

Preface

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PREFACE

Herbert Wechsler†

A Symposium preceded by an Overview hardly needs a Preface to prepare the reader for the information, critique, and analyses that lie ahead. It may, however, be of interest to describe the background of *Restatement, Second, of the Law of Judgments* and to add a word about restatement work in general as it has been approached by the American Law Institute in the last twenty years.

The first *Restatement of Judgments*, published in 1942, was completed in little more than two years with Austin Scott and Warren Seavey as Reporters and Erwin N. Griswold as Assistant Reporter. It was, if I may say so, a remarkable achievement, giving the subject for the first time a coherent structure and an orderly development compatible with the then current systems of procedure. Only the names of the Reporters make it plausible that so much was accomplished in so little time.

More than a quarter of a century had passed before the Council of the Institute concluded, on the basis of a survey of the caselaw by Professors Benjamin Kaplan and David L. Shapiro, that a reexamination was in order. *Restatement, Second*, was accordingly begun with Professors Kaplan and Shapiro as Reporters and their first submission was presented to the Institute in 1973. By that time, however, Benjamin Kaplan had been appointed an Associate Justice of the Supreme Judicial Court of Massachusetts, necessitating his withdrawal as Reporter. Shortly thereafter Professor Shapiro was stricken by an illness that required his withdrawal too. The entire burden of the work devolved accordingly upon Professor Geoffrey C. Hazard, Jr., who had succeeded Professor Kaplan as Reporter in 1973.

It does not depreciate the contribution of the initial Reporters or, indeed, of the able and helpful Advisers, to say that Geoffrey Hazard comes as close as one person can in the collective enterprise of the restatements to determining the content of this *Restatement, Second*. We in the Institute are grateful to him for his able leadership in the production of a work that we believe to be of high distinction.

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As I read the papers in this Symposium, they share upon the whole the Institute's estimate of the quality of the work, while raising questions of detail respecting scope, analysis, or discrete formulations. Professor Hazard is more competent than I to deal with the objections thus put forth, but I subscribe to his rebuttals on the major questions raised. The criticism and rejoinder are, however, welcome indications of the liveliness and the importance of the field of law involved and the constructive influence a new Restatement can exert. The *Cornell Law Review* renders a useful service by so speedily eliciting this challenging exchange of views.

Professor Martin's Overview addresses *in limine* the question of the "proper function of a Restatement,"¹ while acknowledging that "*Restatement (Second) of Judgments*, happily enough, will not generate many contests between the respective champions of the descriptive and normative approaches."² Given that acknowledgement, I shall not take full time to argue that his antitheses (between "restating the law"³ and stating "what some members [of the American Law Institute] think it should be"⁴ or "stating what the law ought to be rather than what the cases say it is"⁵) oversimplify the problem.⁶

The common law calls on the courts to choose between conflicting lines of doctrine and, within subtle limits to be sure, to adapt the principles of earlier decisions to changing conditions in a changing world. The statement of a rule accordingly involves something more than the conclusion that past cases have so held—namely, the implicit judgment that our courts today would not perceive a change of situation or of values calling for the adaptation of the rule or even for a new departure. Appraisal of the weight of factors calling for a change is obviously relevant to that implicit judgment.

The conclusion that follows from these premises is that the Institute in its deliberations is obliged to weigh all of the considerations relevant to the development of common law that our polity calls on the courts to weigh in theirs, meaning, of course, the

¹ Martin, *The Restatement (Second) of Judgments: An Overview*, 66 CORNELL L. REV. 404, 404 (1981).

² *Id.* at 405.

³ *Id.* at 404.

⁴ *Id.* n.1.

⁵ *Id.* n.2.

⁶ For more extensive treatment of the point, see Wechsler, *The Course of the Restatements*, 55 A.B.A.J. 147, 150-51 (1969); Wechsler, *Restatements and Legal Change: Problems of Policy in the Restatement Work of the American Law Institute*, 13 ST. LOUIS U. L.J. 185, 189-90 (1968).

courts of last resort under a proper view of the judicial function. That working formula was approved by the Council of the Institute in 1968 and has, upon the whole, guided our work throughout Restatement, Second. The treatment of Judgments reflects this approach and evidences, I submit, its utility and wisdom.