V

LUNCHEON ADDRESS

By Professor G. Edward White
(Representing the class of new life members of ALI)
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The Tuesday luncheon session
honoring new life (25-year) members
and new 50-year members
convened in Salon III of
the Ritz-Carlton, Washington, D.C.,
on May 21, 2013.
President Roberta Cooper Ramo presided.

President Ramo: I have to tell you, my feel-ings are a little hurt now, because Judge Lynch pointed out that he had enough moral authority to quiet a room and requires a whole lot more of that on my part.

One of the most interesting things that I get to do as President of The American Law Institute is look through a lot of lists of things, and early on I looked through the list of people who were in this class and saw many names; this is an extraordinarily distinguished group of people. As usual, I got on the phone with our Director, Lance Liebman, who, by the way, has a terrible cold, and that is why he is not here, and we should all be grateful. So if you noticed me scooting as far away from him as I could get yesterday, it was not a political statement.

I said, "Well, Lance, this is really a remarkable class, there's sort of one name I see," and he said, "Oh, well, you don't have a choice." He said, "The preeminent legal historian of our generation is Professor White at the University of Virginia Law School." Happily, I knew that, Ted, and I, too, had my eye on your name.

You can tell, from the biography that is in front of you, things that I will not repeat, except to say that the very idea that one could teach, write 15 books ranging from Oliver Wendell Holmes to baseball, which maybe isn't such a reach, I don't know, I have to think of it a little bit. But the reason my eye was on Professor White's name was for a slightly different reason, and that is, as some of you who know me well know, I worry about things, and I used to worry a lot about poets and how we are going to have poets in our world, and recently I have started worrying more. I had started worrying more about historians, and I worried a lot about the state of the law and how we pass on the culture that is so important to the vibrancy of the American legal system. But as I began more seriously to read, in print and on my Kindle,

Ted, some of your books over the last few months, I am not so worried anymore, because not only is your work important, informative, maybe more importantly it will be inspiring to generations of legal historians and legal biographers that come.

It is my honor on this very special day to introduce, from your class, Professor Ted White. (*Applause*)

Professor G. Edward White: Thank you. It is very nice to be here, and it is reassuring to hear that there are some audiences left for my work, Kindle or not. The culture of reviews has changed significantly since the last time I wrote a book, in a somewhat dismaying fashion. You have to Google yourself in order to find out your reviews. But I am not here to talk about that.

I thought I would take the occasion of the 90th anniversary to do a brief history of the Institute's activities from the Second World War to the present. I am picking the Second World War as a starting point because I wrote an article that came out several years ago on the period between the formation of the Institute in 1923 and the criticism of the first Restatements and the ALI's response to that. [G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 Law & Hist. Rev. 1 (1997).] So I am picking up the story at the point where the ALI decides to commission Second Restatements and also to initiate the model-legislation projects.

You may recall that the nub of the criticism of the first Restatements was that they failed utterly to respond to the idea that American common-law subjects were in a process of continual growth and change, and to simply restate the black-letter law without any accompanying commentary gave a misleading and fallacious assumption that somehow these subjects became static around black-letter rules.

Now the Institute's hierarchy, I have a published version of this address coming out in *The Green Bag* [G. Edward White, *From the Second Restatements to the Present: The ALI's Recent History and Current Challenges*, 16 Green Bag 2d 305 (2013)], and I am going to spare you much of the detail of that, but I used the internal sources that were actually supplied by the ALI itself. The ALI has a number of pub-

lications most of you know about but are not generally known to the scholarly world, but they are also quite revealing about how the ALI is thinking about things, and one of the things the ALI did around the Second World War was to commission a committee chaired by Learned Hand to investigate the idea of the Restatements and propose reforms, which the Hand committee did and which the ALI decided to adopt.

Now that, I think, that episode from the initial formation through the decision to have Second Restatements of a different form amounts, in retrospect, to the first of three crises that the ALI has faced. So what I am going to do today is to review those crises and try to link them to broader themes in American legal culture in the late 20th century.

The first of the crises involving the critical reaction to the Restatement, I think, pivoted around the idea about whether uncertainty and complexity, which were the two concerns that the founders of the ALI addressed in the 1920s—the ALI came into being in large part because this group of elite legal professionals was trying to respond to uncertainty and complexity, uncertainty in the sense of not being able to know what the law was, complexity in the sense of not being able to retrieve what the law was because it was showing up increasingly in numerous jurisdictions in numerous forms.

I think it is fair to say that by the time the Second Restatements were commissioned, the ALI had internalized the criticism of the first Restatements in a way that suggested that uncertainty and complexity were perhaps endemic in American law, that it was not possible to reduce American common-law subjects to black-letter rules that would remain static over time, and moreover, complexity was inevitable because the common-law and statutory projects responded to growth and change in the culture, and that was just the way law worked, so complexity was something that one should relax about rather than trying to fight.

Now there were two other dimensions of the ALI in its formation that also ended up precipitating crises that occurred chronologically later than the first crises involving the Restatements.

The first of the dimensions of the ALI in 1923 was that it was conceived of by its members, as well as others, as a group of independent, elite legal professionals basically drawn from three cohorts—the judiciary, the practitioner cohort, and the legal academy—but the members of the ALI were approaching its work, the idea of law reform, independently, not as representatives of clients or spokespersons for particular interest groups. They were approaching these issues as individuals, and this was part of their image as professionals who were capable of detachment, objectivity, integrity, and distancing from client concerns. That was so broadly shared by the membership that it wasn't even considered as an issue on the table.

Another generally shared set of values revolved around the fact that these cohorts of the ALI membership were perceived of as essentially doing the same thing, being centrally concerned in their legal work with the same sorts of issues, whether they were judges, practitioners, or legal academics.

If we think back to that time and, indeed, to much of the 20th-century history, it was not at all uncommon for elite practitioners and judges and legal academics to be collectively interested in the course of doctrine, in the application of doctrine to cases, in the generation of doctrine, and in the intricacies of doctrine, and it really did not matter in which cohort one was situated; this was a central concern. So the idea, then, is that the ALI is a group of independent professionals with shared academic, if you will, or intellectual concerns.

I think both of those assumptions have ended up being significantly modified by developments in the legal profession over the rest of the 20th and early 21st centuries, and in two instances these developments have resulted in what I am calling crises; perhaps that term is too strong. The ALI certainly responded effectively to the first crisis, and I think they can be said to have responded effectively to the second, and the third is ongoing, so I don't mean to be painting a gloomy picture here, just narrating events.

Now the ALI, under the directorship of Herbert Wechsler, was embracing the idea of, first, law evolving over time and the Restate-

ments and the statutory projects reflecting that development, but also the idea that it was less easy to separate the normative and declarative dimensions of law, the difference between the law as it was, so to speak, and the law as it ought to be or might be in the future.

There is an episode that Wechsler recounts very proudly in an address he gave in 1968. He had, in reports to the ALI in 1966 and 1967, raised this same issue that was referred to earlier in the ceremony honoring Geoffrey Hazard that it was rather difficult to distinguish between the law as it was and the law as it ought to be, and indeed the Restatement should not try to make that distinction but should engage itself with projects that had an aspirational element, that made predictions about what the courts might be doing, that accepted the idea of legal change.

Wechsler proudly noted that there had been a dissent from this position, and two members had expressed grave concern over the ALI's potential abandonment of its long-standing practice of declaring the law as it was, as apart from the law that members attending meetings thought ought to be or might be adopted by courts in the future. Wechsler says this dissent was filed, it was considered by the Council, and the Council unanimously adopted his position, namely, the position that the ALI would be pursuing projects that could not be easily characterized as fully declarative but would have a normative and aspirational element.

So I took all that to be the ALI, under Wechsler, settling into a position where they essentially confessed that the first wave of criticism of Restatements was appropriate, they have adopted their policies to embrace that, they are moving on, and they are moving forward.

Now during Wechsler's tenure, I think perhaps to the surprise of Wechsler, another crisis began to surface, and this crisis, I think, was related to the second of those defining themes in the ALI's formation, the idea of lawyers as independent professionals. Wechsler retired from the directorship in 1984. At the end of his tenure, he called attention to activities involving the project on Corporate Governance in which a group called the Business Roundtable had intervened and lobbied for

particular positions. Wechsler described this as a frontal attack on the integrity of the Institute and the nadir of his experiences as Director.

What he meant by that was that there was a difference, for him a qualitative difference, between recognizing change and folding in change to legal doctrine, and openly lobbying for self-interested positions that might benefit one's clients, and by the time this deliberation took place, in-house counsel were more frequent in the ALI's membership, and the ALI meetings had taken on a somewhat different character so that certain projects, Corporate Governance being one, became lightning rods for adversarial positions.

This is conveying a different sort of message from the message that was conveyed in the ALI's formation. It is that members of the ALI are less independent professionals and more potentially in the service of their clients, and so they are, in some ways, not able to shed their professional roles fully and become independent in their ALI work in a manner that they are not so independent in their practice.

Of course, at this time, the nature of the law practice is changing. Firms are getting much bigger. Clients are getting more sophisticated. Spinoff firms are being created. Competition is rife within the elite sectors of the bar. People are spending more time attracting clients and recruiting clients, and so, in some ways, as the nature of law practice changed, the idea of shifting from being a rainmaker or being a recruiter or thinking continuously about how one is going to attract clients to the sort of work of ALI is a little more abrupt, and some of it has begun to move over. So we get not only the Corporate Governance episode, but we get two events in the 1990s, first an Annual Meeting in 1995 involving the project on products liability, the Products Liability Restatement, in which representatives of insurance companies and representatives of plaintiffs and defense lawyers go through the same kinds of lobbying techniques that were present in the Corporate Governance project, and this stimulates Council the next year to make a rule stating that when one comes to an ALI meeting, it is anticipated that clients' interests will be left at the door.

Now the very fact that that rule is stated suggests that there has been a sea change from the original conception of what ALI membership meant and what lawyers did in the 1920s. Well, if one looks at the next decade, the ALI has actually, to some extent, resolved this problem or at least responded to it in an interesting way.

I found a handbook called *Capturing the Voice of The American Law Institute*. I am sure some of you are intimately familiar with it, but I wonder how many of you know it at all. It was prepared for Reporters and Advisers of ALI projects, and it adopts a different terminology, or let's put it another way: It officializes an existing terminology that the ALI was developing.

There are four kinds of projects that are listed in the handbook, and they are described in somewhat different terms. The critical feature in the description is that some projects are described as mainly declarative, some projects are described as wholly normative, some projects are described as somewhat in between, and a fourth project, a fourth category, "Studies," is described as sort of preliminary to the others.

I will just give you a little language from the handbook: Restatements are "clear formulations of common law and its statutory elements or variations," reflecting "the law as it presently stands or might plausibly be stated by a court." Notice they have retained Wechsler's idea of semi-predicting in the Restatements, but they have also made it clear that the Restatements are primarily declarative.

The Model Penal Code, those projects are called "Legislative Recommendations," and they are described as assuming "the stance of prescribing the law as it shall be." That is, these are normative recommendations, and, of course, the people recommending, the ALI Reporters and Advisers, are not the members of the legislature, so they are not enacting them, but they are taken to be aspirational.

The Principles category is described as assuming "the stance of expressing the law as it should be, which may or may not reflect the law as it is"; a combination, then, of the declarative and normative elements.

Now the Principles category got its momentum primarily, I think, from the skirmish on Corporate Governance. I think Corporate Governance, I may be wrong about this factually, but I believe that Corporate Governance, in its initial stages, was not conceived of as a Principles project. Indeed, I don't think the category of Principles was well defined, but it became clear over the course of the Corporate Governance project that this was not just a matter of articulating the business-judgment rule; this was a whole series of proposals about how corporations should govern themselves and necessarily had normative elements, and somehow the idea of calling it Principles, rather than calling it a Restatement, made it appear more aspirational and less declarative.

And then finally, studies are described as projects "that analyze in depth particular areas of the law," so as to lay "the practical and theoretical groundwork for subsequent black-letter propositions." That sounds as if these are preliminary Restatement projects, but really studies, in the terminology of the ALI prior to this handbook, were just preliminary studies, just whatever people were doing prior to embarking on one of the other categories.

Now, what does this represent? I think what this represents is yet another recognition on the part of ALI officialdom that the line between declarative and normative in generating law reform is endemic and blurred. It is not going to be possible to rigidly separate the one from the other, and one should just recognize this. There may be degrees and the categories are designed to reflect the degrees.

So I think, in a way, and moreover, that the episodes in Products Liability and in Corporate Governance suggest that it is perhaps inevitable that the legal profession will have a political, adversarial, normative dimension and that deliberations over doctrine will include that dimension.

So, in a roundabout way, this is kind of another confession and adaptation, both on the side of recognizing the changes in the legal profession and recognizing the fact, in American jurisprudence, that you cannot rigidly separate declarative and normative legal propositions.

That gets me to the third of the so-called crises, and again, let's go back to the 1923 Meeting, and I stipulated that those members, drawn from three different cohorts, had comparable views of the central dimensions of their work. They occupied different roles, representing clients or teaching students or being on the bench, but they were essentially doing the same thing, and let me illustrate how powerful and long standing that conception of legal work was.

This is a story that Lance Liebman has told repeatedly, so many of you may have heard it. When Lance Liebman joined the Harvard Law faculty in 1970, one of the members of the faculty, who was then emeritus, was Austin Scott; Austin Scott, the legendary trusts scholar. Scott had joined the Harvard faculty in 1909. He was emeritus at 85, but he was still active. He wrote the Restatement of Trusts; he had written a treatise on trusts. He was working on various projects.

It turned out that Lance's office and Scott's office were in the same wing of what was then called Langdell Hall, now called Areeda Hall, on the second floor. And Lance said to me that he became accustomed to going into Scott's office early in the morning when he would come in, he said, in part, just to make sure that a man of his age had survived the night, (*laughter*) but they became friends, although Lance was never quite clear that Scott knew who he was. (*Laughter*)

But on one morning, Lance came into Scott's office, and Scott said, "Lance," and this was a signal that Scott in fact did know who Lance Liebman was, "Lance, to be great, you need to write a Restatement, a casebook, and a treatise. Seavey wrote a Restatement and a casebook, but he never wrote a treatise." (*Laughter*)

Now if you think of those projects as defining greatness for legal academics, what are they all about? They are all about doctrine, synthesizing doctrine, explaining doctrine to students, perfecting the analysis of doctrine. They are all endeavors that anybody in the legal profession could relate to, whether they were a judge, whether they were a practitioner, whether they were legal academics.

Imagine that conversation taking place in a law school today. It just wouldn't. It just wouldn't. Junior scholars are not inclined to do

casebooks. They are not particularly rewarded for doing casebooks. They are certainly not inclined to do treatises, the amount of work that that takes and the relatively limited recognition that that now gets in most sectors of the legal academy, and, of course, they are not in a position to do Restatements, and moreover, probably wouldn't be inclined to do Restatements.

So the conversation, if a junior scholar would come into the equivalent of Austin Scott's office today, it would probably be something like, "If you want to be great, you need to do interdisciplinary, ambitious, theoretical, sophisticated, empirical, and inaccessible work." (*Laughter*)

Now that is perhaps an exaggeration, but it is not too far from what might be called the incentive structure for juniors in the academy today. It is certainly what is weighed heavily in the tenure decision, and if one looks over the lists, and I just did this as an exercise on the train up this morning, I took "Top 10 Law Schools" and looked at the list of ALI members and asked myself, I don't know all of the names, but I am fairly familiar with junior faculty at most of these institutions, not very many junior faculty on the ALI membership.

So what I think is happening, and I don't know whether I want to call this a crisis—before I say that, there is another dimension to it, of course, and that is the continuing pressure on people who are in the elite sectors of the practitioner cohort of the legal profession to rainmake, to compete for clients, to do other than reflect on the development of the law and legal reform in depth. Query whether people of that sort have time and, even if they had time, inclination to pursue ALI projects in depth.

The ALI has, quite rightly, recruited its Advisers and Reporters from academic ranks and from ranks of persons who feel that they have time to devote to intensive analysis of ALI projects. If the incentives of people in the academy are pointing in different directions, how many people at the junior and mid-range stage of their careers are going to be inclined to get involved in the kind of commitment it takes to be a Reporter, or even an Adviser, on an ALI project? I think it is a potential concern.

I think, more basically, the gap between what specialists in the various cohorts of the profession do, and this includes the—everybody talks about the difference between judges and legal academics and how judges don't care about or read about most of the things in law reviews, which is undoubtedly so, but there is also a growing gap between judges and practitioners. What practitioners spend most of their time doing, in many instances, is not directly connected to the work of judges. Practitioners are often no more familiar with recent judicial decisions than they are with recent scholarship.

So I think, as a general matter, this is a concern. Now this is an institution that has very successfully, for its history, bridged that gap, that has been a forum for people from the various cohorts to get together and talk about areas of common ground and share expertise. I think that is a great thing. I think that is one of the distinguishing features of the ALI. I don't know of another organization in the legal profession here or elsewhere that has been able to do that, but I think, to some extent, that is under siege, unless we work at closing this gap.

Now the ALI has taken some steps, and I think they are useful. The prize awards to junior scholars suggests that not only does the ALI want to recognize these, but they have to read their work, they have to pay attention and actually decide what they like in current scholarship, so that your audience is not just your specialist peer in some other law school.

It is also a recruiting device. Sometimes the experience will be sufficiently favorable that the scholar may come on board a Restatement or other sort of project.

There are other things one could do. I myself favor the idea of maybe making preliminary forays and identifying prospective Reporters or Advisers on projects and asking them to sketch out prospectuses in which they could investigate how much they want to commit to the field, and others could think about how promising some prospective Restatement or other project might be without the kind of deep commitment that the Reporter process takes.

I think that Lance has thought a lot about this, and Dan Meltzer has thought about it, and I am sure the ALI will come up with some ingenious solutions. But I just want to identify the problem as being bigger than just getting somebody to be the Reporter for Project A but rather an intra-professional problem that I hope we can do something about.

It is still my experience, when I go to meetings with people like yourselves or people from the bar, that I have delightful conversations, that I find out how intellectually stimulating their company is, that I wish I could spend more time with them, I wish we had more common ground. Having done that, I go back and I retreat to my insular concerns. (*Laughter*)

So in conclusion, it is not a fully sanguine history that I have presented, but I do not want it to be thought as ending in a downer. This is a great organization, and I am sure it will survive. Thank you very much. (*Applause*)

President Ramo: Well, first let me say that it is one thing to read history in the far past; it is another thing to have a historian talk about you. I am just personally grateful that nobody told you what we did about the Rule Against Perpetuities, so if everybody could keep quiet about that, I would really be grateful.

Professor White says he—and we have time for maybe two questions. Any questions that anyone would like to ask?

Well, let me say, on behalf of your class, let me present you with your signed certificate making you a life member. We are very grateful for everything you do, including pointing out to us in the most sincere, helpful, and erudite way what we need to do to go forward and remain an important part of the American judicial institutions. Thank you, Ed. (*Applause*)

Professor White: Thank you all.

(Applause)