A Message from ALI President David F. Levi

Last month’s 96th Annual Meeting was a wonderful example of what our remarkable membership can accomplish when we get together. Our members from across a wide spectrum of experience, expertise, and viewpoints, in their collective wisdom, voted to complete three projects at this year’s meeting: Restatement of the Law, Charitable Nonprofit Organizations, Restatement of the Law, The U.S. Law of International Commercial and Investor–State Arbitration, as well as Principles of the Law, Data Privacy.

The time and knowledge that our Reporters, members, and project participants have contributed to these projects cannot be overstated. In these three projects, more than 50 drafts were produced, each incorporating changes suggested to the Reporters by members, participants, and the ALI Council. The completion of these projects is a testament to ALI members’ dedication to the Institute and our mission.

Six additional projects at varying stages were also on the Annual Meeting agenda. The membership discussed drafts on Policing; Consumer Contracts; Intentional Torts; Children and the Law; Compliance, Risk Management, and Enforcement; and American Indian Law. Several of these projects have Sections that garnered motions from our members, which led to spirited and helpful debate on all sides of the issues.

These debates are one of the hallmarks of The American Law Institute. All members are encouraged and expected to state their views, to listen to the perspectives of others, and to share the collective goal of finding the best answer. We do so collegially and respectfully. And, as we think through these issues together, we often find that later drafts bear only superficial resemblance to the tentative first thoughts that our superb Reporters offer as a starting point.

We were honored this year to welcome Chief Justice of the United States John G. Roberts, Jr., who presented ALI’s Friendly Medal to Retired Supreme Court Justice Anthony M. Kennedy. In presenting the medal, Chief Justice Roberts with Henry J. Friendly Medal recipient Retired Associate Justice Kennedy and ALI President David F. Levi

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The Debate Over the Role of Restatements

In the past few years, we frequently have seen the charge that the ALI’s mission is to state what the law “is,” rather than what the Institute thinks the law “ought to be,” and that we recently have strayed from this mission and should right the ship. This charge most often is made when the ALI chooses to restate a minority rule. As one commentator wrote in criticizing the Restatement of the Law, Liability Insurance (which, despite the criticism, followed majority rules in nearly all of its Sections): The adoption of a minority rule in a Restatement “is fundamentally inconsistent with the purpose of a Restatement of Law project.” Such comments rest on the notion that the ALI’s mission is simple, uncontested, and has always been so. That, however, is not the case.

The debate over the role of Restatements is as old as the Institute itself. The 1923 Report on the Institute’s establishment makes clear that Restatements never were meant merely to be simple summaries of undisputed legal rules. Rather, Restatements were meant to “be at once analytical, critical and constructive.” Their “object should not only be to help make certain much that is now uncertain and to simplify unnecessary complexities, but also to promote those changes which will tend better to adapt the laws to the needs of life.” This Report also recognized that the Restatements sometimes might set forth minority rules: “Where the statement of the law set forth [in a Restatement] is against the weight of authority in most of the states, but the matter has not been the subject of a prior decision by the courts in some one or more of the states, the courts in these jurisdictions … without waiting for any legislative authority, may follow the law as set forth in the restatement.”

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Despite these admonishments, it appears that the first round of Restatements, completed between 1923 and 1944, almost always restated majority legal rules. As described by the ALI’s first Director, William Draper Lewis, “[t]he Restatement states the law as it would be today decided by the majority of courts.” But the approach was not monolithic. In 1948, after completion of the Restatement First series, then-Director Herbert Goodrich explained in his Report to the ALI Membership that “[o]ver and over again the statement was made that we were endeavoring to state the law as it was, not as some of us would like it to be. All the time we recognized that there were places for a give and take even within that limitation; in cases of division of opinion a choice had to be made and naturally we chose the view we thought was right.” Moreover, participants in this process and prominent commentators lamented that the Restatements were “substantially limited to [a] statement of the law as it is” and therefore departed from “the original conception,” as Professor Hessel E. Yntema of the University of Michigan put it in 1936. Similarly, Yale Law School Dean Charles E. Clark noted in 1933 that many ALI participants had come to view the Restatement First’s approach as a “straitjacket,” characterized by an undue emphasis on “announc[ing] a more or less binding and final rule of law,” and being “caught between stating the law which should be and the law which is,” ultimately “often end[ing] by stating only the law that was.”

The proper role of Restatements received more sustained attention under the leadership of the eminent Herbert Wechsler, who served as the ALI’s Director between 1963 and 1984. Consistent with the 1923 Report, Wechsler embraced the idea that restating the law involves some measure of normative judgment. And, he believed in making this approach explicit. As we now quote in our Style Manual, as well as on the walls of the ALI Conference Room where we meet to discuss projects, Wechsler described a “working formula” under which “we should feel obliged in our deliberations to give weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs.” Under this view, “a preponderating balance of authority would normally be given weight, as it no doubt would generally weigh with courts, but it would not be thought to be conclusive.” The ALI Council in 1968 endorsed Wechsler’s vision of restating the law by unanimously adopting Resolution No. 2061—“approv[ing] the statement of policy by the Director in his 1966 Annual Report (pp. 5-9) governing the latitude and scope of the formulations of black-letter and comments in the Restatement of the Law, Second”—and this vision has since provided the guiding light for the Institute’s Restatement work.

Over the years, we have continued to refine this formulation. Most importantly, in our 2015 revisions to the ALI Style Manual, the Council articulated a clear requirement that, “if a Restatement declines to follow the majority rule, it should say so explicitly and explain why.” That way, if a particular black-letter provision reflects a minority position, a judge choosing to follow it would be on notice that the majority of jurisdictions had decided the issue differently. This explicit admonishment properly reflects the view that the ALI, as an institution focused on promoting clarity in the law, must doggedly pursue such clarity in its own work.

Moreover, those who argue that restating a minority rule entails saying what the law “ought to be,” rather than what it “is,” ignore that in those jurisdictions that already have adopted the minority position, this is the law that “is.” Viewed from the perspective of such a jurisdiction, the ALI’s restatement of the competing majority position amounts to a recommendation to change its law; we would be telling such a jurisdiction what its law “ought to be.” And if the ALI were to recommend such a change, we should be able to offer a reasoned explanation why the majority position is the better rule; counting noses, without further analysis, is unlikely to persuade the minority jurisdiction to abandon its approach. Likewise, if a minority rule is chosen, the rationale for selecting it over the majority rule should be clearly articulated.

This transparency also should allay concern over instances where a Restatement distills a rule that is latent in a body of case law, but which never has been expressly announced by a court; or times where a Restatement offers new terminology to describe what courts are doing; or circumstances where a Restatement anticipates issues that have not yet arisen in decided cases and offers a view on how the law should be extended to decide those issues. To be sure, these are matters of judgment, similar to the kind of judgment exercised by a common-law judge.

In this connection, it is instructive to look at the criticism of one of our Restatements in partially dissenting opinions by Justices Scalia and Thomas. While the Court is usually a consistent and approving consumer of Restatements and frequently cites to the Restatements for support, on this occasion we came in for some criticism from two Justices who often have relied on the Restatements over their long tenures. The criticism was directed at § 39 of the Restatement Third, Restitution and Unjust Enrichment, a Section described by Justice Thomas in the principal partial dissent (also joined by Scalia) as “lack[ing] support in the law.”

An examination of the Comments to § 39, as well as a look at the proceedings from the ALI Annual Meeting where it was discussed, reveal the care with which the Section was developed. The idea was to distill—from a collection of cases that reached generally consistent outcomes, but which were, on the whole, unclear and undertheorized—a rule for future courts to apply. The Comments explicitly explained the approach. In my view, that is an example of the ALI carrying out its responsibility, set forth in its Certificate of Incorporation, “to promote the clarification and simplification of the law.”
I end this letter with three thoughts. First, the debate over whether Restatements should reflect what the law “is” as opposed to what the law “ought to be” has been a core part of the ALI’s focus since its founding. And, for more than half a century, we have followed a fairly consistent approach of generally restating majority rules but not necessarily being wedded to them, especially when ignoring better rules or trends would cast ALI into the role of being a roadblock to change. Second, equating what the law “is” with majority approaches and what the law “ought to be” with minority approaches is a category mistake. It would certainly surprise a minority jurisdiction that its law is aspirational but not real. And, third, instances in which critics claim that a Restatement provision has no support are often examples of the ALI articulating a rule that explains a pattern developing in the case law.

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.

Annual Meeting Sunday Events

This year’s Annual Meeting featured three Sunday events. The day began with 51 Imperfect Solutions: States and the Making of American Constitutional Law. This panel discussion featured Jeffrey S. Sutton of the U.S. Court of Appeals for the Sixth Circuit, with Allison H. Eid of the U.S. Court of Appeals for the Tenth Circuit, Joan L. Larsen of the U.S. Court of Appeals for the Sixth Circuit, and Goodwin Liu of the California Supreme Court in discussion of topics from Judge Sutton’s book, 51 Imperfect Solutions: States and the Making of American Constitutional Law. ALI President David F. Levi moderated the discussion.

The programs continued with Artificial Intelligence (AI), a panel discussion led by Mariano-Florentino Cuéllar of the California Supreme Court. The panel addressed some of the exciting and difficult legal issues surrounding the use of AI as it becomes more complexly woven into our daily life. Cary Coglianese of University of Pennsylvania Law School, Kristin Johnson of Tulane University Law School, and Tom Lue of DeepMind joined Justice Cuéllar as panelists.

The final program on Sunday was the ALI CLE course, Duty to Whom? Ethics Dilemmas Confronted by Government Lawyers. Planning chair and moderator Troy A. McKenzie of New York University School of Law was joined by panelists John B. Bellinger III of Arnold & Porter Kaye Scholer, Meredith Fuchs of Capital One; Derek P. Langhauser of Office of the Governor, Maine; Thomas D. Morgan of The George Washington University Law School; and Richard W. Painter of University of Minnesota Law School. This panel addressed some common ethical issues confronted in the public sector.