

What Would Law Teachers Like to See the Institute Do?

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Mr. President and Gentlemen of the Association of American Law Schools: It certainly is appropriate that the law teachers should talk about the future work of the Institute because, after all, it was through this Association that the Institute was started. It is due to the individuals who compose the faculties of the schools of this Association that the Institute has functioned successfully since its organization in 1922.

Since the American Law Institute was organized in 1923 it has been chiefly engaged on two main projects. One of them was the Model Code of Criminal Procedure. The Code was finished and approved in 1931. It was universally acknowledged to be a highly competent technical piece of work. At the time of its completion the interest of lawyers and the public in criminal law administration seemed to be at low ebb. No one seemed to be excited about improving criminal procedure except for a few scholars in law schools, or in any work in the criminal law. We have moved a considerable distance since that time. It seems fair to say now that the interest is almost at flood tide. Whether changes come through the American Bar Association activities, the federal government's participation through the Department of Justice, or from certain spectacular criminal careers by well-known and well-advertised public enemies is an interesting query, but not important here. The Model Code of Criminal Procedure has

received and is receiving a great deal of attention due to this awakened interest in matters concerning criminal justice. It is constantly discussed by Bar Association Committees, state commissions and other bodies, official and unofficial. Each legislative year sees portions of it enacted into law in the various states.¹

The other main piece of business of the Institute thus far has been the Restatement of the Law. Nine volumes have appeared; two in Contracts, two in Agency, two in Torts, one in Conflict of Laws, and two in Trusts. It has been hard work, terribly hard work. Only those who have been very close to it know the thought and energy it has taken from the Director, the Reporters, their assistants, and from many members of the Advisory Committees. The product is high in quality, and is so regarded by the profession. Lawyers cite it to courts; judges quote it in opinions; law professors write articles about it. The common law can be restated, and the Institute is successfully restating it.

As is inevitable in human affairs, there are varying degrees of enthusiasm about the Institute's accomplishments to date. Many of us in the law, and especially those whose legal work is within the teaching profession, feel that there is a serious social lag between our legal rules and our rapidly shifting society. Being conscious of that lag and being socially minded persons, we are eager to see it grow less. Each has his own favorite method of taking up the slack and his

¹ Statistical material was published in A. B. A. Journal for April, 1935, p. 253.

own selected spot where he thinks the most important effort should be made. It is to be expected in the course of things, therefore, that, when considerable effort is expended in a different method or outside the particular field which one of us thinks most important, he will directly or inferentially chide those whose approach is not the same as his. Thus the criminologist may say that a Code of Criminal Procedure does not help to solve the riddle of the misfit individual in society and the penologist add that such a code offers no program for reshaping the misfit, if he is convicted of crime and sent to a penal institution, to take his place in the complex life of our day. A restatement of existing law, another suggests, does not grapple with the more fundamental problem whether the existing law is adequate to the needs of present day society.

The truth of such statements will be readily admitted by any thoughtful lawyer and certainly by all members of the American Law Institute. Criminal Procedure is only one part, and perhaps a small part, of an enormous social problem. But note also that it is the part of a larger problem with which the lawyer is closely in touch and for the successful operation of which he is responsible. He does not know, from his professional knowledge or experience, why men commit crimes. He has no answer, based upon his technical learning, to the question what is the best thing to do with law breakers. He should not ignore those questions, but his first responsibility is surely in the field where he does have peculiar professional knowledge and skill. It was entirely appropriate, therefore, that the Institute's first work was in Criminal Procedure.

In the same way many of the problems of our substantive law go far beyond questions concerning that body of precedents built up in the course of development in Anglo-American law. They are based upon unsolved questions in economics, sociology, and government. Their solution, if, as, and when we find the solution, will call for many other heads in addition to that of the lawyer. It is likely, too, that the method used

for changing law to fit changing times will in some instances need to be more rapid and more drastic than the slow development through judicial precedent. Who knows, for instance, but that a compensation scheme in motor vehicle accidents may one day come with the swiftness which marked the change from employer's liability to workmen's compensation in the industrial field?

Be that as it may, the problem of immediate importance and of professional responsibility for the lawyer seems that of our common law. Is it clear? Is it consistent with itself? Do our legal terms mean what they say? Have we general principles or only myriads of separate instances? So here, too, the first place for legal work to start seemed the straightening out of our own material, a re-examination and restatement of existing common law. That is just where the Institute began.

It is the privilege of any one working in one part of our legal field to deprecate the endeavors of others in different parts of the field. The same privilege is open to the spectator who sits on the fence and watches both groups. But it is also the privilege and the duty of those who are on the job which seems to them worth doing to say, as did Nehemiah when Sanballat and Geshem invited him to a party when he was building the walls of Jerusalem: "I am doing a great work, I cannot come down." The project of restating the law was not adopted in a hurry. It had thoughtful consideration from a group of distinguished people from all branches of the legal profession who concluded it was worth a major effort in time and money. The success of the work thus far and the invaluable co-operation which it has received from law teachers throughout the country prove the soundness of the original conclusion.

Along with the Restatement, we have the state annotation program. The project of local annotations is not, strictly speaking, an Institute activity, although the Institute has encouraged it and helped it. Obviously, an annotation program cannot keep pace in all states in all subjects with the Institute's rate of work.

There are not enough well-organized bar associations in the country to carry the program at such a pace. Bar associations have many other useful activities which they should and do promote, and, as every one knows, annotation work itself is hard, long, and tedious. Teachers have participated in it in a most helpful way. But obviously there can be no call upon them to abandon all other enterprises to do an annotation in a given subject for their state. There are many things to do in the law. The harvest is great, and the laborers are few. The recent article by Mr. Harold Laski in Harper's magazine, called "The Decline of the Professions," demonstrates anew how few the laborers are. If a law teacher is meeting his classes and getting out a casebook or working upon a legislative program for his state or doing any one of the many useful extracurricular things which law teachers do, he obviously cannot be reading state decisions and getting out an annotation. Yet the point should be stressed that, in whatever legal field a man is working, a thorough knowledge of his own state decisions and statutes in that field confers an immensely important enlargement of his usefulness. This is no new idea. Albert Kales talked it a good many years ago and others of us had emphasized it long before the American Law Institute was organized. The proposition is still sound. A man can learn an immense lot that is useful to him by a check of his own decisions and statutes with the Restatement in any given subject. If he will head up his research into written form so that the product is a state annotation, he has contributed to his own knowledge and the Restatement's practical usefulness, to the mutual benefit of the Institute, the users of the Restatement, and himself.

The considerations underlying this point seem of such high importance that a few words should be devoted to them, even at the risk of straying from the immediate question of Institute future program. In a little more than fifty years the law teacher has changed from a benevolent retired judge or practitioner reading set lectures richly larded with

personal anecdotes in a perfunctory class exercise to a position of power and importance in the legal profession. He has done it by years of devoted and intelligent intramural work in the law. As said before, there is still plenty to do. Not that all worthwhile effort is limited to reading, analyzing, classifying cases, understanding legal history and other activities known as orthodox. Certainly we have need of new methods of approach, new systems of terminology, liaison with other fields of social science. But we shall make a mistake so grave as to be catastrophic if a generation of law teachers appears which is afraid to do orthodox work in the law for fear of being thought old fashioned. Surely we are still lawyers, even though to be good lawyers we have to pick up something of the other social sciences in our stride.

The Institute's organization, method of work, and accomplishments are so familiar to the professional public by this time that elaboration is uninteresting and unnecessary. This discussion is more concerned with a future program than with past accomplishments. But there are two collateral successes of the Institute which should be mentioned here because they bear upon suggestions for its future program.

One is that there has been developed, through experience, an effective way to produce co-operative work in the law. It is not hard to find an able scholar who is willing to work. It is not hard to get Committees together who will talk at large (and at length) and pass resolutions. But to get a scholar's work helpfully considered by successive groups in widening circles has not only been an individual triumph for Dr. Lewis but a distinct achievement for the Institute as well. Already this modus operandi has been taken up by other workers in the legal field. It has been adopted by those in charge of research in International Law and by the committee working upon federal court rules.

The second by-product of Institute experience is its membership. It is country-wide; it contains leaders in the law from every state. It includes, in well-balanced portions, the teaching, judicial,

and practicing branches of the profession. It is a working membership. Its members read reams of material, write volumes of critical comments, present their views to committees, and discuss them in open meeting. A list of prominent names as window dressing for an enterprise is too well known an American phenomenon to excite comment or surprise. But a collection of people of standing who will interest themselves in the technical side of the work is something new, and the Institute has accomplished it.

So much for past history. Criminal Procedure finished for the present; the Restatement well under way with nine volumes in print; a tried and successful method of co-operative work in law; a selected working membership of high quality.

What can the Institute do in the future? Already plans for a future program have been drawn and steps made in the direction of enlargement of activity. These may be mentioned briefly.

The first is the completion of the Restatement of the Common Law. This involves considerable thought and work along the lines already well established. Questions will arise concerning the choice of subjects which are appropriate for Restatement and the selection of individuals to carry the work along in those subjects. Law teachers and others have been consulted as to their views upon the suitability of subjects for restatement. The conclusions on the list as it now stands are not necessarily final, and additional suggestions are welcome.

Second. A program of work on the substantive side of the criminal law. This program has had thought and attention over a great many months. The Institute has had the help of an able advisory committee and has had the benefit of the thought and conclusions not only of lawyers, law teachers, and public administrators, but scholars in the fields of sociology, education, and psychiatry as well. The recommendations of this committee are in print,² have been consid-

ered and approved by the Executive Committee and Council of the Institute, and have been submitted to one of the Foundations as a basis for possible grant of funds to finance the enterprise. If the appropriation is made, the Institute will be prepared to do work of value in the legal side of this important and challenging series of problems and also to make such further co-operative studies and investigations in related branches of learning as is necessary and useful.

Third. Program of co-operation with Research in International Law. Research in International Law has been going forward since 1927 under the auspices of the faculty of the Harvard Law School. This research has now become affiliated with the American Law Institute, and the results of the work will, under the working agreement, be brought to the attention of the American Law Institute from time to time as the work progresses.

Fourth. Steps toward co-operation with other agencies for law improvement. The National Conference of Commissioners on Uniform State Laws is an older body than the American Law Institute. Their aims and purposes are not mutually inconsistent, but indeed very close together. The beginning has already been made for closer association between the work of the Institute and the Conference, a method of procedure outlined, and two subjects for joint effort selected, namely, Aeronautical Flight and an Estates Act. As to procedure, the agreement provides that each body shall appoint representatives to meet from time to time for the purpose of discussing acts which their respective organizations contemplate drafting. At the meetings, agreements will be reached concerning the drafting of acts in which the two groups may advantageously co-operate. When the two organizations have agreed to join their efforts in drafting an act, the representatives of each will attempt to agree on a Reporter whom they can recommend to their respective organizations. After a Reporter has been selected, his advisers will be named by the Institute and the Confer-

²See American Law Institute Reports in Relation to Future Work 1935.

ence. The completed draft prepared by the Reporter and his advisers will be submitted to the Conference and to the Council of the Institute, respectively, in the customary manner.

Along similar lines is the beginning of co-operative effort with such bodies as the New York Commission on Law Improvement. There has already been consultation with the officers of this organization, and it is expected that each group can find subjects on which the work of each will be useful to the other.

Fifth. Creation of a fund to encourage scholarly and scientific legal work.

The best statement of this project can be taken from the Report of Director Lewis upon the point as follows:³

"The creation of a legal research fund which can be used to encourage men, especially young men of outstanding ability, to study the subjects which we look forward to restating and produce monographs and other writings thereon. The wise expenditure of such a fund would, we believe, not only tend to insure adequate Restatements, but would also, apart from this, of itself advance legal science. It is, we submit, true of law as of the other sciences, that any considerable improvement rests not so much on the plan of improvement, though a proper plan is important, as on the development of men of first-class ability to take part in the work."

Sixth. The drafting of statutes for the improvement of the law. This field of endeavor grows directly out of the experience in the Restatement. The Institute already has a memorandum listing a large number of situations where there seemed obvious need for legislative action to take the law beyond what Restatement could properly do. Whether the work in this field will be done by the Institute independently or whether in co-operation with the National Conference of Commissioners on Uniform State Laws, or both, is a question which remains to be worked out in the future. But that there is a field here for useful endeavor there is no doubt.

³ See American Law Institute Reports in Relation to Future Work 1935.

So much for plans already sufficiently worked out to be stated as present projects. The object of the discussion this afternoon is to ask the law teachers what, in addition to the present work and proposed program, they would like to see the Institute do. Should it give some help in matters of legal procedure? Should the Institute be the means through which useful factual investigations could be carried on and the results scrutinized by its membership? Examples would be the federal court study by Dean Clark and his associates, published by the Institute, and the fact study of motor vehicle accidents which appeared a few years back. Just what are the concrete suggestions for law improvement, orthodox or unorthodox, with which the Institute should assist, is a matter upon which every member of that body and every person with responsibility for its administration very earnestly desires the benefit of the law teachers' thought and experience.

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Mr. President and Members of the Association: It had been the plan to have the comments of the speakers on the program available to each of them in advance of the meeting, but that plan did not materialize, and consequently there will be a certain amount of duplication.

It has been noticed for some time that, whenever two or three or ten of us have been together in the hall or around the dining table, presently some one would begin to describe some project of outstanding importance which should receive immediate attention and which would be undertaken at once were it not for some insuperable obstacle, and the obstacle has ordinarily been the same, although sometimes expressed in different language. Now we have spoken of the want of time; again we have mentioned the lack of man power; and sometimes we have been frank and spoken in terms of the need of money.

During this same period the American Law Institute has rather successfully demonstrated its ability to secure adequate financial backing whenever it has

a project of sufficiently outstanding merit demanding its attention. And, if there ever was a "natural" in the field of judicial endeavor, it would seem to be this: Projects literally crying out for performance, on the one hand, and the American Law Institute eagerly looking around for new worlds to conquer, on the other. The purpose of this symposium is to bring the two together, so that any law teacher who has in mind some project which he feels is reasonably comparable with the Restatement of the Common Law, as a matter of size and importance, may bring this out into the open for general consideration, so that all of these projects may be compared, with the thought that perhaps one of them may be found suitable for the next major undertaking of the Institute.

Now one project of this nature seems to me to lie in the field of statutory law. When we discuss some problem of negotiable instruments or a problem in some other field which has received the attention of uniform legislation, we have no hesitation in getting right down to the very words of the statute itself. But what we have to say on other problems is frequently of such a nature that an outsider who happened to be listening in and who judged only from what he heard on that occasion, might feel that we were quite unfamiliar with the general field of legislation.

It is not that way when we are back at home in the classroom. After we have intrigued the class through and over and under and round about some problem of the common law, we frequently make reference to some local enactment or some type statute, and at that point the discussion starts all over again to see whether this statute is merely declaratory of the common law or whether it has made some change, and, if so, what change; to see whether this statute has succeeded in clarifying old doubts or whether it has, as is all too frequently the case, given rise to doubts which had not existed before.

But, when we come together from all parts of the country so that we should be in a position to throw important light upon this statutory material, from a com-

parative point of view, we seem to be peculiarly silent. Our records disclose very scant references to statutory trends or patterns in this country.

Probably no one has been long engaged in the teaching branch of the profession without having occasion now and again to go to the books of the forty-eight states and of the territories and the possessions and perhaps also to the federal enactments in order to trace out all of the legislative material of the country on some particular problem. This is interesting and illuminating work, but it is time consuming. It is not only the time it takes to go to the forty-eight or more different sets of books; it is not only the time that it takes to solve the puzzle of statutory indices, each constructed according to a different plan, if any; nor is it that, after this has been done, it takes time to check up the recent supplements and session laws to see what changes have been made since the last general compilations. But, if it is worth the time and effort to trace out and copy down the law of all of the jurisdictions, it is because it is important to compare that of each with every other.

When we refer to the common law in the general and casual sort of way, our reference is frequently suggestive of the thought that we regard it as something immutable and indisputable, whereas, of course, the moment we become specific, we recognize that it is subject to change and frequently subject to different interpretations in different jurisdictions at the same time.

When we speak of the statutory law, we often refer to it as if it were something too evanescent to be even entitled to our attention, something here today and gone tomorrow, which doesn't even stay long enough for us to find it, whereas we know very well that a very substantial part of our legislation has been peculiarly stable and enduring.

We often speak of American legislation as a whole as if it were entirely too complicated to be capable of reasonable consideration. How can we possibly deal with forty-eight and more laws on every point? But every investigation that has been made along this line has disclosed

that, difficult as the problem may be, it is always something less complex than that.

The practice of copying statutes from the books of other states has tended to give rise to certain patterns. At one point, for instance, we may find a general pattern which prevails on more than half of the statute books of the country. In a considerable number of other states, this pattern is still clearly discernible, although perhaps there are certain major variations, and there are few jurisdictions in which that pattern can't be found at all. At another point we may find five or six patterns, each having substantial representation. Elsewhere the patterns may be even more numerous, but it always seems to be something substantially less than just forty-eight different laws.

Viewed from another angle, if we open the statute book of any state at random, we may find before us an enactment that is really unique. It may be there is nothing else like it anywhere. But the probability is that we can duplicate it exactly in the books of a few other states and perhaps of many other states.

What a boon it would be to the court which has occasion to pass, for the first time, upon some difficult problem of statutory construction, if there were some place to which it could turn and see at a glance whether this statute is actually without counterpart or whether exactly the same thing can be found on the books of certain other states, and, if so, just what jurisdictions these are.

In the one event the court would know at once that no direct light upon its problems would be found in the decided cases. In the other event, the court would know just where to turn to see whether or not any other court had occasion to pass upon exactly the same point. Needless to say, the court might or might not be satisfied with the solution reached elsewhere, if there were any. But, notwithstanding the suggestion that we had in one of our round table conferences, the court would be glad to know what some other court has had to say upon the subject, if anything has been said.

For the same reason, it would be a boon to the lawyer who has occasion to present such a case to the court, if such material

were available to him. The importance of a comparative picture of the American legislation to members of the teaching branch of the profession is too obvious to require mention at a meeting of this nature. In fact, any one who is interested in the law from other than the narrowest possible point of view might have occasion to make reference to such information, if it were available. If, for example, we have a group made up of lawyers and laymen interested in approaching the crime problem from an interstate point of view, it may be important to know in advance that there is no jurisdiction in the country in which a private person, acting without a warrant, is authorized to make an arrest for a misdemeanor which was not committed in his presence. It may be of further interest to add that there are four different views in the different states with reference to the right of the private person, acting without a warrant, to make an arrest for a misdemeanor which was committed in his presence. It may also be worth while to go further and specify what these views are and in what jurisdictions they prevail.

Now this information is not available without reference to legislation as well as to the common law. If our interest is in another field, the substantive law of homicide, perhaps, are we warranted in continuing to repeat, without qualification, the old formula that there can be no homicide except of one who has been first born alive, when we know that, by statute in more than a dozen states, it is possible to have the killing of an unborn quick child under circumstances amounting to manslaughter and at least one state in which it may amount to murder?

The truth of the matter is that we have in this country a veritable wilderness of statutory material, some of it good, some of it bad, some of it indifferent. Some of it is merely declaratory of the common law; some of it has very definitely changed the law; some of it is still in the field of doubt as to whether it belongs in one group or the other. Much of it has been copied, with or without variation, from the books of one state by some other state or by many other states, and yet we have

not had, in recent times, any study of this material as a whole to see which of it is good, which bad, which indifferent, to find out exactly which has merely been declaratory of the common law, just how extensive and how significant is the change which has been made by that which is not declaratory, nor to trace out the various intricate patterns which will be found when we have made a thorough examination of American legislation as a whole.

A pioneer work along this line was conducted some years ago by Stimson in his American Statute Law. Some parts of the problem have been investigated in recent times. The American Law Institute itself conducted a very elaborate study of legislation in the field of criminal procedure as a part of the preparation for its model code. Individual efforts have begun to make their appearance, among which may be mentioned, merely for the purpose of sampling, at least, Vernier on American Family Laws and Bordwell on Wills.

Legislation has been playing, and must continue to play, a role of constantly increasing importance in the legal field. We cannot answer Mr. Goodrich's question, What have we got? without knowing something of the picture of legislation as well as having a Restatement of the Common Law.

With the Code of Criminal Procedure finished, with the Restatement of the Common Law well on the road to completion, with the task of constructing a Code of Criminal Law definitely agreed upon, an exhaustive study of American statutory law on an analytical and comparative basis seems to me to be the largest assignment in the legal field which is now in need of immediate attention.

The Restatement of the Common Law brought forth as a by-product the state annotations. Probably a study of our legislative material would not require anything in the form of state annotations, for the reason that most of the jurisdictions have already undertaken the task of annotating their own enactments. But something in the form of composite annotations might be very helpful. If, for

example, a certain statute is to be found on the books of thirty different states with only minor variations, we might turn to any one of these jurisdictions and find section after section which had so far received nothing in the form of judicial interpretation. Should we bring together at one place the leading cases from all of these thirty, it might be possible to throw important light upon almost every word.

But, whether or not anything in the form of annotations should be found to be useful, we may depend upon it that important by-products of one kind or another would flow from a study of this nature. One which is very definitely within the field of possibility is with regard to the statutory index itself. There may be states in this country in which the statutory index is so satisfactory that no one who has occasion to make use of it ever offers any comment or criticism. But certainly state after state may be found in which the index does not measure up to that standard.

My own work along this line, which has been regrettably limited in its scope, has seemed to indicate that the index of the Illinois statutes is rather adequate, whereas that in most of the other jurisdictions seems not to be so. On the other hand, as I thumb through the Illinois index, it seems rather bulky. The thought has occurred to me that perhaps a careful study of statutory indexing might succeed in reducing that material to a substantially narrower scope without any real sacrifice. But whether this could be done or not and whether or not others have reached different conclusions with reference to the relative merit of the various indices, if a careful study should succeed in bringing forth a reasonably adequate and reasonably satisfactory product which could be recommended as a standard statutory index, with the hope that all of the states might make use of it in their further publications of enactments, this would be an achievement of very real merit. It would be welcomed not only by those who have occasion to use the statute books of many states, but certainly in quite a number of jurisdictions it would

be welcomed by those whose effort does not require the use of more than their own set of books.

Even other by-products may reasonably be expected. No doubt committees working in many parts of the field would not be satisfied merely to deal with the existing material, but would want to go farther and recommend something in the form of a model statute on the subject, and this might not necessarily be limited to a statute which was thought to be of such a nature that it should be urged upon every Legislature for adoption as it is. It might perhaps be something merely to be set aside for reference purposes, so that any legislative committee having occasion to draw a bill on that subject would have some place to which it could turn and find what had been recommended for the purpose, by some recognized authority, and would not be forced to venture a guess as to what state probably had the best working model. My own belief is that probably the greatest service to be rendered to legislative bodies in the future will not be in the field of uniform legislation. It is not the purpose of this remark to belittle in any way what has been done in uniform legislation. The thought is rather that, after more than forty years of intensive and effective work along that line, probably the greater field of usefulness in the future may be found in the other direction. There are departments in which uniformity is of outstanding importance. There are others in which the requirement seems to be that of flexibility, so that the law may be adjusted to meet different needs in different parts of the country.

Even this does not exhaust the list of possible by-products. No doubt one committee after another, working in various parts of the field, would want to have before it not only the enactments of our own jurisdictions, but also what may be found on the statute books of England and of Canada. The Restatement of the Common Law did not find it necessary to go much beyond these jurisdictions, but there is no reason why a study of statutes should be so limited, and one committee after another might find its curiosity still unsatisfied until it had brought

to light the pertinent provisions from the Codes of France and Germany and Spain and other countries, and a study of this nature might not be complete until we had an exhaustive study of the statutory material, not only of our own jurisdictions, but also of every major country in the world.

If this were done, this together with the Restatement of the Common Law would give us a rather adequate picture of law at the present time. It would offer a rather useful starting point for almost any study of comparative law.

Furthermore, when the time comes for us to make a really bold re-examination of the whole legal scheme in the light of sociology, economics, politics, ethics, and the other so-called nonlegal materials, it will be rather useful for us to have the strictly legal materials themselves in as usable form as possible, and such a study would seem to contribute rather largely to that end.

Without seeking to go farther for the moment, let it suffice to say that a study of the statutory law certainly needs to concede nothing to the Restatement of the Common Law as far as size is concerned, and it seems to me that it is equally as important and that it offers equally as much promise of making substantial contribution to the general field of juridical science.

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Mr. President and Colleagues: By an obscure and somewhat gratuitous chain of events which I don't quite understand, I have been injected into this symposium. The only explanation which I have been able to find as offering a reasonable indication of the reason for this phenomenon is the fact that I presume I am one of the few remaining nonparticipant observers of the work of the American Law Institute and can represent that point of view. In so doing, I shall simply try to express my own honest conclusions about it. There will doubtless be some misunderstandings as to details, but you will be able to correct them, and, in order to permit me to do so with brevity and, at the same time, avoiding the imprecision of

extemporary discourse, I beg of you to allow me to read the few suggestions that I have to make.

It will generally be agreed, I believe, that the creation of the American Law Institute in 1923 was one of the most hopeful events in the recent legal history of this country. The plan for the Institute, as formulated in the impressive report which motivated its establishment, was well-conceived, broad-visioned, and based upon a comprehensive analysis of the chief defects in the legal system of the United States. This plan was significant in at least three important respects. In the first place, it defined an ambitious and, in some respects, a unique task for the Institute to accomplish; the report refers to "the work which the organization should undertake as a Restatement," and adds that the object of this Restatement "should not only be to make certain much that is now uncertain and to simplify unnecessary complexities, but also to promote those changes which will tend better to adapt the laws to the needs of life."¹ In other words, the proposed object was to undertake an exhaustive study of the law of the United States in order to state that law in ideal terms, which should take account of new social needs and at the same time form a common pattern for judicial decision, to the end that the maladjustments of law to contemporary conditions and the evils of the law's diversities might thereby be alleviated. In the second place, conceiving that the task of the improvement of the technical legal system was incumbent upon the legal profession as a whole, the plan designated a select and nevertheless representative organization through which a conscious, equal, and permanent union of the efforts of the judiciary, the bar, and the law schools might be formed to prosecute the task. In the third place, and this was perhaps the most significant feature of the plan, the necessity of comprehensive exhaustive study was for the first time in this country adequately recog-

nized as the indispensable basis of systematic legal reform. In sum, the Institute was formed to promote the improvement of the laws of the United States by scientific research. This feature, which has distinguished the Institute from the welter of organizations dedicated to legal reform, was highly significant and hopeful.

It will not need to be emphasized that the branch of the legal profession which is here represented has a special stake and a peculiar responsibility in this enterprise. In a real sense, the Institute is the offspring of this Association; it grew out of ideas as to the need of a more vital study of law expressed in the meetings of this gathering by the late Wesley N. Hohfeld and others some twenty years ago and was actually brought into being as a result of the activities of a committee of this Association of which Professor Beale was chairman. Moreover, the lion's share of the labor which has gone into the Restatement of the Law has been borne and will in the future have to be borne by members of the law school faculties here represented. The Institute has been a great opportunity for the law teacher; it is correspondingly his responsibility.

Other considerations than the immediate interest of this group justify a discussion of the work of the Institute at this time and in this place. Ideals of reform, however high, when translated into reality, must inevitably take concrete, and therefore more rigid, form. Likewise, institutions which are devoted to the performance of a particular task, in the exigencies of its execution, tend to lose something of their initial flexibility and to become stereotyped. The Institute and the large purpose which it was created to fulfill have not been immune from this inevitable metabolism. Furthermore, even in the brief period since 1923, there has been a perceptible movement of legal ideas, an appreciable reorientation of social values, and, let us hope, a certain accumulation of experience. The Restatement of the Law has now been in process for more than a decade. If only for this reason, it is a welcome omen that occasion has been sought here to take

¹ Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute, p. 14, reprinted in the American Law Institute Proceedings, vol. I.

counsel together and, considering the experience which has been had, once more to lift up our eyes unto the hills.

Fortunately, in this discussion, the concern is not primarily with the virtues or imperfections of any particular work which has been done by the Institute, but with the possibilities for the future. If it may be put that way, we are met neither to bury Caesar nor to praise him, but rather to survey Caesar's domain. In so doing, however, it is essential to take bearings. Therefore, before attempting to mark out directions in which the activities of the Institute could profitably be extended, brief account should be taken, first, of the major objective in view; second, of the peculiar resources of the American Law Institute; and, third, of the respects in which it may be thought that the Restatement of the Law, as thus far accomplished, falls short of the objective. In the light of a consideration of these matters, it will be possible succinctly to itemize the chief suggestion which I have to contribute to this discussion, namely, that it would be a misfortune to regard the Restatement of the Law in its present form as more than a preliminary reconnaissance of the battleground, and that accordingly, in advancing towards the objective for which it was created, the American Law Institute has before it large and inviting possibilities.

First, then, to recur to the cardinal point, the objective of the Institute. The definitive terms in the Institute charter are as follows:

"The particular business and objects of the society are educational, and are 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 encourage and carry on scholarly and scientific work."²

It deserves to be borne in mind, owing to the limitations later imposed, that this broad purpose to improve the laws of the United States through scientific research is the basic function of the American Law Institute, that this is what the Restatement of the Law in its initial con-

ception connotes. In fact, in view of the spell which mere names sometimes cast upon the imagination, it would doubtless clarify the position of the Institute, if the ambiguous term, "Restatement of the Law," were abandoned, and an expression more aptly signifying the essential purpose were instead adopted, as a description of the work of the Institute. At any rate, it is clear that the competence of the Institute within this purpose is wide.

Second and briefly as to the resources at the disposal of the Institute. The chief of these may simply be enumerated: (i) The Institute is a going Institution with a recognized and important function. (ii) It comprises a select personnel, representative of the influential elements in the judiciary, the bar, and the law school world. (iii) It is widely and favorably known among the active members of the profession. (iv) It is able to command a large amount of expert assistance, for the most part at relatively nominal cost. (v) It has been liberally financed and presumably should be in a favorable position to secure additional grants for really worthwhile extensions of its activities. (vi) Finally, the Institute has the great advantage of an independent national position, which enables it to co-operate effectively with the various law schools and other interested institutions without yielding to the sectional jealousies and competitive instincts by which less representative organizations are sometimes handicapped. These factors, combined with the inherent soundness of the initial plan upon which the Institute was founded, are tremendous assets. In fact, it is difficult to perceive any serious limitation upon the effective prosecution of its task by the American Law Institute other than such as are an integral part of the task itself or may exist in the imagination or resolution of those by whom it may be directed.

It would doubtless be more comfortable to rest at this point, but candor compels a consideration of the third preliminary item, the sufficiency of the Restatement of the Law in its present form. Obviously, this is a relevant topic; if the Restatement, as at present conceived, is an ultimate formulation, adequate to remi-

² American Law Institute Proceedings, 33.

edy the grave defects in the legal system of the United States, there is clearly not much for the Institute to do but to fold up its books so soon as the Restatements now projected are completed. I take it, therefore, that a candid expression of opinion is indicated at this point as to the crucial question of the adequacy of the present Restatement of the Law, if only since, even in these degenerate days, honesty on an issue such as this may be thought the best policy.

In approaching this somewhat delicate issue, one source of difficulty can be eliminated *ab initio*; the question relates to the general policies which should be followed in the Restatement of the Law, and therefore it seems unnecessary to surrender to the possible embarrassments of discussing the merits of any particular published Restatement. On the other hand, it is impossible to consider the question of policy without recurring to the original plan for the Institute, particularly in view of the fact that it is in essential respects sound. This may have the appearance of exorcising Banquo at one of Macbeth's feasts, and, I fear me, that, as in the play, Macbeth may dismiss us peremptorily. If the next paragraph or so seems to rehearse a part for Banquo, I trust that you will understand that it is done benevolently.

As this comment implies, the initial conception of the work of the Institute as outlined in the original report, subject to certain qualifications by no means vital which may be noticed in a moment, furnishes an admirable standard by which to measure the adequacy of the actual Restatement of the Law. It is not possible to read this document justifying the creation of the Institute without being impressed by the cogent analysis of the defects in the system of American law therein portrayed and by the appropriateness of the objective thereby defined for the American Law Institute. Measured by this yardstick, the work of the Institute has been incompletely accomplished in a number of significant respects.

1. The initial plan contemplated an ideal statement of law, analytical, critical, and constructive, embodying whatever improvements in the law itself might

be recommended by exhaustive study. The actual Restatement of the Law purports to be, and is substantially limited to, a statement of the law as it is. This departure from the original conception, it need not be emphasized, is a material nullification of the major objective of the Institute.

2. The initial plan definitely prescribed that a complete citation and critical discussion of all relevant legal materials to support the Restatement would be essential to its success. The present Restatement contains no citation and no critical discussion of any specific legal sources. The sole relief to this situation is that the several Restatements are being supplemented by state annotations, which are, however, necessarily inadequate, because localized and for the most part uncritical.

3. The initial plan explicitly anticipated that studies of the field of legal procedure and of the administration of justice, might form a part of the Restatement of the Law. Thus far the work of the Institute in these basic fields has been limited to criminal procedure, and the product has been put forth, not as a part of the Restatement itself, but as a model law.

4. The initial plan supposed that the law in the books would provide inadequate information with respect to certain legal questions, and therefore contemplated that the activities of the Institute should necessarily include factual surveys. For reasons which are not entirely apparent, no such endeavor to obtain factual information on vital issues has been made by the Institute as such.

In addition to these limitations of the Restatement of the Law revealed by comparison with the initial plan, there are two further limitations which derive from imperfections in the plan itself.

5. The initial plan did not prescribe a clear and satisfactory position as to the value which should be attributed, in the work of Restatement of the Law, to modern statutory trends as contrasted with currents of judicial decision. This ambiguity is reflected in the actual Restatement, which exhibits no definite policy as to either the inclusion or the exclusion of statutory materials as a basis for the Re-

statement of the Law. Even to a Restatement of the Law as it is, it might be thought such statutory materials are relevant.

6. The initial plan made no specific provision for the comparative study of foreign experience or even for the consideration of *data* accumulated in other sciences, in connection with the Restatement, and it does not appear that such *data* have systematically been employed in the actual work.

Of course, this method of ascertaining, by reference to the initial plan for the Institute, the aspects in which the actual Restatement of the Law needs to be supplemented, amended, or repealed, is not necessarily conclusive. The ultimate question is whether the Restatement is an effective remedy for those defects in the system of justice to which the American Law Institute has been addressed. This is a question which it is doubtless premature to estimate at the present time. Nevertheless, it is to be remarked that the affirmative evidence as to the influence of the Restatement of the Law in alleviating the defects in the legal system thus far is negligible. Assuredly the burden of the mass of the law has been increased rather than lessened to date by the Restatement and the related legal literature. The flow of judicial decisions continues unabated. The complexities of legislation have magnified rather than diminished during the past decade. There are more law reviews to be examined than ever before. The stream of jurisprudence has not been stopped by adding to its waters. It is to be anticipated that many of the tributaries will be affected, if not illuminated, by the Restatement of the Law, but whether the total result will be to clarify uncertainty, to eliminate diversity, to create greater precision in legal terminology, or to enlighten the ignorance of judges and lawyers, is, in view of the limited scope of the Restatement, the generality of its rules, and the absence of a critical explanation of the authorities, disputable to say the least. No significant evidence to that effect has yet appeared. In the absence of cogent evidence as to results, the adequacy of the Restatement of the Law as hitherto con-

ceived has to be tested by general considerations. For this reason, the preceding remarks have suggested that the initial plan of the Institute, envisaging a thoroughly scientific, thoroughly documented, and forward looking study as a basis for the improvement of the law, furnishes an acceptable standard of reference. In the interests of clarity, the first thing to be recognized in this discussion is that the limited scope of the present Restatement of the Law necessarily reduces it to a partial, or, let us rather say, a preliminary contribution to such a study.

Realization that the initial essay of the Institute in the Restatement of the Law has distinct limitations, is not serious cause for dismay. Even when restricted to a single jurisdiction, the difficulties of the mere formulation of law are formidable. Past experiences in the drafting of consolidated statutes and in the codification even of relatively restricted branches of the law indicate that repeated revisions are essential to approach acceptable statement. The German Civil Code, for example, representing the results of a century of intensive analytical study, was not adopted until after the initial project had been thoroughly criticized over a period of time and superseded, in a later draft, on a number of important points. Our own chief written law, the Constitution of the United States, was anticipated by a considerable experience with colonial charters and state constitutions and involved a drastic revision of the Articles of Confederation. It is to be remembered that the Restatement of the Law is in some respects an original venture, and that each topic not merely covers a vast subject-matter, but is also intended to serve the purposes of a variety of jurisdictions. These considerations suggest that, while it is highly necessary to recognize the limitations and to identify the possible errors of the Restatement of the Law at the present juncture, it is also desirable to realize that the Restatement may nevertheless be regarded as a preliminary survey which may afford a basis for further progress.

We are now in position to respond to the principal question, What should the Institute do? The preceding remarks

have emphasized the broad competence of the Institute in the promotion of scientific research to improve the law, the enviable resources at its disposal, and, measured by the initial plan for the Institute, the distinct limitations of the work thus far undertaken. In consequence, it has been suggested generally that the Restatement of the Law in its present form must therefore be regarded as a necessary preliminary stage in the evolution of the task to which the Institute is dedicated. By inference, the directions in which the effort should be extended have already been suggested. The limitations of the present Restatement of the Law constitute the opportunity of the American Law Institute. It remains to consider certain specific practical aspects of the problem with which the Institute is faced. Attention is directed to four principal points.

1. The first and fundamental *desideratum* is to have a thorough clarification of ideas as to what the Restatement of the Law is about. This much is certain, that the notion of improving the law by restating it as it is is unsatisfactory. Nay more, it constitutes an indefensible retreat from the objective of the Institute. The Institute was created to ameliorate, not to perpetuate, the existing difficulties in the legal system. Moreover, as a guide to define the contents and sphere of the Restatement, the conception of restating the law as it is is not merely ambiguous, but it places the Reporters in an unenviable position, which can only be concealed by verbal compromise and censorship. Where there is diversity in the law, how can it be stated in a single rule? Where there is uniformity, what is the need for Restatement? If the law as it is is to be restated, there is no escape from this dilemma. In consequence of this conception, it is convenient to suppress the treatises, since they would demonstrate the insecure basis upon which the supposed law as it is rests. Consequently, too, most of the *data* to which attention should be given in a responsible formulation of law have to be excluded in the preparation of the Restatement—*data* as to the practical needs to be met and as to the appropriateness of the means of reg-

ulation employed to meet them. The conception of restating the law as it is necessarily cannot admit such considerations, because they might require an improvement and therefore a change in existing law. If, as may well be the case, any such considerations have obtruded themselves into the present Restatement, they have been smuggled.

These remarks, it will be noted, come close to the threadbare issue as to codification. Undoubtedly, many errors and evils have been committed in the name of codification, but it deserves to be added that the argument against codification in the report embodying the initial plan for the Institute is unsatisfactory. It is there suggested that the so-called common-law method of judicial legislation has two advantages over statutory enactment—namely, greater flexibility (which is but another word for uncertainty), and greater precision and detail in the formulation of law (which presupposes greater certainty)—and it is therefore proposed that, in contrast to the European codes, which confide excessive discretion to the courts on account of the generality of their prescriptions, the Restatement of the Law should be, not a code, but a formulation of specific principles and rules. This is a strange concatenation of ideas, which appears the more extraordinary now that the Restatement of the Law has turned out to be a statement of the general principles of the common law, not dissimilar to the European codes. It may be remarked that the chief motive for the position taken with respect to codification in the report, to wit, the anticipated hostility of the bar, has probably been exaggerated. There is evidence that the supposed traditional opposition to codification in this country was engendered in the dispute as to the adoption of David Dudley Field's Civil Code rather by its numerous defects than by the fact that it was a code. It is to be remembered that, despite these defects, the Code was adopted in a number of states, that much of the law of the several states has been reduced to statutory form, and that even the arch opponent of codification, James C. Carter, expressed the opinion that a good digest of the law, as contrasted with

a general code, would be a work of "priceless value."³ It is something of an irony that Carter's argument is employed to support a Restatement of the Law which has a purpose and many of the characters which he opposed. In any event, there is abundant justification on other grounds for the decision not to place the Restatement in effect through uniform enactment, and particularly the danger of premature adoption of so comprehensive a formulation. It is a mistake, however, to infer from this decision that the Restatement is essentially other than a code. Its intention is to state the law in authoritative comprehensive terms, and this, give it whatever name you please, is a species of codification. Awareness of this fact is essential in providing as to the future work of the Institute.

In the writings of a recent humorist, I have been told there is a description of a fabulous bird, which, because it abhorred looking ahead, always flew backwards. Yet, strangely enough, in spite of its remarkable habits of locomotion, it managed to survive. This bird, the story alleges, is the law. The Restatement of the Law, as thus far conceived, will enable the legendary creature to appreciate the somewhat rarefied atmosphere of the common law in which it flies, but this is not enough. It would be an excellent thing if the American Law Institute could, through the Restatement of the Law, educate the bird of justice to try to fly forward once in a while. To do so will not necessarily involve the method of uniform legislation, but it will require a Restatement that is forward, as well as backward looking or, in other words, a statement that is not a mere Restatement of the Law.

2. The second practical observation which seems pertinent is that, in the prospective work of the Institute, primary emphasis should be laid upon the preparation of exhaustive treatises or digests as a means of supporting and verifying the several Restatements of the Law, rather than upon mere subjective formulation. The reasons for this suggestion are:

First, that, unless and until such basic studies are available, it will be impossible to form an assured judgment that the Restatements are what they should be and to amend them as may be required; second, that such studies will involve a type of critical investigation which individual scholars cannot reasonably be expected to undertake on their own initiative and without assistance; third, that there is a very considerable possibility that, without such supplementary studies, the influence of the Restatement of the Law will be seriously curtailed. As a means of improving the law and of guiding future legal action, statements of general principle alone are a poor substitute for such statements substantiated by a critical and comprehensive analysis of the authorities and other relevant *data*.

In the preparation of such studies, certain specific considerations should be attended. In the first place, it would be very advantageous to push forward the state annotations, in conformity with the present policy of the Institute, so as to make the results available for more critical examination. In the second place, it would be more or less indispensable to have the treatises or digests assigned so as to take advantage of fresh and unbiased viewpoints. This consideration should in principle rule out those responsible for a restatement from the preparation of the analogous treatise. In the third place, as an incidental part of the work, the respective Restatements should be critically examined, and the results should be expressed in the form of specific recommendations to the Institute as to whether and, if so, how the Restatements in question should be amended. In the fourth place, as another incidental part of the work, especial attention should be given to the possibilities of eliminating antiquated or unfortunate precedents from the formal law. Finally, the treatises should be inspired by the paramount objective to improve the legal system of the United States; to this end all relevant data, including legislation, foreign experience, evidence as to the practical operation of legal rules, as well as judicial opinions, or, in other words, all the resources

³ Carter, "Provinces of the Written and Unwritten Law" (1889) 2 Va. State B. A. Rep. 95, 125.

which modern science has to offer for the solution of legal problems should be utilized. If we are to have a Restatement of the Law, we are entitled to have the best that can be devised.

3. A third observation, which need not be elaborated, is the desirability of extending the scope of the Restatement of the Law in area as well as in content. In this connection, to refer to a specific example, the claims of legal procedure and of the administration of justice should be given attention. There is no aspect of law which is more fundamental to scientific legal inquiry, has greater significance in the practical operation of the legal system, stimulates a keener interest in the bar, or stands in more definite need of simplification and improvement, than this field, which has too long been the Cinderella of jurisprudence.

4. The fourth observation which is offered is that the American Law Institute may conceivably serve a highly useful function as a legal science research council. It is obvious that such a function might easily develop out of the task upon which the Institute has embarked. As conceived in the initial plan and as justly so conceived, the vistas of investigation opened up by the task are almost unlimited. There is no reason why all parts of the task should be done directly under the auspices and direction of the Institute; indeed, if such a thing were possible, it would nevertheless be undesirable for the Institute to try to command the entire field of scientific legal research involved in the Restatement of Law. On the other hand, there is every reason why the Institute should stimulate and assist, morally and, if feasible, financially, any independent scientific enterprises which are relevant to the task. It has been pointed out that the Institute has the unique advantage of being a representative national institution, and that, to accomplish its object, the participation of many heads and many hands will be required. It would therefore be entirely appropriate for the Institute to enlarge the wise policy which it has developed with respect to the preparation of state annotations and to promote specific investigations, compara-

tive, historical, or factual, in the fields which may be involved in its future work. For obvious reasons, it would be advantageous to the legal community if the Institute or some similarly influential body could thus serve to co-ordinate and advance scientific study looking to the improvement of the law. To discharge such a function effectively, the principal requirements are imagination, impartiality, and a generous yet astute policy of co-operation.

In conclusion, the point from which we started in these observations may be recalled, namely, that, if the mind is fixed upon the central task of the Institute as defined in the initial plan, the opportunity of the American Law Institute to contribute to the betterment of the legal system in this country appears large, if not indeed unique. The prospect cannot but stir the imagination. But this point of view implies a recognition of the fact that the Restatement of the Law in its present form should be regarded as a preparatory survey, a somewhat inevitable preliminary to more intensive and incisive inquiry. There may perhaps be an incidental difficulty in accepting this viewpoint, owing to the policy which the Institute has pursued with respect to the promulgation of the Restatement of the Law. It has apparently been thought that the authority of the Restatement should not merely derive from its intrinsic merits, but should also be built up by energetic publicity. I do not wish to criticize this policy, which has a degree of justification, but merely to point out that it involves the danger that the effective propagandization of the Restatement may conceivably compromise the future work of the Institute. *Cave canem.* It will require a certain finesse to suppose that a Restatement of the Law, which has been advertised as authoritative, is imperfect. Yet this is precisely what must be done, if the Institute is to fulfill its opportunity.

In this connection, if I may voice a final observation, lies one of the most difficult and responsible problems in the direction of the affairs of the Institute. By virtue of its very purpose and conception to improve the law by scientific

study, the Institute, Januslike, faces in two directions, the scientific and the practical. It has, to use the language of business, a sales as well as a productive function. It will require great wisdom and fortitude to harmonize the practical counsel of expediency that no step should be taken which may impede the reception of the Restatement by the bar with the scientific counsel of perfection. And, particularly so, since the work of the Institute is too important to admit of material compromise. Reference is made to this matter, because there are a few signs that, as sometimes happens, in the direction of the Institute the sales *motif* has substantially influenced production. The decision to restate the law as it is, rather than to put forth a candid effort to improve the law by critical formulation, as originally designed; the omission of the treatises; the imperfect provision for incisive independent criticism of tentative Restatements as the condition *sine qua non* of their submission for approval—these are phenomena which are difficult to explain except upon the supposition that the policy of securing the public acceptance of the Restatement has affected its content and perhaps even partially diverted the fundamental purpose. I trust that these are not significant signs, that they are not indicative of preconceptions which may preclude a fresh and courageous view being taken of the future work of the Institute. If such a view be taken and, as in the initial plan, renewed emphasis be placed upon the necessity of the most thorough research as the indispensable condition of substantial legal reform, it is my profound belief that the American Law Institute has the opportunity to render to this republic services of the highest significance in the improvement of its laws. There is much to be done in this direction, and, because of its peculiar possibilities, we confide to the Institute many of our hopes.

WILLIAM DRAPER LEWIS

Director of American Law Institute

I am very sorry, gentlemen, that the exigencies of time, which I recognize,

prevent me from having the advantage of suggestions from a number of you here. I hope you will not feel that you are doing something that will not be welcome, if you write me any suggestions which out of your own thinking or out of this discussion occur to you, because, as has been more than once emphasized this afternoon, we really need your suggestions.

It is true that the magnitude of the Institute's work on the Restatement and the fact that during the thirteen years of the Institute's existence it has been our major work have doubtless given many the idea that the Restatement of the Common Law was the sole object of the Institute's organization and existence. Of course it was not, and I am very glad that Mr. Yntema has emphasized that fact. He has done that very well.

We started out with the desire to restate the existing law, but that merely for two reasons: One, that we felt it would be a decided boon to the administration of justice in this country if there was a clear, definite, and, to some extent, an authoritative statement by such a body as the Institute, of what the general common law of the United States is. We have never for one moment concealed the fact that the law of any particular state might vary in some respects from what the Restatement stated. But we felt, as Mr. Lemann has expressed it, that, if we were going on to make any improvements of the law, this Restatement of the existing general common law was an essential preliminary thing to be done. A clear statement of what the law is is one of the essential things to make the lawyer think that it should be changed and improved.

When we started the work on the Restatement, we had two things which we thought we could do. One was to produce the Restatement in substantially the form that it has been produced. The other was to accompany each Restatement with a treatise which would set forth the case authorities, which would discuss the law from various angles, and have a critical as well as a constructive discussion of what that law was.

I think Mr. Lemann will remember the attempt to do that, which was instantly undertaken, in the Conflict of Laws. That group thought that they should begin first to work with the treatise, and Mr. Beale submitted several chapters of a proposed treatise on Conflict of Laws. Now it is no criticism of Mr. Beale to say that the part of the plan of the Institute, as far as the Restatement was concerned, which broke down—which hadn't been properly thought through—was this very treatise which was to accompany the Restatement. The Restatement itself was based on the concept that it should be group work, that it shouldn't be merely the work of one man, which a group would work over and say it was good or bad or criticize it and suggest certain changes, but that it should be built up by group discussion from conference to conference. That is the way that it has been built up.

When we tried to do that with a treatise, I made this discovery: It was that, while it was entirely possible to secure a group of men who would unite on an expression of what the law was, without any qualifications, not by compromise but simply by getting around a table and hammering at its correct expression, they could get to a united result. So that, as the Restatement stands today, it is not a series of compromises, and in very few instances does it contain statements that the entire group which worked with the Reporter on the Restatement does not agree with. Of course, such instances do exist. If you will look at the tentative drafts, you will see where they do exist.

But when we tried to take Mr. Beale's treatise and get a united expression as to what that treatise should express, as to the criticism of this case or what another case stood for, we found we were engaged in an impossible task.

I never imagined that that would be true, but it was true. What happened was that we spent in Conflict of Laws, on this treatise, something over \$10,000 or \$11,000, and we got nowhere. Therefore we have only accomplished, as far as the Restatement is concerned, one-half

of what we started out to do, which was to produce a Restatement with an accompanying treatise. We have only produced the Restatement.

One of the things that I should like to hear from you here is how that other half of our original project should be carried out.

I should like to deal first with the suggestions of Mr. Yntema. I think I may say to him, and I am sure he will understand it when I do, that I was quite surprised when I found what he had got out of a very careful study of the Report on which the Institute was started. I happened to have something to do with the writing of that Report. I do not attempt for a moment to say that I wrote the entire Report, because that, too, was group work. But, after all, it was the writing out, after some nine months of meetings of the small group, of which I was one, of the ideas which Mr. Root and I had talked over before the thing was started at all. Therefore, I have had something to do with that Report.

I think you made just one mistake. In reading the Report you mixed what was specifically recommended to be done in the way of Restatement with the analysis of the defects in the law. The Restatement was never conceived for a moment as a work to correct the defects of the law. It is an attempt to give an orderly statement of the existing law.

As stated, the Institute as organized is not confined to stating existing law. But, when we began the work on the Restatement, I had a council of thirty-four learned gentlemen, of which Mr. Lemann was one. They were all convinced of the worthwhileness of the Restatement. Therefore, when I intimated that we should take up other things, as, for instance, Criminal Procedure, I met from many of the Council this reaction: "Why, we were established to do the Restatement. We are doing the Restatement. It is not done. It is a very important work, and we don't want to be bothered with anything else."

It took about a year and one-half before practically all the members of the Council were convinced that the Restatement was merely one of the things which

the Institute should do at the present time. However, the Institute is now definitely committed to a much wider field than the statement of existing law.

The Report on the Future of the Institute, submitted to the Annual Meeting last year, deals primarily, as Mr. Goodrich has pointed out, with statutory work that can and should be done by the Institute. The defects of the law, which are many and manifest, are so clear to the groups that did the work on the Restatement, that they are anxious to draw statutes to correct those defects. We have already begun to draft some of these statutes, and I hope that there will be a considerable amount of completed work of this character for submission to the Annual Meeting of 1937.

The common-law method of developing law is bone of our bone, flesh of our flesh, but that does not mean that at some future time there may not be a general code of private law. It certainly does not mean that today we shouldn't be able to take portions of the Restatement where we know the decisions will prevent needed reforms and draft a statute to express the law as it should be.

If I may turn to Mr. Perkins' remarks for a moment, I was greatly interested in what he had to say about the statutory law. I am often asked by laymen whether we are not engaged in the work of making clear the entire statutory law of the United States. Well, we are not. But Mr. Perkins comes along and suggests why not? Why not do work with statutes as a whole? He has several concrete suggestions. They are well worth thinking over. I can assure him that, as far as the present Director of the Institute is concerned, they will be given careful consideration.

There is one thing I should like to call to Mr. Perkins' attention, however, and to the attention of all of you, and that is the steps that have to be taken before a major work of the Institute can be begun. In the first place, the general desirability of the project has to appeal not only to the Director and his immediate assistants but to the executive committee of the Council and the Council itself. That, of course, takes a certain

amount of time, as it should take time. Then we have got to have the project thoroughly thought out by a group who know before they begin, where they are going and about where they want to arrive. Now, Mr. Perkins, that is the thing that I am looking at you to do; in other words, to take your paper and give us concrete suggestions as to what can be done. You were concrete in spots, and that was highly desirable—but concrete so that I can place your project before others. To do this I must get into my own rather slow brain not only the general object of your suggestion but the detailed manner of carrying it out.

Take, for instance, the work on criminal justice. We had an idea that we wanted to do some work on criminal justice, and we were surprised to get, and were grateful to get, a request from the American Bar Association and later from this Association that we should appoint a joint committee to see what work could be done by this Association and the American Bar Association and the Institute along these lines. They worked for six months; they worked very hard; and they produced a more or less definite plan. The only unfortunate part of the plan was that they produced it just at the height of the depression; in other words, in July, 1931. They recommended that the Institute undertake to restate the substantive criminal law and produce a Code of Criminal Law. We couldn't go any farther. We looked at it, and we thanked them for it, but the conditions of the country just then made the two pieces of work, or either one of them, impossible.

Furthermore, I had some doubt about it. I was chairman of that committee, but I sat there to be educated by the experts in criminal law. When I got through with the end of that education, I came out with the feeling that they were all very able men, but that perhaps they had made two mistakes. In the first place, I could not help feeling that we didn't want a Restatement of the Criminal Law; nor that it wasn't necessary to spend the time, even if it could be done, to get the kind of Restate-

ment of Law that we put out in other subjects, in the criminal law to have the necessary basis for improvement of the law. Of course, the present criminal law would have to be known, and a good deal of work would have to be done, but not that. Then I had this other profound doubt. There are problems of crime and criminology and criminal law concerning which the lawyer can have an opinion because of his experiences as a lawyer; but there are other social sciences which have their point of view towards the criminal law, the result of their studies. I made up my mind that, if there ever was a reasonable prospect that we could undertake this work, we should get a new committee that would re-examine the recommendations of the first committee, and that that new committee should be composed in part of persons who were psychiatrists, criminal sociologists, and persons of that general ilk, as well as lawyers.

So two years ago we appointed another committee to advise us as to the work which we should do in criminal justice. They worked for a year; they worked very hard. The members, legal and non-legal, gave each other full co-operation. They produced a report. Now, if you compare that report with the first report, you will find they are not in the same class. Anybody looking at those two reports realizes that the second report, compared with the other, is A-1 and the other is about C, though it was the best that could be done at the time.

Having the second report, the next thing was to find out whether the Council of the Institute wanted to go ahead with it. To do that, I had to take that report and work for two or three months over it and put a lot of concrete details into it. The Council agreed that it was just the thing the Institute should do. We were then confronted with the financial problem. That problem of finance is not nearly as hard as the problem of getting things right, but it is not an easy problem. The persons who control foundations rightly want to know in detail exactly how their money is going to be expended and what are to be the re-

sults. It took another three months to work out additional details and to place before one of the larger foundations a definite project with the confidence that, if they had the money and were willing to expend it, we could produce definite results of value in a definite amount of time and, by so doing, lay the foundation for still larger work in the field of criminal justice.

Now I go over this matter for this reason: The first thing we want from you is suggestions. I don't care how much you have thought them out. Let me have them. But if you can go on beyond that and give us suggestions which will fill in the picture, which will enable me to take the initial step, which is to talk the matter over with the men who count in the inner control of the Institute, and to say to them, "I think this is worth while," and then to make additional detailed suggestions so that we are justified in expending the money necessary, because it does take money, to make a thorough investigation of the plan and to build up a project that can ultimately justify us in going to persons of means, or to foundations for the money necessary to carry it out—that is the kind of help which we most need. In other words, what I want, gentlemen, is the initial suggestions, just as many of them as you have and also as much detail as possible. Get as far as Mr. Perkins got, or even not as far, and then add to your suggestions as many concrete things as possible.

Gentlemen, I was going to conclude the paper I prepared, which I have not read to you, with a hope and a warning against discouragement. The hope was that those of you who were primarily interested in the work of the Institute as a Restatement work should not think that we were going to abandon the completion of the Restatement up to a point where it should be and can be completed, in view of the present state of American scholarship and judicial decision. I don't think it is necessary for me to stress that here in this group. You know that we have sufficient money to go on and complete the definite subjects on which we

are now engaged; that we may get additional money to complete other subjects when we are convinced that they should be restated. In other words, the foundation work of the Institute, which is the Restatement, is not going to be abandoned. But the world is full of interesting things, and I am quite well aware of the fact that there are a great many law school teachers who are interested in other things than the Restatement of the Law, and I am very glad that that is true. But, because of our concentration, largely on the Restatement, we haven't yet been able to have their interest in the Institute.

Now I am very much in hopes that, as we turn to definite, concrete improvement of the law, through the drafting of statutes or in other ways, we shall have the interest and the help of scholars that heretofore have not been working with us. So that we shall not only expand the work of the Institute, but increase our hold not only on the bar and on the bench, but on the men who really have to do the constructive work for the improvement of the law in this country—the law teachers in the principal law schools of the United States.

I thank you.

Meeting of the Association of American Law Schools—1935

Held at Hotel Roosevelt, New Orleans, Louisiana, December 27, 28, and 30, 1935

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