

**ELI SEPTEMBER SPEECH III**  
**PARALLEL, CONGRUENT, OR ONE CONTINUOUS**  
**BRIDGE**

[Thank you for that kind introduction.] Let me begin by extending my appreciation to you and to the other members of the ELI Executive Committee for inviting me to speak on behalf of the Uniform Law Commission at this opening ceremony for your 5<sup>th</sup> annual conference. It is an honor and a pleasure to be here.

We were very pleased that ELI Executive Committee member and Chair of your International Relations Committee, Sjef van Erp, could attend our ULC annual meeting in Williamsburg, Virginia, in July. Professor van Erp addressed the full Conference on the ELI's progress and projects and led planning discussions on emerging issues in managing digital assets. And it is always a pleasure to see ELI vice president, Professor Christianne Wendehorst at the ALI meetings in Washington.

Through our interaction with members of the ELI and our observations of ELI structure we have begun to observe—and I believe it is a mutual observation—that the ULC and the ELI may have a commonality in our processes, projects and ultimate goals.

This has caused us to ask whether there might be sufficient common ground or purpose to make it mutually worthwhile not only to exchange ideas and information but also to pursue opportunities to work together in specifically identified areas.

Because the nature of law reform through the ULC's nearly 125 years has sometimes been a solo journey, we have tried to exercise a degree of caution and not leap too

quickly to an assumption of commonality solely out of an enthusiastic anticipation of having very pleasant ELI company on the law reform path. Instead, we have tried to approach this more analytically to be sure that everyone's valuable time and resources would be maximized rather than misspent. To that end, we have looked carefully at five different elements of our respective organizations – elements that we view as fundamental.

First, we looked at whether the ELI is an organization primarily working at restating existing law or whether you are also working through legislative processes to shape future law.

## I.

### (Legislative as Well as a Restatement Institute)

Our early impression of the ELI, perhaps because of the similarity in name to our ALI—American Law Institute, was that the ELI's primary purpose was to produce scholarly work that restated and clarified existing law.

I have been a proud member of our American Law Institute for 15 years. And both as an ALI member and in my work as a trial and an appellate judge I have deeply valued the centrality of the ALI's mission to provide restatements on what the law is rather than what they believe the law ought to be. I recognize that the ALI's scope has broadened through their Principles and Model Law projects, but its Restatement work has continued as its central purpose.

And I want to make clear that the ULC is also engaged in the research, study, and evaluation of existing law. But this is done in support of our purpose of creating the best possible law for legislative enactment, rather than for publication as an independent product.

The ULC has as its central mission the drafting of legislative acts. The heart of the ULC's work over the last 124 years has been developing more than 250 uniform acts that have then been presented for state adoption. This work has provided a strong and integrated structure of state laws that govern commercial transactions, family law, property law, trusts and estates, business entities, consumer law, and administrative and licensing law.

And our legislative activities do not end with drafting, but continue into the enactment stage. Commissioners have the responsibility to work with the legislature in the state from which they are appointed to assist in enactment and implementation of our approved acts.

In looking at this issue of restatement versus active involvement in legislation, we noted that the question surfaced early in the ELI's formation. Some of your founding members suggested that actual drafting and legislative work would be important to obtain better and more integrated laws. I read with interest Professor and Director Reinhard Zimmerman's observation that a restatement methodology might not serve the ELI well because there was not a fully developed or settled European law that could be restated. Justice, Professor, and Speaker of your Senate, Irmgard Griss similarly observed that to serve as a catalyst in developing a comprehensive European legal culture and achieving workable legal solutions would require the ELI to combine pragmatic work with the positivistic law. And ELI President Sir Francis Jacobs emphasized that the ELI intended to have a true impact on the developing law, not just to conduct purely academic research.

We saw that these concerns were taken to heart and incorporated into your formation documents—to provide for a process (first) of researching and evaluating European law and (second) making specific proposals and providing practical guidance for the development of European Law. The legislative component has been well reflected in the ELI's work and in the comments about that work. As the Director of the Academy

of European law recently said, the ELI has an established record on research and quality legislation.

To us, these statements encompass a mission not only to analyze what the law is, but also to work through the legislative process to revise and improve the law. And in that mission the ELI and the ULC are working on common paths.

Having resolved this threshold question affirmatively, we proceeded to a second definitional element of the ULC—our structure as an organization of states working within a federal constitutional system.

## II

### (Our Federalism Framework)

As provided in our United States' Constitution, the ULC works within a balanced federal framework in our uniform law activities. We work to preserve and uphold the boundaries of federal and state authority. And when the boundaries of responsibility overlap and result in concurrent jurisdiction, we work through interactive governmental processes to create cooperative solutions. These solutions are structured to allocate power and responsibility between our federal and state governments.

It would be easy to say that the ULC and the ELI are not parallel in federalism structures because the EU law stems from Treaties as an independent source of law rather than through a national Constitution. But a closer examination reveals functional correlations. Most fundamentally, the same way that our ULC proposed statutes stand in relationship to our umbrella federal law, the EU's national member statutes stand in relationship to the umbrella Union law.

Parallel questions arise from these structures on which laws should be merged and which should remain separate, issues of proportionality, primary structural competence, divisions of power in determining what actions are necessary for achieving objectives, and which exceed it. Questions also arise on the role of the courts in determining allocation of power and authority and the delicate balance of shared or separate enforcement. These are questions of great significance that can arise in equal measure whether the foundational law draws down from a constitution or up from a combination of treaties.

The ULC also enters into these jurisdictional thickets in our cooperative work with the U.S. State Department on the Ratification of International Treaties that affect domestic laws—particularly in the areas of the law that have traditionally been governed by the states.

A knowledgeable ELI observer said five years ago during the ELI's inaugural speeches, that “bringing together diverse legal systems and cultures under the same umbrella while still respecting their differences and the interplay between national and Union Law is at the same time an opportunity, a requirement, and a challenge.”

Every indication is that the ULC and the ELI share parallel opportunities, requirements, and challenges under that same umbrella. At minimum there is a commonality of challenges.

Moving from how our two structures are defined to how they operate, we looked next at whether there is a commonality in governance structures—in efforts for open processes, democratic decisionmaking, attention to representational participation, and standards for impartiality and independence.

### III (Operating Procedures)

The operating procedures set out in the ELI's Articles of Association confirm its commitment-- similar to the ULC's commitment-- to open processes that encourage access, transparency, and inclusivity. Neither the ELI's nor the ULC's operating procedures would be a very good roadmap for creating a bureaucracy.

In the early efforts to assure democratic decisionmaking, ELI's founding President, Sir Francis Jacobs, called attention to the original features of the ELI that allowed members to become closely involved in all parts of the ELI's work, beginning with the power to make suggestions for the formulation of projects, all the way through to the final decision of the full General Assembly approving the results.

Correspondingly, through our ULC Scope and Program function, all commissioners may suggest study or drafting projects. And, at the end of all of the drafting processes and revision work, the entire membership votes on whether to approve the final act. As part of that process, the entire act is read aloud and debated line by line and considered section by section at two annual meetings.

Both the ULC and ELI demonstrate a commitment to representational participation. Because ULC commissioners are appointed by elected state officials, we have commissioners representing each state--typically 3-5 from each. ELI's parallel efforts toward representational membership is reflected in published materials and in the growing membership throughout the EU member states. The establishment of national hubs also appears to advance the principle of representative participation as the ELI works from theories of positivism to actions based on pluralism.

Another shared governance principle is the parallel commitment to impartiality and independence. Article 16 of the ELI's Articles of Association specifically sets forth

the policy on Conflicts of Interest. This corresponds to and meshes with the ULC's Statement of Policy on Conflict of Interest that is appended to the ULC constitution.

These common principles of governance confirm a solidarity in both organizations that builds on rule-of-law foundations that ensure independent decisionmaking.

Having considered our third category, governance Procedures, I now turn to our fourth, substance – what are the projects that the ELI has identified? What are the acts that the ULC is working on? Are we confronting similar substantive issues?

#### IV (Substantive Issues)

We note that one of the ELI's significant early projects has been the work on the Common European Sales Law and this project continues. One of the ULC's most influential set of acts, on which we invited the ALI to join, has been the Uniform Commercial Code which has been adopted in all of our states. We have not forgotten that our innovations in the unified codification of commercial law originated in Great Britain so it is fitting that the circle of commonality comes back to Europe.

In commending the ELI on the work on the sales law, former EU Justice Commissioner Viviane Reding commented that there is perhaps no better example of how valuable the work of the ELI is for building a European law and justice structure, than this contribution to contract law.

There are strong echoes of commonality in other ELI projects--Guidelines on Administrative Law, Non-profit Foundation or Association Law, recognition and enforcement of rules and determinations in family and succession law. And tomorrow we will be looking at two other areas of common interest--digital assets and contracts for a digital world.

There is no question that the digital age has made significant inroads into the ways in which we transfer value and define property. In addition to working on the transfer of digital assets, the ULC also has an act close to completion on Social Media Privacy and an expedited drafting committee on the Regulation of Virtual Currencies. The virtual-currency committee is sorting through crypto-currency systems and Bitcoin structures in an effort to assure some greatly needed consumer protections while at the same time taking care not to stifle the creative potential of a more direct payment system.

The Canadian ULC is also looking at this issue, following the Canadian Senate's report on digital currencies, aptly subtitled, *You Can't Flip this Coin*. But we cannot overlook the fact that even though we may have to develop new regulatory approaches to these technologies they nonetheless hold great promise for allowing capital markets to operate more efficiently and at the same time to provide greater transparency and security.

The cumulative effect of these cyberspace digital developments on traditional areas of law raises the interesting issue of what has been called, "the Law of the Horse." Now you may well be asking yourself, "What is the Law of the Horse?" Like digital currency, it, too, has an imaginative source, but since we are in a city of great equestrian roots and because the term "Law of the Horse" was coined by Karl Llewellyn, one of our more well-known Uniform Law Commissioners, I think a quick explanation is in order.

The issue is one of legal analysis and education. Llewellyn and others start from the unifying principle that legal education and analysis should be limited to subjects that draw down from and relate back to the entire structure of the law and that therefore the correct method of legal analysis comes from application of the general rules to the particular subject, not from selecting out a particular subject and



isolating it from the general rules. So, for instance, even though there are plenty of cases that deal with the sale of horses or people kicked by horses or licensing and racing of horses or even the care veterinarians give to horses, it would be wrongheaded to aggregate these strands into a law school course or, worse yet, a recognized legal field of “Law of the Horse,” because it would be elevating the group of objects above the unifying principles and turning the analytical path upside down, resulting in what some have called multidisciplinary dilettantism which instead of cross-pollination, causes cross-sterilization of ideas.

Frank Easterbrook, a U.S. appellate judge—extended this critique of misplaced analysis to cyberspace saying that there was no more a “Law of Cyberspace,” than a “Law of the Horse.” And this souped-up telephone technology must be properly sorted out and comprehended by the general application of torts, contract, property, trust and estate law, commercial transactions, and privacy law. He contends that the functional differences are not so fundamental that we need to catapult electronics into a whole new category of law.

Nonetheless, there are still rumblings of greater divergence. An article in last week’s New York Law Journal focused on educating Tomorrow’s Lawyers for Digital Success, referring to a small but growing list of law schools that are adding a field entitled “digital lawyering” to their curriculum and practice opportunities.

For now, I think that we are making the right choice to extend an existing and settled area of the law—in our case, fiduciary law, and in your case, contract law—to incorporate the special features of digital property and digital methodology. Whether the regulation of virtual currencies can fit as easily within the law of money-payment systems may be a future question.

But whether or not Cyberspace ends up creating a Law of the Horse, we need only look at the commonalities within the affected range of conventional law—trusts and

estates, contracts, and privacy-- to conclude that the ELI and the ULC have multiple substantive areas in which common projects or working groups could be very helpful to the better development of the emerging law. To quote Professor Peter Lown, a central figure in the Uniform Law Conference of Canada, "Through addressing our common needs with our shared experiences, we can achieve better informed solutions."

And, coincident with the reference to the ULC of Canada, I come to the fifth and final area on which we looked for organizational commonality, the area of international outreach.

## V

### Global Context

The ELI's Articles of Association, lists first among your stated aims, the aim of studying and stimulating European legal development in a global context. Our current discussion of potential interactive projects make it evident that both the ELI and the ULC are working in a global context.

As with the ELI's primary goal of studying and stimulating European legal development, the principal objective of the ULC is drafting acts for the unification of state law. But as pointed out by ULC commissioner Dean Robert Stein, "There has been an international dimension to the work of the ULC from its earliest days." In his book on the history of the Uniform Law Commission, Dean Stein provides a detailed and thoughtful account of the ULC's work on international outreach, pointing out that in light of our increasingly globalized community, "in order for state law to be most effective in our federal system, it must be able to cross not only state borders, but also national borders."

ULC outreach has extended to many geographic areas and to a variety of law revision forums. Our longest and most productive relationship with a law reform and unification organization has been with the Uniform Law Conference of Canada. We have held ULC annual meetings in Canada and worked closely together on harmonization of law in a growing number of areas. I was particularly pleased that Peter Lown from the Canadian ULC could participate with Sief van Erp in our discussions in Williamsburg on Digital Assets and also that the Canadian ULC expressed an interest in continuing to work jointly on this project going forward.

Several of our ULC Presidents have urged greater commitment to international projects. President Barton Kuhns in 1956 took the position that the discussion of the promulgation of uniformity of local laws on an international level can be an important contributing factor to the attainment of world peace. Whether we believe we are advancing the mega principle of working toward world peace or a more narrowly defined principle of working toward better laws—or both—the ELI and the ULC are jointly working in the global context.

So, we have tracked through affirmations of ULC/ELI commonality in five important areas—first, in our parallel work through legislative processes to shape future law; second, our comparable federal frameworks; third, in the commonality of our procedures as we work toward democratic decisionmaking; fourth, similar substantive issues in both settled legal areas, and also in emerging legal issues relating to the digital age; and finally, in our shared work in a global context.

This evaluation has caused us to conclude that there is no significant structural impediment to the ULC and the ELI working successfully together on a joint project to advance our goals—and, indeed in certain categories of action—perhaps even in the emerging area of digital assets, privacy, and management—that it could well result in a stronger basis of action for us both. So, perhaps we can now consider

shifting our attention to finding the right project—one that will enhance our joint efforts and make us stronger by virtue of our common cause.

In comments on the ELI's remarkable progress in these last five years there are recurring references to bridges. Bridges between legal cultures, between public and private law, between scholarship and practice, privacy bridges, President Wallis's tug-of-war bridge, and the colorful symbolic bridges on the Euro note series to name a few.

So perhaps we are on another bridge. And it is not particularly significant that one organization is 5 years old and the other is nearly 125 years old. We are still, like surveyors on a bridge project looking intently at plans and structures. And whether our ultimate project turns out to be a parallel bridge, a congruent bridge, or a continuous bridge we will be working to the same ends, attempting to accomplish the same goals.

I thank you for inviting me to this Conference and for this opportunity to share thoughts. Most of all, I thank you and salute each of you for what you do every day--if not with the certainty of attaining world peace--at least with the vitality of being out there-- envisioning and constructing these bridges to bring our nations and our world closer together.

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