1998

Foreword

Herbert P. Wilkins

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The American Law Institute has been a major force in the sound development of American law. Its monumental first Restatements, pronouncing on the fundamental principles of the common law, have greatly influenced the advancement and unification of legal principles in this country. Revisions of the initial Restatements have permitted the Institute to reassess stated principles and to recognize developing concepts. Not every Restatement has been of uniformly high quality. Some have started and have been abandoned; others have been completed and then substantially ignored. The Institute’s attainments, however, have been generally outstanding. Writing from the point of view of a Justice in a common law court of last resort for more than twenty-five years, I can attest to the beneficial guidance that the Institute’s work has provided. The level of analysis rises when a Restatement has dealt with an issue. In the days when law clerks were uncommon and computer-aided research nonexistent, the Restatements must have been invaluable tools.

The Institute’s non-Restatement work has been of high quality, although sometimes controversial. The Model Penal Code has served as an instructive guide to legislatures and to common law courts in its...
presentation of important principles, such as its definition of the lack of criminal responsibility. The collaboration of the Institute with the National Conference of Commissioners on Uniform State Laws produced the Uniform Commercial Code and is now producing revisions of the Code. The Institute has made major contributions to the development of federal tax legislation. Recent controversial subjects such as Principles of Corporate Governance and the Restatement (Third) of Torts: Products Liability required substantial expenditures of time and effort, but they resulted in works that have focused attention on important considerations, to be accepted or rejected only after serious reflection. The burden in time, effort, and money is heaviest when the Institute undertakes controversial subjects. If such a subject is important, and thus worthy of the Institute’s attention, and other factors (such as time, a well-qualified Reporter, and money) permit, the Institute has been willing to take on a controversial subject even if problems will unavoidably arise in the course of the undertaking. The Institute’s mission is not to publish only in areas of limited or no controversy.

The Institute has been the subject of several criticisms of varying merit. If it is a crime, the Institute should seek leave to plead nolo contendere to the charge that it is an elitist organization. The prime criterion for Institute membership is not demonstrated promise, but fulfilled promise. Strong intellectual skills and successful professional experience tend to provide the kind of judgment that will contribute to the high level of work product that the Institute seeks and generally produces. The requirement of demonstrated professional achievement has, however, the negative consequence that admission to membership is unlikely until a lawyer has been graduated from law school for at least ten, and probably more, years.

A criticism, which is becoming increasingly invalid, is that the Institute is dominated by white men who live in the eastern seaboard between Boston and Washington and attended Ivy League law schools. It is no doubt true that the major thrust for the creation of the Institute came from people in that category. The burdens of train travel before World War II contributed to the focus on the Northeast. Today, however, Institute membership is far more national, more diverse, and expanded. The membership committee, until recently under the chairmanship of Philip S. Anderson of Arkansas, has worked hard to find qualified women and minorities, with attention to the election of younger members. The Council of the Institute now has a wide geographical distribution, as demonstrated by the variety of regional accents I hear at meetings of the Institute’s Council.
Another and more philosophical criticism of the Institute comes from those who object to a private "legislative" body prescribing preferred rules or announcing principles of law on subjects such as corporate governance and family law. I have already stated my approval of the work product of the Institute as an instructive guide and a beneficial compilation of relevant considerations in resolving contested legal issues. I doubt that it would be better for lawyers, judges, or the public if there had been no American Law Institute, no Restatements of the law, no principles of law on any subject, no Model Penal Code, and no proposed federal tax legislation. In any event, the work of the Institute does not have the force of law, except in the Northern Mariana and Virgin Islands where Restatement law is embraced.1

A lawyer obviously rejoices if, however, she discovers that a Restatement black letter section supports her position on an issue of first impression. Although no one has to follow the Institute's lead, many lawyers have urged, and many judges have ruled on reflection, that principles of law that the Institute has developed should be accepted. As certain works in this issue attest, however, not everyone agrees with the Institute's work. Serious articulated disagreements with the Institute provide reasons against which to test, and perhaps on which to reject, Institute proposals. In such cases, unthinking reliance on the Institute's position, simply because of the perceived force of its views, would be inappropriate.

Another charge is sometimes leveled, but never proved. Contrary to the views of some, the work of the Institute has not been adversely influenced by outside interests or segments of society that have self-interest as their driving force. During the Corporate Governance Project ("Project"), corporate America, which initially saw the Project as a conservative force against possible radical change in this country's law of corporations, revised its view (when the threat disappeared) and saw the Project, to use some hyperbole, as a menace to the core of the free enterprise system. Although, as a Council member, I received numerous communications from interested parties (as I have on some other proj-

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1. See 7 N. MAR. I. CODE § 3401 (Supp. 1992) ("In all proceedings, the rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed as generally understood and applied in the United States, shall be the rules of decision in the courts of the Commonwealth, in the absence of written law or local customary law to the contrary . . . ."); V.I. CODE ANN. tit. 1, § 4 (1995) ("The rules of the common law, as expressed in the restatements of the law approved by the American Law Institute, and to the extent not so expressed, as generally understood and applied in the United States, shall be the rules of decision in the courts of the Virgin Islands in cases to which they apply, in the absence of local laws to the contrary.").

Published by Scholarly Commons at Hofstra Law, 1998
jects), I was not subjected to personal contact, probably because I am a judge. I believe the pressure on practicing lawyer members of the Council was more personal and intense. However, many people are involved in Institute projects, and the subject matter of each project receives such intense, open scrutiny that the pressure of certain economic interests cannot be a deciding force. The ultimate and effective safeguard is the floor of the annual meeting where a disinterested majority will reject those who seek not the best answer but the answer best for themselves.

Some members of the Institute complain that it has played no significant role in confronting serious problems in the administration of justice, such as (a) the congestion of cases, (b) the high cost of litigation, (c) the effect of drugs, including alcohol, on children and families, (d) the need for less confrontational means of resolving disputes, (e) the increase in self-represented litigants, and (f) a more effective process for the treatment, education, and rehabilitation of certain persons convicted of crimes, particularly nonviolent crimes. A case that the Institute should act on such matters can be made from the objects of the Institute, unanimously approved at time of its formation. They included the “better adaptation [of the law] to social needs” and, most particularly, the goal of “secur[ing] the better administration of justice.”

Subjects of importance in the administration of justice cannot, however, be studied and resolved solely by intellectual analysis. Expensive and well-supervised empirical studies are necessary to acquire the necessary data on which to base conclusions about the causes and cures for most, if not all, the problems found in the administration of justice. The Institute is not set up structurally or financially to undertake such projects. Nor is it clear that its membership is composed of people with sufficient experience to exercise informed judgment on many administrative topics, for example, in criminal justice and the legal problems of the poor. The time may come when the Institute will venture into issues in the administration of justice, but today it seems wiser for it to focus on what it knows how to do and do well.

I add my own picayune criticism. Trained not to go from first to third without touching second, I have been uneasy about the Institute’s decision to designate recent Restatements as a Restatement (Third), even though there is no Restatement (Second) on the subject and sometimes even no Restatement (First). There is, for example, no Restate-

ment (Second) of Restitution but work is under way on a Restatement (Third) of Restitution. The Restatement of The Law Governing Lawyers, about to be completed, will be designated Restatement (Third), although it has no antecedent. Others surely will have no problem with the practice. Estate planners, for example, comfortably consider the tax consequences of generation-skipping, an event that I would have once thought a biological impossibility.

The first seventy-five years of the Institute have been productive, intellectually challenging, and beneficial for the development of the law. The next seventy-five years will raise different problems to be addressed, although I hope at the same time the core materials can be reorganized and adjusted on a regular basis. Already the Institute has projects on international substantive and procedural law. Work on international law will continue and expand. It will, however, test the Institute, not only because of language differences but also because of marked departures in approach and in underlying legal concepts in other legal systems. Advances in science, particularly in medicine and genetics, will present new and currently unimagined issues. Some problems may not be capable of resolution solely by lawyers, and the participation of representatives of other disciplines may be needed, a process that, to date, has not always worked effectively in the Institute. There will, therefore, be ample challenging work for the Institute.