the initiation of possible change, giving more thought and analysis to the change before acting. The use of the second *Restatement* is both less defensible and less appropriate because no distinction is made in the Blackletter law between what the law is, and what the law should be in the opinion of the ALI.

6. The opinions of the ALI as to what the law ought to be are valuable and should be promulgated as such, but they should not be promulgated in the present manner. It is difficult to ascertain those provisions which tend to reflect what the law is, and the many others which are essentially the ALI's views about what it ought to be.

7. Because the rationales for the new goals of the drafters of the second *Restatement*, as demonstrated by its recent products, are not justifiable in their present form, efforts should be made to influence the ALI to revise its current format. The changes in the second *Restatement* suggested in this paper can, for the most part, be accomplished with a minimum of endeavor in order to achieve maximum benefits to society, without destroying the true effectiveness of any of the work done by the ALI to date.

9. It should be recognized that these changes may not take place. In the event the ALI refuses to revise its approach, alternatives should be sought by the bench and bar to ameliorate the unfortunate results of such a refusal.

## X. CONCLUSION AND PROPOSAL

Erwin Griswold has suggested that efforts to revise the current form of the *Restatement* might take place internally in the ALI.

[T]he Council, and perhaps an annual meeting, might be asked to consider whether the Restatement as a whole has too far departed from the objective of predictability and uniformity, thus leaving too many questions . . . too wide open, so that courts may go to almost any lengths to reach results they *want*, for some reason, to reach, while wrapping themselves in the mantle of the American Law Institute to show how legitimate and up-to-date they are.<sup>146</sup>

However, I should like to suggest that the recent legislative actions of that unelected body may have reached proportions significantly beyond the ability of the Institute to correct by itself. They affect the whole people of the United States and much of its economy. Accordingly, it is proposed that a "meeting" should be convened, composed of persons predominantly outside of the American Law Institute's advisory and recommending personnel, in order to examine what should be the proper approach toward a true restatement of the law, which would essentially state the law as it exists to the extent possible, and how proposed changes in that law can be presented in a manner which will not mislead the bench and bar.

In 1921, Justice Cardozo, then on the New York Court of Appeals, called for a "Ministry of Justice" for mediation between the legislature and judges, which would "report where change is needed."<sup>147</sup> Following the organization of the American Law Institute, he addressed its third annual meeting in 1925 and, after examining some of the early drafts, stated that

if the general scheme or spirit of their work was to be criticized at all, at least in some of the preliminary drafts, it was in a certain search and seeking now and again for definiteness and assurance and finality in fields where definiteness and assurance and finality must be left to the agency of time. It points to a danger that we must be vigilant to avert.<sup>148</sup>

Cardozo pointed out that "the fundamental conceptions of the law breed others in their image, and that the progeny will be misshapen or distorted, unless the parent conceptions are sound and pure and clear."<sup>149</sup> He added: "[b]ut there is still another lesson, and this a lesson for legal philosophy or rather perhaps a warning. If fundamental conceptions are capable of this propagating power, at what point shall they be checked?"<sup>150</sup>

It appears that we have now arrived at the point where consideration ought to be given to this warning by checking the "legislative

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146. Letter, *supra* note 5 (emphasis in the original).

147. Cardozo, *supra* note 142, at 125. See *supra* notes 142-43 and accompanying text.

148. M. HALL, *supra* note 136, at 397.

149. *Id.* at 400.

150. *Id.*

power" of the "restaters."<sup>151</sup> This may be the single most important action we can take at this time. The meeting proposed here is the place where we can begin.

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151. *Id.* at 402.

Cardozo was emphatic on this point when he stated:

I am speaking of the magisterial pronouncements of the restatements themselves. In these, let us give definiteness and fixity of outline where there is definiteness and fixity in the law as it exists or where argument so preponderates that a choice is fairly safe. Let us not hesitate, however, in other situations to say in all frankness that the problem is yet unsolved, and while indicating competing considerations either way, to leave the answer to the years.

*Id.* This argument is something that the modern "restaters" currently refuse to consider.

