Restatements and Non-State Codifications of Private Law

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Abstract

This paper offers a vantage point through which to assess the phenomenon of projects codifying private law that are undertaken by private persons or institutions, distinct from legislatures and state-sponsored codification and law-revision projects. The private institution on which this paper focuses is the American Law Institute (ALI). ALI works in statutory form—most notably the Uniform Commercial Code and the Model Penal Code—as well as through projects that generate "Principles" to guide legal development within their specific fields and "Restatements" that authoritatively cover the law in a field.

The history of the Restatements sketched in this essay fits within the prototype of *Searching for Utopia* with which the paper begins. Although the Restatements do not control their subsequent reception by courts, at times Restatements succeed in anticipating legal development. This paper also demonstrates that ambiguity accompanies the underlying terminology of authority and, for that matter, private law. Finally, and for many reasons, contemporary Restatements speak to an audience of disbelief in the existence of one common law that exists autonomously of invading influences, including statutes. How to assess authority, influence, and success for a Restatement are more interesting questions

Introduction

This paper offers a vantage point through which to assess the phenomenon of projects codifying private law that are undertaken by private persons or institutions, distinct from legislatures and state-sponsored codification and law-revision projects. My institutional focus is the American Law Institute (ALI), which since its founding in 1923 has promulgated Restatements in many areas of the law, plus work in statutory form—most notably the Uniform Commercial Code and the Model Penal Code—and projects that generate "Principles" to guide

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legal development within their specific fields. A private tax-exempt organization,[1] the ALI chooses its own members and has developed elaborate procedures and internal practices, some of which are discussed below. Although the ALI's early history is significant to understanding its ongoing work,[2] my temporal focus is contemporary and is shaped by my experience as the Reporter for the ALI's Restatement (Third) of Agency, adopted and promulgated by the ALI in 2005.[3] Agency (Third) succeeds Agency (Second), which in 1958 succeeded the original Restatement of Agency, completed in 1933. Although the successive Restatements of Agency are my primary concern, I refer to the history of other Restatements, in particular those covering Torts.

It is incontestable that the ALI's work—and in particular the project of restating private-law subjects like agency—is not static. That is, change external to the ALI itself and the texts it promulgates tends to prompt other changes, including shifts in the functions that a Restatement serves, the structure of Restatements as texts, and the succession of one Restatement by another, as well as the nature of the work that the ALI undertakes. For reasons I discuss later, more of the ALI's work following the first generation of Restatements consisted of statutory projects. To be sure, the ALI's relatively long life among contemporary sponsors of non-state codifications highlights the phenomenon of change with more immediacy than is so for younger institutions

[1]Although the ALI is not an instrumentality of the United States or of any state, its federal tax-exempt status means its property and net income are not subject to taxation, and its public-regarding purposes make it eligible to receive tax-deductible contributions from donors.

[2]On the early history, see the numerous sources cited in, e.g., Adams, Kristin David. 2004. The Folly of Uniformity: Lessons from the Restatement Movement. Hofstra Law Review 33:423, 432n.41. (hereinafter cited as Adams, Lessons).

[3]Publication in final form followed in 2006. The ALI publishes Restatements pursuant to a long-lived joint venture with the West Publishing Company. The ALI (not the individual Restatement Reporter) owns the copyright interest in the work.

and the texts they sponsor. Nonetheless, responses to change warrant thought in connection with other non-state projects that promulgate texts intended to be authoritative or influential. The goals and purposes for which the ALI was founded imply that its work may be dynamic over time. Its ALI's Certificate of Incorporation states that

> The particular business and objects of the society are educational, and are to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific work.[4]

These organizational purposes, as applied to an ongoing organization that endures over time, may require new texts that supplant old ones.[5]

The ALI's history also invites reflection on the nature of its influence and the status of its authority in the development of law in the United States, plus shifts in these over time. I suspect that one's prototype of the law and of legal change shapes how these questions might be framed and answered. Some prototypes may be a better descriptive fit for some jurisdictions than others. Two opposing prototypes come to mind. First, an author or sponsor of a legal text intended to be authoritative could be characterized as an architect making design choices that are articulated through rules that, stated ex ante, are determinative of subsequent outcomes to which the rules apply. The end result, like a structurally-sound building constructed on the basis of an architect's plans, is static. Change within this prototype requires either outflanking the rule system or amending it. Although an author or sponsor of legal change within this prototype might be a state

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[4]American Law Institute. 1923. Certificate of Incorporation. www.ali.org/doc/charter.pdf. Accessed 27 Feb 2013.

[5]For recognition that "it was natural for the restatements to get out of date," see Jansen, Nils and Ralf Michaels. 2007. Private Law and the State: Comparative Perceptions and Historical Observations 15, 57. 2008. Beyond the State: Rethinking Private Law. (Nils Jansen & Ralf Michaels eds. 2008)

instrumentality—such as a civil code commission or other official drafting body—non-state actors may sponsor legal change through wide-sweeping work with an architectural or ex-ante quality, comparable to the ALI's initial and ongoing projects concerning the Uniform Commercial Code.

In contrast, consider the relationships implied by Jan Fabre's sculpture, *Searching for Utopia*, a cast I saw on display in south Amsterdam at the intersection of Apollolaan and Beethovenstraat.[6] *Searching for Utopia* is a monumental work in bronze that depicts a large and finely-detailed tortoise, mounted by a small human figure (the sculptor himself) who holds reins through which the tortoise might be directed. The label accompanying the sculpture proposed that it be understood as a visualization of the wisdom of making incremental and slow progress towards Thomas More's *Utopia* or its non-fictional counterparts. However, the sculpture invites multiple understandings. For our immediate purposes, the relationship between the rider and the giant tortoise may capture some of the relationship between the ALI as promulgator of Restatements and the onward development of law in the United States on subjects that the Restatements cover. Like Jan Fabre's giant tortoise, the law may be guided in its development when judges apply rules as clarified or simplified by a Restatement. And like the human rider atop the tortoise, the two remain separate actors because the ALI is an autonomous institution separate from courts and the state more generally.

Alternatively, courts may ignore a Restatement's suggestive reins, as a giant tortoise may proceed on a course otherwise determined by it. The influence or authority of a non-state legal

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[6]For an image of Searching for Utopia, see Fabre, Jan. 2011. Searching for Utopia. www.panoramio.com//photo/55203509. Accessed 27 Feb 2013.

text within this prototype may occur incrementally, necessarily awaiting the long view for overall assessment and for incorporating the prospect of significant variation, both from the text and among courts. Depending on their subject, the force of a Restatement's reins will vary and, within subjects, vary from issue to issue. This variation may be a function of issues and subjects: some are more controversial than others and individual Restatements vary in other ways, including their continuing vitality over time. Moreover, Restatements for some subjects—torts in particular—necessarily reflect the inseparable impact of institutions of civil procedure on substantive legal rules. This is because the significance of the lay jury in shapes tort doctrine in the United States, as reflected in the Restatements. Although this effect might be characterized as a distortion of tort doctrine,[7] more neutrally it constitutes just another circumstance shaping tort law,[8] comparable perhaps to a tortoise's instinct to amble toward water or food. In any event, and as discussed below, qualities inescapably present in the ALI's work—its mutability over time and its variability in influence—help explain the emphasis with which the organization has defined itself as the author of work it promulgates.

Authors and Procedures

It is no mere matter of legal form or commercial expediency that the ALI itself holds the copyright interest in Restatements. Reporters, who are responsible for drafting and researching,

[7]See Green, Michael. 2011. The Impact of the Civil Jury on American Tort Law. Pepperdine Law Review. 38: 337.

[8]One documented example of another circumstance is the influence of lobbying by pro-defendant organizations to champion the enactment of statutes that cap recoveries or, one way or another, reduce the prospect of recovery. See Cross, Frank. 2011. Tort Law and the American Economy. Minnesota Law Review 96:28. Professor Cross's data show no negative effects associated with more pro-plaintiff tort law; indeed pro-plaintiff tort law appears to be associated with economic growth. Id. at 86-89.

are not the ALI's employees (and thus Restatements are not so obviously characterized as works made for hire) but, according to the Institute's *Handbook*, a Reporter "reports *to* the Institute by means of a series of drafts, which are then reviewed according to the deliberative processes established by the Institute and revised as a result of these processes."[9] Most Reporters are full-time professors of law; all are appointed by the ALI's Council on the recommendation of its Director. Under the ALI's bylaws, publication of any work as that of the ALI requires "approval by both the membership and the Council,"[10] which is the Institute's governing body. An impasse between a Reporter and the Council may lead to the Reporter's resignation. This occurred most recently to my knowledge in the Restatement project on economic torts. As the Reporter's 2007 letter of resignation characterized the dispute,

> At the meeting I presented Council Draft No. 2 covering much of the field of economic negligence. There was strong disagreement voiced at the meeting with the direction taken in the draft. The draft states the law of economic negligence (and in particular negligent misstatement) in terms that emphasize its relation to contract law and that distinguish the law of economic negligence from accident law involving physical harm. The criticism was that the law of economic negligence should be situated within a general tort of negligence....[11]

In 2010, the project resumed with a new Reporter. Although the 2012 Tentative Draft submitted by the ALI's Council to the ALI Annual Meeting explained that courts "impose tort liability for

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[9]American Law Institute. 2005. Capturing the Voice of the American Law Institute: A Handbook for ALI Reporters and Those Who Review Their Work 1. www.ali.org/doc/stylemanual.pdf. Accessed 27 Feb 2013. (hereinafter cited as ALI, Handbook).

[10]American Law Institute. Bylaw 6. www.ali.org/doc/Bylaws07/pdf. Accessed 27 Feb 2013.

[11]Feldthusen, Bruce. 2011. What the United States Taught the Commonwealth About Pure Economic Loss: Time to Repay the Favor. Pepperdine Law Review. 38:309,319-320. (quoting Letter from Mark P. Gergen, Fondren Chair of Faculty Excellence, University of Texas School of Law, to Advisers, Consultants, and Council Members, American Law Institute (Dec. 2007)).

economic loss more selectively than liability for other types of harm,"[12] liability for negligent misrepresentations "depends on the same standard of care familiar from other cases of negligence," with the defendant's duty limited in a number of respects.[13]

As this example illustrates, the ALI's organizational structure is complex and is geared to enhance the institutional character of authorship of the ALI's end-products. Many components of this structure and its processes tend to distance the Restatements themselves from the individual Reporters associated with them, enveloping the final product in a carapace of institutional authorship. To be sure, individual Reporters remain the first movers for each text, and retain what may be considerable powers of persuasion to champion their work, but collapsing authorship of a Restatement into an individual Reporter's persona misunderstands both the ALI and Restatements.

The ALI's deliberative processes include, for each Restatement project, a group of Advisers appointed by the Institute's Council and a separate group (the Members Consultative Group) composed of members who choose to receive working drafts from the project and who have the opportunity to meet as a group with the Reporter. Unlike the ALI's Council and its membership, the Advisers and Members Consultative Group associated with a Restatement do not hold veto powers. Depending on the subject, interim drafts of Restatement projects may attract wider audiences among practicing lawyers, academics, and organized interest groups. As in its earliest days, the ALI's work continues to proceed, project-by-project, through in-person meetings at which successive drafts produced by the Reporter are reviewed. Thus, delineated

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[12]Restatement (Third) of Torts: Liability for Economic Harm §1,cmt.c. 2012. (Tentative Draft No. 1, Apr. 4, 2012).

[13]Id. § 5, cmt. b.

procedures, iterative consultations and revisions, and sequential approvals all shape the outcome of any Restatement's text.[14]

From its early days, the ALI's leadership worked to assure some measure of consistency across Restatement projects. During the sequence of meetings that led to the first Restatement of Agency, the ALI's first Director, William Draper Lewis, often instructed the Reporter for Agency to consult with the Reporter for another subject to co-ordinate their terminology or treatment of overlapping questions, occasionally directing the Agency Reporter to obtain an answer to a specific question from another project's Reporter.[15] Reporters for other projects occasionally attended meetings of the Advisers for Agency and were credited with solving problems in drafting the Restatement's text.[16] The ALI's practices in its early days are consistent with an organization that took its work and itself seriously. A stenographer made a transcript of the exchanges at Advisers' meetings, followed by transmission of a transcription via carbon paper on onion-skin copies to the Reporter and each Adviser.[17]

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[14]Schwartz, Alan and Robert E. Scott. 1995. The Political Economy of Private Legislatures. University of Pennsylvania Law Review 143:595,650. Their primary focus in this article, revisions to the UCC, may limit the force of the article's conclusions as applied to Restatements. The general conclusions are that a "private legislature" (like the ALI) "will have a strong status quo bias and sometimes will be captured by private interests." Id. But apart from a brief treatment of an early round of work on the Restatement Third of Torts applicable to one issue in products liability, *see id.* at 648-649, the article does not address Restatement projects.

[15]DeMott, Deborah A. 2007. The First Restatement of Agency: What Was the Agenda?. Southern Illinois Law Journal 32: 17,24.

[16]Id. at 24-25.

[17]This practice has been discontinued. The records it created are, unsurprisingly, full of insight into the intellectual and institutional development of the ALI's work in its early era. The ALI continues to publish transcripts of its Annual Meetings, but the earlier practice of publishing minutes from Council meetings has also been discontinued. The Institute's Archives (which are not complete) are maintained by and accessible through the University of Pennsylvania. The Biddle Law Library. www.law.upenn.edu/bll/archives/ali/. Accessed 27 Feb 2013.

More recently, the ALI formalized its general expectations of Reporters in a 2005 Handbook, which was "conceived as a means of both articulating and preserving an appropriately uniform style for the various products of the Institute ...."[18] The Handbook recognizes that "the prospects for achieving and maintaining a comprehensive "Restatement of the Law appear increasingly remote" because "today's Restatements tend to be separate articulations of increasingly discrete areas of the law," and the ALI has many projects that do not aim to produce Restatements.[19] Nonetheless, a characteristic style is, in the Handbook's estimation, worth attempting to articulate and preserve.[20] The ALI itself, in other words, has an authorial voice that characterizes and identifies its work and distinguishes it from the published work of individual legal scholars.

The ALI's self-developed and actively-enforced "voice" could be characterized as a formal element intended to enhance the authority of its work. As stated in the Handbook, the ALI's objective "is to speak with an authority that transcends that of any individual, no matter how expert, and any segment of the profession, standing alone."[21] The ALI's style, as "the manner in which its voice is presented, must transcend the styles and idiosyncracies of individual Reporters to make that asserted authority credible."[22]

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[18]American Law Institute. Handbook at 3. www.ali.org/doc/stylemanual.pdf. Accessed 28 Feb 2013.

[19]*Id.* at 2-3.

[20]*Id.* at 3.

[21]*Id.* at 2.

[22]*Id.*

The ALI's concern that its authorial persona be manifested in a recognizable voice is consistent with Nils Jansen's emphasis on the form in which Restatements are written as crucial to their authority, distinct from the persuasiveness of their content.[23] Early on, the ALI's founders disdained treatise- or textbook-like discursive treatments of the law that mixed statements of present law with history and legal theory. Instead, the Restatements were to consist of "normative 'statement[s] of the principles of the law'" drafted "'with the care and precision of a well-drawn statute', and with 'the mental attitude ... of those who desire to express the law in statutory form.'"[24] Single and decisive rules of law should be articulated even in the face of uncertainty about the present state of the law.[25] And assuring that such articulations occur in a consistent voice is integral to their form.

To be sure, it is important not to overstate form's significance. As discussed below, some jurisdictions never followed or adopted the law on some issues as articulated in the Restatements. Moreover, later generations of Restatements include components in addition to decisively-articulated rules in statutory-like form, in particular further commentary and the Reporter's research notes. On the other hand, form matters greatly in legal discourse. As Marta Madero explains, "legal language partly functions like the neoclassical Latin of the humanists" because it was not intended as 'breathless statement of fresh perceptions of the world.'"[26] Legal

[23]See Jansen, Nils. 2010. The Making of Legal Authority: Non-legislative Codifications in Historical and Comparative Perspective 107-108.

[24]Id. at 105, quoting American Law Institute, Report of the Committee Proposing the Establishment of an American Law Institute 20.

[25]*Id.*

[26]Madero, Marta. 2010. Tabula Picta: Painting and Writing in Medieval Law 3, quoting Baxandall, Michael, Giotto and the Orators. 1971. Humanist Observers of Painting in Italy and the

language constitutes, like any language, "'a collective attempt to simplify and arrange experience in manageable parcels.'"[27] Perhaps form matters, not more that it does in legal discourse generally, but for distinctive reasons in the realm of Restatements. In particular, their core functions seem inexorably linked to the style in which they are written.

Material

The essential material on which a Restatement draws is the decisional law of courts in the United States with the objective of stating underlying principles that give coherence to a subject. This is unsurprising in light of the concern of the ALI's founders that "the underlying principles of the common law had become obscured by the ever-growing mass of decisions in the many different jurisdictions, state and federal, within the United States."[28] In Benjamin Cardozo's assessment, the "fecundity of our case law"[29] had become problematic; and, beneath sheer numbers of cases, many courts obscured the legal principles on which decisions turned, leading to considerable uncertainty in some jurisdictions. The ALI's founders also understood that courts and judicial decisions are not "fungible."[30] In some jurisdictions, many issues remained unresolved by any case. And some courts were viewed as more authoritative than others. As

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Discovery of Pictorial Composition. 1350-1450, 47. Many thanks to Emily Kadens for alerting me to Madero's book.

[27]Id. at 3, quoting Baxandall, supra note 26, at 44.

[28]American Law Institute. Handbook at 4-5. www.ali.org/doc/stylemanual.pdf. Accessed 28 Feb 2013.

[29]Cardozo, Benjamin N. 1924. The Growth of the Law 4, quoted in King, Joseph H. 2011. The Torts Restatement's Inchoate Definition of Intent for Battery, and Reflections on the Province of Restatements. Pepperdine Law Review 38: 623,651.

[30]King, supra note 29, at 662.

Herbert Wechsler (the ALI's third Director) wrote in 1969 of the first Restatement of Torts, "[e]ven as a law student forty years ago, I knew that germinal opinions like those of Judge Cardozo in the *Palsgraf* case ... had been embraced in the drafts of the first Restatement long before they had much following in other courts in the view that they were right and should be followed ....."[31]

Complicating the question of sources, contemporary Restatements may draw upon other materials, most importantly statutes. The ALI's Handbook (2005) embraces statutes as legal sources much more broadly that did the ALI's founding document (1923), in which "the existing law" was said to be found "in the decisions and scattered statutes."[32] A major interim development, acknowledged by the Handbook, is "the growing prevalence of statutes in the traditional fields of the common law" with some statutes "essentially codifications of the common law."[33] Separately, the ALI might determine that a statute that alters and supersedes a common-law rule is preferable and so state in a Restatement.[34]

According normative force to statutes represents a sharp departure from the ALI's earlier days. The Agency Restatements are illustrative. Restatement (Third) of Agency relies on widely-adopted statutes that supersede common-law rules. For example, it states that an individual principal's loss of capacity does not automatically terminate an agent's actual authority; the agent's authority terminates only when the agent has notice that the principal's loss of capacity is

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[31]Wechsler, Herbert. 1969. The Course of the Restatements. American Bar Association Journal 55:147,149. Quoted in King, supra note 29, at 663.

[32] American Law Institute. Handbook at 7. www.ali.org/doc/stylemanual.pdf. Accessed 28 Feb 2013. ("and scattered statutes" is italicized in the Handbook, but not in the founding document).

[33]Id.

[34]Id. at 8.

permanent or that the principal has been adjudicated to lack capacity.[35] This is contrary to the position taken in Restatement (Second) of Agency but is consistent with the widespread adoption of statutes that do not automatically void an agent's actual authority upon the principal's loss of capacity. These include a Uniform Commercial Code (UCC) provision protecting a bank (acting as agent) when a customer loses capacity, contemporary partnership legislation, as well as statutes in many states that permit the creation of durable powers of attorney.

In contrast, consider an episode at the 1927 Annual Meeting when discussion turned to a provision in the first Restatement of Agency that preserved the common-law rule that a woman's marriage, by destroying her capacity to consent, also eliminated her ability to be bound by transactions entered into by an agent on her behalf, even an agent appointed before the marriage. Many states by that time had by statute abolished the common-law rule. An ALI member rose from the floor, characterized the common-law rule as "barbarous," and urged the Reporter to omit it from the draft unless he could determine that some states still followed it. This recommendation was not adopted.[36] Restatement (Second) of Agency, promulgated in 1957, demoted the issue to a Comment, which states that "[i]t is not within the scope of the Restatement of this Subject to state in detail the rules by which it is determined whether a person has capacity. The common grounds for incapacity are minority, marriage by a woman ...."[37]

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[35]Restatement (Third) of Agency §3.08 (1).

[36]DeMott, supra note 15, at 36.

[37]Restatement (Second) of Agency §122.cmt.a. A further comment seems to reflect the assumption that the common-law rule retained vitality as applied to married women, observing that "[w]here incapacity is created by marriage, by becoming an enemy alien, by losing citizenship or by conviction of a crime, the incapacity operates from the moment it is created until the condition ends." *Id*. cmt. d. Likewise, a comment to an earlier sections states that "[t]o the extent that a married woman can contract or appoint others as agent, she has capacity to

Contemporary Restatements may also refer to foreign law "for application by analogy," in the Handbook's formulation.[38] Perhaps more strongly, the Handbook urges "[r]eporters to be alert to the possibility that a comparative-law perspective may enrich a particular explication and analysis of U.S. law."[39] On this score, both the second and third Agency Restatements included, among the advisers, members of law faculties in the United Kingdom.[40] When reliable English-language sources were available, Restatement Third of Agency discusses relevant rules from jurisdictions other than the United States, England and Wales, and Commonwealth jurisdictions. As it happens, in many business activities to which agency law is especially relevant— in particular those activities reliant on non-employee intermediaries such as brokers in shipping, reinsurance, and investment securities—the contemporary common law appears to share more similarities across common-law jurisdictions than in other private-law subjects. And the underlying business activity often takes place in multiple jurisdictions. Thus, the Third Restatement of Agency may make more use of comparative-law references than do other contemporary Restatements.

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appoint her husband to contract or do other acts on her account, aside from statute." Id. § 22, cmt. a.

[38]American Law Institute. Handbook at 10. www.ali.org/doc/stylemanual.pdf. Accessed 28 Feb 2013.

[39]*Id.*

[40]For the Second Restatement, L.C.B. Gower served as an adviser through the third tentative draft. Professor Gower was at the time a visiting professor at Harvard Law School. See Restatement (Second) of Agency viii. For the Third Restatement, Professors Francis M.B. Reynolds (Worcester College, Oxford) and Gareth Jones (Trinity College, Cambridge) served as advisers, Professor Jones throughout the project's duration and Professor Reynolds from 1999 onward. Restatement (Third) of Agency v.

Functions

The ALI's Handbook acknowledges that, from the beginning, "two impulses at the heart of the Restatement process" underlie a central tension: "the impulse to recapitulate the law as it presently exists and the impulse to reformulate it, thereby rendering it clearer and more coherent while subtly transforming it in the process."[41] It is also possible, as Joseph King recently wrote, that in retrospect the founders' vision for the functions to be served by Restatements may appear more "crystallized or manifest" than the reality during the ALI's early work.[42] After all, the Restatement enterprise was novel, and how the founders' initial intentions are now understood is difficult to detach from an assessment of the end-products. Moreover, these end-product Restatements differed, as did their Reporters, in their relative caution or boldness.[43] For example, a member speaking at the ALI's 1932 Annual Meeting noted the relative intellectual modesty of the Reporters[44] for Agency in contrast with some of their colleagues. He urged the Reporter, Warren A. Seavey, and his advisers "to 'lay down the rule which he thinks the courts should adopt rather than try to derive a rule from the decisions which is not fully developed.'"[45] But Seavey replied that, when confronted by a rule that seemed unsound, "he had two options: 'To

[41]ALI, Handbook at 4.

[42]See King, supra note 29, at 659.

[43]Kelley, Patrick J. 2007. Introduction: Did the First Restatement Adopt a Reform Agenda?. Southern Illinois Law Journal 32:3.

[44]Floyd R. Mechem served as the initial Reporter from 1923 until his death in 1928. He was succeeded by Warren A. Seavey, who completed the first Restatement and served as the sole Reporter for the second Agency Restatement. See DeMott, supra note 15, at 18-23.

[45]Id. at 31, quoting Warren A. Seavey, Discussion of the Restatement of Agency Tentative Draft No. 7, 10 A.L.I. Proc. 318 (1931-1932).

recite what the courts have decided or to say nothing.'"[46]

Cautious though it may have been, the first Restatement of Agency legitimated the subject by giving a coherent account of it. Agency's intellectual merit—or its status as a distinctive subject—had previously been questioned by Roscoe Pound[47] and challenged by Oliver Wendell Holmes with Holmes claiming that agency doctrine consisted of no more than a fiction identifying agent with principal, plus common sense.[48] Seavey responded aggressively to Holmes in a 1920 law review article, arguing that scholarship could, through careful examination of judicial opinions, identify the operative elements and consequences of agency relationships, thereby "finding the rhyme and reason of the law which has grown on the fertile soil of a three party relationship."[49] One measure of the first Restatement's success and influence and that of the successive two Restatements is that no competing account has emerged—no comprehensive treatise challenges the Restatement's treatment of agency law in the United States. Indeed, the last comprehensive scholarly treatise on the law of agency in the United States was published in 1914.[50] Its author, Floyd R. Mechem, served until his death in 1928 as the Reporter for the first

[46]Id.

[47]DeMott, supra note 15, at 28-30.

[48]Holmes, Oliver Wendell. 1923. The Common Law:180-183. 1891. Agency I. Harvard Law Review 4: 345-350-351. 1891. Agency II. Harvard Law Review 5:1, 14.

[49]Seavy, Warren A. 1920. The Rationale of Agency. Yale Law Journal 29:859. Seavey reported in his memoirs that this article was the basis on which he was invited to join the Restatement project as an adviser to the first Reporter, Floyd Mechem. As it happens, the Harvard Law Review (Holmes's publisher) rejected Seavey's article, according to Seavey. He joined Harvard's faculty in 1929. DeMott, supra note 15, at 22 n. 74.

[50]Mechem, Floyd R. A Treatise on the Law of Agency: Including not only a Discussion of the General Subject but also Special Chapters on Attorneys, Auctioneers, Brokers and Factors. (1st ed. 1889, 2nd ed. 1914).

Restatement. The Agency Restatements thus became central to how lawyers and judges understood the subject and to the conceptual structure for teaching agency-law topics in law school curricula. In this respect, the Agency Restatements serve a function comparable to the celebrated English-law treatise, Bowstead and Reynolds on Agency, now in its nineteenth edition,[51] because, like Bowstead and Reynolds, the Agency Restatements occupy uncontested intellectual terrain as comprehensive accounts of the subject.

In contrast, the first Restatement of Contracts (1932), with Samuel Williston as Reporter, differs in many ways from Arthur L. Corbin's later (1950) magisterial treatise.[52] Characterized as "something of a realist *eminence grise*," Corbin wrote a comprehensive account of contract law that challenged the Restatement position's on doctrinal points and, more broadly, reflected Corbin's emphasis on the importance of facts in judicial decision-making.[53] Readers who sought one had an alternative to the Restatement, and Corbin's treatise was a work of wide scope and manifest scholarly depth. Similarly, in Torts, the first Restatement (1939) was followed by extensive writing by Leon Green[54] and by William L. Prosser's treatise.[55] Green and Prosser provided accounts of tort doctrine that were far from identical, but both challenged the Restatement. Indeed, Prosser in turn served as the initial Reporter for the second Torts Restatement.

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[51] Bowstead and Reynolds. 2010. Agency. P.G. Watts ed.20th ed.

[52]Corbin, Arthur L. 1950. Corbin on Contracts.

[53]Duxbury, Neil. 1995. Patterns of American Jurisprudence 140.

[54]E.g., Green, Leon A. 1927. The Rationale of Proximate Cause. 1930. Judge and Jury.

[55]Prosser, William L. 1952. Handbook of the Law of Torts.

The ALI's Handbook, published in 2005, recognizes that Restatements may have a predictive (or leading-edge) function, in addition to clarifying and simplifying the law as it stands at the time of drafting. That is, "a significant contribution of the Restatements has also been anticipation of the direction in which the law is tending and expression of that development in a manner consistent with previously established principles."[56] As discussed above, as research resources the Agency Restatements serve a function comparable to well-regarded continuing treatises in the English tradition. But scholarly work in that tradition does not (or at least not necessarily) serve the leading-edge function embraced by the Handbook for Restatements.

As discussed above, the Reporters for the first Restatement of Agency did not aspire to anticipate or guide legal development. It may be that, for Restatements as a whole as an ongoing institutional project, endorsing and embracing this further goal became possible only after the relatively cautious precedents set by the first Restatements.[57] They established the ALI's institutional credibility. But perhaps each generation of Restatements is or was feasible or credible only in its own times. The first Restatements were the product of a simpler era's law in the United States. A larger audience believed in the existence of a general common law, a belief reinforced by the ability of federal courts to develop general federal common law in cases involving disputes between parties of diverse citizenship. This landscape changed dramatically with the Supreme Court's 1938 decision in *Erie R.R. v. Tompkins*, which required federal district courts, in cases involving state-law claims, to apply the same common law as would a state court

[56] American Law Institute. Handbook at 5. www.ali.org/doc/stylemanual.pdf. Accessed 28 Feb 2013.

[57] Adams, Kristin David. 2007. The American Law Institute: Justice Cardozo's Ministry of Justice?. Southern Illinois Law Journal 32:173,182.

sitting in the same state.[58] By the early 1960's, one leading federal appellate judge, Henry Friendly, characterized his function in interpreting state law as "akin to that of Charlie McCarthy, the famous ventriloquist's dummy ...." and an intellectually unsatisfying task.[59] Relatedly, to aspire to guide legal development or anticipate it, as opposed to continuing in the cautious vein of the first generation of Restatements, makes a distinctive contribution.

After the first generation of Restatements the province of the common law itself, as a matter of positive law, became part of a legal landscape that included more statutes, more administrative regulation, as well as more legitimation of diffusion in common-law rules across jurisdictions. That's not to say that empirically such diffusion occurred, but *Erie* blessed its legitimacy. Thus, it plausible that a more explicitly normative orientation for Restatements would follow in a more complex era, the common-law basics having already been addressed by the first generation of Restatements. To continue on exclusively in their vein would be, in Suzanne Lepsius's assessment, to indulge in an exercise in an "artificial common law," a construct unlikely to help a lawyer win a case and, after *Erie*, implausible as a portrait of "the

[58]1938. United States 304:64.

[59]Dorsen, David M. 2012. Henry Friendly: Greatest Judge of His Era. 314. Judge Friendly, a member of the ALI's Council from 1961 until his death in 1986, was an influential participant in several ALI projects. Id. at 132. These involved the jurisdiction of federal and state courts, administrative law, corporate governance, conflicts of laws, codification of the federal securities laws, international jurisdiction, and a pre-arraignment code for prisoners. Id. Only one of these—conflict of laws—was a Restatement project. Overall Friendly's legal world was not the simpler common-law era reflected in the first generation of Restatements. His pre-judicial career involved complex business transactions and service as the general counsel of Pan American Airways. Although he wrote influential opinions applying common-law doctrines, his biographer emphasizes Friendly's distinctive contributions to business law in judicial opinions and, in extra-judicial writings, to public-law questions and court reform. Id. at 346.

actual law in force ....”[60]

Reception and Application

In two jurisdictions, the Restatements are treated by statute as the de facto common law. In the Northern Mariana Islands, which became a United States Commonwealth in 1986, the 1984 Code provides that “the rules of the common law as expressed in the Restatements of the law approved by the American Law Institute ... shall be the rules of decision in the courts of the Commonwealth in the absence of written or customary law to the contrary ....”[61] Comparable language was added to the Code of the Virgin Islands in 1957.[62] Kristin David Adams suggests that the history of the Virgin Islands, a Danish colony before they became a dependency of the United States in 1917, suggests an absence of “any immediate intention to permit the Islands to create their own laws.”[63] The 1957 Code provision followed a 1921 Code provision comparable to prior colonial codes but focused on the common law of the United States, not Danish law.[64] Thus, writes Professor Adams, “[a]fter so many years of colonial rule, it may have felt more natural to the Islands at that time [1921] to look to the United States, an external source, for their laws.”[65]

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[60]Lepsius, Suzanne. Taking the Institutional Context Seriously: A Comment on James Gordley. 232,242, in Nils Jansen and Ralf Michaels, supra note 5.

[61]Northern Mariana Code. 7:§3401.

[62]Virgin Island Code. §4.

[63]Adams, Kristin David. 2004. The Folly of Uniformity: Lessons from the Restatement Movement. Hofstra Law Review 33: 423,429.

[64]*Id.* at 428-429.

[65]*Id*. at 429.

Of course, in general Restatement provisions are not the object of wholesale incorporation by statute. Assessing their success often requires a retrospective look at their influence on courts and on scholarly discourse. For many years, the ALI itself published an annual table of cumulative case citations to each individual Restatement, broken down state-by-state. Torts topped the last cumulative list by a large margin, followed by Contracts, then Agency.[66] These citation counts, however, do not reveal whether the cited point was part of the case's holding, or an obiter dictum, or even in a dissenting opinion from a divided court. Thus, proceeding with a finer-grained methodology may better assess relative success. A well-known example is judicial reception of the provision in Restatement Second, Torts on strict liability for harm caused by a defective product. Many state courts treated the provision—Section 402A—as tantamount to a statute, in one scholar's assessment elevating the section and its comments to the status of "holy writ."[67] But this does not mean that courts uniformly adopted the principle stated in Section 402A; Delaware, North Carolina, and Massachusetts did not.[68] Nor did the status of

[66]See American Law Institute. 2004 Annual Report Published Case Citations to Restatements of the Law. www.ali.org/annualreports/2004/AM04_07-RestatementCitations04.pdf In particular, as of March 1, 2004, state and federal courts in the United States had cited the Restatements in published opinions 161,486 times. Of that total, Torts accounted for 67,336 citations, Contracts for 28,739, and Agency for 15,830. Conflict of Laws trailed Agency with 13,496 citations followed by Judgments with 10,773 and Trusts at 10,704. The table also breaks down citations to each Restatement on a state-by-state basis. These numbers are not adjusted for the overall number of published opinions from courts in particular states. Cumulatively across Restatements, California accounted for the largest number of citations (8264) followed by Pennsylvania (7874) and New York (6628). The 2004 data are the latest available, at least publicly.

[67]Henderson, James A., Jr. and Aaron D. Twerski. 1995. A Proposed Revision of Section 402A of the Restatement (Second) of Torts. Cornell Law Review 77:1512. Quoted in, inter alia, Vandall, Frank J. 1995. The Restatement (Third) of Torts, Products Liability, Section 2(B): Design Defect. Temple Law Review 68:167.

[68]Christie, George C. 2012. The Law of Torts. 5th edition. In those states, product-defect cases are within the ambit of general negligence or warranty law.

Section 402A signal an end to evolution in the law. Over time, many courts confined the strict liability principle to instances of manufacturing defect, as opposed to claims of defective design or inadequate warning. The ALI followed suit; Section 402A was succeeded by a separate component of the third Torts Restatement focused solely on Products Liability that confines strict liability to manufacturing defects.[69]

Authority, Legitimacy, and Influence

The history of the Restatements sketched in this essay fits within the prototype of *Searching for Utopia* with which the paper began. Like the reins held by the rider astride the giant tortoise, the Restatements do not control their subsequent reception by courts. At times, as discussed above, Restatements may succeed in anticipating legal development; whether this constitutes guidance—as when the tortoise responds to a rein—or simply percipience—as when the rider casts his rein in the direction he predicts the tortoise will take—may depend on the observer's methodology and perspective. The ALI, as the Restatements' institutional author, constructed its voice and other elements of its authorial persona, such as the elaborate deliberative and iterative procedures that precede the final promulgation of a text as a Restatement, to enhance their usefulness, credibility, and persuasiveness.

The paper also demonstrates that some ambiguity accompanies the underlying terminology of authority and, for that matter, private law. To Nils Jansen, to say that a legal text is authoritative means that "the legal profession accept[s] it as an ultimate source of the law,

[69] 1997. Restatement (Third) of Torts: Product Liability §2.

without requiring further legal reason to do so."[70] The relative authoritativeness of legal texts, when authorities conflict, is a function of "how they are applied and interpreted by professional lawyers and in the course of legal argument."[71] As a consequence, a text's authority may not be stable over time and any asserted hierarchy among texts is always contestable.[72] It is implicit, though, that legal "authority" stemming otherwise than from the state cannot be entirely self-constructed by its promulgator, depending as it does on its reception by legal audiences. Thus, as the ALI summarizes the character of its authority in the Handbook, "[a]n unelected body like the American Law Institute has limited competence and no special authority to make major innovations in matters of public policy. Its authority derives rather from its competence in drafting precise and internally consistent articulations of the law."[73] One might add, however, that within the law of agency, "authority" itself is a term that connotes the right or power of legally-consequential representation of another person. Perhaps confusion with this meaning of "authority" underlies claims that Restatements stem from an unrepresentative institution, one not chosen through politically-accountable processes or even the legal profession as a whole. But this critique confines the meaning of "authority" to its agency sense, as opposed to credibility and reception by an intended audience.

To some legal practitioners and scholars in the United States, the term "private law" would not be common usage. Once again one's prototype may be significant, and for some that

[70]Jansen, supra note 23, at 43.

[71]Id. at 43-44.

[72]Id. at 44.

[73]ALI, Handbook at 5.

prototype is contract law. However, as discussed above, the Restatements were significant in articulating and furthering the development of tort law in the United States. Involving as it does the direct imposition by the law of duties, tort law is often controversial and can be the object of political disputes. Does it lie outside the province of private law, as Leon Green long argued?[74] Regardless of its characterization, tort law's presence within the Restatements is important to understanding their history, accomplishments, and limitations.

Finally, and for many reasons, contemporary Restatements speak to an audience of disbelief in the existence of one common law that exists autonomously of invading influences, including statutes.[75] Such a belief is inconsistent with the institutional circumstances of law and its development in the United States, which include the fact of federalism that underlies the *Erie* doctrine and procedural institutions such as lay juries. How to assess authority, influence, and success for a Restatement are more interesting questions once their contemporary audience comes into view.

[74]E.g., Leon A. Green, Tort Law Public Law in Disguise, 38 Tex. L. Rev. 1 (1959).

[75]For further discussion, see DeMott, Deborah A. 2003. Statutory Ingredients of Common Law Change: Issues in the Development of Agency Doctrine. Commercial Law and Practice 56, 68-73. Sarah Worthington ed.

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