

## THE AMERICAN LAW INSTITUTE IS ALIVE AND WELL

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It is gratifying that a Law Review Symposium be devoted to the work of The American Law Institute. Not *a* work of the Institute, such as the Restatement of Torts, Products Liability, or the Principles of Corporate Governance or such less controversial but also important projects as the Restatement of Trusts (Prudent Investor Rule). Rather, this Symposium is addressed to *the* work of the Institute, that is, the procedures and processes, formal and informal, through which the ALI undertakes to fulfill its stated mission. The Institute's stated mission is "to promote the clarification and simplification of the law and its better adaptation to social needs." The contributions to this Symposium develop several propositions.

First, any project dealing with operative law today is necessarily controversial to some degree. Some of the ALI projects have been very controversial, notably Products Liability, Corporate Governance, and The Law Governing Lawyers. Aspects of those controversies are echoed in these pages. However, other ALI projects that are not mentioned here have involved issues of similar importance, but less visibility. I have in mind, for example, the Restatement of Trusts (Prudent Investor Rule), which rejected a mischievous legal proposition that had undergirded traditional trust department practice for at least two generations. The proposition was, in effect, that the optimum investment portfolio of a fiduciary consists solely of high-grade corporate bonds and U.S. Treasuries, regardless of the risk of inflation. The Prudent Investor Restatement makes clear that maintaining the nominal principal of a trust fund does not fulfill a trustee's responsibilities.

Another example of an important but lower visibility project is the Restatement of Suretyship and Guaranty. That Restatement accomplished the difficult task of integrating bodies of legal doctrine concern-

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ing secondary contract responsibility for obligations in two different market and law practice settings. One field was building construction work, the other commercial lending. The skill in the integration produced a unification of rules that were at risk of diverging due to the estrangement of practitioners in these two fields. Patient analysis and deliberations in the course of the ALI project resolved the esoteric but intense complexities of the subject.

Whether or not publicly controversial, most ALI projects necessarily address difficult intersections of policy and social interest. Hence, the projects necessarily address disputable legal resolutions. This circumstance makes the Institute's work often controversial, sometimes publicly so as in the case of the Products Liability Restatement. At the same time, the fact that the subjects of the Institute's work are of public importance is a significant reason why its work is important.

Second, any project worth undertaking by the ALI must pass muster across a wide spectrum of critical opinion. ALI projects include both Restatements and proposed legislation. The concept of a Restatement is familiar to legal audiences, and will become more so through this Symposium. A Restatement is a synthesis of the evolving law in a specific subject that is cast in a form similar to legislative rules. Examples of Restatements include those addressed in this Symposium, for example, the Restatement of The Law Governing Lawyers.

The concept of model legislation is self-defining: a text intended for adoption by the legislative process at the state or federal level. Examples of proposed legislation in the Institute's work include the Model Penal Code, the Uniform Commercial Code (done in cooperation with the National Conference of Commissioners on Uniform State Laws), our projects in federal tax law, and now in process, the Principles of the Law of Family Dissolution. Both a Restatement and a model legislative proposal aim to be "operative law"—legal rules that are actually to function as such in society. To fulfill this function, legal norms must be formulated at a level of specificity and with a responsiveness to reality that is acceptable in the contemporary administration of justice. And they must be compatible with the whole corpus of other law, that is, they must fit within the existing legal context.

The term "operative law" is distinct from legal theory pitched at a high level of abstraction, which characterizes much of academic legal discourse these days. Legal theory at a high level of abstraction is not required to confront, as operative law must confront, the problem of being intelligible to a jury or a busy trial judge. High level legal theory also is not necessarily required to confront the interrelationship among

various domains of the law. Examples of such interrelationships are discussed in this Symposium. One example is the relationship between a right to legal representation that is not hampered by conflict of interest, on the one hand, and, on the other hand, an insurer's right to limit its obligations to the terms it has underwritten. The essential problem is to coordinate the insured's right to loyal representation with the insurer's right to limit its indemnification to the coverage afforded in the insurance policy. The Restatement of The Law Governing Lawyers has sought to address this interface, while recognizing that in some states the insurance company is an additional client along with the insured, but not in some other jurisdictions.

Another example is the relationship between tort law and contract law in obligations arising in the distribution of products, a subject addressed in the Products Liability Restatement. Another example that comes to mind is the relationship between a shareholder's right to know what the corporation is doing and the corporation's need to maintain its secrets from the competition, which was touched on in the Corporate Governance Project.

These interrelationships among domains of the law are captured in the statement that the law is a seamless web. Dealing with these relationships is a part of the law's obligation to see that, from the citizen's viewpoint, various parts of the law do not contradict each other. In the modern era of specialization, keeping alert to that obligation is increasingly difficult and increasingly important. We should hope that legal theorists would devote greater attention to this aspect of the law.

The term "operative law" also differentiates the work of The American Law Institute from the typical discourse in contemporary political forums—legislatures, executive press conferences, etc. The work of The American Law Institute is to formulate legal rules that take account of a broad range of social and economic considerations that, sooner or later, will be implicated when a legal rule is given operative effect. In contrast, contemporary political discourse proceeds through slogans, sound bites, and one-liners. It evokes stereotypes such as "Cadillac welfare mother," "moneyed interest," etc. Stereotypes are oversimplified interpretations that ignore the complexities of real life, not only in the interrelations among sectors of the law referred to above, but also in the variations and permutations of fact patterns within a legal sector. For example, in addressing conflict of interest imputed to lawyers in a law firm, in my opinion the problem of imputation in law firms that have separate offices in different localities (even different countries) is not invariably the same as the problem of lawyers *A* and *B* in

the same suite of offices. Here I simply disagree with Professor Freedman.

Operative law is the stuff that judges and lawyers have to work with, the material that responsible legislators should be trying to fashion, and hence formulations of the kind that the ALI seeks to develop. However, legal propositions these days must meet the challenge of criticism based on contemporary legal theory and find acceptance in larger and more diffuse political forums. Legal theory at times may not be immediately relevant, but it is a part of the public discourse about law. So too are the views expressed in ordinary public opinion. It is not possible to take precise soundings of these various views, nor does the Institute undertake to do so. However, the membership of the Institute is in touch in manifold ways with what is going on in society. In my observation, members of the Institute generally do indeed "leave their clients at the door," but they do not leave at the door their accumulated engagements with reality. Given the wide range and types of interests having expression in today's American community, formulating legal provisions that can find acceptability in this larger sense often is not so easy.

Third, and relatedly, there is no single viewpoint—no Olympian height—from which to contemplate a legal system in a comprehensive way. To work with operative law is to work within the legal system itself—inside the sausage factory as Chancellor Bismarck sardonically described it.

The American Law Institute is itself a creature of law. It is a private, nonprofit corporation formed under the laws of the District of Columbia. It is not a government agency. Hence, the Institute has no governmental powers, despite the "authority" attributed to it. In the conventional concept of what is "political," the Institute is not political, certainly not so in the sense that the American Federation of Labor and the United States Chamber of Commerce are political. Viewed in "political" terms more broadly defined, the Institute is a cooperative venture of concerned professionals seeking to express themselves on matters of public interest. Its work product is offered into the marketplace of legal ideas and receives whatever weight it may be given by the authoritative organs of government—judicial and legislative. It is certainly a pertinent proposition whether the ALI has appropriately accomplished the task it has undertaken. It is a very different proposition whether it is inappropriate for a group of concerned professionals to try to accomplish that task.

In assessing the significance of the ALI, account must also be

taken of the fact that our country's legal system is federal, not unitary. The pluralism of our legal system is both a *raison d'être* for the Institute—harmonization of the laws of the several states—and an explanation of the Institute's influence over the long term. A private organization such as the ALI could not prosper if its activity consisted of arguing with the Supreme Court of the United States over the meaning of the United States Constitution, for example, the interpretation of the Due Process Clause that has required the *Miranda* warning. Nor could the Institute prosper by directly arguing with the Delaware Supreme Court over Delaware corporation law or with Texas over the rule of privity in legal malpractice. The Institute does prosper, or has so far, in judiciously seeking to think through legal propositions that emanate from multiple authoritative sources and are applicable in all parts of our federal system.

Still more fundamentally, in my view it is impossible adequately to understand law, whether American law today or otherwise, except on the basis of substantial experience within the legal system. That kind of understanding involves appreciation not only of what is going on in the present but what has gone before and what may unfold in the future. As Holmes put it, the life of the law is not logic but experience. Members of the ALI have a lot of experience. Of course, one ingredient of thoughtful experience is attempting to see a situation from outside the situation. Objectivity, as we might call it: Always to be sought, often to be hoped for, never fully achieved.

This Symposium is a demonstration of the multiplicity of voices, viewpoints, and interests that ought to be taken into account in any serious address of law. Hence, it also is a demonstration of the voices, viewpoints, and interests that the ALI should take into account. My experience in the Institute is only one viewpoint and an "interested" one at that. Be that as it may, my impression is that the Institute has on the whole been doing a good job in its undertaking.