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Restating Restitution: The Restatement Process and Its Critics

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Restating Restitution: The Restatement Process and Its Critics

Doug Rendleman*

Abstract

This Article uses controversies in drafting sections of the Restatement (Third) of Restitution and Unjust Enrichment to examine the rigor of the American Law Institute's internal process. The sections reviewed stem from the Slayer Rule that prevents a killer from inheriting from his victim and Marvin v. Marvin's restitution for an unmarried cohabitant. I maintain that the disputes within the ALI reveal a searching and demanding process that leads to consensus doctrine that is accurate and legitimate, yet not frozen in time.

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* Huntley Professor, Washington and Lee Law School. Thanks to colleagues for close readings that, in addition to refreshing candor, contributed substantive improvement and suppressed infelicities, bad spelling, and faulty arithmetic—Professors Andrew Kull, Douglas Laycock, Caprice Roberts, Chaim Saiman, Emily Sherwin, and ALI Deputy Director, Elena Cappella. Thanks to my topnotch research assistant Ms. Megan Williams who exceeded her usual stellar contributions as this Article developed. Remaining lapses are my own. Thanks to the Frances Lewis Law Center for summer research support. I presented earlier stages of this Article at a Southeastern Association of Law Schools (SEALS) Remedies panel in the summer of 2007, at the Restitution Roundtable organized by Professor and Francis Lewis Law Center Scholar in Residence Eoin O'Dell in December 2007, and to the Francis Lewis Law Center Faculty Enclave in March 2008. Thanks to the participants.

"I can see what the law is like. It's like a single-bed blanket on a double bed and three folks in the bed and a cold night. There ain't never enough blanket to cover the case, no matter how much pulling and hauling, and someone is going to nigh catch pneumonia. Hell the law is like the pants you bought last year for a growing boy, but it is always this year and the seams are popped and the shankbone's to the breeze. The law is always too short and too tight for growing humankind. The best you can do is do something and then make up some law to fit and by the time the law gets on the books you would have done something different."

—Willie Stark, *All The King's Men*.¹

I. Introduction

The American Law Institute's *Restatements of the Law* are ambitious attempts to articulate the common law in disparate areas like torts, contracts, and restitution. Critics of the American Law Institute (ALI) process question both its legitimacy and its accuracy in undertaking to "restate" common law. In this modest effort, I defend the Restatement process, focusing on the ALI's internal process for the ongoing third *Restatement of Restitution and Unjust Enrichment*.

What follows is somewhat of an ALI insider's view. I am both an Adviser to the restitution project and a twenty-five-year ALI member. Restatement reporters, the ALI professional staff, and the governing Council comprise an inner circle, but, although I neither speak for the ALI nor express ALI policy, my vantage point is located inside the ALI's mainstream.

Several testing stages comprise the ALI's formal process in developing a restatement. The restatement's reporter drafts sections, comments, and notes with citations. This becomes a published Preliminary Draft that the reporter presents to meetings with a Members' Consultative group of volunteers and to an appointed group of Advisers, selected by the Executive Director to secure pro and con balance. Spirited discussion often occurs at these meetings. The Preliminary Draft in turn becomes a published Council draft for discussion by ALI's governing body, the Council. Next, a published Tentative Draft, available online and bearing the notice that it is not ALI policy, is discussed and voted on at the members' annual May meeting. Earlier versions and efforts may be, in effect, remanded to the reporter at any stage of the process. Final approval comes after that membership vote, vetting by the ALI's professional

1. ROBERT PENN WARREN, *ALL THE KING'S MEN* 136 (Bantam Books 1959) (1946).

staff, completion of the whole restatement to be circulated as a proposed final draft, and a final membership vote.

In her article in the *Indiana Law Review*, Professor Kristin Adams examines the criticism of ALI's membership, mission, goals, and values; the critics describe the ALI as insular and a bulwark against greater reform.² Moreover, many critics describe the ALI as a throwback to formalism rather than an approach that a legal realist and a progressive should follow.

The criticism most applicable to me is that ALI membership is "attractive only to older and less intelligent scholars."³ The observers' point about age is well taken, for, although most do not need it, almost all ALI members are qualified for the protection of forty-plus age-discrimination legislation. An ALI member perforce has achieved a measure of professional success as a judge, practitioner, or professor. Moreover, although the ALI is undertaking assiduous recruitment efforts, it has fewer minority, female, and small-firm lawyers than it should. Professor Adams, herself a friend of the restatement process, concludes that criticism of the ALI is "disguised criticism of the American common law court system," and that these critics simply do not like the common-law technique.⁴ I will return to that point in my conclusion.

II. Restitution

Including restitution in the ALI's *Restatements of the Law* is particularly appropriate because restitution is a court-made or common law subject like contracts and torts. In 1937, the first *Restatement of Restitution* implemented part of the legal realists' reform agenda when it united previously disparate streams bearing the nonfunctional headings of law and equity into a unified functional body of doctrine under the single title of unjust enrichment.⁵ Seventy years later, the profession needs a new restatement to present a modern and coherent body of doctrine free of obsolete categories unknown to lawyers, judges, law students, and professors.

2. See Kristin David Adams, *Blaming the Mirror: The Restatements and the Common Law*, 40 IND. L. REV. 205, 221–30 (2007) (discussing criticisms of the ALI). *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, 85 (1990) (describing the ALI as "progressive, pragmatic, and reformist").

3. Adams, *supra* note 2, at 244.

4. *Id.* at 265.

5. See Andrew Kull, *Restitution and Reform*, 32 S. ILL. U. L. REV. 83, 87 (2007) (discussing the first *Restatement of Restitution* and its success).

Restitution is an essential and nuanced common law area. But many smaller American states lack a decision on particular restitution points. States, large and small, have muddled restitution analysis or have made just plain incorrect restitution decisions.⁶ Many lawyers, judges, and professors misunderstand and misstate basic restitution principles. Although restating restitution is a traditional project in an ALI that is branching out to non-common law substantive topics,⁷ cross-disciplinary projects,⁸ and international areas,⁹ the *Restatement of Restitution* has enjoyed smooth sailing and has benefitted from many accolades, including the ALI honoring its reporter, Professor Andrew Kull, as R. Ammi Cutter Reporter. Approbation, however, has not been universal.

Notable scholars have commented unfavorably on the *Restatement of Restitution*. Peter Birks, the late Regius Professor of Civil Law at the University of Oxford and one of the world's leading restitution scholars, observed that *Restatement* reporter "Professor Kull is now in a position to give us at long last a law of unjust enrichment. Yet the signs are that he will not."¹⁰ Professor Chaim Saiman, a less senior scholar but a rising star of restitution theory, observed that the *Restatement* "looks to reprise a method of legal scholarship that has been out of fashion for nearly one hundred years."¹¹ I will not disdain to point out that the professors' observations stem from opposite premises—Birks viewed the *Restatement* as not formalist enough, Saiman as too formalist.¹²

In this Article, I will examine the membership-approved tentative drafts of two controversial sections of the ongoing third *Restatement*, Sections 45 and 28. I will focus on debate in the ALI's internal process. In the course of this analysis, I will examine restitution and related areas: the common law,

6. See Andrew Kull, *Rationalizing Restitution*, 83 CAL. L. REV. 1191, 1195–96 (1995) (noting the ignorance of many American lawyers and judges of the basics of restitution).

7. See, e.g., FEDERAL JUDICIAL CODE REVISION PROJECT (Tentative Draft No. 4, 2001) (proposing changes to sections of Title 28 of the United States Code).

8. See, e.g., PRINCIPLES OF CORPORATE GOVERNANCE: ANALYSIS AND RECOMMENDATIONS (1994) (incorporating law and economics principles).

9. See, e.g., RESTATEMENT OF THE LAW (THIRD), FOREIGN RELATIONS LAW OF THE UNITED STATES (1987) (restating principles of international law affecting the United States).

10. Peter B.H. Birks, *A Letter to America: The New Restatement of Restitution*, 2 GLOBAL JURIST FRONTIERS, Article 2, 20 (2003) (on file with the author).

11. Chaim Saiman, *Restating Restitution: A Case of Contemporary Common Law Conceptualism*, 52 VILL. L. REV. 487, 528 (2007).

12. Compare *id.* at 528–31 (criticizing the use of legal formalism in the new *Restatement*), with Birks, *supra* note 10, at 15–19 (discussing Professor Kull's position and concluding that it was untenable).

contracts, property, torts, statutes, and other restatements. This examination will reveal some fault lines and friction between other specific areas and the general principles favoring restitution. I will show how the internal restatement process works to create accurate and legitimate, though not petrified, doctrinal statements.

III. The Slayer Rule

Section 45 states the *Restatement of Restitution's* Slayer Rule: "A slayer's acquisition, enlargement, or accelerated possession of an interest in property as a result of the victim's death constitutes unjust enrichment that the slayer will not be allowed to retain."¹³ This blackletter rule is a broad statement that the unjust enrichment principle overrides the victim's testamentary disposition or the intestacy statute in order to prevent the slayer from profiting from his wrong.¹⁴ Today its major point is not controversial.

The inquiry becomes technical and the territory contested when the slayer and his victim own concurrent interests with right of survivorship, for example a joint tenancy. Here the *Restatement* and the Uniform Probate Code provisions are discordant.

The third *Restatement's* Slayer Rule carries forward the first *Restatement's* traditional rule.¹⁵ Faithful to the principle of preventing a wrongdoer's unjust enrichment, the slayer's concurrent or successive interests in property held with the victim "may not be enlarged in consequence of the victim's death."¹⁶ Before the slaying, each joint tenant holds, in effect, "an undivided half interest for life plus a contingent remainder in the undivided fee."¹⁷ The *Restatement* measures the remedy after the slaying: The unified estate belongs in equity to the estate of the victim subject to the slayer's pre-existing life interest in one-half.¹⁸

The Uniform Probate Code remedy, however, diverges from the traditional *Restatement* rule. The UPC provides that the slaying severs the co-tenancy,

13. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 45(2) (Tentative Draft No. 5, 2007).

14. See *id.* § 45 cmt. e (discussing the Slayer Rule in the context of taking through inheritance).

15. See RESTATEMENT (FIRST) OF RESTITUTION § 188 cmt. b (1937) (discussing the Slayer Rule in the context of co-owners of property).

16. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 45(2)(c) (Tentative Draft No. 5, 2007).

17. *Id.* § 45 cmt. h.

18. See *id.* (indicating the interest is transferred to the estate).

shifting the relationship between the slayer and the victim's estate from joint tenancy to a tenancy in common, the killer and his victim's estate each owning one-half interest in fee.¹⁹ The slayer receives a distinctly smaller interest under the *Restatement* solution than under the Uniform Probate Code's tenancy-in-common solution.

The *Restatement's* Illustration 14 illustrates the foregoing:

H and W hold the family home as tenants by the entirety and hold some investments in securities as joint tenants. H murders W, is convicted of the crime and is imprisoned for life. In the ensuing litigation, . . . H proposes that the murder of one spouse by the other should be deemed to sever the cotenancy, thereby allowing him to retain a one-half interest as a tenant in common with W's estate [the UPC solution].²⁰

According to the *Restatement* solution, however, *H's* interest in the property is "limited to his preexisting life interest in one-half, or its commuted value."²¹ In the Illustration, and often in real life, *H*, who will be spending the balance of his life in prison, may be indifferent that his share under the *Restatement* is less than under the UPC. However, this narrow and technical point straddles a crucial watershed—the ALI's fidelity to the goal of preventing a wrongdoer's unjust enrichment.

A close vote at the 2001 ALI members' meeting on the property restatement supported the principle now expressed in Section 45 and the result achieved through application of the *Restatement* solution when the slayer kills a co-tenant.²² That majority fell short of universal approbation, however. Professors Lawrence Waggoner and John Langbein, reporters of the *Restatement (Third) of Property*, disagree with the *Restatement of Restitution* view of the remedy. The Reporter's Note to the *Restatement (Third) of Property* opposes the *Restatement of Restitution* position, arguing instead for the UPC rule.²³ The reporter for the *Restatement of Restitution* responded in his Reporter's Note to Section 45 by including an elaborate argument for

19. See UNIF. PROBATE CODE § 2-803(c)(2) (amended 2006) (stating that felonious killing severs joint tenancy and creates tenancy in common).

20. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 45 cmt. h, illus. 14 (Tentative Draft No. 5, 2007).

21. *Id.*

22. *Discussion of the Restatement of the Law Third, Property (Wills and Other Donative Transfers)*, 2001 A.L.I. PROC. 263 (2002).

23. See Reporter's Note to RESTATEMENT (THIRD) OF PROPERTY: DONATIVE TRANSFERS § 8.4 cmt. 1 (2003) (discussing UNIF. PROBATE CODE § 2-803).

Section 45's approach, a point that, by the ALI's position and precedent, is well-taken.²⁴

The sharp debate about this narrow issue of how the *Restatement of Restitution* ought to measure restitution took place, first, during the discussion at the meeting on the Property Restatement and, second, within the ALI's internal process and inner circle.²⁵ The ALI membership meeting that took up the *Restatement of Restitution*'s Section 45 passed it without any comment on the floor.²⁶

Where does this dispute leave the law? A judge in a state with the UPC should apply it. A pity. The more salutary *Restatement of Restitution* solution is available in other disputes.

IV. Marvinizing

Section 28, the *Restatement of Restitution*'s unmarried-cohabitants section, presented a more basic area of controversy. The section provides that:

At the termination of a period in which two persons, not married to each other, have lived together in a relationship resembling marriage, if one of the former cohabitants owns a specific asset to which the other has made substantial uncompensated contributions in the form of property or services, the person making such contributions has a claim in restitution against the owner of the asset as necessary to prevent unjust enrichment.²⁷

Marvin v. Marvin,²⁸ the California Supreme Court's 1976 decision, became the principal cohabitant's-restitution decision and has attracted a broad, though not panoptic, following.

We examine here the related law of marriage, property, gifts, and contract. For example, the couple is not formally married. Although one has formal title to property, the other did the work that earned the money that paid for it; however, the nonowner-other could have formed a contract but did not. The *Restatement*'s Illustration 8 is particularly instructive:

24. See Reporter's Note to RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 45 cmt. h (Tentative Draft No. 5, 2007) (arguing for the Section 45 approach to survivorship interests).

25. See Kull, *supra* note 5, at 87 (discussing the debate surrounding section 45).

26. *Discussion of the Restatement of Law Third, Restitution and Unjust Enrichment*, 2007 A.L.I. PROC. 203 (2007).

27. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 28 (Tentative Draft No. 3, 2004).

28. See *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976) (allowing restitution for services of unmarried domestic partner).

A and B live together as unmarried cohabitants for six years; for half of this time they are engaged to be married. A is regularly employed as a nurse while B continues as a full-time student, attending medical school and completing his residency. A has the primary income during the couple's life together; over the years she contributes \$100,000 to the . . . tuition. The engagement is terminated and the relationship ends when B begins medical practice. A sues B on a theory of unjust enrichment.²⁹

The ALI *Principles of the Law of Family Dissolution* submit what states' family law "ought" to be. The *Principles* treat the break-up of an informal relationship as if it were the break-up of a family, leading, in effect, to equitable distribution.³⁰ If a state adopts the *Principles*' solution as a matter of family law, the *Restatement of Restitution* solution is otiose.

But in the great majority of states that have not adopted the *Principles*' approach, the *Restatement* accords a cohabitant a restitution claim. The *Restatement* solution is that "A has a claim against B to recover \$100,000."³¹ The *Restatement*'s solution will usually be less generous to the restitution plaintiff than the equitable distribution called for by the *Principles of Family Dissolution*.

That's not all. Professor Emily Sherwin is a valuable adviser to the *Restatement of Restitution*, an enthusiastic supporter of that enterprise, a remedies scholar, and a jurispudite; she has published a leading jurisprudence-restitution article in the *Texas Law Review*,³² and is co-author of an influential monograph with Professor Larry Alexander, *The Rule of Rules*.³³ In private law, Professor Sherwin is a conservative positivist who maintains the need for formal moral reasoning, clear standards, and bright-line definitions. Her *Texas Law Review* article echoes her principles and controverts the idea that a court might employ the imprecise term "equity," without more, to advance "fairness" in restitution.³⁴

29. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 28 cmt. d, illus. 8 (Tentative Draft No. 3, 2004).

30. See PRINCIPLES OF THE LAW OF FAMILY DISSOLUTION: ANALYSIS AND RECOMMENDATIONS §§ 6.02 cmt. a, 6.05, 6.06 (2002) (discussing the break-up of nonmarried cohabitants).

31. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 28 cmt. d, illus. 8 (Tentative Draft No. 3, 2004).

32. Emily Sherwin, *Restitution and Unjust Enrichment: An Analysis of the Principle of Unjust Enrichment*, 79 TEX. L. REV. 2083 (2001).

33. LARRY ALEXANDER & EMILY SHERWIN, *THE RULE OF RULES: MORALITY, RULES, AND THE DILEMMAS OF LAW* (2001).

34. See generally Sherwin, *supra* note 32 (discussing the connection between unjust enrichment doctrine and equity).

Professor Sherwin's recent article in the *Colorado Law Review* is an outgrowth of an earlier memo on "Heartbreak Cases," that she wrote for the *Restatement of Restitution* reporter and Advisers when they met to consider the cohabitant section.³⁵ Although in her author's asterisk footnote she thanks Reporter Andrew Kull for his helpful comments,³⁶ Professor Sherwin's article maintains forcefully that Section 28 is ill-advised and wrong-headed because it is inconsistent with principles of restitution and with other parts of the third *Restatement*.³⁷ Section 28, Sherwin argues, grants restitution to a plaintiff who may have made a gift or who could have negotiated a contract.³⁸ She thinks this result converts restitution from rules to open-ended "equity," undermining predictability and clarity.³⁹

Professor Sherwin deals with Illustration 8, discussed above, well into the body of her article. She says that "[i]n the absence of even an informal agreement to pay, paying for someone else's education is a risky undertaking that probably should be construed as either a gift or a gamble."⁴⁰

Once again, the debate was internal within the ALI's process; after sharply opposing views were stated and considered at the Advisers' meeting, the process continued. At the membership meeting, members requested that the Reporter's Note state contrary authority and discussed the relationship between the principles of family dissolution and the restitution restatement, but no one opposed the basic principle of cohabitant restitution.⁴¹

That hardly closes the "cohabitant problem" in states' positive law. A state's solution could be the *Principles'* equitable distribution, the *Restatement's* restitution, or Professor Sherwin's contract-property rationale.

35. See generally Emily Sherwin, *Love, Money, and Justice: Restitution Between Cohabitants*, 77 U. COLO. L. REV. 711 (2006) (discussing restitution in the context of cohabitation cases).

36. *Id.* at 711 n.1.

37. See *id.* at 736–37 (concluding that Section 28 does not fit in with the remainder of the *Restatement*, which has attempted to contain the unjust enrichment doctrine).

38. See *id.* at 718 (stating problems with *Restatement* approach).

39. See *id.* (noting clarity of the new *Restatement* in general but its "falser[ing]" in this area); see also Chaim Saiman, *Restitution in America: Why the US Refuses to Join the Global Restitution Party*, 28 OXFORD J. LEGAL STUD. 99, 122 (2008) (referring to Section 28 as "left-leaning").

40. Sherwin, *supra* note 35, at 730.

41. *Discussion of the Restatement of the Law Third, Restitution and Unjust Enrichment*, 2004 A.L.I. PROC. 194 (2005).

V. Conclusion—A Diffuse Establishment?

I remember that back in the dim mists of antiquity in the '60s, during my days in college and law school, the Establishment was a monolithic single force that faced resolutely backwards. The passing years have transformed the Establishment; the closer I approach anything that looked from a distance like an Establishment, the more diffuse and pluralistic it turns out to be. Though I lack full concord with some other parts of the *Restatement of Restitution*, I agree with its rules in both Section 45 and Section 28. A court following unjust enrichment principles may reject an absolutist view of property and contract and override particular property, contract, and gift doctrines.

With regard to Section 45, the Uniform Probate Code solution to the Slayer Rule for a co-tenant incorrectly enlarges the slayer's interest, unjustly enriching a wrongdoer. I favor the *Restatement of Restitution* solution because it does a superior job of advancing the principle of preventing or reversing unjust enrichment.

With regard to Section 28, in my opinion, people beginning a romantic relationship are unlikely to think about their exit strategies if and when the relationship may terminate.⁴² In this context, I find it inconsistent with human nature to draft a formal contract or to apply formal gift law.

A court ought to decide a restitution dispute in light of related common law and statutory principles. If the related law does not permit the plaintiff's recovery, the court should not grant the plaintiff restitution that would undermine the related reason to deny recovery.⁴³ A court granting a plaintiff-cohabitant restitution should prevent the defendant's unjust enrichment, not extend the benefits of marriage to the unmarried.

The *Restatement of Restitution* is more traditional and formalist than many other recent ALI projects because of its base in judicial decisions; it has attracted the approbation and participation, although not the universal harmony, of Professor Emily Sherwin, a major positivist scholar. However, as Professor Chaim Saiman wrote in an e-mail about an earlier draft, it "is about as realist as something called the 'Restatement of Restitution' can be expected to be."

42. See John D. McCamus, *Restitution on Dissolution of Marital and Other Intimate Relationships, Constructive Trust or Quantum Meruit?*, in UNDERSTANDING UNJUST ENRICHMENT 366–67 (Jason Neyers et al. eds., 2004) (noting that partners do not negotiate for property rights when entering relationships).

43. See Doug Rendleman, *When is Enrichment Unjust?: Restitution Visits an Onyx Bathroom*, 36 LOY. L.A. L. REV. 991, 1002–03 (2003) ("A court should not award a plaintiff restitution without examining restitution's effect on other substantive doctrines that decline liability.").

At their base, restitution doctrines are laws for common people because these variations on the overarching principle of preventing defendants' unjust enrichment override more specific rules. Progress and a better quality of justice for the law's consumers will follow a restatement of restitution that articulates and publicizes these unjust enrichment principles and makes the law of restitution available and more accessible to the legal profession.⁴⁴

Professor Adams wrote that ALI's critics may dislike its restatements because of their disdain for the common law process.⁴⁵ The restatement process does not specifically follow a common law court's adversary technique, with the reporter acting as judge, receiving adversaries' briefs, and drafting an opinion for a collegial court. But the ALI's formal process resembles the best features of a common law decisionmaking process: "[t]he combination of explicitly normative reasoning with a reliance on the lessons of the past, along with a recognition that both are indispensable."⁴⁶

Any body like the ALI that attempts to "restate" common law principles as blackletter rules is, perforce, as doctrinal or "formalist" as the process that leads to its conclusions. Related areas are examined. Majority and minority rules are consulted. The reporter's research, ideas, and articulation are tested against others'. The reporter's drafts are exposed to the curiosity and candor of the members' consultive group, the Advisers, the council, and the members. Each phase is a potential intellectual crucible, although the testing may occur off the public stage. Although its membership could be more diverse, the ALI internal process is rigorous and intellectually heterogeneous within the intellectual community of doctrinal legal analysis.

This Article has summarized disputes about both a technical point of measurement and the doctrinal cornerstone of a section. The ALI's collective reasoning usually reaches a principled result with the rule expressing a professional consensus. Representation of broader backgrounds and interests would, however, improve the ALI's decisionmaking, its predictions about where the law is headed, and its restatements' legitimacy. If, as I don't think, the results are insular and barriers to reform, then so is the ALI's common-law-like process.

44. Professor Saiman states it more elaborately but a little differently: "American discourse openly embraces the court's redistributive powers, and views restitution as the legal framework through which considerations of justice traditionally precluded from orthodox doctrine find their expression in the positive law." Saiman, *supra* note 39, at 114.

45. See Adams, *supra* note 2, at 265 (noting that criticism of the ALI may simply be criticism of the common law process).

46. David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845, 857 (2007).

As my lead quotation from fictional Willie Stark reveals, I am a legal realist and progressive, influenced by Leon Green and Felix Cohen. I hope I am also realistic. Because I also believe that lawyers and courts can apply doctrinal rules to decide most disputes correctly, I am pleased to participate in and defend the ALI enterprise.

The United States' common law will remain conservative at the center; but, driven by social changes and lawyers' adversary technique, it is pluralist in developing areas. The nation has no single private-law court. In its federal system, each state's court of last resort has the final word on that state's common law. Jury trials and elected judges guarantee surprises.

The ALI's restated sets of blackletter rules cannot curb the generative influence of a court's outlier decision that may in its turn become the future generation's leading precedent.⁴⁷ Indeed, far from suppressing this generative impulse, the ALI's re-restating into second and now third restatements accommodates its process to social and legal changes. But just as the law itself cannot stay abreast of a dynamic society, the ALI's restatements will usually tag a little behind where the common law is leading.

47. See *Marvin v. Marvin*, 557 P.2d 106, 122 (Cal. 1976) (allowing restitution for services of unmarried domestic partner); *Riggs v. Palmer*, 22 N.E. 188, 191 (N.Y. 1889) (establishing foundation for the Slayer Rule).