

Wednesday Evening Session  
May 17, 2000

The Annual Dinner of The American Law Institute was held in the Grand Ballroom of The Mayflower, Washington, D.C., on Wednesday, May 17, 2000.

**President Wright:** May I have your attention, please. It is already 9:30. We have had a pleasant evening. We still have what I believe will be very pleasant things to come, but I know also that at 9:00 o'clock promptly tomorrow morning the Institute gets back to work, and so we can't keep you unduly long.

Before I introduce the speaker of the evening, there are some other people who certainly need to be introduced, and what I look forward to at this dinner every year is the opportunity to ask the staff of ALI and ALI-ABA to stand. I think they do a wonderful job for us all year long. I hope they will all stand so that you can acknowledge them. (*Applause*)

We are particularly honored tonight to have not one, but two, members of the United States Supreme Court attending the dinner. I recognize full well that this is not an honor for The American Law Institute, it is an honor for our speaker, who is a friend of these two Justices, as he is of so many leaders of the American legal profession.

Justice Breyer spoke three years ago, I believe, to our Annual Dinner. My dinner companion was reminiscing about his speech and saying it was one of the best speeches she'd ever heard at an Annual Dinner. Justice Breyer, we are very happy to have you, sir. (*Applause*)

If memory serves, Ruth Bader Ginsburg was elected to the Council of the Institute when she was a law professor at Columbia and was a very active member of the Council during her years on the Court of Appeals for the District of Columbia. When she was elevated to the Supreme Court, she felt that she had to give up her membership in Council, but fortunately she has not given up her interest in The American Law Institute, and to have her always is a great pleasure and honor. Ruth. (*Applause*)

People have come from far corners of the world to this Annual Meeting. I know, for example, that we have four people from Australia who are here, and I am extremely happy about that, but I am going to introduce people who came a somewhat shorter distance but still a very long trip.

The Chair of the Council, Rod Perkins, was, as you all remember, my predecessor as President. For the last couple of years, he and Joan have been living in Moscow, where he set up an office for his law firm and will be

there, I guess, probably till the end of this year. He was not able to attend our December Council meeting because he had been here one week before for the 90th birthday party for our former Director, Herbert Wechsler. That was surely a wonderful reason for not coming back a second time in two weeks. That he is here, that they are here tonight is particularly remarkable given the fact that Rod in New York on Friday had an operation on his knee, but he was eager to get to the ALI, he was here in time for our lunch on Tuesday, he has spoken in the proceedings and been active, as always. Rod and Joan, will you please both stand. (*Applause*)

And something that I have never done before. It would be very hard to be President if you didn't have a wonderful wife. Custis. (*Applause*)

Our speaker tonight has been a friend of ours for many years. Lady Woolf and Custis were trying to decide whether it was 1987 or 1988 when they were in Austin and we met them for the first time. We have seen them several times since. We were guests at a magnificent dinner party at their house. It has been a great pleasure to know Lord Woolf, as he now is. He is both a great judge and a great procedural reformer.

As a judge, he has had a career that I think may very well be unprecedented in the English judiciary. He started out as a Judge of the High Court. When I first met him, I believe he was a Justice of the Court of Appeal. He went from there to the House of Lords. Then he was translated from the House of Lords to be Master of the Rolls, which is the top civil judge in England, and, in a development so recent that we don't even talk about it in the Program for this Annual Meeting, on June 6 he will become Lord Chief Justice. So he will have occupied every senior legal position in the English system except for being Lord Chancellor, and Lord Chancellor is really a political appointment rather than a judicial appointment.

If Harry Woolf had done only all those things, his would have been an extraordinary career, but that is not all that he has done. He has twice led groups that have made intensive studies of what is happening in the English justice system and recommendations how to do it better, one time on the criminal side, one time on the civil side.

A good friend of mine sent me, I got it only this week, the *Times* for May 2, 2000, and I realize you won't be able to see it very far, but I will tell you what it says, and you can at least see the pretty color. (*Laughter*) The headline is "Verdict of Woolf Shakeup: It's a Qualified Success." And if you read the article, it's a qualified success only because our friends in Britain have not yet provided the money to implement the things that Lord Woolf and his colleagues thought were needed to reform the civil-justice system. But the reforms in the system themselves, everyone who speaks about them in this article is extremely enthusiastic about how good they all are, and if only they would give us the people to carry

everything out we would really have a civil-justice system that would work much better.

I had been hoping for some years to get Lord Woolf to come to one of our Annual Dinners. He has been a member of the Institute for a number of years, and at last I was able to set a date more than a year in advance when he could come, and it is a real pleasure for me to introduce to you The Right Honourable Lord Woolf of Barnes. (*Applause*)

**The Right Honourable Lord Woolf of Barnes:** Well, President, fellow judges, fellow members of the Institute: It is a huge privilege to be able to come to Washington to join you at this Annual Meeting. It was a privilege which would have been even more rewarding for all who are here if, unfortunately, I hadn't now to address you, (*laughter*) because I am very conscious that following in Steve Breyer's footsteps is an almost impossible task.

I may say that the President did not warn me in advance just what standards have been set by the Institute. It has also been a huge pleasure, a pleasure which makes the journey by itself worthwhile, to be able to sit with Ruth Ginsburg, whom I have known for so long, and to see her husband, Martin, here, with his own bow tie. I say that because the last time that Martin had to wear a bow tie in our company was in England. He had not remembered to bring it with him. (*Laughter*) But he looks even smarter tonight than he did on that occasion.

I had, of course, read about the distinction of the Institute without coming here, but the time I have spent — and it has been a very short time that I have spent with you — has made me realize that the Institute is an extraordinary institution. It is quite remarkable the interplay which takes place between the members of the Institute who are judges, the members of the Institute who are academic lawyers, and above all, the members of the Institute who are practitioners. The Institute, in my belief, is performing a unique role, a role which I do not believe is performed in the same way by any comparable institution. You have something here which you really should treasure.

In England, when we have institutions we do not often change them. (*Laughter*) My very office personifies that. It has been going since the 13th century. (*Laughter*) It has evolved, but basically it has remained the same, and so I am rather sad to be changing my job, as you have heard, from Master of the Rolls to Chief Justice. I can tonight still do what I sometimes do, just give you an indication that there is no other office quite like the Master of the Rolls anywhere in the world. Chief Justices you will come across everywhere. (*Laughter*) (*Applause*) If you don't believe me, one of the places I have visited very recently was Gibraltar. They have two judges, a Chief Justice and a Deputy Chief Justice. (*Laughter*)

I obtain great satisfaction when somebody asks me what I do. When I say, "I am the Master of the Rolls," they look at me with complete bewilderment. (*Laughter*) I had to speak in France recently, and they thought they had the answer. They introduced me as the *le maître des petits pains*. (*Laughter*)

But, you know, this organization is fortunate to have as its President someone who has established himself as an institution in a single lifetime. He has an outstanding reputation on both sides of the Atlantic as a lawyer and as an academic and as an advocate. We tried hard to entice him to England, and I am glad to say that Custis and Charlie spent a marvelous 12 months in our country. He held a most distinguished visiting professorship, the Goodhart Chair.

In order to encourage him to spend as much time as possible in England, he was made an Honorary Fellow of Wolfson College, and, quite exceptionally for an overseas visitor, he was made a Corresponding Fellow of the British Academy, which is about as high an honor as we can bestow on anyone. But the year ended with instead of, as we hoped, his spending more and more time in England, back to Texas. (*Laughter*) I had a vision of Charlie and Custis on the range, guns on their hips, galloping across the prairies, (*laughter*) but Charlie made a great mistake. He caused me to receive an invitation to Texas University, and then I found out what he was really doing. I can tell you that in the senior common room at Texas University there is a chair, one chair which nobody dare sit on. That's Charlie's chair, and instead of being out on the range, when I saw Charlie in Texas he was occupying his chair, a very comfortable chair, and a chair which I can understand why he wants to fill. (*Laughter*)

Why I think the Institute is respected in the United Kingdom is because of its publications on American law. The Restatements have a huge reputation. It is the first source to which a foreign lawyer turns if he wants to know about United States law.

The Restatements help us to develop our own law. This morning I was attending the discussion on the paper on Restitution, and I learned, which I fully accept, that until you published your paper on Restitution we did not even know that we had a law of restitution. (*Laughter*) You, of course, may have forgotten since that time that you have a law of restitution, but the fact of the matter is that it is the buzz subject in my jurisdiction.

You know, just this year the House of Lords had to consider whether the tort of malicious prosecution should be developed. Should it apply, for example, to disciplinary proceedings? They held a position hitherto in our jurisdiction that had been quite clear, it only applied to criminal prosecutions. But counsel appearing on behalf of the appellant relied on the Restatement Second of Torts, 1977, § 674, which says that

the tort should apply to all proceedings. Lord Steyn gave a judgment with which all the members of the court agreed, so I assure the President it was a unanimous decision, (*laughter*) it wasn't a decision in respect of which there was any dissension, and they accorded the greatest respect to the Restatement. Lord Steyn said, and I quote, in this judgment which was given two months ago, "The Restatements are prestigious and influential publications, which are often cited by appellate courts throughout the Commonwealth.... For my part the citations from the Restatement on the present appeal must be accorded considerable weight."\* The House of Lords then went on to dismiss the appeal. (*Laughter*) I may say that the fact that this commendation was made by Lord Steyn had nothing to do with the fact that he is a member of this institution. (*Laughter*)

I know that the Restatements will not be to everybody's taste. Lewis Carroll's *Alice's Adventures in Wonderland*, as you will remember, asked, "what is the use of a book ... without pictures or conversation?" I have been searching, but I have yet to find a Restatement which has either pictures or conversations. I hope that next year that state of affairs will be remedied. (*Laughter*)

However, all legal systems today suffer from at least two complaints: The law is overcomplex, and the position is that it is too uncertain. One of the real problems facing appellate courts today is information overload. More and more decisions are being reported, and more and more authorities are being cited, so there is a real danger of courts being drowned in a sea of authorities. To have a bible to which you can cling, a sort of life belt, for lawyers and appellate judges must be marvellous. Oh that I was a judge of your Supreme Court and only needed to look at the Restatements. (*Laughter*)

The great achievement, as it seems to me, of the Restatements is that in an area of the law they provide a code, but they do not provide it in the form of legislation which is inflexible and rigid. They provide it in a form which allows it to develop and therefore does not stultify the strength and the greatness of the common law, and that, it seems to me, is the genius of the Restatements. They carry conviction because of the consultative process which takes place in their production, the sort of discussions that I have been able to witness while I have been here. It is remarkable that these Restatements are being continuously produced.

But if I may say so, even bibles of this sort should be treated with a modicum of caution. I don't know whether you know, as I do, the fate of Melanic II, the Emperor of Ethiopia. If the Emperor felt unwell, he believed that he had only to tear one or two pages out of the Bible, consume them, and then he felt better. If his testamentary intake was modest, they

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\*Gregory v. Portsmouth City Council [2000] 1 A.C. 419 at 429.

did him no obvious harm. However, one day he had the misfortune to suffer a stroke. He felt so desperately ill that he thought desperate action was necessary, so he ordered the whole Book of Kings to be torn from the Bible and for him to be fed the book page by page. Before he could consume the whole book, I have to report that he, unfortunately, died. Could there be better confirmation of Bacon's aphorism that some books are to be tasted, others to be swallowed, and a small minority chewed and digested? (*Laughter*) (*Applause*)

The next meeting, I believe, of the Institute is to be in London in conjunction with the visit of the ABA. We in England are extremely excited about this visit. We are hoping that it is going to be an enormous success. You are going to be able to have the opportunity of listening to our Prime Minister in the Albert Hall; that is, if his maternity leave is over. (*Laughter*) You are going to have the opportunity of attending the Royal Gallery, and you are going to find that this very conservative country is going through a period of immense constitutional and legal change.

The legal scene, I believe, in England has never been so stimulating. Both lawyers and judges are having to change their ways. On the whole, it is extraordinary how accommodating the legal profession and the judiciary have been.

In the 19th century, things might have been very different. The well-known English judge, Mr. Justice Griffiths Evans, lived in that time, and when he was told about reform his response was, "Reform? Reform? Don't talk to me about reform. Things are bad enough already." (*Laughter*)

The first of our changes involves a movement in the United Kingdom from a unified state to a federal state. Scotland now has its own Parliament. Wales has an Assembly. And if, as we pray, the negotiations which are now taking place in Northern Ireland are successful, after this weekend Northern Ireland will again have its own Assembly. This is constitutional change for a unified state of dramatic proportions. It will inevitably give rise to challenges as to the legality of the legislation passed by the devolved institutions. Highest courts are going to have to play, in relation to that legislation, a very similar role to your Supreme Court.

We now have for the first time an elected mayor of all of London. We have had and still have a Lord Mayor of the City of London. That has been the situation for over 600 years. Perhaps Dick Whittington was the most famous Lord Mayor. But we have never previously had a democratically directly elected Mayor, and the significance of his arrival on the political scene is underlined by the fact that our Prime Minister is not elected in that way, nor is the leader of the opposition. The new Mayor was elected Mayor without the support of either of the political parties, and indeed without the support of any political party, standing against a candidate from his own party.

Then there has been the reform of the House of Lords, with the expulsion of the hereditary peers, some of whose families have been members since the time of Dick Whittington. I am glad to say that the Law Lords have survived.

There are also the civil-justice reforms, for which I have to take a degree of responsibility, to which the President referred. Indeed, I believe them to be more fundamental than any reforms that have taken place in our jurisdiction. They start by introducing a new concept of what is meant by determining cases justly. They abolish the rules of evidence in civil proceedings. They finish by substituting readily understood English for Latin. You can well imagine that it was dropping Latin that caused the real concern. (*Laughter*) How can a legal system survive without it being possible for there to be an ex parte application which is sub judice for certiorari or mandamus made viva voce by a counsel acting pro bono as an amicus, which is adjourned sine die for a hearing de novo on evidence which is accepted de bene esse where the claimant is seeking to recover on a quantum meruit pro tempore? (*Laughter*) (*Applause*)

You will note I used the word "claimant." My youngest son, who, like my other sons, is a lawyer, told me that he has given up using the word "plaintiff" (which, of course, is still common parlance on this side of the Atlantic) in loyalty to his father. He now starts off his statements of case by saying, "In this case the claimant," open brackets, "hereinafter called the plaintiff," close brackets, has a claim for damages. (*Laughter*)

There are going to be similar changes made for criminal proceedings, and a similar process is taking place now. But I suspect that, of all these changes, the most dramatic is going to be implementing the European Convention as part of our domestic law. That is going to have a dramatic effect upon our whole legal culture. We have for a great deal of time had specific legislation that addresses specific problems. For example, we have had specific legislation, modeled in fact on yours, prohibiting discrimination on the grounds of race and gender. But that was legislation which was not of general application, although it had a constructive effect. One of the champions of our discrimination legislation was Baroness Helena Kennedy, and she has campaigned long and hard and is well known for her role in this work. She says, and I have no reason to doubt what she says is true, that she was recently traveling on a British Airways flight, and the air hostess came up to her and said, "Mrs. Kennedy, I thought you would like to know that all the staff on this aircraft, everyone, is a woman." Helena was delighted. She said, "Can I perhaps go into the cockpit in those circumstances?" And the air hostess looked at her with shock and said, "We don't call it that anymore." (*Laughter*) (*Applause*)

There are, however, going to be more fundamental changes as a result of the human-rights legislation. On the whole, English law has worked on the principle that it is the responsibility of the courts to enforce duties. What the human-rights convention is going to do is change the focus. Instead of the courts enforcing duties, making public bodies perform their duties, now there are going to be the individuals with the right to come to the courts and say, "Enforce my rights." Some are not entirely happy about this change. Speaking for myself, I felt that our family law was correct, in not talking about parental rights over children but referring to parental responsibilities.

While I welcome this change and have long advocated it, I think we have to be very careful to keep it in proportion. We don't want to become a society where we are always thinking that we have a right, and if something goes wrong we must be entitled to a remedy. (*Applause*)

I finish these remarks by reminding myself that we are in the Mayflower Hotel. (*Laughter*) One of the most important events that is going to happen during the ABA conference in London is a rededication ceremony at Runnymede. The principles of Magna Carta were transported to the new world by the Pilgrim fathers. Since then many of the principles have been infused with new vitality in this country and assisted in that by the members of this Institute. They have then been exported back across the Atlantic. The process has rather been like the motion of the ocean that divides our two nations. The tide goes out only to come back in again, affected by the process, which has taken place. It then goes out again, and it is my belief that within the common-law countries we have an immense amount to share. I think the fact, which is undoubtedly true, that English law is now being substantially influenced by the civil law of Europe has not had the effect of stemming the tide. I believe that it has meant that the two great common-law systems have more, not less, to offer each other. Perhaps English law is in a position to provide a gateway to greater understanding within this jurisdiction of the civil jurisdictions of Europe.

As the economy becomes global, and the United States, of course, has been a leader in bringing that about, so must our legal systems. There is more that we have in common than that which divides us. We have to continue to learn from each other. There are today bigger challenges facing the legal systems of the world than probably ever before. I have already referred to the fact that our citizens are demanding more from us than ever before. They are concerned by problems of access to the legal systems. They are concerned about the problems of rising crime, to which we seem not to have the right answers. I do not believe they are happy when they see more and more people being incarcerated for longer and

longer at greater expense, depriving other services of the community of the resources which they need. (*Applause*)

We are going to have to be able to meet these challenges. They are important for our citizens, they are even more important for those jurisdictions which have not the good fortune to have the advantages we have. The common law applies in a great number of countries where, unfortunately, the legal system is under huge pressure. Some of those countries are former colonies of the United Kingdom, where judges and members of the profession are trying to maintain the standards which they learned from us, and we have to set them an example and provide them with support. It can be an extremely lonely job being a judge, or even a practitioner, in some of these countries if you are trying to do your best to maintain the standards to which I have referred. If they are to maintain their integrity, if they are to maintain their independence, by setting them an example we can help them. We can provide them with the courage or help them to have the courage that they need to perform their difficult tasks.

I think this Institute has a huge contribution to make. Perhaps when I leave tomorrow to go back to England the thing that I will take away with me that is most important is the fact that the Institute is looking outside the United States. It is looking at the impact of what it is doing on the reforms in other jurisdictions. It is not taking an insular view but taking a broad view. That, I believe, is what we must continue to do.

So I thank you very much, Mr. President, for allowing me to come here. I thank you very much for listening to me so courteously, and I look forward to welcoming as many as possible of the members of the Institute to London later this summer. Thank you very much indeed. (*Applause*)

**President Wright:** You have now seen why for several years I have been hoping to induce Lord Woolf to come speak to us. That marvelous combination of substance and wit is something I associate with the British and the best of the British, and we have certainly heard it tonight.

I racked my brain earlier thinking is there any way that I can introduce Lady Woolf before I introduce Lord Woolf and I did not think that there was and so I now have the pleasure of introducing my long-time friend, Lady Woolf, who is every bit as charming and witty as her husband. Marguerite. (*Applause*)

I have only one disappointing thing to say to you before I declare the proceeding adjourned. When I declare the Annual Meeting adjourned tomorrow, I will declare it adjourned *sine die*. I still use Latin.

You suggested how useful the Restatements were for Justice Breyer and Justice Ginsburg and their colleagues. Unfortunately, the Institute has never produced a Restatement of Constitutional Law, which is the subject

on which they spend a large part of their time, but a very famous professor at the Harvard Law School, Thomas Reed Powell, did do a Restatement of Constitutional Law for a *Harvard Law Review* banquet. It had one Section and one Caveat. The Section said, "Congress may regulate interstate commerce but not too much." (*Laughter*) The Caveat said, "How much is too much is beyond the scope of the Institute." (*Laughter*) I suspect that my friends on the Supreme Court on both sides of Monday's opinion might well have used that.

It has been a pleasure having you all here tonight. I hope you have enjoyed Lord Woolf as much as I have. I have enjoyed having all of you present at our Annual Dinner. The dinner is adjourned, and I will see you at 9:00 o'clock in this room.