

RESTATEMENTS AND LEGAL CHANGE:
PROBLEMS OF POLICY IN THE RESTATEMENT WORK
OF THE AMERICAN LAW INSTITUTE*

HERBERT WECHSLER**

Chief Justice Williamson's kind offer of a place on the agenda of this meeting is an honor that I much appreciate, the more so since you know my limitations from my presence on a previous occasion some eight years ago. It also is a welcome opportunity to talk about the enterprise that has become my main preoccupation, the work of the American Law Institute, in the one place where so substantial a percentage of the Institute's most valued members *ex officio* can be found. Would that your sessions might be timed to facilitate your presence at the meetings of the Institute in May, but I appreciate that terms of court may not permit that possibility. This makes me the more grateful for the chance to render an account of Institute activities and seek your guidance on some current problems.

I.

A word of background may be useful at the start. The Institute was founded, as you know, in 1923, as a permanent organization "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to carry on scholarly and scientific legal work," to quote the charter of incorporation that bears as its first signatures the names of William Howard Taft, Charles Evans Hughes and Elihu Root. It has been steadily at work for forty-five successive years, under the presidencies of George N. Wickersham, George Wharton Pepper, Harrison Tweed and, since 1961, Norris Darrell.

During the first twenty years of its existence, it produced the nineteen volumes of the first restatement (RESTATEMENT OF CONTRACTS [1932], AGENCY [1933], CONFLICT OF LAWS [1934], TRUSTS [1935], RESTITUTION [1937], TORTS [1939], SECURITY [1941], JUDGMENTS [1942], and PROPERTY [1944]), in addition to four model statutes (MODEL CODE OF CRIMINAL PROCEDURE [1930], MODEL YOUTH CORRECTION AUTHORITY

* A paper presented to the Conference of Chief Justices at its 20th Annual Meeting, Philadelphia, August 1, 1963.

** A.B.; LL.B.; LL.D.; Professor of Constitutional Law, Columbia University School of Law; Director, American Law Institute; Member of the President's Commission on Law Enforcement & Administration of Justice; Member of the N.Y. State Commission on Revision of the Penal Law and Criminal Code.

Act [1941], Model Youth Court Act [1942] and MODEL CODE OF EVIDENCE [1942].

A brief recession of activity during the second world war was followed by the drafting, in collaboration with the Commissioners on Uniform State Laws, of the Uniform Commercial Code [1952, revised 1958], the preparation of the Model Penal Code [1962], a Tax project, including important work on the technical improvement of federal taxation, especially the income tax [1954, 1958], and, [starting in 1953] the continuing production of Restatement Second. Agency [1958], Trusts [1959] and the first two volumes of Torts [1965] have been completed; the rest of Torts and Conflict of Laws are near completion; and the work in Contracts is well under way. Moreover, the Restatement of the Foreign Relations Law of the United States [1965], which took ten years of work, is a new topic in the series.

At last May's meeting, two of the important projects of recent years were given Institute approval. The Study of the Division of Jurisdiction Between State and Federal Courts that Chief Justice Warren asked the Institute to undertake in 1959, consists of a proposed revision of the portion of Title 28 of the United States Code that defines the jurisdiction of the federal District Courts, together with a valuable supporting commentary. The Federal Estate and Gift Tax project presents a series of important recommendations for improvement of the present statute taxing transfers *inter vivos* and on death, accompanied by an extensive study of the major problems of that field by Professor A. James Casner of the Harvard Law School.

The completion of these studies leaves as the main features of the current program the restatement work in conflicts, torts and contracts that I previously mentioned, and two major legislative projects. These are: (1) the preparation of a Model Land Development Code¹; and (2) the further development of the Model Code of Pre-Arrestment Criminal Procedure, on which work began some years ago. In addition, the Permanent Editorial Board for the Uniform Commercial Code, established by the Institute and the Commissioners, has inaugurated a full reexamination of Article 9 of the Code. The results of this study will in due course be published and submitted to the Institute and the Commissioners.

As this brief sketch discloses, the emphasis of our programs has been shifting through the years from the Restatements to some legislative form, be it a Model Act, a proposed code or the proposed revision of specific legislation. The shift reflects important changes in prevailing views as to the role of legislation in the sound develop-

1. This governs the type of planning and control that now is typically dealt with by the statutes addressed to zoning, subdividing, city planning and urban redevelopment.

ment of our law and also in prevailing practice. I greet it with enthusiasm, I confess, not because I am deficient in respect for courts or for their contribution to the management and the coherence of our law, but rather for the reason that legislators are, as Chief Justice Traynor put it, "freer than judges to write on a clean slate, in terms of policy transcending case or controversy, and to erase and rewrite in response to community needs." What our law requires most and will increasingly require in the future is that systematic reexamination and re-thinking at the legislative level that is not within the competence of courts as such, though its effective consummation does require all the insight that judicial experience provides. The Institute is, happily, a unique forum for such work, resting as it does on the collaborative effort of the bench, the bar and the best talent of the schools, a forum in which judges are as free as any legislator is to favor the removal of the encrustation in a field of law and a fresh legislative start.

Holding these views, as I do, you may well ask why I have chosen as my subject problems of policy in our restatement work, rather than some more exciting subject in the area Judge Learned Hand described in his last words to the Law Institute as "our ventures in law making: that is our model codes, which I dare believe will in the end be the most important part of our work."²

I have at least three reasons for my choice. The first is that of all of our work, the Restatements speak directly to the courts and especially to the highest courts in which the members of this conference preside. The measure of their utility to others is essentially their usefulness to you. The second is that we have and must undoubtedly maintain a continuing commitment to keeping the Restatements current and to improving them in every way we can. Even if the codifying impulse should reach the fields with which they deal, as it has so suddenly in England, the Restatements will afford vital insurance that what Judge Cardozo called the "verdict of quiescent years" will not be lightly disregarded. You may be certain that the British Law Commission, which has now begun to codify the law of contracts, includes the Restatement in the sources it will use in that great work. The third, and what my mentor Karl Llewellyn would have called the *real* reason, is that our work in the Restatements, and some things that I have said about that work, have recently been attacked. It is with that attack, and with problems that have been suggested by it, that I mean primarily to deal.

II.

The occasion for the attack was the action of the Institute in approving RESTATEMENT (SECOND) OF TORTS § 402A, a new section

2. 1961 ALI PROCEEDINGS 390.

that affirms the strict liability of the vendor of "any product that is in a defective condition unreasonably dangerous to the user or consumer or his property" for "physical harm thereby caused to the ultimate user or consumer, or to his property," if "the seller is engaged in the business of selling such a product" and "it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold."

The Section was before the Council and the Institute in three successive years. (1962, 1963, and 1964.) It was first submitted by Dean Prosser, the Reporter, in a form that limited the rule to sellers of food and products for intimate bodily use, like cosmetics, where the liability was first imposed by court decisions. The Institute approved the statement as applied to such products in 1962 but asked the Reporter to revise the comments, which he did in 1963, with Institute approval. The Section would, indeed, have been included in Volume 2 of *TORTS 2d* in that form but for the conscientiousness of the Reporter, who observed that "the case law has been expanding with explosive force."³ The Reporter noted that beginning with a case in Michigan in 1958, decisions had extended the strict liability "to such things as animal food, automobiles, tires, airplanes, airplane instruments, grinding wheels, cinder building blocks, herbicides and insecticides, combination power tools, a power golf cart, children's playground equipment, a chair, a riveting machine, a water heater and the like." He estimated that there were some sixteen jurisdictions in which such extensions had occurred, including New York, New Jersey, California, Connecticut, Michigan, Iowa, Tennessee, and to a limited extent at least, Pennsylvania, Florida and Missouri. "Obviously," said Dean Prosser, "something has been happening which is rapidly expanding the case law." Seeing this, he felt obliged to call the matter to the attention of the Council, which agreed that the Institute should be given the opportunity to change the Section to apply to all products sold by one in the business of selling such a product, if it is expected to reach the consumer in the condition in which it is sold. On resubmission of the issue to the 1964 Meeting, in view of the extraordinary case development, the more generalized statement of the rule was approved by a voice vote.

Following the publication of volumes 1 and 2 of *RESTATEMENT (SECOND) OF TORTS*, the Defense Research Institute, Inc., an organization of attorneys specializing or particularly interested in the defense of tort claims, published a brief "directed to the American Law Institute . . . and to all American trial and appellate courts and to the bar generally" arguing that Section 402A as adopted was a minority rule, unsupported by and inconsistent with the most recent decision of the highest courts of a majority of states. This being so, the brief con-

3. 1964 ALI PROCEEDINGS 349.

ended that the Institute's adoption of Section 402A was "an unprecedented departure from its traditional role," a departure that "threatens to undermine the confidence of the American courts and the legal profession generally in this authoritative institution in restating the law." The "error of Sec. 402A" was said to be "that it is but a mere prophecy and not a restatement of this law." The Institute was said to have "exceeded its bounds of authority by approving a forecast of the law as the restatement of the law" and was asked to "correct its error by restating the law to be what it actually is" (Foreword, p. 1), not "what some members think it should be" (p. 17).

The Council paid no attention to the brief, since its members and the members of the Institute were well aware when they approved Section 402A that decisions in support could be adduced in only a minority of states; whether the number was sixteen as the Reporter thought or six as the Defense Institute submitted would not have altered their opinion as to the direction that the law was taking on the strength of its momentum in that course. The action of the highest courts upon the issue in the intervening years surely yields no basis for regretting such a judgment.

The matter could no doubt have rested there and would have, I suppose, had I not chosen to pursue it in more general terms in my Annual Report for 1966. I did so, I may say, less because of the brief than because of statements at the 1965 Meeting by my friend Fred B. Helms of North Carolina⁴ and Laurent K. Varnum of Michigan,⁵ positing, as it appeared to me, too simple an antithesis between an affirmation of what the law is and what it ought to be. The issue that aroused my interest, and that it seemed to me the Institute had had to face from the beginning, was "how far a judgment as to what the law should be legitimately plays a part in reaching a decision as to what it is."

Putting the problem in this way, I ventured to suggest that it could not be 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."⁶ 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 said in the same paper, to adapt law to "changing conditions in a changing world."

I asked, therefore, if the statement of a rule does not involve something more than the conclusion that it is supported by the past

4. 1965 ALI PROCEEDINGS 346.

5. 1965 ALI PROCEEDINGS 355.

6. Lewis, *History of the Restatement*, RESTATEMENT IN THE COURTS, at 19 (1945).

decisions, namely, 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 answers 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?

I noted that the Institute had been responsive to such questions in situations where the books reveal "opposing lines of authority"⁷ and that Judge Goodrich in his 1948 Report of the Director⁸ had expressly stated that in "cases of division of opinion a choice had to be made and naturally we chose the view we thought was right." 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 would not be thought to be conclusive. And when the Institute's adoption of the view of a minority of courts had helped to shift the balance of authority, it was quite clear that this was taken as a vindication of the judgment of the Institute and proper cause for exultation.

Given all this, I asked in the Report if the Institute was not obliged in its "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," meaning, of course, especially "the courts of last resort under a proper view of the judicial function." I might have added; though I carefully refrained, that even as a law student forty years ago I knew that germinal opinions like those of Judge Cardozo in the *Palsgraf* case,⁹ *MacPherson v. Buick Motor Co.*,¹⁰ or *Ultra-*mares Corp. v. Touche, Niven & Co.**,¹¹ had been embraced in the drafts of the first Restatement long before they had much following in other courts, in the view that they were right and should be followed; and that this was the very process the Reporter, the Council and the floor had pursued in adopting Section 402A.

Again, I think the matter might quite well have rested there, since annual reports of the Director are documents that normally are treated with intelligent neglect—had I not been so pleased with my own words that I assumed to press it further. Reporting to the Institute in 1967, I repeated what I called "a working formula" that "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."¹² And while I had the wit

7. Goodrich, *Restatement & Codification*, DAVID DUDLEY FIELD CENTENARY ESSAYS, 242 (1949).

8. 1948 ALI PROCEEDINGS 18.

9. *Palsgraf v. Long Island R.R., Co.*, 248 N.Y. 339, 162 N.E. 99 (1929).

10. 217 N.Y. 382, 111 N.E. 1050 (1916).

11. 255 N.Y. 170, 174 N.E. 441 (1931).

12. 1967 ALI PROCEEDINGS.

to note that whether "this criterion will prove to be acceptable and viable can only be determined as the Institute is called upon to deal with situations that invoke its application," I asserted that the "statement of the principle has not, at least as yet, provoked dissent."¹³

A dissent was very speedily filed. The Defense Research Institute has an American Law Institute Liaison Committee, with a distinguished membership including its chairman Fred B. Helms and Laurent K. Varnum, to whom I have previously referred. A letter from Mr. Helms voicing the Committee's disagreement with my statement was followed by a memorandum to the Council expressing grave concern that the Institute is in the process of abandoning the long tradition that it undertakes in the Restatement to express established law, as distinguished from the law that a majority of those attending think ought to be, or will at some time in the future be, established by the courts. It called upon the Council to reaffirm the Institute's traditional policy or, in the alternative, make clear that it has changed. The memorandum was published by the Defense Institute last May¹⁴ and may have come to your attention. On the chance that it has not, I reproduce its major paragraphs below.¹⁵ The Council gave it full consideration at its meeting in March, 1968 and ended, I am glad to say, by giving its unanimous approval to the statements in my 1966 Report.

It was, of course, no new departure in the Institute's conceptions to declare that in our system of case law any statement that the law is such and such is more than an empirical finding that decisions have so held. It implies a normative assertion as to what should now be held, if and when the question is presented. This view was patently implicit in the claim for the Restatements of authority transcending any treatise, i.e., the authority of the collective judgment of those sharing in their preparation, namely, the Reporter and

13. *Id.*

14. 9 FOR THE DEFENSE, No. 5, special memo (May, 1968).

15. "Concern has been expressed that if the Restatements only state established law, rapid changes in common law may date the Restatements before they are published. It has also been suggested that there is a need for the Institute to avoid strengthening a rule which it is believed a careful court, mindful of the differences between judicial and legislative functions, ought to disapprove. It has been suggested that at a time when the common law is undergoing change in many areas, catching the principle of motion seems to be a vital part of any effort to describe the existing state of the law.

"The problem then appears to be whether the Institute wishes to undertake the responsibility for attempting to clarify the law for judges, lawyers, law professors, and students of the law by trying to catch, in mid-air as it were, what is felt to be principles of motion or change. One of the difficulties resulting from such an endeavor may be that the Restatements will place the Institute in the position of being an advocate for change rather than an objective observer of that change. Who can say with any accuracy that a court which may at some time in the future adopt section 402A will not do so principally because of the imprimatur placed upon it by the Institute. It would be equally difficult to determine if the Institute's prediction did in fact come true in the natural course of events or if the prediction itself caused the change. . . ."

Advisers, the Council and the members sufficiently concerned about the subject to participate in its consideration.¹⁶ To make the point explicit is, however, of importance in restatement work, precisely for the reason that it shows and measures how much scope there is for seeking to exert an influence on the performance by the courts of their enormous task of managing, maintaining and reshaping the non-statutory law. It permits the Restatements to attempt to be what they have been and are in fact, a modest but essential aid in the improved analysis, clarification, unification, growth and adaptation of the common law. The fresh analysis, for instance, that has been embodied in the drafts of *CONFLICTS SECOND*, that owes so much to the opinions of Chief Justice Traynor, Chief Judge Fuld and others of your number, would have been impossible in a Restatement, if the view that I describe had not obtained.

III.

The principle accepted by the Council has, it seems to me, important implications beyond reaffirming the position that the Institute is not obliged to govern its appraisals by a count of jurisdictions. It should operate, or so it seems to me, to liberate the process of restatement from any surviving rigid limitations, like the dogma that a rule supported by decisions must be stated in the absence of a cleavage of authority, without assessment of the influence that such decisions would or should exert on a contemporary court, or the dogma that a rule that we restate, may not be criticized by caveat or comment, simply because it would be uniformly followed by the courts.

Dogmas such as these developed in the days of the first Restatements, with their magisterial pronouncements, limited commentary, taboo on the citation of decisions, exclusion or, at least, subordination of all statutory matter and elimination of the Reporter's explanatory notes from the official publication¹⁷ (with the exception of important deviations in the *RESTATEMENT OF THE LAW OF PROPERTY*.) These were the points of criticism thirty years ago, a criticism well supported in today's perspective, on which the critics won the day with the inauguration of *RESTATEMENT SECOND*. Protesting it would ne'er consent, the Institute consented, as Judge Goodrich took the place of Dr. Lewis as Director.¹⁸

The intervening years brought steady progress in restatement method, under the benign but forthright aegis of Judge Goodrich.

16. See Note 6 *supra*, at 9. 18.

17. See Leach, *The Restatements as They were in the Beginning, Are now, and Perhaps Henceforth shall Be*, 23 A.B.A.J. 517 (1937).

18. See, e.g., GOODRICH & WOLKIN, *THE STORY OF THE AMERICAN LAW INSTITUTE*, 12-13 (1961).

As the work proceeds today, the emphasis has shifted from dogmatic affirmation to, as near as may be, reasoned exposition. The black letter is accompanied by an extensive set of comments submitted to the Institute for its consideration and approval. There are no artificial rules as to the content of the comments. They are meant to be explanatory and expositive of the black letter; often, the main content will be there. When statutory developments have been important in a field, the statutes will be analyzed and noted. Witness the important change in this respect in the current revision of the RESTATEMENT OF CONTRACTS. The Reporter is encouraged and expected to marshal the decisions on important issues in his Notes. They are published with the volumes, normally as an Appendix but in one case (Foreign Relations Law) immediately after the comments. The only difference is that the Reporter's Notes are his; they are not weighed or approved by the Council or the Institute, though suggestions for their change or their development are made.

Remnants of the old views persist, of course, regrettably it seems to me. There was an illustration when the Institute considered Section 402A of TORTS. The Section as proposed and as approved contains a caveat, stating that the Institute expresses no opinion as to whether the rules of strict liability apply, *inter alia*, "to harm to persons other than users or consumers." A member, Whitman Knapp of New York, suggested that it was absurd to think that if an automobile with a defective steering gear caused injury to the driver and to a pedestrian, the driver would have the benefit of a strict rule but the pedestrian would not. The Reporter replied that he agreed with Mr. Knapp's logic but that as the strict liability decisions were cast in terms of liability to users or consumers, he did not feel justified in formulating a broader rule. Mr. Knapp then moved to have the caveat changed to read that the "Institute expresses approval of expansion of the rule to permit recovery by such persons." There was some discussion of the merits of the question but the motion was defeated, primarily I think (and I presided at the time) on the ground that it was inappropriate in the Restatement (and especially in a caveat) to take a position, without decisional support, that a rule should be extended.¹⁹ If that is so, it seems to me unfortunate, whatever may be thought to be the merits on the point; and I venture no opinion as to that. If such a question were to come before your court and you consulted the Restatement, would you not be interested in knowing whether a Reporter and Advisers, who had given the entire question thought, perceived a basis for distinction, and, whether their conclusion seemed correct to two such bodies as the Council and the Institute in their review of the submission?

19. 1964 ALI PROCEEDINGS 367-372.

IV.

Twenty years ago when the Institute was taking stock of its achievements and its future, a committee of which Judge Learned Hand was chairman said in a 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. Very possibly it was and is. But if the Institute cannot work back through the Restatements, with a view to finding where the law that it has stated is in need of renovation, should it not make clear as it proceeds, the areas in which it thinks such renovation is in order, either by adjudication or by legislative change, indicating which is deemed appropriate?

I do not hesitate to state my own opinion that it should. Until it does, restatement work will make a smaller contribution than it can to the great task that lies before us: the continual refreshment of the legal system we have had the fortune to inherit and have the duty to maintain and to improve.