

## The Restatement (Fourth): An Interview with One of the Two Co-ordinating Reporters

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### 1 The Restatement: By Whom and For Whom?

*Symposium Editors:* Paul, an icebreaker, and tongue in cheek: why ‘Restatement Fourth’ rather than ‘Fourth Restatement’? Is this book so special that it can override ordinarily applicable grammatical rules?

*PBS:* This is the custom of the American Law Institute (ALI), which we honour. One might note that on this particular point, our 2020 book reflecting on the Restatement does follow ordinary usage rather than ALI practice.<sup>1</sup>

*Symposium Editors:* To observers from outside US law circles, the ‘Restatement’ can appear as a weird animal also in other respects. In your contribution, Paul, you note that ‘the authorship of a Restatement ... is a bit confusing’, not the least because the eventual product requires approval by ‘the attendees at the ... ALI’s annual meetings’. In your own experience, as co-ordinating reporter of the Restatement ‘project’, did this need for approval impose real constraints or was it more of a formality?

*PBS:* In my experience, the Council review is the most challenging, although we would take nothing to the Council that greatly agitated our advisers. The Council is the governing body of the Institute, something like a board of directors. The General Meeting is a useful sounding board that provides helpful editorial suggestions as well as prolonged colloquy on matters of substance. The General Meeting has the authority to amend the text, although exercise of that power is rare and did not happen to us.

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<sup>1</sup> Paul B. Stephan, and Sarah H. Cleveland, *The Restatement and beyond: The Past, Present, and Future of U.S. Foreign Relations Law*, Oxford 2020.

*Symposium Editors:* Let's turn from authorship to audience. Who is the core audience of the Restatement (Fourth)? For whom did you write/report? Relatedly, how is the 'success' of the Restatement defined? When will the Restatement (Fourth), in your view as coordinating reporter, have been a success?

*PBS:* We write for multiple audiences. The US judiciary comes first, and we think we have had an impact when it cites our work. We care about other policymakers, even though an objective measurement of impact is harder to come by. In particular, citations are less likely to measure impact in the executive and legislative branches. Scholarly influence is also important, although not as great as judicial because scholars do not have a direct effect on the development of the law, although some think otherwise. Our goal is for the Restatement to be a reference point for both practical and scholarly conversations. Unlike many of the other Restatements, we also care about overseas reception. We hope both to help foreign lawyers (policymakers, practitioners, scholars) understand better the U.S approach to these issues and perhaps also nudge them a bit to take on board our approaches, if not necessarily the specifics of our law.

## **2 Relationship with the Restatement (Third)**

*Symposium Editors:* It has been said that what you have done is a project that could not be done: opening the widely praised Restatement (Third). What did you decide to restate, what not, why, and with what consequences?

*PBS:* What do you mean, 'opening'? Do you mean 'revisiting'? The Third Restatement has been widely praised, but also subjected to trenchant criticism by both judges and scholars. After 30 years, much had changed in this rapidly evolving sector of US law, and we were able to persuade the ALI that time had come for another look. We focused on three topics – treaties, the law of jurisdiction (prescriptive, adjudicative, enforcement), and state immunity – that had developed considerably since the 1980s, not always in directions that the Third Restatement foresaw or advocated.

*Symposium Editors:* Speaking of the Third Restatement, the Reporters of that Restatement (Louis Henkin, Andreas Lowenfeld, Louis Sohn, Detlev Vagts) were widely revered. In your

contribution, you refer to them as, ‘if not exactly ... colossi, then certainly as great eminences’. And yet, in more than a few instances, the Restatement (Fourth) opts for a different approach. Did you feel iconoclastic, perhaps as a reluctant iconoclast?

*PBS:* They were fine and admirable men of their generation, but I reject an approach to law that regards any human being as an ‘icon’. Times change, and no one has the capacity to look all that far into the future. I don’t expect reverence from the future, but perhaps a bit of respect would be nice. Our approach to their work was respectful, but necessarily critical.

### **3 Selecting the Reporters**

*Symposium Editors:* In your contribution, you describe the selection of reporters, and especially the decision to approach the task with a ‘bi-partisan’ team composed of moderates, but moderates that would credibly appear to be politically balanced. Do you feel this focus on political balance has had a tangible impact on the reception of the new Restatement?

*PBS:* Not so much a focus as taking it as a prerequisite. Another approach, more visionary or radical, doubtlessly would have had a different kind of impact, but it’s impossible to say what that difference would look like without being clear about what kind of radical or visionary product we are talking about. I take some comfort in seeing the Restatement as not very infected with the political craziness that seems to make up at least the surface of contemporary US politics.

*Symposium Editors:* Also, looking beyond political balance, did you consider other elements of diversity in selecting the team of reporters?

*PBS:* Diversity is such a loaded and perhaps contested term. We looked for different areas of expertise and perspective. Happily, the field of foreign relations law has, from a sociological perspective, changed a lot in the last 30 years, in particular through the rise to prominence of many great female scholars. This is a long-term persistent trend in the US legal academy, which the composition of our team reflects.

#### **4 The Process of ‘Restating’**

*Symposium Editors:* A number of Restatement reporters contributing to this symposium emphasize the need to reflect ‘the law as it is’ rather than the ‘law as it should be’. In your view, is ‘restating the law’ a descriptive or a normative exercise? Did you feel you had space for discretion, and if so where?

*PBS:* As a somewhat literal minded jobbing law professor, ‘restating’ carries a connotation of starting with the status quo as well as being transparent about where one departs from that anchor point. Because of the complexity of legal authority in the US system – lots of judicial decisions, different trends and philosophies – there remains plenty of room for discretion and judgment. If you were to read the Restatement, you would find many instances where we identified controversies and offered our views on the best approach. Examples, just off the top of my head, include whether this is a presumption for or against self-execution of treaties (we maintain there is neither) or whether the expropriation exception in the Foreign Sovereign Immunities Act extends to any international law violation entailing a loss of property, or only violations of the law governing expropriation of the property of aliens (we maintained the latter, a position the Supreme Court later endorsed).

*Symposium Editors:* As a related point, were you not – at least occasionally – frustrated by the inability to critique decisions by courts? Could one not say that the philosophy of the *Restatement (Third)* was, at least in part, sometimes to be a dissenting opinion, paving the way for the future development of the law? And from that perspective, could you be ‘accused’ of being too timid by not at least pointing to different directions?

*PBS:* I am not sure what you mean by critique. We felt free to criticize judicial decisions, including those of the Supreme Court. Our means of criticism tended toward technical analysis, rather than free-form normative arguments. For me, that kind of discipline is liberating. I strongly believe in the value of technical lawyering employed in the context of policy debates.

## **5 A US Restatement on Questions of Global Interest**

*Symposium Editors:* To a non-US international lawyer, the Restatement can appear as international law as seen through purely American sunglasses. How did you see your role? As an American lawyer, as an international lawyer, as both, or as something else?

*PBS:* ‘Sunglasses’? Are you suggesting partial blindness? In my view, we contain multitudes (with apologies to Walt Whitman): we have multiple identities and professional toolkits that we can apply selectively as it seems useful. I am certainly an American lawyer, but I have reason to believe I count as an international lawyer as well as a student of comparative law. Unless one wants primarily to assign club membership (then I ask, why?), one should be comfortable with this mix of perspectives and skills.

*Symposium Editors:* Sunglasses are used to avoid blindness, but they do colour the view, and the view will change depending on the sunglasses. Would you encourage other states to start restating their foreign relations law? The Foreign Relations Law of China, Russia, Nigeria, Chile, etc etc etc?

*PBS:* The predicate to this question is institutional: What organizations comparable to the American Law Institute exist around the world? What makes the Restatements different from ordinary scholarship is the institutional authorship and the nature of the institution (the three Ps: prominent, prestigious, private). Different societies have different takes on the value of private institutions. As many have noted, in some societies law reform commissions serve a similar function to the ALI, and there is no obvious reason why they shouldn’t get into foreign relations law if they feel the need. The European Union occasionally relies on expert committees to produce studies of interest, and it is high time for a systematic study of the foreign relations law of the European Union (putting aside the question of whether there is any EU law that is not about foreign relations). But what works in the United States does not necessarily fit elsewhere. I forswear imperialism in all its forms.