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## *OPENING REMARKS*

By The Honorable Pierre N. Leval  
*Judge of the United States Court of Appeals  
for the Second Circuit and ALI Council member*

*The eighty-sixth Annual Meeting  
of The American Law Institute  
convened in the Grand Ballroom  
of The Mayflower, Washington, D.C.,  
on Monday morning, May 18, 2009.  
President Roberta Cooper Ramo presided.*



**President Ramo:** We have begun these Meetings very often with distinguished remarks from a variety of important people, and we continue that tradition today. As I thought about opening this, my first Meeting as President, I thought about what The American Law Institute means. I realize as I go about our work and as I meet lawyers who don't know about our work and people in the public who don't know about our work, that we have not been so open in communicating what our values are and what the value of The American Law Institute is, not just to the citizens of our country but it turns out, as I travel around the world, to the citizens of many countries.

Everywhere I go out of the U.S., people are anxious to have us and we have a great deal of pressure often for us to help start a law institute just like, they say, The American Law Institute, in countries all over the world. Some countries have something that looks like The American Law Institute, but few have an organization that reflects the intellectual values, the personal civility that is the hallmark of what we do at a time when civility is too little understood as a foundation of democracy.

One day in the late winter, Lance Liebman called me and said, "You missed a meeting in New York at which Pierre Leval spoke so movingly about The American Law Institute that I wished that everyone could hear it," and I immediately said, knowing Judge Leval, "Everybody should hear it," and thought that he was the perfect person to open this 86th year for us.

So let me introduce him to you; Pierre's long and distinguished biography is in the materials, but I want to say just a few personal words.

When you are new to the Council and new to this group, it can be an intimidating process, especially if you are a lawyer from New Mexico, and a really large firm at the time I began was bordering on 25—we may be going more in that direction, tragically, in big cities now (*laughter*)—and you look around and you see, as I have already introduced today, the icons of our profession. One of the first people to reach out to me when

I joined the Institute, just standing there because I was kind of afraid to take a chair, was Judge Leval, something that he probably doesn't remember.

Judge Pierre Leval is really everything that you hope to have in a Council member. He is intellectually elegant, he is thoughtful and practical in his remarks, and it is my honor to introduce him to this first Opening Session for me to speak about The American Law Institute.

Pierre Leval. (*Applause*)

**Judge Pierre N. Leval:** Good morning. Thank you, Roberta, for those extraordinarily gracious remarks. If I have ever in the past taken a position against falsehood I need to rethink that position. (*Laughter*)

While vacationing on the rocky coast of Maine a few years ago, I was taken to visit a lifelong painter of the sea. Lamenting the beastly intolerable difficulty of capturing its rolling swells, the painter railed, "If only it would stand still just for a minute." The sea did not oblige.

At The American Law Institute we have a similar problem. If the law would only stand still our task would be easier, but the law is not more accommodating than the sea. Even if the law would agree to stand still, that would go only so far to help us in our task.

While the law as a whole does not stand still, there are parts that do, at least for a time. The trouble is while they stand still, we change. Our society changes. Its understandings and its aspirations change. Voices which in the past were not given a podium from which to express needs and dissatisfactions eventually come to be heard. Answers which in the past were unquestioningly accepted as wholly satisfactory become unsatisfactory, at times even shamefully so.

Before I go on for too long about the difficulties of our task at the ALI, I should perhaps have started with the first difficulty, the difficulty of understanding just what the task is. The founding committee of the Institute deplored the uncertainty and complexity of our law. The charter they created speaks of a purpose to promote the clarification and

simplification of the law and its better adaptation to social needs. We meticulously undertook Restatements and statements of principles.

What is a Restatement all about? Is it to tell what the law is? Yes, in part, but only in part.

Is it to tell what the law should be? Again, yes in part, but what is the meaning of “should be”? What the law should be from whose point of view?

Now if the world followed Polonius’s advice, for example, there would be neither borrowers nor lenders, and we may soon be there, (*Laughter*) that is, unless President Obama can persuade those who were placed on earth so that they might lend to fulfill that God-given trust. (*Laughter*)

If there were no lenders and no borrowers there would, of course, be no need for a law on lending, but once there are lenders and borrowers they are likely to have different points of view on what the law on lending should be. So what then? Does it follow that there is no such thing as a neutral desideratum, no such thing as a fair and efficient balance of the interests of lenders and borrowers? Some contend the only useful perspective is whose shoes you stand in.

At the ALI we reject that notion. For most questions, not all questions, but for most questions there are objective reasons, sound reasons, grounded in fairness and efficiency, for preferring one rule over another. It is not always easy to know what rule is to be preferred, and when one thinks one knows what the rule should be, finding the words to express it correctly so as to produce a desirable solution for all types of cases is devilishly difficult.

In other instances, when no single answer trumps the competition, a valuable product of our work, at times perhaps even more valuable than producing black-letter rules of law, is the exposure and evaluation of reasons that might support competing views. Furthermore, the fact that some problems may not yield a single best answer doesn’t mean that there

aren't a host of bad answers available to any question, and we judges have a way of landing on those. (*Laughter*)

In our common-law tradition, the law develops oddly. In some significant part, the law constantly improves itself, as courts that understand the problems perceive and resolve ambiguities, cut back on prior overstatements, and rethink solutions to previously unperceived difficulties.

At the same time, the law constantly deteriorates as judges who do not sufficiently understand the particular problem they face, and that condition will certainly afflict every single judge at some time or other, woodenly and unthinkingly quote and apply prior verbal formulations to situations they were never intended to cover. A huge, huge benefit of the Institute's work is to improve the odds that we judges, laboring endlessly like ants on the creation of the common law, will line up in the former column rather than the latter.

The ALI receives its share of criticisms. Some of them have merit and are worth listening to, and we do listen, and we do our best to correct those problems. Among the criticisms has been that we drew our membership excessively from prestigious schools, large firms, and persons, mostly male, ensconced in power and privilege. There was truth in it. We needed a wider representation of voices in our deliberation. We addressed it seriously. We have made and continue to make major efforts to diversify. You can all help in the continuation of that goal.

Another observation has been that a larger part of the membership ought to have more opportunity to participate more directly in the production of Institute texts. That made good sense and it has been addressed constructively, first with Consultative Groups and now with Roberta's exploration of fuller opportunity for members to participate by electronic communication.

In somewhat different terms we are accused of being a self-appointed elite. If the charge of elitism refers to our efforts to attract smart people who care deeply about improving the law, that charge is true,

but that is the strength, rather than a weakness, of our Institute. And as for self-appointed, that also is true. No one asked us to do this difficult work, but no one is compelled to read what we write, much less pay any heed to it, and any who believe that they would do the job better are free to self-appoint just as we have done. The respect our work receives will ultimately depend on the respect it earns.

Today at the Institute we perch on the shoulders of giants who preceded us: Learned Hand, Karl Llewellyn, John Minor Wisdom, Roger Traynor, Herb Wechsler, Henry Friendly, Charlie Wright, just to name a few. The wide attention and respect our work attracts today is due in no small part to their huge contributions.

Together with the respect they bequeath to us comes the obligation on us to do our best to continue to earn the world's trust in the value of the Institute's work. I submit to you that the Institute's task, difficult as it is even to understand, is very much worth doing. Law is important. Law is fragile. Clarifying the law, helping it to develop in directions of greater fairness and efficiency in a rapidly changing world is a huge and difficult undertaking and very much worth the vast commitment of effort it requires.

Welcome, all of you, to the 86th Annual Meeting of The American Law Institute, and, invoking the words of Maurice Sendak's immortal Max, let the wild rumpus start. (*Laughter*) (*Applause*)

**President Ramo:** Well, to that I would say, Judge, easy for you to say. (*Laughter*)

Thank you very much.