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# The ALI and the UCC

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*by*
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I will speak at less length than some of my colleagues here for two reasons. One is, my knowledge of this subject is extremely limited. I've taught for thirty years, but in areas of law that have nothing to do with these. And, it is only on coming to the American Law Institute job a year ago, that I find myself learning about NCCUSL, learning about all these issues, and learning in substantive ways about commercial law. Suddenly, out of the repressed memory, have come back my experiences in Professor Brancher's course in commercial law. I didn't learn it then, and I'm paying the price by having to learn it now.

But I've already made my contribution to this meeting because Dean Scott came and presented his outstanding paper in a discussion session at Columbia Law School.[1] We had a very good discussion on that paper and I thought, this is raising very deep questions, very important questions, about the UCC process, and about law reform in a larger way. The American Law Institute itself is not a perfect institution for discussing and debating that question. The ALI's meetings normally proceed on the assumption that we're engaged in working on a Restatement or a statutory project and we work on the substance. And I thought: "Well, the AALS is the place where there's a body of law professors—here you are in this room—who live with these questions everyday and they are very knowledgeable and very concerned about them." And, by accident, two of my Columbia colleagues, Carol Sanger and John Manning, were Chairs for, or involved in the leadership of, the contracts section and the legislation section. So, here we are. And so, I helped bring about this session, and having done that I should probably be able to sit down right now. But I will just make a couple of other attempts to contribute.

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1. Robert E. Scott, *Rethinking the Uniformity Norm in Commercial Law: A Comparative Analysis of Common Law and Code Methodologies, in* THE JURISPRUDENTIAL FOUNDATIONS OF CORPORATE AND COMMERCIAL LAW 127 (Cambridge University Press, 2000).

I agree with a great deal of what Gail said—but let me add two facts that put a little perspective on what she said from my point of view. One is that there's been a lot of discussion about the cost of participating, and the ALI has paid for consumer representatives' expenses to be involved in some of the ALI work and we can do more of that in the future. Also in our system, for ALI members, we have members consultative groups for all of our projects, and we've helped subsidize the attendance and participation of those members at projects. The ones who are rich lawyers don't need it, but the judges and the academics sometimes make use of our help in attending and participating in meetings. I think the participation issue is important and hardly has been fully solved, but we have made some attempts to do that.

The second point I'd like make is that I did like the comparison to the legislature, all of which was based on this very enlightened nation called California. I was a kid in a capital city, Frankfort, Kentucky, and I should say to Gail that the legislative process in Kentucky did not work exactly in all those ways. And now, as an adult, I have lived in Massachusetts and New York, and I have a number of friends and former students who are legislators in New York where they tell me that very often it's thirty days after they vote for something that they receive the copy or are able to receive in writing what they enacted. So, California may be a little bit at the, as you always say, at the left coast of American experience.

Dick Speidel was Dean of my wife's law school in the last millenium, so he and I go back a ways. Dick said, "The goal of the ALI is to get it right and the goal of NCCUSL is to get it right enough to get it enacted." Well, I hope the goal of the American Law Institute is to get it right. We work to get it right, and I think our procedures are set up to bring in a lot of input. Of course, Gail's right, it then takes a very long time. But we get our stuff out there, at least to our members, who are hardly a cross-section of the legal profession, much less the country. But our defining idea is of an elite organization of judges, academics, and practicing lawyers, and to get these things fully considered by that group. And we're far from perfect, but we put in the effort to keep drafting and re-drafting and see if we can get agreement that we more or less stated it properly.

Now, from the beginning, there were questions. The ALI was founded—it's not as old as NCCUSL—in 1923. From the beginning, there were questions about how to do that. This is the 1920's I'm talking about. Langdell, starting in the 1880s, had had a notion that legal first principles are found in the sky someplace, almost geometric principles, and then a deductive process would bring us down to their application to specific events. Forty years later, by the time the ALI was founded and doing its early work with the first Restatements in

the 1920s and 30s, legal realism had advanced and that basic Langdellian idea was not working anymore and it was more of an inductive process to build law from specific cases and from court decisions as they had addressed specific cases.

The ALI considered and could have done treatises—it could have done Codes. There was a stage at the beginning where the ALI might have turned into some American version of civil law codification. The ALI certainly could have done statutes. And those were talked about and discussed, and the records exist, and there was a notion, "No, we shouldn't do treatises. We'll let the professors go and continue to do the treatises. We're not going to be a codifying organization. We're not going to recommend statutes." Rather, and here's the language from that period, we were going to "bring together the best minds in the profession and encourage and try to contribute to a process by which judges would conserve and clarify the common law and that would be different from Legislatures and Congress which produce, this is a quote now, 'undisciplined politicized reform.'"[2]

In other words, there was a deep anti-democratic, anti-legislative idea. John W. Davis said it in an ALI meeting, "None of us here, I fancy, certainly none of us who are familiar with Congress or the forty-eight Legislatures of our States, anticipates that this labor shall be committed to their charge. Law reform cannot be for legislatures, for elected people. This work, as all of us agree, must be such as to commend itself to the considered judgment of the craftsmen of the profession." Who was that? That was the judges, the professors, you see, the process of judge-made law.

As a little time went by, we got to the World War II period and suddenly the ALI was selling out that principle, or circumstances were changing, and it entered into an alliance with a different organization that stayed—this seems to be the theme of today—stayed in cheaper hotels than we can afford to stay in. And NCCUSL, a state legislative organization as Fred so well explained, and the ALI, this elite elected, certainly non-governmental organization of people who, because they're members, describe themselves as the 3,000 leading lawyers in America—but you know, self-identified. These two very different organizations got together and began the work on the Code which has, until, I would say, recent years, been widely regarded as a great achievement contributing to commercial life in the United States.

2. G. Edward White, *The ALI and the Triumph of Modernist Jurisprudence*, 15 LAW & HIST. REV. 1 (1997).

They found Llewellyn, and, now I quote from Bob Scott's colleague, the outstanding historian Ted White. This is Professor White at the University of Virginia:

> As the principal draftsman of the Uniform Commercial Code, [Llewellyn] produced a statute whose organizing jurisprudential principle was the creation of flexible provisions that could reflect and accommodate "merchant reality"—the observed practices of participants in commercial exchange. With its emphasis on empirical data, flexibility, and the equation of rationality, in the commercial world, with tacit practice, the UCC was a modernist and Realist document; it also represented the American Law Institute's version of law reform.[3]

This was, at that point, a different version of law reform than the body of Restatements had been. And it was committed to State Legislatures, this earlier defamed group, but committed to them with a lot of pressure on them because of this uniformity argument that Gail now rightly raises questions about. But the uniformity argument was a way to get fifty, or as Fred says, fifty-three, with the Virgin Islands, Puerto Rico, and D.C., fifty-three jurisdictions, to a substantial extent, to adopt it.

In her recent writings, Lisa Bernstein has raised very deep questions, and to me, very convincing ones, about the extent to which Llewellyn and his colleagues did, in fact, know what commercial reality was, and how much empirical research was done, and those are fascinating questions.[4] But this was the image, or the myth, or the thought that got us to the recent period. Now we've come to the present period, and as usual, things continue to change. And in this period we're in, we've now had the experience that Dick presented.

For me, going back to Dick's quote, "The goal of the ALI is to get it right." For me, who came into this a little later so I'm not now speaking at all about events where I was a significant participant—for me, there was a lot of work done to produce Article 2B—for there to be a UCC provision about software, licensing of software. When it came forward the American Law Institute was not persuaded that this was satisfactory work or work ready to be part of the UCC, and so the ALI did not approve it. Now, that seems to me consistent with the idea that the ALI's goal is to get it right. NCCUSL, as fully within their authority under the agreement between the two organizations, has taken it out as a model law. Virginia and Maryland have enacted versions of it, and that's the present situation. Similarly, Professors Speidel and Rusch did their great work and there was a draft and many years had been put in, and after debate and vote and

3. *Id.* at 129-30.

4. *See generally* Lisa Bernstein, *The Questionable Empirical Basis of Article 2's Incorporation Strategy: A Preliminary Study*, 66 U. CHI. L. REV. 710 (1999).

consideration, the ALI felt that this would be a good new version of Article 2 and approved. Our sister organization was not persuaded, and they're within their procedures, and they withdrew it from consideration. So I run into a variety of people, especially some in this room, who said at various times, especially when it was a little hotter last year and whatever, "Isn't this terrible for the ALI?" or something like that. And I have to say, I guess I'm too thick-skinned, but I have to say, I don't feel embarrassed. In other words, 2B did not persuade the ALI, and we didn't adopt it. 2 did, and we adopted it. But it takes a lot more than us, happily, to make a law. And the other group, whose agreement was needed, didn't agree, and so that didn't become a recommendation, much less a law.

Then the question was whether to take up 2 again, and we did agree that it was worth another try and the new team went to work on this and I have to say that the work of Henry Gabriel and Bill Henning as leaders, and everybody else involved, has been outstanding. It is by no means clear that we will make it, in other words, that there will be a Revised Article 2. It is up against this—most of you are experts on this—up against this question of scope. And scope is simply the question of the boundary between Article 2 and whatever law there is or isn't going to be about software. And the idea that, the notion that it's a challenge, to figure out the law of software in the year 2001, seems to me completely understandable. We're talking about technology that's changing every minute, about practices that are evolving, questions that are very new. And, I'm not surprised that that's difficult. Once it is difficult, it's then difficult to draw the boundary and to see what the connection and the relationship between Article 2 and Article 2B should be.

We've had very good debates about that at the ALI sessions that have taken it up: the last two council meetings; the last annual meeting. And, again, there may not be an Article 2 revision, but I will not feel that our resources have been misused. In other words, these have been heavy, serious, quality debates about very serious, up-to-date questions, and I think we contribute by being a forum where these issues are debated. I think Gail and others today will say very good things about how we can do a better job of being the place where these issues are debated. I think getting stuff out better and having various kinds of electronic means so that people don't always have to have meetings in hotels and can communicate in other ways, we can do a lot better at that and we will. But the idea of us as the forum where people argue, submit, debate, disagree about these issues is fine.

On the merits, now I want to begin to turn this meeting toward Dean Scott's paper and ideas. I just want to put five things in front of you as very serious subjects for academic inquiry, writing, research,

consideration, and disagreement. There was an assumed ideology about the UCC when I was a law student; it lasted quite a bit beyond that time, but it's over now. And so, right now, suddenly—not suddenly, but in the recent period—every one of these five things has come to be open for serious argument.

First, do we want our commercial law to be federal or state? My colleagues at NCCUSL have an ideology and a belief. Their organization is based—I think, Fred disagreed with a little of this a few minutes ago—but I think their organization is based on two ideas: 1) uniformity of law and 2) law enacted at the state level. I have always felt that there is a bit of a tension and maybe even a contradiction in those two ideas. If we want it uniform, maybe it should come from Washington. But the federal/state question is in front of us and in recent years Congress has done important things about commercial law that begins to, a little bit, destabilize the core existence of commercial law as a state matter. I think we will, even in this federalist era, continue to see tension about that question and it requires careful examination and debate.

Second, what about the argument for uniformity? Would we be better off if many of these areas of law were taken up State by State? Maybe that produces a race to the top. Maybe it produces a race to the bottom. But the question is certainly debatable and has to be kept in front of us all the time.

Third, the question raised in a very provocative way by Dean Scott, do we want statute or common law? Going back to what John W. Davis said,[5] would we have better commercial law, right now, especially with the very hard questions coming up with new forms of commerce and new forms of electronic goods or hybrid goods? Should we, for a period of time, let that law evolve case-by-case, judge-by-judge? Or, can we make law, statutory law, with sufficient specificity to be a contribution? Or when we begin doing it, as we begin seeing the difficulties, do we make the statute so general that we are continuing, in effect, to leave the matter for court decision?

Fourth, what is the relevance of trade practice? To what extent do we want simply to have law ratify practice? What is the practice of those in business?

And fifth, to what extent do we want to acknowledge and recognize the freedom of the parties to provide? In other words, are we going to make default rules, or do we, on the other hand, want to protect, for example, consumers, and perhaps small business?

One of the great ways, fascinating ways, in which that arises—and now I'm talking about Article 1 of the Code for which Professor Cohen is the Reporter—the issue of choice of law and the ability of

5. *See* White, *supra* note 2.

people to make contracts, or business to make contracts, that say "We want this handled under the law of New York," or "We want it handled under the law of Singapore." To what extent do we want to place limits on the ability of the parties to make their own law?

Each of those is a hard question and many of these issues require getting into three, four, or five of those five areas, each of them raising very provocative and difficult matters. Finally, we're at the point where none of this is solely domestic. The ALI has begun—this organization formerly known as the American Law Institute—has now completed its work on insolvency law, Canada, Mexico, and U.S. I call the project NAFTA Bankruptcy, but it's very serious work trying to coordinate very different systems. Three languages—French, Spanish, English—and already having an effect with some actions taken in Mexico City recently that is producing a degree of coordination when bankruptcies occur with assets in more than one of those three nations. Our work on the Hague convention, judgments and jurisdiction, is just beginning, but it's very important for American domestic law, and Professor Hazard's project on transnational civil procedure, looking to new kinds of civil procedure for international or transnational commercial disputes. So there's going to be more of all of this work occurring in an international setting.

I guess I would only leave you with two small points that occur to me after my showing you very recent, and so far not, so deep, involvement in these matters. One is, I don't believe we're going to go back to a point where none of it is statutory. In other words, I think in a democratic society, the Legislatures are going to be involved, that Congress is going to be involved. That then gets you to all kinds of good public choice questions about what roles should be played by organizations such as NCCUSL and the ALI. What sort of role in recommending or urging legislation? It's a parallel question to the historic role of the ALI through its Restatements in trying to persuade judges of what the best common law is. But it's different in various ways, and I think Gail has raised a lot of those differences in a very helpful way. But I think, and perhaps Bob Scott and I disagree about this, I think statutes are here for at least another period of time.

The second and final point I'll make is, I do think that when we're talking about information, or intellectual property, or these new sorts of barely-coming-into-existence electronic and other methods, I think we do have new and difficult questions. I think they are different, and thus, I think we shouldn't be surprised that we have to struggle very hard to work our way towards legal concepts, and then that drawing the boundaries is difficult, bordering on impossible. And so when you hear references from this microphone in the last hour to people of good faith who have had lots of problems recently, I

think one of the reasons is that the boundary between the refrigerator and the refrigerator that's really a computer is a hard, not an easy, set of questions. I'm not surprised that it's proving difficult and will take some time to figure them out.

Thank you.