

A Restatement of Jurisprudence: Why Not?

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I. INTRODUCTION

At the turn of the nineteenth century there existed in the United States a plethora of contradictory cases that highlighted conflicts between and within states regarding

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the then current state of the common law.¹ The American Law Institute ("ALI") came into existence in 1923 in order to remedy this confusing state of law with The "Restatements" of United States Law, the first of which was published in 1932.² The Restatements are now usually offered as a *fait accompli* in today's law schools, part of the legal precedent complex along with cases and statutes. But should they be?

At the outset, the rule-oriented Restatement Movement faced much criticism, mostly from Legal Realists.³ Perhaps opening itself up to more criticism by sacrificing some original objectives and operating premises of the Restatement movement, the ALI decided to include Legal Realist critics, such as Professor Karl Llewellyn, in the Restatement Second effort.⁴ This co-option of Realists led to changes in content, such as the reform-minded effort that produced the Uniform Commercial Code. The drafters also altered the form with more emphasis on commentary.⁵ These changes accentuated the actual and potential fissures in the movement.

Additionally, another factor occurred to destabilize the original Restatement objectives: special interest groups began to lobby for rules they wanted included in the Restatements.⁶ Similarly, lawyers who represented or advised these powerful

1. See GRANT GILMORE, *THE DEATH OF CONTRACT* 65 (Ronald K.L. Collins ed., Ohio State University Press 1995) (1974) (claiming that there was a "breakdown of the case law system"); G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 *LAW & HIST. REV.* 1, 7 (1997) (explaining that there was a "great volume of recorded decisions" and a "number . . . of novel legal questions"; Grant Gilmore, *Legal Realism: Its Cause and Cure*, 70 *YALE L.J.* 1037, 1041 (1961) (noting that the number of printed cases swelled in the late nineteenth century).

2. See Gregory E. Maggs, *Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 *GEO. WASH. L. REV.* 508, 513-14 (1998). Unlike the author, Professor Maggs takes a very favorable view toward the Restatements, such as the *RESTATEMENT (SECOND) OF CONTRACTS*. *Id.* at 542-43 (arguing that the *RESTATEMENT (SECOND) OF CONTRACTS* is an accurate predictor of case outcomes).

3. See *infra* notes 23-25 and accompanying text.

4. White, *supra* note 1, at 46 (noting that Llewellyn was hired to contribute to the Restatement projects).

5. *Id.*

6. See Charles W. Wolfram, *Bismarck's Sausages and the ALI's Restatements*, 26 *HOFSTRA L. REV.* 817, 820 & n.10 (1998) (pointing out that lobbying was done during ALI processes); *id.* at 821 (discussing insurance industry lobbyists at work in the ALI drafting process). Nonetheless it is asserted that the ALI process is sufficiently public to be a worthwhile effort. *Id.* at 833-34. Professors Conk and Rubin are much more critical. See George W. Conk, *Punctuated Equilibrium: Why Section 402A Flourished and the Third Restatement Languished*, 26 *REV. LITIG.* 799, 801 (2007) (arguing that the *RESTATEMENT (THIRD) OF TORTS* wrongfully dampens the duty of care owed to innocent consumers); Edward L. Rubin, *Thinking Like a Lawyer, Acting Like a Lobbyist: Some Notes on the Process of Revising UCC Articles 3 and 4*, 26 *LOY. L.A. L. REV.* 743, 787 (1993) ("Banks were well represented; corporate users were represented intermittently; but consumers were virtually unrepresented."). While some critics argue that ALI restatements involve politics from top to bottom, others extol the ALI process. See generally *Symposium on the American Law*

interests were sometimes able to infiltrate the leadership directing the Restatement revisions.⁷ Furthermore, after The Restatement (Third) of Torts took a more restrictive view of products liability than existed in Restatement Second, critics also pointed out that the Restatement process is obviously political.⁸ Thus, the question is whether The Restatements are a help or a hindrance.

Despite the perpetual questioning of The Restatements' original mindset and ongoing worth, the Restatement Movement is alive and well. In fact, the reach of The Restatements is ever-expanding into new areas of legal theory. For instance, commentators have recently proposed a Restatement of Statutory Interpretation.⁹ Additionally, despite the conflict in the Canons of Construction, commentators have proposed a Federal Rules of Statutory Interpretation.¹⁰ If a Restatement of Statutory Interpretation could exist, why stop there? Why not create the Restatement of Jurisprudence?

In this essay, I first examine the beginning of the Restatement Movement and the early critiques of the Restatements. Second, I discuss the disturbing question of whether the Restatements originally sought reform. In other words, was the ALI really composed of a stodgy conservative elite seeking to cement the status quo or was it reform-minded? Third, I briefly consider the reaction of the ALI to early criticisms of the Restatement First. Fourth, I discuss whether special interest groups are poisoning the Restatement process. Fifth, I explore current suggestions for an unlikely project: a Restatement of Canons of Statutory Interpretation and a Federal Rules of Statutory Interpretation. Sixth, I attempt an appraisal of the Restatement Movement and its previously discussed problems and begin to consider a Restatement of Jurisprudence. Finally, I offer a skeleton draft of the Restatement of Jurisprudence. Why not?

Institute: Process, Partisanship, and the Restatements of Law, 26 HOFSTRA L. REV. 567 (1998).

7. See Wolfram, *supra* note 6, at 820 (explaining the lobbying influence); see also *infra* note 65.

8. See Conk, *supra* note 6, at 801 (explaining how, in substantial contrast to the previous restatement, the Third Restatement favors industry at the expense of the consumer). See generally Symposium, *supra* note 6.

9. See, e.g., Gary E. O'Connor, *Restatement (First) of Statutory Interpretation*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 333, 334 (2004).

10. See Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* 238-43, in LEGISLATION: UNDERSTANDING AND USING STATUTES 228 (Peter L. Strauss ed., 2006) (arguing that because canons often conflict, judges in individual cases will use their judgment to decide which one to follow); Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 HARV. L. REV. 2085, 2148 (2002) (explaining Llewellyn's critique and noting that the conflicting canon debate remains unresolved).

II. SOME REASONS FOR THE RESTATEMENT MOVEMENT AND EARLY REALIST CRITIQUE OF LANGDELLIAN MODEL

Starting in 1932, the ALI started publishing "Restatements" of United States law.¹¹ These Restatements aimed to set forth the law in such fields as contracts, torts, and property. A major reason for the Restatement Movement was that, as early as the beginning of the twentieth century, the conservative legalist establishment became concerned that the law was getting out of control due to the growing mass of reported cases.¹² The Restatement leading lights, according to Professor Gilmore, sought a rigid mold, motivated by the desire to protect the common law case system from "statutory encroachment."¹³ This was a conservative response which, "when looked on as a delaying action," Gilmore sees as "remarkably successful" in delaying "statutory encroachment."¹⁴

The plethora of cases, often conflicting, were tantamount to fodder for Legal Realists in the 1920s and 1930s.¹⁵ Legal Realists attacked the conservative legal positivist Langdellian approach to law extant in the late nineteenth and early twentieth centuries.¹⁶ Briefly, the model introduced by Langdell in the latter part of the nineteenth century called upon the professors writing casebooks to select cases

11. See Maggs, *supra* note 2, at 514.

12. See John P. Frank, *The American Law Institute, 1923-1998*, 26 HOFSTRA L. REV. 615, 620 (1998) ("The [ALI's] founders and developers were not exclusively, but were to a considerable extent, the conservative bulwark of the American law."); see also *supra* note 1 and accompanying text; Conk, *supra* note 6, at 806 (calling the ALI a "starchy bastion of the legal establishment"). But see N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 LAW & HIST. REV. 55, 56 (1990) (noting that almost all legal historians were wrong in asserting that director Lewis was conservative, and that the conservative establishment meant to preserve case law from statutory contamination); see also *infra* notes 48-53 and accompanying text for further discussion of Hull's views.

13. GILMORE, THE DEATH OF CONTRACT, *supra* note 1, at 65.

14. *Id.* at 65-66. Gilmore notes, however, the "schizophrenic" nature of the RESTATEMENT OF CONTRACTS. *Id.* at 66. In any event, Gilmore later seemed to embrace the Restatement Movement, declaring that the disease diagnosed by Realism was cured by the Restatements and adoption of Uniform State Laws. See Gilmore, *Legal Realism: Its Cause and Cure*, *supra* note 1, at 1043-44, 1048 (1961); see also Maggs, *supra* note 2, at 515 ("Despite . . . academic objections, the Restatement took the judiciary by storm. Courts relied on the work heavily and ultimately cited its rules in over twelve thousand cases.").

15. See GILMORE, THE DEATH OF CONTRACT, *supra* note 1, at 65; Gilmore, *Legal Realism: Its Cause and Cure*, *supra* note 1, at 1041 (explaining the explosion in volume of printed cases).

16. See GILMORE, THE DEATH OF CONTRACT, *supra* note 1, at 65; White, *supra* note 1, at 34-45 (providing an excellent and extensive account of Realist critique); see also Myres S. McDougal, *Future Interests Restated: Tradition Versus Clarification and Reform*, 55 HARV. L. REV. 1077, 1086 (1942) (arguing that the Restaters only restated ambiguities and failed to provide predictability). But see Maggs, *supra* note 2, at 543 (noting that the Restatement rules appear to provide predictability).

from which the prevailing rules of law were to be extricated.¹⁷ The conservative legal elite's reaction to the case inflation, and the aforementioned Realist attack, led to the founding of the ALI in 1923, which consequently spawned the Restatement Movement.¹⁸

The ALI was composed largely of status quo legalists.¹⁹ Recent scholarship, however, has questioned whether this emphasis on the conservative nature of the Restatement Movement is entirely accurate.²⁰ It is argued that the Executive Director of the ALI Restatement Project, William Draper Lewis, was reform minded and the Restatement First Series reflected a reform motif.²¹ If true, and if the Restatement First Series did commingle status quo formalism with reform effort, then the fault line existed even in the First Series. This question of whether The Restatements First were reformist is pursued in section III.²²

In any event, the Restatement Movement was controversial both within the ALI, which produced it, and by others outside the ALI.²³ After publication of the first effort, the Restatement of Contracts in 1932, critics, mostly Legal Realists, attacked the Restatement Movement; some finding it "fantastic."²⁴ Fundamental to the dispute was whether there could be law as science or on the other hand only a science about law.²⁵

One Realist critic accused the Restaters of "suppressing facts."²⁶ An eminent Restater replied that he bitterly resented such statements.²⁷ Another critic suggested a

17. See White, *supra* note 1, at 6.

18. See GILMORE, *THE DEATH OF CONTRACT*, *supra* note 1, at 65 (discussing how the Restatement Movement was an "almost instinctive reaction of the legal establishment" to the realist critique).

19. See Frank, *supra* note 12, at 620.

20. See Hull, *supra* note 12, at 56 (arguing that legal historians are wrong to assert that director Lewis was conservative, and that the conservative establishment aimed to preserve case law from statutory contamination); see also Patrick J. Kelley, *Introduction: Did the First Restatement Adopt a Reform Agenda?*, 32 S. ILL. U. L.J. 1, 11 (2007) (discussing Professor Hull's work and noting that she appears to have been right, in part, in labeling the Restatement Movement as progressive).

21. See Hull, *supra* note 12, at 56.

22. See *infra* note 52 and accompanying text.

23. See White, *supra* note 1, at 34-46 (providing an excellent, extensive, and comprehensive account of Realist and related critique). McDougal described the RESTATEMENT OF PROPERTY drafters' assumption of emphasis on doctrine as "little short of fantastic." *Id.* at 36 (quoting Myres S. McDougal, Book Review, 32 ILL. L. REV. 509, 513 (1937) (reviewing RESTATEMENT OF THE LAW OF PROPERTY, THE AMERICAN LAW INSTITUTE (1936))).

24. *Id.*

25. See *id.* at 47 (Professor White describing how Langdell's law as science proposition was shown to be out of touch with reality).

26. EDWARD STEVENS ROBINSON, *LAW AND THE LAWYERS* 36 (The Macmillan Company 1935).

27. Herbert F. Goodrich, *Institute Bards and Yale Reviewers*, 84 U. PA. L. REV. 449, 451-52 (1936).

fundamental flaw.²⁸ Was it possible to restate what had not been stated in the first place and might be incapable of statement?²⁹ There were cries of reproach for the addition of section 90 to the Contracts Restatement from a distinguished British scholar who described section 90 as vague and reformist.³⁰ The Restatement doctrines were seen by critics as "outdated, hopelessly abstract," or even worse: "simply incoherent."³¹

The essence of the Realist critique is that a perfect Restatement of Contracts would still be problematic.³² The Restatement First drafters were operating under the conceptualism inherited from Langdell.³³ Langdell proposed that the law consisted of relatively few fundamental principles that could be induced from cases chosen.³⁴ According to the Langdellian Model, novel questions could not arise.³⁵ Leading up to the drafting of the Restatement First series, the ALI progenitors adopted this model but departed from it in their pronouncements by noting that many "novel" questions were arising.³⁶ However, they thought it would not be productive to subsume the novel questions into the Restatements by codas and epicycles.³⁷

So, the mindset of the ALI at its inception was to create order out of chaos and set out the rules of law.³⁸ Gradually, however, "imperfections" infected this lofty

28. See ROSCOE POUND, AN INTRODUCTION TO THE PHILOSOPHY OF LAW 282-83 (Yale University Press 1922).

29. See *id.*

30. See Frederick Pollock, Book Review, 47 HARV. L. REV. 363, 365 (1933) (stating that section 90 of the RESTATEMENT OF THE LAW OF CONTRACTS leaves the author "in a fog" and fearing that equitable part performance is being smuggled in contrary to clear House of Lords rejection of such doctrines). Section 90 allows enforcement of a contract even though there is no consideration if there is reasonable reliance and it would be unjust not to do so. RESTATEMENT OF THE LAW OF CONTRACTS § 90 (1932).

31. See White, *supra* note 1, at 46.

32. See *id.* at 47 (noting that even a "perfected" Restatement was doomed to be out of touch with legal reality). The Realist critics had a field day attacking the Restater's formalist presumptions. See *id.* at 34-40. But many Realists substituted one brand of formalism for another. This includes the thought that certainty in the law could be found in social scientific studies. See *id.* at 42-43 (explaining how Realists thought that "empirical social scienc[ce] would yield a sense of what the law 'really' was").

33. See GILMORE THE DEATH OF CONTRACT, *supra* note 1, at 65.

34. See White, *supra* note 1, at 6.

35. *Id.* at 6.

36. *Id.* at 7.

37. *Id.* at 22-23 (stating that the Restaters did not want to create numerous "subsidiary rules").

38. See W. Barton Leach, *The Restatements As They Were in the Beginning, Are Now, and Perhaps Henceforth Shall Be*, 23 A.B.A. J. 517, 518 (1937) ("[The Restatement] would give no reasons; it would cite no authority; it would state no history; it would concede no doubt or divergence."); Maggs, *supra* note 2, at 514 (explaining that, in the beginning, the ALI "did not desire to create new rules"). But see Kelley, *supra* note 20, at 2 (summarizing Professor Hull's research

goal: reasons, history, and even the citation of state cases were sandwiched in.³⁹ Once reasons, state cases, and history are included in a Restatement, for example, Property, the potential for a fault line is created. The problem was that it is one thing to state legal rules and principles but another to compare the Restatement propositions with what judges had actually done in the past.⁴⁰

Critics thus expressed doubt that there was any “law” in the 48 states, with the added variable of an overarching federal system, that could be expressed.⁴¹ Even one of the Reporters of a Restatement pointed out premises or rules of the enterprise that were troublesome.⁴² Specifically, Restaters operated under a restrictive set of internal rules.⁴³ First, a rule the Restaters decided to state could not be criticized in the Restatement.⁴⁴ Professor Barton Leach, Reporter for the Restatement of Property, was troubled by a future interest rule that provided for the inalienability of a right of entry and the destruction of such interest if conveyance is attempted.⁴⁵ Leach was not a Realist but had his own reform agenda which he was unable to effectuate. Thus, Leach was highly critical of this and some other future interest rules adopted but remained silent until after the publication of the Restatement of Property.⁴⁶

III. THE ALI RESTATEMENT FIRST ELITE: CONSERVATIVE OR REFORMIST?

The conventional wisdom, which is accurate, is that the founders of the ALI in control of the Restatement Movement were conservative.⁴⁷ Professor Hull qualifies

suggesting that reform-minded Restaters competed with Restaters seeking to maintain the status quo); Hull, *supra* note 12, at 64 (arguing that the actual founders of the ALI were pragmatic progressives and that the founder’s opponents were conservative formalists); *id.* at 70 (explaining how Professor Beale was nominally in charge of the founding committee and yet his conservatism had little influence). Participants at a recent AALS conference debated the extent to which the original Restatements were reformist. Kelley, *supra* note 20, at 2. Hull does not document what in the early Restatements was reformist but, rather, looks at the historical events giving rise to the first Restatements. *Id.* at 9.

39. See Leach, *supra* note 38, at 518-19.

40. See Charles E. Clark, *The Restatement of the Law of Contracts*, 42 YALE L.J. 643, 654 (1933) (explaining that the “law” does not exist where the Restatement attempts to react to an ever-increasing amount of case law and statutory authority).

41. See, e.g., *id.* at 654.

42. See Leach, *supra* note 38, at 518.

43. See *id.* at 519.

44. See *id.*

45. *Id.* at 519-20.

46. See generally W. Barton Leach, *Perpetuities in Perspective: Ending the Rule’s Reign of Terror*, 65 HARV. L. REV. 721 (1952); W. Barton Leach, *Perpetuities in a Nutshell*, 51 HARV. L. REV. 638 (1938).

47. See *supra* note 12.

this accurate assessment.⁴⁸ Hull contrasts the political tilt of the high level officials, mostly bar association luminaries who held the highest titled offices,⁴⁹ with executive director, William Draper Lewis. While the former were conservative bar elite, Hull states that Lewis was a progressive pragmatist.⁵⁰ Nonetheless, Hull states that Lewis and other "progressive pragmatists" in charge made compromises with conservatives in their own ranks.⁵¹ Presumably related is the question of whether the Restatement First series was status quo or reformist. Professor Patrick Kelley, commenting on the AALS symposium addressing this issue, appears to derive an equivocal conclusion: the answer depends on who the reporters were and what the term reform means.⁵² Even Professor Hull seems to have concluded with a definition of "reform" that is watered down: some founders hoped clarification would lead to "liberalization."⁵³

IV. REACTION OF ALI ELITE: COOPTION OF CRITICS AND CHANGE OF KEY OPERATING PREMISES

The elite Restatement officials may have been "stunned" by the previously mentioned Realist critics of Restatements First.⁵⁴ Perhaps this in part led to the definite stylistic break between the First and Second Restatements. More extensive commentary and new rules appeared within Restatements Second.⁵⁵ The Uniform Commercial Code was commissioned, and a prominent Realist, Professor Karl Llewellyn, was co-opted to supervise and institute reform.⁵⁶ Moreover, the Second Restatement drafting, which started around 1952, to some extent rejected major premises of original Restaters.⁵⁷ Commentators have pointed out that instead of seeking enduring principles and rules, the Second Restaters supposedly stated policies from legislative reform from the 1930s to the 1970s.⁵⁸

48. See Hull, *supra* note 12, at 56 (arguing that almost all legal historians were wrong in asserting that director Lewis was conservative, and that the conservative establishment attempted to preserve case law from statutory contamination).

49. See generally Hull, *supra* note 12.

50. *Id.* at 83 (writing that Lewis was a "pragmatic progressive" with a reformist agenda).

51. *Id.* at 86.

52. Kelley, *supra* note 20, at 2-3.

53. See *id.* at 11; see also *id.* at 10 (explaining how Hull defines Progressivism such that, by definition, Progressivists have a "reform agenda").

54. White, *supra* note 1, at 46.

55. See *id.*; Maggs, *supra* note 2, at 516-17.

56. White, *supra* note 1, at 46.

57. See GILMORE, THE DEATH OF CONTRACT, *supra* note 1, at 75-76; Maggs, *supra* note 2, at 516-17.

58. See GILMORE, THE DEATH OF CONTRACT, *supra* note 1, at 76.

V. SPECIAL INTERESTS SOMETIMES LOBBY ALI RESTATEMENT PROCESS

A. *Restatements*

Another departure from the Restatement First *modus operandi* which indicates further fault lines follows. A growing body of literature questions the bias of the ALI and the bias of related bodies in their role as drafters of proposed uniform state laws.⁵⁹ One commentator stated that ALI representatives claim they are not representing their clients at the revision meetings.⁶⁰ For example, the lawyers who make their way into the revision group of legal rules about a bank's liability to its customers, Rubin argues, share the mindset of the banking elite.⁶¹ Unconvincingly, they say they check their clients, like coats, at the door.⁶²

The use of bank counsel in ALI law projects has been criticized, apparently unsuccessfully, by numerous commentators since the early 1930s.⁶³ For example, Professor Rubin criticizes the ALI procedures in formulating the Restatement part concerned with banking laws.⁶⁴ A particularly devastating account relates an encounter of a lawyer involved in the ALI process of Restatement of banking insurance laws.⁶⁵ He found himself in a Texas court being questioned about an ALI provision with which he was involved.⁶⁶ The Texas Court branded the ALI Restatement provision as bought and paid for by the insurance companies who benefit from it.⁶⁷ A judge stated that the court intended to reject the Restatement provision because it did not protect the insured and excoriated the advocate for his lobbying effort that encouraged the ALI to accept the provision.⁶⁸

The attacks, however, are not the whole story. The Restatement Movement has many defenders. For example, Professor Maggs maintained the Restatement (Third) of Contracts contains several desirable reform provisions.⁶⁹ In fact, he has tracked

59. See *supra* note 6 and accompanying text; see also Ryan E. Bull, Note, *Operation of the New Article 9 Choice of Law Regime in an International Context*, 78 TEX. L. REV. 679, 680 n.6 (1999) (providing an extensive list of sources criticizing the ALI process, including the argument that concentrating quasi-lawmaking power in a small group of private, elite, and possibly biased parties was not in the public interest).

60. Rubin, *supra* note 6, at 748-49.

61. *Id.* at 749 (explaining that, from the perspective of banker's lawyers, claimants against banks "tend to be careless, mistaken or dishonest").

62. *Id.*

63. *Id.* at 748 & n.18.

64. *Id.* at 787.

65. See Lawrence J. Fox, *Leave Your Clients at the Door*, 26 HOFSTRA L. REV. 595, 613-14 (1998).

66. See *id.*

67. See *id.* at 614.

68. See *id.*

69. Maggs, *supra* note 2, at 542; see also Frank, *supra* note 12, at 638-39 (noting that the

their acceptance in a number of cases that he cites.⁷⁰ He concludes the Restatement of Contracts is a vehicle for valuable reform.⁷¹ But the Maggs analysis raises another question. How can one prove that but for the Restatement, the reform would not have occurred?⁷² In short, is it not closer to the truth that the Restatements are convenient window dressings for decisions the courts want to make? Would the decisions have been different without the Restatement?

B. *Uniform State Laws*

A growing body of literature also questions the bias of the ALI and related bodies in their role as drafters of proposed uniform state laws.⁷³ Professor Conk argues that the corporate interests prevailed on the ALI to water down products liability to a vague and meaningless formula of cost benefit analysis, rejecting provisions that were more favorable to consumers.⁷⁴ Another commentator stated that it may be wrong for the ALI to use its private veneer to draft Restatements and uniform state laws because the ALI may be susceptible to private interest group pressure.⁷⁵

Professor Rubin takes the ALI to task in their drafting of Articles 3 and 4 of the Uniform Commercial Code.⁷⁶ He points out succinctly: "Banks were well represented; corporate users were represented intermittently; but consumers were virtually unrepresented."⁷⁷ The problem is that the ALI cloak masks the fact that the drafting and lobbying group was dominated by the banking industry.⁷⁸ Rubin

Restatements have had a huge and successful impact via real world application).

70. Maggs, *supra* note 2, at 542, 543-55 (providing an appendix tracking citations to certain Restatement sections).

71. *Id.* at 542-43.

72. See Wolfram, *supra* note 6, at 819-20 ("To what extent Restatements in fact exert the intended impact on courts is unknown and perhaps unknowable."). Wolfram points out that Restatement inspired or not, "change-the-landscape decisions" may occur in any field at any time. *Id.* at 820.

73. See Rubin, *supra* note 6, at 788 (arguing that the ALI and The National Conference of Commissioners on Uniform State Laws (NCCUSL) "should be extensively reformed or entirely abolished" if they again allow the infiltration of the banking industry as they did with the Article 3 and 4 revision process). *But see* Maggs, *supra* note 2, at 515 ("Despite these academic objections . . . [c]ourts relied on the work heavily and ultimately cited its rules in over twelve thousand cases.").

74. Conk, *supra* note 6, at 801 (commenting that the Third Restatement differs substantially from the prior Restatement in that the Third Restatement favors industry at the expense of the consumer).

75. See Rubin, *supra* note 6, at 788.

76. *Id.* at 743, 785, 787-88 (pointing out that "the ALI and NCCUSL played the game like ordinary lobbyists" trying to "ram through" pro-banking legislation and yet "purport[ed] to represent the public interest").

77. *Id.* at 787.

78. *Id.* at 788.

concludes that the results were disgraceful and that the responsible organizations should be reformed or abolished.⁷⁹

VI. A RESTATEMENT OR FEDERAL RULES OF CANONS OF STATUTORY INTERPRETATION? WHY NOT?

Some commentators have recently made a flurry of suggestions for a surprising project: a Restatement of Rules of Statutory Interpretation.⁸⁰ Not to be outdone, some commentators have proposed a Federal Rules of Statutory Interpretation.⁸¹ One might be forgiven for expressing the thought that Llewellyn put both these possibilities in the deep freeze with his classic work on dueling canons. For every important statutory interpretation canon, Llewellyn argues that another canon is lurking capable of an opposite result.⁸²

The Statutory Interpretation Restatement literature is aware of dueling canons and frank about the difficulties.⁸³ Are the canons of statutory interpretation reducible to rules? The answer given is disarming; it is better to have some rule (no matter what?) than no rule.⁸⁴ These proponents say there is no real problem about “lack of rules” if you look at statutory interpretation in practice.⁸⁵ The real problem they find is over-exposure to scholarly commentary on statutory interpretation and Derrida deconstruction.⁸⁶ It is better to discard both the scholars and the French.⁸⁷ Also, it is important to remember that such efforts of structuring law domains, such as treatises, have similar problems.⁸⁸ Thus, this recent flurry of commentators seems undaunted by potential difficulties of a Statutory Interpretation Restatement, or even Federal rules on the subject.

But pausing a moment for some reality therapy, Legal Realists would counter this move to tout a Statutory Interpretation Restatement by pointing out that courts may be result oriented. In other words, the canons of construction may be mere

79. *Id.*

80. *See generally* O'Connor, *supra* note 9.

81. *See generally* Rosenkranz, *supra* note 10.

82. LLEWELLYN, *supra* note 10, at 239-43 (displaying a catalogue of some of Llewellyn's conflicting canons); Rosenkranz, *supra* note 10, at 2148 (restating the “classic Llewellyn critique...that each canon actually has a counter-canon”).

83. *See* O'Connor, *supra* note 9, at 362; Rosenkranz, *supra* note 10, at 2148.

84. *See* O'Connor, *supra* note 9, at 363-64 (citing Rosenkranz, *supra* note 10, at 2157).

85. *See, e.g., id.* at 362-63 (explaining that in the real-world “there is much common ground” regarding statutory construction and that “many different courts construe many different statutes on a regular basis, with some degree of success”).

86. *Id.* at 363 (explaining that “too much exposure to Derrida” and over-exposure to law review articles on statutory interpretation lead some “to doubt that a coherent approach to statutory interpretation is possible”).

87. *See id.*

88. *Id.* at 362.

veneers to hide policy preferences.⁸⁹ As mentioned above, proponents of a Canons of Statutory Interpretation Restatement are mindful of the Llewellyn critique that canons travel in contradictory pairs.⁹⁰ However, a Restatement proponent continues, even if Llewellyn is correct, Congress could, for example, exclude one of the conflicting pairs.⁹¹ For example, the canon *expresio unius exclusio alterius* could be relegated to the trash heap. While a Restatement proponent points out the use of legislative history is highly controversial on the current Supreme Court,⁹² he adds that Congress could end the debate by, for example, excluding legislative history.⁹³

Trying to eliminate this particular rule of interpretation, or to eliminate legislative history, may meet severe resistance from some members of Congress. Congress would, of course, need to pass a Federal Rules of Statutory Interpretation. However, Congress and the Court may be at odds over the prevalence of a particular law and policy. This friction could exist because Congress seeks to project its policy views and the Court seeks to impose its views.⁹⁴ Moreover, it is not just the liberals who might wish their policy to trump the Court's preferred policy. The Justice Scalia "textualists" are in the class of offenders as much or more than anyone else.⁹⁵ So, even if Congress passes the Federal Rules of Interpretation, the Court might not pay any attention to them.⁹⁶

Lurking in this dispute about use of canons are conflicting jurisprudential frames. For example, one commentator reviewing the question of statutory interpretation norms rejected the so-called dynamic interpretation.⁹⁷ She favors statutory

89. See Rosenkranz, *supra* note 10, at 2148 (explaining that some critics of canons find them to be nothing more than "a veneer for judges' policy preferences").

90. See *supra* notes 82-83 and accompanying text.

91. Rosenkranz, *supra* note 10, at 2148.

92. *Id.* at 2150 & n.300 (explaining that Justice Scalia disapproves of using legislative history while Justice Breyer finds it "invaluable").

93. *Id.* at 2151 ("Congress might end this debate with a one-sentence statute: 'The United States Code shall [or shall not] be interpreted with deference to pre-enactment legislative history.'").

94. See Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes To You?*, 45 VAND. L. REV. 561, 562, 578 (1992) (explaining how congressional purpose is easily thwarted by the manipulation of canons of construction by courts).

95. See *id.* at 562 (explaining that Justice Scalia and his fellow conservatives' use of canons make them prime offenders when it comes to thwarting congressional purpose).

96. See Adam W. Kiracofe, *The Codified Canons of Statutory Construction: A Response and Proposal to Nicholas Rosenkranz's Federal Rules of Statutory Interpretation*, 84 B.U. L. REV. 571, 606 (2004); *Id.* at 580 ("General interpretive instructions are often simply ignored by the courts."). Kiracofe suggests that Congress could act by attaching a particular canon to a specific statute, thereby guiding courts in their interpretation of statutes. *Id.* at 584-85, 607. This suggestion is problematic, however, because more confusion—not less—is introduced when Congress enacts additional interpretive framework. See *id.* at 600 & n.148 (listing distinguished critics who "ridicule such approaches").

97. Amanda L. Tyler, *Continuity, Coherence, and the Canons*, 99 NW. U. L. REV. 1389, 1428 (2005) (arguing that "those canons that advance statutory coherence and stability . . . play a valuable

interpretation canons that reinforce stare decisis and continuity.⁹⁸ She rejects commentators who see the law as a dynamic responsive operation, alert to current congressional signals and changing social norms.⁹⁹ She describes these, pejoratively, as “political winds.”¹⁰⁰ With all this ideology at work, the proposed Restatement of Jurisprudence may face not only political winds but stormy weather.

VII. SUMMARY

In summary, the problem of an increasing outpouring of potentially conflicting cases was and is a real problem. The goal of the Restatement Movement, to create order out of chaos, is and was understandable. But the Restatement Movement has been criticized from the outset.¹⁰¹ The Movement presumes the validity of the Langdellian legal positivist frame.¹⁰² The thrust of the Restatement First Series was to enshrine law acceptable to the conservative elite behind the movement.¹⁰³ That there are rules of law that can be set out like chess rules is highly controversial.¹⁰⁴ To the extent that the Restatements did or will engage in reform, there will be controversy. Thus, displayed is the potential for policy or political fissures inherent in any movement to say what the law is at a particular time and place. Realists, Sociological Jurisprudents and others questioned that rules or even standards should be, or in fact are, the determinates of judicial decisions.

Consequently, the Restatement Project provided an important occasion for a Modernist¹⁰⁵ reaction. This Modernism, perhaps inadvertently promoted by the conservative Restatement Movement, has led to questions about the value of the Restatements.¹⁰⁶ Legal Realists and others had a field day criticizing the Restatement mode and content.¹⁰⁷ More recently, commentators have criticized the Restatement

role within a greater interpretive framework that protects the stability of statutory law by elevating the values of continuity, coherence, and predictability and embracing the idea that only modest change to the statutory landscape should follow in the absence of evidence of congressional desire to effect greater change”).

98. *Id.*

99. *Id.* at 1390-93.

100. *Id.* at 1461 (rejecting the selection of canons for the purpose of “tracking prevailing political winds or social norms”).

101. *See supra* notes 33-34 and accompanying text.

102. *See supra* note 16 and accompanying text.

103. *See supra* notes 12-13 and accompanying text.

104. *See White, supra* note 1, at 47.

105. As Professor White uses the term, “Modernism” could be taken as referring to what is today a burgeoning array of jurisprudential schools, many questioning Langdellian positivism. *See White, supra* note 1, at 1-2 (arguing that the creation of the ALI spawned “modernist jurisprudence in America”).

106. *See, e.g., White, supra* note 1, at 46-47.

107. *See id.* at 33-47.

Projects (and Uniform State Law Projects). They argue that special interest groups are using the ALI to promote their special vested interests.¹⁰⁸

Undaunted, the Restatement movement seems unstoppable. As previously stated, commentators have recently proposed a Restatement or even Federal Rules of Statutory Interpretation.¹⁰⁹ Maybe, as the Restatement of Statutory Interpretations Canons proponents say, having some rules is better than having none.¹¹⁰ Maybe the Restatement of Jurisprudence can equally satisfy (and dissatisfy) any point of view! Maybe it is better to have clarity than floundering around between contradictory rules or indeterminate principles.

Finally, are jurisprudential rules particularly helpful in determining why a case was decided a certain way? Choice of a jurisprudential frame may not necessarily constitute the real reason for judicial decisions; however, is this not the same situation that prevails for other Restatement rules? Moreover, the complaint that the Restatement of Jurisprudence only adds to the confusion will put the Restatement of Jurisprudence on a par with the other Restatements! Finally, the process of drafting a Jurisprudence Restatement may be free of vested interests using the ALI to advance their economic interests. A critic of this statement, however, asks why would it be free of such influence? Good question. Maybe some of us jurisprudes can become highly paid lobbyists! So, a Restatement of Jurisprudence? Why not? Below follows a skeleton draft.

VIII. SKELETON DRAFT: RESTATEMENT OF JURISPRUDENCE

CHAPTER I: DEFINITIONS

§a Jurisprudence: Jurisprudence is a relatively abstract arena of law. It is, in short, ideas *about* law. Jurisprudence seeks an answer to the question, what description is appropriate to describe the process of decision making in settling legal controversy processes and the nature of a legal system. What are the sources of decisions, and what is the proper attitude toward those sources? Related, what is the essential nature of law, and legal systems, if indeed they have an essential nature?

Comment:

Some commentators have given up on the definition process, saying that jurisprudence is not definable but instead is an "attitude or an aesthetic."¹¹¹

108. See *supra* notes 59-68 and accompanying text.

109. See *supra* notes 80-91 and accompanying text.

110. See *supra* note 84 and accompanying text.

111. See Jack Van Doren, Essay, *Environmental Law and the Regulatory State: Postmodernism Rears Its "Ugly" Head?*, 13 N.Y.U. ENVTL. L.J. 441, 441 (2005) (describing "postmodernism as a movement that resists definition, and which may be described as an attitude or an aesthetic").

§b Modernism: Modernism is a condition that crystallized in the eighteenth century.¹¹² Enlightenment modernist thinkers stressed the role and importance of reason.¹¹³ For them, reason is a human faculty that produces objective understanding and truth.¹¹⁴

Comment:

Advocates of Modernism stress that their conclusions derive from logical foundations.¹¹⁵ Thus, resolution of legal cases is made from rules, standards, policies, or norms derived from a legal reasoning process. An example might be the Restatement project itself.

§c Foundationalism: Foundationalists construct mental edifices using reason, which support the conclusions the writer presents.¹¹⁶

Comment:

Geometry would be an example of Foundationalism. The claim that a Restatement contains rules or standards derived from cases or other appropriate sources that resolve legal decisions is a foundationalist claim.

§d Postmodernism: Postmodernists deny the possibility of the modernist exercise, problematizing the use of reason to build foundations.¹¹⁷

Comment:

Postmodernists reject basic tenets of reason and foundationally oriented discourse.¹¹⁸ They often embrace irony and contradiction and claim that many important questions are irresolved and irresolvable.¹¹⁹ At the same time,

112. See Dennis Patterson, *From Postmodernism to Law and Truth*, 26 HARV. J.L. & PUB. POL'Y 49, 50 (2003).

113. See Adam Todd, *Neither Dead Nor Dangerous: Postmodernism and the Teaching of Legal Writing*, 58 BAYLOR L. REV. 893, 898 (2006).

114. See *id.* at 899.

115. See *id.* at 898-99.

116. See William M. Sullivan, *After Foundationalism: The Return to Practical Philosophy*, in ANTI-FOUNDATIONALISM AND PRACTICAL REASONING: CONVERSATIONS BETWEEN HERMENEUTICS AND ANALYSIS 21, 21-22 (Evan Simpson ed., 1987); William N. Eskridge, Jr. & Philip P. Frickey, *Statutory Interpretation as Practical Reasoning*, 42 STAN. L. REV. 321, n.2 (1990) (defining "foundational").

117. See Van Doren, *supra* note 111, at 441-42.

118. *Id.*

119. *Id.* at 442.

postmodernists may decline to define postmodernism as part of their problematizing rational discourse.¹²⁰

§e Formalism: Formalism is a term used to describe any system of jurisprudence that posits an objective answer to legal controversies.¹²¹

Comment:

Formalism would include positivism, natural law, policy science, legal process reasoning, and rights analysis based on asserted preexisting rights in that these approaches posit objective answers to legal disputes from foundational constructs.¹²²

§f Interest Group Pluralism: Many interest groups may seek to affect legislation. This results in Interest Group Pluralism self justification, since they argue that this prevents any one faction from getting its own way.¹²³ Accordingly, advocates of this explanation argue that a mini-democracy emerges from which proper community values emerge.

§g Classical Liberalism: This arises as a modernist mode. In this modernist construct, advocates may stress *laissez-faire* and the invisible hand.¹²⁴ In short, advocates are formalists relying on secular preexisting rights.¹²⁵ It is the business of government to protect those rights.¹²⁶ Private property rights are central, and direct democracy cannot be trusted because factions not possessing property may not trust private property as an institution. Property rights thus posited may be based on natural law.¹²⁷

§h Nihilism: Formalists and others attack opponents such as Critical Legal Studies (“CLS”) advocates, calling them “nihilistic.”¹²⁸ They find that the CLS and Legal

120. *Id.* at 441.

121. *See generally* Frederick Schauer, *Formalism*, 97 YALE L.J. 509 (1988).

122. *See generally* John W. Van Doren, *Understanding Unger*, 16 WM. MITCHELL L. REV. 57, 59-72 (1990) (discussing a number of legal theories that propose objective answers to legal controversies).

123. *See* Kermit Roosevelt III, *Forget the Fundamentals: Fixing Substantive Due Process*, 8 U. PA. J. CONST. L. 983, 992 (2006); Susan D. Carle, *Re-Valuing Lawyering for Middle-Income Clients*, 70 FORDHAM L. REV. 719, 730 (2001).

124. *See* Richard A. Posner, *Pragmatic Liberalism versus Classical Liberalism*, 71 U. CHI. L. REV. 659, 659 (2004) (book review) (stating that some equate classic liberalism with *laissez-faire*).

125. *See, e.g.*, RICHARD A. EPSTEIN, SKEPTICISM AND FREEDOM: A MODERN CASE FOR CLASSICAL LIBERALISM 2-3 (2003).

126. *See id.* at 1.

127. *See generally* Posner, *supra* note 124.

128. *See* Victor Rabinowitz, *The Radical Tradition in the Law*, in THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 680, 681 (David Kairys rev. 3d ed., 1998) (stating that CLS writings

Realist claims about legal indeterminacy and incoherence deny the efficacy of rights and the rule of law.¹²⁹ Therefore, Nihilists are destructive and offer nothing to replace what they destroy.¹³⁰ For schools of thought that are sometimes on the receiving end of this epithet, see Legal Realism, CLS, and deconstruction, *cf.* pragmatism.

Comment:

Nihilism may lead to conservative results and silence.¹³¹ Worse than that, Nihilism may reinforce an inability to empathize, a point which would be invisible to the advocate.¹³² However, the pain not felt by the Nihilist is readily detectable to those on the receiving end of tyranny and oppression.¹³³

CHAPTER II: RESTATEMENT RULES OR PROVISIONS

A. Closure Schools (Objectivist)

§1 Positivism: Modern Legal Positivism is a prominent theory of jurisprudence which maintains that law is composed of rules that resolve controversies.¹³⁴ There is, however, a small area of legal uncertainty referred to as an “open texture” area in which aims, goals or policies of the law may be considered and determinat.¹³⁵

Comment:

The law “no vehicles in the park” clearly includes trucks and automobiles. The rule clearly forbids those vehicles. However, there is a relatively small area of “open texture” which raises questions as to whether bicycles, ambulances to carry out injured persons, or an airplane war memorial are included. Rules are not enough, and considerations of conflicting policies may be needed to settle these problems.

“sometimes repudiate the rule of law and lapse into nihilism and hopelessness”). Legal realism and deconstruction schools of thought, as compared to pragmatic approaches, are also likely to be on the receiving end of this type of epithet.

129. See Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509, 512 (1984).

130. See Rabinowitz, *supra* note 128, at 682.

131. See Judith Schenck Koffler, *Forged Alliance: Law and Literature*, 89 COLUM. L. REV. 1374, 1391 (1989) (book review).

132. See *id.* at 1392.

133. *Id.*

134. See John W. Van Doren, *Theories of Professors H.L.A. Hart and Ronald Dworkin – A Critique*, 29 CLEV. ST. L. REV. 279, 279-80 (1980).

135. See H.L.A. HART, *THE CONCEPT OF LAW* 121, 123 (1961).

§2 Policy Science: Policy Science advocates hold that positive law is porous and implies that the "open textured" area is large and significant.¹³⁶ Accordingly, decisions should be based on policy.¹³⁷ There are eight broad policies, sometimes referred to as outcomes, that when properly understood and employed provide right answers in the cases.¹³⁸ The eight outcomes desired are power, wealth, enlightenment, skill, well-being, affection, respect, and rectitude.¹³⁹ Thus, Policy Science and Positivism are in tension.

Comment:

This is the Laswell MacDougal Policy Science Jurisprudence.¹⁴⁰ As an example, when the policies of land ownership and the right to exclude conflict with medical needs and human dignity, medical needs and dignity trump property rights.¹⁴¹

§3 Dworkin's Rights Theory: This rights theory cautions that preexisting rights must precede legal decisions or those decisions may be *ex post facto*.¹⁴² Political morality is the source of these rights which may trump rules and policy determinants.¹⁴³

Comment:

Equal "concern and respect" for citizens in the polity is a major goal of Western legal systems.¹⁴⁴ A judge whom Dworkin calls Hercules is able to produce right answers to hard cases.¹⁴⁵ Political morality can be inferred from the inherited legal

136. See McDougal, *supra* note 16, at 1078-79 (criticizing the RESTATEMENT OF PROPERTY for its emphasis on doctrine to the exclusion of policy guidance and clarification of goals).

137. See *id.*; see also *infra* note 138.

138. See W. MICHAEL REISMAN & AARON M. SCHREIBER, JURISPRUDENCE: UNDERSTANDING AND SHAPING LAW: CASES, READINGS, COMMENTARY 14-15, 19 (1987).

139. See *id.*

140. See *id.* at 14-15.

141. *State v. Shack*, 277 A.2d 369, 374 (N.J. 1971). In *Shack*, two workers, one offering medical aid and another offering legal aid, entered a farmer's property to assist migrant workers living on the farm. *Id.* at 370. The Supreme Court of New Jersey held that the farmer's right to exclude people from his land, arising from ownership of the land, could not trump the rights of the worker to seek aid. *Id.* at 374. See also LUTHER L. MCDUGAL III & MYRES S. MCDUGAL, PROPERTY, WEALTH, LAND: ALLOCATION, PLANNING AND DEVELOPMENT 119 (2d ed. 1981) (discussing *State v. Shack*).

142. See John W. Van Doren, *Jurisprudence: What Does It Matter?*, 54 FLA. B.J. 327, 327 (1980) (describing Dworkin's theory).

143. See Van Doren, *supra* note 134, at 296-97, 300; see also Anthony D'Amato, *Elmer's Rule: A Jurisprudential Dialogue*, 60 IOWA L. REV. 1129, 1129 (1975).

144. See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 180 (1977).

145. See RONALD DWORKIN, LAW'S EMPIRE 239 (1986); see also BRIAN BIX, JURISPRUDENCE: THEORY AND CONTEXT 87-89 (2d ed. 1999) (discussing Dworkin's "right answer thesis").

materials which produce answer *x* which is better than answer *y*. In *Riggs v. Palmer*, for example, the grandson killed his grandfather hoping to inherit from his will before his grandfather could change it.¹⁴⁶ The grandson was caught by the political morality principle that no one can benefit from his own wrong.¹⁴⁷ So, that principle trumped the rules comprising the laws of succession, which ordinarily do not look to the worthiness of the beneficiary.¹⁴⁸

§4 Natural Law I: Natural lawyers hold that state-created law should be controlled by a source external to it, which is morality.¹⁴⁹

Comment:

Law of the state, statutes, court decisions, constitutions, and other state-created provisions are deemed not law if they conflict with morality.¹⁵⁰ Example: slavery is not law because it is immoral. Legal Positivists criticize this view as a misleading confusion of law and morality.¹⁵¹

§5 Natural Law II: State-created law is subject to an architecture of eight “procedural” natural law propositions that are universally applicable to legal systems.¹⁵² These constitute the “inner morality of law.”¹⁵³ For example, the rules of a legal system must be expressed in general terms, publicly promulgated, prospective in effect, expressed in understandable terms, consistent with one another, not be impossible to comply with, not changed so frequently that the citizen cannot rely on them, and administered in a manner consistent with their wording.¹⁵⁴

146. 22 N.E. 188, 189 (N.Y. 1889).

147. *Id.* at 190 (“No one shall be permitted . . . to take advantage of his own wrong.”). *See also* Van Doren, *supra* note 134, at 297 (discussing *Riggs* and stating that “[t]he principle ‘no man shall profit from his own wrong’ prevailed over the statute”).

148. *See supra* note 143 and accompanying text. *But see* *Owens v. Owens*, 6 S.E. 794, 794-95 (N.C. 1888) (granting a wife her dower despite the fact that she was convicted for being an accessory to her husband’s murder because there was no “sufficient legal ground for denying [her] the relief” she sought).

149. *See* Van Doren, *supra* note 142, at 328.

150. *See id.* (“A natural law approach might argue that a rule should not be applied if it is unfair.”).

151. *See* Peter Mirfield, *In Defense of Modern Legal Positivism*, 16 FLA. ST. U. L. REV. 985, 989 (1989) (book essay) (rules are the important thing; there is no overlap between law and morality).

152. *See* LON L. FULLER, *THE MORALITY OF LAW* 39 (Yale University Press rev. ed. 1969) (1964).

153. *See* H.L.A. Hart, Book Review, 78 HARV. L. REV. 1281, 1284 (1965) (quoting FULLER, *supra* note 152, at 42).

154. *See supra* note 152 and accompanying text.

Comment:

Hart's Positivism conflicts with Fuller's Natural Law.¹⁵⁵ Hart argues that Fuller confuses ineffectiveness of law with morality of law.¹⁵⁶ Thus, failure to implement Fuller's rules makes law ineffective, but does not supply a necessary law and morality connection.

§6 Legal Process School: To correct the problems addressed by Legal Realism, legal problems should be channeled to the right place.¹⁵⁷ The legislature is the right place for policy decisions, where consensus values or Interest Group Pluralism produce laws that reflect legitimate community values.¹⁵⁸ Courts should show great deference before changing the legislative determination by constitutional interpretation, perhaps even waiting for a clear consensus in the community.¹⁵⁹ Also, administrative agencies in the Regulatory State have expertise in their areas.¹⁶⁰ Again courts should tread lightly here.¹⁶¹

Comment:

Right answers will emerge if the community's legal problems are properly channeled.¹⁶²

§7 Epstein's Rights Theory: As in "Classical Liberalism,"¹⁶³ there are rights that predate legalist determinations.¹⁶⁴ Pragmatists, Critical Legal Theorists, and others fail to grasp this concept.¹⁶⁵ Individual choice should be maximized consistent with the rights of others. Judge Richard Posner in his new incarnation (Pragmatism) trusts pragmatic democratic deliberations while playing fast and loose with conventional

155. See, e.g., ANALYTIC JURISPRUDENCE ANTHOLOGY 84-85 (Anthony D'Amato ed., 1996) (providing Hart and Fuller critiques of each other's works).

156. See Hart, *supra* note 153, at 1285-86.

157. See HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 4 (1994).

158. See *id.*

159. See Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 266-67 (1973).

160. See Van Doren, *supra* note 111, at 444 (explaining the evolution of agency deference).

161. See *id.* at 457 (describing the role of the courts in a regulatory state).

162. See HART, *supra* note 157.

163. See *supra* Section VIII, ch.1, §g.

164. See EPSTEIN, *supra* note 125, at 26 (claiming that individual rights predate formal classifications).

165. See generally *infra* Part B, §§ 2, 9 and accompanying text.

morality and the rule of law.¹⁶⁶ Posner “offers aid and comfort to the likes of Hitler and bin Laden,” because the absence of rights theory produces a moral jungle.¹⁶⁷

Comment:

Epstein once professed to be a Libertarian: favoring no taxation (it is theft) and no government regulation.¹⁶⁸ He now rejects these views.¹⁶⁹ “[O]ne set of social institutions is better than a second so long as at least one person in the first is better off than in the second.”¹⁷⁰ Also, no one should be “worse off in the second.”¹⁷¹ Surplus is to be divided pro rata (*cf.* the flat tax).¹⁷² What is required is “a major cutback in social legislation with a consequent reduction in levels of taxation and regulation.”¹⁷³ Epstein seeks to maximize individual liberty and choice consistent with the liberties of others.¹⁷⁴ For support, see Law and Economics.¹⁷⁵ For criticism, see Legal Realism and CLS.¹⁷⁶

§8 Law and Literature: This movement appears to direct us to great literature as a source of values in the legalist enterprise.¹⁷⁷ At least it can direct us away from the pervasive colonization by advocates of law and economics.¹⁷⁸ Literary references now adorn judicial opinions.¹⁷⁹ Law and literature may be used to inform a course in legal ethics suggesting what appropriate roles are for students when they become lawyers.¹⁸⁰

Comment:

Another conflict in the legal process occurs in how legislation should be interpreted. Law and literature can elucidate methods of interpretation in literature that have (or can be argued to have) applicability to law. The choice of interpretive models can be revealed to be thinly disguised politics. Compare Justice Scalia’s

166. See Richard A. Epstein, *A Farewell to Pragmatism*, 71 U. CHI. L. REV. 675, 682 (2004).

167. See *id.* at 682.

168. See *id.* at 675-76.

169. *Id.* at 676.

170. *Id.*

171. *Id.*

172. See *id.*

173. *Id.* at 677.

174. See *id.* at 676-77.

175. See *infra* Section VIII, ch. II, Part B, § 3.

176. See *infra* Section VIII, ch. II, Part B, §§ 1-2.

177. See Koffler, *supra* note 131, at 1374.

178. See *id.* at 1391.

179. See *id.*

180. See Rob Atkinson, *Nihilism Need Not Apply: Law and Literature in Barth’s THE FLOATING OPERA*, 32 ARIZ. ST. L.J. 747, 752-753 (2000).

textualism with deconstruction (intent not knowable).¹⁸¹ For criticism, see Posner on law and literature, arguing that the law and literature movement has little to offer law.¹⁸²

§9 Orthodox Marxism: Law is not autonomous, but is instead determined by the elite, often capitalists, in society.¹⁸³ Capitalists make law and make its operation mysterious, the better to control, oppress, and confuse the proletariat.¹⁸⁴

Comment:

Property and contract law are central to capitalism and fashioned by the ruling elite to perpetuate their control and exploitation in class, race, and gender arenas. The myth is circulated that the system is neutral and that all sectors benefit, thereby creating a false consciousness.

B. Non-Closure Schools

§1 Legal Realism: Legal Realists find that courts have a doctrinal choice in the decision process.¹⁸⁵ Thus, no judge is bound by a rule or standard unless she chooses to be so bound.¹⁸⁶ Much of the legal arena is like Hart's "open textured" area.¹⁸⁷

Comment:

For Legal Realists, rules may govern chess but not law. For example: In deciding whether segregation in public schools is constitutional, two major principles conflict: freedom of association and freedom not to associate. Choice of the latter produces *Plessy v. Ferguson*.¹⁸⁸ Choice of the former produces *Brown v. Board of Education*.¹⁸⁹ Another example: *Lawrence v. Texas*¹⁹⁰ decriminalized homosexual conduct and overruled *Bowers v. Hardwick*.¹⁹¹ In rejecting *Bowers*, the Justices

181. See Jack Van Doren, *Is Jurisprudence Politics By Other Means? The Case of Learned Hand*, 33 NEW ENG. L. REV. 1, 9-10 (1998).

182. RICHARD A. POSNER, LAW AND LITERATURE: A MISUNDERSTOOD RELATION 353, 353-358 (1988).

183. See Karl Klare, *The Politics of Duncan Kennedy's Critique*, 22 CARDOZO L. REV. 1073, 1079 (2001).

184. See *id.*

185. See Van Doren, *supra* note 142, at 328.

186. See *id.*

187. See John W. Van Doren, *An Attack on a Defense of Modern Positivism*, 25 NEW ENG. L. REV. 813, 821 (1991) (open textured area is very large).

188. 163 U.S. 537 (1896).

189. 347 U.S. 483 (1954).

190. 539 U.S. 558 (2003).

191. 478 U.S. 186 (1986), overruled by *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

demonstrated that they have a choice whether to invoke *stare decisis*.¹⁹² For criticism or conflicting views, see Legal Positivism¹⁹³ or any other formalist theory.

§2 Critical Legal Studies: Law is indeterminate.¹⁹⁴ The legal arena is composed of rules and standards that exist in contradiction, or high level of abstraction, such as “reasonableness.”¹⁹⁵ “Reasonableness” can accommodate results that conflict over time.¹⁹⁶ Formalists wrongly present rights or process as productive of correct answers.¹⁹⁷ Resolution of this indeterminacy can only be by policy choice, a polite word for politics.¹⁹⁸

Comment:

Legal controversies could easily go either way because conflicting acceptable legal arguments and analogies exist in most cases.¹⁹⁹ Formalists create a false necessity that the status quo is “natural and necessary” and deviation therefrom is perilous.²⁰⁰ This prevents creative transformative thought and reinforces a sometimes excessively hierarchical society repressive with respect to race, gender and class.²⁰¹

§3 Law and Economics: Law is indeed porous.²⁰² What is needed, and what is often done, is a choice of law that reinforces, or mimics, market solutions and maximizes wealth and efficiency in society.²⁰³

Comment:

Example: In nuisance cases, the neighboring property owners and a cement plant emitting cement dust interfere with one another. The person who values the resource the most (as determined by willingness to pay money) is to be awarded the right to

192. Compare the relatively short period of time between when *Bowers* was decided and overturned. See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003) (overruling *Bowers* after only about 17 years).

193. See *supra* Section VIII, ch. 2, Part A, § 1.

194. See Jack W. Van Doren, *Exploring Contradictions*, 4 FLA. B.J. 21, 23 (Apr. 1985).

195. See *id.* at 21-22; see also *id.* at 24 (parsing the legal definition of “property” and finding no definitive meaning).

196. See *supra* Section VIII, ch. 2, Part B, § 1.

197. See Van Doren, *supra* note 194, at 22 (noting that the practice of law is not like using rules to play a game as positivists might suggest).

198. See *id.* at 23 (“CLS advocates argue . . . that . . . [a]ll law is politics.”).

199. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1700 (1976). See also *supra* Section VIII, ch. 2, Part B, § 1.

200. See John W. Van Doren, *Impasse: Is There a Beyond?*, 13 W. ST. U. L. REV. 493, 503 (1986).

201. See *id.* at 496, 502.

202. See *supra* Section VIII, ch. 2, Part B, § 1.

203. See BIX, *supra* note 145, at 186-87.

proceed. Wealth is thereby maximized. This "wealth maximization" process should determine the result that the cement factory continues operation, and damages may be payable to the property owners.²⁰⁴

§4 Public Choice: The indeterminacy analysis of Legal Realism and CLS is a good beginning. But things are much worse than they thought. Where the court is composed of judges with differing views, cycling occurs, resulting in alternating and somewhat helter-skelter decisions. Stable results from courts are very unlikely. So much for courts. How about the legislature? Sorry, no help there either. Government actors seek to maximize their own welfare and do not work in the public interest. Interest Group Pluralism is no help because highly organized and financed interest groups often get what they want at the expense of the public interest. Keep all these guys out of our business, quite literally. Let the market prevail.²⁰⁵ Cf. Epstein Rights Theory²⁰⁶ and Law and Economics.²⁰⁷

Comment:

Some regulation may be necessary to preserve competition. But otherwise, it is goodbye Regulatory State.

§5 Fem Crit I: Fem Crits, in common with other feminist jurisprudents, find the society and legal system pervaded with male domination.²⁰⁸ Far from being neutral, the legal system reflects a male dominated society that disadvantages women.²⁰⁹ Critical Feminist theorists may hold that gender roles should be optional and shared, not stereotyped.²¹⁰ They find the roles according to characteristics attributed to women (caring) or men (individualism) are not necessarily appropriate.²¹¹ These traits may be acculturated and should be embraced optionally.²¹²

204. See *id.* at 188-89 & n.39 (discussing *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870 (N.Y. 1970)); see also John W. Van Doren, *Air Pollution: Expanding Citizens Remedies*, 32 OHIO ST. L.J. 16, 24, 26 (1971).

205. See Van Doren, *supra* note 111, at 446, 464-67.

206. See *supra* Section VIII, ch. 2, Part A, § 7.

207. See *supra* Section VIII, ch. 2, Part B, § 3.

208. See Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*, *supra* note 128, at 329 (discussing male domination of public and private spheres).

209. See *id.*

210. See Frances Olsen, *The Sex of Law*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*, *supra* note 128, at 694, 696-97, 704.

211. See *id.* at 694. Cf. *id.* at 696 (celebrating a woman's unique qualities can lead to those unique abilities being used against women in certain contexts).

212. See *id.* at 694.

Comment:

Neither so-called “male traits” nor “feminine traits” are better than the other. Binaries are deceiving. Androgyny is the best model.²¹³ If comfortable in the roles, men should cook dinner and engage in child care; women should bring home the bacon and teach athletics to the children if that is what they want to do.

§6 Fem Crit II: Equality Feminists: Equality Feminists only want a level playing field.²¹⁴ They seek to eliminate discrimination in, for example, employment and education.²¹⁵ Ordinarily they do not seek “special” rights based on characteristics that women possess and men do not.²¹⁶

Comment:

Equality Feminists open their own doors. They fear that for every door that is opened, another will be closed. While only women can become pregnant, no special rights should accrue because of this feature.²¹⁷ If women’s differences are taken into account, they may be denied jobs based on the argument that they need protection.²¹⁸

§7 Neo-Marxism: Orthodox Marxism cannot adequately explain phenomenon in the later capitalist stages of development.²¹⁹ Actually, capitalist regimes make concessions to the proletariat in terms of wages, unions, and working conditions.²²⁰

Comment:

Capitalists make concessions to labor or human rights only as a means of forestalling rebellion which might displace the ruling elite.

§8 Critical Race Theory: The legal system is controlled by the elite, white power-holders.²²¹ The elite grant concessions to African Americans and other racial

213. See *id.* at 696-97, 704.

214. See *id.* at 698.

215. See *id.* (pointing out the success of equality feminists in reducing discrimination).

216. See *id.* at 699 (noting the conflict between equality feminists and feminists supporting “special treatment” for women’s unique characteristics).

217. See *id.* at 702-03 (contrasting feminist theory that maintains that women should be afforded special rights due to their ability to bear children).

218. See Taub & Schneider, *supra* note 208, at 330.

219. See, e.g., Robert W. Gordon, *Some Critical Theories of Law and Their Critics*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE*, *supra* note 128, at 648.

220. See Rabinowitz, *supra* note 128, at 683-84, 689-90 (pointing out that concessions are made but that activists are still needed in the constant battle to obtain, keep, and expand rights).

221. See Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1, 20-21 (2001).

minorities.²²² But when the resource allocation opportunities become sufficiently threatening to the white middle and lower classes, there is a resounding halt.²²³

Comment:

Palliative relief to racial minorities is granted when it is in the interest of the white, male ruling-elite.²²⁴ Thus, *Brown v. Board of Education*²²⁵ occurred when the United States could no longer be credible in the struggle for Third World allegiances when it practiced apartheid.²²⁶

§9 Pragmatism: Pragmatists reject foundational edifices for their legal solutions.²²⁷ No universal principles serve them as mandatory directives.²²⁸ "Practical reason" is borrowed from Aristotle as the guide for dealing with legal problems.²²⁹

Comment:

Americans are sometimes said to be pragmatists.²³⁰ Pragmatists can believe in any goal.²³¹ They can be Marxists, Libertarians, or anything in between.²³² But they cannot ground their legal or policy decisions on foundational preexisting dogmatics.²³³ See criticism of Pragmatism in Epstein's Rights Theory.²³⁴

§10 Deconstructive Jurisprudence: All discourse, including jurisprudence, loads the dice.²³⁵ Certain ideas are given a privileged position *sub silentio* so that the conclusion is foreordained.²³⁶

222. See Derrick A. Bell, Jr., *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

223. See Gordon, *supra* note 219, at 644.

224. See Bell, Jr., *supra* note 222, at 523.

225. 347 U.S. 483 (1954).

226. See Kelly A. MacGrady & John W. Van Doren, *AALS Constitutional Law Panel on Brown, Another Council of Nicaea?*, 35 AKRON L. REV. 371, 381 (2002).

227. See ANALYTIC JURISPRUDENCE ANTHOLOGY, *supra* note 155, at 220.

228. See John Dewey, *Logical Method and Law*, 10 CORNELL L.Q. 17, 27 (1924).

229. See Thomas F. Cotter, *Legal Pragmatism and the Law and Economics Movement*, 84 GEO. L.J. 2071, 2071-72 (1996).

230. See, e.g., Richard A. Posner, *Legal Pragmatism*, 35 METAPHILOSOPHY 147, 149 (2004).

231. See Richard A. Posner, *What Has Pragmatism To Offer Law?*, 63 S. CAL. L. REV. 1653, 1654, 1661 (1990) (outlining a brief history of pragmatic thinkers and noting the diversity among the group).

232. See *id.*

233. See Dewey, *supra* note 228, at 27.

234. See *supra* Section VIII, ch. 2, Part A, § 7.

235. See J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 YALE L.J. 743, 747-48 (1987).

236. See *id.* at 754.

Comment:

The job of the deconstructor is to expose these rhetorical devices that pervade contemporary discourse, including jurisprudence. Deconstructers are immune from the rhetorical device of privileging so that the answer is foreordained. Or they occasionally embrace it with all its irony or self-contradiction. See Postmodernism.²³⁷ Cf., Legal Realism²³⁸ and Critical Legal Studies.²³⁹

IX. CONCLUSION

Various persons reviewing the draft of this essay asked for clarification of “how to take” the Restatement draft. One very knowledgeable reader,²⁴⁰ for example, finds the skeleton draft troublesome, highly oversimplified, and selective. My reply is that the observer is quite correct. The skeleton draft content is heuristic, anecdotal, selected more or less at random, with appalling omissions, and does not indicate how at least some of these schools might fit together. In short, no metarule is offered to indicate how the rules interact or how high level abstractions should be handled.

There are, then, several arguments against a Restatement of Jurisprudence. First, where are the rules of the Restatement of Jurisprudence? When rules or schools of jurisprudence conflict, which is often, what rules or schools should prevail over other rules?²⁴¹ Is reform a desired goal? If reform is a desired goal, whose reforms should be accepted and which school of jurisprudence would best effectuate reform? Will such a Restatement be used? If used and cited, can we believe the Jurisprudential rule was the real reason for the decision? For example, the “plain meaning” construction canon, often invoked, is similar to the approach of legal positivism. But can we believe “plain meaning” is not a cover for implementing an undisclosed policy objective? Where are the metarules, the rules for determining which Jurisprudential theories prevail over which others?

But is it not true that most of the critiques of a Restatement of Jurisprudence apply to the Restatement movement as a whole? If scholars are serious about a Restatement of Statutory Interpretation, or a Federal Rules of Statutory Interpretation, why discriminate against Jurisprudence? Canons of statutory interpretation are in hopeless conflict, and little indication exists that such a Restatement of statutory rules, or any other Restatement provisions, would be followed unless convenient to the

237. See *supra* Section VIII, ch. 1, § d.

238. See *supra* Section VIII, ch. 2, Part B, § 1.

239. See *supra* Section VIII, ch. 2, Part B, § 2.

240. Professor Christopher Roederer, Associate Professor of Law at Florida Coastal School of Law.

241. See generally Christopher Roederer, *Negotiating the Jurisprudential Terrain: A Model Theoretic Approach to Legal Theory*, 27 SEATTLE U. L. REV. 385 (2003) (addressing the similar problem of whether there is a metarule to determine which jurisprudential theory should be preferred and concluding that observation, experiment, and critical thinking should be applied).

decision makers. Somehow though, I feel this Jurisprudence Restatement will not be at the top of the ALI agenda.

After World War II, the ALI projected drafting a model human rights guarantee document called the "Statement of Essential Human Rights."²⁴² The document that emerged from this was never adopted by members because the drafters could not agree which rights should be enumerated.²⁴³ Hopefully, a similar fate does not await the Restatement of Jurisprudence.

The question remains, what criteria justifies the existing Restatement projects that does not justify the Restatement of Jurisprudence? So let's get to work: A Restatement of Jurisprudence: Why Not?

242. *Statement of Essential Human Rights*, 243 ANNALS AM. ACAD. POL. & SOC. SCI. 18, 18-26 (1946).

243. See Sarah A. Seo, *A Shattered Dream: The American Law Institute and the Drafting of the International Bill of Rights*, 30 T. JEFFERSON L. REV. 179, 180-81 (2007).