Michigan Law Review

Volume 34 | Issue 4

1936

WHAT SHOULD THE AMERICAN LAW INSTITUTE DO?

Hessel E. Yntema
University of Michigan Law School

MICHIGAN LAW REVIEW

VOL. 34 FEBRUARY, 1936 No. 4

WHAT SHOULD THE AMERICAN LAW INSTITUTE DO? *

Hessel E. Yntema †

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 help 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

* An address given at the annual meeting of the Association of American Law Schools at New Orleans, December 30, 1935.—*Ed.*

† Professor of Law, University of Michigan. A.B., A.M., Hope College; A.M., Ph.D., Michigan; B.A. (Juris), Oxford; S.J.D., Harvard. Author of various articles in legal periodicals.—*Ed.*

[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, reprinted in 1 AMERICAN LAW INSTITUTE PROCEEDINGS 1 at 14 (1923). For further discussion of the American Law Institute, see the writer's essay, "The American Law Institute," in LEGAL ESSAYS IN TRIBUTE TO ORRIN KIP MCMURRAY 657-691 (1935), and references there cited, and also "The Restatement of the Law of Conflict of Laws," 36 COL. L. REV. 183 at 186-198 (1936).

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 recognized 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 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 legal 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 conception 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: (1) The Institute is a

[2] 1 AMERICAN LAW INSTITUTE PROCEEDINGS 117 (1923).

going institution with a recognized and important function. (2) It comprises a select personnel, representative of the influential elements in the judiciary, the bar, and the law school world. (3) It is widely and favorably known among the active members of the profession. (4) It is able to command a large amount of expert assistance, for the most part at relatively nominal cost. (5) It has been liberally financed and presumably should be in a favorable position to secure additional grants for really worthwhile extensions of its activities. (6) 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 remedy 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 conjuring 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 somewhat incidental 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 restatement 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 the aspects in which the actual Restatement of the Law needs to be supplemented, amended, or repealed by reference to the initial plan for the Institute, 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 conceived 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.

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 is to be restated as it is, 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 regulation 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 prescrip-

tions, 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 foward once in a while. To do so will not necessarily involve the method of uniform legislation, but it will require a Restatement that is

[3] Carter, "Provinces of the Written and Unwritten Law," 2 VA. STATE B. A. REP. 95 at 125 (1889).

forward- as well as backward-looking or, in other words, a statement that is not a mere restatement of the law.

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 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.

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.

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, comparative, 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, Janus-like, 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.