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Reflections on Self-Study

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"FROM THE TRENCHES AND TOWERS"
COMMENTARY
The Case for an In-Depth Study of the
American Law Institute

Reflections on Self-Study

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Alex Elson is a friend of more than 30 years, beginning when I was on the faculty at the University of Chicago. He is and remains a loyal and concerned member of the American Law Institute and has attended most of the annual meetings in his 31 years of ALI membership. He has had a varied and successful law practice while also epitomizing the independence and civic commitment to which all lawyers should aspire. His concern for and about the institute is welcome and exemplary.

A couple of years ago, Mr. Elson proposed to the ALI Council that an outside study be done of the institute. The proposal was substantially as set forth in his text herein. I considered it a very serious proposal and treated it very seriously. We asked several recognized social scientists to review the proposal, to indicate whether they would be interested in doing a study along the lines indicated, and, if they had such an interest, to outline the scope, methodology and cost of such a study. We received constructive responses, some indicating an interest in pursuing a project. The cost estimates varied but were in the vicinity of $500,000. (Based on my experience with ALI projects and earlier experience in supervising empirical research while executive director of the American Bar Foundation, I thought these estimates optimistically low, but the institute's deliberations proceeded on their face value.)

The question, then, was whether it was worth it to the ALI to commit a half million dollars or so to the kind of inquiry set forth in the proposal. The question was discussed by the officers: Roswell B. Perkins, chair of the

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council; Charles Alan Wright, president; Patricia Wald and Michael Traynor, vice presidents; Bennett Boskey, treasurer; and Elena A. Cappella and Michael Greenwald, deputy directors. It was then considered at a regular meeting of the council (the 60-member governing board of the institute). We concluded that it was unlikely that we could find an outside source to fund such a study; that it was unlikely that the gain to be realized from such a study would be worth the expenditure, however the project might be funded; and that the gain in understanding and insight about the institute on the part of those responsible for its affairs, which is where the results would most count, would be marginal. Accordingly, we decided not to undertake such a project, thanked those from whom we had solicited responses (sending them modest honoraria for their advice), and advised Mr. Elson of our decision. In retrospect, I believe that judgment was correct.

Purely in technical terms, in my opinion, the project proposal as formulated is simply infeasible. The project aimed to develop empirical evidence (as distinct from gathering opinion from various sources), because (I assume), if the aim were to gather opinion from various sources, the responses would range over almost all possibilities. The possibilities would certainly include some that I have heard as director, ranging from the view that the ALI is a morally and intellectually corrupt, self-centered bunch of high-paid lawyers and their academic acolytes to the view that it is the most intellectually honest law reform game in town, really tries to expound the law correctly, and often does so.

Obviously, the kind and distribution of responses would be a function of the basis and technique for sampling respondents. Respondents would have to be fairly knowledgeable about the ALI. There are many lawyers and judges, and indeed some law professors, who do not know what the ALI is (and doubtless do not care). Respondents could not be limited to the ALI's membership. Membership is not compulsory, and disappointed or outraged members can vote with their feet (some have done so). Membership consists mostly of people who think the activity is worthwhile. Hence, the ALI membership list would be a skewed sample, but so would a sample of people who had sufficient knowledge of the institute but who were not members—the hostile, skeptical, and indifferent. Moreover, if folks in the latter category thought the institute work wasn't worth doing in the first place, how could they have a useful opinion about exactly how the work was done?

Yet, assuming the technical problem of sampling could somehow be resolved, what would such an opinion poll reveal? There is every reason to expect that a poll of knowledgeable lawyers, legal scholars, and jurists would come out as indicated above. Some respondents would say the institute is corrupt, some that it tries hard, and some would ask,"What difference does it make?"

Another technical problem will involve the number and variety of questions. The set of questions posed may be good for a lawsuit deposition but are impossible for a quantitative inquiry. There are too many questions, too vaguely phrased, with too much overlap, trying to obtain information about too many issues. Each would generate at least two answers ("yes" and "no") and more likely five ("definitely yes" . . . "definitely no"). Distributing the answers into the cells reflecting the respondent characteristics would yield cells with few entries or, in some cases, no entries. Such results simply support firm conclusions, perhaps not even coherent ones.

Another interpretation of the proposal, probably closer to Mr. Elson's intention, is that it aims to obtain a smaller number of more discursive responses from respondents who could be described as thoughtful and responsible. But, again, how would such a set of respondents be selected? I submit that members of the Council of the American Law Institute—professors from law schools of standing, lawyers from law firms and law departments of standing and in a variety of fields of practice, justices and chief justices of state courts, trial and appellate judges of the federal system—fit the description of being thoughtful and responsible. I assume that many of the professional counterparts of the membership of the ALI council—other professors from law schools of standing and so forth—who are not members of the council would take a view essentially as follows:

> Look, they do their thing and I do mine. I happen to be more interested in (law practice as such, child welfare, the opera, etc.). If I knew enough about specific issues in the ALI agenda to have an opinion, I would have already expressed it or ascertained whether it had been otherwise expressed. Without better information, I can't second-guess a group that has the kind of responsibility they assume to exercise and whose members have the knowledge and kind of judgment that I assume they probably have.

Still another interpretation of the proposal is that a suitable academic or professional would do the job: review the draft texts and the minutes of meetings, interview the institute's reporters and advisers, and interview concerned members of the institute and outsiders who cared to express opinion. It perhaps need not be noted that this methodology would be subject to all the difficulties posed above. It can be noted that the use and value of such a project would depend almost entirely on selection of the suitable academic or professional.

The provocations for Mr. Elson's concern are evidently the Corporate Governance and the Products Liability Projects. However, it should be recognized that during the years those projects were being conducted, they were only a part of the ALI's undertakings. Over the same period, the institute brought forth the *Restatement Third of the Foreign Relations Law of the*

United States (itself involving a number of controversial propositions); the *Restatement Third of Trusts: Prudent Investor Rule* (recognizing a major change in the concept of risk and return in portfolio management); *Restatement Third of Suretyship and Guaranty* (a highly technical but legally very important subject); *Restatement Third of Torts: Unfair Competition* (a skillful exegesis on highly important forms of intellectual property); *Restatement Third of Property: Mortgages* (an equally skillful integration of decisional law and statutory development). Some of these projects also involved controversial issues or at least issues that were controversial to some interest groups and thus recognized as controversial by those participating in the projects. The portfolio of institute projects necessarily reflects the fact that, in intellectual investment as in financial investment, prudent management entails a combination of risk and return.

But, concerning only the Corporate Governance and Products Liability Projects, who could do the investigation? Perhaps someone like Dean Robert Clark of Harvard Law School, who had declined to become involved in the Corporate Governance Project for reasons I assume made sense at the time and still do? (And wouldn't it be said that Harvard is part of the elitist establishment of which an objective inquiry would have to be wary?) Perhaps Dean Phillip Blumberg of the University of Connecticut? (But wasn't he among the advisers on the Corporate Governance Project?) Perhaps Professor Paul MacAvoy, now of Yale, not a lawyer at all? (But hadn't MacAvoy made clear, early in the Corporate Governance Project, that he thought the enterprise was a fool's errand or worse?) And who would be the counterpart analyst for Products Liability, the other recent ALI project that has been controversial? Professor Marshall Shapo (who had committed himself to a different view of the subject that was as fully expressed as the views expressed by the reporters)? Perhaps a collaboration of the Product Liability Advisory Council (defense oriented) and the American Trial Lawyers Association (claimant oriented)?

Who, exactly, is the suitable academic or professional? Who is knowledgeable enough about the intricacies of the law and politics of corporate governance and products liability but still somehow detached? I can aver (for what it is worth, considering the source) that there were and are suitably thoughtful academics and professionals in this world. Many of them were, and many of them still are, on the ALI council.

I will address attitudes I observed and heeded concerning the Corporate Governance and the Products Liability Projects, because these projects involved the controversies that excited Elson's concerns. However, there are similarly controversial issues in many other ALI projects, for example, in the past, the Model Penal Code Project and the Project on Division of Jurisdiction between State and Federal Courts, and, in the present, the Project on Principles of Family Dissolution.

With regard to the Corporate Governance Project, some members of the council thought the project was ill-advised, some thought it an important undertaking, and some thought it worthwhile if only to offset inappropriate enthusiasm for a federal law of corporate governance. Still others thought the project would at least develop in-depth analysis of the core legal problems in corporate governance or, at best, not only give pause to a federal law of corporate governance but also incline the Delaware Supreme Court away from some of its more opaque doctrines, particularly the distinction between "demand refused" and "demand excused." One very smart and experienced member of the council observed, with a sigh, concerning the most extreme of the proposals being considered in the project, that any corporate official or corporate lawyer who could not live with these rules was not worth his or her salary.

There was a similar array of opinion in the council concerning the Products Liability Project. Some thought the project should not be commenced until the institute had first done a revision of other parts of the Restatement Second of Torts. Others thought the subject should await further legislative development. Others thought it should not be undertaken at all because it would involve policy. Some thought the formulations originally tendered by the reporters were too inflexible (the views prevailed and the final draft is significantly different from the first draft). Some outside commentators thought that a manufacturer of goods should be allowed to disclaim all liability except refund of the price, a view that found little support from any institute participant.

From my experience with many ALI projects—not just the two that troubled Elson—it is possible to draw the following conclusions. First, drafting any complicated set of legal rules involves myriad subtle differentiations, concerning which, in the phrase, reasonable minds could differ. This is certainly true of any formulation that would be given serious consideration in legal discourse in the United States at any given time. Both the Corporate Governance and Products Liability Projects emerged with differentiations that reasonable minds might well approve or disapprove. In the Corporate Governance Project, for example, the formulation retained a concept of liability for negligence on the part of corporate directors, in the teeth of thoughtful suggestions that director liability should be limited to what it has almost become, in practice, liability only for breach of the duty of loyalty. The formulation retained a distinction between board prior approval of an "interested" transaction and board ratification of such a transaction, in the teeth of insistent argument by corporate lawyers that approval and ratification should have the same legal standing. The formulation rejected the distinction between "demand refused" and "demand excused," notwithstanding that many defense-oriented lawyers recognized that distinction as a Catch-22 snare for plaintiffs. In the Products Liability Project,

the key formulation differentiated among manufacturing defect, design defect, and failure to warn, in the teeth of objection that "design defect" simply substituted court or jury choice for consumer choice. The formulation acknowledged that liability can properly be based on res ipsa loquitur, in the teeth of objection that res ipsa was a pathway to circumvention of the very concept of design defect. The formulation recognized different rules for pharmaceuticals, in the teeth of the objection that there is no difference in principle between manufacture of a machine and manufacture of a drug.

Some readers may have difficulty appreciating the significance of the specifications in the previous paragraph. If so, that difficulty illustrates the point made earlier, that evaluating an ALI drafting product requires a substantial measure of sophisticated knowledge of particular legal subjects.

Second, the issue that really has concerned Alex Elson is whether the whole process in the Corporate Governance or the Products Liability Project gave too much heed to the interests of particular groups, expressed through intensive and repeated presentations by lawyers associated with one side or another. That issue also really concerned me and other officers of the institute. But I know of no way of resolving that issue, then or now.

The reporters, the advisers and consultants, and members of the council and the institute have a self-imposed duty to give some heed to the views expressed by, or which correspond to, views of interest groups. The question is how much heed.

There have always been interest groups in political society, even in the supposedly absolutist regimes of the Caesars or Louis XIV. There was a period in which that fact was ignored. During the Progressive Era (say, 1880 to 1932), there was a widely shared view that some sector of society was free of the disability of interest and hence could have a wholly objective conception of the public interest. Many leaders of the bar shared this view, no doubt including some of the founders of the American Law Institute. Others, such as Eugene Debs, William Jennings Bryan, and Professor Du-Bois, did not. The difference between then and now is not the emergence of "interest." Nor, with deepest respect for Alex Elson, is it the case that some lawyers at some time in the past had a unique capacity for objectivity. What has changed is a recognition by most of us that, to some extent, views depend on viewpoint. The difficult problem is to take this connection into account.

Under the ALI's traditions, it was the duty of all participants in the Corporate Governance Project to take account of the views of corporate management and the corporate bar. It was also their duty to take account of the view that the legitimacy of capitalism depends on adequate legal accountability of corporate directors, which includes accountability in court enforceable through lawsuits that are inevitably ugly. It was the duty of the participants in the Products Liability Project to take account of a compara-

ble range of views. At the same time, there was a duty not to truckle to the interests of corporate management, but also a duty not to disregard the potential for abuse in the stockholder derivative suit. There was a similar duty of skeptical openness in the Products Liability Project.

How is it to be determined whether a responsible decision maker, individual or collective (i.e., the reporters specifically or the ALI as a whole), gave enough heed but not too much? Every lawyer or legislator who has lost a dispute can have an opinion on that question and so can every intellectually honest lawyer or legislator who has won such a dispute. On what basis does one resolve the swearing contests into which such disputes can degenerate?

Third, the issue at stake in this matter is the integrity of an institution, in this case the American Law Institute. That kind of issue is the most important challenge, in the large and in the long run, in any political community committed to openness in social controversy but which also recognizes the inevitability of making social choices. It is an issue that does not admit of a scientific answer, including an answer mediated through social science.

The American Law Institute engages in continuous reexamination of its project agenda, the scope and focus of its specific projects, and the legal formulations that address various topics in each project. The process of reexamination is inherent in the work itself. Under the institute's standing procedure, a project is approved only on the basis of a considered initial suggestion, typically originating from a member of the council or a member of the institute at large. The idea is thereafter reviewed by the director in consultation with experts in the field; by the program committee, a standing committee of the council; through a written prospectus prepared by an academic expert (selected with an eye to being chosen as the project's reporter); and by discussion and approval of the officers of the Institute and of the council. As is well known to members of the institute, after a project has been undertaken, it proceeds by topical stages in annual drafting cycles. These consist of a preliminary draft presented to an advisory committee of experts who have diverse professional experience and to a Members Consultative Group, in which all members of the institute can elect to participate; a council draft, which is a revision of the preliminary draft undertaken in light of the discussions with the advisory committee and members group; and a tentative draft, which is a further revision in light of the discussions with the council; and in many projects, particularly ones involving controversial subject matter, there is a proposed final draft, a full text of the whole product that is still open to revision on specific points. Throughout, the director and council members follow the development of the text in detail. It may also be observed that a project can be terminated once begun. We

have done that on several occasions, being unsatisfied with the way the work was evolving.

The procedure is not foolproof. I can attest to having awoken after a project has been published to think of propositions or nuances that, quite apart from whether they were controversial or not, could and should have been formulated differently. I am sure all attentive members of the institute have had similar reactions. But a project, like life itself, has to end sometime. Taken as a whole, in my estimation the endings in the institute projects have been at least worthwhile.

That too has been the verdict of the profession and, by extension, of responsible officials, particularly the judiciary and legislatures. Elson is simply incorrect in suggesting that the institute is "vested" with any authority, quasi or otherwise. The institute has no authority—none—beyond that earned by its product. We say what we say and ask that others take it seriously. On the whole, the institute's work product has been taken seriously. Indeed, it is the prospect that an institute's formulation will be taken seriously that makes its projects sometimes controversial. A law review article in the *Siwash Law Journal* or even the *Harvard Law Review* rarely has such potential. But it is important to attend the reason for the significance of an ALI formulation, whether in corporate governance or in some less controversial subject such as suretyship. The reason for the institute's influence, whatever it may actually be, is the care, multiple participation, and prolongation of the professional discussion out of which institute formulations are derived. The key is professional discussion—"professional" in content and style, "discussion" that is searching and in earnest. Such is the medium, and the medium is an essential component of the message.

In this light it perhaps can be better understood why the council, after similar consultation and professional discussion of Elson's proposal, thought that little would be learned from the proposed "independent" evaluation. Rather, the members of the council and of the institute consider that their very function, on a continuing basis, is to participate in independent evaluations of the institute and its work. That, in turn, can explain why some members of the council are baffled by Elson's proposal. The director, having been more often the recipient of much less thoughtful and polite criticism of the institute, was perhaps less excited.

Still more fundamentally, the question Elson presents for study is of a kind that cannot be answered by a study. It can be answered by each person who cares to address it and who is free to compare his or her conclusion with that of others. That, after all, is how reputation is established.

For myself and the institute, in the Corporate Governance Project we put confidence in Professor Melvin Eisenberg (the chief reporter) and his colleagues, Professors John Coffee, Ronald Gilson, and Harvey Goldschmidt and lawyer Marshall Small. In the Products Liability Project we

put confidence in Professors James Henderson and Aaron Twerski. In all our projects we put faith in the ALI process by which the drafts are subjected to extensive and reiterated public criticism. Those of us associated in giving direction to the institute's work have sufficient confidence in ourselves to keep at it. I very much hope that Alex Elson shares that confidence, even if uneasily. Uneasy confidence is surely the most that can honestly be expected or received in today's world.