Minutes of the
One Hundred and Thirty-Fourth Meeting
of the Council

The Byrne Room
The Association of the Bar of the
City of New York
42 West 44th Street
New York, New York

March 20, 21, 22, and 23, 1968

The Executive Office
The American Law Institute
101 North 33rd Street
Philadelphia, Pa. 19104
AGENDA

One Hundred and Thirty-Fourth Meeting of The Council of The American Law Institute

March 20, 21, 22, and 23, 1968

The Byrne Room
The Association of the Bar of the City of New York
42 West 44th Street
New York, New York

1. Wednesday, March 20, 1968

10:00 A.M. - Call to Order by the President

Preliminary matters, including questions concerning Restatement policy raised by Liaison Committee of the Defense Research Institute, of which Fred B. Helms, Esquire, is Chairman

Report of the Committee on Membership.

10:45 A.M. - Federal Estate and Gift Tax Project
Dean A. James Casner

12:45 P.M. - Luncheon - Princeton Club

2:15 P.M. - A Model Code of Pre-Arraignment Procedure
Professor James Vorenberg
Professor Paul M. Bator
Professor Charles Fried
Professor Telford Taylor

5:00 P.M. - Adjournment

2. Thursday, March 21, 1968

10:00 A.M. - A Model Code of Pre-Arraignment Procedure continued

12:00 P.M. - A Model Land Development Code
Professor Allison Dunham
Professor Ira Michael Heyman
Professor Terrance Sandalow
Professor Jan Z. Krasnowiecki
12:45 P.M. - Luncheon - The Harvard Club
2:15 P.M. - A Model Land Development Code continued
5:00 P.M. - Adjournment

3. Friday, March 22, 1968
10:00 A.M. - A Model Land Development Code continued
11:00 A.M. - Study of the Division of Jurisdiction between State and Federal Courts
Professor Richard H. Field
Professor Charles Alan Wright
12:45 P.M. - Luncheon - The Association of the Bar of the City of New York
2:15 P.M. - Study of the Division of Jurisdiction between State and Federal Courts continued
5:00 P.M. - Adjournment
5:00 P.M. - Cocktails - Residence of Mr. and Mrs. Norris Darrell, 1107 Fifth Avenue

10:00 A.M. - Restatement, Second, Conflict of Laws
Professor Willis L. M. Reese
Professor Austin W. Scott
1:00 P.M. - Luncheon - The Century Club
2:15 P.M. - Until adjournment - Restatement, Second, Conflict of Laws, continued
THE AMERICAN LAW INSTITUTE

Minutes of the One Hundred and Thirty-Fourth
Meeting of the Council

March 20, 21, 22, and 23, 1968

The Council of The American Law Institute assembled on Thursday morning, March 20, 1968; at 10:00, in the Byrne Room of The Association of the Bar of the City of New York.

The President presided, and the Director was Secretary of the meeting.

Present were:

Frederick A. Ballard       Vester T. Hughes
Francis M. Bird            Laurance M. Hyde
Charles D. Breitel          Joseph F. Johnston
John G. Buchanan           William B. Lockhart
Homer D. Crotty            Carl McGowan
R. Ammi Cutter             Charles M. Merrill
Norris Darrell             Timothy N. Pfeiffer
Hardy C. Dillard           Walter V. Schaefer
Edward J. Dimock           Eugene Bonn Strassburger
Arthur Dixon               Roger J. Traynor
H. Vernon Eney             Harrison Tweed
Thomas E. Fairchild        John W. Wade
Henry J. Friendly           Lawrence E. Walsh
Edward T. Gignoux          Charles H. Willard
Erwin N. Griswold          Laurens Williams

Also present were Herbert Wechsler, the Director, and Paul A. Wolkin, the Assistant Director.

Present at various times were the Reporters for the projects listed on the Agenda of the meeting.

1. The President called the meeting to order and welcomed the members of the Council. He reported with regret the death of William A. Schnader.
2. Mr. Buchanan submitted written Minutes in Memory of H. Eastman Hackney and Robert N. Miller, copies of which appear in Appendix A. The following resolution was unanimously adopted:

Resolution No. 2060 On motion, duly seconded,

RESOLVED: The Minutes in Memory of H. Eastman Hackney and Robert N. Miller are adopted by the Council of The American Law Institute, and the Secretary is requested to send copies of them on behalf of the Council to their immediate relatives and friends.

3. The Director presented his report, a written copy of which was distributed in advance of the meeting and appears in Appendix B.

(a) The following resolution was unanimously adopted concerning the questions relating to Restatement policy raised by Mr. Fred B. Helms of Charlotte, North Carolina, on behalf of The American Law Institute Liaison Committee of the Defense Research Institute:

Resolution No. 2061 On motion, duly seconded,

RESOLVED: The Council approves 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.

The Director was requested to advise Mr. Helms of the action of the Council.

Appendix C contains the statement by the Director which appeared in his 1966 Annual Report.

(b) Pre-Arraignment Criminal Procedure

The Director suggested that the discussion of the continuance of this project be deferred until Professor Vorenberg
is present and submits his report.

(c) Model Land Development Code

The Council was advised that The Ford Foundation had approved a five-year extension of its grant for the Model Land Development Code project.

(d) The Director reported receipt of a letter from Mr. Schnader on studies on the Uniform Commercial Code being conducted in Louisiana and on other Code matters. The report appears in Appendix D.

(e) The Director submitted a bank resolution for approval by the Council. It would authorize one signature on checks drawn on bank accounts of the Institute, instead of two presently required. Adoption of the resolution appeared to be indicated because of the difficulty encountered on occasion in obtaining two signatures and the ensuing delay in distribution of payroll and other checks. Checks issued under the proposed resolution would involve fixed current expenditures, and the present post-audit system would verify the funds disbursed. If the resolution is adopted, copies of vouchers of disbursements would be submitted regularly to an officer, most likely the Treasurer.

The resolution was unanimously adopted.

Resolution No. 2062 On motion, duly seconded,

RESOLVED: The First Pennsylvania Banking and Trust Company be and hereby is authorized to make payments from the following accounts upon and according to the check, draft, note or order of this corporation when signed by the President, Treasurer, Director or Assistant Director:
<table>
<thead>
<tr>
<th>Account Number</th>
<th>Account Title</th>
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<tbody>
<tr>
<td></td>
<td>The American Law Institute</td>
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<td></td>
<td>The American Law Institute Payroll Account</td>
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<tr>
<td></td>
<td>The American Law Institute Maurice and Laura Falk Foundation Endowment for the Uniform Commercial Code</td>
</tr>
<tr>
<td></td>
<td>Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association</td>
</tr>
<tr>
<td></td>
<td>The Practical Lawyer, Committee on Continuing Legal Education of the American Law Institute</td>
</tr>
</tbody>
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4. The report of the Director of the Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association was distributed in advance of the meeting and appears in Appendix E. The President reported that, following the discussion at the previous meeting of the Council on the problems that have arisen with the American Bar Association, relating to the Joint Committee, he had addressed a letter to the President of the Association concerning the matter, a copy of which appears in Appendix F. Mr. Morris replied, his letter also appearing in Appendix F. Mr. Darrell advised the council that, in accordance with Mr. Morris' request, further discussions will be held.

5. The President called to the attention of the Council the Treasurer's Report which appeared among the reports submitted in advance of the meeting. He commended the efforts that were being made by individual members of the Council in some states to
increase the number of sustaining members. The Treasurer's Report appears in Appendix G.

6. Federal Estate and Gift Tax Project

   Dean Casner and Professor Andrews appeared to present Council Draft No. 4 on the Federal Estate and Gift Tax Project.

   Preliminary to this presentation, the President reported that a Committee consisting of the Director, Mr. Hughes, Mr. Williams, and the President, had met prior to the Council meeting with the Reporter to review his proposed Council Draft No. 4 and that the Draft before the meeting reflected the recommendations which the Committee had submitted to the Reporter.

   The Reporter then presented various propositions in the Draft. He noted that the major change was the absence of a Reporter's recommendation as to unification and of any request for a vote on this issue.

   (a) **Retention of Dual Tax System vs. Change to Unified Transfer Tax**

   A motion, to table the resolution proposed on page 99 of the Draft and the discussion following it, was lost.

   There was agreement that the resolution should be modified to state, in essence, that inasmuch as a primary justification in changing to a Unified Tax System is to avoid shifting the tax burden to those who do not or cannot take advantage of the dual tax system by making inter vivos transfers, it should be understood by those charged with determining the rate structure that the change should not itself be used as a device for raising additional revenue in such fashion as to defeat the purpose of a unified system.
The Reporter agreed to modify the resolution to reflect this sense of the meeting.

The comment following the resolution on page 99 was modified as follows: In the first sentence add "with the approval of the Council" after "the Reporter"; in the second sentence, the words "If no additional resolutions are considered" are to be deleted and the sentence is to begin with the word "The." Additionally, the following paragraph and the resolutions that it includes are to be deleted.

(b) The Rate Schedule Program

The responses to the Resolutions on pages 86 and 87 were as follows: Resolution No. 1 was approved.

Each member voting only on one of the resolutions, 7 favored Resolution No. 2; 7 favored Resolution No. 2(a); 6 favored Resolution No. 2(b).

As between 2 and 2(a), 8 favored 2 and 13 favored 2(a).

As between 2 and 2(b), 6 favored 2 and 14 favored 2(b).

By a vote of 11 to 10, Resolution No. 5 was rejected.

A proposal that estates under $100,000 not be subject to taxation either under a dual or unified transfer tax system, even though this might involve higher rates in various brackets than might otherwise be the case to produce the required revenue, was approved by a vote of 15 to 8.

The Council, thus, appeared to favor higher exemptions, even at the cost of higher rates, with the advantage that returns need not be filed.
Another vote favored 15 to 6, Resolution No. 2(b) over 2(a), subject to the vote on the proposal for the $100,000 exemption.

As between Resolutions 4 and 4(a), the vote was respectively 10 and 9; as between 4 and 4(b), it was 10 and 8; as between 4(a) and 4(b), it was 7 and 13. Each of these Resolutions assumed that the transfer for consumption rule was operative.

The following resolution was unanimously adopted:

Resolution No. 2063 On motion, duly seconded,

RESOLVED: The Reporter is authorized to submit to the Annual Meeting Council Draft No. 4, entitled "Major Problems in Federal Gift and Estate Taxation, and Recommendations in Reference Thereto," as modified at this meeting of the Council;

FURTHER RESOLVED: The final publication resulting from the Federal Gift and Estate Tax Project shall consist of the document "Major Problems in Federal Gift and Estate Taxation" as submitted to and approved by the Annual Meeting and indicating the actions taken by it and Study Draft No. 3, denominated as the Reporter's Document and being Study Draft No. 2, as revised and updated, to reflect subsequent work plus studies developed by the Reporters as part of the project and not previously distributed.

The President expressed the appreciation of the Council to the Reporter for his devotion and contributions to the Federal
Gift and Estate Tax Project during the years it was under consideration.

7. **Model Code of Pre-Arraignment Procedure**

    Professors Vorenberg, Fried and Bator appeared to submit Council Study Draft No. 1.

    At the outset the Council was informed that Professor Bator was withdrawing from the project for personal reasons, and not because of any disagreement with the direction the project is taking.

    The following resolution was unanimously adopted:

    Resolution No. 2064    On motion, duly seconded,

    RESOLVED: The Council expresses its appreciation to Professor Paul Bator for his assistance as a Reporter for the Project on a Model Code of Pre-Arraignment Procedure, and wishes him well in his future endeavors.

    In connection with his presentation, Professor Vorenberg advised the Council that he hoped it would approve a submission to the May Annual Meeting of the material before it as a Study Draft. It would contain an expanded introductory note, and present four models or alternatives. These would be articulated in statutory language. The Draft would not contain any material on search and seizure. The empirical material would be updated and published as part of the Draft. An oral report to the Annual Meeting would summarize the contents of the Draft and some discussion would be invited from the floor on such questions as the Draft might prompt.
The following resolution was unanimously adopted:

Resolution No. 2065  On motion, duly seconded,

RESOLVED: The Reporter for a Model Code of Pre-Arraignment Procedure is authorized to submit to the May, 1968 Annual Meeting a Study Draft of proposals for various alternative models of pre-arraignment procedures and a summary of the empirical data that has been collected and prepared, the material to be reported to the Annual Meeting by the Reporter and to be followed by discussion of questions the material may prompt to be raised from the floor.

The Reporters then withdrew, and the Council went into executive session to consider the continuation of the project, and if it is to be continued, its scope.

The Director reported on a letter he had received from Judge Friendly and preliminary discussions with The Ford Foundation concerning an additional grant in the amount of $200,000 to fund future work on the project and an extension of time.

Recommendations for the future of the project appear in pages 3 through 6 of the Director's Report in the Appendix to these minutes.

The following resolution was unanimously adopted:

Resolution No. 2066  On motion, duly seconded,

RESOLVED: The Council authorizes continuation of the work on the Pre-Arraignment Procedure Project, in accordance with the recommendations submitted by the Director in his report, except that any decision on continuation of the search and seizure phase await the further submission by Professor Taylor and that the submission to The Ford Foundation make clear that the Institute is not committed to publication of a Code but may in lieu thereof publish results of the project in the form of a Study Draft.
It was agreed, following adoption of the resolution, that recommendation no. 2 of the Director's Report on this project be modified to read "the exploration of possibilities and of statutory models... ."

8. Prior to consideration of the submission of A Model Land Development Code, the President introduced to the Council Mr. H. Vernon Eney, of Baltimore, Maryland, a new member of the Council attending his first meeting.

9. **A Model Land Development Code**

Professor Dunham and his Assistant Reporters appeared to submit Council Draft No. 1. After their presentation, the following resolution was unanimously adopted:

**Resolution No. 2067**

On motion, duly seconded,

RESOLVED: The Reporters for A Model Land Development Code are authorized to submit to the May, 1968 Annual Meeting Council Draft No. 1 as Tentative Draft No. 1 for the preliminary information of and discussion by the Annual Meeting, the Draft to indicate that the Council has not yet acted on any of its provisions.

10. **Study of the Division of Jurisdiction Between State and Federal Courts**

Professors Field and Wright appeared to submit Council Draft No. 8.

After discussion, the following resolution was unanimously adopted:

**Resolution No. 2068**

On motion, duly seconded,

RESOLVED: The Reporters are authorized to submit to the May, 1968 Annual Meeting Council Draft No. 8, as modified by the discussion, as Tentative Draft No. 6, and if no substantive changes requiring resubmission to the Council are voted at the Annual Meeting, Tentative Draft No. 6 may, as edited, be published in Official Draft form.
FURTHER
RESOLVED: The Draft shall designate Professor Richard H. Field as Chief Reporter and Professors Charles Alan Wright and Paul J. Mishkin as Reporters.

11. Restatement of the Law, Second, Conflict of Laws

Professors Willis L. M. Reese and Austin W. Scott appeared to submit Council Draft No. 22.

The following resolution was unanimously adopted:

Resolution No. 2069 On motion, duly seconded,

RESOLVED: The Reporters are authorized to submit Proposed Official Draft, Part 2 of the Restatement, Second, Conflict of Laws to the 1968 Annual Meeting, embodying the submissions to the Council as approved by it.

12. Committee on Membership

Mr. Bird reported on behalf of the Committee. He noted that the policy was being continued of including, among those to be designated as Life Members, Emeritus Members who are in the class eligible for life membership, provided they had been dues-paying members for 25 years. He further noted that there would be a luncheon for Life Members and recently elected members at the May, 1968 Annual Meeting.

Mr. Bird reported the deaths of the following elected members:

Robert Blair-Smith of Philadelphia, Pennsylvania
John L. Donnell of St. Louis, Missouri
Elder W. Marshall of Pittsburgh, Pennsylvania
Paul H. Ray of Salt Lake City, Utah

Additionally, the deaths were noted of Jacob M. Lashly of St. Louis, Missouri, an Emeritus Member, and Robert N. Miller of Washington, D.C., Harry D. Nims of New York City, and William A. Schnader of Philadelphia, Pennsylvania, Life Members.
These, plus the request for emeritus membership status and a resignation, will create six vacancies in the elected membership.

The following were being recommended to fill the six vacancies:

Derek Curtis Bok - Boston, Massachusetts  
Cale Crowley - Billings, Montana  
Stewart L. Kadison - Los Angeles, California  
Richard Harte Keatinge - Los Angeles, California  
James Berton Lewis - New York, New York  
Ira Maurice Price, II – Los Angeles, California

Emeritus membership status was being recommended for Eugene Quay of Chicago, Illinois.

Acceptance of the resignation of Lucien W. Shaw was also recommended.

The following resolution was unanimously adopted:

Resolution 2070

On motion, duly seconded,

RESOLVED: The request for transfer to emeritus membership recommended by the Committee on Membership is hereby granted; the resignation reported by the Committee on Membership and recommended for acceptance by it is hereby accepted; the individuals recommended by the Committee on Membership for election to membership are hereby elected.

Mr. Bird further reported the following would be designated Life Members at the May, 1968 Annual Meeting:

Paul P. Ashley - Seattle, Washington  
Raymond C. Baldes - Boston, Massachusetts  
*John O. Bigelow - Newark, New Jersey  
Alan Wilson Boyd - Indianapolis, Indiana  
Ernest William Clemens - San Antonio, Texas  
*Joseph J. Daniels - Indianapolis, Indiana  
Edward J. Dimock - New York, New York  
Laurence H. Eldredge - Philadelphia, Pennsylvania  
Byron K. Elliott - Boston, Massachusetts  
*Harold Evans - Philadelphia, Pennsylvania  
Thomas K. Finletter - New York, New York  
E. Smythe Gambrell - Atlanta, Georgia

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Mr. Bird then submitted a proposed amendment to Section 5 of the Bylaws.

After discussion, the following resolution was unanimously adopted:

Resolution No. 2071

On motion, duly seconded,

RESOLVED: In accordance with the provisions of Section 10 of the by-laws of The American Law Institute, the following proposed amendment be submitted for adoption at the Forty-fourth Annual Meeting of The American Law Institute, May 22-24, 1968. [Words with a line through them are to be deleted; underscored words are to be added]:

Amend Section 5 to read as follows:

5. The board of managers of the Institute shall be called the "Council". The affairs of the Institute shall be managed by the
Council, which shall also have power to make rules not inconsistent with these by-laws.

The members of the Council shall be elected by the members of the Institute. No member of the Council shall be elected by the members of the Institute except at an annual meeting.

The members of the Institute at the organization meeting shall elect twenty-one persons members of the Council. At the first meeting of the Council its members shall by lot divide themselves into three classes of seven each. The members of the first class shall hold office until the annual meeting to be held in 1926; those of the second class until the annual meeting to be held in 1929, and those of the third class until the annual meeting to be held in 1932. The successors of each class of members of the Council shall be elected by the members of the Institute for a term of nine years. Each member of the Council shall serve until the expiration of his term of office and until the election of his successor.

The number of members of the Council shall be forty-two divided into three classes of fourteen each. Upon an increase of the number of members of the Council, one-third of the additional members shall be elected for the term of office of each of the three existing classes of members and shall for all purposes become members of that class.

The minimum number of members of the Council shall be forty-two, divided into three classes of fourteen each, with terms expiring in 1968, 1971, and 1974, respectively, and each nine years thereafter. Subject to the provisions below relating to additional memberships, the term of each membership shall be nine years. Each member of the Council shall serve until the expiration of his term of office and until the election of his successor.

* Terms fixed by original by-laws are continued hereunder.
The Council may at any time increase the number of members of the Council by any number up to the number of members then serving who have attained the age of seventy-five years. The Council, in creating any such additional membership, shall determine the existing class to which it shall be assigned, subject to the requirement that the total membership of the Council shall at all times be divided into three classes as nearly equal in number as may be. The term of each such additional membership shall expire at the date of termination of the class to which it is assigned. In no event shall a member be elected to the Council, if as a result the total number of members of the Council would exceed forty-two, plus the number of members then serving who have attained the age of seventy-five years.

In case of any vacancy in the authorized number of members of the Council, whether due to resignation, death, or disqualification, or to a failure of the members of the Institute to elect the authorized number of counsellors, a counsellor otherwise, a member of the Council may be appointed by vote of the Council to fill such vacancy until the members of the Institute shall elect a counsellor member of the Council to fill the vacancy for the unexpired part of the term of the vacant membership. He shall be elected by the members except at an annual meeting.

13. Revision of the Bylaws

It has been suggested from time to time that it would be appropriate to appoint a committee to review the Bylaws of the Institute, and it was noted that this appears to be an appropriate time for such a committee to be designated. Accordingly, the following resolution was unanimously adopted:

Resolution No. 2072

On motion, duly seconded,

RESOLVED: The President is authorized to appoint a committee to review the Bylaws of The American Law Institute and to make recommendations for their revision where deemed appropriate.
The President announced that he will appoint such a committee and that he is designating Joseph F. Johnston to serve as its Chairman.

There being no further business, the meeting adjourned on Saturday afternoon, March 23, 1968.

Respectfully submitted,

Herbert Wechsler
Secretary
APPENDIX C
Report of the Director

The American Law Institute

To the Members of the American Law Institute.

Ladies and Gentlemen:

ON FREEDOM AND RESTRAINT IN THE RESTATMENTS

EVER SINCE THE INSTITUTE began to work on the Restatements it has had to face the problem of how far a judgment as to what the law should be legitimately plays a part in reaching a decision as to what it is. Since the question arose at the last Meeting and is likely to arise again at this, I have searched the record for such light as it may cast upon the answer.

The problem, it should be noted, is not solved by full agreement that the purpose of restating is, as William Draper Lewis said, to express "as nearly as may be the rules which our courts will today apply"—rules covering "not merely situations which have already arisen... but by analogy rules applicable to situations likely to arise" (History of the Restatement in Restatement in the Courts [1945] p. 19). The common law calls on the courts to show a due regard for precedent but also calls on them to choose between conflicting lines of doctrine and, as Dr. Lewis also said, to adapt law to "changing conditions in a changing world".
Does not the statement of a rule involve, then, something more than the conclusion that it is supported by the past decisions? Is there not also the implicit judgment that our courts today would not perceive a change of situation calling for the adaptation of the rule or even for a new departure? And if we ask ourselves what courts will do in fact within this area, can we divorce our answer wholly from our view of what they ought to do, given the factors that appropriately influence their judgments, under the prevailing view of the judicial function?

The Institute has been responsive to such questions in situations where the books reveal “opposing lines of authority” (Goodrich, Restatement and Codification in David Dudley Field Centenary Essays [1949] p. 242). In “cases of division of opinion a choice had to be made and naturally we chose the view we thought was right” (Report of the Director [1948] p. 18). In judging what was “right”, a preponderating balance of authority would normally be given weight, as it no doubt would generally weigh with courts, but it has not been thought to be conclusive. And when the Institute’s adoption of the view of a minority of courts has helped to shift the balance of authority, it is quite clear that this has been regarded as a vindication of our judgment and a proper cause for exultation.

What of the case, however, where no substantial cleavage has as yet appeared in the decisions? Here, so far as I can gather from the record, the practice on the whole has been to state the rule of such decisions as there are, without attempting to assess the influence that they would have or ought to have on a contemporary court, even if the case should be of first impression in a given jurisdiction. The caveat, of course, has been employed, pursuant to Cardozo’s admonition not to hesitate “to leave the answer to the years” when a “problem is yet unsolved”
(The American Law Institute, Proceedings of the Third Annual Meeting [1925] p. 106, also in Law and Literature [1931] pp. 137-138); but caveats are supposed to reserve questions of the scope or application of a rule, not to cast doubt on its validity. Beyond this, the Reporter may express in the Reporter's Notes such doubts as he may have respecting the continuing vitality of the decisions. Whether the Commentary also may elaborate such doubts, and thus accord the Institute the freedom that it grants to its Reporters, probably is still an open question.

Given the retreat from dogma sounded when the Institute began Restatement Second, such freedom seems to me entirely proper. It is, indeed, the only way the Institute can avoid strengthening a rule that it believes a careful court, duly mindful of the difference between the judicial and the legislative function, ought to exercise authority to disapprove. A further dividend of this approach is that it reduces the temptation to contribute to the law's development by prematurely finding that a change that is believed to be desirable is one that already has occurred.

A far bolder step was recommended to the Council and the Institute in 1947 by the Special Committee on the Future Program of the Institute, of which Judge Learned Hand was chairman. The Committee, of which Mr. Buchanan, Mr. Tweed and Judge Wyzanski are the surviving members, said in its Report:

"Your Committee thinks that in presenting a highly successful Restatement of the Law the Institute has accomplished only part of the objectives in the mind of its founders. . . .

"We think the time has come to study critically these rules which we have so clearly stated. Such a study should indicate (1) what rules are founded upon historical accident,
misconception of other cases and the like; (2) what rules are unjustified by any principle of justice, but are unimportant or harmless and may be left as they are because of the desirability of certainty; (3) what rules are unsupportable in principle and evil in action; (4) what rules are functionally or otherwise desirable, but have been established upon grounds that are unsound or inapplicable and which may lead in later cases to erroneous or unjust applications of the rule....

"So here, we think, is an inviting field for legal scholarship of a type for which the Institute is particularly competent. There are many forms it might take. It could begin, for example, with a critical examination of the contents of some one portion of the Restatement, chapter by chapter or section by section. Such studies may lead to a demonstration of desirability of legislation in some instances, with possible further cooperative work with the Commissioners. Or they may lead to such a pronounced adverse criticism in narrow situations that courts could feel free to change previous rules without waiting for legislative authority.

"....We have responsibility in the matter, more especially since the Institute's authority behind the Restatement may conceivably grow so great as to prevent or retard changes in adaptations of the common law which would otherwise occur through natural growth. We are in a position where we can effectively and helpfully promote that growth, not retard it."

Such an enterprise seemed to some members of the Council to be too large a task to undertake. It is, however, smaller than the responsibility the British have reposed in their new Law Commissions for England and for Scotland, charged by the Act of 15 June, 1965 with the duty "to take and keep under review all the law with which they are respectively concerned with a view to its systematic development and reform, including in particular the codification of such law, the elimination of
anomalies, the repeal of obsolete and unnecessary enactments and generally the simplification and modernisation of the law . . . ." If we cannot work back through the Restatements with a view to finding where the law that we have stated is in need of renovation, should we not at least make clear, as we proceed, the areas in which we think such renovation is in order, especially when we believe the task to fall within the province of the courts of last resort under a proper view of the judicial function?

I do not ventilate these questions to invite the substitution of mere personal opinion for the objectivity that gives distinction to the Institute's Restatement of the Law. My purpose rather is to ask if we are not obliged in our own deliberations to weigh all of the considerations relevant to the development of common law that our polity calls on the courts to weigh in theirs.