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BLAMING THE MIRROR: THE RESTATEMENTS AND THE COMMON LAW*

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* MARIE HENRI BEYLE STENDHAL, *THE RED AND THE BLACK*, ch. XIX, at 375 (C.K. Scott-Moncrieff trans., W.W. Norton & Co. 1926) (1831). The complete quote is as follows:

A novel is a mirror carried along a high road. At one moment it reflects to your vision the azure skies[,] at another the mire of the puddles at your feet. And the man who carries this mirror in his pack will be accused by you of being immoral! His mirror shews the mire, and you blame the mirror! Rather blame that high road upon which the puddle lies, still more the inspector of roads who allows the water to gather and the puddle to form.

Id. Stendhal's words seem as appropriate for the Restatements as for the novel—we should neither credit nor blame the mirror (the Restatements and the novel, respectively) for the beauty or the flaws in the original (the law and the reality echoed in the novel, respectively).

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INTRODUCTION

Criticism of the American Law Institute¹ and the Restatement movement is a common phenomenon and comes from two sides. The critique from one side is that the Restatements are too activist, stating the law as the Institute believes it should be, rather than the law as it is.² The critique from the other side is that the Institute is too conservative—frozen in time in the late 1800s or early 1900s—and fails to incorporate the best contemporary practices in the study of law.³ This Article focuses on the latter criticism.

The Institute has outlasted the heyday of Formalism⁴ and has weathered (and continues to weather) the storms of Legal Realism,⁵ Law & Economics,⁶ and Critical Legal Studies.⁷ This Article addresses the extent to which the Institute has, or even should have, allowed these theories to influence the Restatements. There is a potential downside to attempting to incorporate the divergent theories of each school of thought: the product thus produced could end up being so homogenized and uncontroversial that it would accomplish little.⁸

1. In this Article, the American Law Institute is also sometimes referred to as "The Institute" and "ALI."

2. For an analysis of the various concerns courts and scholars have raised with regard to the use of the Restatements, see Kristen David Adams, *The Folly of Uniformity? Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423, 434-43 (2004). The Article also proposes a reasoned and purposeful means of applying the Restatements in a manner that is consonant with the natural development of the common law. *Id.* at 445-50.

3. See *infra* Part II.A. This criticism brings to mind the words of Herbert Wechsler, who suggested that it is appropriate for the Institute to recognize changes in the law and the world, just as a common-law court would. Herbert Wechsler, *The Course of the Restatements*, 55 A.B.A. J. 147, 149 (1969). He goes on to note that the common-law court system calls for a respectful balance between precedent and change. *Id.*

4. See *infra* Part II.B.

5. See *infra* note 21.

6. See *infra* note 22.

7. See *infra* note 23.

8. See Alex Elson, *The Case for an In-Depth Study of the American Law Institute*, 23 LAW & SOC. INQUIRY 625, 632 (1998). The author quotes a study of the Chicago Bar in a way that seems equally applicable to the Institute:

This Article begins by analyzing six recurring themes in the literature critiquing the Restatements. As this Section will show, the American Law Institute faces steady criticism regarding its membership,⁹ its mission and goals,¹⁰ its perceived insularity,¹¹ its conservatism in the face of proposed reform,¹² its philosophy of law, and its level of utility as a resource for practitioners and judges.¹³

Next, the Article presents three different perspectives on the Restatement movement. First is the common conception that the Restatements are a veritable formalist anachronism that have failed to countenance the important developments in jurisprudence over the last century.¹⁴ Second is the viewpoint that the Restatements are actually more progressive than many have assumed.¹⁵ Last is the intermediate argument that the Restatements represent an effective, albeit purposefully conservative, reform movement.¹⁶

The Article closes with the suggestion that many of the criticisms of the Restatement movement should be more accurately presented as critiques of the common-law court system.¹⁷ This final section suggests that, although it is fair and constructive to critique the Restatements and the American Law Institute for characteristics that are unique to the Institute's product—especially those that might tend to interrupt the natural common-law-making process¹⁸—it is neither fair nor constructive to criticize the Institute or its products for traits that are endemic to the common-law courts whose opinions form the basis of the Institute's work.¹⁹

There are too many groups within the profession that have too many conflicts with too many other groups—conflicts that are deep-seated and not subject to compromise. Any action of the association that would be likely to be regarded as “decisive” or “progressive” is also likely to offend one or more of these major factions. . . . Herein lies the dilemma of every professional association. The more its membership reflects the diversity of the larger society, the more limited and non-controversial will tend to be the set of goals, however important they may be, that it can effectively pursue.

Id. (citation omitted).

9. *See infra* Part I.A.

10. *See infra* Part I.B.

11. *See infra* Part I.C.

12. *See infra* Part I.D.

13. *See infra* Part I.E-F.

14. *See infra* Part II.A.

15. *See infra* Part II.B.

16. *See infra* Part II.C.

17. *See infra* notes 329-50 and accompanying text.

18. *See Adams, supra* note 2, at 445-50 (examining the way in which use of the Restatements may distort a jurisdiction's natural law-making process).

19. *See infra* notes 334-55 and accompanying text.

I. COMMON THREADS IN SCHOLARSHIP CRITICIZING THE RESTATEMENT MOVEMENT

As an initial note, criticizing the Restatements as a Formalist²⁰ project that has failed to incorporate Legal Realism,²¹ Law & Economics,²² and Critical Legal

20. Some initial definitions may be useful. Classicism, or Formalism, is the view of law as a science and a discrete specialty. It has been criticized as “Mechanical Jurisprudence” to be distinguished from Sociological Jurisprudence, a forerunner of Legal Realism. See generally Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605 (1908); Roscoe Pound, *The Scope and Purpose of Sociological Jurisprudence*, 24 HARV. L. REV. 591 (1911). The writing of Formalist Simeon Baldwin provides a good example of the genre. Baldwin describes law as “both Science and Art—a philosophy and a trade[,]” and demonstrates his confidence in the discrete, logical nature of the law. Simeon E. Baldwin, *The Study of Elementary Law, the Proper Beginning of a Legal Education*, 13 YALE L.J. 1, 2 (1903). In describing the function of cases and the role of lawyers, Baldwin quotes attorney Edward J. Phelps:

[C]ases do not make principles: they only illustrate them; and that the well trained student has a higher learning than they can furnish. “He does not . . . need to wade through hundreds of volumes of books to see whether a particular point has been somewhere or other decided. He knows how it was decided, if it ever was, and how it ought to be decided if it never was.”

Id. at 9 (citation omitted). In commenting on the law student’s task in learning the aforementioned principles, Baldwin states, “Fortunately . . . these underlying propositions or principles are neither numerous nor obscure.” *Id.* at 10. For an argument that Formalism cannot appropriately be viewed as an obsolete philosophy, especially in the area of contract law, see generally Mark L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207 (2005).

21. Legal Realism is law defined as “[t]he prophecies of what the courts will do in fact.” Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897), reprinted in AMERICAN LEGAL REALISM 17 (William W. Fisher et al. eds., 1993) [hereinafter Holmes, *The Path of the Law*]. “The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.” *Id.* at 15. Realism is also famously associated with Justice Oliver Wendell Holmes’s statement, “The life of the law has not been logic: it has been experience.” OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881), reprinted in AMERICAN LEGAL REALISM (William W. Fisher et al. eds., 1993) [hereinafter HOLMES, THE COMMON LAW]. Holmes goes on to say, “The law embodies the story of a nation’s development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.” *Id.* Holmes also exhorts that lawyers should seek social—not just logical—justification for rules, stating,

I cannot but believe that if the training of lawyers led them habitually to consider more definitely and explicitly the social advantage on which the rule they lay down must be justified, they sometimes would hesitate where now they are confident, and see that really they were taking sides upon debatable and often burning questions.

Holmes, *The Path of the Law*, *supra*, at 21.

John Henry Schlegel lists what he characterizes as the four claims of Realism: “that the rules [are] simply incoherent, . . . that justification [is] inappropriate to scientific inquiry, . . . [that] the process by which the rules were created [is not coherent], . . . [and] that the rules [are] simply

Studies²³ involves making the same recurring criticisms.²⁴ As this section shows,

wrong.” John Henry Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391, 405 (1984). Another author states, “The Realist methodology was characterized by three tenets: an emphasis on study of the evolution of legal doctrine, a critical approach to use of formalistic reasoning, and a firm commitment to progressive law reform grounded in social scientific research.” Note, *‘Round and ‘Round the Bramble Bush: From Legal Realism to Critical Legal Scholarship*, 95 HARV. L. REV. 1669, 1671 (1982).

Realism is sometimes said to have been defined by the exchange between Roscoe Pound and Karl Llewellyn. AMERICAN LEGAL REALISM 49 (William W. Fisher et al. eds., 1993) [hereinafter AMERICAN LEGAL REALISM] (noting that Llewellyn was later called the chief Realist).

22. Law & Economics scholars describe rule-making as ultimately (and appropriately) market-driven, with legal rules as a price structure. John R. Brock, *Economics and Legal Studies* 2 U.S. A.F. ACAD. J. LEGAL STUD. 203, 209 (1991) (“Economists tend to view legal rules as a set of implicit prices that motivate people to act in particular ways.”). Brock goes on to state, “Ultimately, good law must be good economics . . .” *Id.* at 214.

23. One definition of Critical theory is that it challenges the assumption of the dominance of the rule of law. See Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 462-63 (1987). Stated another way, the Critical Legal Studies movement began by pointing out the incoherence of a system of law assuming an equality that was so clearly not there. E. Dana Neacsu, *CLS Stands for Critical Legal Studies, if Anyone Remembers*, 8 J.L. & POL’Y 415, 421 (2000) (“CLS was born out of frustration with, and in an effort to expose, the contradictions and incoherence of both liberal and conservative legal theories.”). Even these definitions are controversial; in fact, even key Critical scholars have declined to define the movement. See RICHARD W. BAUMAN, *CRITICAL LEGAL STUDIES: A GUIDE TO LITERATURE* 3 (1996). Consequently, there are no orthodox Critical views and no Critical texts that adherents commonly recognize as being authoritative. *Id.* at 1.

24. Note that Law & Economics and Critical theory trace their roots back to Realism. The similarities between Critical Legal Studies and Realism are readily apparent. Schlegel, *supra* note 21, at 407-08 (“[T]he drawing of parallels between these two intellectual movements separated by nearly fifty years may . . . be appropriate, perhaps even illuminating, because of a shared, relatively left politics, practiced in a relatively conservative social and political environment.”). *Id.* at 407. Schlegel goes on to explain this statement:

First, while the politics of most of the CLS group is much left of Realist politics, it, like Realist politics, is threatening to the dominant elements in legal education less because of its absolute position on the political spectrum than because it is left relative to those dominant elements; left is destabilizing. More important, however, just like Realism, CLS has as one of its central goals the dejustification of legal rules. Indeed, the movement uses essentially the same techniques; claims of incoherence or inappropriateness abound, as do examples of demythologizing (i.e., debunking or trashing) judicial decisionmaking (and everything else), and direct denials of the correctness of policy.

Id. (enumerating the differences between the two); see also BAUMAN, *supra* note 23, at 3 (enumerating similarities between the two). Richard Bauman goes on to note that Critical theory is different from Realism in that Critical theory rejects the proposition that social science can

these criticisms often center on the membership of the Institute, the scope and goals of Institute projects, the perception that the Restatements have not incorporated the knowledge of other disciplines, the widespread conception that the Institute is anti-reform, and the view that the Restatements represent antiquated Formalist thought that is not useful to modern lawyers.

A. Criticism of the Institute's Membership

The Institute has been criticized as being dominated by conservative forces and as failing to be inclusive.²⁵ Along the same lines, the Institute has been criticized for ostensibly allowing its reporters to become too powerful and for excluding rule-skeptics who might have been critical of the Institute's mission and projects.²⁶ Judge Richard A. Posner has criticized the American Law Institute for a lack of generational diversity on its elite Council,²⁷ as well as a lack of intellectual diversity in its general membership.²⁸ He provides specific

provide viable answers and is not reformist in the same moderate way. Instead, the Critical movement is generally considered to be more radical. *Id.* at 4; *see also* AMERICAN LEGAL REALISM, *supra* note 21, at xiv (suggesting that Law & Economics and Critical Legal Studies both can trace their roots to Realism).

Some have gone a little bit further, suggesting that Critical theory is actually a continuation of the Realist program. Note, *supra* note 21, at 1669 ("These [Critical] scholars locate the genesis of today's crisis in the Realist legacy and see their task as the continuation of an abandoned Realist project.").

25. Elson, *supra* note 8, at 625-26 (describing criticisms of the Institute as elitist, as lacking the perspective of nonlawyers and interdisciplinary legal scholars, and as lacking intellectual and generational diversity).

26. Alan Milner, *Restatement: The Failure of a Legal Experiment*, 20 U. PITT. L. REV. 795, 797-98 (1959) (Although the Institute claims that its review process ensured that "the peculiar slants were minimized[,] the author asserts that "[a]ctual practice . . . [falls] somewhat short of this ideal."). Milner continues, "The introduction of 'sceptics' into these gatherings was . . . jealously guarded against. And for obvious reasons—because the sceptics, whose scepticism was directed primarily *against rules*, could not espouse the cause of Restatement without academic hypocrisy, and so their usefulness would be cut down accordingly." *Id.* at 798 (emphasis in original). The author's comments raise the question of whether admitting skeptics into the Restatement process could actually improve the product, echoing the points raised in Part II.C. Milner also refers to Judge Charles Clark for the proposition that, in the Judge's experience, "not once was a Reporter defeated on any issue if he persisted in his views long enough." *Id.* Instead, Milner's critique continues, Reporters employ "careful 'forgetting' of criticisms when reports [are] made[.]" *Id.*

27. RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY* 307 (1999) ("[T]he Institute should consider putting a term limit on membership in the Council.").

28. *Id.* at 305. He recommends that at least some nonlawyers be chosen as members, stating, "Some of the greatest experts on matters under consideration by the Institute at this time, such as trust investment, products liability, the apportionment of tort liability, and family dissolution, happen not to be lawyers, law professors, or judges; they happen to be economists, finance theorists, psychologists, and sociologists. Some of these people

examples of lost opportunities he believes this lack of diversity has created. Judge Posner is particularly critical of the Institute for failing to embrace interdisciplinary scholarship and failing to include scholars outside the field of law. He asserts that “[t]he most exciting legal research of the past thirty years has been interdisciplinary,” then adds that “[e]ven the interdisciplinary *lawyers* are barely represented either on the Council of the Institute, or in the ranks of the reporters and advisors of the Institute’s various projects, or in the references in the reporters’ notes.”²⁹

Judge Posner sees this omission as having a considerable impact on the quality of the Institute’s work:

The current family-dissolution draft is centrally about the economics of human capital, on which there is a huge literature not cited in the reporters’ notes though in fact well known to the reporter (Ira Ellman). The corporate-governance project suffered not only because of the opposition of business groups but also because the authors did not give due weight to the challenge posed to conventional legal thinking about corporate governance by modern finance theory, as expounded for example by Frank Easterbrook and Daniel Fischel. . . . The truncation of the Institute’s Enterprise Liability Project, which had engaged contemporary economic thinking on products liability, bespeaks a lack of receptivity on the part of the Institute to modern interdisciplinary scholarship.³⁰

This criticism is not limited in origin to Posner and others associated with Law & Economics. It also includes members of the Realist movement who made it a priority to introduce nonlawyers into law faculties.³¹ Justice Abrahamson provides a different perspective that calls the validity of this criticism into question, noting that the reporters consult “a committee of advisers, (not all of whom are ALI members or lawyers).”³²

actually teach at law schools, some on a full-time basis. Some would be interested in the work of the Institute. They could give that work an empirical dimension that it now lacks and that . . . legal research sorely needs more of.

Id. at 307.

Judge Paul A. Simmons has made a similar criticism, alleging that the Restatements are tailored to a particular philosophical bent. Paul A. Simmons, *Government by an Unaccountable Private Non Profit Corporation*, 10 N.Y.L. SCH. J. HUM. RTS. 67, 77 (1992) (“In order to reshape the common law into the desired philosophical image of the ALI, the proper choice of reporter for each ALI project is absolutely required.”).

29. POSNER, *supra* note 27, at 304 (emphasis in original).

30. *Id.* at 304-05.

31. AMERICAN LEGAL REALISM, *supra* note 21, at 234 (describing, as part of the Realist movement, the introduction of social scientists and others, some with no training in law, to law-school faculties).

32. Shirley S. Abrahamson, *Refreshing Institutional Memories: Wisconsin and the American Law Institute—The Fairchild Lecture*, 1995 WIS. L. REV. 1, 15. She also notes the involvement of

Judge Paul A. Simmons expresses his concern about the cooption of the judiciary into the American Law Institute.³³ He also expresses his perception that the Institute is still dominated by Harvard and Yale,³⁴ does not ensure that minority viewpoints are adequately presented,³⁵ and fails to represent the states equally.³⁶ Contrasting with the portrayal of the Institute as insular and elitist are the Institute's outreach efforts, such as Arthur Corbin's plea for all attorneys with relevant expertise to lend their knowledge to the Restatement endeavor.³⁷ Furthermore, there is at least some evidence that the Institute founders believed they had assembled a representative group of lawyers, professors, and judges to

a consultative group that consists of Institute members who are interested in the project. *Id.* Elsewhere, Justice Abrahamson acknowledges the critique some have levied against the Institute for declining to include nonlawyers as members. *Id.* at 33. She states that "[s]ome have alleged that a bias exists in the ALI because the only interests and perspectives reflected are those of the legal profession, which may tend to favor use of the litigation system." *Id.*

33. Simmons, *supra* note 28, at 70 ("The original incorporators of the ALI have ingeniously and unilaterally compromised both the state and the federal judicial system by incorporating the entire leadership personnel into the participating memberships [sic] activities of the ALI by gratuitously conferring automatic voting and participating memberships on virtually every important judicial leader in the entire judiciary system of the United States."). Judge Simmons finds it particularly troubling that "[t]his was done without obtaining any official consent or permission from any branch of any state or federal government, and without obtaining the prior consent of any of the affected judicial officials." *Id.*

34. *Id.* at 83 ("An unspoken requirement of the ALI membership process seems to be that a potential member, in order to be elected, should be a graduate of Harvard or Yale Law School."). See also AMERICAN LEGAL REALISM, *supra* note 21, at 272 ("Harvard, under the direction of Roscoe Pound, had become [by 1928] thoroughly involved in the Restatements of the American Law Institute.").

35. Simmons, *supra* note 28, at 67 (describing the American Law Institute as failing to give "any meaningful consideration of any kind to the social, economic, and political interests of the various minority groups in this country"). Elsewhere, he states,

There are no members of the ALI Council who would have the natural proclivity to protect the social and economic interests of the middle class, the blue collar working class, or the ethnic minorities, with the possible exception of the four ALI Council members who are lawyers in very small firms with fewer than twenty five partners and associates.

Id. at 89.

36. *Id.* at 88 ("Statistics of the residential distribution of the ALI Council members indicate that twenty six states do not have any resident ALI Council members."). It appears to be Judge Simmons' assumption that the Council should function like Congress, with state-by-state representation. He states, "Thus, millions of people who do not have any ALI Council members from their state are unrepresented." *Id.*

37. Arthur L. Corbin, *The Restatement of the Common Law by the American Law Institute*, 15 IOWA L. REV. 19, 24 (1929) ("[E]very person having special knowledge in any field of law is in duty bound to make a careful study of the documents that are being prepared in his field and to send to the Institute all the criticisms and suggestions that he thinks to be of importance.").

commence the Restatement project.³⁸ Herbert Goodrich describes the distinguished membership of the Institute as a matter in which it may appropriately take pride.³⁹ Judge Posner has expressed a different opinion, criticizing the American Law Institute as not being elite enough in modern times.⁴⁰ One way to test these critiques and others would be to engage in the kind of research proposed by Herbert Kritzer, who has suggested a comprehensive study of the “mission, membership, and . . . process” of the Institute.⁴¹

B. Criticism of the Institute’s Goals and Vision

Related to the critique of the Institute’s membership is the criticism that, in typical Formalist fashion, the American Law Institute has not been the force for social justice that it could and should have been.⁴² Stated differently, some claim that the Restatements have lost the sense of purpose and spirit of progressiveness with which the project was begun.⁴³ Some scholars associate this evolution with

38. THE AMERICAN LAW INSTITUTE 50TH ANNIVERSARY 41 (ALI 1973) [hereinafter AMERICAN LAW INSTITUTE] (“[W]e determined to make the gathering to which our Report [recommending the founding of the Institute] should be submitted representative of the legal profession in the United States in the sense that each of those invited should be a leader of the profession of the law either by reason of official position or of well established professional standing.”).

39. Herbert F. Goodrich, *What Would Law Teachers Like to See the Institute Do?*, 8 AM. L. SCH. REV. 494, 497 (1936). The author states, “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 standing who will interest themselves in the technical side of the work is something new, and the Institute has accomplished it.” *Id.*

40. POSNER, *supra* note 27, at 305 (“[I]n sharp contrast to the experience in the first half century of the Institute, few of the reporters for its projects are drawn any more from the leading law schools.”). Posner goes on to state, “[T]he diminished representation of the most prestigious law schools in the Institute’s work has contributed to the sense that the Institute has lost its former centrality in the process of legal modernization.” *Id.*

41. Herbert M. Kritzer, *Evaluating the American Law Institute: Research Issues and Prospects*, 23 LAW & SOC. INQUIRY 667, 671 (1998). This article is a recommendation by political scientist Kritzer for a comprehensive study of the “characteristics and attitudes of the membership,” the “representativeness or unrepresentativeness of the institute membership,” and the ways in which the Restatements are used, together with a cross-check with social-science scholars regarding the substantive quality of the product insofar as it reflects the knowledge of other disciplines. *Id.* at 670. Kritzer’s proposal is in response to the issues raised by Professor Elson. *Id.* at 667; see generally Elson, *supra* note 8.

42. Goodrich, *supra* note 39, at 508 (incorporating the symposium comments of Hessel Yntema, who stated that “[i]t 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”). For explanation of Yntema’s reference to “the bird of justice,” see *infra* note 245.

43. JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM & EMPIRICAL SOCIAL SCIENCE 256 (1995). Much of Schlegel’s criticism speaks more generally to the modern state of legal

the Institute's decision, particularly in the first series of the Restatements, to limit the project's purview to existing law.⁴⁴ Some of these scholars had read the founding report of the Institute as promising greater reform and were very disappointed by this turn of events. Hessel Yntema describes this as an "indefensible retreat"⁴⁵ and "a material nullification of the major objective of the Institute."⁴⁶

Professor William La Piana makes the same point about the Institute's choice of mission when he elucidates the difference between "social justice" and "legal justice," using the lexicon of Pound's sociological jurisprudence.⁴⁷ Similarly, Judge Posner has criticized the American Law Institute as staying out of the central, "institutional rather than doctrinal," issues of law reform.⁴⁸ Posner sees this as a lost opportunity for the Institute to maintain its reputation of leading the legal profession.⁴⁹ Henry Hart and Albert Sacks go a bit further in their

scholarship:

Scholarship in the high-Germanic mode of Wigmore and Williston, scholarship whose purpose is the patient organization and classification of the rules, is dead. We do still restate the law and write treatises, but somehow those activities are different than they were eighty years ago. The American Law Institute is a club with its own rules and sells its own sense of having arrived; treatises are a by-product of something else—the need for cash to put children in private schools, the existence of the material sitting there anyway, the demand of the profession for easy, reasonably accurate access to the rules in specialized fields. The norm of scholarship has shifted and the identity of the law professor as well.

Id.

44. See *infra* note 58.

45. Goodrich, *supra* note 39, at 507 (incorporating the symposium comments of Yntema, who also stated, "[T]he notion of improving the law by restating it as it is [sic] unsatisfactory").

46. AMERICAN LEGAL REALISM, *supra* note 21, at 52; Goodrich, *supra* note 39, at 505 ("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.").

47. William P. La Piana, *A Task of No Common Magnitude: The Founding of the American Law Institute*, 11 NOVA L. REV. 1085, 1102 (1987). "[T]he sociological jurist criticizes legal systems, doctrines, and institutions 'with respect to their relation to social conditions and social progress.'" *Id.* at 1103 (citation omitted).

48. POSNER, *supra* note 27, at 305 (describing the traditional, "doctrinal" work of the Institute). Posner acknowledges that the increasingly political nature of American law, coupled with the Institute's desire to stay out of politics, has made it difficult for the Institute to address the central contemporary issues. *Id.* at 307. "Whatever its causes, the politicization of important areas of American law has made it difficult for the Institute to engage with the most important questions without crossing the line that separates technical law reform from politics." *Id.*

49. Posner states,

Occasionally the Institute engages institutional issues, as in its work on complex litigation. But for the most part it has been content to remain in the groove first planed in the 1920s—preparing [R]estatements, now most often subsequent editions of the original [R]estatements, of common law fields. This is valuable work. But with the

characterization of the Institute's decision that the Restatements should state only "existing law,"⁵⁰ rather than introducing new ideas as to what the law should be. As they state, "[T]hus, the Institute limited itself to the role only of a follower in the statement of the law and of a follower, moreover, willing to join the parade only after it was well under way."⁵¹ Their description has in many instances borne true: although the Institute sometimes has recommended the adoption of a minority rule, even this has been, historically, a relatively infrequent occurrence.⁵²

principal exception of tort law, the doctrines of the common law are on the periphery of contemporary worries about the law—and that seems a strange place in which to concentrate the resources of an organization of the leaders of the profession.

Id. at 306.

50. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF THE LAW* 737 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994). As the authors note, there was some sentiment to the contrary. The authors include this revealing quote from reporter Joseph Beale:

If we are to settle and to clarify the law, to adapt it to the needs of life, can we avoid making our statement as to what we think the law is; basing it, unfortunately, not on precedent, because precedent does not decide it, but on the other elements which the President [Benjamin Cardozo] has so happily described as entering into the judicial function, analogy, the needs of society, economic, social, ethical, taking advantage of all the experience and judgment on these matters with which the Lord endowed us at birth, and our experience in life has given us, should we make an effort to state what we think is the sound rule?

Id.

51. *Id.* at 740. The authors clarified elsewhere: "This did not mean that it [the American Law Institute] would not espouse a minority view. The Institute never descended to counting noses and stating only the weight of greater authority." *Id.* at 739. They did, however, suggest that this conservative approach led to a missed opportunity for the Restatements to have greater influence:

For judges who were interested not only in the negative question of when a court is warranted in overruling or qualifying old precedents . . . without awaiting action by the legislature, the [R]estatements, literally taken, provided exactly no help at all. For they purported to say only what the law "was" in situations in which a substantial number of courts had already broken the new ground. As to when a lead should be taken in breaking ground, they had nothing . . . but neutral "caveats."

Id. at 744. The courts face the same dilemma in deciding how activist they may be without losing credibility and authority. See *infra* Part IV.

The Institute's own conservative view of its proper role is consistent with the words of Herbert Goodrich, who stated that the Institute "should neither promote nor obstruct political, social, and economic changes." HERBERT GOODRICH, *THE STORY OF THE ALI* 285 (1951).

52. Warren A. Seavey, *The Restatement, Second, and Stare Decisis*, 48 A.B.A. J. 317, 318 (1962) ("[T]he statements were usually in agreement with the rules in a very large percentage of the states, a survey showing something like ninety per cent [sic] agreement with decided cases on contested points . . ."). Elsewhere, Seavey notes the concern that the product must remain "a statement of the prevailing American law and not a professional dream." *Id.*

Criticisms like these tend to perpetuate the Institute's Formalist image. In contrast, scholars associated with the Critical Legal Studies movement are identified with an almost inherent, left-leaning sense of the centrality of social justice,⁵³ which has been dubbed as being "politically dissident."⁵⁴ Realists, likewise, are often politically liberal⁵⁵ and are frequently characterized by an emphasis on the social purpose of law.⁵⁶

Despite these characterizations of the ALI's work as conservative and generally uncontroversial, Justice Shirley Abrahamson reminds us that the Institute's history has not always been free of controversy.⁵⁷ The Institute founders also articulated a reasoned basis for the Institute's decision not to address matters of great disagreement.⁵⁸ Modern Institute President Michael Traynor has affirmed this judgment in describing the way in which he believes Institute resources might most effectively be used.⁵⁹ In addition, it is important

53. Mark V. Tushnet, *Critical Legal Studies: A Political History*, 100 YALE L.J. 1515, 1535 (1991) ("A fair number of the first group associated with [CLS] were 'red-diaper babies,' the children of leftist activists in the 1930's and thereafter.").

54. BAUMAN, *supra* note 23, at 3.

55. AMERICAN LEGAL REALISM, *supra* note 21, at 52 (noting the leftist orientation of most Realists).

56. *Id.* at 167 (describing what the Realists called "purposive adjudication" as requiring that "[f]or guidance in decision-making, . . . courts . . . depend primarily on consciously articulated social policies"); Felix S. Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 809 (1935), reprinted in AMERICAN LEGAL REALISM 212, 218 (William W. Fisher et al. eds., 1993) (describing an ideal state of law in which "[s]ocial policy" will be comprehended not as an emergency factor in legal argument but rather as the gravitational field that gives weight to any rule or precedent"); Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, in AMERICAN LEGAL REALISM 68, 72 (William W. Fisher et al. eds., 1993) [hereinafter Llewellyn, *Some Realism*] (describing Realism as being characterized by "[t]he conception of law as a means to social ends and not as an end in itself").

57. Abrahamson, *supra* note 32, at 6 ("In 1975 it was reported that when the CIA and FBI were investigating politically threatening groups, the ALI was on their list of targets.").

58. AMERICAN LAW INSTITUTE, *supra* note 38, at 23 ("Changes in the law which are, or which would, if proposed, become a matter of general public concern and discussion should not be considered, much less set forth, in any [R]estatement of the law such as we have in mind."). The text goes on to specify that this prohibition would bar, for example, the "advocacy of novel social legislation." *Id.* (clarifying that, "[w]hen, however, a social or industrial or any other policy has been embodied in the law, and also has been so far generally accepted as to be no longer a subject of public controversy, then the improvement of the law in relation thereto may not be beyond the province of the [R]estatement"). Along the same lines, the Institute's founding documents expressed conviction that the Institute should not purport to restate areas of law in which "it may not be in the power of the bar by a [R]estatement, however good, to attain desirable results." *Id.* at 46 (noting that "[s]uch a subject is international law").

59. Michael Traynor, The President's Letter, "That's Debatable": *The ALI as a Public Policy Forum Part I*, A.L.I. REP., Winter 2002, available at http://www.ali.org/ali/R2402_presltr.htm. Traynor relates a telling story from the 1959 annual meeting:

to note that the Institute has sometimes been criticized when it was perceived as acting too quickly, rather than waiting for the courts to thresh out the issues more thoroughly. Some have argued, for example, that the creation of the Restatement of Conflicts may have been precipitous because the field was too new and unsolidified.⁶⁰ Warren Goodrich responds to this sort of argument by noting that the Restatements are most useful when they respond to current problems, not resolved ones.⁶¹

As the previously noted comments of Hessel Yntema intimated, one point of view is that the Restatement movement began with social justice as part of its agenda, but later abandoned these aspirations in favor of a total focus on increasing the clarity of the black-letter law.⁶² To the extent that this is true, it

At the conclusion of the discussion [regarding the “roles of judge and jury in capital cases”], a question was raised whether the Institute should also take a position on abolition of the death penalty. Director Goodrich stated that “We have felt that legislative opinion as backed by public opinion is so divided on the subject that we did not think a formal expression by us would help settling the question one way or the other Let’s be practical. You know what will happen if we start the debate on this subject. We never will get through with it, and we cannot do the other things which we have to do. And at the end, everybody will be of the same opinion as he was when we started out.

Id. at 7. Traynor continues, describing the areas in which he believes the Institute can make an appreciable difference:

A precious resource of the Institute is its ability to apply deliberative processes to the central object of clarifying and simplifying the law and adapting it to social needs. Even on an issue as provocative as the death penalty was over 40 years ago and still is, the Institute could usefully debate the important legal and policy issue of the function of judge and jury without having to tackle the divisive question of abolition.

Id.

60. For an interesting and comprehensive discussion of this project, see Symeon C. Symeonides, *The First Conflicts Restatement Through the Eyes of Old: As Bad as Its Reputation?*, 32 S. ILL. U. L.J. (forthcoming 2007).

61. Herbert F. Goodrich, *Institute Bards and Yale Reviewers*, 84 U. PA. L. REV. 449, 455 (1936) (“The Restatement should not be an epitaph for a life that has run its course, but a practical help in the solution of current problems.”). Goodrich goes on to acknowledge that the passage of time may ultimately produce a superior product. “If we now see as in a glass darkly, the results of our partial vision can at least be set down for the benefit of others. If subsequently another generation writes a superior Restatement, so much the better.” *Id.*

62. LAURA KALMAN, *LEGAL REALISM AT YALE 1927-1960*, at 14 (1986). Kalman describes the inception of the movement in 1923, and the way it has changed since that time:

The [I]nstitute directed its reporters to “make certain much that is now uncertain and to simplify unnecessary complexities” and “to promote those changes which will tend better to adapt the laws to the needs of life.” As work progressed, the [I]nstitute abandoned the second objective, telling its reporters to “state clearly and precisely in the light of the decisions the principles and rules” of existing law. Increasing legal certainty became the [I]nstitute’s only objective, a goal underlined by its decision to print the

may represent a purposeful decision on the part of Institute founders to allow the legislatures to take the lead in lawmaking, as Institute leaders understood the democratic form of government to function best.⁶³ Or perhaps the shift was a societal one, rather than something that took place internally within the Institute.⁶⁴

Another viewpoint is that the Restatements actually do serve as a force for social justice by making it possible for judges to see more clearly when an old law should be changed or abandoned.⁶⁵ Similarly, some characterize the Restatement movement as a public service performed out of the bar's sense of civic duty,⁶⁶ noting the sense of public-mindedness with which Institute members approach their work.⁶⁷ Along these lines, there is at least some evidence that the founders of the Institute believed the project would advance the cause of social justice.⁶⁸

rules in especially bold black letters.

Id.

63. AMERICAN LAW INSTITUTE, *supra* note 38, at 14 (describing the founders' view of the separation of judicial and legislative functions). The report of the founders' committee stated,

It is the province of the people and of legislative bodies, through constitutions and statutes, to express the political, economic and social policies of the nation, of its states, and of smaller communities. It is the province of lawyers to suggest, construct and criticize the instruments by which these policies are effectuated. The proposed organization should concern itself with such matters as the form in which public law should be expressed, the details of private law, procedure or the administration of law, and judicial organization. It should not promote or obstruct political, social or economic changes.

Id.

64. AMERICAN LEGAL REALISM, *supra* note 21, at xii (describing a shift in the law, following the Civil War, from focusing on justice to focusing on precedent and formal equality in the application of law).

65. Seavey, *supra* note 52, at 318 ("[I]n many cases [a Restatement] was of aid to the courts in changing a rule, unjust but based upon authority.").

66. George W. Wickersham, *The American Law Institute and the Projected Restatement of the Common Law in America*, 43 L.Q. REV. 449, 449 (1927) ("The American Law Institute . . . was the result of a movement originated at meetings of the Association of American Law Schools out of discussions over the existing dissatisfaction with the law and its administration and a recognition of the growing feeling among the members of the legal profession that the bar owed a duty to the public to improve the administration of justice."). Wickersham was the first president of the American Law Institute.

67. Abrahamson, *supra* note 32, at 4 (quoting Judge Abner Mikva as saying, "ALI reminds us that we are a profession and that, while we hope to do well as lawyers, we also expect to do good . . ."). The Institute's founding documents reflect a similar view of the public duty of lawyers: "The community may rightly look to the lawyer to promote social peace, good order and well-balanced social progress." AMERICAN LAW INSTITUTE, *supra* note 38, at 58.

68. AMERICAN LAW INSTITUTE, *supra* note 38, at 16 ("[E]veryone realizes that long-drawn-out litigation is, on account of the expense, a greater hardship on those of relatively small means

Yet another perspective is that social reform is beyond the appropriate purview of the Institute.⁶⁹ Arthur Corbin suggests that change is more properly seen as falling within the jurisdiction of the common-law courts rather than the American Law Institute.⁷⁰ Instead, Corbin suggests, the role of the Institute is not to stand in the way of such change once it has been recognized by the court system.⁷¹ His remarks show, however, that he nevertheless believed that the Restatement position should be considered in the balance even when mores and economic values might suggest a different result.⁷²

The Restatements have also been criticized as relying too much on the power of language.⁷³ This critique, like that of the Institute's mission, is fundamentally

than on the litigant with a long purse.") The Institute founders believed that their project, by making the law less unnecessarily complex, would reduce the time and expense associated with litigation. *Id.*

69. Fred B. Helms, *The Restatements: Existing Law or Prophecy*, 56 A.B.A. J. 152, 154 (1970) ("[T]he American Law Institute should continue to use its prestigious *Restatements* to state the law recognized by the courts. They should leave predictions of change caused by social policy and economics to the law review and textbook writers."). Helms cautions the reader:

The adoption by the A.L.I. of this prediction technique has forced the courts to look at law review articles to determine the present majority rule Instead of giving the courts an authoritative, determinative source with which at least to begin the decision-making process, the *Restatements* are in danger of being treated as merely worthwhile treatises.

Id. at 153 (citation omitted) (emphasis in original).

70. Corbin, *supra* note 37, at 28 ("Before this great community for which the Restatement is being made would be willing to adopt it, its doctrines must have received approval and application in some litigated case."). Corbin elaborates: "So far as new social mores and business practices are concerned, there is no research machinery for their discovery. The present writer believes, however, that if there were such machinery, it would be influential in affecting the Restatement only in very limited fields." *Id.*

71. *Id.* at 36 (asserting that the Restatements should not "in any serious degree operate to limit the development of law in accordance with changing conditions, practices, and mores"). Corbin elaborates: "The [R]estatement by the Institute, if well done, may tend to reduce the amount of ignorant and unintentional variation; it may reduce, but it cannot and should not prevent, that conscious variation that is based upon new experience, changing conditions, and new customs and desires." *Id.* at 27.

72. *Id.* at 39 ("[I]n the discussion and criticism of judicial decisions, and even in the consideration of social mores and economic theories, when the learned instructor reports that some courts hold *this* and some theorists assert *that*, he must now add that the American Law Institute says *the other*."). Elsewhere, Corbin quotes Elihu Root who states, describing what he hoped would be the authority of the Restatement project, "there will be not a conclusive presumption [of the correctness of the Restatement position] but a practical *prima facie* statement upon which, unless it is overturned, judgment may rest." *Id.* at 22.

73. Mitchell Franklin, *The Historic Function of the American Law Institute: Restatement as Transitional to Codification*, 47 HARV. L. REV. 1367, 1368-69 (1934) ("The assumption of the [Institute] draughtsman, therefore, is that language has social significance, and can be depended

a criticism that the Institute is too conservative in its outlook. The Institute's use of language was a favorite source of condemnation by members of the Realist movement.⁷⁴ "Word magic" and "word ritual" were some of the pejorative terms Realists have used to challenge the assumption that words have discrete, unchanging meaning.⁷⁵ Somewhat later in the twentieth century, "postmodern" scholars, including those associated with the Critical movement, made similar claims.⁷⁶ Incidentally, this problem may be one that is endemic to the English language; George Wickersham has noted the limits of English, as compared to Latin, in expressing concepts of law.⁷⁷

Evidence supports this interpretation of the Restatements' approach to terminology. The ALI's own documents suggest that the Institute founders believed that careful and purposeful use of language could make a substantive difference in the success of their project.⁷⁸ As Warren Seavey notes, the goal was to limit a word to only one meaning throughout its use in the Restatements.⁷⁹ The Realists, of course, would deny the possibility of this kind of consistency. Further, at least one scholar claims that the Institute has not only failed in its efforts to guard the careful use of language in its Restatements, but also may not have made this goal a priority in the first place.⁸⁰

upon as an authoritative means of intercommunication.").

74. ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S*, at 141 (1983) ("Across the Atlantic Wittgenstein was demonstrating the absurdity of attempting to put language in a straitjacket, yet the Restaters pressed on."). This is especially important insofar as one view of the Restatement movement is that it was an attempt to "protect [O]bjectivism from destruction by a new school of legal thought, [R]ealism." Nathan M. Crystal, *Codification and the Rise of the Restatement Movement*, 54 WASH. L. REV. 239, 240 (1979) (characterizing the viewpoint of Grant Gilmore regarding the Restatement movement). Crystal ultimately challenges this assumption. *Id.*

75. NEIL DUXBURY, *PATTERNS OF AMERICAN JURISPRUDENCE* 119-20 (1995) (quoting C.K. Ogden, J.A. Richards, and Charles E. Clark).

76. GARY MINDA, *POSTMODERN LEGAL MOVEMENTS* 3 (1995) (defining postmodern legal thought); *id.* at 239 ("Postmoderns thus reject the 'common sense' understanding of language which associates the meaning of words with fixed objects in the world.").

77. Wickersham, *supra* note 66, at 455 ("The fact is, that the English language does not lend itself readily to exact expression of juridical thought, as does the Latin language and those directly derived from it.").

78. AMERICAN LAW INSTITUTE, *supra* note 38, at 29 (addressing "the importance of expressing the [R]estatement in clear and simple English, avoiding so far as possible, the use of technical and unusual terms[,] and that 'the [R]estatement should be understandable by an intelligent, educated person who is not a trained lawyer.'").

79. Seavey, *supra* note 52, at 318 (describing the Restatements' "rules for writing"). The Institute's founding documents are consistent with Seavey's characterization. *See* AMERICAN LAW INSTITUTE, *supra* note 38, at 48 ("[A]n important part of the work of the Institute must be to secure precision in the use of legal terms.").

80. George R. Farnum, *Terminology and the American Law Institute*, 13 B.U. L. REV. 203, 208-09 (1933). The author states that it is "altogether plain that the various reporters and their

C. Criticism of the Institute's Apparent Insularity

Some scholars claim that the Restatements err in reifying the law as its own discipline, even as its own science, rather than incorporating the knowledge of other disciplines.⁸¹ Like the two critiques previously discussed, this one, too, is at its core a criticism that the Institute is old-fashioned and outdated in its goals and methodology. The idea of the “science of law” was a Formalist ideal⁸² to which Realism attempted to respond.⁸³

Others complain that the Restatement movement reflects a disproven view of the legal profession as having something unique and unbiased to offer. In recent years, Law & Economics scholarship challenged this conception in part through a push for interdisciplinary scholarship.⁸⁴ Furthermore, as early as 1923, Realist Walter Cook recommended the inclusion of “real economic experts” in the Restatement project as a necessary precondition for identifying “the best rule.”⁸⁵ Not long after, Charles E. Clark and Robert Maynard Hutchins criticized the American Law Institute for failing to take such advice and as therefore failing

advisers have not come to any complete arrangement among themselves as to the consistent use of definite terminology throughout the entire series of subjects being restated.” *Id.* at 208. The author goes on to state, “[W]e have it on unimpeachable authority that ‘at the start’ of the work ‘there was no insistence on a uniform legal terminology throughout all of the Restatements.’” *Id.* at 209 (quoting Formal Statements of Director, Proposed Final Draft No. 1—Conflict of Laws p. 26).

81. References to law as a science appear several times in the founding documents of the Institute. See, e.g., AMERICAN LAW INSTITUTE, *supra* note 38, at 44 (describing “the encouragement and conduct of scientific legal work” as a major goal of the Institute); *id.* at 63 (describing the law as one of a number of “applied science[s]”).

82. AMERICAN LEGAL REALISM, *supra* note 21, at xii-xiii (noting “the desire of the relatively new cadre of professional law teachers [around the turn of the last century] to persuade skeptical university presidents and practicing lawyers that law was a science, a technical but integrated field that could be mastered only through three years of full-time study”).

83. *Id.* at 3-4 (referring to the work of early Realist Holmes and others as being perceived as “a denunciation of all efforts (like those of Harvard Law School’s dean, Christopher Columbus Langdell) to represent law as a ‘science’”).

84. Nicholas S. Zeppos, *Reforming a Private Legislature: The Maturation of the American Law Institute as a Legislative Body*, 23 LAW & SOC. INQUIRY 657, 660 (1998) (“[Law & Economics] scholars fundamentally challenged both the idealized model of interest group pluralism and the legal process assumptions about the legislative process.” (internal citations omitted)).

85. SCHLEGEL, *supra* note 43, at 77. Schlegel states, [A]fter going through the Institute’s plan for generating an authoritative statement of “the ‘best’ rule” where legal analysis had identified conflicting rules, Cook observed that choosing the best rule would involve in many cases “a knowledge of economic facts which the legal experts will not have.” Rather, one would need “the cooperation of real economic experts,” people who are “trained in getting at and in interpreting the meaning of the facts relating to our industrial and financial organization.”

Id. (footnote omitted).

to do adequate research to support the Restatement project.⁸⁶ Lawrence Friedman is more trenchant in his critique, describing the first series of Restatements as “almost virgin of any notion that rules had social or economic consequences.”⁸⁷ Judge Posner offers a more measured interpretation, noting that the need for interdisciplinary perspectives in the law was not readily apparent until relatively recent times.⁸⁸ Posner does, however, point out that “the composition of the Institute . . . is limited to practicing lawyers, judges, and law professors—that is, to lawyers and only lawyers” and, therefore, criticizes the Institute for failing to incorporate interdisciplinary scholarship.⁸⁹

Early Realist Oliver Wendell Holmes was perhaps one of the first to point out the importance of interdisciplinary study in the law.⁹⁰ The rise of

86. *Id.* at 83 (“[A]fter recounting the unsuccessful efforts at procedural reform and detailing contemporary efforts, including those of the American Law Institute, [Clark and Hutchins] concluded: ‘The reformers have failed, we believe, because the necessary basic research has been lacking We regard facts as the prerequisite of reform.’”). Clark and Hutchins believed that the Restatement project should have been “correlated with the study of allied subjects outside the law.” *Id.*

87. LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* 582 (1973). The author further states, “They took fields of living law, scalded their flesh, drained off their blood, and reduced them to bones. The bones were arrangements of principles and rules (the black-letter law), followed by a somewhat barren commentary.” *Id.*

88. Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761, 763 (1987) (Posner states that, as recently as “1965[,] it reasonably appeared that any deficiencies in the legal system could be rectified by lawyers trained and operating in the tradition of autonomy.”). Posner notes, among other factors contributing to the need for interdisciplinary study in law, the decline of “political consensus associated with the ‘end of ideology.’” *Id.* at 766 (citation omitted). He also credits the rise of statutes with a decline in the lawyers’ monopoly on the proper understanding of law. *Id.* at 773 (noting that “[t]he particular skill honed by legal education and cultivated by legal scholars is that of extracting a legal doctrine from a series of cases and fitting it together with other doctrines similarly derived. It is a particularly valuable skill in dealing with common law,” but less necessary in the age of statutory domination).

89. POSNER, *supra* note 27, at 304. Additionally, he states,

A great deal of the work that [has] practical relevance [to the law] is done by people with law degrees, of course, but not all—think of the work of Ronald Coase, Gary Becker, William Landes, and Steven Shavell, to name only a handful of the distinguished economists who have worked on legal problems and who ought to be well known to everyone seriously interested in law reform.

Id. Similarly, Judge Paul A. Simmons points out, “There are no sociologists, economists, accountants, political scientists, bankers, stockbrokers, insurance executives, corporate chief executive officers, engineers, or penologists represented on the ALI Council, even though ALI publications are of significant social and economic importance.” Simmons, *supra* note 28, at 88 (footnotes omitted). Perhaps notably, the same could be said of the judiciary, whose work the American Law Institute purports to assist. *See infra* Part IV.

90. Holmes, *The Path of the Law*, *supra* note 21, at 22. Holmes famously stated, “For the

interdisciplinary study may be associated with Legal Realism and, later, Law & Economics.⁹¹ The need for interdisciplinary scholarship was a common theme in the Realist era, even though at least one scholar admits that, although he is convinced social facts influence judicial decisions, he is not entirely sure how the mechanism functions.⁹² Roscoe Pound, likewise, calls for increased interdisciplinary study and decreased legal “monasticism.”⁹³ Alan Milner makes the same point in a slightly different way, suggesting that lawyers should receive training in the behavioral sciences.⁹⁴ Law & Economics is overtly interdisciplinary,⁹⁵ and the same is true of much contemporary legal scholarship. Yale Professor Robert Ellickson has noted the dominance of interdisciplinary

rational study of the law the black letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.” *Id.* He was particularly concerned that lawyers understand the value of studying history:

The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened skepticism, that is, toward a deliberate reconsideration of the worth of those rules.

Id.

91. Professor Ulen describes a decreased sense of law as being its own discipline, associated with the rise of Law & Economics. Thomas S. Ulen, *Firmly Grounded: Economics in the Future of the Law*, 1997 WIS. L. REV. 433, 436 (“Prior to the advent of [Law & Economics], the study of law did not have a coherent theory of decision-making, largely because it did not need such a theory. Law was an autonomous discipline.”).

92. Cohen, *supra* note 56, at 225 (“We are still in the stage of guesswork and accidentally collected information, when it comes to formulating the social forces which mold the course of judicial decision.”). The author goes on to enumerate what had been observed, to date, about the workings of these forces. *Id.*

93. Roscoe Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12 (1910), reprinted in AMERICAN LEGAL REALISM 44 (William W. Fisher et al. eds., 1993) [hereinafter Pound, *Law in Books*] (“Let us look to economics and sociology and philosophy, and cease to assume that jurisprudence is self-sufficient. . . . Let us not become legal monks.”).

94. Milner, *supra* note 26, at 824 (asserting that “the need is to make [lawyers] familiar with more techniques than merely analytical legal ones”). Milner continues, “For a start, they should be at least [be] passingly familiar with the behavioral sciences, with some idea of the inter-relationship of sociological, psychological, and criminological material to legal concept and problems.” *Id.* (footnote omitted).

95. John R. Brock, *Economics and Legal Studies*, 2 U.S.A.F. ACAD. J. LEGAL STUD. 203, 203 (1991) (noting that “virtually every major law school in the United States now has at least one full-time PhD economist as a member of the law faculty”). Brock goes on to characterize economics as the penultimate social science. *Id.* at 214. “There is only one social science. Economics interpenetrates them all, and is reciprocally penetrated by them . . . the same master pattern of social theory—one into which the phenomena studied by the various social sciences to some extent already have been, and ultimately will all be, fitted.” *Id.* (quoting Jack Hirshleifer, *The Expanding Domain of Economics*, 75 AM. ECON. REV. 53, 68 (1985)).

study in recent years.⁹⁶ Lawrence Friedman has also commented on the prevalence of interdisciplinary methods in Law & Society literature.⁹⁷

Because interdisciplinary scholarship has become so prevalent, several scholars have tried to identify ways in which the Institute might benefit from this body of work. Professor Herbert Kritzer, a political scientist, suggests that the Institute use scholars from other disciplines to evaluate its handling of the various social issues that the Restatements address.⁹⁸ Along the same lines, Hessel Yntema has criticized the Institute for not having gone forward with the empirical factual surveys that were promised in the early days of the Institute.⁹⁹

Both Law & Economics and Realist scholars have pushed for more empirical research.¹⁰⁰ This emphasis is a natural outgrowth of both movements, which are described as being more social-science oriented than traditional doctrinal research is.¹⁰¹ One scholar has asserted that the reason for the law profession's general resistance to this transformation is that the scientific method is deductive, while traditional case study is inductive.¹⁰² Even so, there is at least some evidence that the Institute founders intended to incorporate empirical study into the Restatement project.¹⁰³ This effort was likely abandoned on account of the considerable time and expense involved.¹⁰⁴

There is also some indication that the leaders of the Restatement movement were familiar with these methodological criticisms early on¹⁰⁵ and may even have

96. Robert C. Ellickson, *The Twilight of Critical Theory: A Reply to Litowitz*, 15 YALE J. L. & HUMAN. 333, 343 (2003) ("Currently some of [the] hottest topics in the academy are the interrelated issues of trust, social capital, socialization, and norms The most ambitious work is self-consciously interdisciplinary.").

97. Lawrence M. Friedman, *The Law and Society Movement*, 38 STAN. L. REV. 763, 763 (1986) ("People who carry on law and society research vary greatly in methods and outlook. What they share is a general commitment to approach law with a vision and with methods that come from outside the discipline itself . . .").

98. Kritzer, *supra* note 41, at 671 ("The purpose of these reviews would be to ascertain the degree to which the Restatements are consistent or inconsistent with empirical understandings of the phenomena addressed by the Restatements.").

99. Hessel E. Yntema, *What Should the American Law Institute Do?*, 34 MICH. L. REV. 460, 465 (1936) (asserting that, "[f]or reasons which are not entirely apparent, no such endeavor to obtain factual information on vital issues has been made by the Institute as such").

100. Ulen, *supra* note 91, at 436 ("I am confident that [Law & Economics], in conjunction with law and society, will foster the empirical study of legal rules and institutions.").

101. *Id.* at 434 (describing Law & Economics as "a force that transformed many faculty from exclusive practitioners of traditional doctrinal research to a more social-science-oriented research").

102. *Id.* at 446 ("Some commentators have objected to [Law & Economics'] attempt to construct a theory of legal rules and institutions on the ground that law is inherently an inductive discipline, slowly growing from case to case and eschewing grand theories.").

103. AMERICAN LAW INSTITUTE, *supra* note 38, at 56-57 (describing planned "legal surveys" that would illuminate "the practical operation of existing rules of law").

104. *See infra* note 307.

105. Goodrich, *supra* note 39, at 496 ("Certainly we have need of new methods of approach,

taken steps in response.¹⁰⁶ In addition, Institute leader Herbert Wechsler seems to have considered, and ultimately rejected, the conception that science would necessarily enrich the creation of good law.¹⁰⁷

Some scholars have attempted to divide the study of law into a science of and a science about law—a division which is controversial—in an attempt to demonstrate the value of endeavors like the Restatements as artifacts of a science about law.¹⁰⁸ Others have characterized the description of law as a science as, at least in part, itself an artificial construction intended to protect the professional identity and monopoly of lawyers.¹⁰⁹

In considering the Institute's chosen methods, it is important to note that it is not universally accepted that Institute members must consider social facts when crafting Restatement principles that promote social justice. Arthur Corbin acknowledges the difficulty inherent in ensuring that the American Law Institute's Restatements are consistent with the fabric of American law and society.¹¹⁰ He goes on to suggest, however, that "experience indicates that the best way to turn mores into law is to do it piecemeal by the "molecular motion"

new systems of terminology, liaison with other fields of social science."). Goodrich adds, in defense of the Institute and its methods, "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." *Id.*

106. Modern Institute President Michael Traynor has urged Institute members to take the advice of former Director Herbert Wechsler, who stated, "We should feel obliged in our deliberations to give due weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs." Traynor, *supra* note 59.

107. Jonathan S. Simon, Wechsler's Century and Ours: Reforming Criminal Law in a Time of Shifting Rationalities of Government 6 (2003), *available at* <http://repositories.cdlib.org/cslls/lss/11> (unpublished manuscript) (describing, in the criminal law context, Wechsler's concern with "the increasing claims of would be professionals to have developed scientific expertise, 'adequate, or nearly adequate, to solve the practical problems of crime control'"). Simon later asserts, "Wechsler felt that law was particularly endangered by the twin pressures of populism and professional hubris (associated with the human sciences)." *Id.* at 7. Instead, Wechsler seems to have embraced the more conservative belief in the law as having something unique to offer as its own discipline.

108. Milner, *supra* note 26, at 810 ("[T]he first would deal purely with the interdependence of rules and deductions from them, the second with putting these rules and deductions into their proper places in the judicial and social processes."). Milner goes on to indicate what he believes to be the futility of such an exercise: "[T]o make this division is to assume that one can syphon the oxygen out of water and still get washed in what is left—to assume that one can exist independently of the other and still perform more or less the same function." *Id.* at 810-11.

109. La Piana, *supra* note 47, at 1089 ("As social structure changed and America became more and more a national society, mastery over a politically neutral body of scientific knowledge became an important way to make one's place in society respectable and secure.").

110. Corbin, *supra* note 37, at 27. Corbin asks, "[I]s the Institute sufficiently taking into account the recent variations already evidenced in court decisions and also the social mores and business practices that are already ripe for new variations that must inevitably take place?" He then responds, "The answer to this is easy; most certainly the answer is No." *Id.*

of the courts.”¹¹¹ Harlan Stone’s viewpoint, similarly, is that so-called sociological jurisprudence is not nearly as novel as some have claimed it to be. Instead, he asserts that judges have always considered the factors urged by the “sociological method.”¹¹² Oliver Wendell Holmes, likewise, has shown that the law captures current judgments about value and priority, even when it does not do so expressly.¹¹³ Thus, it is not clear that it is appropriate to criticize the Institute as neglecting interdisciplinary study and empirical methods, if such study and methods would be duplicative of the best current efforts of common-law courts.

D. Criticism of the Restatements as a Bulwark Against Greater Reform

One view of the Restatement movement is that it was an attempt to protect the common law against codification.¹¹⁴ Some scholars agree with this view even though they also claim the Restatements ultimately have borne great similarity, in form and in goals,¹¹⁵ to a code.¹¹⁶ Roscoe Pound ascribes this resistance to

111. *Id.* at 28 (“[W]e should remember that new social mores and business practices are in general forced upon the attention of our courts about as soon as they can be described as ‘prevailing.’”). Corbin further states, “It is no new or surprising dogma that custom makes law. As fast as custom can safely be turned into law, the courts generally do it; and the Institute will be willing to recognize.” *Id.* at 28-29. In responding to the criticism that the American Law Institute moves too slowly, Corbin’s response seems to be that “the danger involved in stating unadjudicated mores and practices as existing law would be much greater.” *Id.* at 29.

112. Harlan F. Stone, *Some Aspects of the Problem of Law Simplification*, 23 COLUM. L. REV. 319, 328 (1923) (“It is not a novel idea, that in declaring law the judge must envisage the social utility of the rule which he creates. In short, he must know his facts out of which the legal rule is to be extracted and in a large sense they embrace the social and economic data of his time.”). Stone continues,

Many years ago, Mr. Justice Holmes in classic phrase reminded us that “the life of the law is not logic but experience.” If this is what is meant by the sociological method and by sociological jurisprudence, it is the method which the wise and competent judge has used from time immemorial in rendering the dynamic decision which makes the law a living force.

Id.

113. Holmes, *The Path of the Law*, *supra* note 21, at 19 (“We do not realize how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind.”).

114. Crystal, *supra* note 74, at 239 (“Grant Gilmore and Lawrence Friedman have characterized the Restatement project as a reactionary attempt by the legal establishment to maintain the common law system against the attacks of the legal realists and the threat of codification.”). Lawrence Friedman describes the situation: “The proponents [of the Restatements] were hostile to the very thought of codification. They wanted to head it off, and save the common law, by reducing its principles to a simpler but more systematic form. The result would be a Restatement, not a statute.” FRIEDMAN, *supra* note 87, at 582.

115. Lawrence M. Friedman, *Law Reform in Historical Perspective*, 13 ST. LOUIS U. L.J. 351, 371 (1969) (“The philosophy of the Restatements was opposed to the philosophy of codification.

codification to the historical distrust that lawyers and judges have had for legislation.¹¹⁷ Another related perspective is that the Restatements were intended to be superior to codification because they would preserve the flexibility and dynamism of the common law on which they would be based.¹¹⁸

The notion that the Restatements historically have been anti-reform and anti-codification is not universally accepted. Thurman Arnold has argued that the Restatements were intended to present a more conservative solution than codification to the problem of an overwhelming volume of sometimes contradictory case law.¹¹⁹ Others, including Institute leader William Draper Lewis, were sympathetic to—or at least not opposed to—the idea of codification,

In fact, the Restatements were supposed to save the common law from the horrors of codification. But the Restatements' goals were strikingly similar to those of the codifiers.”).

116. The Institute founders recognized this similarity but strongly recommended that their product not be adopted as a code, at least not in the traditional sense. AMERICAN LAW INSTITUTE, *supra* note 38, at 26. The founders were particularly concerned that the Restatements not lose the dynamism of the common law on which they are based. *Id.* (“The adoption of a statutory form might be understood to imply a lack of flexibility in the application of the principle, a result which is not intended.”). The founders also believed their product would be, in some ways, substantively different from a code. *Id.* at 27 (“The statement of principles should be much more complete than that found in European continental codes.”). The founders of the Institute did, however, leave open the possibility that their product would earn what they called “quasi statutory sanction.” *Id.* at 30-31 (noting that the result would be that “they shall have the force of principles enunciated as the basis of the decisions of the highest court of the state, the courts having power to declare modifications and exceptions”).

117. Roscoe Pound, *Liberty of Contract*, 18 YALE L.J. 454 (1909), reprinted in AMERICAN LEGAL REALISM 29-30 (William W. Fisher et al. eds., 1993) [hereinafter Pound, *Liberty of Contract*].

118. Samuel Williston, *Written and Unwritten Law*, 17 A.B.A. J. 39, 41 (1931). Williston states, “One of the evils of codification, I think, that may be observed in French and German writing is the tendency to narrow legal thought.” *Id.* Williston distinguishes the Restatement project on this basis, stating that the principles thus enunciated “will not be straight-jackets for the law.” *Id.* He continues:

The courts need not accept them unless they like, and it is hardly to be expected that a court of a state where there is a well settled rule on a particular point will throw it over simply because the American Law Institute has laid down a rule at variance. But most of the rules stated in the American Law Institute will not be at variance with the settled rules of the courts.

Id.

119. Thurman W. Arnold, *Institute Priests and Yale Observers—A Reply to Dean Goodrich*, 84 U. PA. L. REV. 811, 818 (1936) (“A code would have been a way of control [of the rapid inflation of case law], but we were not yet ready for such an amount of governmental interference with private law. The rugged individualism of separate cases, each standing sturdily on its own four legs in a little empire of its own, whose boundaries were fixed by stare decisis and maintained by constant fighting, could not be destroyed without loss of national character.”).

even while touting the usefulness of the common law.¹²⁰ Still others—both inside and outside the movement—saw the Restatements as a necessary first step toward codification or some other significant reform.¹²¹ Finally, Robert Cooter and Thomas Ulen claim that the Restatements are more similar to civil-law codes than many realize,¹²² perhaps even intentionally similar,¹²³ making the whole debate about whether the American Law Institute was supportive of—or attempted to end—the codification movement somewhat pointless.¹²⁴

Yet another view of the Restatements is that they were meant to transform American law into a treatise-based system similar to Roman law.¹²⁵ If this theory is valid, then the Restatements may ultimately support the creation of a legal framework that is distinguishable from either a traditional civil-law or a common-law system. One characteristic of Roman law, which some scholars see reflected in the Restatement movement, is the dominance of the university

120. Goodrich, *supra* note 39, at 512 (reflecting the comments of William Draper Lewis, who stated, “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.”).

121. *Id.* at 502 (reflecting the symposium comments of Roswell M. Perkins). Mr. Perkins stated, in describing why he thought the current Restatement project was useful and important, [W]hen 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 [as the current Restatements] would seem to contribute rather largely to that end.

Id. During the same symposium, William Draper Lewis expressed similar sentiments: “[W]e felt . . . 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.” *Id.* at 510.

122. *Id.* at 507 (expressing the views of Hessel Yntema 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”). Yntema goes on to state of the Restatement project, “Its intention is to state the law in authoritative comprehensive terms, and this, give it whatever name you please, is a species of codification.” *Id.* at 508.

123. Seavey, *supra* note 52, at 318 (“The original [R]estatement was intended as a code, in the old form, a set of rules stated with little explanation.”).

124. ROBERT COOTER & THOMAS ULEN, *LAW & ECONOMICS* 61 (4th ed. 2004) (asserting that the Restatements “serve similar functions as the codes that are thought to be characteristic of the civil law countries”). The authors go on to state, “Comparative law scholars vigorously debate whether the differences between civil and common law are more apparent than real.” *Id.*

125. Max Rheinstein, *Leader Groups in American Law*, 38 U. CHI. L. REV. 687, 692 (1971) (describing the Restatements of the Law as the culmination of the trend toward a “professorial law” system). The author describes this is a natural trend, given the nature of the development of the American legal system. “Because the professors are not only the teachers of the practicing branch of the legal profession but also the guides and advisors, American law, as actually practiced, has begun to assume some of the traits of a professorial law.” *Id.* Rheinstein describes “professorial law” as that which tends “toward systematization and occasionally toward creation of concepts of high abstraction.” *Id.*

professor in the lawmaking process.¹²⁶ The Roman system has been praised for producing a notably seamless jurisprudence because so much is the product of a single author.¹²⁷

As the previous discussion mentioned, some scholars understand the Restatements as being a natural transition to codification.¹²⁸ Nathan Crystal, going a step further, describes the Restatements themselves as being a conservative form of codification.¹²⁹ Hessel Yntema finds this development ironic, given the Institute founders' supposed opposition to codification.¹³⁰ Crystal has challenged this common conception, suggesting that the Restatements were at least not intended to prevent codification and that the Institute might even have been sympathetic to the cause.¹³¹ Consistent with Crystal's assertion, there

126. Franklin, *supra* note 73, at 1371 ("For the first time in Anglo-American legal history the law teacher holds a position comparable to the civilian law teacher when the latter writes doctrine."). See also *supra* note 28.

127. Stone, *supra* note 112, at 328-29. Stone described the Roman law system:

The Roman law system created such a [systematic, scientific] device through the writings of the jurists who subjected its doctrines to critical examination and whose influence was in the direction of systematic organization and development. Through imperial decree the writings of [scholars] Papinian, of Paulus, of Gaius, of Ulpian, and Modestinus and their collaborators, already possessed of the authority of their merit, were given the authority of law, of greater weight in fact than the pronouncements of the courts. The result was the excellence in form and systematic development of the Roman law

Id.

128. Franklin, *supra* note 73, at 1373 ("The function of the Institute is to liquidate the English reception with its judge monopoly, and to clear the way for codification resting upon a formal base of legislation.").

129. Crystal, *supra* note 74, at 265 ("The Restatement project, begun in 1923 by the ALI, represents a continuation and modification of the late nineteenth century codification movement.").

Crystal asserts,

This link is shown in two ways. First, the sponsorship of the Restatements came from professional law teachers and elite lawyers associated with the ABA, the same groups which were the principal sponsors of codification. Second, the goals and fundamental ideas of the advocates of the Restatement project were substantially the same as those of the late nineteenth-century codifiers.

Id.

130. Yntema, *supra* note 99, at 468-69 (characterizing as "unsatisfactory" the statements against codification in the original report of the founders). Yntema notes that the founders urged the common law as being superior to a code due to the flexibility, precision, and detail that, they stated, the common law would provide. *Id.* Yntema goes on to state, "[T]his 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." *Id.* at 469.

131. Crystal, *supra* note 74, at 239 ("[T]he Restatement movement was, in fact, sympathetic to the goals of codification . . .").

is evidence of early support for the Restatement movement as the natural precursor to “the ultimate legislative restatement of law, from which judicial decision shall start afresh.”¹³²

E. Criticism of the Institute’s Philosophy of Law

The Restatements have been criticized as exaggerating the role of law, especially the common law. Instead, some scholars have asserted, the law of any case can never be articulated without controversy and cannot credibly be represented as uncontroversial.¹³³ In addition, Critical and Realist scholars have suggested that common-law principles can be marshaled to support any position.¹³⁴ This is an area in which perceptions have evolved over time. Even Herman Wechsler, then Director of the American Law Institute, recognized on the occasion of the Institute’s 50th anniversary that the founders’ perspectives on the discrete, finite nature of law may seem different from those of lawyers today.¹³⁵

Debunking the myth of common law’s dominion and reasonableness was a common Realist theme. Roscoe Pound’s response was to encourage opinion leaders not to be afraid of statutes and the progressive reform they symbolized.¹³⁶ Pound expressed his agreement with the observation that “the courts in practice tend to overturn all legislation which they deem unwise.”¹³⁷ Karl Llewellyn’s

132. DUXBURY, *supra* note 75, at 59 (noting that “Pound’s passion for classifying fields of law accorded well with the American Law Institute’s Restatement project”).

133. See Milner, *supra* note 26, at 803 (“[I]s there any one ‘principle’ for which a case stands? Will all future decision-makers, looking at the same case, agree on its ‘holding’? Or will some take broad views of it and others take restrictive views, according to the particular policies they are trying to follow in the cases before them?”).

134. For an example of this phenomenon, see *infra* note 158 and accompanying text. See also Milner, *supra* note 26, at 805 (describing a certain case as “not authority for any *one* proposition but . . . relevant as support for any number”). Milner goes on to state, “[T]he ‘rule’ is a composite creature. When a judge announces that he is following such-and-such a case, i.e. that he is extending its ‘rule’ to cover the case before him, he is performing an extremely complicated intellectual task.” *Id.* at 811.

135. AMERICAN LAW INSTITUTE, *supra* note 38, at viii. Wechsler states, No less than other documents, the Report [of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law, which recommended the creation of what became the ALI] is a product of the time when it was drafted. . . . The remedies proposed may seem in our perspective to exaggerate the ultimate potential of judicial action for unifying and adapting the enormous product of a plethora of case law systems, and to under-estimate the promise of systematic, renovating legislative work in many of the areas of lawyers’ law.

Id.

136. Pound, *Law in Books*, *supra* note 93, at 44 (“Let us not be afraid of legislation, and let us welcome new principles, introduced by legislation which express the spirit of the time.”).

137. *Id.* at 39.

approach to the issue was to focus on the indeterminate nature of judge-made law. Llewellyn cautioned that simply calling something a rule does not provide enough information. Instead, he urged, it is important to determine whether courts really follow a rule or just recite it.¹³⁸ Stated another way, the Realist view was that rules do not wholly guide judges; rather, judicial analysis is relatively flexible and more complex than might be assumed.¹³⁹ A more critical Realist position was that judicial opinions are dishonest intellectually but serve an important function in creating legitimacy.¹⁴⁰

These criticisms have sometimes been phrased in a way that seems to call the Restatement project directly into question.¹⁴¹ Lawrence Friedman describes the American Law Institute as being “dedicated to the pursuit of legal rationality”—a rationality that Friedman contends is illusory.¹⁴² More pejoratively, “Thurman Arnold analyze[s] the meetings of the American Law Institute as a form of ritual, the incantations of a priestly caste reassuring the legal world of its orderliness and predictability, among other means through the use of charming parables (the ‘Illustrations’ of Restatement principles).”¹⁴³ Professor Thomas Ulen suggests, as a more reliable alternative than reliance on the rule of law, that economics is

138. Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930), reprinted in AMERICAN LEGAL REALISM 55 (William W. Fisher et al. eds., 1993) [hereinafter Llewellyn, *A Realistic Jurisprudence*]. Llewellyn considered several different possible meanings of the statement, “[T]his is the rule.” *Id.* He went on to state, “[R]ules of substantive law are of far less importance than most legal theorists have assumed in most of their thinking and writing, and . . . they are *not* the most useful center of reference for discussion of law.” *Id.* at 56 (emphasis in original).

139. AMERICAN LEGAL REALISM, *supra* note 21, at 164 (noting the moderate Realist position, “[J]udges sometimes to some degree pay attention to the ‘paper rules,’ but that they are also influenced powerfully by other considerations.”).

140. *Id.* at 165 (“By making each decision seem inevitable, opinions deflect popular criticism of the courts’ rulings and conceal from the judges themselves the true bases of their rulings.”).

141. *Id.* at 166 (“[T]he Realists argued that scholars and judges should jettison most of the accepted ‘black letter’ rules and develop ‘working rules’ that would more accurately describe the actual behavior of courts.”). The editors describe the Institute as “an influential group of law teachers . . . elaborating its own version of classicism.” *Id.* at xii. The editors continue,

Properly organized, law was like geometry, the teachers insisted. Each doctrinal field revolved around a few fundamental axioms, derived primarily from empirical observation of how courts had in the past responded to particular sorts of problems. From those axioms, one could and should deduce—through uncontroversial, rationally compelling reasoning processes—a large number of specific rules or corollaries.

Id.

142. Friedman, *supra* note 115, at 355-56 (“The bar’s organized public energy crystallizes around reform and institutions committed to reform.”).

143. Robert W. Gordon, *Professors and Policymakers: Yale Law School Faculty in the New Deal and After*, in HISTORY OF THE YALE LAW SCHOOL: THE TRICENTENNIAL LECTURES 75, 98 (Anthony T. Kronman ed., 2004).

an appropriate lens for viewing what the law is and what it should be.¹⁴⁴

A related criticism is that the very existence of the Restatements represents an overemphasizing of the role of the common law vis-à-vis statutory law in the modern age. There is some evidence to support this criticism: then-contemporary Institute leader George Wickersham describes the common law, rather than statutes, as being the essence of American law.¹⁴⁵ In addition, when the Restatements do address statutory law, they may exaggerate their rationality. For example, one scholar has made the observation that the first series of Restatements adopted the then-current view of legislatures as being democratic and were also influenced by Hart and Sacks in their belief in the inherent reasonableness of the legislative process and its product.¹⁴⁶

Critical scholars and Realists would dispute any characterization of law as being inherently rational. Law & Economics scholars would propose efficiency as an alternative focus and a more realistic goal. Roscoe Pound, a Realist for much of his career, opined that lack of equal bargaining power makes liberty of contract a farce for the weaker party, thus calling into question the reasonableness of a system of private law built around this principle.¹⁴⁷ Pound also asserted that, due to the inequitable distribution of resources and the resulting disparity in access to the court system, a substantively different criminal law exists for rich and poor defendants.¹⁴⁸ Professor Lawrence Solum made a similar point when he described the liberal approach to law as mystifying,

144. Ulen, *supra* note 91, at 433 (“[L]aw and economics offers an attractive method of describing how people are likely to respond to law and of making normative judgments about legal rules and institutions.”). The possibility of incorporating economic theory more overtly into the Restatement process is discussed *infra* in notes 294-97 and the accompanying text.

145. Wickersham, *supra* note 66, at 454-55 (“Altered, modified, moulded by judicial decision, sometimes clarified, sometimes obscured by statute, the common law is still the wool and fabric of the law of America, against which statutes often vainly contend and through which they always must be interpreted.”). The author goes on to praise the common law: “The common law, as Lord Bowen once said, is ‘an arsenal of common sense principles.’” *Id.* at 455.

146. Zeppos, *supra* note 84, at 659 (“As envisioned by Hart and Sacks, each governmental institution—judiciary, legislature, and executive—had unique capabilities and procedures that legitimated the decisions they reached. . . . As for the legislature, its ability to be open to different groups, along with its electoral pedigree, meant that its work was due respect by the coordinate branches of government.”).

147. Pound, *Liberty of Contract*, *supra* note 117, at 27. Pound quoted a sociologist as saying, “[M]uch of the discussion about ‘equal rights’ is utterly hollow. All of the ado made over the system of contract is surcharged with fallacy.” *Id.*

148. Pound, *Law in Books*, *supra* note 93, at 40. Pound states,

The malefactor of means, the rogue who has an organization of rogues behind him to provide a lawyer and a writ of *habeas corpus* has the benefit of the law in the books. But the ordinary malefactor is bullied and even sometimes starved and tortured into confession by officers of the law.

Id.

obscuring, and ultimately falsely legitimizing the current system of law.¹⁴⁹ Related to this is the belief, common to Realists and Critical scholars, that Classicists overemphasize the distinction between public and private law.¹⁵⁰ Professor Ulen suggests that Law & Economics scholars would also downplay this distinction, albeit for reasons of maximizing efficiency rather than due to the social-justice concerns that typically motivate Realist and Critical scholars.¹⁵¹

Arthur Corbin presents a different viewpoint, suggesting that the Restatements normally look more critically at the common law than these scholars suggest. He asserts that “[a] stated rule used by [any] court as a basis of decision must fight for its life [in the Restatement process] whether the rule is enunciated by a state court or by the United States Supreme Court.”¹⁵² Corbin and others also praise the common-law process as a useful, coherent source of law.¹⁵³ In addition, there is some evidence that the Institute founders believed the lack of respect for the common law was due to the very defects that the Restatement project sought to cure, and thus would be ameliorated over time as the work of the Institute progressed.¹⁵⁴

The Restatements are also criticized as reflecting the false assumption that precedent can be understood logically.¹⁵⁵ Instead, Critical scholars have claimed that common-law precedent can be used to marshal support for any position a lawyer might choose to take on behalf of a client.¹⁵⁶ Llewellyn made a similar claim with regard to the canons of statutory construction, suggesting that there were opposing canons for every circumstance.¹⁵⁷ This concept of malleability of

149. Lawrence B. Solum, *On the Indeterminacy Crisis: Critiquing Critical Dogma*, 54 U. CHI. L. REV. 462, 462 (1987). “Frequently, the claim that legal rules are indeterminate is the starting point for such a critique of the rule of law.” *Id.* Solum dubs this the “indeterminacy thesis.” *Id.*

150. See *infra* Part II.C., notes 310-15.

151. Ulen, *supra* note 91, at 435 (“I speculate that economic theory will prove to be the force that provides a unifying theory among the now-distinct areas of private law, between private and public law, between law and social norms, and between different national legal systems.”).

152. Corbin, *supra* note 37, at 25.

153. *Id.* at 26 (“A law is a statement of uniformity in the past sequence of events, based upon the recorded observation of those events, by the help of which we believe that we are able to predict the future course of events.”).

154. AMERICAN LAW INSTITUTE, *supra* note 38, at 16. After describing the complexity and uncertainty that the Institute sought to remedy, the author then noted that “[p]erhaps . . . the most serious result of these defects is that they create a lack of respect for law.” *Id.*

155. FRIEDMAN, *supra* note 87, at 582 (“[The] arrangements [of the Restatements] were strictly logical; the aim was to show order and unmask disorder.”). Friedman goes on to state, “Courts that were out of line could cite the [R]estatement and return to the mainstream of common law growth.” *Id.*

156. Tushnet, *supra* note 53, at 1524 (“As it was derived from the analysis of paired oppositions, the indeterminacy argument held that within the standard resources of legal argument were the materials for reaching sharply contrasting results in particular instances.”).

157. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or*

precedent brings to mind the Realist cliché that “how a judge decides a case on a given day depends primarily on what he or she had for breakfast.”¹⁵⁸ Oliver Wendell Holmes presents a more measured critique, pointing out that law is not wholly logical as mathematics is, but going on to describe that fallacy as being understandable due to the training that lawyers receive in logic.¹⁵⁹ Other Realists have raised the moderate points that “much legal doctrine is internally inconsistent”¹⁶⁰ and that a focus on consistency tends naturally toward oversimplification.¹⁶¹ Part of this critique is specifically focused on Formalism. Roscoe Pound criticizes Formalism for twisting facts against common experience to reinforce old notions, ignoring real-world needs and conditions.¹⁶² Pound also asserts that it is not possible to make logical sense of a chain of legal

Canons About How Statutes Are to Be Construed, 3 VAND. L. REV. 395 (1950), reprinted in AMERICAN LEGAL REALISM 228 (William W. Fisher et al. eds., 1993) (giving twenty-eight paired examples of opposing canons of statutory construction, beginning with “[a] statute cannot go beyond its text” and “[t]o effect its purpose a statute may be implemented beyond its text”).

158. AMERICAN LEGAL REALISM, *supra* note 21, at xiv. Others make the same point in a more moderate manner. See Walter W. Cook, *Scientific Method and the Law*, 13 A.B.A. J. 303 (1927), reprinted in AMERICAN LEGAL REALISM 242, 247 (William W. Fisher et al. eds., 1993) (expressing incredulity that “eminent members of the bar [still] assert that all a court does in deciding doubtful cases is to deduce conclusions from fixed premises . . .”); JEROME FRANK, *LAW AND THE MODERN MIND* (1970), reprinted in AMERICAN LEGAL REALISM 205 (William W. Fisher et al. eds., 1993) (asserting that judges are no more and no less biased than other people are); Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71 (1928), reprinted in AMERICAN LEGAL REALISM 199 (William W. Fisher et al. eds., 1993) (“Judges are men and men respond to human situations.”); Max Radin, *The Theory of Judicial Decision: Or How Judges Think*, 11 A.B.A. J. 357 (1925), reprinted in AMERICAN LEGAL REALISM 195, 198 (William W. Fisher et al. eds., 1993) (suggesting that courts always have opinions as to the right outcome for a given set of facts). Some suggest that the law should embrace, rather than hide from, the inherent discretion that judges exercise. See Joseph C. Hutcheson, Jr., *The Judgment Intuitive: The Function of the “Hunch” in Judicial Decision*, 14 CORNELL L.Q. 274 (1929), reprinted in AMERICAN LEGAL REALISM 202, 204 (William W. Fisher et al. eds., 1993) (suggesting that, in close cases, the use of the judicial “hunch” makes the outcome more trustworthy, not less so).

159. Holmes, *The Path of the Law*, *supra* note 21, at 19. Holmes states that “[b]ehind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding.” *Id.*

160. AMERICAN LEGAL REALISM, *supra* note 21, at 165 (adding that “it is therefore naive to believe it possible either to derive particular legal rules from general concepts and particular outcomes from the application of rules to facts or to derive the answer to one case from a prior decision in a related case”).

161. John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17 (1924), reprinted in AMERICAN LEGAL REALISM 185, 188 (William W. Fisher et al. eds., 1993) (explaining the use of precedent and familiar concepts as a sort of “inertia”).

162. Pound, *Liberty of Contract*, *supra* note 117, at 33 (describing what Pound characterizes as the tendency to insist upon sharp demarcations in the law and to draw those lines arbitrarily).

precedent.¹⁶³ Instead, Pound claims, courts bend rules to bring about justice as they see fit in individual cases.¹⁶⁴ This claim is specially pertinent insofar as the Restatements are viewed as a Formalist endeavor.¹⁶⁵ Of course, there is also evidence to the contrary—evidence that tends to suggest that the American Law Institute took measured steps to ensure that its Restatements would reflect the modern law accurately,¹⁶⁶ rather than serving as a historical record of the way the law had been in the past.¹⁶⁷

Related to the claim that the Restatements over-emphasize the logic of judicial precedent is the criticism that the Restatements express a level of uniformity and clarity in the law that simply do not exist, and they are therefore misleading.¹⁶⁸ Alan Milner makes the same point in a way that challenges the

163. Pound, *Law in Books*, *supra* note 93, at 41 (“When . . . one turns to the cases themselves and endeavors to fit each case in the scheme, not according to what the court said was the rule, but according to the facts of that case, he soon finds that the apparent rules to a great extent are no rules . . .”).

164. *Id.* (“The forms may be kept, but the substance will find some fiction or some interpretation, or some court of equity or some practice of equitable application, to sanction change.”). Pound describes the judicial lawmaking process:

Legally, the judge’s heart and conscience are eliminated. He is expected to force the case into the four corners of the pigeon-hole the books have provided. In practice, flesh and blood will not bow to such a theory. The face of the law may be saved by an elaborate ritual, but men, and not rules, will administer justice

Id.

165. *See infra* notes 203-15 and accompanying text.

166. GOODRICH, *supra* note 51, at 288 (indicating that the Restatements were not intended to show the “ideal rules of law,” but instead the true state of current law, acknowledging the existence of trends).

167. KALMAN, *supra* note 62, at 38-39 (describing the manner in which Thurman Arnold and Charles Clark sought to protect the accuracy of the product by limiting its reliance on historical fact). Kalman states,

[W]hen the American Law Institute began planning its Restatements of the Law, Arnold and Clark opposed any stress on the history of legal rules out of the fear that it would serve to heighten the legitimacy of those rules. Arnold proposed an emphasis on the obsolescence of traditional legal machinery through the use of section headings such as “The Statute of Uses of Henry VIII is the origin of certain artificial concepts which have no utility in solving modern problems and may therefore be discarded as a method of judicial expression.” Clark more soberly warned the committee drafting the Restatement of the Law of Property against treating “property history” as modern American law: “Dicta repeating the rules of Lord Coke’s time without independent consideration of them are of comparatively little value.”

Id.

168. Goodrich, *supra* note 39, at 507 (including the comments of Hessel Yntema that “[t]he 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”). Yntema states, “Where there is diversity in the law, how can it be stated in a single rule? Where there is

fundamental reliance on precedent: “[T]he only conceivable purpose in looking at past decisions is to see whether there are any policies which transcend even the individuality of the different judges; to weigh them in their context of time, place and effect; and, the vital push, to assess their value for future decisions.”¹⁶⁹ Max Rheinstein has described the Restatements as misleading for a different reason in that they contain “a law that . . . is in effect everywhere and nowhere.”¹⁷⁰ Professor John R. Brock proposes an alternative approach from the field of economics, suggesting increased use of deductive reasoning and decreased reliance on precedent.¹⁷¹

A contrasting viewpoint is that the Restatements, by making it easier for judges to overrule former precedent as needed, will ultimately create a *less* misleading body of law.¹⁷² In addition, Roberto Unger provides an interesting counterpoint to the Realist critique of the common law, suggesting that the Realists went too far and lost credibility by implying that there was no coherence to the common law whatsoever.¹⁷³

uniformity, what is the need for Restatement?” *Id.*

169. Milner, *supra* note 26, at 812. Milner adds, “The Restatements are completely inadequate here. In concentrating exclusively on the verbalizations of the judges and not approaching the study of past decisions from a functional angle, they give no accurate trend in decision-making which can be of any use.” *Id.*

170. Rheinstein, *supra* note 125, at 692. Rheinstein acknowledges that this is probably inevitable, given the nature of the Restatement project. “An attempt to teach the law of every jurisdiction not only would be impossible, it would be sheer nonsense.” *Id.* Thus, “[t]he curriculum necessarily must concentrate on those elements which are common to the laws of all the states.” *Id.* Interestingly, this same scholar goes on to praise the case method, so often decried as being woefully and formalistically out of date. In this process, Rheinstein states,

Inevitably, one begins to search for the policy reasons by which the judges were moved, and one seeks to discover the ways in which life is actually being affected by the work of the courts Thus comes the realization that judges, through their decisions, can influence the course of social life, can restructure society, can be social engineers.

Id. at 694-95.

171. Brock, *supra* note 95, at 210. The author states,

The economist’s approach is to draw logical deductions from generalized observations of behavior within society. This approach permits economists to be clear and precise about the issues On the other hand, the law’s approach of reasoning by analogy places on judges and scholars the difficult burden of explaining every case.

Id. Brock quotes Judge Posner for the proposition that “economics . . . is free of entanglements of precedents and legalism that prevent lawyers from rethinking a field from the ground up.” *Id.*

172. Stone, *supra* note 112, at 322 (noting that “[t]he frank overruling of precedent, for reasons well understood, is rarely resorted to”).

173. ROBERTO MANGABEIRA UNGER, WHAT SHOULD LEGAL ANALYSIS BECOME? 62 (1996) (“American [L]egal [R]ealists and post-[R]ealists . . . romanticized the common law as the product of an experimental and context-bound reasoning that made legal abstraction look obtuse.”). Unger goes on to discuss what he calls “[t]he incongruity of the scorn for analogy.” *Id.*; see also Ellickson, *supra* note 96.

Several Realist critiques focus on the organization and format of the Restatements, suggesting that the classifications presented are not useful. Instead, Realists have tended to propose narrower, more fact-specific case groupings.¹⁷⁴ Thus, it is apparent that not all Realists wholly reject the ideals of ordering and predictive generalization; instead, some have espoused the more moderate view that classifications can be valuable if they are narrow and empirically based.¹⁷⁵ Moderate Realists object only to those groupings that they characterize as artificial.¹⁷⁶

Samuel Williston provides one response to this critique, especially insofar as it is directed at the Restatement of Contracts, for which he served as reporter. He argues that the Realists have tended to make the law more complex than necessary by denying the existence of a relatively small number of “fundamental principles” that govern most situations.¹⁷⁷ He chides the Realists for falsely implying that every situation is unique and thereby undermining appropriate confidence in these foundational principles.¹⁷⁸ Early Institute documents reflect a similar concern that over-parsing of the law could ultimately result in needlessly convoluted case law.¹⁷⁹

Others share Williston’s belief that the common law should consist of broad principles, rather than fractured bits of precedent, and that the Restatements

174. Llewellyn, *Some Realism*, *supra* note 56, at 73 (noting “[t]he belief in the worthwhileness of grouping cases and legal situations into narrower categories than has been the practice in the past”).

175. AMERICAN LEGAL REALISM, *supra* note 21, at 166.

176. Crystal, *supra* note 74, at 247 (“Thurman Arnold . . . criticized the organization of the Restatement of Trusts. He argued that classification should be based on the function of the trust device, rather than on the rational reformulation of old categories such as active trust, passive trust, and resulting trust.”).

177. KALMAN, *supra* note 62, at 47.

178. *Id.* (criticizing “those who considered the ‘simplest application of fundamental principles of contract’ in an insurance policy or contract of suretyship as ‘peculiarities’ unique to the factual situation involved”). Describing Williston’s view of the role of a Restatement, Kalman continues: “He emphasized the need ‘to treat the subject of contracts as a whole and to show the wide range of application of its principles.’ For Williston, the ‘whole’ body of contract law was much more limited than it was for some of his contemporaries.” *Id.* (footnote omitted). Along the same lines, the report of the committee that recommended the founding of what ultimately became the Institute decried, among other things, “attempts to distinguish between two cases where the facts present no distinction in the legal principle applicable.” AMERICAN LAW INSTITUTE, *supra* note 38, at 17.

179. AMERICAN LAW INSTITUTE, *supra* note 38, at 65 (expressing concern that a court, faced with a decision in which it disagreed with applicable precedent, “may refuse to follow the prior decision, but so far pay formal respect to it as to write an opinion in which the court instead of frankly overruling the prior case attempts to distinguish the two cases on account of some immaterial difference in their respective facts”). One of the stated goals of the Restatement movement was to make it easier for judges to feel confident in overruling out-of-date or otherwise unsuitable case law. See Stone, *supra* note 112.

should make sure the common law remains general and cohesive.¹⁸⁰ One consistent view is that individuation and specific application of broad principles should be left to judges, who perform this function best.¹⁸¹ Most Realists, with the exception of the most radical, recognize that some consistency is needed and should not be wholly eroded, even due to compelling facts in individual cases.¹⁸² The Institute has sought to find an appropriate balance. Herbert Goodrich cautions that the principles contained in the Restatements should not be too broad or too narrow to be useful, but also acknowledges that erring on either side is probably inevitable to some extent.¹⁸³

Professor Solum expresses a slightly different concern, making the Critical argument that the legal system cannot produce predictable, justifiable results in individual cases—rather, only social and political judgment can effectuate justice consistently.¹⁸⁴ Thus, a Critical scholar would see the Restatements as overstating the power of the law to accomplish knowable results, regardless of whether the principles used are broad or narrow.

F. Criticism of the Restatements' Commercial Practicability

The Restatements have also been criticized for ostensibly failing to keep up

180. See STEVENS, *supra* note 74, at 133. Stevens writes about the “atomistic approach to the common law” associated with the case method and the veritable explosion of published cases in the early part of the twentieth century. *Id.* He describes the Restatements as a response to the “‘wilderness of single instance’ that the American common law had become.” *Id.*

181. Franklin, *supra* note 73, at 1391-92. Franklin states,

Some juridical problems cannot be dealt with in job lots, others can and should be. The first should not be restated or codified, the second should be. . . . The Institute should have taken account of this problem of the division of labor, and refrained from a sortie into the proper domain of the judge.

Id.

182. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* (1921), *reprinted in* *AMERICAN LEGAL REALISM* 172, 173 (William W. Fisher et al. eds., 1993) (“We must not sacrifice the general to the particular. We must not throw to the winds the advantages of consistency and uniformity to do justice in the instance.”).

183. Goodrich, *supra* note 61, at 453. Goodrich states,

One may . . . admit that there are difficulties about the form in which the Restatement is cast. A writer is in danger of making his generalizations so broad that they are meaningless on the one hand, or, on the other, setting out his blackletter rules with such particularity that the user becomes immersed in a flood of detail. Instances probably can be found of both faults by even a friendly critic of any one of the portions of the Restatement which have appeared.

Id. (footnote omitted).

184. Solum, *supra* note 149, at 465 (“Critical scholars often try to demonstrate that a given body of legal doctrine is indeterminate by showing that every so-called legal rule is opposed by a counterrule. Because the rule and the counterrule support opposing results, the authoritative legal materials, taken as a whole, fail to provide determinate outcomes in any given case.”).

with the viewpoints and priorities of practitioners. As an example of this phenomenon, Jonathan Macey asserts that the Institute's Principles of Corporate Governance have been unsuccessful because they failed to take Law & Economics to heart, as corporate attorneys have.¹⁸⁵ Critiquing the practical value of the Restatements in a different way, Alan Milner argues that the elitism and the unrepresentative nature of the Institute ensure that the Restatements cannot credibly claim to be the voice of the legal profession.¹⁸⁶ Milner's comment raises the question of whether any group could ever fully represent the diverse body of lawyers, judges, and legal academicians as a whole.¹⁸⁷

The existence of discord between the Institute and the larger body of practicing attorneys could be a natural outgrowth of the fact that most Restatement reporters are law professors—a group that is fairly removed from the crucible of public opinion.¹⁸⁸ Consistent with this fact, the Restatements have been described as being overly academic and historical in approach; the original Restatements were described as naively “[h]arking back to medieval precedents” in a way that “was not relevant to an America beset by the [D]epression.”¹⁸⁹ A

185. See generally Jonathan R. Macey, *The Transformation of the American Law Institute*, 61 GEO. WASH. L. REV. 1212 (1993). Instead, the author describes the project as a “wish-list of reformers.” *Id.* at 1217. The author traces much of the controversy surrounding the project to the fact that “the intellectual revolution caused by the [Law & Economics] movement caught up with the [p]roject.” *Id.* at 1224. Elsewhere, the author claims that the project ultimately faltered because it could not hold up to Law & Economics scrutiny. *Id.* at 1228 (noting that “the [Law & Economics] scholars were able to present scientific evidence that allowed them to claim that the existing, market-oriented legal norms were superior to the ALI’s proposed norms from the perspective of the investing public”). For a contrary view—that the project actually did incorporate lessons of Law & Economics, see generally E. Allan Farnsworth, *Law Is a Sometime Autonomous Discipline*, 21 HARV. J. L. & PUB. POL’Y 95 (1997).

186. Milner, *supra* note 26, at 798 (“The real question is how far a legal document which does not and cannot represent the views of other than a few named individuals can properly stand as the authentic voice of the profession.” (quoting Charles Clark, *The American Law Institute and Law of Real Covenants*, 52 YALE L.J. 699, 730 (1943))). Milner goes on to assert that, “there is simply no such thing as a state having altered its method of judging on the basis of a *Restatement* ‘rule.’” *Id.* at 802 (emphasis in original).

187. For example, John Henry Schlegel suggests that Critical scholars could not properly purport to represent the dominant views of practitioners. Schlegel, *supra* note 21, at 410 (“Less successful [than attempts to incorporate young scholars] have been attempts to involve practitioners who share a common politics in the organization The mismatch is obvious: Practice is only tangentially relevant to a group largely engaged in dejustifying rules, for examining the law in action is only a variation on the other CLS techniques for achieving that end.”). This comment raises the question of whether it would even be feasible for the Institute to involve Critical scholars in the Restatement project. See *infra* text accompanying notes 281-316.

188. Simmons, *supra* note 28, at 70 (“The ALI version of a relevant rule of law is often the mere reflection of the legal philosophy of the ALI reporter (a law professor) as to what the relevant rule of law should be.”).

189. STEVENS, *supra* note 74, at 141 (“Much of what the Restaters—a favorite target of the

related criticism is that the Restatements have, by the nature of Institute process, produced a noticeably different product from law that would have been created by a democratically elected legislature.¹⁹⁰

The Institute has expressed its awareness of each of these critiques and has arguably been fairly responsive to some. There has been at least some attempt to ensure that the black-letter principles captured in the Restatements reflect the realities of law as applied. Realist Arthur Corbin, for example, worked as an adviser to Samuel Williston during the latter's tenure as reporter for the Restatement of Contracts.¹⁹¹ Corbin encouraged Williston to ensure that the Restatement of Contracts reflected the law as practiced, not just as discussed in theory.¹⁹²

In addition, not all scholars agree that the American Law Institute is dominated by academicians. Indeed, Judge Posner and Justice Abrahamson have challenged this common conception.¹⁹³ Finally, it is possible that any lag

Yale faculty—were trying to do, by way of consolidating basic principles of the common law in different areas, was indeed naive.”). Similarly, Hart and Sacks describe a time when Institute members knowingly and expressly voted in favor of a rule that all present admitted was archaic. HART & SACKS, *supra* note 50, at 739-40 (describing the discussion of one of the principles of agency, which even Reporter Warren Seavey described as “shocking” and “archaic” in application). For a discussion of the first Restatement of Agency, see Deborah A. DeMott, *The First Restatement of Agency: What Was the Agenda?*, 32 S. ILL. U. L.J. (forthcoming 2007).

190. I explore this possibility in an earlier article. See generally Adams, *supra* note 2; see also Simmons, *supra* note 28, at 70-71 (“Often the adopted ALI rule does not reflect what the relevant rule of law would have been if the matter had been the subject of public hearings with input from a broad-based citizen constituency with public debate, and with final action required to be taken by legislators who are directly accountable to their general public constituency.”).

191. See KALMAN, *supra* note 62, at 26.

192. *Id.* (“Publicly Corbin defended the [Restatement] effort; privately he worked to persuade Williston to state working rules that accurately described the realities of law.”).

193. POSNER, *supra* note 27, at 304. Posner states,

The influence of academics preponderates in the shaping of the Institute's work because they alone have the time to produce the kind of output in which the Institute specializes. But the preponderance of practitioners in the membership, along with a generous sprinkling of state and federal judges, prevents the academic members from losing touch with the practical needs of the profession. On controversial as distinct from technical issues, the influence of practitioners and judges, expressed in voting in both the Council and at the annual meetings, is apt to dominate.

Id. Justice Abrahamson also notes the concern for maintaining the balance among the three constituent groups of Institute members: judges, professors, and practitioners. She also describes two different views of the extent to which the Institute has been successful in maintaining this balance:

Although the [R]estatement process combines scholarship with practical experience and involves the academy, the bench and the bar, some continue to assert that it does not ensure a healthy balance among the ALI's constituent groups. These critics contend that the [R]estatements are predominantly the work of the reporters, generally law

between societal change and the recognition of that change in the Restatements is simply inevitable. John Dewey has suggested that statutes can never keep up with the changing state of society.¹⁹⁴ The same kind of critique would seem to apply to the Restatements, which, like statutory law, are the products of a lengthy deliberative process.

The Restatements have been criticized as reflecting the old-fashioned view that judges apply the law rather than make the law or at least participate in its making. By way of explanation, John Chipman Gray described the Blackstonian Formalist view of the judicial function as stressing that the law of the land must be assumed to be dictated by the latest decisions.¹⁹⁵ This strict adherence to the concept of precedent means that no law is ever treated as truly new.¹⁹⁶ As Thurman Arnold stated when characterizing the Restatements as a Formalist project, "It [is] not the function of the Restatement to fabricate but only to assay and extract the nuggets which, being pure gold, [do] not even need gilding."¹⁹⁷ Some scholars go a step further, describing the Restatements as claiming to

professors, who are little influenced by the advisers, Council, or members. They complain that a persistent professor-reporter can usually prevail, thus providing an overbalance of academic sway in the [R]estatements and the ALI. William Draper Lewis, on the other hand, pointed out that the advisers examined the drafts with minute care and suggested that "the name 'Advisers' did not express accurately or adequately their actual relation to the work which, except in individual instances, would be more properly described as 'Co-Workers with the Reporter.'"

Abrahamson, *supra* note 32, at 16 (quoting William Draper Lewis, *History of the American Law Institute and the First Restatement of the Law: "How We Did It,"* in RESTATEMENT IN THE COURTS 1, 7 (1995)). Justice Abrahamson goes on to state,

In my experience the Council, members and reporters respect and protect each others' roles. I have heard reporters yield to the Council and membership, saying that they are persuaded or that the product is the ALI's, not the reporter's. At other times the reporters prevail because their position has merit and the members have confidence in them. Often the final position is a compromise reached among the reporters, advisers, consultative group, Council and membership.

Id. at 16-17; *contra* Franklin, *supra* note 73, at 1371 ("The position of the judges as paramount is weakened by the Restatements, but their loss is the gain in prestige of the university law school teacher.").

194. Dewey, *supra* note 161, at 192-93 ("[S]tatutes have never kept up with the variety and subtlety of social change.").

195. JOHN CHIPMAN GRAY, *THE NATURE AND SOURCES OF THE LAW* (1909), *reprinted in* AMERICAN LEGAL REALISM 36 (William W. Fisher et al. eds., 1993) ("Blackstone's theory was urged with great force, that the decisions of the courts did not make [l]aw; and that the [l]aw must be taken to have been always what the latest decisions declared it to be.").

196. *Id.* ("The doctrine of precedent, correctly stated, forbids the assumption that a new law was created by the prior decision . . .").

197. Arnold, *supra* note 119, at 817. Arnold also noted, "The source of the law was the cases, which needed only to be boiled down. The completed product of the Restatement which is now before us represents the results of that great intellectual smelter." *Id.*

represent natural, or divine, law.¹⁹⁸

By way of contrast, realism and other, more contemporary schools of thought embrace the idea of judges as lawmakers.¹⁹⁹ The Realists also espoused the more controversial idea that judges have not only the right but also the duty to make law,²⁰⁰ particularly in matters of first impression.²⁰¹ Realist scholars also note how the myth of judges as law-finders has been perpetuated by the judges themselves, fearful of seeming to make the law.²⁰² This balance-of-power debate as to the appropriate roles of the judiciary and legislature continues today.

Having presented six recurring threads in the scholarship that critiques the Restatement movement, this Article will now present three perspectives on the movement as a whole, showing how it might be seen as wholly Formalist, surprisingly progressive, or purposefully moderate.

II. VIEWS OF THE RESTATEMENT MOVEMENT

A. The Dominant Perspective: The Restatements Are a Throwback to Formalism

The most common criticism of the Restatements is that they are a throwback to the era of Formalism, not recognizing the ways that the leading trends in jurisprudence have developed and influenced the law since the American Law Institute was founded in 1923. Stated another way, one popular perspective on the Restatement movement is that it was and is a conservative reaction against the onslaught of Legal Realism,²⁰³ representing a last gasp of Classicism.²⁰⁴ This

198. Franklin, *supra* note 73, at 1374 (describing the position of the Institute as being that “the Restatements are to be binding because they embody natural law and must, therefore, be observed”). Gray also suggests that perhaps judges need to fool themselves or others into believing that they do not make law. He states,

Whether it is desirable that such remarks [about judges being lawmakers] should be made, or whether, if made, it is desirable that they should be believed, whether it is desirable that the judges’ power and practice of making [l]aw should be concealed from themselves and the public by a form of words, is a matter into which I do not care to enter. The only thing I am concerned with is the fact. Do the judges make [l]aw? I conceive it to be clear that, under the [c]ommon [l]aw system, they do make [l]aw.

GRAY, *supra* note 195, at 37.

199. AMERICAN LEGAL REALISM, *supra* note 21, at xv (“To a degree far greater than their counterparts in virtually any other country, American judges think of themselves as lawmakers. That self-image originates to a large degree in Legal Realism.”).

200. *Id.* at 168 (noting the Realist belief that, if judges disagree with the policies behind the laws they are required to uphold, they should change the laws).

201. Cook, *supra* note 158, at 249 (asserting that judges have no choice but to legislate in matters of first impression).

202. See GRAY, *supra* note 195, at 34 (“[T]he judges have been unwilling to seem to be law-givers, because they have liked to say that they applied [l]aw, but did not make it . . .”).

203. Crystal, *supra* note 74, at 239 (“Grant Gilmore and Lawrence Friedman have

criticism is not entirely unfounded; there is some evidence that the movement was perceived in this way by scholars at the time of its inception.²⁰⁵ There is also plenty of evidence that at least some early Realist scholars were very critical of the Restatement project, even at its founding.²⁰⁶ A common critical

characterized the Restatement project as a reactionary attempt by the legal establishment to maintain the common law system against the attacks of the [L]egal [R]ealists and the threat of codification.”). Another scholar has described the Restatement project and its perceived influence on the rise of [L]egal [R]ealism:

But for the classical generation’s projects of legal science, the treatises and articles of Langdell, Ames, Beale, Williston, and Scott, and the Restatement projects that came about as close as American common lawyers could get to comprehensive codifications of private law, there could have been no [L]egal [R]ealist movement. But for the classics’ heroic work of generalization, doctrinal rationalization, and synthesis—and, I should add, the fifty years’ work of classical lawyers, judges, and treatise-writers in building up the imposing structures of classical constitutional law—there would have been nothing to critique as “empty formalism” and “transcendental nonsense”—as sterile, oppressive, over-abstract, indeterminate, and removed from life.

Gordon, *supra* note 143, at 130 n.64.

204. Cohen, *supra* note 56, at 217 (“The ‘Restatement of the Law’ by the American Law Institute is the last long-drawn-out gasp of a dying tradition.”); *see also* DUXBURY, *supra* note 75, at 24 (describing the Restatements as espousing the theory of law as its own science). The author asserts,

The ALI had bestowed professional credibility on the Langdellian idea that the basic principles of the law are simply there to be discovered by logical analysis and thereafter reported in a fashion which reflects their “real”—meaning unambiguous—nature. For the [R]ealists, the Restatement movement represented the high-water mark of Langdellian legal [F]ormalism.

Id. at 24. Lawrence Friedman made the same point: “[T]he [Uniform Commercial] Code was modernity itself compared to the [R]estatements of the law, perhaps the high-water mark of conceptual jurisprudence.” FRIEDMAN, *supra* note 87, at 582. Justice Abrahamson describes a similar impression and also brings in the specter of anti-codification, discussed *supra* at notes 114–40. Abrahamson, *supra* note 32, at 18 (“The conventional wisdom . . . is that the ALI was founded ‘by a band of legal [F]ormalists working hand in hand with the legal moguls of New York and Philadelphia corporate finance to save the common law from statutory liberalization and other un-American pollutants.’” (quoting N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 LAW & HIST. REV. 55, 56 (1990))).

205. Roscoe Pound has been described as “an ardent supporter of the American Law Institute and its work with the Restatements, regarding it not merely as an effort to produce a national legal system but also as an effort to beat back the Realist movement.” STEVENS, *supra* note 74, at 136; *see also* DUXBURY, *supra* note 75, at 60 (“To [Pound’s] eyes, the Restatements were not merely an effort to produce a national legal system; they were also a challenge to [L]egal [R]ealism.”).

206. Justice Abrahamson captures several of these criticisms, including the criticisms of Professor Herman Oliphant, Judge Learned Hand, and Justice Holmes. Abrahamson, *supra* note 32, at 13–14. Oliphant expressed his concern that, in restating the law, the Institute would necessarily make the body of common law appear more consistent and logical than it is. *Id.* Hand

characterization of the American Law Institute at that time was as the “priesthood” of orthodox Formalist legal thought.²⁰⁷ This argument is bolstered by the fact that so many Harvard scholars were involved in the movement at its beginning.²⁰⁸ In fact, the dominance of conservative Harvard Law School in the First Restatement series²⁰⁹ continued to some extent in the second series.²¹⁰ In addition, one might note the choice of Elihu Root—who has been characterized as a Formalist²¹¹—as the first President of the Institute, from 1923 to 1937.²¹² Likewise, former Institute Director Herbert Wechsler has been described as a leader in the relatively conservative Legal Process school.²¹³ Carrying these observations of Formalist involvement in the Institute further, some have gone so far as to describe the Restatement project as being attractive only to older and less intelligent scholars.²¹⁴ Similarly, the Restatement taxonomy itself has been described as Formalist, outdated, and uncreative.²¹⁵

feared that the project would reflect “little regard for the law’s social context.” *Id.* Holmes described himself as an “aged skeptic” who found little new in the Institute’s efforts. *Id.*

207. Gordon, *supra* note 143, at 97 (“[T]he American Law Institute . . . periodically assembled the entire priesthood [of legal orthodoxy] for the particularly sterile enterprise of producing Restatements of the Law.”); Milner, *supra* note 26, at 795 (describing the development of jurisprudence over the first half of the 20th century as “that same concentration on formality, on the rule of the rule, which has been the key-number of Anglophile jurisprudence since Blackstone”). Milner goes on to focus the balance of his article on the Restatement movement. *Id.* at 795-826.

208. KALMAN, *supra* note 62, at 14 (noting that “Harvardians staffed” the Restatement project). Kalman also states that “the [R]estatement project may well have represented the final effort to realize Langdell’s ideal of a science of law.” *Id.*

209. See AMERICAN LAW INSTITUTE, *supra* note 38, at 105-07 (listing the organizers and founders of the Institute).

210. *Id.* at 143-99 (listing the Institute leaders, reporters, and advisors during the era of the Second Restatement).

211. La Piana, *supra* note 47, at 1110 (“Root . . . not only trusted in the gradual development of the law to solve the current problems, but he even praised the *bete noir* of the sociological jurist—freedom of contract—as the instrument of the destruction of a society based on status.”). La Piana adds that “[h]e was a believer in a theory of law which Pound had labelled an anachronism.” *Id.* at 1110-11.

212. *Id.*; see AMERICAN LAW INSTITUTE, *supra* note 38, at 11.

213. Simon, *supra* note 107, at 1 (“Wechsler was one of the leading exponents of the [L]egal [P]rocess school that dominated academic law in the 1950s and 1960s.”).

214. Cohen, *supra* note 56, at 217 (“The more intelligent of our younger law teachers and students are not interested in ‘restating’ the dogmas of legal theology.”); Franklin, *supra* note 70, at 1368 (describing the “older, more staid jurists” associated with the American Law Institute). Franklin proceeds to state that “[t]hese men, less imaginative than the others, less demonstrative, less conscious that the wasteland [recognized by the scholars associated with Legal Realism] exists, for a decade have been doing the work of the Institute.” *Id.*; see also Note, *supra* note 21, at 1677 n.57 (noting that the Realists and Critical scholars are both generally “part of the ‘younger generation of law’”).

215. Cohen, *supra* note 56, at 217-18 (“I think that the really creative legal thinkers of the

Other scholars have challenged this characterization of the Restatements as a Formalist bulwark against Realism.²¹⁶ Nathan Crystal has pointed out not only the involvement of leading Realist Arthur Corbin in the Restatement project,²¹⁷ but also the fact that other major early Realists conspicuously declined to be critical of the movement.²¹⁸ In addition, he has attempted to show that, as a matter of historical fact, the Restatement movement began before Realism became viable as its own school of thought.²¹⁹ Ultimately, it is Crystal's conclusion that the Restatements, at least initially, lacked any philosophical bent of their own.²²⁰ In addition, it is probably important to remember the stabilizing, attractive nature of Formalist thought, even in contemporary legal education, and especially in endowing new lawyers with a belief in the power of their chosen profession to effectuate justice.²²¹ Thus, it may not be appropriate to consign Formalism wholly to the early part of the twentieth century and before.

B. Another View: The Restatements Have Incorporated the Leading Trends in Jurisprudence, Especially in the Second Series

Another, less common, view is that the Restatements are fairly progressive,

future will not devote themselves . . . to the taxonomy of legal concepts and to the systematic explication of principles of 'justice' and 'reason,' buttressed by 'correct' cases.”).

216. Crystal, *supra* note 74, at 245-48. Crystal argues that the Restatement movement, “far from being a reaction to the challenge of [R]ealism, originated before [R]ealism developed as a coherent position.” *Id.* at 239.

217. *Id.* at 246 (“The participation of the [R]ealist Arthur Corbin in the drafting of the first Restatements is further evidence that the Restatements were not a response to the attack of legal reformers.”).

218. *Id.* at 245 (“Scholars who played a prominent role in the [R]ealist movement did not criticize the commencement of the Restatement project. Herman Oliphant and Karl Llewellyn, for instance, expressed cautious optimism, rather than criticism, of the project.”). See also DUXBURY, *supra* note 75, at 147 (“Not that every [R]ealist viewed the Restatement project with disdain. Herman Oliphant, for example, apparently without irony, lauded the project as ‘truly impressive.’” (quoting Oliphant, *supra* note 158, at 71)).

219. See Crystal, *supra* note 74, at 248. (“Realism was not generally recognized as a significant force in the legal community until the famous debate between Roscoe Pound and Karl Llewellyn in 1931.”). Crystal thereby concludes that “[t]hus, if anything, the Restatement project seems more the occasion for the formation of the [R]ealist movement than the reverse.” *Id.*

220. *Id.* at 246 (“In the beginning, therefore, the Restatement movement was not aligned with either [R]ealism or [O]bjectivism.”). Crystal further states that “[t]he first evidence of any alignment occurred in 1925, when Walter Wheeler Cook expressed objection to the concept of ‘domicile’ in the Restatement of Conflicts.” *Id.*

221. Schlegel, *supra* note 21, at 404 (“[F]or all the nascent elite to sleep comfortably, the message must be positive. It need not be panglossian, but to be effective, the message cannot be that more than a few rules need fixing in order to get the system running right. Within this basic intellectual structure operates the history of legal education since 1870.”).

especially as they have moved from the first series into the second and third.²²² For example, the American Law Institute has begun, as scholar Gary Minda asserts, to show “new energy and interest in . . . focusing on questions of jurisprudence” in a way that demonstrates increased receptiveness to some of the postmodern schools of thought.²²³

Others have suggested that perhaps the Restatements have been consistently Progressive in the capital “P” sense. The founders’ expectation that restating the law would be a continuous process²²⁴ reflects the same belief in dynamism that pervades the Progressive Movement.²²⁵ There is also some evidence that the Institute founders believed the current system of discerning the law was *too* Formalist and were interested in fashioning a more progressive alternative.²²⁶

The leaders of the American Law Institute have certainly been cognizant of the criticism levied at the Restatement movement. In addition, it seems arguable that the American Law Institute has responded to at least those forms of criticism

222. But even the first series incorporated the innovative ideas of ground-breaking cases, in some instances, before they became mainstream. Wechsler, *supra* note 3, at 150.

223. MINDA, *supra* note 76, at 251 (noting the “focus on postmodern interpretive strategies” that has been evident during recent meetings of the American Law Institute). Minda defines “postmodernism”:

Today, the term is used by a variety of contemporary academics to signify a new mood or aesthetic in *intellectual* thought. In law, postmodernism signals the movement away from interpretation premised upon the belief in universal truths, core essences, or foundational theories. In jurisprudence, postmodernism signals the movement away from “Rule of Law” thinking based on the belief in one true “Rule of Law,” one fixed “pattern,” set of “patterns,” or generalized theory of jurisprudence.

Id. at 3. This lengthy definition illustrates that Minda’s characterization, if ultimately proven to be true, is responsive to many of the critiques historically made of the Restatements.

224. See AMERICAN LAW INSTITUTE, *supra* note 38, at 45 (“The work of restating the law is rather like that of adapting a building to the ever-changing needs of those who dwell therein. Such a task, by the very definition of its object, is continuous.”).

225. Pound, *Law in Books*, *supra* note 93, at 30 (“This is the condition Professor Henderson refers to when he speaks of the way of social progress as barred by barricades of dead precedents.”). Pound states,

Legal systems have their periods in which system decays into technicality, in which a scientific jurisprudence becomes a mechanical jurisprudence. In a period of growth through juristic speculation and judicial decision, there is little danger of this. But whenever such a period has come to an end, when its work has been done and its legal theories have come to maturity, jurisprudence tends to decay. Conceptions are fixed. The premises are no longer to be examined. Everything is reduced to simple deduction from them. Principles cease to have importance. The law becomes a body of rules.

Id.

226. AMERICAN LAW INSTITUTE, *supra* note 38, at 17 (containing a critique of Formalism and the Harvard Legal Process school as neglecting the societal causes of law’s complexity); *id.* at 65 (containing a critique of the Harvard Legal Process school as creating immaterial factual distinctions in an effort to avoid overruling precedent).

that would not require the Institute to abandon its central organizing purpose. There is some evidence that Herbert Wechsler recognized that the first series of Restatements were not making the greatest possible contribution to the law and that the Institute took steps to ensure that the second series incorporated some of the valid criticism the first series generated.²²⁷ Especially in the second series, the Institute has endeavored to make the Restatements as dynamic as the common law they purport to represent.²²⁸ In addition, the Restatements increasingly have incorporated sociological information regarding matters of particular social concern.²²⁹

The Institute's responsiveness to progressive critics should not be entirely surprising, given the reformist character of many of the Institute principals. One scholar noted that even Herbert Wechsler, although careful not to designate himself as an interdisciplinarian, seems to have followed the practice of borrowing from other fields.²³⁰ In addition, Geoffrey Hazard, former Director of the Institute, was once executive director of the American Bar Foundation, itself an interdisciplinary organization.²³¹ Further, according to the characterization of Herbert Wechsler by his colleagues at Columbia in 1978, Wechsler himself cautiously could be described as a Realist.²³² This assertion rings true, in that Wechsler's scholarship and career evidence a belief in law's power to effectuate

227. Elson, *supra* note 8, at 627-28 ("Herbert Wechsler characterized the first Restatements as 'magisterial pronouncements, limited commentary, taboo in the citation of decisions, exclusion or subordination of all statutory matter and elimination of all the reporters' explanatory results from the official publication, with the exception of important deviations in the Restatement of the Law of Property.'").

228. Dewey, *supra* note 161, at 194 ("[R]ules may . . . become harmful and socially obstructive if they are hardened into absolute and fixed antecedent premises.").

229. Yntema, *supra* note 99, at 461 (noting that 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").

230. Sir Leon Radzinowicz, *Appreciation: Herbert Wechsler's Role in the Development of American Criminal Law and Penal Policy*, 69 VA. L. REV. 1, 7 (1983) (noting Wechsler's belief that criminal law "can never be self-contained," but "must draw upon a group of other disciplines such as criminology, psychiatry, the social sciences, history, and politics"). The author goes on to clarify "that the rather shallow term 'interdisciplinary' has never made a deep impression on Wechsler's mind. He believes that the borrowing and assimilations should be accomplished judiciously, in concrete terms and in harmony with the particular needs of the criminal law." *Id.*

231. Geoffrey C. Hazard, Jr., *From the Trenches and Towers: Reflections on Self-Study*, 23 LAW & SOC. INQUIRY 641, 641 (1998) (describing Mr. Hazard's previous experience with the American Bar Foundation, during which time he was responsible for overseeing empirical research).

232. Faculty of Law, Columbia University, *Resolution of the Faculty*, 78 COLUM. L. REV. 947, 947-48 (1978) (providing a tribute to Professor Wechsler upon his retirement, emphasizing both his career as a professor and his distinguished public service during and after World War II, particularly in the Nuremberg trials).

social justice and a conviction that the law should reflect morality and social policy.²³³ One could cite Wechsler's involvement in the Nuremberg Trials as evidence of his commitment to pursuing social justice.²³⁴

Another telling anecdote comes from the obituary of Edward Hirsch Levi, Dean of Chicago Law School and Institute Council member. Levi's technique of pairing lawyers and economists in the classroom was part of what became the "Chicago school" of Law & Economics.²³⁵ Other information suggests that there have been increased recent attempts to incorporate Law & Economics with at least anecdotal success.²³⁶ Thus, it is appropriate to say that the Institute is not monolithically Formalist—nor has it ever been.

Other scholars have taken a slightly different approach in defending the characterization of the Restatements as a progressive enterprise. They suggest that sound judicial opinions incorporate social fact as a matter of course through the liberal education of judges as undergraduates, which is reinforced during their law studies.²³⁷ Corbin, similarly, has suggested that judicial opinions already incorporate social fact more effectively than Restatements could.²³⁸ At least some proponents of the Restatement movement cited this kind of reasoning in preferring the Restatement format to a system of codification.²³⁹ Thus, it may

233. *Id.* The resolution stated in part,

Herbert Wechsler's dominant professional interest has been the improvement of American law through systematic application of the powers of reason. His aim has been to point the direction of law reform by careful appraisal of social policy and moral values, by refined articulation of legislative choices, by patient explication of the psychological, administrative, and social realities in which the legal system functions.

Id.

234. *Herbert Wechsler 1909-2000*, A.L.I. REP., Summer 2000 ("From 1944 to 1946," after Wechsler had already become a member of the Columbia law faculty, "he was Assistant Attorney General in charge of the War Division, and his responsibilities included development of the legal framework for trying Nazi war criminals and service as chief technical adviser to the American judges at the Nuremberg Trials.").

235. *See Edward Hirsch Levi, Emeritus Council Member, Is Dead at 88*, A.L.I. REP., Spring 2000 (calling Levi "[a] pioneer in developing interdisciplinary programs at the Law School").

236. *See, e.g.,* Thomas S. Ulen, *Firmly Grounded: Economics in the Future of the Law*, 1997 WIS. L. REV. 433, 434 n.3 (describing the inclusion of Law & Economics concepts in the ALI's Corporate Governance Project). For one scholar's viewpoint that Law & Economics scholars "remain largely aloof from such practical efforts at law reform" as those in which the Institute is engaged, see Farnsworth, *supra* note 185, at 100. Professor Farnsworth's statements may be equally true of Critical scholars.

237. Rheinstein, *supra* note 125, at 695 (noting the trend toward requiring a formal undergraduate education prior to law school admission). Rheinstein states, "In all colleges social studies became a necessary part of the curriculum. The familiarity with social science consequently acquired was carried over in law school into the critical discussion of cases." *Id.*

238. *See supra* note 111.

239. DUXBURY, *supra* note 75, at 60 (describing Roscoe Pound's support of the movement). According to the author, Pound believed,

not have been Formalism that prevented the Institute from focusing on social facts in the Restatements, but rather a sense that doing so would duplicate the internal processes already taking place within the common-law courts.

C. A Safe Compromise? The Restatements as Limited Reform

Yet another view of the Restatement movement is that it has been purposefully and appropriately moderate in its reform efforts. In other words, some have recognized the Institute as an instrument of law reform, albeit a conservative one. As an introductory matter, Professor Lawrence Friedman provides a useful definition of two kinds of law reform: (1) “[A] more or less general revision of the laws, or of some branch of law, in the direction of consistency or systematic arrangement,” and (2) “procedural improvement—change in the housekeeping aspects of justice.”²⁴⁰ It is this second form of law reform that Friedman describes as being most common in modern American experience.²⁴¹ Thus, perhaps the Institute, as a monitor of the common law, functions much as a common-law court would, making changes that might seem trivial to outsiders but are nevertheless important to those in the legal profession.²⁴² This perspective is consistent with Natalie Hull’s scholarship suggesting that the American Law Institute was created out of a spirit of “pragmatic progressive reform.”²⁴³ Similarly, Institute leader Chief Justice Roger

As “agents of the common law and allies of the courts,” the Restaters “would ensure the dominance of judicial experience in the development of law by relying on ‘traditional conceptions and traditional categories’ The dominance of judicial experience was important to Pound not simply as a means of preserving the continuity of traditional legal forms, but also as an indicator of the moral values of ‘society at large’; for, like [Oliver Wendell] Holmes, he believed that the courts reached decisions—albeit ‘seldom consciously’—on the basis of common moral values shared by the community.

Id. (footnotes omitted).

240. Friedman, *supra* note 115, at 351 (“In common speech, the phrase ‘law reform’ is typically applied to one of two kinds of legal change.”). As to the first kind of reform, Friedman states, “This is reform through codification, which has been . . . a ‘cardinal vehicle’ of reform during the last century of legal history. General codification has not had a happy time in the United States; but codification on a smaller scale has become epidemic.” *Id.* (citation omitted).

241. *Id.* at 353 (“Law reform . . . in its usual sense, . . . refers primarily to improvement in the formal parts of law.”). “In short, both in the mouths of laymen and lawyers[,] law reform has not necessarily stood for so grand a program as the word ‘reform’ may seem to promise.” *Id.* at 351. Friedman states, “In law as in politics, reform is not revolution.” *Id.*

242. *Id.* at 356 (“In the long view of history, it is not surprising that the profession chooses to center its attention on rather technical, craft-oriented problems, to the exclusion of what others see as the more serious problems of society.”). Lawyers may also hold a higher opinion of technical reform than outsiders do. *Id.* at 357. As Friedman states, “They may . . . feel that the more elegant and systematic legal system carries with it, in the long run, important values for society.” *Id.*

243. POSNER, *supra* note 27, at 303 (“[The Restatement movement] was not, as many have thought, a rearguard action by traditionalists distressed by the rise of statutes and the first stirrings

Traynor has been described as a reformer, albeit not necessarily in the usual sense of that term.²⁴⁴

In considering the work of the Institute, it seems important to note the natural conservatism of the law²⁴⁵ and the way in which this trait might influence lawyers' views on reform.²⁴⁶ Along the same lines, some have described law reform as being typically external in origin,²⁴⁷ and perhaps this is even appropriate if the law is to serve the needs of the public.²⁴⁸ This consideration would suggest that the American Law Institute, being an elite organization and a leader in a conservative field, mirrors at least some of the conservatism of the law it endeavors to restate.²⁴⁹

Taking this argument a step further, Lawrence Friedman suggests that the experience of codification and Restatement in American society is an inherently conservative phenomenon.²⁵⁰ Consistent with his perspective, the Restatements

of the realist movement.”). Posner leaves open, however, the question of whether the Institute is still an instrument of progressive reform in modern times. *Id.*

244. G. Edward White, *Tribute: Roger Traynor*, 69 VA. L. REV. 1381, 1383 (1983) (“Although his political perspective was more ‘liberal’ than ‘conservative,’ his principal interest in law ‘reform’ was that of a technician, anxious to make doctrine more serviceable, predictable, and logically coherent.”). White praises Traynor, using words that might also characterize the Institute at its best: “An ‘innovative’ Traynor opinion conveyed a sense that authorities had been thoroughly canvassed, questions of reach and scope thoughtfully considered, and language carefully phrased. His opinions were academic exercises in the best sense.” *Id.* at 1384.

245. A number of sources include the following illustration: “[T]here is . . . 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.” Goodrich, *supra* note 39, at 508 (reflecting the symposium comments of Hessel Yntema); Abrahamson, *supra* note 32, at 7 (giving the same illustration).

246. CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT* 201 (1981) (noting the natural conservatism of the law and lawyers’ collective fear that codification would create poor substantive changes).

247. Friedman, *supra* note 115, at 353 (“Demands for legal change are frequently, even typically[,] exogenous. They come from concrete interest groups, from the government bureaucracy, even (sometimes) from that vague, sponge-like mass called ‘public opinion.’”).

248. *Id.* at 367 (“Major change, change that takes power from one class and hands it over to another, cannot be achieved through ordinary litigation and through the ordinary work of private practitioners. Major change takes place through law, but hardly through lawyer’s law in its usual sense; it takes place through programs of towering scope, which are legislative and executive in origin [T]he organized body of lawyers has no mandate to destroy or utterly transform existing law.”).

249. The early writings of the Institute reflect this view of the law. AMERICAN LAW INSTITUTE, *supra* note 38, at 77 (suggesting that “the conservatism of lawyers” has contributed to the increase of gamesmanship in the law at the expense of sense and justice).

250. Friedman, *supra* note 115, at 354. Friedman states,

Both codes and [R]estatements were reforms that did not reform. In the 19th century, law was constantly and vigorously changing; every new statute was in a sense a reform;

espouse a relatively modest agenda—to promote certainty and a lower degree of complexity in the law.²⁵¹ Taking this logic a step further, perhaps law is not just conservative but actually more conservative than other disciplines and professions. Roscoe Pound and Karl Llewellyn suggest that jurisprudence has been slower to recognize the contributions of sociology than have other fields.²⁵² Pound also asserts that, because the law is resistant to change, there is a frequent gap between law and public opinion.²⁵³ This viewpoint is not, however, uncontroversial: Max Rheinstein advances a much more radical view of the lawyer's role in American society.²⁵⁴

so was every new doctrine and ruling. The codesmen were interested in reform in a special sense. They wanted to perfect an existing system. They wanted to make it more knowable, harmonious, certain. Drastic shifts in allocation of political or economic power, through law, were not to their purpose.

Id. Friedman describes this kind of conservative codification as the “spiritual parent[] of the [R]estatements of the law.” *Id.*

251. COOK, *supra* note 246, at 12 (providing a compelling description of uncertainty as a significant problem in the pre-Restatement era and of codifications such as the Restatements as promoting modest reform).

252. Pound, *Law in Books*, *supra* note 93, at 31 (“Jurisprudence is the last in the march of the sciences away from the method of deduction from predetermined conceptions.”). Pound is also concerned that law students quickly forget the importance of the education they received before law school. This statement, if true, would tend to suggest that lawyers are trained not to consider anything that is deemed to be beyond the bounds of the law. *Id.* Pound states, “[T]he natural law theories which are a matter of course in all our law books are not unlikely to persuade [a new law student] that what he learned in college is immaterial in the domain of law.” *Id.* See also Llewellyn, *A Realistic Jurisprudence*, *supra* note 138, at 57 (describing law as “the most conventionalized and fiction-ridden of disciplines”).

253. Pound, *Law in Books*, *supra* note 93, at 42 (stating that “law has always been dominated by ideas of the past long after they have ceased to be vital in other departments of learning”). Pound states, “This is an inherent difficulty in legal science, and it is closely connected with an inherent difficulty in the administration of justice according to law—namely, the inevitable difference in rate of progress between law and public opinion.” *Id.*; see also Llewellyn, *Some Realism*, *supra* note 56, at 72 (noting the general Realist “conception of society in flux, and in flux typically faster than the law, so that the probability is always given that any portion of law needs reexamination to determine how far it fits the society it purports to serve”).

254. Rheinstein, *supra* note 125, at 688. Rheinstein states,

The words of Rudolph Wietholter recently reminded me of the diversity of legal styles: “We do not have to harbor any fear that members of the legal system will bring about a change of the social order. Quite the contrary, society is being stabilized and the status quo is maintained primarily by means of the law and the lawyers.”

As to Germany, this proposition may contain a grain of truth. For a considerable period it also would have been applicable to England. But it certainly does not apply to the United States or, to speak more correctly, to the present third phase of the legal development of the United States.

In addition, scholars disagree as to whether legal academia promotes conservatism or encourages reform. Alfred S. Konefsky and John Henry Schlegel describe the law-school reward structure as promoting conservative scholarship that creates no danger of systemic reform.²⁵⁵ Alternatively, Lawrence Friedman suggests that law professors are more receptive to wide-ranging reform than other members of the law profession might be.²⁵⁶ This debate is particularly pertinent to those who, like Rheinstein, see law professors as leaders in the development and reform of the law.²⁵⁷

Regardless of why the Restatements have adopted their current form and philosophy, many scholars have recognized that the work of the American Law Institute through the Restatement movement is truly valuable, even if it represents a more limited kind of reform than some observers would prefer.²⁵⁸ It is clear that the Institute founders believed they were doing something that was not only important, but crucial.²⁵⁹

Id.

255. Alfred S. Konefsky & John Henry Schlegel, *Mirror, Mirror on the Wall: Histories of American Law Schools*, 95 HARV. L. REV. 833, 849 (1982) (“One possible explanation for the lack of original thinkers is that the reward structure within the law school is incompatible with serious scholarship.”). Instead, the authors claim, “Teachers are chosen on the assurance that they will bear their share of the enormous class loads and participate in professional (read ‘safe’) law reforms, bringing conservative bar support to the institution.” *Id.*

256. Friedman, *supra* note 115, at 356 (“The higher the prestige of the professor, the more likely he is to engage in law reform. No one seems to regard law reform as trivial or beneath the dignity of endowed chairs of law.”).

257. Rheinstein, *supra* note 125, at 690-91 (following the Civil War, Rheinstein describes a “change from material-rational to formal-rational thinking,” which he connects “with the rise of a new group of co-leaders of the law, the academic teachers and scholars—the professors”).

258. Posner recommends a different kind of limited reform effort:

The simplification of law was one of the Institute’s original goals, and it is one that would be well served by the Institute’s undertaking to monitor the thousands of appellate decisions, state and federal, handed down every year for conflicts on technical points of law and to propose solutions that I predict would be welcomed by courts and legislatures.

POSNER, *supra* note 27, at 308-09. I explore this potential mission for the Institute in another article. See Kristen David Adams, *The American Law Institute: Justice Cardozo’s Ministry of Justice?*, 32 S. ILL. U. L.J. (forthcoming 2007) (Part III.B., “Proposals Motivated by Increased Pressures on the Courts”).

259. AMERICAN LAW INSTITUTE, *supra* note 38, at 11 (quoting the recommendations of the committee that was formed to organize what became the Institute). The committee’s recommendations included the following statements:

[T]he opinion that the law is unnecessarily uncertain and complex, that many of its rules do not work well in practice, and that its administration often results not in justice, but in injustice, is general among all classes and among persons of widely divergent political and social opinions.

As Nathan Crystal notes, “Evidence indicates that uncertainty of the law was a significant problem. Statistics gathered by the ABA showed that approximately fifty percent of the cases which reached appellate courts were reversed.”²⁶⁰ George Wickersham notes concern for the sheer volume of reported case law, dating back to at least 1821.²⁶¹ Warren Seavey describes the American lawyer, by the nineteenth century, as being “overburdened by the mass of material flowing from the presses,”²⁶² rendering the true state of the law very difficult to discern. Samuel Williston provides a similar picture, citing statistics on the

It is unnecessary to emphasize here the danger from this general dissatisfaction. It breeds disrespect for law, and disrespect for law is the corner-stone of revolution.

Id. Elsewhere, the founders expressed their concern that lack of faith in the outcome of legal matters motivated many litigants to compromise matters rather than entrusting them to the court system. *Id.* at 15 (describing “the feeling [among litigants] that the outcome of all court proceedings is uncertain no matter how just the claim”).

260. Crystal, *supra* note 74, at 249 (“Some judges and writers complained that it was difficult to determine what the law was. Others complained that the legal system was unnecessarily complex.”). The Institute was particularly concerned with situations in which identical or near-identical statutes were interpreted in varying ways, much to the confusion of the bar. AMERICAN LAW INSTITUTE, *supra* note 38, at 81. The Institute founders believed that these “accidental variations,” unlike purposeful variations in the law, contributed little to the development of the law. *Id.* (“Conflicting judicial interpretation of like statutory provisions has rarely any compensating good effect to offset the resulting uncertainty and complexity.”). I discuss this potential mission for the Institute in another article. See Adams, *supra* note 258, at Part III.A (“Proposals Motivated by the Rise of Statutory Law”).

261. Wickersham, *supra* note 66, at 450-51 (“Mr. Justice Story, in an address to the bar of Suffolk County, Massachusetts, in 1821, referred to ‘the mass of the law’ as accumulating with an almost incredible rapidity, and said, ‘it is impossible to look without some discouragement upon the ponderous volumes which the next half century will add to the groaning shelves of our jurists.’”). A colorful quote from the report recommending the founding of what became the Institute reflects a similar perspective: “In England in the old days [legal] literature was a scanty rivulet. In England and her Colonies it has swollen in modern times to a stately stream. But in America it has become a raging torrent fed by hundreds of tributaries.” AMERICAN LAW INSTITUTE, *supra* note 38, at 66. The report notes, “It is of course impossible for any individual lawyer or judge to read, still less by any device to carry in his mind, one one-thousandth part of this mass of case law.” *Id.* at 67.

262. Seavey, *supra* note 52, at 317. The author continues:

Search books helped, but finding cases was merely the beginning of [the lawyer’s] work of synthesizing them. The treatises were helpful, but they were the products of individuals of varying capacity and their statements were far from authoritative. The profession yearned for a court of final resort, like the House of Lords which never knowingly changes a once-stated opinion, or a code like that of Justinian, authoritative and so clearly expressed that there could be argument only as to the application of the rules to the facts.

Id.

proliferation of the case law.²⁶³ This phenomenon, coupled with the inevitable contradictory opinions that were generated, made it difficult to determine how a court would rule in any given case.²⁶⁴ Businesses became frustrated at the inability to plan resulting from this situation.²⁶⁵ In addition, the confused state of the common law ultimately weakened the value of citations to precedent in legal arguments.²⁶⁶ Arthur Corbin cited the “[u]ncertainty of mind,” “confused reasoning,” and “actual conflict in decision” that were common problems at the time.²⁶⁷ Wesley Newcomb Hohfeld shared the consistent view that unclear legal terminology and inconsistent use can easily result in unclear law.²⁶⁸

It was this crisis, whether perceived or real, to which the American Law Institute was attempting to respond through the creation of its Restatements and which it continues to address in modern times. Along the same lines and recognizing the criticism directed at the Restatement movement, some express a concern that the Institute’s Restatements may be abandoned by young scholars in favor of what might be perceived as more prestigious scholarship.²⁶⁹

The opposite viewpoint is that the Restatement movement is too conservative to be useful, in that the American Law Institute failed to take the more significant courageous steps that would be required for meaningful results. In addition, Hessel Yntema has argued that the Restatements have failed to meet even their more modest stated goal of relieving the attorney’s burden of sorting through

263. Williston, *supra* note 118, at 40 (noting the increase in American Law Reports from 1885 to 1914 to 1928, from 3500 to 8600 to over 11,000). Williston described the increase as being more than should be attributed simply to the addition of new states. *Id.*

264. Wickersham states, “[W]ith the swelling volume of precedent, the task of ascertaining what the law is in any given case has grown formidable.” Wickersham, *supra* note 66, at 455.

265. *Id.* at 455 (“People demand to learn what is the law, not as the result of a law suit, but while actual litigation is yet afar off. They are not content to rest on a bare probability of the judgment which a [c]ourt of justice may apply to their acts.”).

266. *Id.* at 457 (“This ‘avalanche of decisions by tribunals, great and small,’ Judge Cardozo has truly said, ‘is producing a situation where citation of precedent is tending to count for less and appeal to informing principle is tending to count for more.’” (citation omitted)).

267. Corbin, *supra* note 37, at 19. Corbin describes an era in which “[i]t was apparent that whatever authority might be found for one view of the law upon any topic, other authorities could be found for a different view upon the same topic.” *Id.* at 21 (describing “a situation where the law was becoming guesswork” (citation omitted)).

268. Wesley Newcomb Hohfeld, *Some Functional Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913), reprinted in AMERICAN LEGAL REALISM 45 (William W. Fisher et al. eds., 1993) (“[I]n any closely reasoned problem, whether legal or non-legal, chameleon-hued words are a peril both to clear thought and to lucid expression.”). The author goes on to note, “[T]he above mentioned inadequacy and ambiguity of terms unfortunately reflect, all too often, corresponding paucity and confusion as regards actual legal conceptions.” *Id.*

269. Goodrich, *supra* note 39, at 496 (“[W]e 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.”).

reported case law.²⁷⁰ Thurman Arnold compares the Restatements in this way to the Hilary Rules of pleading, which ultimately became disfavored, describing both efforts as being well-intentioned, inevitable, and ultimately misguided because greater change was needed.²⁷¹ Nevertheless, the author admits, “From the point of view of a science of law, the Restatement by the American Law Institute is as near perfection as human things can make it.”²⁷² A similar critique is that the Restatements fail to be helpful because their provisions are largely obvious.²⁷³ Another criticism is that the Restatements, being a creature of committee drafting and compromise, tend naturally to present law that is “not in force anywhere.”²⁷⁴ Furthermore, Oliver Wendell Holmes disputed the characterization of the law as being too vast to be knowable,²⁷⁵ a point that would

270. *Id.* at 506 (reporting the opinion of Hessel Yntema that “the influence of the Restatement of the Law in alleviating the defects in the legal system thus far is negligible”). Yntema elaborates:

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.

Id.

271. Arnold, *supra* note 119, at 819 (“[I]t was probably inevitable that the same sort of thing attempted by the Hilary Rules in procedure should have been repeated by the American Law Institute in substantive law. The idea that the old system was perfect and needed only clearness and accuracy on the part of lawyers and judges was so fixed that had anything else been tried it would not have obtained even a scattering support.”). The author goes on to state, “Of course the Hilary Rules did not stop the great pleading inflation, nor has the Restatement stopped the great post-war substantive law inflation. It has become another book which must be consulted, while the cases and texts pour out as before.” *Id.*

272. *Id.* at 816 (noting that “[t]hey have employed the most distinguished experts available and submitted the results to the most distinguished practical lawyers”).

273. DUXBURY, *supra* note 75, at 148. The author gives the following support for this assertion:

Even William Reynolds Vance, one of the most conservative legal scholars at Yale during the 1930s, was prepared to denounce the Restatement of the Law of Property as a series of “solemn declarations . . . so obvious that they are rather ludicrous. . . . The judge who would base his decision of any question of law upon these black letter declarations would be worse than lazy; he would be incredibly stupid.”

Id. (citation omitted).

274. Milner, *supra* note 26, at 798 (having already criticized the Institute as allowing the over-dominance of reporters, the author adds, “[E]ven if the advisers sometimes managed to convince the Reporter of the error of his ideas, the result would far more likely be the striking of a balance, than the Reporter’s sliding down to the other end of the academic see-saw. With such a compromise, taking two extreme points of view into account, we then arrive at the delightful conclusion that the particular ‘rule’ is one which is not in force anywhere.”).

275. Holmes, *The Path of the Law*, *supra* note 21, at 16 (“The number of our predictions when generalized and reduced to a system is not unmanageably large.”). Holmes states, “They present

tend to call into question the assumption that a Restatement is even needed, much less valuable. Thus, the value of the Institute's Restatements can be disputed.

Lawrence Friedman takes a more moderate approach in critiquing the Restatements. To the extent that the Restatements represent a hybrid of what Friedman calls "half ratification, half real inducement to change,"²⁷⁶ he acknowledges that this kind of reform is "not only typical of the work of Anglo-American courts; it is arguably the most vital and productive kind of change."²⁷⁷ Additionally, he argues that even reform that is merely "ratification" may be valuable in improving the public perception of lawyers.²⁷⁸

The question remains whether it would even be possible for a law-reform effort to incorporate all of the criticism that has been levied at the American Law Institute and the Restatement movement by scholars in Legal Realism, Law & Economics, and Critical Legal Studies and maintain a useful level of coherence. The Realists, while often sharply critical of the American Law Institute, seemed to lack a clear sense of what would be a better alternative.²⁷⁹ Neil Duxbury suggests that the reason for this failure to suggest another model could be the ultimate similarity in goals between the Realists and the Restaters. Thus, despite their critique, the Realists may not have been able to envision a better program than the Institute produced.²⁸⁰ Arthur Corbin acknowledges the failings inherent

themselves as a finite body of dogma which may be mastered within a reasonable time. It is a great mistake to be frightened by the ever increasing number of reports." *Id.*

276. Friedman, *supra* note 115, at 363 ("Formal legal change often comes at the middle point in a social process which requires a number of distinct steps for its completion. Formal legal change ratifies those steps already taken, but it forces or hurries society along with regard to the steps not yet taken.").

277. *Id.* at 364 ("Very generally, an attempted legal change, in a non-revolutionary setting, will have most effect and be most meaningful when the change is relatively slight.").

278. *Id.* at 358 (describing law reform as "a banner of rectitude waved in the public eye"). Friedman goes on to state, "The profession . . . finds it valuable to blunt the edge of popular distrust through mounting its own war against injustice." *Id.*

279. STEVENS, *supra* note 74, at 141 ("The alternatives offered by the Yale critics [associated with the Realist movement], whether in terms of intellectual or pedagogical goals, were largely nonexistent.").

280. DUXBURY, *supra* note 75, at 149 ("[A]s with the treatment of Langdellian legal education generally, one finds in the literature of [R]ealism a reluctance to develop critique of the Restatements into solid proposals for reform."). The author continues:

Possibly this reluctance stemmed from the fact that, for all the [F]ormalist underpinnings of the Restatement movement, one of its primary goals—the simplification of the common law—rather echoed the general [R]ealist disdain for legal verbosity and word magic. Fred Rodell, for example, wondered why legal documents lack the plainness of language of cook-books, almanacs or columns of classified advertisements: surely, he reasoned, it must be possible "to cut through those layers upon layers of verbal varnish and bare the true grain that lies beneath." Such a sentiment would not have been out of place at the Harvard Law School, which he so despised. The [R]estaters too, after all, were trying to uncover the true grain of the law.

in a black-letter system of law, but he goes on to suggest that no better form is available.²⁸¹ Early Institute Director Herbert Wechsler seems to have considered the models used by other disciplines such as science, but ultimately concluded that no other fields offer clearer answers.²⁸² It is also important to note that no school of thought, including Law & Economics, is universally recognized as valid; Law & Economics, for example, has been criticized as a false science lacking empirical support.²⁸³

Returning to the Realist claim that rules don't wholly guide judges and assuming that, instead, analysis is relatively flexible, some fundamental questions remain.²⁸⁴ What is an appropriate response to this conclusion? Should the Institute abandon rules completely? What would be a better system than one based on rules? In addition, returning to the Realist thesis that working rules are more useful than black-letter rules,²⁸⁵ is this just a simple manner of labeling, such that a mild disclaimer or change in terminology could cure the entire problem? If not, how could the criticism be addressed?

Both Realism and Critical theory have been criticized for lacking a positive thesis. This phenomenon has made it very difficult to conceive of a way in which the Institute—or any other policymaking group—could implement a positive program that incorporates the wisdom of each movement.²⁸⁶ Instead, as one scholar noted, the kind of pure criticism that Realism and Critical theory

Id. Warren Seavey similarly reports that the Restatements were intended to be written without “academic phrasing.” Seavey, *supra* note 52, at 317. Seavey continues:

Ambiguous Latin phrases like *res ipsa loquitur* and *respondeat superior* were taboo, except for apology and explanation in good English. For the phrases “in general” and “in most instances,” favorites in the old days of easy writing, there had to be substituted the conditions under which a rule would operate, for a statement of law with unstated exceptions is not a rule.

Id. at 318.

281. Corbin, *supra* note 37, at 29. Corbin states,

A black letter statement that is finally adopted may still be found to be made up of variables and modes of expressions that may have had their origin on the tower of Babel; but they have the merit of being the survivors in a struggle with other forms of expression that almost invariably are worse.

Id.

282. Simon, *supra* note 107, at 10 (“In [their] 1937 Columbia Law Review articles, Wechsler and Jerome Michael had devoted innumerable footnotes and whole sections to discussing the human sciences, but with the upshot of tracing a model of criminal law dependent not on the positive knowledge of science but precisely on its uncertainty.”).

283. BAUMAN, *supra* note 23, at 240.

284. See *supra* note 139.

285. See *supra* note 141.

286. Neacsu, *supra* note 23, at 426-33 (discussing the splintering of the Critical movement). The author concludes that “it seems [the] CLS failed or refused to provide a coherent radical vision of social change.” *Id.* at 428. As a result, the author states, “CLS no longer seems to possess a voice comprehensible to anyone outside its own small circle.” *Id.* at 416.

have provided is ultimately only destructive and thus difficult to incorporate.²⁸⁷

In addition, neither Critical theory nor Realism clearly represents the leading ideas in jurisprudence. As Professor Robert Ellickson has noted, even theorist Duncan Kennedy has said the Critical movement has ended.²⁸⁸ One reason for this demise could be that the movement failed to secure the support of practicing lawyers.²⁸⁹ Critical theory was not necessarily intended to be merely theoretical. Instead, there is some evidence that the movement was meant to be transformative, not just ideological, but it has failed to take this second step.²⁹⁰ It may be the very indeterminacy that characterizes Critical scholarship that keeps it from being able to propose a coherent alternative.²⁹¹ The movement has also been greatly harmed by its own internal divisions.²⁹²

Similarly, Realists are criticized as being unable to agree on a positive model for the role of law.²⁹³ Unlike Realism and Critical theory, Law & Economics presents a coherent positive program.²⁹⁴ This program has also resonated with

287. Note, *supra* note 21, at 1683 (“Engaged in labyrinthine textual explorations easily dismissed as the interpretive idiosyncrasies of individual writers, the [C]ritical legal scholars might find themselves increasingly segregated from both their academic contemporaries and the political realities to which their scholarship is addressed.”).

288. Ellickson, *supra* note 96, at 340 (“In law journals the rate of citations to CLS work fell by roughly one-half between 1988-1990 and 2000-2002. By 1996, Duncan Kennedy, previously CLS’s pied-piper-in-chief, was asserting that the movement was ‘dead.’”). Ellickson went on to state, in describing the reasons for the demise of Critical theory, that “postmodernism becomes a laughingstock when it lapses into total nihilism about the possibility of factual knowledge.” *Id.* at 341.

289. See Schlegel, *supra* note 21, at 403. This statement, if true, begs the question of how the Institute should include Critical scholars in its work, which is intended to be of great practical use to practitioners and judges.

290. David M. Trubek, *Where the Action Is: Critical Legal Studies and Empiricism*, 36 STAN. L. REV. 575, 591 (1984) (“While Critical legal scholars seek to show relationships between the world views embedded in modern legal consciousness and domination in capitalist society, they also want to change that [tradition] . . . [T]he analysis of legal consciousness is part of a transformative politics.”). Trubek further acknowledges that this aspect of Critical theory’s potential has not been wholly understood, much less realized in practical effect. *Id.*

291. Solum, *supra* note 149, at 463 (examining and ultimately agreeing with the notion that focus on indeterminacy prevents CLS from having a clear program to offer). Solum states, “The skeptical possibilities invoked by both rule-skepticism and epistemological skepticism are not practical possibilities, and only practical possibilities affect the way one acts.” *Id.* at 479.

292. See BAUMAN, *supra* note 23, at 18 (describing the fragmentation of Critical theory into Critical Race Theory, Feminist Jurisprudence, Modernism, and other groups).

293. See Milner, *supra* note 26 (comprehensively criticizing the Restatements but failing to present a coherent alternative); see also AMERICAN LEGAL REALISM, *supra* note 21, at 165 (“[T]he weakness of [the Realists’] affirmative program contributed significantly to the deterioration of the movement in the early 1940s.”).

294. Ulen, *supra* note 91, at 436-37 (noting the greater success of Realism in presenting a negative thesis than a positive alternative).

non-academicians in some important ways—for example, many judges have attended the Law & Economics Center at George Mason.²⁹⁵ At the same time, and by way of contrast, the lack of a clear program makes it less likely that there could be any such center for studies in the Realist or Critical movements.

Thus, it remains unclear how the Restatements could incorporate the best lessons of Realism and Critical theory. At the same time, if Law & Economics has proven itself to be particularly useful to judges,²⁹⁶ perhaps the Restatements should be more responsive to the developments and jurisprudence in this area. Even so, there are risks of going too far, since Law & Economics has been criticized as reifying the market-based nature of law with few proven empirical results.²⁹⁷

In addition, Realists and others have called repeatedly for greater empirical study in law, suggesting that doing so will effectuate a significant, substantive difference in the law thus created.²⁹⁸ John Henry Schlegel describes Charles Clark's attempt to study empirically "[t]he actual effect of procedural devices on the progress of litigation,"²⁹⁹ which included a planned collaboration whereby the American Law Institute would publish the final results.³⁰⁰ Ultimately, the Institute did publish the research, but only in a version that was "virtually devoid of any conclusions or interpretive material."³⁰¹ The reporting of this incident in

295. Brock, *supra* note 95, at 203 ("Over 350 federal judges have attended the Law and Economics Center at George Mason University[,] and the Department of Justice has sponsored economics short-courses for over 100 federal judges.").

296. *Id.* at 205 ("[T]here appears to be an emerging consensus among academics familiar with [Law & Economics], that to be a literate judge capable of adequately understanding legal issues and questions, a working knowledge of economics is essential.").

297. Kritzer, *supra* note 41, at 669 ("Economic analyses of law and the legal system have been largely theoretical with relatively little in the way of good empirical results to show the validity of the theoretical arguments."). Kritzer adds, "Theory is important because it suggests questions and avenues for inquiry. Untested theoretical propositions, whether derived from economic analyses or some other disciplinary approach, are at best a start. It is an understanding of the actual workings of legal principles and legal procedures that is ultimately needed." *Id.*

298. *See supra* notes 99-103 and accompanying text.

299. SCHLEGEL, *supra* note 43, at 84-85 (Clark planned "to take the field in Connecticut in the effort to discover how the administration of justice is working." (citation omitted)).

300. *Id.* at 90 (describing the "complicated arrangement" between Clark and the American Law Institute). The agreement was to proceed as follows:

The agreement required approval first by a committee of the ALI Council consisting of two members of the [National Commission on Law Observance and Enforcement] and Judge Learned Hand, then by the Council, and finally by the [American Law Institute] membership—a process so full of potential traps that it plainly left Clark worried.

Id.

301. *Id.* at 94 ("This action had the support of William Draper Lewis, executive director of the American Law Institute, who was as worried as Clark about the problems of getting any conclusions approved by his diverse membership." (citing letter from William D. Lewis to Charles E. Clark (Mar. 3, 1933) (on file with the Beinecke Rare Book Library, Yale University))).

Schlegel's text, *American Legal Realism and Empirical Social Science*, is meant to show the Institute's failings with regard to empirical legal research. Schlegel has also criticized the American Law Institute as failing to use its considerable resources to support empirical study when it had the opportunity to do so.³⁰²

This is probably not as clear a point as Schlegel suggests, however. Evidence suggests that the Institute leadership has long been aware of the potential benefits of empirical study but has chosen to use its resources elsewhere, based primarily upon the limitations of institutional resources and the considerable time and expense associated with high-quality empirical work.³⁰³ In fact, historical documents suggest that the Institute, from its very inception, had planned to engage in empirical study to support its Restatements.³⁰⁴

Some have acknowledged the particular difficulty of empirical research in the field of law.³⁰⁵ In addition, the Institute's cost estimates on the proposed Kritzer empirical study³⁰⁶ referenced earlier in this Article showed the estimated

302. Schlegel notes, as a preliminary matter, that the American Law Institute and the Johns Hopkins Institute of Law, which was founded to support empirical research, shared a common concern for "the growth in legislation and judicial decisions that together led to 'existing confusion.'" *Id.* at 152. He goes on to state, in explaining why Realist scholars were not more prevalent in the American Law Institute in its early days,

The enormous American Law Institute scholarship engine had already been set in motion, its wheels well greased with money that might have been captured for empirical research in law, but that instead lined the pockets of more traditional legal scholars. That organization provided now tax deductible opportunities for slightly left of center, upper caste lawyers to socialize in an atmosphere that reinforced the notion that theirs was a learned profession and thus further separated them from the stench of the *Untermenschen* of the profession. Even more debilitating was the notion fueled by the ALI's mere existence that library, not field, research was *the* method of legal research among the group in the profession that was the most likely to support empirical research in law.

Id. at 212.

303. Traynor, *supra* note 59 (describing various considerations with regard to empirical study and ultimately recommending that the Institute consider making good use of the excellent empirical work sponsored by other organizations, such as the American Bar Foundation and the RAND Institute for Civil Justice).

304. Yntema, *supra* note 99, at 465 ("The initial plan [for the Institute] contemplated an ideal statement of law, analytical, critical, and constructive, embodying whatever improvements in the law itself might be recommended by exhaustive study.").

305. AMERICAN LEGAL REALISM, *supra* note 21, at 233 ("Some scholars labored mightily at empirical research, only to find conclusions elusive, their hard-won data so incomplete as to be unpublishable, their work useless for suggesting reform."). *See also* Underhill Moore & Charles C. Callahan, *Law and Learning Theory: A Study in Legal Control*, 53 YALE L.J. 1 (1933), *reprinted in* AMERICAN LEGAL REALISM 265 (William W. Fisher et al. eds., 1993) (relating the much-maligned New Haven empirical traffic study).

306. *See generally* Kritzer, *supra* note 41.

cost would probably be at least half a million dollars, maybe more.³⁰⁷ Furthermore, it is important not to characterize empirical study as having been universally embraced; Critical scholars, for example, are not wholly supportive of this approach to the study of law.³⁰⁸

In addition, although the Institute is often criticized for failing to communicate coherently the “is/ought” distinction in its Restatements, it is not clear that the distinction is one that is ultimately itself coherent.³⁰⁹ Herbert Wechsler has suggested that the Institute cannot separate *is* from *ought* because courts consider what the law *ought to be* in deciding what the law *is*.³¹⁰ Perhaps the Institute members do, too, when the Institute chooses to adopt a minority rule in a Restatement product. Critical scholars, likewise, reject the distinction between what the law is and what it should be.³¹¹ Alan Milner shows how the Restatements changed over time in this fashion, from the first series to the second, from stating the law that is to the law that ought to be.³¹² While Herbert Wechsler suggested that the distinction has been overplayed,³¹³ Felix Cohen went

307. Hazard, *supra* note 231, at 641 (comparing estimates for the proposed research and referencing Hazard’s experience in supervising similar empirical studies as executive director of the American Bar Foundation).

308. Trubek, *supra* note 290, at 579 (asserting that some Critical scholars “express hostility towards empiricism because they think it is associated with determinism and positivism”). Trubek goes on to assert that empiricism can, and often does, have an appropriate place in Critical scholarship. *Id.* at 586 (“[T]here is no reason to identify nondoctrinal methods of research in legal studies with positivist determinism.”).

309. Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697 (1931), reprinted in AMERICAN LEGAL REALISM 59, 61 (William W. Fisher et al. eds., 1993) (“One of the conspicuous actualities of the legal order is the impossibility of divorcing what [courts, lawmakers, and jurists] do from the question what they ought to do or what they feel they ought to do. For by and large they are trying to do what they ought to do.”).

310. Herbert Wechsler, *Restatements and Legal Change: Problems of Policy in the Restatement Work of the American Law Institute*, 13 ST. LOUIS U. L.J. 185, 190 (1968) (“And if we ask ourselves what courts will do in fact within this area, can we divorce our answers wholly from our view of what they ought to do, given the factors that appropriately influence their judgments, under the prevailing view of the judicial function?”).

311. Trubek, *supra* note 290, at 596 (“This distinction . . . is incoherent to anyone who accepts, as I do, the vision of knowledge and politics on which CLS is based.”).

312. Milner, *supra* note 26, at 812-13 (“The Restatements’ approach first proceeded solely on the basis that the law (decisions) of the past would be perpetuated and simply mirror the law (decisions) of the future, apparently without regard to community policy, the innovations of future judges or, indeed, any rational appreciation of the utility of the decisions in changing conditions. Later, the approach was partially abandoned, with the realization that the criterion of ‘law as is’ was one ‘the limits of which were, in the nature of things, somewhat elastic.’” (citation omitted)).

313. Hardy Cross Dillard, Comment, *Herbert Wechsler*, 78 COLUM. L. REV. 953, 954 (1978) (lauding the “forward-looking and creative approach [Wechsler took] to the work of the American Law Institute”). Dillard clarified:

I refer in particular to the way in which he and the [American Law Institute] Council

a step further, expressing his opinion that what courts *ought* to do is irrelevant.³¹⁴

And finally, perhaps the Restatements assumed their current form and mission because broader reform was deemed too dangerous to the legal profession. Thurman Arnold goes so far as to intimate that more comprehensive law reform could have “destroy[ed] the independent universe of the law.”³¹⁵

Contemporary legal thought continues to make a place for classical theory, conservative though it is and antiquated though some call it. Traditional legal education and the case method have been described as essential to the identity of the modern law teacher and the American law school.³¹⁶ In addition, it may seem hard to imagine a legal system that does not generate new lawyers who believe in the power and coherence of the law. Thus, it may still make sense for legal education to espouse Formalist thought, though enriched with Critical and Realist perspectives.³¹⁷

Understanding the historical context in which the Restatements have been prepared may also be important to evaluating their degree of success. As the Great Depression began, William Draper Lewis proudly announced in the American Bar Association Journal that the American Law Institute had reached the “advanced stage of its great work.”³¹⁸ The fact that the Restatement project was not derailed by the Great Depression is itself at least a modest success, even more so because the Institute depended on public financial assistance for the project.³¹⁹ There is yet another way in which historical context may be crucial to understanding the decision of the Institute founders to pursue what may now appear to some to be too-modest reform: G. Edward White suggests that the

have responded to those who would sanctify the “black letter” of the Restatements by making too dogmatic and simplistic a distinction between the law that *is* and the law that *ought to be*, as if the former were always a fixed datum rigorously separated from the latter.

Id. (emphasis in original); see also Wechsler, *supra* note 3, at 149 (asserting that Fred Helms and others who have criticized the Restatement movement have exaggerated this distinction).

314. Cohen, *supra* note 56, at 220 (“For the [R]ealist, . . . law in general . . . is a function of legal decisions. The question of what courts *ought* to do is irrelevant here.”).

315. Arnold, *supra* note 119, at 824 (“The small problem of legal inflation which the American Law Institute strove to deal with so sincerely, so gallantly and so ineffectually, could easily respond to practical treatment, if it were not for our fear that such practical treatment would destroy the independent universe of the law.”).

316. Konefsky & Schlegel, *supra* note 255, at 844. (“[I]n the case method is found both the distinctiveness of and protective coloration for the modern American law teacher. It informs his identity as a teacher and scholar whose method is unique, and at the same time allows him to be just one of the boys at the faculty club.”).

317. See *supra* note 220 and accompanying text.

318. William Draper Lewis, *American Law Institute Reaches Advanced Stage of its Great Work*, 16 A.B.A. J. 673 (1930).

319. *Id.* at 674 (“This lesson is that the members of a public profession like the Law, if they vision a worthwhile and great public service, and are willing to give time and labor to its realization, will receive from the public the necessary financial co-operation.”).

academicians of World War II times—which would include, of course, many of the Institute founders—needed to maintain their belief in the power of law, so as to stave off fascism.³²⁰ The rule-aversion that characterized Realist thought arguably became less attractive as the United States faced the rise of totalitarian regimes.³²¹ Instead, conservative reform efforts such as the Institute’s may have appeared increasingly compelling.

Others have suggested that, when the Institute was founded—that is, in the middle of the Progressive era—the law was seen as anti-reform to outsiders,³²² and at the same time the law was also trying to create and protect its own identity as a distinct profession.³²³ The Progressive era was thus the genesis of professional law teachers and professional law education.³²⁴ Both dynamics may have contributed to the development of the Restatements in their current form, as a kind of “safe, conservative reform.”³²⁵ This was also the period of transition

320. White, *supra* note 244, at 1385. This somewhat lengthy quote makes the author’s point: [A] number of able jurists of [Chief Justice Roger Traynor’s] generation—the generation that came to maturity during World War II—made a firm link in their jurisprudence between intellectual competence and moral legitimacy. The linchpin words for those jurists were words like “craftsmanship” or “reasoned elaboration,” words that suggested that if a judicial opinion met professional standards of clarity, internal coherence, and logical reasoning, then it was necessarily “right.”

Id. (adding, “It was important for Traynor’s generation to make law a rational, moral force for justice, a bulwark against totalitarian oppression.”). White goes on to show how time has changed scholars’ perspectives on this matter, by making allusion to the lessons of the Critical movement and the Civil Rights Era:

[I]n the years in which my generation has come to maturity there have been some powerful testaments to the capacity of legal reasoning to distort reality and to evade moral issues. When “the tools of one’s craft” can function as euphemistic weapons to disguise one’s motivations and to paper over one’s blunders, one can hardly claim that intellectual coherence and moral integrity are one and the same.

Id.

321. Note, *supra* note 21, at 1676 n.54 (“G. Edward White suggests that the Realists’ retreat was [in part] occasioned by the rise of totalitarian regimes in Europe, a development that made the Realists’ relativistic approach to morals unpalatable to the general community.”).

322. La Piana, *supra* note 47, at 1087 (“[T]he legal system and the legal profession were to a great degree out of step with the progressive elements of society because they appeared to be obstacles to the most broadly accepted goal of Progressivism, social justice.”).

323. *Id.* at 1090 (citing “the desire to solidify the place of the legal expert in a changing society”).

324. Franklin, *supra* note 70, at 1370. The author states,

In the United States, the law school has developed only within the very recent past, indeed, not before 1870, with the accession of Mr. Langdell to the Harvard deanship, and even at Harvard it may be suspected that a tradition of the professional law teacher was not firmly established before the turn of the century.

Id.

325. La Piana, *supra* note 47, at 1093 (“After an address on the subject in 1884 by Judge John

from reception of English law to the development of an authentic American law.³²⁶ Thus, the stakes at that time were considerable and would affect the ongoing character of the law in America.

Maxwell Bloomfield describes the period of Jacksonian democracy as being “a vigorous leveling movement in American law,”³²⁷ a movement that challenged the professional dominance of lawyers over their field.³²⁸ This experience helps to explain the importance of the formation of the American Bar Association in 1878, which Bloomfield and other scholars have described as “the dawn of modern professionalism” in the law.³²⁹ During the same period, lawyers faced a crisis of public opinion that was also a ground for significant concern.³³⁰ The bar responded in a self-protective fashion, ultimately making the profession far more elitist and setting back efforts at diversity.³³¹

F. Dillon, the [American Bar] Association decided that one of the defects of the legal system which could be safely and conservatively reformed by lawyers was delay and uncertainty in judicial administration.”). These are, of course, among the major stated goals behind the founding of the American Law Institute. *See supra* note 260.

326. *Id.* at 1371 (“At this point the American Law Institute enters upon its historic mission of transition, to liquidate the consequences of the British reception and to prepare for a new system.”); COOK, *supra* note 246, at 3 (noting that it was unusual for the United States, post-Revolution, to maintain the legal system of its former owner). In another article, I explore a similar point in a different context and reach a somewhat different conclusion from Cook’s—namely, that it may be quite natural for a jurisdiction emerging from colonial rule to build its law from external sources. *See Adams, supra* note 2, nn.28-31 and accompanying text.

327. Maxwell Bloomfield, *Law vs. Politics: The Self-Image of the American Bar (1830-1860)*, 12 AM. J. LEGAL HIST. 306, 306 (1968) (noting that this period was characterized by “the popular election of all state judges” and “scaling down educational requirements for admission to the bar or eliminating them altogether”).

328. Bloomfield describes what he characterizes as the then-current belief that “law was a rational science” with “basic principles” that “be easily grasped by all men.” *Id.* at 311.

329. *Id.* at 307 (contrasting this with the “demoralization” and “deprofessionalization” of the law during the 1840s and 1850s). Professor Friedman shares this same viewpoint, describing the period following the Civil War as a time “in which lawyers became more ‘professional,’ drawing more sharply the distinction between *their* sort of logic and that of industrial men.” Friedman, *supra* note 115, at 370 (emphasis in original).

330. Maxwell Bloomfield, *Lawyers and Public Criticism: Challenge and Response in Nineteenth-Century America*, 15 AM. J. LEGAL HIST. 269, 270 (1971) (“Throughout the nineteenth century, at any rate, anti-lawyer protest [was] overwhelmingly a middle-class protest that center[ed] upon demands for cheaper and speedier justice.”). Bloomfield described this as a “tug-of-war between the public and the legal profession that persisted throughout the nineteenth century.” *Id.* at 271. *See also* COOK, *supra* note 246, at 14 (noting the pressure on lawyers, who were perceived as being responsible for the confused state of the law as a matter of professional self-interest); GOODRICH, *supra* note 49, at 285 (making reference to the pressure on attorneys to promote law reform).

331. Bloomfield, *supra* note 330, at 277 (describing the “post-Appomattox” bar as pursuing “a policy of narrow self-interest that drastically obstructed the recruitment and assimilation of such

Classification may also have been attractive because it was empirical and thus appeared scientific in the Baconian sense. Thus, the Institute founders may reasonably have believed the Restatement project to be consistent with, rather than antithetical to, the notion of empirical study.³³² So perhaps, in the face of progressive cries for reform, an organized attempt at classification, such as the Restatement project, was a safe response, meeting the need for reform without requiring the legal profession to take on more divisive topics such as social justice. In addition, although scholars in other areas of jurisprudence may wish the agenda of the Institute were different, most have little that is constructive to add to the Institute agenda or to enrich (rather than dismantle) the Restatement movement.³³³

CONCLUSION

Perhaps the preceding litany of criticism of the American Law Institute and the Restatement movement, when carefully examined, reveals itself to be merely disguised criticism of the American common-law court system. Much of the criticism that describes the Restatement movement as being over-conservative could also be directed toward the court system that provides the fodder for the Institute's projects.³³⁴

Both the Restatements and the common law have been described as archaic, lacking appropriate concern for social justice, imprecise in their level of generality, and sometimes even legally incorrect.³³⁵ Along the same lines, both

aspiring social groups as Negroes, women, and East European immigrants").

332. La Piana, *supra* note 47, at 1095 (noting that "in general Baconianism meant empiricism, the avoidance of hypotheses, a belief that careful observation of the material world and proper classification of the facts observed would allow the induction of the principles underlying the processes of nature"). La Piana adds a statement that suggests classification may also have contained natural-law threads: "This would reveal, ultimately, the very mind of God." *Id.*

333. *See e.g.*, Ellickson, *supra* note 96, at 342 ("The Critical leftists in the legal academy rarely engage in mutually advantageous exchanges with those involved in mainstream social-scientific study of legal issues.").

334. The Honorable Shirley S. Abrahamson provides this description of the American Law Institute, in a lecture she gave at the University of Wisconsin Law School: "[A]n obscure but influential forum where fights are waged with footnotes, partisanship is officially discouraged, and deliberations are conducted at semi-glacial speed." Abrahamson, *supra* note 32, at 6. If the word "obscure" were deleted, Justice Abrahamson's description might be equally appropriate for the common-law court system.

335. Perhaps the best example of each of these criticisms, insofar as they relate to the Restatement movement, comes from the following, long quote from Laura Kalman's book, *Legal Realism at Yale*. After describing Arthur Corbin's own constructive involvement in the process, she states,

Corbin's Yale colleagues vociferously objected to the [R]estatement. Dean Charles E. Clark attacked the *Restatement of the Law of Contracts* for possessing "the rigidity of a code (with the added unreality that it is a declaration unsupported by a sovereign or

have been criticized as being poorly informed, in that their policies and decisions are sometimes based on unusual cases that become distorted when translated into more ordinary experience.³³⁶ The judiciary has been alternately described as representative of the larger public³³⁷ and counter-majoritarian.³³⁸ The courts have

by past precedent) and without the opportunity for reform and advance which a code affords." Clark thought that the authors of the [R]estatement had been penned into a "straitjacket"; their once fruitful activities had been pressed "into the dry pulp of the pontifical and vague black letter generalities." Thurman Arnold accused [Restatement Reporter] Austin Scott of clothing modern problems "in the garb of ancient language" in the *Restatement of the Law of Trusts*. [Yale colleague Earnest G.] Lorenzen found "a vast number of specific rules conforming largely to the rigid pattern" in the [C]onflicts [R]estatement. [Conflicts of Law Restatement Reporter Joseph Henry] Beale's classification of "completely dissimilar situations under a general abstract principle" would not increase legal certainty, Lorenzen warned. "It will inevitably create exceptions and refinements and a general repetition of the wilderness of single instances and precedent which it was the purpose of the Restatement to avoid." Even Yale's most conservative theorist, William Reynolds Vance, opposed the effort. The "pontificating black letter formulas purporting to restate the law of property," he claimed, were "sometimes inaccurate, often obscure and always pompous and dull"; any judge would be "incredibly stupid" to base a decision on any of the legal rules included in the [R]estatement.

KALMAN, *supra* note 63, at 26-27. Insofar as the common-law courts are concerned, perhaps the best single source of criticism along these lines is found in Justice Benjamin Cardozo's famous article, "A Ministry of Justice," in which he calls for "modest codification" as a solution to such problems. See generally Benjamin N. Cardozo, *A Ministry of Justice*, 35 HARV. L. REV. 113 (1921). In another article, I explore the possibility that Justice Cardozo's article may have been intended to lay the groundwork for what became the ALI two years after the article was published. See generally Adams, *supra* note 258.

336. PETER H. SCHUCK, *THE LIMITS OF LAW* 363 (2000) ("[A]djudication constitutes a radically decentralized, poorly informed decisionmaking process, which reduces the policy coherence and general applicability of judge-made law."). In elaborating upon his point regarding the lack of sufficient information for policymaking, Schuck states, "Common-law judges are generalists, seeing relatively few cases dealing with any given subject and having little control over their issue agendas." *Id.* at 364. Elsewhere, Schuck states, "Adjudication also has a selection bias against the most typical, generalizable behavioral patterns with which policymakers should be primarily concerned." *Id.* Note that Schuck's comments relate to mass-tort litigation.

337. PAUL W. KAHN, *THE CULTURAL STUDY OF LAW* 78 (1999) ("[C]ourts, no less than the popularly elected political branches, claim to represent the people. When courts say what the law is, they purport to speak as the voice of the popular sovereign would speak."). Elsewhere, Kahn states, "At best, [courts] are a fair reflection of our values and beliefs, with all the tensions that we experience among these norms." *Id.* at 136. For a similar description of the Institute, see *supra* notes 38-39 and accompanying text.

338. William N. Eskridge, Jr. & John Ferejohn, *Politics, Interpretation, and the Rule of Law*, in *THE RULE OF LAW* 265, 267 (Ian Shapiro ed., 1994) ("[J]udicial rulings, insofar as they are aimed to increase lawlikeness, must often be countermajoritarian and therefore politically unpopular.").

been called appropriately³³⁹ and inappropriately³⁴⁰ elitist. Both the judiciary and the Institute have been described as inevitably slow in their law-making process and ill-suited to effectuating major reform³⁴¹ but, elsewhere, exhorted not to be *too* slow and conservative.³⁴² Along the same lines, both have been criticized³⁴³—and, at other times, lauded³⁴⁴—for their roles as political actors.³⁴⁵

See also KAHN, *supra* note 337, at 68 (“Courts, we are told, are counter-majoritarian . . .”).

339. UNGER, *supra* note 173, at 70 (“The power to declare law must be concentrated in a relatively insulated and continuous elite.”). For a similar description of the Institute, see *supra* notes 33-36 and accompanying text.

340. UNGER, *supra* note 173, at 115 (“To be tolerable within democracy a common law cannot represent the cumulative discovery and refinement of a natural and stable world of custom by a group of legal wise men.”). For a description of the similar critiques of the Institute, see *supra* notes 25-38.

341. This lengthy quote from Lawrence Friedman is instructive:

What Parliament can do in a month’s intensive work, a court can do only over the years—and never systematically, since the common law does not look kindly on hypothetical or future cases. It confines itself to actual disputes. If no one brings up a matter, it is never decided. It is no answer to say that all important questions will turn into disputes; “disputes” are not litigation, and only litigation—primarily appellate litigation—makes new law. Nor is it easy for judges to lay down quantitative rules, or rules that need heavy public support (in the form of taxes) to carry out, or rules that would have to be enforced by a new corps of civil servants. Judges are supposed to decide on the basis of preexisting principles. This could hardly tell them what the speed limit ought to be, or the butterfat content of ice cream. An English (or American) court could not possibly “evolve” a Social Security law. The common law is therefore not only slow; it is impotent to effect certain kinds of significant legal change.

FRIEDMAN, *supra* note 87, at 18. For a similar critique of the Institute, see *supra* notes 69-71 and accompanying text.

342. UNGER, *supra* note 173, at 115 (asserting the need for the common law to be reinterpreted and updated continually). For a similar critique of the Institute, see *supra* notes 82-163 and accompanying text.

343. Stephen Macedo, *The Rule of Law, Justice, and the Politics of Moderation*, in *THE RULE OF LAW* 148, 170-71 (Ian Shapiro ed., 1994) (“The problem is . . . that transferring too many political issues to the courts may force relatively undigested changes on the polity.”). Macedo continues: “The process could feed on itself: settling political issues through the courts today may invite others to do the same tomorrow. If the courts and the Constitution become . . . mere partisan arenas—vehicles for advancing one’s partisan agenda—then these vital guardians of constitutional limits may be undermined.” *Id.* at 171.

344. KAHN, *supra* note 337, at 101-02. Kahn states,

Ordinarily, we distinguish law’s rule from political action. But not always. . . . Chief Justice Earl Warren, for example, is often praised for bringing the instincts and practices of the political actor to the Supreme Court. This is not just a matter of rhetorical technique, but of seeing the possibilities for innovation and new meanings from within the Court itself. . . . [C]ourts do on occasion claim for themselves the virtues of political action.

Others simply describe the political pressures on both institutions as being inevitable.³⁴⁶ Both the judiciary and the Institute have been praised for their innovation in setting policy³⁴⁷ and in helping the legislature in its own law-making.³⁴⁸ At the same time, they have also been cautioned against creating the

Id.

345. Yet another view is that the courts lack political authority in any significant way or are insulated from politics. *Id.* at 130 (“Courts are rarely in a position to deny the political order the opportunity to do what it would otherwise do.”). Kahn continues, “To begin with, it would be a mistake to think that they want to. Judges do not stand apart from the polity; they are a part of it, with the same values and beliefs that we find there.” *Id.* Schuck makes a similar point. SCHUCK, *supra* note 336, at 363 (“[I]f political accountability for policymaking is desirable, adjudication may represent a poor vehicle for accomplishing it.”). Schuck concludes, “The judiciary, which dominates the [adjudication] process, is relatively insulated from the kind of refined public opinion to which legislators and agency policymakers are subject.” *Id.* For a similar critique of the Institute, see *supra* notes 43-73 and accompanying text.

346. Eskridge & Ferejohn, *supra* note 338, at 267 (“[T]he courts . . . remain chronically vulnerable to political forces within the constitutional structure . . .”). Elsewhere, the authors state, “[C]ourts cannot avoid taking fundamental political positions, however implicitly, in deciding how to read the work of the legislature.” *Id.* at 290. To elaborate, the authors state, “As these issues are profoundly political, it seems especially unlikely that their resolution can turn on a set of factual claims about that it is what legislatures are ‘really’ doing when producing a statute.” *Id.*

347. SCHUCK, *supra* note 336, at 364 (enumerating a number of judge-made innovations in the mass-tort context that “[c]entralized, statutory systems probably would not—and in civil law countries have not [been] adopted . . . as quickly, or in some cases at all”). Schuck goes on to say, “The common-law system . . . facilitated not only their creation but also the refinements and new applications that followed.” *Id.* I explore this potential mission for the Institute in another article. See Adams, *supra* note 258, at Part III.C (“Proposals Motivated by the Problem of Bad or Obsolete Law”).

348. Jack Knight & James Johnson, *Public Choice and the Rule of Law: Rational Choice Theories of Statutory Interpretation*, in *THE RULE OF LAW* 251-52 (Ian Shapiro ed. 1994) (“[T]he courts, insofar as they act as honest and good agents, are viewed as strengthening rather than obstructing democratic processes.”). The authors continue, “This is because ‘enhancing the efficacy of statutes is a fundamental value in a democracy . . .’” *Id.* at 252. Roberto Unger makes a similar point in describing the role of common-law courts in the statute-making process:

We strengthen [the common law’s] continuing vitality and authority by bringing to its case-by-case development the assumptions and analogies active in the political making, and the judicial construction, of statutory law. In this way we make it ours rather than expecting it, through its immanent development, “to work itself pure.”

UNGER, *supra* note 173, at 115. A third, similar source is Hart & Sacks. This quote demonstrates the courts’ crucial role vis-à-vis the legislature, as the authors see the situation:

Courts are regularly open for the settlement of disputes, as legislatures are not. . . . Disputants with a sense of wrong are likely to seek first of all not a change in the law but a declaration that existing law is in accordance with their position. Legislatures, with far more comprehensive responsibilities than any other official institution, are unlikely to stop to listen to demands for a change in the law unless it is plain that such

appearance of invading the legislative function³⁴⁹ and advised that their more appropriate role is to fashion the common law rather than fine-tuning statutes.³⁵⁰

As another example, precedent has been described as both the great strength and the great weakness of the common-law court system. When the Restatements are criticized for their over-reliance on a logical system of precedent, perhaps this criticism simply reflects frustration with the common-law courts themselves.³⁵¹ Along the same lines, criticism of the American Law Institute as having done too much (raising the specter of judicial activism) or too little (showing that the system is out of touch with social-justice needs and emerging trends)³⁵² mirrors the critique of both common and judge-made law.³⁵³ It makes sense that the challenges facing the American Law Institute mirror those of the court system because many members of the Institute are judges, professors,

a change is needed. This is unlikely to be plain unless a court has spoken. So it has happened and continues to happen that emerging problems of social maladjustment tend always to be submitted first to the courts. . . . Legislatures and administrative agencies tend always to make law by way not of original solution to social problems, but by alteration of the solutions first laid down by the courts.

HART & SACKS, *supra* note 50, at 163-164.

349. KAHN, *supra* note 337, at 12 (“The courts always operate under a threat that they will be accused of creating—or nullifying—law without popular consent.”). Kahn describes this kind of accusation as a typical move for a dissenting judge. *Id.* at 68 (“Even at the moment of decision, the dissenting voice accuses the Court of straying from law’s rule.”). Macedo makes a similar point: “Victories won in court . . . may bypass the arduous process of democratic deliberation and persuasion, thereby provoking resistance, resentment, and instability.” Macedo, *supra* note 343, at 170. For a discussion of similar concerns with respect to the Restatement movement, see *supra* note 63 and accompanying text.

350. Roscoe Pound, *The Formative Era of American Law*, in *THE LIFE OF THE LAW* 52, 60 (John Honnold ed., 1964) (describing the strengths and weaknesses of a judiciary trained in the common-law tradition). Pound states,

[T]he common law has never been at its best in administering justice from written texts. It has an excellent technique of finding the grounds of decision of particular cases in reported experience of the decision of other cases in the past. It has always, in comparison with the civil law, been awkward and none too effective in deciding on the basis of legislative texts.

Id.

351. Stone, *supra* note 112, at 320-21 (asserting that the various reporters alone cannot support the coherent development of the common-law system and describing precedent as both the great strength and great weakness of the common law).

352. Friedman, *supra* note 115, at 351 (describing the Restatement movement as an attempt to avoid codification through more conservative, safe reform).

353. Justice Abrahamson notes, “Currently the tension between the ‘is’ and the ‘ought’ is manifest in the formulation of the ALI’s third series of [R]estatements” Abrahamson, *supra* note 32, at 22. In describing the *Restatement (Third) of Torts: Products Liability*, Justice Abrahamson continues, “Some want a document that will formulate a consensus but not create new law; others visualize the third [R]estatement as recommending change.” *Id.* at 22-23.

and practitioners who were trained in a system dominated by appellate case law.

There is some evidence that leaders in the Restatement movement share this impression of the common goals and challenges that both the Institute and the courts face. President Herbert Wechsler has made the comparison overtly, directing members to “weigh all of the considerations relevant to development of the common law that our polity calls on the highest courts to weigh in their deliberations.”³⁵⁴ At least one leader in the Restatement movement, in indicating that criticism of the Restatement project is welcomed, has employed language seeming to suggest his expectation that the Restatements are likely to suffer from the same imperfections as the decisions of common-law courts.³⁵⁵

In closing, it is important to keep criticism of the Institute and the Restatements separate and distinct from criticism of the common law that motivates the Institute’s major work and the courts that participate in its making. It is thus appropriate to be mindful of the Institute’s privileged status as a private policy forum,³⁵⁶ but arguably unfair to criticize it for mirroring the characteristics of the common law and the courts. Thus, in critiquing the work of the Institute, to paraphrase the words of Stendhal, it is important to separate the image from the mirror.³⁵⁷

354. Abrahamson, *supra* note 32, at 21. Wechsler goes on to state that this approach, in which the Council formally concurred, “would enable the [R]estatements ‘to attempt to be what they (had) been and (were) in fact—a modest but essential aid in the improved analysis, clarification, unification, growth and adaptation of the common law.’” *Id.*

355. Corbin, *supra* note 37, at 29 (“The productions of the Institute should receive constant criticism, both destructive and constructive, from within the membership of the Institute and from without.”). Corbin goes on to state,

There will be found bad analysis, classification, and terminology. There will be turgidity and complexity of style. In places there will be unfilled gaps where the law should have been stated; and in other places there will be labored efforts to cover unimportant details and to express every possible limitation and exception. There will be failure to recognize the obsolescence of old rules through disuse by the courts and to realize the existence of new rules already immanent in the more recent decisions and in the life around us. The men available may not be sufficiently expert or sufficiently numerous; and some that are expert and available may not be enlisted. There are problems here to be solved and weaknesses to overcome As applied by officials with narrow experience and dull minds, it may at times result in decisions as harmful as would have been rendered without it. We may be sure that the Restatement of American law will have imperfections and that new ones will develop in the future; and we should see to it that the American Law Institute is given immortal life in order to have the machinery constantly at hand for their correction.

Id. at 29-30 (footnote omitted).

356. Exploring the way in which the Restatements may change the natural development of the common law was the major focus of an earlier article. *See generally* Adams, *supra* note 2.

357. STENDHAL, *supra* note *.