

# Restatement and Reform: A New Perspective on the Origins of the American Law Institute

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At the December, 1945, annual meeting of the Association of American Law Schools, William Draper Lewis, who had directed the American Law Institute since its founding, made a startling confession about the founding of the ALI. Everett Fraser, then president of the AALS, had enticed Lewis to speak by complimenting the former University of Pennsylvania Law School dean: "People [at the AALS] talked of a Juristic Center. In the American Law Institute you made it a reality."<sup>1</sup> There was some truth to this—Lewis was the driving force behind the creation of the ALI. Fraser nevertheless mischaracterized Lewis's achievement. According to an unpublished, recently discovered typescript of Lewis's informal remarks, Lewis chided Fraser, "you know that there is not a word of truth in what [you] said . . . [because in] doing what I could to establish the American Law Institute, I did not create but rather for the time being killed any attempt to establish a legal center." Lewis conceded many members of the AALS in the early 1920s "desired to start a Judicial Center conceived of as a place where law professors could meet, usually in the summer, discuss law, carry on legal researches and write legal books." Lewis claimed he had torpedoed that plan; he had something very different in mind for the ALI. "Elihu Root and [I] used this [AALS Committee on a Juristic Center] to summon a group of prominent lawyers to meet with the members of the Committee, and that by the work of that larger group grew the American Law Institute and its Restatement of the Law . . . it is not true that the American Law Institute is a Juristic Center. It is

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what Mr. Root and I intended it to be: an organization to carry out specific legal projects for the constructive improvement of the law and its administration.”<sup>2</sup>

This article is an account of the origins of the ALI based upon hitherto unexamined manuscript sources and a new interpretation of other documentary materials,<sup>3</sup> which reveal that Lewis’s purpose was progressive, pragmatic reform of the law, and his triumph was the co-option of the leading lawyers and judges of his day to this goal. He stage managed, prodded, manipulated, and plotted so well that both his contemporaries and later historians did not fully grasp the essence of his achievement.<sup>4</sup> To be sure, Lewis was not entirely fair to Fraser, much less to later historians. In his off-the-cuff reminiscence on the founding of the ALI, Lewis lifted the veil of secrecy from his purposes and his plans, but he was not so forthcoming about the ALI’s original reformist program in print. His official version of the history of the ALI, published that same year, and many other accounts of the origins of the ALI by participants obscure this point, whether by design or inadvertence one cannot determine. Later critics and scholars have mistaken Lewis’s and the other founders’ motives and thus missed their moves. It is important that the historical record be set straight because precedent in institutions is almost as important as precedent in law. These inaccuracies have led to the conventional wisdom that the ALI was created by a band of legal formalists working hand in hand with the legal moguls of New York and Philadelphia corporate finance to save the common law from statutory liberalization and other un-American pollutants. Nothing could be farther from the truth. The origins of the ALI lay in the vision of a group of “progressive-pragmatic” legal academics, who wished to reform law and promote the influence of law professors in the wider world of legal practice.<sup>5</sup>

## I

The story begins in 1906, at the annual meeting of the American Bar Association in St. Paul, Minnesota. At an evening session of the meeting, thirty-eight-year-old Roscoe Pound, former commissioner (judge) of the Nebraska Supreme Court and current dean of the University of Nebraska Law School, gave an address that shocked the old guard, galvanized his own generation, and marked the emergence of the modern era of American legal and jurisprudential history.<sup>6</sup>

Pound’s address focused on the imprecise nature of the administration of justice. He laid the woes of the law at the door of over-eager and

legally naive legislators, the nature of society, and, most heretically, the judges. He criticized the bar and judiciary for allowing treatable symptoms to go uncorrected. Pound's implicit sociological jurisprudence emphasized the cultural origins of law and its responsiveness, or recent lack thereof, to that extralegal bugaboo, public opinion. Pound was not arguing for direct democratic influence in judicial procedure—he opposed the political interference of the popular election of judges. Rather, he argued for judicial decision making sensitive to currents of opinion, an implicit denial that judges objectively discovered principles of law floating in the air.

Pound articulated what many of his generation had begun to recognize: that the classical-formalist paradigm of how the law was applied in the courts—how judges discovered law—had lost its explanatory power under the accumulation of contradictory data. The explosion in published reports of cases by the West Law Book Publishing Company had graphically illustrated inconsistencies between, and even within, jurisdictions. Complaints about the confusion of the law and the multiplicity of cases in the last decade or so of the nineteenth century was the manifestation of the cognitive dissonance of a generation groping with this increasing contradiction between data and paradigm. Older formalists futilely tried to ignore the contradiction by either attempting to reconcile cases or perfecting their schemas for legal classification.<sup>7</sup> The progressive-pragmatist generation, through their spokesman, Pound, was the first to identify what the new case data was telling them: that the classical-formalist paradigm did not describe or explain the reality of what was happening in the courts.<sup>8</sup>

A furor erupted at the ABA meeting over progressive New York lawyer Edward Wheeler's resolution to have Pound's talk reprinted and distributed in advance of its publication in the Annual Report. Wheeler wanted Pound's scathing critique disseminated as quickly as possible to members of the bench and bar who had not had the opportunity to hear it for themselves.<sup>9</sup> Among the sharpest critics of the motion was James DeWitt Andrews, the moving force behind the ABA Committee on Classification and Restatement of the Law.<sup>10</sup> He was joined by other members of the ABA's "conservative" old guard in condemning Pound's "drastic attack" and defending the orderly, formalistic system of justice that had prevailed for nearly half a century.<sup>11</sup> Pound's admirers retreated in the face of "the repressed indignation of the assemblage," but as John Henry Wigmore recalled thirty years later, the "progressive-minded" "younger men" knew even as they lost the battle that cool, late-summer evening, a fatal blow had been struck against the "stout defenders of Things-As-They-Are."<sup>12</sup>

On the steps of the Minnesota capitol the next day, a few of the law professors and deans who were disenchanted with the intransigence of the ABA's conservative practitioners met in an unheralded but historic conclave. Lewis was there, as well as Dean Wigmore of Northwestern and George Boke of the University of California at Berkeley. Little is known of what transpired among Pound's academic allies, other than a mutual expression "to do *something* about it in [their] own limited spheres," a resolution that would lead to the ALI and the restatement of the law.<sup>13</sup>

Wigmore took the first step by bringing Pound to Northwestern University's School of Law—the beginning of the hitherto obscure Nebraska jurist's rise to academic prominence.<sup>14</sup> More important in the history of the ALI, however, was the part Wigmore would play in crippling Andrews's own *Corpus Juris* restatement project.

Only a few months after the dissidents' call to arms in St. Paul, Lewis extended the call to legal educators in an address to the AALS: "If, as a profession, we are awake to our public duties, it is the small class of men who are devoting their lives to legal teaching who must point the way."<sup>15</sup> Thus the future leader of the ALI committed himself to an active reformist role for academic scholars, though nearly twenty years would pass before he could find the key to implementing his vision.

Forty years later, Wigmore recalled the St. Paul ABA meeting in a letter to Lewis: "Looking back in memory to the day when you and I and two or three other young fellows sat on the steps of the courthouse in St. Paul, and hoped for the day when Pound's plea for progress could materialize. . . ."<sup>16</sup> Lewis and Wigmore had seen the future.

## II

The seeds that Pound had sown at the ABA meeting in 1906 began to germinate eight years later. Wesley Newcomb Hohfeld of Yale University Law School, one of the stars of the early twentieth-century academic firmament and a young protégé of Pound (now Story Professor of Law at Harvard), translated Pound's message and the resolution of the academic rebels of 1906 into a call for action. At the 1914 AALS meeting, Hohfeld claimed that "our leading lawyers and judges have been awakened to such of our juridical defects as are real and substantial" by Pound's early critique. Time and events had made reform of the law and legal thinking increasingly urgent: "Men's minds have been stirred to the point of conscious and definite struggle for change,

and matters of law and justice have become great political issues both in the nation at large and in the various states.”<sup>17</sup>

Hohfeld’s solution was a program to transform professional law schools at certain universities into national academic juristic centers to foster genuine academic training in law and jurisprudence and to promote research that would lead to the needed reform of the law. Hohfeld did not include in this center judges and practicing lawyers. The essence of his plan was the new-found self-importance of the legal academic. At present, Hohfeld complained, “[t]he majority of the universities have . . . been content to offer purely professional or vocational courses in law along conventional lines—what is commonly called general jurisprudence being entirely, or almost entirely, ignored.”<sup>18</sup> Hohfeld argued that without law school-sponsored training and research in jurisprudence, there could never be the reform of the law everyone agreed was necessary. Like many in his AALS audience, Hohfeld resisted leaving reform to non-academic practitioners:

Practicing lawyers are, as a class, too busy with their individual problems and the earning of a livelihood to give the necessary time and energy to the broadest aspect and problems of the legal system. Furthermore, they are not so apt to have the detached and disinterested viewpoint that would ordinarily characterize a university law faculty; and we know that only too many lawyers of low standards are apt to think that existing defects mean more litigation and hence more earnings to themselves and as a result no longer have the complete confidence of the great masses of the public.<sup>19</sup>

Hohfeld concluded that such reform would best be associated with academic centers where well-trained law professors could devote their scholarly expertise to problems in the development of the law. The Yale professor reassured his colleagues that the graduate jurisprudential centers he proposed were not meant to entirely supplant ordinary law schools. He explained, “I am not thinking specially of the needs of the ordinary professional law students. On the contrary. . . I have in mind primarily the gradual building up of a class of university jurists—legal pathologists and surgeons, we might call them—who shall have a far greater share and influence than at present in prescribing for our ills. . . .”<sup>20</sup>

Hohfeld’s endorsement of the academics’ role in promoting clarification of the law was not unequivocal. There was a subtle criticism of existing legal education and law professors in his program to redesign university law schools into national juristic centers. Only a couple of years before his AALS address, rehearsing this same theme in a letter

to Pound, Hohfeld had wondered whether the law schools and their faculties were up to the task:

Surely university law schools must take the lead in endeavoring to develop a *system* as distinguished from the present unwieldy and imperfect mass of case law; and to accomplish this purpose it would seem necessary that the law schools worthy of the name begin by building up a body of men who shall be real jurists comparable to those of Germany,—not merely a body of money-making lawyers with wits sharpened by mere dialectic based upon the acute and subtle distinguishing of the judicial instances to be found in the Harvard case-books. As brother Wigmore has pointed out in the Green Bag, we at present are hardly in a position to work out an ideal *corpus juris*,—because of this very want of a sufficiently large body of men trained, in reasonable measure, from the hystorical [sic], systematic, comparative and analytical points of view.<sup>21</sup>

The minutes of the meeting record no immediate response from his AALS audience and his plan for a drastic redesigning of the major law schools spurred little discussion.<sup>22</sup>

The following year, however, Dean Harry Richards of Wisconsin mentioned Hohfeld's talk in his AALS presidential address.<sup>23</sup> In assessing the status and future of American law schools, Richards said: "The elaborate school of jurisprudence outlined by Professor Hohfeld last year will not be possible until we have had a complete revolution in sentiment concerning these matters." It was a backhanded reference, for Richards recognized that the vast majority of lawyers and law professors did not want to transform professional schools into graduate centers. He conceded that the law schools aspired to greater academic legitimacy when he said, "[w]e would like to have men in our faculties who feel its importance. . . . Their knowledge in these fields will not be of immediate use in the classroom, [but] it will enrich their teaching and contribute to a correct knowledge of our law. . . ." Nevertheless, Richards counseled that "[a]n Association we should show our interest in this work by active encouragement. . . . [that is], [t]he schools that have the material and the men for this field should have our active backing." He did not propose that the AALS actively promote such jurisprudential work. Then, in an apologetic afterthought, Dean Richards vaguely posited the "hope that in time the idea back of Professor Hohfeld's paper may be realized by the establishment under the auspices of this Association of a center for such studies in Washington [D.C.], where students can come in contact from time to time with representative American and European scholars in these broad lines of jurisprudence." By a combination of practical criticism and feint praise,

Richards put an end to Hohfeld's original plan to reform the law school curriculum and originated a very different proposal for a single national juristic center.<sup>24</sup>

It seems unlikely from his phrasing that Richards intended to spur immediate action, but at least one enthusiastic member of the audience, George Boke, the third conspirator on the steps in St. Paul in 1906, jumped up after Richards finished speaking to move that a committee be appointed to "take under consideration what steps can be taken . . . that a center be started, in Washington or elsewhere, to consider . . . the plan of a central school." Boke's motion was immediately amended by Harvard's Joseph Beale. Beale was apparently less impressed by Richards's offhand proposal for a juristic center than Boke and, sensing Richards's own lack of enthusiasm, watered down Boke's recommendation by authorizing the committee to review "all the recommendations and suggestions contained in the President's paper." With Beale's amendment, Boke's motion quickly passed.<sup>25</sup>

Richards appointed Boke, Beale, and Lewis to the newly formed committee and charged them to meet and report back to the association the next morning before the annual meeting adjourned. Beale, eager to discharge his duties, suggested "that as there is a half hour or so before the time the smoker arrives, the committee [might] make a partial report in a few minutes." Richards responded by announcing that "[w]e will take a recess for five minutes to give the committee an opportunity to prepare a report." Either Richards and Beale saw AALS sponsorship of such a juristic center as a question of no real significance, not requiring thoughtful deliberations, or they thought so highly of its merits that they believed it would require little debate. Later events suggest that the first interpretation may be closer to the truth. In any event, Beale and Richards were wrong about how long it would take the committee to come to a consensus; after the short recess, "the committee presented a tentative report but no action was taken, the matter being left with the committee for further consideration."<sup>26</sup>

The next morning, Richards asked Boke to report on the committee's deliberations. Boke told the gathering that the committee had decided to continue working on the proposal for a permanent juristic center. Boke reported that "the committee [was] unanimous" in its support of the idea, though its members differed "as to where such a center should be established." One wonders if Beale thought he might bring the juristic center to Harvard rather than have an independent center that could ultimately rival Harvard's dominance in legal education, whereas his colleagues from California and Pennsylvania might have preferred an independent institution. Apparently, Boke and Lewis were

able to convince Beale to support the general principle of a juristic center, if not agree on its location. The ad hoc committee proposed that another committee be appointed “to investigate and report at the next regular meeting of the Association upon the different plans for constructive work, with a recommendation as to whether it should be done by an independent center or left to a single law school, as at present.” The recommendation to create a committee of three to follow up on the proposal—with Richards rather than the enthusiastic Boke to chair it—was quickly approved by the AALS membership.<sup>27</sup>

Though Richards made the original suggestion and served as chair of the committee to study its implementation, the extent to which Richards and Beale actually opposed the concept of an independent juristic center becomes clear upon examination of the report presented to the AALS annual meeting in 1916. The committee—now Richards, Beale, Boke, and Dean Harlan Fiske Stone of Columbia (replacing Lewis)—was sharply divided over the proposal. Richards admitted that only “[o]ne member of the committee, Mr. Boke, was strongly in favor of an independent juristic center” and that after hearing Boke’s report and recommendations, “the Committee [save Boke] voted to reject the plan for an independent center.” The committee’s majority report argued that there was wide support to expand the law school curriculum in the areas of jurisprudence and legal history but that “the project for an independent juristic center is particularly inopportune at this time, when the problems arising out of the proposed expansion are new, and when it is not clear along what lines the expansion can most wisely be made. Even if such plans [for a juristic center] were not premature, the possibility of realizing them are extremely doubtful.” The two deans and the Harvard professor thus totally rejected an AALS-sponsored independent juristic center; none supported the creation of an institution that might rival their law schools in supporting advanced jurisprudential training and study. They argued, “The natural and proper development in this advanced field will come through the initiative and experiment of the law schools that have already instituted courses along these lines.”<sup>28</sup> In the context of the other controversies wracking the AALS in these years, it is not surprising that the majority of the committee, representing the major university law schools, would oppose any incursions onto their preserve of elite legal education.<sup>29</sup>

Beale and Richards were already on record as opposing the operation of less prestigious law schools, particularly night divisions opening the ranks of the legal profession to the children of immigrants. At the same 1914 meeting at which Hohfeld had described his reform of the law

school curriculum, Beale, in his AALS presidential address, warned his colleagues:

As long as our doors were entered chiefly by immigrants of cognate blood, the common law as it was studied by Story and Langdell might safely be left to develop and adapt itself to each changed condition. But within the last twenty years a horde of alien races from Eastern Europe and from Asia has been pouring in on us, accustomed to absolute government, accustomed to hate the law, and hostile above all to all wealth and power. As these men accept the citizenship which is almost thrust upon them by politicians desirous of their votes, they take their place among the forces which must in the long run determine the nature of the law.<sup>30</sup>

Richards agreed with Beale and connected this supposed threat to American common law to the issue of AALS accreditation of night law schools. In his presidential address the year after Beale's (the same one in which he sidetracked Hohfeld's suggestions), Richards told the Association that

[i]f you examine the class rolls of the night schools in our great cities, you will encounter a very large proportion of foreign names. Emigrants and sons of emigrants, remembering the respectable standing of the advocate in their old home, covet the title as a badge of distinction. The result is a host of shrewd young men, imperfectly educated, crammed so they can pass the bar examinations, all deeply impressed with the philosophy of getting on, but viewing the Code of Ethics with uncomprehending eyes. It is this class of lawyers that cause Grievance Committees of Bar Associations the most trouble.<sup>31</sup>

Richards's and Beale's elitism had thus an Anglo-Saxon coloration; they were wary of reform, whether social or legal, coming from any direction. Though many in the AALS supported Richards and Beale, for example in the effort to deny support to night law schools, the AALS was not dominated by the elite, conservative forces that controlled the ABA.<sup>32</sup>

Boke ardently disagreed with his colleagues and prepared a stiffly worded minority report. Unable to attend himself, he asked Wigmore to present it to the meeting. Boke's report tracked the report of the ad hoc committee of the previous year, pointing out that the earlier committee members had unanimously supported the creation of an independent juristic center. He supplemented their recommendation with the results of his own research from the previous year, in which he found a "general consensus of opinion . . . among lawyers and law teachers in different parts of the country" supporting the proposed juristic center. Boke disputed the majority's argument that advanced

juristic work would be better undertaken at the law schools themselves: “[T]he creation of an independent juristic center is not in the least opposed to constructive juristic work in the law schools; but on the contrary the highest development of research and advanced instruction possible in each law school in its individual capacity would be consistent and highly desirable in connection with the separate juristic center,— a cooperating body. The development of both the schools and the center would react to the great advantage of each.” The crux of the dispute for Boke was that an independent organization could be devoted not merely to academic study but to research for the improvement and reform of law—an external goal with an audience of practitioners and judges as well as students. “The essential question is . . . whether in *addition* to all the law schools can do individually, there should be created a national juristic center, as a continuing central instrumentality for the scientific development of law and cooperation with the present legal forces of law schools, bar associations, etc., toward a continuous unity of plan.” Boke represented the progressive-pragmatic law professors who wanted to take an active role in law reform while Beale and Richards represented the conservative purists who thought law professors should take a passive role by influencing legal interpretation only through their scholarly treatises. Boke also realized that to have law professors take an active role, they would have to work with the other branches of the legal profession, a prospect many of these same conservative legal educators found unpalatable.<sup>33</sup>

Both the majority and minority reports recommended that yet another committee be appointed, but they totally differed as to how that committee should be charged. The Richards-Beale-Stone majority report wanted the AALS to “refrain from taking any action at this time [toward creation of a juristic center] beyond the appointment of a standing committee to investigate and report upon some effective way in which this Association can stimulate interest and activity in this field [jurisprudence].” In contrast, Boke’s minority report urged an aggressive, active program. His resolution proposed “[t]hat a Juristic Center Conference Committee of five be selected, which Committee shall draft a plan for a conference on the whole matter of the Juristic Center, fix a time of sitting, (not less than one week), and such location as shall seem most desirable, and at the proper time invite representatives of the law schools and the bar to meet with them in a deliberative conference. . . .”<sup>34</sup>

Thus it was Boke, rather than Richards or Beale (who are traditionally given credit), who laid out the plan for and urged the creation of a juristic center that would become the ALI. The conservatives and

formalists among the professors had tried to kill the proposal; the progressive anti-formalists were its true supporters. In part because previous scholars overlooked the contrasting positions of Richards and Beale and Boke, they mistakenly characterized the ALI founders as conservative and formalist.<sup>35</sup>

Although approval of the majority report was quickly moved and seconded, the delegates immediately started to question the vague agenda the Richards majority planned for its proposed committee. Boke, not present, could not defend his plan, but Albert Kocourek from Northwestern supported Boke. Kocourek realized that the reputation of the members of the committee majority would probably win the day: "I suppose the motion in favor of adoption of the majority resolution will be carried." But he argued, Boke "has unselfishly for a long time done a lot of work in favor of his proposal [and] I should be very sorry to see the efforts of a man who is doing this kind of work turned down by this association." Boke didn't ask for a great commitment from the Association, Kocourek pleaded, "[a]ll he is asking for here is a conference. It is not going to hurt anybody." Kocourek then pointed to the weaknesses of the majority recommendation: "I feel very much as the last speaker does about the main resolution. I don't believe that a committee is going to be able to do much to persuade schools to take up the courses which have been labelled in this discussion as courses with 'fancy names.' . . . So on the main resolution here, I would vote 'no,' and I would be in favor of Mr. Boke's proposal to have a conference committee to see what can be worked out. I don't believe that any good will be accomplished by a committee to suggest to individual law schools what they ought to do."<sup>36</sup> Before a substitute motion reflecting Kocourek's position could be formally moved, William Lloyd from the University of Pennsylvania asked that "both reports be laid on the table." As he explained to his fellow delegates: "That means that they will come up next year."<sup>37</sup> Lloyd's motion prevailed without discussion.

The next year the AALS held no meeting, nor would it for three more years. Law schools all but ceased to operate as able-bodied students were called up to serve in the armed forces; even the law professors served the government in the crisis.<sup>38</sup>

### III

The First World War and its aftermath altered the legal community's attitude toward law reform. In the wake of the War, European govern-

ments toppled. While most Americans had little sympathy for the demise of the ancien régime, the manner of their passing—sometimes by bloody revolution—was disquieting. In particular, the collapse of the Romanov dynasty in Russia, replaced by Bolsheviki who espoused economic as well as political revolution, unnerved many in the American legal community.<sup>39</sup> America, too, suffered turmoil in the post-war years. While revolutionaries never physically challenged the government, moderates as well as radicals called for reform. Women, workers, and immigrant groups sought recognition of their demands for political and economic justice.<sup>40</sup>

Leaders of the bar responded to native social and economic protest by criticizing dissenting groups. At a 1919 Conference of Delegates of State and Local Bar Associations, Elihu Root, Secretary of State under Theodore Roosevelt and president of the Conference, spoke as an elder statesman and urged all reformers to display caution and good sense.

Everyone, conscious of great mistakes, finds now to be the time for their immediate remedy. For the moment the people of the world have lost sight of the old truth, proved by the experience of civilization, that the redress of wrong and the advancement towards better things, must come slowly through effort, persistency, courage. For the moment the world has forgotten that prosperity, so necessary to peace and order and the cultivation of the arts, must rest upon steady, painful industry, thrift, enterprise; and that all must rest upon law.<sup>41</sup>

Root concluded that the situation was critical and warned his audience that it would be up to the legal profession to take steps to help return order to society. “It is the duty of the Bar of the United States,” he explained, “to carry on a new propaganda among the people and to recall the people to the older and better judgment that this is a government of laws and not of men, and that the law must be respected and obeyed.” Root reassured the assembled bar leaders that the unrest “is but momentary” but reminded them that “the gods help those who help themselves, and we will not realize that last expectation except by accomplishing it ourselves.”<sup>42</sup> How the bar should go about accomplishing that task was not clear.

Root’s audience read his moderation in the light of its own fears, and turned his conservatism into a rationale for repressive measures. The ABA polled its members on the following highly charged referendum:

WHEREAS, The Constitution of the United States and the Constitutions of the several States contemplate government by and for all the people and not by or for any particular class, group or interest:

*Now be it therefore resolved,* That the liberties of the people and the preservation of their institutions depend upon the control and exercise by the Federal, State and municipal governments of whatever force is necessary to maintain at all hazards the supremacy of the law and to suppress disorder and punish crime.<sup>43</sup>

The preliminary results of the voting, as reported in the *ABA Journal*, showed overwhelming support for governmental force “to suppress disorder”: 4950 in favor, 58 against.<sup>44</sup> With the majority of the bar publicly supporting the use of extreme measures, United States Attorney General A. Mitchell Palmer carried on with impunity a brutal crusade against dissidents—mass arrests and deportations—that wreaked havoc with Bill of Rights guarantees of free expression and due process of law.<sup>45</sup>

While the elite bar as a whole either supported or condoned the attorney general’s assault on dissent, some lawyers and not a few law professors were appalled by Palmer’s tactics. In May, 1920, twelve prominent attorneys and law professors published a scathing, documented denunciation: *Report upon the Illegal Practices of the United States Department of Justice*.<sup>46</sup> Among the twelve protesters were Harvard law professors Zechariah Chafee, Felix Frankfurter, and Pound, University of Chicago law professor Ernst Freund, and Washington University law professor Tyrrell Williams.<sup>47</sup> Whatever their position on Palmer, legal academics shivered in the political atmosphere of 1920 and were justifiably concerned about the future of law, liberty, and order in American society. Leaders of the AALS could hardly overlook the politicization of their practitioner brethren; it would be up to the law teachers to forestall disaster.

#### IV

When the AALS convened for their annual meeting at the end of 1920, the charged political events and reactionary response of the practicing bar during the previous twelve months had placed the creation of a national juristic center in a new light. The plan’s latest sponsor was Association president Eugene Gilmore, a professor at Wisconsin Law School. In his presidential address, Gilmore invoked Hohfeld’s gloss upon Pound’s then fourteen-year-old exhortations: “The conflict between our law and those who are working for social progress has its roots ultimately in our teaching of the law . . . it is too true that the legal scholar is busied chiefly with threshing over old straw.” Gilmore, a progressive, wanted the law schools to teach law as social justice and

thereby reform its practice. He argued that “the foregoing criticisms, if they mean anything, mean a fundamental change in legal education as to its scope, content, and purpose. They mean that the transition from an individualistic to a social idea of justice is to effect organic changes in legal education; that the socialization of juristic conceptions must produce a corresponding socialization in the profession of the lawyer; that he pursues his calling no longer as a strictly private one, but as a calling ‘affected with a public interest’ which carries substantial obligations to the community.”<sup>48</sup>

Gilmore laid the responsibility for reform on the law professorate because “they are so circumstanced as to be best able to accomplish the task.” Echoing Hohfeld’s remarks of six years earlier, Gilmore pointed out that “law teachers as a class are by temperament, training, and status especially fitted for the work of systematizing our law and socializing our legal traditions. Freed from the distractions and strain of active practice and the bias of advocacy in particular cases, they are able to view disinterestedly and critically the entire field of law.” Gilmore argued that a “statement of several branches of the law and an adequate statement of our law as a whole” was a crucial task, but he did not want to leave it to the practitioners.<sup>49</sup>

Gilmore and the others now pushing for the predominance of law professors in the law clarification and reform movement were probably responding, at least in part, to the reemergence of the Andrews’s ABA Committee and its *Corpus Juris* restatement project. The ABA Committee and its project had lain dormant after coming under attack by Wigmore in 1908 and 1914, but Andrews and his fellow practitioners were trying to revive it in 1920.<sup>50</sup> The law professors were also well aware that their practitioner brethren gave them short shrift in practical law reform. At the ABA meeting in 1922, for example, even as the law professors worked toward implementing their juristic center, William Howard Taft, chief justice and former president of the United States, proposed that Congress create a new commission composed of “two Supreme Court justices, two circuit judges, two district judges, and three lawyers of prominence and capacity to prepare and recommend . . . amendments to the present statutes of practice and the judicial code, authorizing a unit administration of law and equity in one form of civil action.” Notably absent from Taft’s important commission for the reform of federal civil procedure were law professors. The ABA, oblivious to this omission, endorsed Taft’s proposal.<sup>51</sup>

Encouraged by the success of the AALS Round Table Conferences on various areas of law held each year at the Association’s annual meeting, Gilmore worked to bring law professors into the task of

reforming the law. Perhaps, he suggested, “[t]his development should take the direction of a better and more permanent organization, and more definiteness and continuity of activity.” As an example of what he had in mind, he reminded his audience of “a matter which grew out of a suggestion in the President’s address in 1915, and which resulted in the appointment of a special committee on the establishment of a juristic center. The report of this committee in 1916 was discussed and laid on the table, where it still remains. . . . The time has come to take up this report again.” Unlike Richards, Gilmore was enthusiastic about a new organization for law reform in which the law professors would play an active role. In sharp contrast to the Richards-Beale-Stone majority report, Gilmore argued that a permanent, independent juristic center was “quite feasible and [it is] well worth-while to bring into a single organization the law teachers and a select group of lawyers and judges who have a genuine interest in law reform. Such an organization should meet at stated periods in a central place and should give extended consideration to the improvement of the law and its administration.” The structure of the organization had evolved from law-school institutes (Hohfeld), to a national academic jurisprudential center (Richards), to a new form: an active, independent organization of law professors, lawyers, and judges dedicated to progressive law reform (Boke and Gilmore). Gilmore concluded by recommending “that a special committee of five be appointed by the incoming president [Arthur Corbin] . . . and that to this committee be referred . . . the entire matter of a juristic center involved in the report of the committee of 1916.”<sup>52</sup>

Immediate support for Gilmore’s proposal came from an unexpected quarter. Beale, last heard denouncing the idea of an independent juristic center in the 1916 committee’s majority report, now moved for “immediate action” to create the proposed committee “to consider during the year some method of improving the Law by a union of the forces of law teachers and of other persons interested in legal science. . . .” Without further discussion, the motion that “a special committee of seven be appointed, to take up the matter of organizing the teachers into an effective organization to deal with the large problem of legal education and law reform” was carried.<sup>53</sup>

Gilmore chose Beale to chair the new committee. As chair of the original 1915 ad hoc committee, a member of the 1916 committee, and the individual who had made the motion for the new committee, Beale probably seemed the logical choice for leading it. Forgotten was Beale’s opposition in 1916. As to why he was now supporting it, the Harvard professor’s enthusiasm apparently waxed and waned depending

on whether his colleagues approved of the idea. In addition, Beale probably realized the importance of the venture and feared the influence of his more liberal colleagues on the direction of the committee. The best way for him to stem that influence and exert control over project was for him to chair the committee. In fact, Beale ultimately lost control of the committee and failed to impose his conservative agenda on the ALI.<sup>54</sup> Nevertheless, Beale's political and juristic conservatism and ostensible role as the original chairman of the 1920 AALS Committee on a Juristic Center has led subsequent scholars to overemphasize his support for and influence over the nascent ALI.<sup>55</sup>

Also appointed to the new committee were two other veterans of its earlier incarnations: Stone (who had signed the majority report of the 1916 committee with Beale) and Lewis, the secretary of the original 1915 ad hoc committee that had unanimously approved the creation of an independent center. The remaining members appointed by Corbin included the two great twentieth-century evidence experts, Edmund M. Morgan of Yale and John Henry Wigmore of Northwestern, as well as James Parker Hall of Chicago and Henry M. Bates of Michigan.<sup>56</sup>

## V

The Committee on Round Table Conferences and a Juristic Center, as it was now called, was, like its predecessor in 1916, split over the report it submitted for publication in the program for the 1921 annual meeting. The majority of the committee—Beale, Stone, Bates, Lewis, and Morgan—claimed that the “law . . . [is] antiquated. . . . Its administration is almost everywhere in need of improvement.” They argued in the strongest reformist terms “that it is the duty of the legal profession to initiate the steps necessary to bring the law and its administration into harmony with existing conditions. . . . If the legal profession does not effectively organize an agency to carry out this duty, individual lawyers and laymen will rashly and ignorantly propose, and in many cases secure, the adoption of crude and superficial remedies.”<sup>57</sup>

The committee's majority report sounds very much like Lewis's work, and it is consistent with what we know of the ALI's longtime director that he probably undertook the writing of the report for the committee.<sup>58</sup> Lewis knew and was critical of Andrews's ABA restatement project, and it was partly that venture that prompted this warning against leaving the job of reform to lawyers and laymen. As Lewis wrote many years later to one of Andrews's former ABA Committee colleagues: “I never saw Mr. Andrews but once. He explained his

project which I thought was fundamentally unsound. . . .”<sup>59</sup> The progressive ideals and pragmatic ethos of Lewis, a “recent Bull Moose politician,”<sup>60</sup> permeate the report: “[T]he law as explained in legal treatises and in the decisions of courts seems to the bulk of the people not so much a machine for securing justice, actually adapted to the needs of the people, [but as a] rule contrived for the aggrandizement of the legal class only, and far removed from the requirements of ordinary life.” These popular perceptions and the volatile social conditions that ensued from them made a complete restatement of the law “necessary.” The committee, as usual, recommended that another committee be appointed, but this time the new panel would be empowered “to invite . . . similar committees representing the courts, the legal professional bodies, and other scientific and learned bodies engaged in the study of the substantive and adjective law and its administration, for the purpose of creating an American Law Institute and an Academy of Law as above, outlined, and with power to name a time and place for the meeting of a conference of these committees.”<sup>61</sup>

Only one member of the Committee dissented from the condemnations of the published report. Hall, newly elected president of the AALS, balked at the majority’s “exaggerated impression of the extent to which our law can fairly be said to be out of touch with present conditions of life” and the recommendation that “the proposed Law Institute should attempt the restatement or rewriting of our entire existing substantive and adjective law . . . [rather than] the plan of a brief survey of the principal subjects of the law by competent specialists in order to select those particular topics in which, by the consensus of informed opinion, there exists a really pressing need for reform, and then concentration of the efforts of the Institute upon these . . . By this method we avoid wasting effort upon those major parts of our law which are tolerably satisfactory. . . .”<sup>62</sup> Hall’s strategy for piecemeal reform ignored the general confusion of the common law that his more progressive colleagues had recognized and wished to remedy. They also realized, however, that Hall’s reputation and his influence as the next AALS president (combined with most lawyers’ natural disinclination for major change) could threaten AALS approval of the bolder plan proposed by the majority.

Outgoing AALS president Corbin orchestrated the counter-offensive to Hall’s attack on the majority’s recommendations. First, Corbin called on Beale to present the committee’s report. Beale played down the dissension between Hall and the rest of the committee, telling the Association that the committee majority had taken the “liberty of scrapping our report and [had decided to present] a verbal report

reduced to the very lowest terms, with the hope that in these lowest terms we may find a way of expressing the views of more men than a longer report would do." Gone was Lewis's scathing attack on the state of the law and its administration. In its place, Beale told his audience that "there is a need of improvement in the law. . . . How much need, how much improvement we don't care. It does not interest us quantitatively to any degree. There is so much need that very great sums of money are now spent by various organizations in seeking the improvement of the law. We take that as proof that there is a considerable need of improvement. How much improvement we can't tell until we begin to try, and therefore, we don't attempt to estimate." The assemblage responded to Beale's remarks with laughter and applause. Beale continued in the same vein: "Our second point, on which we are all agreed, is this: if the law is to be improved it must be improved by lawyers and not by lay tinkers. That, too, I think, must touch an answering chord in every lawyer's heart." The audience continued to respond enthusiastically as Beale manipulated them painlessly, without sharp rhetoric, toward the conclusions of the majority report. Point number three was that the "[law] teachers alone can't do it, if [they] don't work with the other branches of the profession." The fourth and final point was that to carry out this "great public work," law professors and the practicing bar would have to create a permanent organization. The committee's recommendation, Beale concluded, was to create an AALS coordinating committee, as set out in the program's printed report, to bring together at "a time and place for meeting" the law professors, lawyers, and judges to create "a permanent organization for the improvement of the law."<sup>63</sup>

After the motion to adopt the committee's proposal was seconded, Corbin maneuvered around Hall's objections. Corbin announced that he "had expected to call upon Dean Hall, of Chicago, immediately, to present his dissenting report. . . . Inasmuch as the majority members of this Committee, through their Chairman, have scrapped the report as rendered, I shall postpone Dean Hall's opportunity for dissent, if he still has one."<sup>64</sup> Instead, Corbin wheeled out the heaviest weapon in his armory—the brilliant and progressive New York Court of Appeals judge, Benjamin Nathan Cardozo. Only a year before the 1921 AALS meeting, Corbin had been instrumental in bringing Cardozo to Yale to deliver the prestigious Storrs Lectures. Originally attracted by Cardozo's enlightened judicial opinions, Corbin had been impressed by Cardozo's spirited delivery of his lectures. As Corbin later recalled, "what [Cardozo] had said and his manner of saying it had held us spell-bound on four successive days. He had inspired our ambition in

the law and warmed the cockles of our hearts.”<sup>65</sup> Corbin called on Cardozo again, to come to Chicago to inspire the AALS membership in support of the creation of the committee’s proposed American Law Institute.

Judge Cardozo did not fail his Yale friend. Eschewing the overblown rhetoric and bombast too common in many judicial addresses, Cardozo claimed to have “no message to deliver, no counsel to offer. . . .” The New York judge modestly proffered “nothing except my own sympathy and interest in the project, a conviction that there is something to be done and a willingness within the narrow limits of my capacity to cooperate in the task of doing it.”<sup>66</sup> He also persuasively represented the perspective of a working judge—the desire by the judges themselves for the clarification and reform of the law now contemplated by the law professors:

More and more, the need develops with the years, of giving to Judges, through some external agency, the things that organized and systematic and continuous research and study can alone supply. . . . The judge goes upon the Bench and sees before him a list of names and numbers . . . one case follows another. Many are found to involve the application of familiar principles. Another case is called; and all of a sudden it becomes evident that here is a controversy which involves a large question, a question calling for a knowledge, an exact and broad knowledge, of some large department of the law, its history, its development, and its relations to other departments more or less cognate or allied. . . . More and more in such cases we are driven and must be driven to rely upon the work of a Wigmore or a Williston or a Beale, to mention only a few among many and devoted scholars. It is not to be expected . . . that overnight and at the call of a single case we shall do the work which these men have been doing in lifetimes of devoted and intensive effort.<sup>67</sup>

Cardozo was well primed by Corbin on the majority and minority positions, in particular Hall’s opposition. First, the judge defused the potential controversy by observing that “[e]ven before the revision [of the majority report] I found no insuperable conflict between the main report and the dissenting one. Since the revision there is even less.” With unmatched skill, Cardozo seemingly co-opted Hall and at the same time discredited his motives by analogizing the work of the proposed institute to “the work of the Commonwealth Fund, in which [Cardozo became] interested under the leadership of Dean Hall, whose guiding hand has been at the helm.” As Cardozo described Hall’s Commonwealth Fund activities—“a committee of professors and lawyers and judges, the professors holding the balance of power . . . trying to discover the fields where there is need of improvement and reform,

and . . . turning over to subcommittees of scholars the work of investigation and development in the fields that have been thus selected”— they precisely matched Hall’s dissenting proposal. Cardozo made it clear that he thought that Hall’s Commonwealth Fund piecemeal reform was neither sufficient nor as potentially valuable as the comprehensive restatement the proposed new institute could offer. Cardozo told his audience, including Hall, that “the work which the Commonwealth Fund is doing, in a small way, is the work which this Academy should do in a larger way, and with greater prestige and authority.”<sup>68</sup> It is probable that Cardozo put his finger on the source of Hall’s opposition. Dean Hall may have felt he was already accomplishing the reform needed through his own work with the Commonwealth Fund and wanted to protect his sphere of influence from a rival organization. Indeed, Hall may have been responsible for the fact that Commonwealth Fund, though courted by the Permanent Organization Committee for the Establishment of Juristic Center [Permanent Organization Committee] during its early meetings, never contributed any funds toward the restatement work of the ALI during the first several decades of its existence.<sup>69</sup>

The law professors greeted Cardozo’s address with “tumultuous applause.” Now that Cardozo had rallied the troops, Corbin could safely call on Hall to express any reservations he might still have. In the face of overwhelming enthusiasm for the proposal, and Beale’s softening of the language (if not the scope) of the majority report, Hall withdrew his objections and concurred with the majority, a move greeted by applause from the audience. There was no further discussion of the proposal and the resolution to appoint the committee to establish an American law institute was carried unanimously.<sup>70</sup>

## VI

The AALS leadership now had to face the sobering prospect that their resolve to organize a conference of bar leaders might be rejected by practicing lawyers. It was at this juncture that Lewis, “on his own responsibility,” took the project to the acknowledged leader of the American bar, Elihu Root.<sup>71</sup> Root, as noted *supra*, was eager for progressive reform initiated by the legal profession to stem social and political chaos.<sup>72</sup> He had long expressed dissatisfaction with the uncharted wilderness of American common law and had even briefly supported classification and restatement through the ineffective ABA committee.<sup>73</sup> Though disenchanting with that latter effort, Root had

even stronger reasons to be skeptical about being drawn into a project run by law professors. Only a year before, Lewis, Root's old progressive political colleague from Teddy Roosevelt days, had lured Root into taking on the chairmanship of the Legal Education Section of the American Bar Association by promising the seventy-five-year-old Root that he "would not be called upon to do work." Endless meetings and a strenuous fight with the State Bar Association delegates over bar admission standards followed. Root was thus suspicious of suggestions coming from Lewis: "Here is that Lewis back again. Beware! He probably has another no-work project up his sleeve."<sup>74</sup>

Lewis, unaware of Root's initial skepticism, plunged into a description of the AALS proposal for a new American law institute and restatement of the law. Throughout Lewis's exposition, Root sat silently "on the other side of the table with one hand concealed under it and the other hand thrust between the first and second buttons of his coat." After twenty minutes or so, "each hand began to appear. [Root] placed them on the rim of the table and edged them forward with a slight tremulous movement of his sensitive fingers." Lewis stopped, he "well . . . knew the significance of those slowly advancing hands. [Root] wanted to speak." Over the next two hours, Root and Lewis went "over and planned out each step in the organization of the institute; the meeting of the group to promote the establishment of an association for the permanent improvement of the law; the general nature of its report; the arrangements for the meeting in Washington the following February, and the source of necessary financial support."<sup>75</sup>

There is no question that Root's endorsement of the proposed institute was important to its inauguration. Root's contacts within the legal profession could help the academics attract other distinguished practitioners to the project. As a former senator and secretary of state, his involvement would also lend great prestige and attract media attention to the enterprise.<sup>76</sup> But not the least of his attractions as an ally for the venture was his position as an influential trustee of the Carnegie Corporation, the charitable foundation Root had helped create for his close friend and late client, Andrew Carnegie. Lewis undoubtedly had this very much in mind when he approached Root. He was not disappointed; it would be Root's control over the Carnegie Corporation's checkbook and his generous use of that power on behalf of the ALI that would be crucial to launching the organization.<sup>77</sup> Indeed, the Permanent Organization Committee's work in preparing the ninety-page report formally proposing the establishment of the institute was wholly underwritten by the Carnegie Corporation, courtesy of Root.<sup>78</sup>

Root's contribution was not limited to financial support. His hand-

work can be discerned in every detail of the subsequent arrangements. It was almost certainly Root who decided that there would have to be a temporary, intermediate group uniting select bar leaders with the AALS committee members to launch the new institute. Root was also probably responsible for drawing up the guest list and arranging the gathering place for the first meeting of this ad hoc, joint committee. Nevertheless, when Lewis sent out the invitations at the end of April, 1922, he wrote to the select list of practitioners on behalf of the AALS committee, not Root personally. Included with the invitation was a copy of the 1921 AALS resolution to establish a permanent institution for the improvement of law. Lewis also outlined for the invitees a brief history of the AALS committee and summarized their views in favor of the institute. Lewis's letter concluded by mentioning that Root, James Byrne (president of both the Association of the Bar of the City of New York and the Harvard Club of New York), and George S. Wickersham (leading corporate counsel and attorney general under President Taft) planned to attend. In other words, though the AALS committee was the official host for the meeting, it was also sponsored by the leaders of the New York corporate legal community. Indeed, the invitation called for the group to convene at the Forty-Third Street headquarters of the Association of the Bar of the City of New York.

According to the hitherto lost minutes of the first meeting of the new independent Permanent Organization Committee, twenty-three invitees met punctually at ten minutes before one in the afternoon of May 10, 1922 in what was then room ten—the large hearing room—located off the marble-pillared entry of the bar association headquarters.<sup>79</sup> Notable practitioners attending the meeting included Henry W. Taft, New York corporate lawyer, law partner of George Wickersham, and unsuccessful Republican nominee for the state assembly and state supreme court; Charles Culp Burlingham, a well-known New York attorney, judicial reformer, independent Democrat and political advisor to many of New York's governors; Joseph P. Chamberlain, an international law expert and founder and director of the Legislative Drafting Research Fund at Columbia University; George Welwood Murray, a native of Scotland, but an 1876 Columbia Law School graduate and prominent New York City corporate lawyer; and Thomas I. Parkinson, a New York City insurance lawyer, later president of the Equitable Life Assurance Society, as well as professor of legislation at Columbia.

The attendees at this initial meeting were hardly a cross-section of the legal community. There was a heavy bias in favor of successful New York corporate attorneys. Root and Lewis saw these men as the movers and shakers within the profession, opinion leaders that could

lend credibility to their enterprise. The fact that these prominent attorneys far outnumbered the academics who had ostensibly called the meeting, suggests that this gathering was designed specifically to sell the practitioners on the project, not to bring together representatives of various branches of the legal community to form a joint organizational committee.

In addition to the corporate lawyers listed in later published accounts of this historic meeting, the minutes reveal two attendees who were not lawyers. One was Max Farrand, the distinguished Yale history professor and, more important for the purposes of the Permanent Organization Committee, general director of the Commonwealth Fund, a charitable foundation established in 1918 by Mrs. Stephen V. Harkness “for the welfare of mankind.” Probably following up on Cardozo’s suggestion, Lewis had hoped that this foundation, in addition to the Carnegie Corporation, might help underwrite the proposed institute’s restatement project. Other than the short-lived legal reform project in which Dean Hall had been involved, the Commonwealth Fund focused its beneficence on projects related to the advancement of medicine; it did not contribute to the founding of the ALI. Nevertheless, in 1922, Lewis might have thought it worthwhile to invite someone from the fund to the meeting. Also at the meeting but not mentioned in later reports, was Henry S. Pritchett, the noted astronomer and former president of the Massachusetts Institute of Technology. Pritchett was president of the Carnegie Foundation for the Advancement of Teaching and Root’s colleague on the Board of Trustees of the Carnegie Corporation.

When everyone had arrived at the bar association headquarters, Beale, still the putative head of the AALS Committee (though in fact Lewis had taken charge), called the meeting to order. Wickersham then moved to elect Root chairman of the meeting. Beale—and by proxy the AALS—was thus deposed from ceremonial leadership of the Permanent Organization Committee. Though the academics were, at least temporarily, uprooted from formal leadership of the Permanent Organization Committee, they would still exercise enormous control over its substantive work.<sup>80</sup> After this apparent transfer of power from the academics to the lawyers, the group moved across the street to a private dining room on the third floor of the Harvard Club for lunch.

After lunch, Root called on Beale to provide “a short explanation of the history and the objects of the movement which had culminated in the present meeting.” When he finished, Beale called on Lewis to read a formal “Explanatory Statement of the Object of the Meeting Prepared by the AALS Committee.”<sup>81</sup> After detailing the conclusions

of the AALS Committee on a Juristic Center, Lewis confronted the primary problem of defining exactly what the proposed institution would do. How, practically speaking, could an organization clarify the law? The AALS committee, Lewis explained, believed that the permanent organization “should not be limited to particular ways of improving the law, but nevertheless . . . should have a definite piece of work of first importance to which the energies of the association should be directed on its organization.” He then posed two problems which had to be answered by the new Permanent Organization Committee before the American bar could formally adhere to the institute.<sup>82</sup> The first question focused on the specific procedures the new institute should follow to create the proposed restatement. In other words, the step-by-step drafting, reviewing, and adopting of authoritative texts. The second question, related but more fundamental, regarded the structure of the organization—who should be involved and what would be the relationship among the different branches of the profession within the new organization?<sup>83</sup>

As to different methods of procedure for the proposed work itself, Lewis presented two possible models. He pointed to the recent suggestion of Sir John Salmond, justice of the Supreme Court of New Zealand and well-known author on jurisprudence, “that the first work to be undertaken is the preparation of a scientific language, which while departing as little as possible from the usage of popular speech is yet free from those defects which disqualify that speech as an instrument of exact thought.”<sup>84</sup> There had been strong currents in late nineteenth-century and early twentieth-century jurisprudential scholarship urging precise scientific language as a method of eliminating confusion in the law. Beside Salmond, Wigmore and Hohfeld had urged programs for precision in legal terminology.<sup>85</sup> In particular, Hohfeld’s schema of eight pairs of basic jural relationships had become a major focus of jurisprudential interest since his untimely death at the end of World War I.<sup>86</sup> Thus the development of a precise language of the law was a genuine and hotly debated alternative method by which clarification of the law might be accomplished.

Lewis contrasted this jurisprudential language-oriented approach to a second method thought “most likely to obtain practical results” and apparently endorsed by “some of the members of the AALS Committee.” This plan would require that the proposed institute “determine those legal topics most in need of restatement with a view of at once beginning work on those topics.”<sup>87</sup>

Although Lewis and the AALS committee seemed to favor the latter approach, there was no consensus as to the form such a restatement

might take. Lewis reported "that whether the aim of the organization . . . should be the production of authoritative text-books on the one hand, or, on the other, the statement of principles of law in the form of statutes or codes, or a combination of both . . . were again matters on which differences of opinion existed."<sup>88</sup>

In fact, all the above approaches were ultimately employed by the ALI. The Restatement was a summary of legal principles and rules in a form similar to a code; the Uniform Commercial Code was a fairly comprehensive code intended for legislative adoption; the Model Code of Evidence and Model Penal Code were just that, models for statutory reform; and the ALI through its joint venture with the ABA in post-graduate legal education, ALI-ABA, produced authoritative texts on specific areas of law.<sup>89</sup> There was even some attempt to follow Salmond's recommendation to prepare a scientific legal language: Pound had been appointed to chair a Committee on Classification of the Law and Legal Terminology;<sup>90</sup> and some of Hohfeld's terminology of jural correlatives and opposites served as a model for the language of the Restatement itself.<sup>91</sup>

At the May 10, 1922 meeting, however, Lewis could not foresee the eventual resolution of such seemingly disparate approaches. He reported that the AALS committee had pondered the role of the Permanent Organization Committee and it was their "unanimous opinion . . . that the only practical way [was] for such a Committee to make a report which would show an appreciation of the importance and difficulties of the subject and deservedly commend the attention of the profession and the public. . . ." The AALS members suggested that the Permanent Organization Committee "employ a group of advisers who would as a professional matter devote the coming summer to a consideration of the problems indicated, and also give some consideration to the best form of permanent organization. . . ."<sup>92</sup> This advisory committee's report would then be presented to the bar and the public as both rationale and plan for the institute. The academics had, in fact, carefully worked out exactly what ought to be done and had left little for the practitioners to decide. Also, by suggesting that the advisory committee work substantially full-time through the summer on the preparation of the crucial report, they guaranteed academic control over its authorship. Who, after all, other than professors had the summer off from professional duties? Lewis's report and proposals appear in the minutes to have generated no criticism or debate. Wickersham merely moved that a formal committee be established. After Wickersham's resolution was unanimously adopted, Root was unanimously voted chairman. The other officers, also unanimously elected were Wickersham, vice presi-

dent, Murray, treasurer, and Lewis, executive secretary. In addition, Byrne, Hall, Stone, John Milburn, and Albert Kales were elected to serve as an executive committee.<sup>93</sup> There was little need for debate over who would serve as officers of the committee; deference to the already-established network was natural. Though the lawyers might dominate the letterhead of the new Permanent Organization Committee, and its meetings might be held at their bar associations and clubs, by ceding control over the writing of the report to the professors, they guaranteed that the latter would be in charge of deciding policy and program for the ALI. The lawyers dominated the body, but not the soul of the Permanent Organization Committee.<sup>94</sup>

At the executive committee meeting that immediately followed the organizational meeting, the new officers and board discussed the costs of the proposed report they planned to submit to the legal community and the public.<sup>95</sup> They prepared an itemized list of projected expenses. The first major item was \$4,000 to be paid as honoraria to four advisers who, with executive secretary Lewis, would be asked to shoulder the burden of preparing the report during the summer of 1922. Another \$1,000 in honoraria was budgeted for four additional advisers who would meet with and comment on the work of the primary authors. The largest single allocation of funds was \$5,000 to be paid as salary to the executive secretary for a six-month period. It was carefully noted that Lewis was not present during the discussion and vote of his salary. The perpetually impecunious professors were thus to be supported by the Permanent Organization Committee so that they would not, as they often had to do, spend the summer teaching or consulting to augment their relatively small nine-month teaching salaries. The total preliminary budget of \$15,000 plus an additional \$10,000 of anticipated future expenses, would be raised by applying to the Carnegie Corporation.<sup>96</sup> No one seemed to doubt that they would be able to raise the required sum. The executive committee then directed Lewis to prepare “a roster of the names of persons available as advisers, together with a plan of work for the summer” before the executive committee met again on May 27.<sup>97</sup>

The purpose of the May 27th meeting of the executive committee of the Permanent Organization Committee was to appoint and delineate the duties of “advisers” who would work on the formal report.<sup>98</sup> The first group of advisers, now called reporters, were to be those individuals with primary responsibility for drafting the report. Lewis nominated and the committee concurred in appointing professors Beale, Kales, and Williston, and Judge Cardozo as reporters. A second class of advisers, now called critics, would attend meetings of the reporters to

comment and make suggestions for revision. The critics appointed on May 27 included Dean Bates,<sup>99</sup> Dean Stone (a member of the AALS committee), Dean Wigmore (a former member of the AALS committee), and practitioners William D. Guthrie, Frederick W. Lehman, and Russell C. Leffingwell (a board member of the Carnegie Corporation).

## VII

On June 28, 1922, the reporters and critics met in Cambridge, Massachusetts, to discuss the report that the Permanent Organization Committee would submit to representatives of the bar. The agenda, prepared in advance of their meeting, presented several interrogatories for the conferees. The first set concerned the reasons for “varying law in different jurisdictions.” The second set focused on what the proposed restatement should contain and what form it should take. The agenda also identified three goals for the restatement: clarification, simplification, and “adaptation [of the law] to the needs of life.”<sup>100</sup> The first two goals responded to the oft-repeated complaints of both progressive and formalist academics, and practitioners and judges. The third, explicitly reformist goal, represented the contribution of the progressive-pragmatist professors. The agenda was carefully worked out by Lewis with the aid of Williston and Beale, for the participation and support of Harvard Law School was essential to the academic credibility of the report. Lewis had hoped to collaborate with his more progressive friend Pound, but Pound, buffeted by the demands of deanship, pressed Beale and Williston on Lewis as substitutes.<sup>101</sup> The result of this collaboration is a sort of schizophrenic balance of the Harvard professors’ conservatism and Lewis’s progressivism, an unsteady equilibrium maintained in the final report.<sup>102</sup>

The “uncertainty” in the law condemned at the Cambridge meeting was partially attributed to ignorance of comparative jurisprudence generally and ignorance of lawyers and the judiciary in particular, “uniting to produce as judicial precedents decisions in conflict with prior precedents, or recognized judicial principles.” Out-of-touch judges were criticized for “[t]enacious adherence . . . to decisions as precedents which were not founded in reason and in conflict either with recognized principle or the established habit of the people. . . .” Lawyers were equally responsible for “[i]nadequate presentation of the law in briefs . . . tending to induce ill-considered judicial decisions which thenceforth are recognized as stating principles or as constituting precedent.”<sup>103</sup> Criticisms in the final report were equally harsh, but

intended as it was to inspire the support of both judges and lawyers for the institute and its work, the language of that criticism was somewhat softened. The report argued that “In view of the nature of the sources of the law it would be unreasonable to expect the records of any court, no matter how learned and able its judges, to show no inconsistency in the statement or application of legal principles.” At the same time, the report pointedly suggested that “Not a little of the existing uncertainty in the law is the price we are paying for low requirements of legal education preparatory to admission to the bar and for judges often elected for short terms and chosen for reasons unrelated to their legal capacity.”<sup>104</sup>

Much of the Cambridge meeting appears to have been spent looking ahead to the proposed restatement. There was some disagreement about the extent of the restatement. Should the institute attempt a complete restatement of the common law, or should it focus its attention on those subjects that seemed to be in the greatest disarray? Attorney Charles A. Boston sided with those who argued that the ALI “should not restrict [its] effort, but should attempt a complete statement of the whole field, omitting only what is peculiarly local. . . .”<sup>105</sup> The final report, while not ruling out a complete restatement, backed away from immediately undertaking such a comprehensive program. “[E]ven if it were possible of accomplishment,” the report maintained, “to start out with the idea [of completely restating the law] would be a mistake.”<sup>106</sup>

The report was equally candid about why the law professors didn’t undertake the restatement on their own. Lewis argued, generally, that there was “no existing legal organization adapted to the work of making the restatement.” Neither the ABA nor any other bar or judicial organization represented all the lawyers and judges in the nation and even if there were an organization that did, “the nature of its organization might not be adapted to the carrying on of a scholarly and constructive work.” The lawyers did not have the requisite skills or the objective scholarly perspective required for the project. As for the law professors, while a few schools “are real seats of legal learning” with faculties capable of the required scholarship, the AALS realized “that any restatement of the law to acquire the authority necessary to enable it to accomplish results of importance, must be undertaken by an organization representative of all branches of the legal profession.”<sup>107</sup> Reiterating arguments that had reverberated at AALS meetings since Hohfeld’s 1914 address, the authors realized that an alliance between treatise-writing professors and front-line practitioners and judges was the only battle plan for long-term success.

The final report presented at the gathering in Washington was largely

the work of Lewis, who took the suggestions and comments of the reporters and critics and combined them with his own sense of the needs and aims of the proposed institute.<sup>108</sup> The introduction describing the “danger” of the current “general dissatisfaction with the administration of justice,” echoed his earlier report to the AALS, and, more faintly, Roscoe Pound’s 1906 ABA address. The progressive vision of reform of the law was explicit in the report: “We speak of the work which the organization should undertake as a restatement; its object should not only be to help make certain much that is now uncertain and to simplify unnecessary complexities, but also to promote those changes which will tend better to adapt the laws to the needs of life.” The ALI’s restatement was not to be a dry recitation of black-letter principles, but an “analytical, critical and constructive” document:<sup>109</sup>

[It] must be more than a collection and comparison of statutes and decisions, more than an improved encyclopedia of law, more than an exposition of the existing law. . . . There should be a thorough examination of legal theory. The reason for the law as it is should be set forth, or where it is uncertain, the reasons in support of each suggested solution of the problem should be carefully considered. . . . [it] should also take account of situations not yet discussed by courts or dealt with by the legislatures but which are likely to cause litigation in the future. . . . [it] should make clear what is believed to be the proper rule of law. . . . the changes proposed [should] be either in the direction of simplifying the law. . . . or in the direction of better adaptation of the details of the law to the accomplishment of ends generally admitted to be desirable.<sup>110</sup>

## VIII

Lewis’s and many of the other academic founders’ progressive impulses and pragmatic strategy are reflected in the report’s characterization of the restatement.<sup>111</sup> While Lewis pragmatically accepted some of the older, non-reformist perspectives, his intention to use the restatement to influence interpretation and reform of the law was undisguised. Contrary to many later interpretations of the report and its authors’ motives, Lewis and his academic brethren—the ideological founders of the ALI—were not throwbacks to nineteenth-century formalist legal science. They were, in fact, reformist progressive-pragmatists who viewed law as the means to achieving social ends, believers in the power of the legal profession to bring about positive change. Some later critics of the ALI seem to have overlooked the reformist language of the report. They criticize the ALI and its founders

for trying to freeze the so-called established principles of the law in black-letter formulas.<sup>112</sup> Conservative critics from the time of the report to this day argue that the ALI's later reformist posture and innovative legal solutions in some of the restatements was a betrayal of its original aim to restate, not make, law. These critics have ignored the report's explicit reformist plan. They also slight the role and ideology of Lewis, Corbin, Gilmore, Boke, Hohfeld, and the other anti-formalist academics who actively supported the founding of the ALI and who most influenced its agenda. The alliance with the practicing bar was not a sell-out of their progressive and reformist aspirations, but a pragmatic strategy to effect those aspirations.

This impulse is the basis of a coherent movement in American jurisprudence—progressive pragmatism. It fits, insofar as we can say that any ideology occupies an historical space and time, between the heyday of formalism and the full deployment of realistic jurisprudence. It is a more encompassing and historically accurate description of Pound's philosophy and the goals of his generation of reformers than has been proposed. Most important, it is the founding philosophy of the ALI. The term "progressive-pragmatic" refers to the two leading intellectual impulses of the loose jurisprudential alliance. Progressivism was that amorphous social and political movement that came to dominate liberal reform around the turn of the century. While progressives were an eclectic lot, motivated by both radical and conservative concerns, most agreed that reform of nineteenth-century laissez-faire economics and politics was a priority. Progressives favored a business-like, efficient, supple approach to public planning. They strenuously opposed special interests and corruption in government, but split on the issue of control or dismantling of big business. Though not always sensitive to the political problems of minorities, particularly African-Americans, immigrants, and women, they were confident in the power of educated, able men to gather facts on public problems and find solutions.<sup>113</sup> Lewis was a Progressive. He had campaigned for Progressive political causes throughout the 1900s, including those related to law, such as recall of judges.<sup>114</sup>

Pragmatism, the brainchild of Charles Sanders Peirce, had similar intellectual forebears to progressivism. It was conceived in a commitment to empirical science and rested upon a similar faith in the power of human intellect.<sup>115</sup> Pragmatism asserted that meaning came from experience; if theories worked, they were true. There was no ultimate, external, standard of truth—whether platonic or Darwinian. In the hands of social reformers like John Dewey, pragmatism became a transforming ideology of intellectual experimentation. If men gave

meaning to the scientific world, they could give meaning to the social and political world. As Dewey wrote, “[T]he formulation, even as only a theory, or an experimental empiricism which finds values to be identical with goods that are the fruit of intelligently directed activity has its measure of practical significance.”<sup>116</sup> Potentially, pragmatism gave philosophical comfort to progressive reform. Anyone watching Lewis’s orchestration of the ALI founding will recognize him as a pragmatist. Corbin had brought in Cardozo, and added the judge to the AALS committee, but it was Lewis who reached out to petitioners and judges, some of whom had different political philosophies, and added them to the project. Pragmatic considerations dictated to Lewis the step beyond the circle of legal academia if the reform plan was ever to have weight in the political arena.

Professor Rand Rosenblatt, though not specifically applying the term “progressive-pragmatist” to the ALI founders, used the expression to refer to the new, post-Holmesian legal thinkers, and it is the term that best describes this mode of legal thought.<sup>117</sup> To simply call these men anti-formalists, functionalists, or structuralists misses the progressive-reformist aspect of their legal philosophy, which was a post-Holmes phenomenon. To ignore their faith in progressive change combined with their rejection of formalism, or to either mistakenly categorize them as nineteenth-century classical formalists or proto-realists misses this crucial stage in development of modern American jurisprudence. They had to make compromises with the professional establishment and with conservatives within their own ranks, but the inner springs of the institute were progressive, pragmatic, and reformist.

### **Conclusion**

On February 23, 1923, the cream of the American legal establishment convened in Washington, D.C. to found the American Law Institute. In the auditorium of Memorial Continental Hall gathered scores of national legal figures including three U.S. Supreme Court justices, five judges of the U.S. Circuit Court of Appeals, twenty-seven state supreme court justices, the presidents or representatives of seventeen state bar associations, the president and twenty-one General Council members of the American Bar Association, the president of the National Conference and twenty-one state Commissioners on Uniform State Laws, twenty-three law school deans or professors representing the Association of American Law Schools, and nearly two hundred “specially invited” practitioners and law professors from twenty-eight states and the District

of Columbia. Elihu Root commented at the close of the founding meeting that “I have been fifty-six years at the American bar, and that I have never seen so distinguished and competent meeting of the bench and bar as this.”<sup>118</sup> The *New York Times* reported the next day that the meeting was “probably the most distinguished gathering of the legal profession in the history of the country.”<sup>119</sup>

The founders had set themselves the ambitious task of creating a national jurisprudential organization for the improvement of the law. Twenty-two years later, when Lewis told the AALS that “it is not true that the American Law Institute is a Juristic Center,”<sup>120</sup> he was playing with terms. Lewis had taken the idea of a juristic center for the improvement of the law and transformed it. Hohfeld’s idea, misinterpreted by Richards and subsequent AALS leaders, resuscitated in an aborted plan by Boke, recalled in the Roaring Twenties by Gilmore, was finally seized and successfully brought to fruition by Lewis. The American Law Institute became a unique twentieth-century juristic center.<sup>121</sup>

The driving force behind the ALI’s founding was a cadre of progressive law professors who set its original reformist agenda. They sought and achieved an active role in the interpretation of the law, but they faced an ongoing struggle to maintain their reformist objectives for the restatement in the face of their compromises with conservative elements of the practicing bar and within their own academic ranks.

#### NOTES

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I dedicate this article to the late Professor Richard B. Morris, an inspiring teacher and generous mentor.

1. This account of Lewis's AALS remarks comes from a carbon typescript Lewis later distributed to a small group of law professors. The copy I found is in the Karl Llewellyn Papers at the University of Chicago School of Law Library, file R.XII.5. The remarks were made at an informal dinner session at the 1945 meeting and were not published in the proceedings of the AALS.

2. *Id.* The morning after Lewis's remarks, a small group of professors met informally for breakfast in Everett Fraser's hotel suite to discuss the possibility of founding a "true" juristic center independent of the ALI. Attending that meeting and involved in that abortive effort were, in addition to Lewis and Fraser, Merton Ferson, Karl N. Llewellyn, Whitley P. McCoy, Rollin M. Perkins, Maynard E. Pirsig, Warren A. Seavey, and Frank R. Strong.

3. Other manuscript collections used extensively for this paper, some for the first time, include hitherto unused portions of the Roscoe Pound Papers at the Harvard Law School Library, Karl Llewellyn Papers at the University of Chicago Law School Library, the William Draper Lewis Papers at the Archives of the University of Pennsylvania, and the John Henry Wigmore Papers at Northwestern University Library.

4. Most contemporaries' accounts of the founding rely on William Draper Lewis's published recollection of the events. Lewis, *History of the American Law Institute and the First Restatement of the Law: 'How We Did It'* in *RESTATEMENT IN THE COURTS* 1-4 (ALI, 1945). But Lewis's recollections were neither complete nor entirely accurate. Other accounts of some of the founders also oversimplify the events that led up to the founding of the institute, partly because they did not attempt a serious reexamination of the record and partly because they were writing hagiography rather than history. See, e.g., Root, *The Origin of the Restatement of the Law*, 4 *DOCKET* 3575 (Jan. 1933); Corbin, *The Restatement of the Common Law by the American Law Institute*, 15 *IOWA L. REV.* 19 (1929); Goodrich, *The Story of the American Law Institute*, 1959 *WASH.*

U.L.O. 283 [later revised with Paul Wolkin and published as a separate monograph in 1961]. Later ALI-authored accounts include Wechsler, *The Course of the Restatements*, 55 A.B.A. J. 147 (1969), and Darrell & Wolkin, *The American Law Institute*, 52 N.Y.S.B.J. 99 (1980).

Hessel Yntema's 1935 account identifies the AALS's role in the founding, but his review of the AALS proceedings is so superficial that he completely missed what happened in the AALS—who supported the plan for the juristic center and who opposed it. This omission in turn led him to misinterpret the jurisprudence of the active founders. Yntema, *The American Law Institute*, in LEGAL ESSAYS IN TRIBUTE TO ORRIN KIP McMURRAY 657–61 (M. Radin and A. Kidd eds. 1935).

Nearly every subsequent account of the founding of the ALI has relied on one or more of the incomplete and inaccurate contemporary versions and most adopt Yntema's misguided characterization of the founders. Without looking at the manuscript and other unpublished material nor reexamining the published record, these subsequent scholars have overlooked the role of the progressive reformers and exaggerated the role of the conservative formalists in the founding of the ALI. The worst offender is Grant Gilmore. See G. GILMORE, AGES OF AMERICAN LAW 84 (1977) and *idem*, THE DEATH OF CONTRACT 67–69, and 131 n.156 (1974). Gilmore's fanciful account of American legal history particularly regarding the ALI and the political ideology and jurisprudence of William Draper Lewis is as egregiously inaccurate as his account of the Pound-Llewellyn realist controversy. See Hull, *Some Realism About the Llewellyn-Pound Exchange Over Realism: The Newly Uncovered Private Correspondence, 1927–1931*, 1987 WIS. L. REV. 921, 924 n.14, 936 n.108, 937 n.112. Even serious legal historians, however, have accepted the standard account. See L. FRIEDMAN, A HISTORY OF AMERICAN LAW 676 (2d ed. 1985); E. PURCELL, THE CRISIS OF DEMOCRATIC THEORY: SCIENTIFIC NATURALISM AND THE PROBLEM OF VALUE 80 (1973); and Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 BUFFALO L. REV. 469, 517 n.291 (1979). The most recent account of the founding of the ALI makes many of the same errors. LaPiana, 'A Task of No Common Magnitude': *The Founding of the American Law Institute*, 11 NOVA L. REV. 1085 (1987).

5. On the historical development of progressive-pragmatism and its influence on American jurisprudence, see N. E. H. HULL, POUND AND LLEWELLYN: CONSENSUS AND CONFLICT IN THE FORMATIVE ERA OF AMERICAN JURISPRUDENCE, work in progress.

6. Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 A.B.A. REP. (pt. I) 395–417 (1906). While Oliver Wendell Holmes's anti-formalist utterances in *The Common Law* and "The Path of the Law," in 10 HARV. L. REV. 457 (1897), preceded Pound's speech and intellectually influenced Pound and others of his progressive-pragmatist generation, they did not incite them to active jurisprudential rebellion. Holmes, an anomaly in his own generation, rejected formalism but was too cynical to be a progressive. For a more detailed description of Pound's talk, the debate that followed it, and its implications for the development of modern American law and jurisprudence, see Hull, *The Restatement of the Law that Never Was: From Formalism to Progressive-Pragmatism in American Jurisprudence, 1889–1923*, forthcoming article.

7. Hull, *supra* note 6.

8. I use the Kuhnian paradigmatic model cautiously. T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (2d ed. 1982). Schlegel, responding to a suggestion of Robert Gordon, argues that "the progressive reform tradition is not so fully formed to quality as a paradigm and I doubt whether constructs of social reality change in the way Kuhn suggests that scientific paradigms do. . . ." Schlegel, *supra* note 4, at 517 n.

291. I agree with Schlegel that progressive reform was a legitimate “tradition” as a historical phenomenon, but I would argue that does not invalidate the Kuhnian model for explaining changes in American jurisprudential thought. The development and intellectual history of scientific thought is much more closely related and analogous to the development of legal thought than to the historical development of social or political movements. Michael Hoeflich effectively demonstrates the value of Kuhn’s paradigm to explain the evolution of jurisprudential legal science to the classical-formalist era. Hoeflich, *Law & Geometry: Legal Science from Leibniz to Langdell*, 30 AM. J. LEGAL HIST. 95 (1986).

9. The account of what transpired is taken from John Henry Wigmore’s memoir of the event. Wigmore, *Roscoe Pound’s St. Paul Address of 1906: The Spark that Kindled the White Flame of Progress*, 20 J. AM. JUD. SOC’Y 176 (1937).

10. See Hull, *supra* note 6.

11. For a clear explanation of formalism and “classical orthodoxy” see Thomas Grey’s excellent article, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1 (1983). For a direct jurisprudential contrast between the formalist legal scientists who dominated the American Bar Association Committee on Restatement Classification of the Law and their very different, progressive-pragmatic counterparts—the ALI founders—see Hull, *supra* note 6.

12. Wigmore, *supra* note 9, at 177. George Boke would also play a critical role in the founding of the ALI.

13. *Id.* at 178.

14. P. SAYRE, *THE LIFE OF ROSCOE POUND* 137–60 (1948).

15. Lewis, *Legal Education and the Failure of the Bar to Perform its Public Duties*, 6 AALS HANDBOOK 32–49 (1906).

16. Letter from John Henry Wigmore to William Draper Lewis (November 9, 1942) (ALI Archives, folder 7).

17. Hohfeld, *A Vital School of Jurisprudence*, 14 AALS HANDBOOK 76, 77, 136 (1913–16). Over the years Hohfeld’s reputation has been defined by and limited to his contribution to abstract, analytical jurisprudence through his schema of jural relations. As the following analysis of his address to the AALS points out, Hohfeld was actively concerned with reform of the law and no doubt, had he lived, he would have translated his jurisprudential ideas into a reformist program, very probably through the ALI. Hohfeld’s reputation as an abstract theorist has led subsequent scholars to overlook the strong, practical reformist objective of Hohfeld’s AALS plan. See Schlegel, *supra* note 4, at 475 n.86.

18. *Id.* at 81–82.

19. *Id.* at 108.

20. *Id.* at 88.

21. Letter from Wesley Newcomb Hohfeld to Roscoe Pound (September 24, 1912) (Pound Papers, Box 223, file 7, Harvard Law School Library). The restatement project Hohfeld was referring to was the one promoted by James DeWitt Andrews. For the detailed story behind the *Corpus Juris* project and Wigmore’s role in opposing it, see Hull, *supra* note 6.

22. Ordinarily, after a speaker finished his talk, the president of the association would ask for questions and comments and the minutes often indicated some lively reaction to the preceding address. Here, the *Handbook* only notes that Hohfeld gave his talk and that there were some unrecorded comments by Dean Eldon James of Missouri. 14 AALS HANDBOOK 5 (1913–16).

23. Richards, *Progress in Legal Education*, 15 AALS HANDBOOK 60 (1915).

24. *Id.* at 75–76.
25. *Id.* at 27.
26. *Id.* at 28–29.
27. *Id.* at 30. The other members would be appointed later by Richards. *Id.* at 31.
28. 16 AALS HANDBOOK 91 (1916).
29. The debates over accreditation of night or part-time law schools and their “inferior” curriculum, particularly the use of adjuncts rather than professional law professors, and whether the case method of study should be required run through the AALS meetings in these early years. See the AALS *Handbooks* for 1910–16. R. STEVENS, LAW SCHOOL 100–103 (1984) and J. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 102 (1976) also discuss the furor over standards in legal education and admission to the bar during this period and the nativist attitudes that generated concern.
30. Beale, *The Necessity for a Study of Legal System*, 14 AALS HANDBOOK 33–34 (1913–16).
31. Richards, *supra* note 23, at 63.
32. Nevertheless, the AALS was moving, for a complex mixture of reasons including Richards’s and Beale’s protests, to discredit the night law schools. R. STEVENS, *supra* note 28, at 98–99. The ABA was dominated by the corporate bar. See J. AUERBACH, *supra* note 29, at 102–29.
33. Boke’s last-minute letter to Wigmore to read his report, however, arrived while Wigmore was out of town and so Wigmore’s colleague George Costigan presented the report in his stead. 16 AALS HANDBOOK 92, 183–84 (1916). Ever since the separation of the AALS as an independent organization distinct from the ABA in 1900, there had been arguments about how closely the two should work together and whether the AALS should again merge with the ABA’s Section on Legal Education. At the 1914 AALS meeting, Lewis suggested that “the time has now come to substitute for the Legal Section of the American Bar Association this Association, and to identify ourselves as an integral part of the American Bar Association. . . .” His recommendation garnered no support from the other members at the meeting. 14 AALS HANDBOOK 28 (1913–16). Actually Lewis attributed this suggestion to Richards during the discussion following Richards’s presidential address, but Lewis was wrong. Richards, rather than suggesting to make the AALS a section of the ABA, had actually recommended that the ABA discontinue its section and cede the area of legal education to the independent AALS. *Id.* at 61. Richards sought less rather than more involvement between law professors and practitioners and saw little connection between the teaching of law and its practice.
34. *Id.* at 182, 184.
35. See the accounts of the ALI’s founding cited *supra* note 4 and P. SAYRE, *supra* note 14, at 215.
36. 16 AALS HANDBOOK, *supra* note 33, at 94.
37. *Id.* at 95.
38. Dean Wigmore, for example, resigned his academic position to serve in the army’s Judge Advocate General’s office during the war’s duration. Wigmore also strongly supported the prosecution of political dissenters after the war. R. POLENBERG, FIGHTING FATHERS: THE ABRAMS CASE, THE SUPREME COURT, AND FREE SPEECH 249–56 (1988); and W. ROALFE, JOHN HENRY WIGMORE: SCHOLAR AND REFORMER (1977).
39. J. AUERBACH, *supra* note 29, at 102.
40. R. WIEBE, SEARCH FOR ORDER, 1877–1920, at 286–88 (1967); S. ROCHESTER, AMERICAN LIBERAL DISILLUSIONMENT IN THE WAKE OF WORLD WAR I 88–150 (1977); A. WASKOW, FROM RACE RIOT TO SIT-IN: 1919 AND THE 1960S 12–174 (1966);

H. PELLING, *AMERICAN LABOR* 136–41 (1960); J. ADDAMS, *TWENTY YEARS AT HULL-HOUSE* 276–93 (repr. 1960); Chambers, *The Campaign for Women's Rights in the 1920's*, 457–78 in *OUR AMERICAN SISTERS: WOMEN IN AMERICAN LIFE AND THOUGHT* (J. Friedman & W. Shade 3d ed. 1982); E. FLEXNER, *CENTURY OF STRUGGLE: THE WOMEN'S RIGHTS MOVEMENT IN THE UNITED STATES* 306–24 (1974).

41. 6 A.B.A. J. 15 (1920).

42. *Id.* at 16.

43. *Id.* at 3.

44. *Id.*

45. R. MURRAY, *RED SCARE: A STUDY OF NATIONAL HYSTERIA, 1919–1920* (1964).

46. National Popular Government League, facsimile reprinted in *MASS VIOLENCE IN AMERICA* (R. Rubenstein & R. Fogelson eds. 1969).

47. Freund, Pound, Chafee, and Williams as well as the lawyer Alfred S. Niles were all ALI members and founders.

48. The first meeting of the AALS following the war took place the year before. The political and legal tensions of late 1919 and early 1920 had not yet intruded upon the academics and so the three-year old motion about a national juristic center was not revived that year. Instead the professors debated the AALS's relationship to the ABA Section on Legal Education, whether to institute a four-year curriculum, relax the standards for admission for returning veterans, and the perennial question of the accreditation of night law schools. 17 AALS HANDBOOK 40–60, 64–67, 70–82 (1919). Gilmore's address is found in 18 AALS HANDBOOK 140–56 (1919–21).

49. *Id.* at 146, 147, 153. Gilmore denied that he and his colleagues who urged that the law professors take the lead in reform claimed any intellectual superiority: "Those who would lay upon the law teachers the task of law adaptation, improvement and reform do not thereby claim for them any superiority of capacity over the practitioner."

50. See Hull, *supra* note 6.

51. Taft, *Possible and Needed Reforms in the Administration of Justice in Federal Courts*, 47 A.B.A. REP. 250, 32–33 (1922).

52. *Id.* at 32–33, 154–55. Gilmore knew that Corbin, a reformer himself, would strongly support the proposal. See L. KALMAN, *LEGAL REALISM AT YALE* 98–107 (1986).

53. 18 AALS HANDBOOK 76 (1919–21).

54. Beale, the foremost expert in the field of conflict of laws, was chosen as chief reporter for that part of the Restatement. But his strict and outdated formalist approach was rejected by his fellow restaters and he was ultimately ousted, to be replaced by the clearly progressive-pragmatic Herbert Goodrich. See Goodrich, *Institute Bards and Yale Reviewers*, 86 U. PA. L. REV. 449, 456–57 (1936).

55. See note 4 and accompanying text.

56. 19 AALS HANDBOOK 6 (1921).

57. The majority report and the dissent by James P. Hall appeared in the program distributed in advance of the meeting. Subsequent events described below made the two reports obsolete and so they were omitted from the published proceedings of the meeting. Extant copies of the original program are rare. Most law libraries' collections contain only the final published proceedings. Even the AALS's headquarters had no copies of these early materials. Serendipitously, while researching in the Karl Llewellyn Papers, I found that the University of Chicago law library kept the programs of the meetings and bound them with the proceedings. I am very grateful to the library and its staff for helping me locate this rare material. *AALS Program and Reports of Committees* 13 (19th Annual Meeting, 1921).

58. H. GOODRICH & P. WOLKIN, *THE STORY OF THE AMERICAN LAW INSTITUTE, 1923–1961*, at 6 (1961).

59. Letter from William Draper Lewis to Adolph J. Rodenbeck (June 27, 1944) (ALI B58-9); Hull, *supra* note 6.

60. Lewis described himself as such in his 1944 “Off-The-Record Remarks” at the ALI’s annual dinner. These were privately printed and distributed by the ALI to its members. The particular copy I saw was the one sent to Samuel Williston and is now part of the collections of the Harvard Law School library. A slightly different version of these same “remarks” can be found in the ALI Archives, 56-2.

61. 19 AALS HANDBOOK 14 (1921).

62. *Id.*

63. *Id.* at 115, 116.

64. *Id.* at 117.

65. Corbin gave his own account of Cardozo’s Storrs Lectures and the judge’s subsequent address to the AALS in Corbin, *The Judicial Process Revisited: Introduction*, 71 *YALE L.J.* 195, 198 (1961).

66. Indeed, after Cardozo spoke, Judge Orrin Carter, of the Supreme Court of Illinois, addressed the visiting convention in just such a style. 19 AALS HANDBOOK 117, 121–23 (1921).

67. *Id.* at 117.

68. *Id.* at 119.

69. *See* text at p. 77, *infra*.

70. 19 AALS HANDBOOK 121, 123 (1921).

71. Lewis, *supra* note 4, at 1.

72. *See* text at p. 66, *supra*.

73. 2 P. JESSUP, *ELIHU ROOT* 471 (1938).

74. Lewis, *supra* note 60, at 2–4.

75. *Id.* at 3–4.

76. Root had served as president of the ABA and of the Conference of State and Local Bar Associations; his contacts within the community were extensive. J. ROGERS, *AMERICAN BAR LEADERS, 1878–1928*, at 184–87 (1932). On Root’s public career *see* 1 & 2 P. JESSUP, *supra* note 73, *passim*.

77. 2 P. JESSUP, *supra* note 73, at 468, 470.

78. 1 ALI PROCEEDINGS [Part Two] 4.

79. The minutes of these meetings were kept private and have never before been published. Only the briefest account of the first meeting was printed. The ALI staff were unaware that any of the minutes of these early meetings were extant. A professional archivist in the early 1970s had informed the ALI that these early papers had been destroyed in the flooding of the basement of the old ALI offices. I found the typewritten minutes of the first meeting of the POC and the first and second executive committee meetings in a file cabinet in the ALI warehouse. I moved these (and several other papers referred to in this essay) from the warehouse to the ALI library, where I gave letter or number designations to various file folders. These are all stored in a box with my name on it. The minutes for all three meetings are in file folder “A.”

The minutes also reveal the names of several invitees who cabled that they were interested in the organization but could not arrange to attend the May 10 meeting: Charles A. Boston, a New York Lawyer and ethics expert; Judge Benjamin N. Cardozo (no surprise after his appearance at the AALS meeting the previous December); Frederic René Coudert, name partner in the Coudert Brothers firm in New York and scion of the old pre-Revolutionary War family, as well as an Oyster Bay neighbor and ex-

Spanish-American War colleague-veteran of Theodore Roosevelt; William D. Guthrie, the noted ultra-conservative corporate and constitutional lawyer and, from 1913–22, Ruggles Professor of Constitutional Law at Columbia University; Barry Smith, a New York social worker and general director of the Commonwealth Fund; and Charles Strauss, president of the New York County Lawyer's Association and successful real estate developer.

80. See text at p. 80, *infra*.

81. ALI, Minutes of the First Meeting of the Committee on the Establishment of a Permanent Organization, May 10, 1922, at 2, ALI Archives, folder "A," [hereafter cited as POC Minutes of May 10].

82. *Id.* at 4.

83. Lewis phrased the question in more general terms, but this was clearly what he and the committee meant. *Id.*

84. POC Minutes of May 10, *supra* note 81. The article Lewis referred to is Salmond, *The Literature of the Law*, 22 COLUM. L. REV. 197 (1922).

85. Wigmore, *The Terminology of Legal Science (With a Plea for the Science of Nomo-Thetics)*, 28 HARV. L. REV. 1 (1914); Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16 (1913). Joseph Singer traces the pedigree of Hohfeld's analytical schema back to the earlier work of Salmond and another late nineteenth-century American jurist, Henry Terry, though Singer convincingly argues that Hohfeld was, unlike Salmond and Terry an anti-conceptualist analytical jurist. Singer, *The Legal Rights Debate in Analytical Jurisprudence from Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 1049–1059 (1982).

Henry Terry, incidentally, played a crucial role in the history of the ABA Committee project and sent his "Classification of the Law" article to Roscoe Pound when he read that Pound had taken charge of the ALI's Committee on Classification and Terminology. Letter from Henry Terry to Roscoe Pound (July 9, 1923) (Pound Papers, 236-1). Pound didn't think much of Terry's article and called it "hopelessly prolix." Letter from Roscoe Pound to William Draper Lewis (July 3, 1924) (Pound Papers, 235-5). On Pound's work on classification and terminology see note 90 *infra* and N. E. H. HULL, *THE NEW JURISCONSULTS: THE AMERICAN LAW INSTITUTE AND THE TRANSFORMATION OF AMERICAN LAW IN THE TWENTIETH CENTURY*, work in progress. For a detailed examination of Terry's role in the ABA committee's project see Hull, *supra* note 6.

86. Immediately after Hohfeld's death, Corbin and Walter Wheeler Cook published two important articles reevaluating Hohfeld's analytical jurisprudence. Corbin, *Legal Analysis and Terminology*, 29 YALE L.J. 163 (1919) and Cook, *Hohfeld's Contributions to the Science of Law*, 28 YALE L.J. 721 (1919). At its annual meeting the following year, the AALS sponsored a symposium on "Terminology and Classification in Fundamental Jural Relations," in which Corbin, Albert Kocourek, and William Herbert Page debated Hohfeld's schema. For a comprehensive discussion and bibliography of the "Hohfeldian Debate" of the 1920s and '30s (indeed, up to the present), see Singer, *supra* note 85, at 989–93. Immediately following Hohfeld's death, the Yale professor was revered as an American genius of legal philosophy. When the *Encyclopedia of the Social Sciences* was being written in the 1920s, for instance, Hohfeld appeared on the list of American legal writers about whom major essays would be written. He was the only modern writer included with the likes of Jefferson, Story, Langdell, and Thayer. Letter from Alvin Johnson to Roscoe Pound (March 5, 1929) (Pound Papers, 13-9). George Farnum, writing about Hohfeld's influence on the terminology of the ALI's restatement (then in progress), called Hohfeld's "untimely death . . . a real tragedy to

the cause of legal science. . . ." Farnum, *Terminology and the American Law Institute*, 13 B.U.L. REV. 203 (1933).

87. POC Minutes of May 10, *supra* note 81, at 4.

88. *Id.*

89. I agree with the conclusion in Nathan Crystal's excellent article that the restaters were sympathetic to the goals of codification and that the restatement's form was a quasi-code. Crystal, *Codification and the Rise of the Restatement Movement*, 54 WASH. L. REV. 239 (1979). While some individuals who attended the founding meeting opposed codification and expressed reservations that an ALI restatement might be considered a model code of the common law intended for legislative enactment, most of the active founders and early restaters had long supported codification through their work with the NCCUSL.

On the Model Penal Code see Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425 (1968); on the uniform legislative purpose of the Uniform Commercial Code see UCC Article 1 Section 102 and Official Comment; on the history of the ALI-ABA Committee on Continuing Professional Education and its publications see P. WOLKIN, ALI-ABA . . . XL! (1988).

90. The purpose and scope of the work of this short-lived committee is discussed in the "Statement by the Council of the American Law Institute to the Carnegie Corporation" [not dated but probably written shortly after the ALI founding meeting in late February or early March, 1923], ALI Archives, folder "A." In reality, the "committee" was Pound who ultimately submitted a report on classification that he later published. Pound, *Classification of Law*, 32 HARV. L. REV. 933 (1924). Pound's report and article deal only with the question of ways to classify various branches of law; it does not address the question of what terminology the ALI should use to describe different legal relationships. Pound started but did not complete a second report dealing with terminology. He did consult extensively with Francis Bohlen, the reporter for the Restatement of Torts, and with Lewis about the proposed terminology for the restatements. Pound Papers, 235-5.

91. Farnum, *supra* note 86, at 204-14. At the time Farnum wrote his article, much of the restatement had yet to be completed. Farnum noted from the drafts, text of those sections that were published, and from comments at meetings that certain reporters were more enamored of Hohfeld's terminology than others, but that at least some of Hohfeld's schema had been adopted by nearly every restater.

92. POC Minutes of May 10, *supra* note 81.

93. *Id.* at 7.

94. The rest of the May 10 organizational meeting was devoted to the discussion of four resolutions moved by Lewis that would empower the executive committee to act for the larger POC to effect its objectives. The most important of these concerned the solicitation of funding. The meeting of the POC concluded with a recommendation by Root that Charles A. Boston, Benjamin Cardozo, William D. Guthrie, Learned Hand, Julian W. Mack, and Roscoe Pound be invited to join the committee. *Id.*

95. ALI, Minutes of the First Meeting of the Executive Committee on the Establishment of a Permanent Organization for the Improvement of the Law, ALI Archives, folder "A" [hereafter cited as Executive Committee Minutes of May 10].

96. Actually, they also planned to formally approach the Commonwealth Fund, but as we have seen they were unsuccessful.

97. The final item of business was a resolution to have Lewis order one thousand copies of Sir John W. Salmond's *Columbia Law Review* article to distribute to each

member of the Permanent Organization Committee as well as to each of the officers of the Carnegie Corporation and the Commonwealth Fund.

98. The first item on the executive committee's agenda was to hear from W. Thomas Kemp, secretary of the American Bar Association. Kemp outlined for the new group the ABA's thirty-three year effort on law clarification and restatement. Kemp's message was clear: The ABA committee had already staked-out a claim on the work of restating the law. On the fate of the ABA committee *see* Hull, *supra* note 6.

99. There was some doubt as to whether Bates could serve, and the committee chose as an alternate Orrin Kip McMurray, dean of the University of California School of Jurisprudence in Berkeley.

100. There is no copy of the agenda with its interrogatories extant in the ALI archives. I found the copy quoted here in the Pound Papers, 235-5, Harvard Law School Library. Pound himself was unable to attend the meeting because he was, in fact, at the time of the Cambridge conclave on a ship sailing home from Europe. McCarthy [secretary to Dean Pound] to Lewis, (June 9, 1922) (Pound Papers, 235-5). The following account is based upon the agenda and a Report of the Reporters to the Executive Committee, November 30, 1922, ALI Archives, folder "A" and the Hasty Notes of Charles A. Boston [a member of the POC and a participant at the Cambridge meeting] in Answer to Interrogatories in [the] Suggested Agenda for the Cambridge Meeting of Reporters, Critics, Invited Guests and Members of the Committee (1922), typewritten manuscript at Harvard Law School Library (Wambaugh Estate).

101. Letter from William Draper Lewis to Roscoe Pound (May 18, 1922); Pound to Lewis (June 12, 1922) (Pound Papers, 235-5).

102. The contradictory perspectives of formalist simplification and explicit reform in the final report were later commented upon by Charles E. Clark, Clark, *The Restatement of the Law of Contract*, 42 YALE L.J. 643, 644, 644 n.3 (1933).

103. Boston, *supra* note 100, at 1-2.

104. Report of the Committee on the Establishment of a Permanent Organization for the Improvement of the Law Proposing the Establishment of an American Law Institute, (February 23, 1923) 1 ALI PROCEEDINGS [Part One], 1.

105. Boston, *supra* note 100, at 2.

106. Report, *supra* note 104, at 44.

107. *Id.* at 29.

108. Lewis, *supra* note 60, at 11. Lewis admits that Samuel Williston was responsible for placing the recommendations in the front of the report and moving the section on the causes for uncertainty in law to part two.

109. Report, *supra* note 104, at 29. As such, the report, and with it, the concept behind the ALI, was hardly "formalist."

110. *Id.* at 14.

111. Some of the practitioner-founders were undoubtedly similarly motivated, but these sentiments had been quite explicitly expressed at the AALS meetings and were not evident in the extant comments we have of practitioners prior to the Washington, D.C. meeting of 1923. Some practitioners at that latter meeting, Herbert Spencer Hadley for example, did openly express similar sentiments and I cover them in the book.

112. *See* note 4 *supra*.

113. *See, e.g.*, the able summaries in Caine, *The Origins of Progressivism in THE PROGRESSIVE ERA* 11-34 (L. L. Gould ed. Syracuse, 1974); R. L. MCCORMICK, *Progressivism, A Contemporary Reassessment in THE PARTY PERIOD AND PUBLIC POLICY, AMERICAN POLITICS FROM THE AGE OF JACKSON TO THE PROGRESSIVE ERA* 268-87

(New York, 1986); and G. E. MOWRY, *THE PROGRESSIVE ERA, 1900–1920, THE REFORM PERSUASION* (Washington, D.C., 1958).

114. On Lewis's political career, see Box 947, folder 3, William Draper Lewis Papers, University of Pennsylvania Archives. Lewis's liberal reformist impulses continued throughout his life and influenced the direction of the ALI for twenty-five years. See HULL, *supra* note 85.

115. See, e.g., C. S. Peirce, *What Pragmatism Is*, 15 *THE MONIST* 161–81 (1905) and *idem.*, *Issues of Pragmatism*, 15 *THE MONIST* 481–99 (1905). Peirce had developed the theory in the 1870s, and its influence spread widely in academia, though Peirce, for personal reasons, never quite found a home there. See E. C. MOORE, *AMERICAN PRAGMATISM, PEIRCE, JAMES, AND DEWEY* (New York, 1961), and M. WHITE, *PRAGMATISM AND THE AMERICAN MIND, ESSAYS AND REVIEWS IN PHILOSOPHY AND INTELLECTUAL HISTORY* (New York, 1973).

116. J. DEWEY, *THE QUEST FOR CERTAINTY, A STUDY OF THE RELATION OF KNOWLEDGE AND ACTION* 286 (1929, repr. New York, 1960).

117. Rosenblatt, *Legal Theory and Legal Education*, 79 *YALE L.J.* 1153 (1970). The late Edward J. Bloustein demonstrated the influence of pragmatism on Holmes's own jurisprudence in his recent article, *Holmes: His First Amendment Theory and His Pragmatist Bent*, 40 *RUTGERS L. REV.* 283 (1988) but correctly does not attribute a progressive impulse to Holmes.

118. 1 *ALI PROCEEDINGS* [Part Two] 7, 8–19, 88.

119. *N.Y. Times*, Feb. 24, 1923, at 10, col. 8.

120. Lewis, *supra* note 1.

121. Lewis was also disingenuous when he denied that the ALI served as the focus of summertime gatherings of law professors to discuss and argue subtle legal doctrine. During the years of Lewis's directorship, the restaters regularly assembled at Lewis's family compound in Northeast Harbor, Maine, to do just that.