

## *The Wisdom of Crowds*<sup>TM</sup>

By William F. Lee of WilmerHale



### ADAPTED FROM A SPEECH PRESENTED AT THE 89TH ANNUAL MEETING

I have been a member of this extraordinary institution for 30 years. For all of us, the ALI has been a meaningful and special organization. Since my election, much has changed in law practice, and much has changed at the Institute as well.

One of those changes—a change that is profound and will have far-reaching effects—is the need for all of us in the profession to work and think effectively as leaders and

team members in the practice of law. To use the title of the well-known book, the profession has come to recognize and need *The Wisdom of Crowds*.

How does this relate to The American Law Institute, and what does it mean for The American Law Institute? The ALI is one of the pioneers of this very concept. When the Institute was formed in 1923, it immediately issued drafts of Restatements of various totems of the legal profession: Agency, Contracts, Property, Torts, Restitution, Conflict of Laws, and more. These Restatements, and more broadly the Institute's collaborative process for issuing its Restatements, its Principles, its Model Codes, are truly, in my view, among the best and earliest examples of this concept. Each of these efforts demonstrated that the work of a group as a whole is greater than the sum of its parts, and the wisdom of the crowd is greater than any of us individually.

The Institute's process for developing these publications is a prime example, in my view, of the success that comes from aggregating the wisdom and experience of many very, very smart people on a particular subject to develop the best statement of the law that a collective group can provide.

As we prepare for our 95th Annual Meeting, I hope we will all consider just how the Institute and the profession in general can use this model, the wisdom of the crowd, to address the new challenges of the American legal landscape. The Institute itself is doing it. It is addressing the developments in the law of torts, property, and other legal constructs that have existed since the time of Blackstone. But it is also bringing to bear its collective wisdom on contemporary areas: policing, international arbitration, data privacy, and government ethics.

The concepts of leadership, teamwork, and collective effort are, of course, not discipline dependent. I mentioned the fascinating book, by James Surowiecki, *The Wisdom of Crowds*<sup>1</sup>. It has nothing to do with law practice. It has nothing to do with most of what you are doing every day. But it provides a compelling case for the conclusion that the collective wisdom of groups is better suited to solve problems and come to wise decisions than an elite few.

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### THE DIRECTOR'S LETTER BY RICHARD L. REVESZ

## Codes and Majority Rules

As I indicated in my Summer 2015 letter, early in my tenure The American Law Institute clarified the rules that govern its Restatements and, accordingly, updated its Style Manual (formally "Capturing the Voice of The American Law Institute: A Handbook for ALI Reporters and Those Who Review Their Work"). As the Style Manual now indicates, the starting point in fashioning Restatement black-letter rules is ascertaining the nature of the majority rule. Restatements can depart from majority rules under specified circumstances but, if they do, they must say so explicitly and explain why (pp. 5-6). Do the same rules apply to the ALI's Codes? The Style Manual does not provide much guidance on this issue. It indicates that our codifications "have built upon, rationalized, and synthesized previous legislation ... rather than proposing legislation in fields where it had not previously existed" (p. 11). The second clause indicates that we should not undertake codifications in emerging areas of law, which have not yet been the subject of sustained legislative attention, like for example, driverless cars or artificial intelligence. But the first clause does not give guidance on how codifications of established areas should treat existing statutory enactments. For this reason, the best place to seek answers to the question of whether the relationship between Restatements and majority rules applies to codes is in the approach the ALI took with respect to this issue in its prior work. Here, I will focus on our two most influential codifications: the Model Penal Code (MPC) and the Uniform Commercial Code (UCC).

Prior to the MPC, efforts to codify the criminal law in the United States, including undertakings in New York and Louisiana, had been non-reformist. In contrast, the MPC departed from this earlier tradition. Sanford Kadish, a distinguished criminal law academic, noted that the MPC was motivated by "the spirit of

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root-and-branch rethinking and reformulation toward a more just and more effective criminal law.”

The ALI's goals for the MPC were clearly elaborated in the memorandum proposing the project. After indicating that criminal law, “should surely be as rational and just as law can be,” the memorandum criticized the status quo in strong terms: “penal law to-day almost as much as twenty years ago shows the neglect with which it has been treated for so long.” And, it indicated that the MPC was responsive to the need of engaging in “systematic re-examination of the content, methods and objectives of the penal law.”

The MPC rose to the challenge. While the drafting was underway, Herbert Wechsler, its Chief Reporter and later an illustrious ALI Director for more than two decades, noted that the ALI was seeking to construct an “ideal penal code,” which would “take account of long range values as distinguished from immediate political demands.” And, in his foreword to the MPC, Wechsler said that “the purpose of the Institute in undertaking preparation of the [MPC]” was to “stimulate” legislatures to revise the content of their penal laws by reference to “a contemporary reasoned judgment.”

Consistent with this objective, the MPC was responsible for significant substantive innovations. For example, the MPC pushed back against the growing application of strict liability in criminal law. Herbert Packer, another distinguished criminal law academic pointed to the Code's provisions on mistake of fact, unpublished criminal laws, felony-murder, and intoxication as examples of the Code's commitment to the requirement of *mens rea* and aversion to strict criminal liability. Even where the MPC allowed strict criminal liability, it severely narrowed its scope. The Comment on Section 2.05, after noting that the section “makes a frontal attack on absolute or strict liability in the penal law,” added that “[t]he liabilities involved are indefensible, unless reduced to terms that insulate conviction from the type of moral condemnation that is and ought to be implicit when a sentence of probation or imprisonment may be imposed.”

The MPC was also concerned with reforming law in accordance with current scientific knowledge. For example, in a memorandum to the MPC's advisory committee, Wechsler argued that the MPC should reflect the current technical capacities of psychiatrists in evaluating mental disease, as well as an increasing lack of clarity about what constitutes mental disease in the psychiatric community and the public at large. Consistent with this approach, the MPC determined that lack of criminal responsibility could result not only from cognitive challenges but also from “noncognitive impairments,” the exclusion of which “leads psychiatrists to believe that much that they consider relevant to a defendant's responsibility or lack of it is considered irrelevant by the law.”

The UCC follows a similar reformist pattern. Seeking funding for the project, George Wharton Pepper, the ALI's President at the time, wrote that then existing commercial laws were outdated, inefficient, and inapplicable to the realities of commerce, noting, for example, that “[t]he law regulating negotiable instruments is almost fifty years old and the Uniform Sales Act only ten years younger.” He underscored that “many changes in business practices have occurred.” As a result, “[l]aws which were entirely suitable in 1900 are necessarily outmoded in many important respects at the present time.”

Accordingly, Chief Reporter Karl Llewellyn, another iconic ALI figure, approached the drafting of the UCC with a strong reformist agenda. In particular, Llewellyn and the other UCC drafters were concerned with reforming current law to better protect the rights of consumers. Writing on the UCC's history, Allen R. Kamp indicated that Llewellyn was heavily influenced by contemporary social science and that “[t]hese teachings gave rise to his goals for his proposed commercial statute: the use of norms of merchant behavior, the achievement of fairness that would result from balanced trade rules and equality of bargaining, and the achievement of modernistic efficiency that would come from discarding outmoded concepts and formal rules unrelated to commercial reality.” Moreover, Llewellyn was concerned with, “good, rather than merely standard, merchant practices.” Though some of the more ambitious reforms were curtailed during the drafting process, as Homer Kripke, a leading commercial law scholar, noted, Llewellyn's reformist orientation, significantly focused on the protection of consumers, was reflected in requirements concerning the requirement for a conspicuous writing to modify or exclude implied warranties, unconscionability, and the placement of risk on market professionals.

In summary, two of the ALI's most significant figures, Herbert Wechsler and Karl Llewellyn, did not seek, as the lead Reporters of their respective projects, to reflect the approaches followed at the time in a majority of jurisdictions. Quite to the contrary, they were motivated by a desire to discard outmoded approaches and to adopt rules that better comported with modern understandings of justice and fairness, and that reflected contemporary work in the social sciences. In summary, these codes treated existing law in a manner that is altogether different from the approach of the Restatements.

**Editor's Note:** A version of this Director's Letter that includes a bibliography of related material with links to relevant documents is posted on the News page of the ALI website: [www.ali.org/news](http://www.ali.org/news).