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Restating the Law in the Shadow of Codes

The ALI in Its Formative Era

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I. Introduction

For institutions as for individuals, success over time can smooth out narratives of the past, expunging the memory of consequential events and choices made along the way. This chapter recounts the early history of the American Law Institute (ALI) from 1923 to 1945, emphasizing the significance of legislative codification to the ALI's ongoing definition of itself and its mission. This history is more complex than appears from some accounts, not the least because institutional necessities, including funding, shaped the ALI's work over time. Likewise, experience sharpened internal insight into what made (and continues to make) the ALI distinctively valuable. Signal elements of the Restatement—the ALI's principal accomplishment during this era—departed from the project's initial plan. Successfully executing the Restatement required ongoing processes to determine its form, staffing, substantive coverage, and internal organization. Framing the Restatement project as a rejoinder to codification casts new light on both the endurance and fragility of what it accomplished. The point of undertaking the Restatement—intended as an authoritative treatment of private-law subjects within the common law—may have been staving off an intrusion of codification into the common law's domain. If so, the ALI's embrace in the early 1940s of the project that culminated in the Uniform Commercial Code (UCC) appears an about-face that redefined itself and its work or mission. Looking inside the ALI through its surviving records illuminates these dimensions of its early history, including its resilience and evolution into an established institution.

As seen by the ALI's organizers—legal academics, judges, and members of elite segments within the bar—American law in the 1920s was in lamentable shape, in particular its perceived core of general private-law doctrine. Addressing the ALI's 1923 organizational meeting, Elihu Root noted prolixity and variation in legal doctrine: "[W]hatever authority might be found for one view of the law upon any topic, other authorities could be found for a different view…."[1] A profusion of statutory

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[1] *Proceedings at the Organization of the Institute*, 1 A.L.I. Proc., Part II 48 (1923).

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enactments prior to World War I compounded the challenges,[2] and state-by-state enactments of uniform statutes did not eliminate the risk of divergent judicial interpretations.[3] Additionally, in the judgment of Roscoe Pound, the last quarter of the nineteenth century represented "the nadir of American law-book writing," in which authors "assumed to find a rule for everywhere in a common-law decision anywhere."[4] Within a market for law books that operated nationwide by the end of the nineteenth century, authors' incentives aligned with their publishers to produce books that mostly indexed and detailed published decisions.[5] In a more recent assessment, "in the end the treatises recreated complexity," written as most law books were for a lawyers' market that sought shortcuts to precedents and potential arguments but not a text amenable to reading as a coherent whole.[6] Nor was the overall result by the 1920s—understood in today's terms as an epistemic crisis—believed to be resolvable through legislative codification of private-law doctrine. Indeed, although the Restatement represented an oft-repeated commitment to furnishing an authoritative account of "the law as we find it,"[7] it did not address codified doctrine from the seven states that had enacted general civil codes, most notably California.

Drafted neither as a statute for legislative enactment nor as a treatise or digest, the Restatement's authority initially turned on its form and its authorship. As an institutional author, the ALI comprised the well-regarded academics who served as Reporters for each subject, the intense scrutiny brought to bear on draft texts by cohorts of expert Advisers, and the distinguished generalist members of the governing Council, culminating in a vote taken by the ALI's broader elected membership at an Annual Meeting. The hoped-for result would constitute a "prima facie basis" for judicial action, drafted in the style of a well-drawn statute[8] and gathering authority through judicial and professional reception over time.[9] If successful, the Restatement would also keep control over private law within the judiciary, guided by "the craftsmen of the

[2] *Id.* at 49 (reporting 62,000 distinct statutory enactments in the five years preceding 1914).

[3] *Id.* at 57 (delegate notes "multiplicity" of judicial constructions of uniform state laws, in particular Negotiable Instruments Law) (W.H. Washington).

[4] Roscoe Pound, The Formative Era of American Law 159 (1938). In Richard Brooks's assessment, "What appeared as complexity was actually just data, lots of data (i.e. observations) which tended to overwhelm users accustomed to working with smaller samples." Richard R.W. Brooks, *Canon and Fireworks: Reliance in the Restatements of Contracts and Reliance on Them*, in this volume at 109. The problem, in other words, was epistemic and not (or not necessarily) ontological.

[5] *Id.* at 158. For more on the evolution of commercial law-book publishing in the United States, *see* David J. Seipp, *The Need for Restatement of the Common Law: A Long Look Back*, in this volume.

[6] Angela Fernandez & Markus D. Dubber, *Introduction*, *in* Law Books in Action 10 (Angela Fernandez & Markus D. Dubber eds., 2012). Positioned within a broader history, the early treatise writers "were, in a sense, on the defensive," given the revolution in America, and thus "anxious" to demonstrate that their enterprise was respectable, by making "extensive use of English materials" in light of limited indigenous material. John H. Langbein et al., History of the Common Law: The Development of Anglo-American Legal Institutions 847 (2009). In David Seipp's account, had the attention of the grandees of the legal profession not been drawn by public debates about the common law, "the path of least resistance" would have left to commercial publishers the task of addressing the epistemic problem confronted by lawyers. Seipp, *supra* note 5 at 41.

[7] For this phrase, *see, e.g.*, 5 A.L.I. Proc. 191 (1927) ("we must state the law as we find it") (J.W. Beale in response to G.B. Rose).

[8] *Proceedings at the Organization*, *supra* note 1, at 50 (E. Root).

[9] *Id.*

profession. . . ."[10] Additional elements of form mattered. Despite its detailed articulation, ideally the Restatement would be relatively concise among its era's law books. For Joseph W. Beale (the Reporter for Conflict of Laws), a desirable form would be "a little compact book so that it could be carried about, a vest-pocket edition."[11]

And what larger objective motivated this undertaking? The elaborate report submitted to the ALI's 1923 organizational meeting advanced two arguments—not entirely consistent with each other—championing a detailed articulation of the common law over codification: (1) as models, European civil codes and their American counterparts were drafted in unacceptably general language that left too much room for judicial discretion;[12] and (2) by preserving the common law's flexibility, the Restatement would avoid undue rigidity.[13] The second rationale—ensuring flexibility—dominates retrospective accounts of the Restatement's objective.[14] And the ALI's leadership articulated a self-definition for the ALI that underpinned its emergence as a self-perpetuating and distinctly valuable institution. Its multistage deliberative processes, focused on texts drafted with care and expertise, came to define it as an institution more than (or at least as much as) the subject matter or form of its projects.[15]

Like many complex institutions that evolve over time, the ALI responded in its early years to contingencies and crises. In particular, its ongoing relationship with the Carnegie Corporation of New York—which funded the Restatement project—became delicate at times and required difficult choices, some of which shaped the substantive content of the Restatement. Additionally, making the Restatement broadly available meant that the ALI accommodated the commercial demands of the

[10] *Id.* at 112–13 (commending "the method of sympathetic usage"; to give work "force and power," it "must be such as to commend itself to the craftsmen of the profession.") (J.W. Davis).

[11] 2 A.L.I. Proc. 56 (1924) (J.W. Beale).

[12] *Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute*, 1 A.L.I. Proc. 20–21 [hereinafter *1923 Report*] ("The statement of principles should be much more complete than that found in European Continental Codes . . . the court . . . has a much wider discretion than judges of our own courts" in applying a code, given "the detail in which the law is set forth in prior decisions."). For a rich account of the place of the Restatement project in movements toward codification, *see* Nathan M. Crystal, *Codification and the Rise of the Restatement Movement*, 54 Wash. L. Rev. 239 (1979). On the history and present status of codification in one state (Montana), *see* Andrew P. Morriss et al., *Debating the Field Civil Code 105 Years Late*, 61 Mont. L. Rev. 371 (2000). On the contrasting history in California, *see* Bartholomew Lee, *The Civil Law and Field's Civil Code in Common-Law California—A Note on What Might Have Been*, 5 West. Leg. Hist. 13 (Winter/Spring 1992).

[13] *Id.* at 232 (enactment of principles in legislative codification "would sacrifice either "its flexibility or its fullness of detail . . . [w]e fear that if the law stated in this detail were given the rigidity of a statute, injustice would result in many cases presenting unforeseen facts.")

[14] *See, e.g.*, John P. Frank, *The American Law Institute: 1923–1998*, *in* The American Law Institute: Seventy-Fifth Anniversary 1923–1998, at 3, 11 (1998) ("the goal was to maintain the flexibility of the common law"). On the evolution of the ALI's recognition of the values served by Restatements, as well as changes in the law following completion of the First Restatement, *see* Kenneth S. Abraham & G. Edward White, *The Work of the American Law Institute in Historical Context*, in this volume.

[15] 5 A.L.I. Proc. 55 (1929) (although ALI's "primary object" was "to secure an organization by which an orderly statement of our common law could be produced," it was "still more important" that "the legal profession has learned to organize itself for the constructive improvement of justice in this country") (W.D. Lewis); 10 A.L.I. Proc. 31 (1932), at 31 ("we have in the course of our labors [on the Restatement] developed a technique which we find useful in applying to the study of criminal procedure.") (G.W. Wickersham); Michael Traynor, *The First Restatements and the View of the American Law Institute, Then and Now*, 32 S. Ill. U. L.J. 145, 164 (2007) ("The Institute's strengths are its members and its established processes, stature, independence, and dedication to quality.").

law-book trade and its sales practices. The content of what was published reflects this accommodation. For several states, the ALI published comprehensive Annotations to pre-Restatement cases, which required central coordination. It also required funding and staffing, which came in part through state affiliates of the Works Progress Administration (WPA) and other federal relief programs that funded projects sponsored by state bar associations to employ indigent lawyers during the hard days of the 1930s. Separately, publishing the Annotations—seen as necessary to a viable market for the Restatement—implied that the Restatement's own ex cathedra authority might not always suffice. Additionally, the relatively advanced ages of several of the initial Reporters had substantive consequences. Among them, the death of Floyd Mechem—the initial Reporter for Agency—led to postmortem revisions of a basic doctrinal formulation previously approved by the ALI's Council and members.

Messy episodes like these early in the ALI's history mostly stem from challenges that confronted it as a new private-sector institution dedicated to producing authoritative legal texts. And what was to be done when ALI's commitment to restating "the law as we find it" met precedents followed in a majority of jurisdictions that contemporary lawyers and judges found "barbarous"?[16] During this era, the Restatement—by design not drafted for legislatively enacted codification—was not a mechanism for straightforward change in legal doctrine. By the end of the era recounted in this chapter, the UCC embodied a formal capacity to effect doctrinal change within the province of private law.[17] But other developments underscored the value of the Restatement itself. In particular, by heightening the salience of "local law" in *Erie Railroad Co. v. Tompkins*[18] for common-law cases in federal court, the Court in 1938 assured the collateral consequence of additional impact for the Restatement by directing federal courts to follow local law, or so the ALI's leadership believed. The Restatement would be "especially" salient when the Annotations for a particular state evidenced a close correspondence with Restatement provisions.[19]

The remainder of the chapter proceeds as follows. Section II opens with an account of the initial plan for the Restatement's form and structure and then explores how and why aspects of the initial plan changed over the course of the project. Mutability to this degree appears atypical of projects for legislative codification in which basic issues may be resolved early on. Section III turns to the Reporters for the first Restatement, relationships between their work for the ALI and the individually authored treatises they wrote, and the fortuities that almost inevitably followed. For two subjects (Agency and Contracts), Reporters' treatises preceded work on the Restatement; for

[16] *E.g.*, 5 A.L.I. Proc. 324 ("barbarous" rule that marriage terminates authority previously conferred by a woman on an agent) & *id.* at 325 ("I think that there are still several [states] that have the common law rule) (Mechem); 11 A.L.I. Proc. 90 (1933) ("a relic of remote barbarism" that principal's death terminates agent's authority without notice); 12 AL.I. Proc. 295 (1935) ("more or less of a barbarous" rule in Restitution limiting action to covenants in deed when payment made for deed to which transferor had no title) (Seavey); 14 A.L.I. Proc. 90 (1937) (civil action of criminal conversation founded in "entirely archaic barbarous concept of our marriage relation") (Bohlen).

[17] This era in the ALI's history also included work on statutes. These projects—most notably a Code of Criminal Procedure—are beyond the scope of this chapter.

[18] 304 U.S. 64 (1938).

[19] Minutes of the Council [hereinafter CO] Feb. 21–23 1940, at 38 (in *Erie* the Court "unintentionally no doubt" made Restatement "all the more important") (H.F. Goodrich).

Conflict of Laws and Trusts, the Reporters published their treatises midstream. At the risk of overemphasizing individual idiosyncrasies, the section argues that the Reporters' own treatises shaped the Restatement project itself, not just in doctrinal formulation, but sometimes in defining the coverage of Restatements of individual subjects. Likewise, early choices carried ongoing consequences; some Restatement projects overshadowed the scope of other projects, while Reporters' deaths and illnesses had substantive and organizational consequences. The focus shifts in section IV to the ALI itself as it evolved into an institution with a distinct role and mission, one capable of ongoing existence and identified as more than the author of the Restatement. Reaching that point required, among other things, surmounting "the publishing problem"[20] that the Restatement itself posed as well as developing a mature plan for funding independent of particular projects. It also required a substantive agenda capable of sustaining engagement over time, a need met by the UCC and later by the Model Penal Code.[21] A brief conclusion sums up.

II. The Restatement as Planned and How It Evolved: From the Ex Cathedra Text, Past the Treatises, to the Annotations

As described to attendees at the ALI's organizational meeting in 1923, the Restatement over time would "tend to assert itself and confirm itself and to gather authority as time goes on."[22] And mostly it did, but with departures in form and substance from the initial plan, complicated by persistent overoptimism about the time, effort, and funding required to meet commitments. To differentiate the Restatement from treatises written by authors who wrote as mere "photographers" of case citations,[23] the text of the Restatement would be a "direct and simple statement of the law as the Institute declares it,"[24] backed by the ALI's reputation. The text would not cite cases, not even cases supporting the outcome on hypothetical facts stated in an illustration. As work adopted and promulgated[25] by the ALI, the coherence and structure of the text stating authoritative rules—formally reinforced by its bold-face type—would do the work, while also bearing formal similarity to legislatively enacted codifications, whether in Europe or the United States.[26] Accompanying each Restatement—even if not as portable as Joseph Beale hoped—a separate treatise, with the Reporter (not the ALI) as author, would explain the reasoning.[27]

[20] CO, May 10–13, 1939, at 10 (H.F. Goodrich).

[21] The Model Penal Code project, begun in 1962, is beyond the scope of this chapter. On the Model Penal Code, *see* Kimberly Kessler Ferzan, *From Restatement to Model Penal Code: The Progress and Perils of Criminal Law Reform*, in this volume.

[22] *Proceedings at the Organization*, *supra* note 1, at 51 (E. Root).

[23] *1923 Report*, *supra* note 12, at 20.

[24] 2 A.L.I. Proc. 36 (1924) (W.D. Lewis).

[25] Not "published." Restatements are published by American Law Institute Publishers (ALIP), a separate and still extant entity traceable to a partnership between ALI and two law-book publishers. The ALI holds the copyright. *See infra* text accompanying note 139.

[26] On the significance of form for private codification projects, *see* Nils Jansen, The Making of Legal Authority 107–27 (2010).

[27] 2 A.L.I. Proc. 37 (1924) (W.D. Lewis).

The Carnegie Corporation of New York funded the Restatement project.[28] The project, which began in 1923 with an estimated duration of ten years, lasted through 1944.[29] Some subjects had a sole Reporter throughout (Agency, Contracts, Conflict of Laws, Security, and Trusts) or a small team (Judgments and Restitution).[30] Torts and Property, respectively published in four and five volumes, had multiple reporters focused on discrete topics. The ALI began but discontinued Restatement projects in Business Associations and Sales of Land (or "Vendor and Purchaser").[31] By 1930, the Director (William Draper Lewis) had identified a list of additional subjects tentatively believed suitable for coverage in the Restatement, including Public Utilities and Sales of Chattels,[32] for a total of approximately twenty-two titles. Its cost implications doomed this expansion. But although Restatement work "could go on indefinitely," Lewis also noted in 1930 that it was timely to "visualiz[e] the Restatement as a completed whole,"[33] which implicitly assigned even greater importance to transsubstantive matters like consistent terminology and comprehensive indexing. By 1935, the Council's Executive Committee prepared a report on the ALI's future, addressing the content of an "ideal Restatement," which formed the premise of a final grant application to the Carnegie Corporation. The funding that resulted enabled the completion of the multivolume Restatements of Property and Torts, but forced a choice between two other subjects: Business Associations and Security.[34] The choice was Security.[35]

[28] Carnegie's initial grant in 1923 of $1,075,000 to support the Restatement project was later augmented for a total of $2,419,196.90, plus $25,000 toward support of the organization itself and $10,000 to support the "local annotations" project. *See* William Draper Lewis, "*How We Did It,*" *in* HISTORY OF THE AMERICAN LAW INSTITUTE AND THE FIRST RESTATEMENT OF LAW 5 (1945). Overall through 1948, the Carnegie Corporation's committed grants to the ALI add up to more than $2.7 million. Richard L. Revesz, *The Continuing Support of Our Founding Donor*, ALI ADVISER, Apr. 20, 2021. Elihu Root, prominent in the ALI's founding, was a trustee of the Carnegie Corporation from 1919 until his death in 1937. Root succeeded Andrew Carnegie as the Corporation's president in 1911, serving until 1919, and had represented Andrew Carnegie as a private lawyer. For specifics of the ALI's ongoing relationship with the Carnegie Corporation, *see infra* text accompanying notes 155–65. On Root's role in securing the grant and his mentorship of William Draper Lewis, the ALI's initial Director, *see* N.E.H. Hull, *Back to the "Future of the Institute": William Draper Lewis's Vision of the ALI's Mission During Its First Twenty-five Years and the Implications for the Institute's Seventy-Fifth Anniversary*, *in* THE AMERICAN LAW INSTITUTE: SEVENTY-FIFTH ANNIVERSARY 105, 115 (1998).

[29] 2 A.L.I. PROC. 19 (1924). Adjusting for interim inflation, in today's dollars Carnegie's support would be more than $43 million. Revesz, *supra* note 28.

[30] Austin W. Scott and Warren A. Seavey were the Reporters for both; Erwin N. Griswold served as Assistant Reporter for Judgments. Seavey succeeded Floyd R. Mechem as the sole Reporter for Agency; Scott was the sole Reporter for Trusts.

[31] Samuel Williston, the Reporter, took on this subject following completion of the Contracts Restatement. Williston's separate commitment to edit the Annotations, *see infra* text accompanying notes 67 and 131, slowed his work on Sales of Land. He resigned from the project due to poor health. Minutes of the Executive Committee of the Council [hereinafter EC], Feb. 1, 1936, at 3.

[32] 9 A.L.I. PROC. 52 (1930) (W.D. Lewis). The additional estimated cost was $1.5 million.

[33] *Id.*

[34] *Report of the Executive Committee to the Council on the Future of the Institute*, 12 A.L.I. PROC. APPX. 409–30 (1935). As defined in the report, "Security" concerns "the law relating to all transactions in which the performance of a promise by a principal is secured either by the promise of another or by an interest in land, chattels, or choses in action." *Id.* at 416.

[35] Lewis, the Reporter for the discontinued Restatement of Business Associations, explained the situation otherwise in his retrospective account: looking at the subjects covered by the Restatement, a knowledgeable reader may wonder at the omission of "the common law partnership and the Law of Corporations … The

When funding ran short to complete that Restatement, a further choice followed, as between suretyship and mortgages (suretyship won).[36]

The ALI's distinctive processes helped assure quality but did not come for free. Each Restatement had its distinct cohort of Advisers[37] who met with the Reporter and Director Lewis when the Reporter had a draft of new material and, sometimes and in smaller groups, to consider revisions to draft material. Advisers' meetings, or "Conferences," could run over several days, especially in the summer. Like the Reporters, Advisers received payment for their work. The carefully detailed documentation of this group work is an indication of its seriousness for the participants and the ALI itself. The ALI dispatched a stenographer (usually Louise C. Peters) to each meeting who took minutes; on-site or back at ALI headquarters in Philadelphia she transcribed and typed them up, using onion skin and carbon paper sets, for distribution to each Restatement's Advisers and Reporter.[38] Given the meetings integral to each group's work, projects with multiple distinct groups had cost implications; as of 1933, the Torts project cost more than any other over the preceding two years.[39] Additionally, Property and Torts took longer to complete than did other subjects.

Present at almost all of these meetings (and many others as well), and crucial to coordination, quality control, and enforcing consistency in usage and recurrent definitions, Director Lewis "lived a peripatetic life," in the assessment of Samuel Williston, the Reporter for Contracts.[40] In summer time, Lewis convened meetings at his summer home in Maine, housing meetings from 1930 onward in a "portable

reason for the omission was that corporations have their origin in statutory enactment. There was a fear that if undertaken the work could not be successfully carried on; that a considerable portion of our funds might therefore be wasted." Lewis, *supra* note 28, at 22. To be sure, these considerations might have prompted the choice of Security. Lewis's work as Reporter concluded with draft provisions on the creation of shares presented to the Annual Meeting in 1932. CO, Dec. 14–16, 1932, at 24. Discontinuing the Business Associations project responded to the overall demands on Lewis: "The increasing pressure of my work as Director necessarily made the work proceed very slowly. . . ." *Id.* at 25. Nonetheless, Lewis remained "convinced that it is possible for the Institute to do most valuable constructive legal work by producing a comparatively short statement on Corporations for Profit. . . ." *Id.*

[36] CO, Feb. 21–25, 1939, at 22.

[37] For Property and Torts, the composition of each cohort varied by volume and subject-matter divisions within volumes.

[38] EC, Oct. 22, 1926, at 4 (describing post-conference process). Louise C. Peters, the ALI employee who "took the majority of the stenographic notes" at these meetings, plus (unaided) all discussions at Annual Meetings from 1929 to 1942, resigned as of December 1944. EC, Nov. 28, 1944, at 2. This occasion marks the formal acknowledgment in ALI's internal minutes of her work and its importance. ("In looking back over our work on the Restatement . . . we realize that what Mrs. Peters has done for the Institute has been an essential element in its success.") Apart from Peters and her colleagues in support roles at ALI headquarters, the first woman to play an acknowledged role in ALI's work is Soia Mentschikoff, appointed as a Legal Assistant to the UCC's Chief Reporter Karl Llewellyn in 1942 (EC, Dec. 19, 1942, at 38) and, in 1944, Assistant Reporter on the UCC's Sales article (CO, Feb. 22, 1944, at 2).

[39] CO, Dec. 14–16, 1932, at 31 (for current year, estimated cost of $21,900).

[40] Samuel Williston, Life and Law: An Autobiography 313 (1940, reprint ed. 1998) ("He attended the conferences on every subject, so that he was away from his Philadelphia home a large part of the time."). Lewis may have welcomed his travels. Reporting on his train trip to Seattle in summer 1928 for an ABA meeting, he applauded the "Canadian Pacific route," on which "one can get a compartment or drawing room without extra train fare, so I was able to put in four undisturbed good days" of work. EC, Oct. 20, 1928, at 14.

house" constructed at ALI's expense.[41] In general, the progress of the Restatement as a singular work produced through discrete projects—several conducted at the same time—required ongoing mechanisms to further coherence. Although the ALI was aware of the importance of consistent terminology from the start,[42] and despite the impact of Lewis's pervasive presence, occasional meetings among multiple Reporters proved necessary to "smooth out differences" among their formulations.[43] Not all differences in definition were resolvable this way. The initial Reporter for Torts (Francis Bohlen) "reserved the right to question" the Agency draft's definition of "independent contractor" when the question became important to the Torts Restatement.[44] And some pervasive terms and concepts (like "notice") were "troublesome."[45]

The original plan coupled each Restatement with a separate explanatory treatise written by the Reporter as its author to contain citations to case authority and, when the cases diverged, explain the route taken by the Restatement. Treatise drafts would accompany Restatement drafts for review by each project's Advisers and at Annual Meetings; both would be published simultaneously. The treatise component of the plan required arrangements in 1923 with publishers for the two Reporters who had already published definitive treatises—Floyd R. Mechem (Agency) and Williston (Contracts)—because the Restatement treatises were likely to be based on their prior publications.[46] Beale, yet to publish his treatise on Conflict of Laws, had it well underway. In exchange for $4,000 in 1923, he transferred rights to his work-in-progress to the ALI. Beale surrendered his accumulated treatise materials to Lewis, who had them inventoried and then transferred custody back to Beale, with the materials to remain in a steel cabinet to be purchased by Lewis, except when Beale used the materials for ALI purposes.[47] By 1925, work on the treatises had been reduced relative to work on the Restatements themselves[48] and unresolved questions remained, including the extent to which the treatises would be sufficiently standardized.[49] Not all reporters cooperated with the treatise component of the initial plan; Mechem submitted no material for a treatise to accompanying the Restatement volume on Agency.[50] At the end of 1925, the Council confined work to the Restatement itself, with treatises to provide

[41] CO, May 7, 1930, at 7 ("The Director is authorized to have erected a portable house with a room approximately 12 X 15 feet, at a cost not exceeding $1000 for use as a conference room at Northeast Harbor, Maine …"). The cost for the portable house was charged against the general administration account as an item of "Office Furniture and Equipment." For ten years, Williston spent a week at Lewis's property each summer. WILLISTON, *supra* note 40, at 313. He reports the presence of two "portable houses … placed among the trees on the shore" of a sound. *Id.*

[42] *E.g.*, 4 A.L.I. PROC. APPX 46 (1926) (important that recurrently occurring words and expressions "stand for the same thing throughout") (W.D. Lewis).

[43] *E.g.*, EC May 2, 1931, at 5 ("labor" of Beale "at least technically concluded" following conference to "smooth out differences" with Agency and Torts Restatements).

[44] EC, Oct. 14, 1927, 6 A.L.I. PROC. 92–93. This subsequent inquiry does not appear to have happened. *See* text *infra* accompanying note 109.

[45] CO, Apr. 28–May 1, 1926, *in* 4 A.L.I. PROC. 22 (1926).

[46] EC, May 19, 1923, *in* 1 A.L.I. PROC. 37.

[47] EC, June 29, 1923, *in* 2 A.L.I. PROC. 118–19. The cabinet was to bear the ALI's name.

[48] CO, Apr. 30–May 1, 1925, *in* 3 A.L.I. PROC. 38.

[49] 2 A.L.I. PROC. 44–45 (noting likelihood that treatises will vary).

[50] CO, Dec. 16–19, 1925 at 20. Mechem may have viewed such a treatise as unnecessary because his two-volume work, published in 1914, was readily available. For more on Mechem's treatise, *see infra* text accompanying notes 89–90, 92–96, and 113.

explanatory material but not comprehensively to parallel Restatement provisions.[51] Likely not coincidentally, the same meeting noted that three of the Reporters were over the age of sixty[52] as well as the costs entailed by a commitment to publish the treatises. Although minutes from ALI's internal meetings do not reveal whether Beale returned the $4,000 when his treatise materials (and the rights to them) were returned to him in 1933,[53] his salary in that period is noticeably less than the amounts authorized for other Reporters.[54]

John Frank's retrospective assessment is convincing: the plan for simultaneous treatises was "a pie-in-the sky concept," feasible only for Reporters who had already written a treatise or had one well underway, while "for a Reporter who did not already have his treatise in his pocket … the task was simply impossible."[55] As a consequence, beginning in 1932 with the publication of Contracts, the Restatements were "authoritative without authorities," comprising succinctly written doctrinal articulation and brief commentary.[56] Periodically, the Council requested more from Reporters—lists of authorities for their Advisers, explanatory notes—but no consistent practice emerged. By the time the Council and its Executive Committee took up the question of publishing explanatory notes, it was too late for Contracts (already published) and unrealistic for Agency, which was headed toward a firm deadline for publication.[57]

Formally, the Restatements resembled legislatively enacted codifications of doctrine, testing the power of ex cathedra text.[58] Perhaps this outcome was welcome at the time.[59] Two decades later, discussion at the 1953 Annual Meeting turned to a draft definition of charitable trusts that chose between two different lines of authority, prompting a member's request that the text acknowledge the choice. The ALI's President (George Wharton Pepper) responded: "There has been a change of thought on that subject during the life of the Institute. At the start, it was thought to be wise to secure for the black letter … a certain ex cathedra authority to suppress any mention of competing doctrines or dissent or any question of authorities which would raise a question about the soundness" of the Restatement's doctrinal formulation.[60] With time, "we have become more realistic. …"[61] Three years later, the ALI's Director

[51] CO, Dec. 16–19, 1925, 3 A.L.I. Proc. 409–10.

[52] *Id.* at 409, noted in Frank, *supra* note 14, at 15.

[53] CO, Mar. 6, 1929, at 7 (Beale "anxious to make an arrangement with a publisher for the publication of his treatise …").

[54] *Compare* EC Oct. 18, 1930 ($2,500 Reporter's salary for Conflict of Laws; $5,000 salary for Reporters for Agency and Contracts), *with* CO, Dec. 5, 1924 ($5,000 salary for Reporters for Conflict of Laws, Contracts, and Torts).

[55] Frank, *supra* note 14, at 14–15.

[56] *Id.* at 14.

[57] EC, Dec. 1, 1933, at 5 (For Beale and the Conflicts Restatement, unclear whether it would be "fair" to ask him; Herbert Goodrich, also working on Conflicts, was too busy.) Perhaps not "fair" because the ALI's relationship with Beale likely soured when the Council took charge of a draft. EC Oct. 20, 1933 at 5 ("careful scrutiny" given to draft by Council; "more than a mere courtesy due Mr. Beale" to send him a copy of the results with an "opportunity … to make any observation thereon he desires").

[58] 2 A.L.I. Proc. 37 (1924) (noting that Restatements would be characterized by some as "speaking 'ex cathedra'") (W.D. Lewis).

[59] The "poverty of references" in Restatement drafts attracted external criticism. 5 A.L.I. Proc. 106 (1927) (G.W. Wickersham).

[60] 30 A.L.I. Proc. 50 (1953).

[61] *Id.*

(Herbert F. Goodrich, who succeeded Lewis) stated he saw "no profit at all in discussing whether" the initial Restatements would have been better had they been less ex cathedra.[62]

Qualifying the claim that the Restatements spoke ex cathedra, as early as 1927 Lewis acknowledged that "somebody is going to get out annotations to these Restatements. That is bound to come."[63] Leaving their production to commercial law-book publishers would be unsatisfactory, Lewis argued. Authors engaged to research and write annotations would be insufficiently familiar with the ALI's terminology, while commercial publishers' incentives would not further simplification as opposed to multiplying citations.[64] Better then to encourage state bar associations, working in conjunction with the ALI, to sponsor the production of "local annotations" summarizing state-law cases keyed to Restatement provisions. Along with precluding efforts from commercial publishers, the local-annotations project had additional motivations. For the Restatement to gather authority through judicial citations and its use by lawyers, more familiarity with its substance within state bars could only help. Working on annotations served as a commitment device that bonded lawyers to the Restatement, while the availability of annotations helped sales of Restatement volumes in a state, as ALI's publishing partners emphasized.[65] Moreover, the Annotations responded to lawyers' skepticism. The ALI's President (George W. Wickersham) told the 1935 Annual Meeting that "the force of habit of the American legal mind," even when confronted by statements of the law produced by the best legal minds, is to "desire[] to go back through the welter of cases and put himself in the position of those who produced these formulations of the law," to confirm their accuracy.[66] Additionally, lawyers may have been skeptical because they understood that their professional obligations to clients required caution in relying on a novel secondary resource like the Restatement.

Although the ALI distanced itself from formal authorship of the Annotations, it published them and worked to maintain quality. Production of Annotations always lagged the Restatement volumes. Goodrich served as the designated liaison with state bar associations, which varied in keenness and capacity to undertake the project. Samuel Williston (his work on the Contracts Restatement concluded), edited the Annotations and was praised for his tact in working with their authors.[67] The annotators' work necessarily involved a great deal of drudgery, requiring proceeding page-by-page through the digests for particular subjects, sometimes aided by lists of cases furnished by Reporters.[68] But annotation work also required imagination and

[62] 33 A.L.I. Proc. 43 (1957) (H.F. Goodrich) ("The Restatement appeared. . . . It has been successful and it has had a very great influence on the development of the law").

[63] Minutes of Conference of Co-operating Committees of Bar Associations and Specially Invited Persons, Oct. 27, 1927, *in* 6 A.L.I. Proc. 53.

[64] *Id*. at 54.

[65] For more, *see infra* text accompanying notes 140–43.

[66] 12 A.L.I. Proc. 49 (1935) (G.W. Wickersham).

[67] CO, Dec. 18–21, 1933, at 56 (lauding Williston's "gracious urbanity" as editor in ironing out problems) (H.F. Goodrich).

[68] CO, May 8, 1935, at 15 ("The work itself is unmitigated drudgery") (H.F. Goodrich). To be sure, legal scholarship in this era—including that conducted by Restatement Reporters and treatise authors—required stamina in light of the then-available research methodologies.

intellectual agility to organize relevant cases by Restatement sections and then draft a concise and accurate summary of each case.[69]

As a consequence, staffing the Annotations remained a challenge throughout, as did funding.[70] Despite an initial failure to interest the Carnegie Corporation in making an additional grant toward the costs, Carnegie eventually contributed.[71] The ALI itself funded some of the work, as did its publishing venture, American Law Institute Publishers (ALIP).[72] Further support during the Depression of the 1930s came through projects sponsored by state affiliates of federal relief programs—including the WPA and the Civil Works Administration (CWA)—directed toward employing indigent lawyers. In 1934, Lewis and Goodrich traveled to Washington, D.C., to urge the CWA program administrator to extend a Minnesota program to other states.[73] In time, federal relief support ended;[74] by 1943, as law professors and young lawyers joined the war agencies and military services, Goodrich thought the outlook for more annotations in the immediate future was "not very good."[75] And thus the program of local annotations ended. By this time judicial citations to the Restatement itself sufficed to populate a separate book of annotations, *The Restatement in the Courts*, produced by the ALI's own staff and organized state by state.[76]

III. Early Choices and Later Fortuity: Reporters, Their Treatises, and Restatement Projects over Time

The ALI's ongoing challenge of securing the Restatement's identity and authority, tied to but distinct from the Reporters, stemmed from its ambition to produce authoritative legal texts as a private-sector organization. Lewis emphasized to the 1927 Annual Meeting that the Restatements represented "distinctly group work," noting that some Advisers had effectively become Reporters' collaborators,[77] and later reinforcing the point at the 1934 Annual Meeting by characterizing the Restatements as a "group project."[78] To be sure, much work *was* done within groups of Advisers and with Lewis—all those meetings and successive drafts—but each Restatement volume was also personalized to its respective Reporter. Seen in retrospect, Reporters who undertook a Restatement with a treatise already published or well underway were "essentially codifying the treatises with the Restatements. . . ."[79] On the other hand, two large

[69] EC, Apr. 10, 1934, at 5.

[70] By 1940, in order to "round out" an Annotations program, Goodrich urged focusing on states that combined extensive territory with light accumulations of cases plus directly employing "a competent person to produce as much manuscript as possible" to be reviewed by the local bar association. EC, Dec. 21, 1940, at 26.

[71] Lewis, *supra* note 28, at 5.

[72] For more on ALIP, *see infra* text accompanying notes 140–44.

[73] EC, Feb. 10, 1934, at 5. Lewis's retrospective account of producing and funding the Annotations does not mention WPA and other relief programs as sources of support. Lewis, *supra* note 28, at 12–13.

[74] CO, Feb. 23–26, 1943, at 13.

[75] CO, Feb. 23–26, 1943, at 47.

[76] *See, e.g.*, CO, Feb. 23, 1943, at 37 (purchasers of year's Restatement volume to receive paperbound supplement to *The Restatement in the Courts*).

[77] 4 A.L.I. Proc. appx. 37 (1926).

[78] 11 A.L.I. Proc. 329 (1934).

[79] Frank, *supra* note 14, at 14–15.

Restatement projects (Torts and Property) undertaken by Reporters without a treatise of their own—or even a comprehensive contemporary work by another author—took much longer to complete. No doubt this was due in part to the scope of Property and Torts as subjects, but the absence of an already elaborated analytic structure to serve as a starting point cannot have helped. Relatedly, the coverage of the Property Restatement remained an open question from its start in 1926 well into the 1930s.[80]

Additionally, in defending their drafts before the ALI's membership in successive Annual Meetings, the Reporters visibly personified each Restatement volume, which muddled distinctions between their authority as Reporters, which was derivative of the ALI's, and their stature based on their own publications, including their treatises. In turn, by defining the field for inquiry, the Reporters' treatises likely shaped the results when "the law as we find it" underwent restatement. Separately, proceeding simultaneously with multiple Restatement projects—some later discontinued—had implications for the coverage of individual Restatements. And death and illness among the ranks of Reporters inevitably shaped the projects.

No doubt it came as welcome news to the Executive Committee in 1923 that Samuel Williston was, not just willing, but "anxious" to undertake the work of Reporter for the Restatement of Contracts.[81] Published in three substantive volumes in 1920, Williston's *The Law of Contracts* was well received by practicing lawyers and the judiciary, following Williston's 1909 treatise on the law of sales of goods.[82] Beginning in 1902, at the request of the Commissioners on Uniform State Laws, Williston drafted the Negotiable Instruments Law[83] and the Uniform Sales Act (1906).[84] Beyond Williston's professional stature, in the assessment of the ALI's Council's Executive Committee, his treatise on contract law, which "exhaustively set forth" the law, tended to clarify it,[85] with the consequence that "[i]t will make the task of restating the law … far simpler that it would otherwise be."[86] And work could proceed expeditiously; Williston anticipated when appointed in 1923 that a draft of a "considerable part" of the Contracts Restatement could be ready for consideration at the ALI's Annual Meeting tentatively scheduled for February 1925.[87] Likewise, when Floyd Mechem was designated the Reporter for the Restatement of Agency, the Executive Committee acknowledged his stature as "the one person pre-eminently fitted" to serve.[88] His treatise was "accorded an authority by the courts unexcelled if indeed equaled by that accorded to any other legal treatise."[89] Published in 1914, Mechem's second edition remains the last treatise on agency law in the United States of comparable depth and scope.[90]

[80] *Report on Future of Institute*, *supra* note 34, at 418–19.
[81] EC, May 5, 1923, *in* 1 A.L.I. Proc. 62 (1923).
[82] Williston, *supra* note 40, at 263–64.
[83] *Id.* at 219. *See also* Samuel Williston, The Law Governing Sales of Goods at Common Law and under the Uniform Sales Act (1909) (post–Sales Act treatise).
[84] Williston, *supra* note 40, at 222.
[85] EC, May 19, 1923 at 62 (statement of Council to Carnegie Corporation).
[86] *Id.*
[87] *1923 Report*, *supra* note 12, at 93–94.
[88] *1923 Report*, *supra* note 12, at 97–98.
[89] *Id.*
[90] *See* Floyd R. Mechem, A Treatise on the Law of Agency: Including Not Only a Discussion of the General Subject But Also Separate Chapters on Attorneys Auctioneers Brokers and Factors (2d ed. 1914). For more on Mechem himself and his successor, Warren A. Seavey, *see* Deborah

The relationship between the Restatements and the Reporters' treatises can be characterized in substantive terms, as "codifying" legal doctrine as stated in the treatises into Restatement form.[91] Focusing on the Mechem and Williston treatises suggests an additional relationship that also shaped the Restatements for Agency and Contracts, as Reporters' prior publications (regardless of format) likely shaped other volumes as well: the Reporters' treatises defined the scope of inquiry into the law, a prerequisite to "restating the law as we find it." Exhaustive treatments of their subjects the treatises undoubtedly were, but only within the ambit defined by the author. For both treatises, that was the common law, mostly from the United States but with due regard for English precedents. Neither treatise inquired into doctrine as codified in the civil code states in the United States, paralleling its omission from the Restatements. This approach carried pitfalls, as an example from Agency demonstrates.

In fairness, Mechem's treatise acknowledges early on that "several states have statutory statements of the law of agency as part of a general code."[92] An Appendix to Mechem's second volume, preceding the Table of Cases and Index, contains verbatim the language of the Codes' agency law provisions. However, doctrinal analysis in the body of the treatise does not address the Code provisions, just as they go unmentioned in the Restatement. Most of the time, the omissions are of no moment because the substance of the Code provisions falls in line with the Restatement's formulations.

But not always. In the Restatement, section 138 defines a power given as security, that is, "the power to affect the legal relations of another, created in the form of an agency authority, but held for the benefit of the power holder or a third person and given to secure the performance of a duty or to protect a title. . . ."[93] Unlike actual authority in an agency relationship, a power given as security cannot be terminated through revocation by its creator.[94] Powers given as security are valuable in many commercial contexts because they are less fragile than authority in common law agency relationships.[95] Neither Section 138 nor the counterpart treatment in Mechem's treatise[96] acknowledges that the California Civil Code defines an irrevocable power "given as security" substantially more narrowly, by requiring that such a power be "coupled with an interest in the subject matter of the agency."[97] As a consequence, irrevocability requires that the power holder possess a proprietary interest in the "subject matter of the agency"; and the power must be held by the person who holds the interest, not another person or an affiliated entity.[98] The California Annotations to the Restatement

A. DeMott, *The First Restatement of Agency: What Was the Agenda?*, 32 So. Ill. U. L.J. 17 (2007) [hereinafter DeMott, *The First Restatement*]; Deborah A. DeMott, *The Contours and Composition of Agency Doctrine: Perspectives from History and Theory on Inherent Agency Power*, 2014 Univ. Ill. L. Rev. 1813 [hereinafter DeMott, *Inherent Agency Power*].

[91] Frank, *supra* note 14, at 14–15.

[92] Mechem, *supra* note 90, vol. 1, at 11. On the Codes and other precursors to the Restatement, *see* Seipp, *supra* note 5.

[93] Restatement of Agency §138 (1933).

[94] *Id.* § 139.

[95] For a contemporary account of powers given as security and irrevocable proxies to exercise voting rights in securities or membership interests, *see* Restatement (Third) of Agency §3.12 (2005).

[96] Mechem, *supra* note 90, at 405–19.

[97] Cal. Civ. Code § 2359.

[98] *See* Pacific Landmark Hotel, Ltd. v. Marriott Hotels, Inc., 23 Cal. Rptr. 2d 555, 561 (Cal. App. 1993).

of Agency—published in 1937, four years in the Restatement's wake—note the discrepancy, commenting that "[t]he [California] cases leave serious doubt as to whether [the Code provision] is the equivalent of 'powers given as security' as used in Section 138."[99] Thus, relying solely on the Restatement's articulation of "the law as we find it" could be perilous, especially for lawyers unfamiliar with local law.

The perceived linkage between Reporters' treatises and their Restatements may be closest for Conflict of Laws. Beale's three-volume treatise on Conflict of Laws,[100] published in 1935, and the one-volume Restatement, published in 1934, were often reviewed together.[101] Overall, Goodrich told the Council, the Restatement "has been pretty well received"; reviewers who entirely rejected Beale's approach "were unhappy" with the Restatement, while those "more thorough[ly] Bealian than Mr. Beale himself" were displeased by instances in which the Restatement "departed from the Reporter's theory."[102] Writing retrospectively in 1945, Lewis nominated one subject by name for "revision with advantage" in work to succeed the first Restatement: Conflict of Laws.[103] Change in the law itself, of course, could warrant revision; but it would also serve to distance the ALI from Beale as an individual author.[104]

Early on, the Executive Committee recognized the "practical advantage" in having work on Agency, Contracts, and Torts proceed at the same time to enable frequent conferences among Reporters, given Agency's "intimate[]" connection to the other subjects.[105] Although contemporaneous work on all three subjects (plus others) facilitated overall coherence within the Restatement, it also led to midstream relocations of topics as well as overhang effects given the sequencing and pace of work within each project. For example, as between Torts and Agency, at the 1925 Annual Meeting Lewis noted that "we have had to decide under which subject shall be treated the liability of the master to the servant for the master's or the fellow servant's negligent act."[106] At least tentatively, this issue (addressed in the fellow servant rule) went to Torts.[107] But the Agency Restatement, notwithstanding internal upheavals of its own, proceeded on schedule to final publication in 1933, and included the fellow servant rule.[108] And

[99] I California Annotations to the Restatement of the Law of Agency 108 (1937). *See also* Hawkins v. Daniel, 273 A. 3d 792, 810 n. 21 (Del Ch. 2022) (noting disparity between California and common law rule in dispute concerning irrevocable proxy; Delaware follows common law rule).

[100] Joseph W. Beale, A Treatise on the Conflict of Laws, 3 vols. (1st ed. 1935). Beale also published a one-volume work in 1916. *See* Joseph W. Beale, A Treatise on the Conflict of Laws or Private International Law (1916).

[101] CO, Feb. 12, 1936, at 25 (Goodrich).

[102] *Id.* at 25–27. On Beale's theory itself and the Restatement, *see* Symeon C. Symeonides, *Conflict of Laws in the ALI's First Century*, in this volume.

[103] Lewis, *supra* note 28, at 21.

[104] Beale died on January 20, 1943. The Council statement memorializing him acknowledges that it was a "foregone conclusion" that Conflicts would be a subject included in the Restatement and that Beale would serve as Reporter, combining "wide knowledge of the decisions" with a "clear concept of the subject as a whole." CO, Feb. 23, 1943, at 8.

[105] *1923 Report*, *supra* note 12, at 97.

[106] 3 A.L.I. Proc. at 126–27 (1925).

[107] *Id.* at 127.

[108] Restatement of Agency § 474 (1933) (subject to exceptions, "the master is not liable to his servant who, while acting within the scope of his employment or in connection therewith, is injured solely by the negligence of a fellow servant in the performance of acts not involving the performance of the master's nondelegable duties. . . .).

neither Bohlen nor a fellow Torts Reporter appears to have pursued Bohlen's stated concern, noted earlier, about the definition of "independent contractor" in drafts of the Agency Restatement.[109]

The Torts Restatement took much longer to complete. Bohlen's incapacitation from mid-1937 onward led to delays and required reorganizing the work, including adding a fifth working group.[110] As it happens, the Reporter helming that group—Seavey—served throughout as an Adviser to the Torts Restatement, in addition to his work on Agency as an Adviser and then the Reporter, a further connection between the projects that may have diminished the significance of situating individual topics. When Lewis explained the ongoing reorganization of work on Torts to the Executive Committee, he noted that Seavey had been asked to suggest additional Torts topics for inclusion (Seavey served as the Reporter for the Division covering Miscellaneous Rules). For Lewis, "among [Seavey's] good qualities is fertility in the suggestion of situations which may arise in any field of law in which he is dealing,"[111] a trait relevant to Seavey's recurrent presence in multiple working groups.

Although the Agency Restatement includes topics earlier allocated to Torts, it also omits some that strike contemporary readers by their absence. Most prominent are situations in which an agent represents, not an individual person as principal, but an entity of some sort. This omission—which persists in Restatement of Agency (Second) (1958)—attracted inquiry at the 1926 Annual Meeting. In response to a member who questioned why the draft did not cover the appointment of an agent for a corporation, Mechem replied, "that was thought to belong in Mr. Lewis's Business Associations. . . ."[112] The coexistence of that project (discontinued in 1933) likely asserted an overhang effect on Agency's coverage. But the overhang may not entirely explain the omission. Mechem's treatise itself does not deal with corporate officers or, for the most part, with the implications when an agent represents a principal that is not an individual.[113] Thus, and independently of any overhang over Agency asserted by the Business Associations project, the Reporter's treatise likely circumscribed the ambit of inquiry to exclude instances of agency relationships outside the treatise.

Additionally, up until the final draft submitted to the ALI's members in 1933, the Agency Restatement defined apparent authority as did Mechem's treatise, as a power to affect the principal's legal relations when a principal negligently causes a third party to believe the agent possesses authority, entirely distinct from the agent's actual authority that the principal intentionally confers on the agent.[114] Based on his treatise, for Mechem apparent authority bore a close relationship to deceit or fraud as a basis

[109] *See supra* text accompanying note 44.

[110] CO, Feb. 22–26, 1938 at 17. On the ALI's relationship with Bohlen after this point, *see infra* note 159. Seavey served as sole Reporter for Chapter 47 (Damages) and for Divisions 11 (Miscellaneous Rules) and 12 (Defenses Applicable Against All Tort Claims).

[111] EC, Apr. 30, 1938, at 3.

[112] 4 A.L.I. Proc. appx. at 162 (1926).

[113] Not that corporations go entirely unmentioned. *See, e.g.*, Mechem, supra note 90, at § 130 (noting that private corporations have power to appoint agents; "[t]he existence of the agency and the effect of the agent's acts . . . are subject to the same rules which apply to individuals.").

[114] Mechem, *supra* note 90, at 514. The treatise illustrates this with a diagram featuring concentric circles, with "Declared or Express Authority" at its core. *Id.* at 515. Never do (or could) the lines defining the circles intersect.

for a principal's liability to a third party;[115] an agent acted with apparent authority only when the principal's manifestations to the third party concerning the agent's authority diverged from those made to the agent. Requiring divergent manifestations to agent and third party excluded the possibility—known as "lingering apparent authority"—that an agent might appear to have authority following the principal's revocation of authority when the third party lacked notice of the revocation. It also excluded the possibility that an agent might act throughout with *both* actual and apparent authority but the third party could prove the presence of apparent authority much more readily on the basis of manifestations made to it, not internal manifestations as between principal and agent.[116]

Floyd Mechem died in December 1928; Seavey's appointment as the successor Reporter rapidly followed.[117] Seavey, an Adviser from the project's beginning, had become increasingly dominant within the Agency group.[118] The final draft of the Agency Restatement presented to 1933 Annual Meeting redid the basic definition of apparent authority.[119] Defending the final draft, Seavey said of Mechem, "I do not think he quite appreciated at the time the consequences" of his definition of apparent authority.[120] Nor, it seems, did anyone else at that earlier time.[121]

Finally, individuals who served as Reporters themselves—and distinct from their Restatements once published—changed over time in many ways, occasionally distancing them from the ALI and its evolving mission. In his autobiography, published in 1940 when he was seventy-nine years old, Samuel Williston wrote in a mellow tone of codification: "It is certainly probable that at least the partial codification which we already have will be extended to other subjects."[122] The Restatement itself "can serve as a foundation for a code which would surely be superior to anything which could be struck off as an original enactment."[123] One year later, Williston's tone was not mellow when he dispatched written objections focused on the UCC project that the ALI was about to undertake jointly with the National Conference of Commissioners on Uniform State Laws (NCCUSL). Focused on a revision of the Uniform Sales Act, the proposal, in Williston's assessment, contemplated a lengthy process of state-by-state enactment, followed by uncertainty: "Even if the substance of the old rules is preserved, if they are stated in a statute in new words, litigation is invited. . . . Amendments

[115] *Id.* at 512.

[116] For this rationale, *see* RESTATEMENT (THIRD) OF AGENCY § 2.03 cmt. c. (2006).

[117] EC, Dec. 19–22, 1928, at 2 & 27 (acknowledging Mechem's death and appointing Seavey as successor Reporter).

[118] For examples, *see* DeMott, *Inherent Agency Power*, *supra* note 90, at 1823–24.

[119] *Compare* RESTATEMENT OF AGENCY § 8 ("Apparent authority is the power of an apparent agent to affect the legal relations of an apparent principal with respect to a third person by acts done in accordance with such principal's manifestations of consent to such third person that such agent shall act as his agent") (1933), *with* RESTATEMENT OF AGENCY §10 ("Apparent authority is the result of the manifestation by one person of consent that another shall act as his agent, made to a third person, where such manifestation differs from that made to the purported agent") (Tentative Draft No. 1 1926).

[120] 11 A.L.I. PROC. at 79–80 (1933) (discussing revision to Section 8). No comments came from the floor.

[121] When Mechem presented the draft—155 sections long—to the 1926 Annual Meeting, no questions or comments from the floor concerned the definition of apparent authority. 6 A.L.I. PROC. APPX. 152–53. Efforts to date to locate a set of minutes from the relevant Advisers' Conference have failed.

[122] WILLISTON, *supra* note 40, at 316.

[123] *Id.*

should, therefore, never be made without real necessity."[124] Distributed at two successive meetings of the Executive Committee,[125] Williston's objections did not dissuade its members from proceeding. His 1941 objections precede, by almost a decade, Williston's published denunciation of the Code—by that time in full draft form—in particular Article 2 codifying the law on sales of goods.[126] Although prior scholarship dates Williston's opposition to 1950,[127] he stated his position and elaborated his grounds to the ALI's Director and Executive Committee in 1941.

In Williston's published assessment, the UCC draft contained provisions "not only iconoclastic but open to criticisms I regard as so fundamental as to preclude the desirability" of enacting Article 2, if not the entire Code.[128] To be sure, Article 2 would also supersede the Uniform Sales Act (drafted by Williston) but it would also represent "the codification of a large portion of the law, where provisions are expressed in novel phraseology" repealing "statutes that have had years of judicial construction. . . ."[129] For William Twining, Williston's published critique is "a typical example of a conservative defense of the *status quo*."[130] But Williston's history within the ALI is also relevant to understanding his opposition. After all, sequencing the Contracts volume first, with Williston as its Reporter, was seen as crucial to the success of the larger Restatement venture. And notwithstanding his advanced age, Williston soldiered on through 1943 to edit the Annotations, again lending his stature and seasoned judgment to a project crucial to the Restatement's credibility and commercial prospects.[131]

But Williston's opposition to the UCC project failed to persuade the ALI's leadership. Might Williston's opposition also have anticipated the ALI's evolution into sponsorship of a large-scale codification of private law, as well as the specifics of Article 2? After all, introducing new terminology to govern "a large portion of the law" and revamping its substance is just what a code can accomplish. When the ALI's Executive Committee received Williston's 1941 objections, the challenge of articulating an

[124] EC, Aug. 29–30, 1941, App. A headed "MEMORANDUM OF ARGUMENTS PART IV In re CODE OF COMMERCIAL LAW." This text, typed on onionskin paper, does not identify the author, but that it is Williston is evident from the minutes themselves. The format implies that Lewis's practice was to have material he received retyped for distribution. The next item in Appendix A is a letter to Lewis from Schnader, *see infra* text accompanying note 166, dated August 22, 1941, reporting the "particularly good news" that Karl Llewellyn was "highly enthusiastic" about the Code as a joint project of ALI and NCCUSL.

[125] EC, May 2, 1942, at 10, referring to distribution of Williston's "objections" at meeting and at Executive Committee meeting on Aug. 29–30, 1941.

[126] Samuel Williston, *The Law of Sales in the Proposed Uniform Commercial Code*, 63 HARV. L. REV. 562 (1950).

[127] *See, e.g.*, Robert L. Flores, *Risk of Loss in Sales: A Missing Chapter in the History of the UCC: Through Llewellyn to Williston and a Bit Beyond*, 27 PAC. L.J. 161, 166 (1996) (Williston's "famed opposition to the Code came in 1950, when he was nearly ninety years old").

[128] Williston, *supra* note 126, at 562.

[129] *Id.* at 562.

[130] WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 287 (2d ed. 2012). And "Williston lived a long time . . ." Mark L. Movsesian, *Rediscovering Williston*, 62 WASH. & LEE L. REV. 207, 223 (2005).

[131] EC, June 18, 1943, at 9 (Williston to supervise and edit state Annotations through December 1, 1943, at a salary not to exceed $500). When Reporters were asked in the mid-1930s to identify candidates for statutory fixes, Williston singled out some prospects from Contracts. *See Report on Future of Institute*, *supra* note 34, at 426 (noting that Williston had already drafted a proposed Uniform Written Obligations Act and a draft statute allocating risk of loss in contracts to sell real property to the seller unless the buyer is in possession).

agenda for the ALI's future work, beyond completing the Restatement, loomed large. Director Lewis was aware by then that Karl Llewellyn—Reporter for NCCUSL's revision project for the Uniform Sales Act—was enthusiastic about linking in the ALI. William Schnader, NCCUSL's president,[132] announcing Llewellyn's enthusiasm to Lewis, went further, observing that "the Institute's participation in this job is necessary to really round out the Institute's work on the Restatement."[133] In short, perhaps Williston's institutional affinity for the ALI went only so far.[134]

IV. The American Law Institute as an Ongoing Institution: From the "Publishing Problem" of the Restatements to Institutional Stability

Early on, the ALI's leadership recognized both that an annual membership meeting was imperative and that the agenda of the meeting must include "matters of first importance" for discussion.[135] Once the ALI introduced dues for members, the significance of the content of the annual agenda went beyond sustaining members' engagement with the ALI's work. The Restatement itself had succeeded by the mid-1930s on many criteria: increasing acceptance by courts, as evidenced by citations in published opinions, plus mostly favorable reviews and strong sales of its individual volumes. The volumes published by 1935 sold in numbers "far larger than … any other legal text book…."[136] Contracts alone, Lewis announced in 1934, had the greatest sales volume for any law book;[137] to his professed surprise, one year following its publication, Agency's sales equaled those of the Contracts volume at the same point.[138] Toward the end of the decade, as the Restatement was still far from completion and money was tight for the ALI and its projects, the Restatement itself (notwithstanding its sales) was central to the ALI's financial woes. And apart from funding issues, what could sustain the ALI as an institution going forward following the completion of the Restatement? Restatements of additional subjects? Revisions to already published volumes, like Conflict of Laws? Further work on criminal-justice statutes? Their individual importance undeniable, a steady diet of these possibilities could fall short of the ambition represented by a commitment to work on "matters of first importance."

From its start in 1923, the ALI was clear that it would hold the copyright to its publications; the title page would give Reporters "due credit."[139] But the ALI itself would

[132] *See infra* text accompanying notes 166–69.

[133] EC, Aug. 29–30, 1941, App. A (letter dated Aug. 22, 1941 to Lewis from Schnader).

[134] Nor was Williston the only prominent participant to defect when the ALI's evolution became unacceptable. For William Prosser, the Reporter for Restatement (Second) of Torts, the ALI to which he presented a draft in 1969 "was not quite the same" as it had been in 1965 when the ALI adopted Prosser's draft section on products liability. Confronted by the success of a motion at the 1969 Annual Meeting directing him to revise the draft's treatment of private nuisance, Prosser retired as Reporter soon after. Abraham & White, *supra* note 14, at 66.

[135] *1923 Report*, *supra* note 12, at 93.

[136] *Report on Future of the Institute*, *supra* note 34, at 412.

[137] 11 A.L.I. Proc. 329 (1934).

[138] "We were, of course, aware of the singular fact that many lawyers do not regard the law of Agency with equal seriousness…." *Id.*

[139] CO, May 19, 1923, 1 A.L.I. Proc. 28 (Council Resolution 31).

not serve as the publisher. It formed a partnership for that purpose with two commercial publishers (West Publishing Co. and Lawyers' Co-Op Publishing). With Goodrich as ALI's representative, the board of ALIP met for the first time in 1932 and entered into publication contracts for the Contracts and Agency volumes.[140] Timed for September publication in 1932 and 1933 (and thus the prospect of law school usage), Contracts and Agency set a pattern to be followed for the remainder of the volumes. This consisted of staggering the release of individual volumes at predictable intervals,[141] a pace that would not swamp the market. ALI's partners, grounded in their commercial experience, shaped some ALIP decisions; neither ALI members nor judges received complimentary copies of Restatement volumes, and no price discount was offered to members.[142] ALI's partners in ALIP also underscored the importance of a firm commitment to publishing a volume per year, as Goodrich duly communicated to the Executive Committee.[143] A reliable publication schedule mattered to law book dealers, whose representatives (including their traveling sales forces) needed books to sell to their customers on a predictable basis. A reliable publication schedule also helped to secure much-prized standing orders to purchase successive Restatement volumes.[144]

ALI's partners in ALIP also emphasized the importance of the Annotations to making the Restatement volumes marketable. As Goodrich summarized the stakes for the Council in 1934, doing state annotations—to pre-Restatement cases keyed to numbered Restatement provisions—represented a "gigantic task," but the success of the work on the Restatement depended on it "to no slight degree."[145] As detailed earlier, viewed on an intellectual plane, the Annotations were important to overcoming lawyers' skepticism; on the plane of commercial publishing, the Annotations were crucial to selling Restatement volumes into a lawyers' market that valued case citations. Sales in states with Annotations for Contracts and then Agency greatly exceeded sales in states with no Annotations,[146] although ALIP charged more for Restatement volumes packaged with Annotations.[147]

The Annotations also made the Restatement "a publishing problem," in Goodrich's assessment. Having encouraged state bar associations to cooperate with it in producing Annotations, the ALI had "a strong moral obligation" to publish them.[148] Restatement volumes themselves had been priced with the objective of attaining maximum circulation, as well as the "friendly" support of the law book trade.[149] The inaugural Contracts volume was priced to sell, "as low as it was safe to make it," but

[140] CO, Feb. 25–27, 1932, at 10.
[141] 11 A.L.I. Proc. 326 (1934).
[142] CO, Dec. 14–16, 1932, at 38.
[143] EC, Apr. 17, 1943, at 11 ("very unfortunate if the Institute should fail in this connection," comment occasioned by potential delay in scheduled publication of a Property volume).
[144] Standing orders were prized because they secured future sales without additional marketing effort on a per-volume basis. Internal shorthand termed the business they represented the "S.O.B." list, which carried "no sinister significance." EC, Oct. 22, 1932, at 20 (H.F. Goodrich).
[145] CO, Dec. 18–21, 1933, at 17.
[146] *Id.* at 54 (sales in "Annotations" states "far outstrip" sales in other states) (H.F. Goodrich).
[147] *See infra* note 150.
[148] CO, May 10–13, 1939, at 11.
[149] *Id.* at 10.

"complicated by the Annotations problem" because their potential market was mostly limited to single states, which varied in market size, all to be sold at the same uniform price.[150] To produce the Annotations required the ALI's support, while publishing them represented a net loss to be carried by the Restatement given the pricing structure. And, Goodrich informed the Council in 1939, it was unanswerable whether "the enterprise" was profitable at that time.[151]

Over time, as the annual march of Restatement volumes continued and the Annotations program ended, ALIP became profitable, paying ALI $10,000 as its share of profits in 1944.[152] By that time, the ALI's overall financial condition—along with questions about its substantive program going forward—had compelled a series of decisions about itself. Writing on the occasion of the ALI's 75th anniversary in 1998, John Frank reassured readers that it was "thoroughly solvent," its condition of being "adequately but not excessively financed"[153] funded through a combination of membership dues and contributions, publication sales and revenues, grants for projects, and investment income.[154] These indicia of financial stability and continuity for a private-sector institution did not typify the ALI's early years. In addition to limited revenue stemming from publications, the ALI lacked an endowment and did not charge its members dues or seek financial contributions from them.

Delicate episodes in the ALI's ongoing relationship with the Carnegie Corporation shaped the ALI's resolution of issues central to its ongoing existence, beginning with how to fund its own operations, including its central office and the costs associated with holding Annual Meetings.[155] Throughout the relationship, Carnegie exercised active oversight. In 1930, it directed an inquiry into whether improvements might be made in the economy and efficiency with which Restatement work proceeded;[156] the amount of its initial appropriation would be exhausted by the end of 1931.[157] Satisfied by the investigation's findings,[158] Carnegie funding continued. In 1933, Carnegie asked whether it might be possible to reduce the salaries paid to Reporters.[159]

[150] EC, Oct. 22, 1932, at 19–20. The Contracts volume was priced at $6, with an additional charge of $3 for Annotations for a particular state, bound with the Restatement volume as a pocket part. When separately bound, the Annotations cost $1 more.

[151] CO, May 10–13, 1939, at 12.

[152] EC June 10, 1944, at 3 ($10,000 payable by ALIP to ALI upon receipt to be credited to Maintenance Fund, which supported central operation).

[153] Frank, *supra* note 14, at 27.

[154] *Id.* at 28.

[155] The Carnegie Corporation now characterizes its grant-making during this period as "marked by a certain eclecticism and perseverance in its chosen causes." *See* https://www.carnegie.org/about/our-history/past-presidents/#keppel (last visited July 8, 2022).

[156] CO, Feb. 22–24, 1930, at 25–26.

[157] 8 A.L.I. Proc. 53 (1930). On the magnitude of Carnegie's financial support, *see supra* text accompanying notes 28–29.

[158] CO Dec. 18–21, 1930, at 20–21 (reason to believe ALI was "doing the work economically and efficiently").

[159] EC, Oct. 20, 1933, at 25. Following Bohlen's incapacitation in 1937, he was paid for his ongoing availability to consult with other Reporters from his home, up through the end of 1938, with the approval of Carnegie's president. EC, June 9, 1938 at 11. Ingrid K. Bohlen, Francis Bohlen's wife, wrote a letter dated December 26, 1938, stating gratitude for "ALI's generosity in keeping up these monthly payments for so many months after all hope of activity on Mr. Bohlen's part was gone." She reported that Bohlen was unable to write and had not dictated the letter. Lewis read Mrs. Bohlen's letter to the Council. CO, Feb. 22–25, 1939, at 59. Memorializing his lifelong friend, Lewis wrote after Bohlen's death that "[h]e lost health and fortune

A special committee appointed by the Executive Committee, including the President (George Wharton Pepper), conceded that at the outset Reporters' salaries may have been "overgenerous";[160] but by 1933, to cut Reporters' pay risked "dampened enthusiasm" for the task just when the pressures on Reporters were most intense.[161] By 1938, Carnegie determined it would not fund either an endowment for ALI or the extension of the Restatement beyond the subjects included in its prior agreement.[162] Facing a projected deficit for 1938, the ALI sold securities it held.[163] Carnegie's final grant in 1940 enabled the completion of the Judgments volume of the Restatement and the continuation of ALI's central-office operations through June 30, 1941.[164] The grant came coupled with the condition that ALI secure funding for its ongoing operations as a going concern from its members through membership dues or members' contributions.[165]

Separately, sustaining its members' engagement and justifying the ALI's ongoing existence required an agenda of "matters of the first importance." Although various topics and projects were under discussion, the ALI embraced the UCC project in 1942. William A. Schnader—NCCUSL's president and a member of ALI's Council—wrote in fall 1941 inviting ALI's cooperation "in the production of a Uniform Commercial Code," a project NCCUSL already had underway.[166] In winter 1942, Schnader spoke to the Council at length about the proposed code and the ALI's participation; a majority of the Council gave their unqualified support.[167] Fundraising began, backstopped by Schnader personally and his law firm.[168] The Council accepted the proposal in May 1942, subject to funding, and elected the Reporter (Karl N. Llewellyn) a member of the ALI.[169]

At the 1942 Annual Meeting, Lewis told the members that "the law relating to one commercial subject can be solved in a more satisfactory manner if it is dealt with as part of a complete code, rather than if it is treated separately."[170] Lewis also noted the

at practically the same time." William Draper Lewis, *Francis Hermann Bohlen*, 91 U. Penn. L. Rev. 377, 379 (1943).

[160] The rate was $5,000/year.

[161] EC, Oct. 20, 1933, at 25 (concluding that any cut of over 10% would be "unthinkable" and a 10% cut would save only $2,500 overall).

[162] CO, Feb. 22–26, 1938, at 5.

[163] CO, Feb. 22–26, 1938, at 7 ($10,000 in bonds).

[164] CO, Feb. 21–23, 1940, at 7.

[165] EC, Oct. 26, 1940 at 22. Annual dues ($10) began in 1941. EC, Feb. 17, 1941, at 4.

[166] EC, Nov. 1, 1941, at 5. That summer, Schnader wrote to Lewis of Llewellyn's enthusiasm for ALI's involvement. *See supra* text accompanying note 133. Earlier, in 1935, ALI and NCCUSL entered into a cooperation agreement for statutory projects of potential interest to both organizations. EC, Dec. 17, 1935, at 7. The relationship encompassed a proposed statute on Aeronautical Flight. The Council decided not to submit the draft statute to the Annual Meeting because the statute "involve[d] matters of controversial public policy affecting a growing industry," as opposed to obvious defects in substantive law; the cost of any further consideration would need to be met from sources other than the Carnegie grant. CO, May 11–14, 1938, at 14.

[167] CO, Feb. 24–27, 1942, at 36. One member (Daniel M. Kirby) was "willing to co-operate should the Institute take the work, [but] felt it was embarking in the field of legislation with which he had no experience, but that if the Institute did proceed with this work it should change its flag." *Id.*

[168] EC, May 2, 1942, at 9–10.

[169] CO, May 11–15, 1942, at 2–3.

[170] 19 A.L.I. Proc. 47 (1942).

hoped-for growth postwar in trade between the United States and "nations south of us … [e]ach of which has its code of commercial law."[171] As a consequence, legislative codification became the form for a significant portion of the ALI's work going forward, notwithstanding the objections to the UCC project expressed by Samuel Williston. Likewise, ALI's geographical orientation, as Lewis made explicit, shifted in a cosmopolitan direction to encompass Code jurisdictions, away from the sole focus on English common law antecedents[172] and their legacy in the United States.

V. Conclusion

Viewed from today's vantage point, the Restatement succeeded, but the story is messier, one overall shaped by resilience in light of contingencies of all sorts. That there is no general civil code for the United States—and none waits in the offing—could mean the Restatement succeeded in staving off an intrusion of codification, leaving the United States a "common-law" country. But the ALI itself evolved into an institutional champion of codification by embracing the UCC as a code encompassing a major swath of economic activity, albeit not a "complete code" in the terminology Lewis used in 1942.[173] Additionally, multiple relationships emerged between Restatements in particular subjects and statutes. For example, innovative provisions in the UCC's Article Two shaped the content of the Second Restatement of Contracts.[174] And the successive Restatements of Trusts furnished language that trusts legislation directly incorporated, with Restatement (Third) of Trusts and the Uniform Trust Code " 'drafted in close coordination.' "[175]

Separately, uncertainty about what the law may be on any particular point of private law does not beset contemporary lawyers with epistemic anxiety. To be sure, the Restatement helps as a well-organized secondary authority but so do dramatic advances in the technology of legal research that would have mitigated the drudgery required to produce the Annotations. Restoring a fuller history for the ALI's early era does not diminish the magnitude of its accomplishment, but it underscores that what then mattered so much—the assumed opposition of the common law and legislative codification—carries lower stakes now, accustomed as we are to working in a legal milieu in which they coexist.

The fuller history demonstrates that the both the Restatement and the institution that produced it were works in progress during the ALI's early era, as was the form of

[171] *Id.*

[172] For Williston, Article 2 of the Code was additionally problematic because it broke from the English statutory precedent, the 1893 Sales of Goods Act, which had served as his model in drafting the Uniform Sales Act. Williston, *supra* note 126, at 563–64.

[173] The UCC excludes important commercial-law topics; for example, Section 9-109(a)(1) makes its application to collateral effective only for security interests in personal property and fixtures. More generally, Section 1-103(a) expressly embraces "principles of law and equity" not displaced by particular Code provisions. Thanks to Steven Schwarcz for raising these points.

[174] Robert E. Scott, *The Uniform Commercial Code and the Ongoing Quest for an Efficient and Fair Commercial Law*, in this volume.

[175] Naomi R. Cahn, Deborah Gordon, & Allison Tait, *The Restatements of Trusts—Revisited*, in this volume, at 153.

its work. Additionally, paradox is a recurrent element in the story of the ALI and the defining accomplishment of its early era. An exemplar of ex cathedra text emerged—unaccompanied by the treatises contemplated by the original plan—but that text partnered with case annotations in several states—the Annotations—themselves necessitated by the demands that commercial publishing imposed on an organization at least partially rooted in disdain for law books that catered to a lawyers' market. A private-sector institution, which some hoped would keep control over private law with "craftsmen of the profession," turned to public relief programs of the New Deal to complete its work. And the Reporters, crucial to the ALI's institutional authorship of the Restatement, were not themselves entirely submerged as authors within it. All considered, perhaps it's a lesser paradox that an institution cast as a defender of the common law realm of private law came to champion extensive codification. Finally, by informing our understanding of the ALI as an institution, as well as the evolution of its work, the fuller history demonstrates the value of maintaining and preserving archival resources. From its early days onward, likely the ALI's leadership varied in awareness that the ALI might (and should) become a subject of historical inquiry; although the eyes of history could always explore yet more material, enough survives to tell a somewhat messier story.