

THE ALI Reporter

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Project Spotlight: The Law of American Indians



Indian Bill of Rights vs. U.S. Bill of Rights¹

*By American Indian Law Reporter Matthew L.M. Fletcher,
and Associate Reporters Wenona T. Singel and
Kaighn Smith, Jr.*

Many people are not aware that federal constitutional constraints on governmental action set forth in the Bill of Rights and the Fourteenth Amendment do not apply to, or constrain, tribal government.² The primary source for individual rights to constrain tribal government authority is tribal law.

The Indian Civil Rights Act (ICRA), enacted by Congress as Title II of the 1968 Civil Rights Act, is the primary source for individual rights and tribal government action. Portions of the ICRA that substantially mirror the Bill of Rights are popularly called the “Indian Bill of Rights.” The Indian Bill of Rights extends most of the constitutional protections of the Bill of Rights to individuals under the jurisdiction of Indian tribal governments. With the exception of actions for habeas corpus relief, those guarantees are enforceable exclusively in tribal courts and other tribal fora. In order to preserve certain aspects of tribal government and sovereignty, some portions of the Bill of Rights were modified or left out. The main differences include the absences of an establishment clause and of a right to counsel at the government’s expense.

Tribal courts have generally interpreted the provisions of the ICRA in accordance with the method recommended in 1969 by the leading commentary on the Act: “[u]nless the record shows a willingness to modify tribal life wherever necessary to impose ordinary constitutional standards, courts should take this legislation as a mandate to interpret statutory standards within the framework of tribal life.³ One tribal court follows a principle that, where no tribal “custom or tradition has been argued to be

continued on page 4

THE PRESIDENT’S LETTER

These quarterly missives give me a chance to bring each of you up to date on the state of our work and our workings. In a time when there seems to be a great deal of looking after oneself in a very narrow way, the ALI is quite the reverse. Our members give vast amounts of their time for the common good represented by our work. The ALI’s past quarter is emblematic of that generosity of spirit and the American cultural imperative to put one’s shoulder to the wheel for the common good.

We had more than 850 registrants for the Fall Meetings of 13 of our projects as either Advisers or members of the Members Consultative Groups, or sometimes both. Ricky Revesz and Stephanie Middleton are at virtually every meeting and many of our Council members are engaged in the particular projects we are currently working on.

At the October Council Meeting, we had what we think is the next-to-last Council discussion of Model Penal Code: Sentencing. The last little bit will come before the Council at its January meeting and we will then have that project finalized for presentation at our Annual Meeting this May. This could not come at a more important time as the national debate about prison terms on both the state and federal level will be in full throat. There could not be a better example than this project of how the ALI brings the theoretic and the scientific together with the practical realities of information needed by the legal system to make the criminal-justice system work with both justice and safety in mind. We are greatly indebted to our Reporters and Advisers for their time and thoughtful input. If you go to our website, you can see the most recent draft and the interesting comments that are posted there.

Also on the Model Penal Code front, we are continuing to refine the MPC: Sexual Assault Sections. For all proper reasons, this subject has produced some of our most passionate debates. But, as we have moved along, calm discussions and a combination of compromises by all sides have led to a clear definition of consent and progress on several other Sections, and some

continued on page 2

THE PRESIDENT'S LETTER CONTINUED FROM PAGE 1

court decisions have brought us closer to the finish line on this important work as well.

As to Restatements, the Council in October discussed the Restatement of the Law of Consumer Contracts, Torts: Liability for Economic Harm, Intentional Torts to Persons, The Law of American Indians, and Children and the Law. Some of these will come back to the Council for tweaks in January with presentation to the membership in May, and others will come to the 2018 Meeting in whole or in part.

Last in October were two Principles projects that are both timely and with strong views on many sides: Data Privacy and Policing. We may see portions of one of these at the Annual Meeting for your approval, but this will depend on the Reporters' abilities to incorporate the changes suggested at the Council meeting and on our very crowded Annual Meeting schedule. I can be more precise about the Annual Meeting schedule after we complete our January Council meeting in Philadelphia.

We also had a very long Projects Committee meeting chaired by Justice Goodwin Liu. These meetings allow the Committee to hear from Ricky and Stephanie about the progress being made in all of the projects. This also gives us a chance to hear about new projects that Director Revesz is thinking about and/or that have been suggested by various members from time to time. We are in general agreement that we will wait until after our Annual Meeting, when we will hopefully have several of our projects completed, before we take on new ones. But there is a great deal of time and work even to prepare a project for the Committee and the Council, and Ricky is working away on this with Stephanie's able advice and counsel.

We have received the good news that the trajectory of ALI CLE is starting to head into positive financial territory. This is in major part thanks to our ALI CFO Julie Scribner, who is also the Director of ALI CLE, and to Steve Weise, who oversees this project for the Council. You are missing a great bet if you are in a firm and have not taken advantage of the great bargain of a firm-wide subscription to ALI CLE, which provides access to in-person and online programs as well as to our CLE materials. Just visit ali-cle.org/lawpassfirm to learn more and suggest to your firm that they sign up. Among other things, access to *The Practical Lawyer* and CLE program materials is hugely helpful for anyone in practice or for training new associates in a cost-effective way.

All of this is made possible with your work, and we remain totally independent because of your financial generosity. So we hope you look at our Annual Report and make sure that the ALI is on your list for year-end giving.

Our President Designate David Levi is working away in preparation for taking the helm in May 2017. I know that Ricky and Stephanie join me in our delight in working with David and in looking forward to his leadership, which will take us to even higher levels of accomplishments.

Finally, you may have noticed that we had an election a few weeks ago. Not surprisingly, we had active ALI members on both sides of the partisan aisle working closely with the candidates, and others working in their states or on the national front on election-law issues. However this came out, we knew that the result would be hard for the losing side, given our times and the rhetoric. In this particular time, our role in displaying our culture of respect, civility, and

devotion to the American legal system is more important than ever. For those of our members who I am sad to say I know have faced personal slurs of many kinds over the last months, I speak for each of us in saying we are indeed an organization that is all for one. In each of our communities, at our dinner tables, in our firms, and at our meetings the one thing we can do is both state our opinions firmly, stand for justice, and be ready to support the rights of all Americans.

I wish you the happiest end of 2016. And I thank each and all of you for your part in making The American Law Institute worthy of the national and international respect and admiration that it has.

Put our Annual Meeting on May 22-24, 2017, on your calendar now. I want to thank you in person.

Roberta

Roberta Cooper Ramo
President

94th Annual Meeting

MAY 22-24
WASHINGTON, DC

VIEW ALL UPCOMING
MEETINGS AND EVENTS
ON PAGE 19.

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THE DIRECTOR'S LETTER BY RICHARD L. REVESZ

The American Law Institute and the U.S. Supreme Court

In an effort to show that the ALI's influence is not confined to the states, in my last letter I focused on the impact of our work on the development of federal common law, both in the Supreme Court and the U.S. Courts of Appeals. In this letter, I look more specifically at the use of ALI materials by the Supreme Court during the 2013 to 2015 Terms.

During the past three Terms, the Supreme Court cited ALI publications in 50 separate opinions across 37 argued cases—roughly one-sixth of the total. Ten of these opinions were unanimous, one was per curiam, 19 were majorities, 12 were dissents, four were concurrences, and four were partial concurrences and partial dissents. Seventeen of those 50 opinions relied on more than one ALI publication. In total, there were 71 citations to ALI publications during these three Terms.

Justice Scalia was the most frequent author of opinions citing ALI publications, with nine opinions, followed by Justice Thomas with eight, and Justice Alito and Justice Kagan with six each. Each of the nine Justices wrote at least four opinions citing ALI publications.

Justice Scalia's reliance on ALI's work might seem surprising because in 2015, in a partial concurrence and partial dissent in *Kansas v. Nebraska*, he took issue with the majority's reliance on the Restatement Third of Restitution and Unjust Enrichment, and stated that "modern" Restatements "are of questionable value, and must be used with caution." He acknowledged the authoritative quality of the original Restatements but indicated that, "[o]ver time, the Restatements' authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be." In that opinion, Justice Scalia stated that the newer Restatements "should be given no weight whatever as to the current state of the law, and no more weight regarding what the law ought to be than the recommendations of any respected lawyer or scholar."

Nonetheless, prior to *Kansas v. Nebraska*, in the 2013 and 2014 Terms, Scalia cited to the newer Restatements—Second and Third—seven times in five cases. And, in the 2014 Term, following *Kansas v. Nebraska*, Justice Scalia went on to cite a newer Restatement, the Restatement Second of the Foreign Relations Law of the United States.

It seems fair to conclude that Justice Scalia depended a good deal on the Restatements and generally admired the work product of the ALI. His concern that the Reporters might impose their own normative vision has been addressed in recent years by the requirement, contained in our Style Manual, that if a Restatement "declines to follow a majority rule it should say so explicitly and explain why." A possible explanation, for example, might be that a significant trend of recent decisions points in a different direction. Moreover, the Reporters' policy

views are confined to the Reporters' Notes, which are not the official position of the ALI. In contrast, both the black letter rules themselves and the Comments to the black letter, which are the only portions that constitute the ALI's position, must be adopted by both the ALI Council and membership body.

During the 2013 to 2015 Terms, the field of ALI work that the Court cited most frequently was Torts, with 18 opinions: five to the original Restatement, nine to the Restatement Second, two to the Restatement Third, Torts: Apportionment of Liability, and two to the Restatement Third, Torts: Liability for Physical and Emotional Harm. Next, there were 10 citations each to the Model Penal Code and to Judgments (three to the original Restatement and seven to the Restatement Second).

ALI publications were cited in constitutional, statutory, and procedural cases. For example, on the constitutional front, in *Zivotofsky v. Kerry*, both the majority and the dissent relied on Restatements of Foreign Relations (Third and Second, respectively) to determine the scope of the President's power to recognize foreign states. With respect to statutory interpretation, a unanimous Court in *Tibble v. Edison International* relied on the Restatement Third of Trusts to decide whether actions taken by a fiduciary after the date contested investments were included in a mutual fund could constitute a breach of fiduciary duty under the Employee Retirement Income Security Act of 1974. As to procedural matters, the majority in the high-profile case *Whole Woman's Health v. Hellerstedt* relied on the Restatement Second of Judgments to reverse the Ninth Circuit's ruling that claim preclusion barred some of the plaintiff's challenges to the constitutionality of a Texas law regulating abortion clinics. Justice Alito's dissent in that case also cited to this Restatement to support the proposition that those challenges were barred by claim preclusion.

The Restatements of Torts and Contracts are often thought to be directed primarily—perhaps exclusively—at state common law. But the Supreme Court has relied on them to interpret particular federal statutory provisions. For example, as to Torts, in *Paroline v. United States*, the Court relied repeatedly on the Restatement Third, Torts: Liability for Physical and Emotional Harm, to determine whether the mandatory restitution to a victim of child pornography under the Violence Against Women Act was limited only to those harms to the victim that were proximately caused by the defendant's actions. On the Contracts front, in *Omnicare, Inc. v. Laborers Dist. Council Const. Indus. Pension Fund* the majority relied on the Restatement Second of Contracts (and the concurrence on the original Restatement) to determine that a statement of opinion could not constitute an "untrue statement of ... fact" for the purposes of the Securities Act of 1933.

PROJECT SPOTLIGHT: THE LAW OF AMERICAN INDIANS CONTINUED FROM PAGE 1

implicated . . . , [tribal courts] will look to general U.S. constitutional principles, as articulated by federal and [state] courts, for guidance. . . .”⁴

The so-called “Indian Bill of Rights” provides:

No Indian tribe in exercising powers of self-government shall—

- (1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and to petition for a redress of grievances;
- (2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or thing to be seized;
- (3) subject any person for the same offense to be twice put in jeopardy;
- (4) compel any person in any criminal case to be a witness against himself;
- (5) take any private property for a public use without just compensation;
- (6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense (except as provided in subsection (b));
- (7)
 - (A) require excessive bail, impose excessive fines, or inflict cruel and unusual punishments;
 - (B) except as provided in subparagraph (C), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 1 year or a fine of \$5,000, or both;
 - (C) subject to subsection (b), impose for conviction of any 1 offense any penalty or punishment greater than imprisonment for a term of 3 years or a fine of \$15,000, or both; or
 - (D) impose on a person in a criminal proceeding a total penalty or punishment greater than imprisonment for a term of 9 years;
- (8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;
- (9) pass any bill of attainder or ex post facto law; or
- (10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.⁵

The individual-rights protections include: the rights to free exercise of religion, to free speech, to freedom of the press, to freedom of assembly, and to petition for a redress of grievances; the right to be free of unreasonable searches and seizures without a search warrant to be issued only upon a showing of probable cause; the right to be free from being placed in double jeopardy and from self-incrimination; the right to due process and equal protection; the right to be free from taking of property without just compensation; the rights to a speedy trial, to confront witnesses, and to the assistance of counsel; the freedom from excessive bail and cruel and unusual punishment; the freedom from bills of attainder and ex post facto laws; and the right to a jury of at least six persons in all criminal cases carrying the possibility of imprisonment.

The Act provides for enhanced sentencing authority for Indian tribes, provided that the sentencing tribe meets statutory criteria guaranteeing criminal procedural rights. It authorizes those persons detained after conviction of crimes by tribal authorities to petition for a writ of habeas corpus in federal court.

As we move forward with the Restatement, it’s important for our members to remember the limitations of federal law on tribes. Indian tribes as sovereign nations and the different laws that govern them make the Restatement particularly important, as more and more often judges and practitioners are being asked to deal with this polarity, but don’t yet have the background in this area of law.

¹ This piece presents information contained in Council Draft No. 3 (Sept. 7, 2016), including proposed black letter, Comments, and Reporters’ Notes from Council Draft No. 3. There was discussion of portions of Council Draft No. 3. However, due to insufficient time, no approval was sought at the October Council Meeting. The Council will continue its consideration of the draft at a future meeting.

² Proposed black letter from Restatement of the Law of American Indians, Chapter 2, § 23 (AM. LAW INST., Council Draft No. 3, 2016). See id.

³ Note, *The Indian Bill of Rights and the Constitutional Status of Tribal Governments*, 82 HARV. L. REV. 1343, 1355 (1969).

⁴ *Louchart v. Mashantucket Pequot Gaming Enter.*, 27 Indian L. Rep. 6176, 6179 (Mashantucket Pequot Tribal Ct. 1999).

⁵ 25 U.S.C. § 1302(a).

U.S. Foreign Relations Law Project Meeting

September 15 and 16 in Philadelphia, PA

Jurisdiction, Sovereign Immunity, and Treaties were all discussed at this two-day meeting. This project will appear on the January 2017 Council meeting agenda and may be presented to members at the 2017 Annual Meeting, potentially completing this project.



Sean David Murphy of George Washington University Law School and Gerald L. Neuman of Harvard Law School



Treaties Reporters Curtis A. Bradley of Duke University School of Law and Edward T. Swaine of George Washington University Law School

Conflict of Laws Project Meeting

September 9 in Philadelphia, PA

Preliminary Draft No. 2 included portions of Chapters 1, 2, 5, 6, and 7, with topics ranging from Geographic Links and Domicile to Torts.



R. Lea Brilmayer of Yale Law School and Erin O'Hara O'Connor of Florida State University College of Law

Children and the Law Project Meeting

October 27 in Philadelphia, PA

Meeting attendees discussed Preliminary Draft No. 2, which includes portions of Parts I-III. Part I (Children in Families) includes Sections on the Duty to Provide Economic Support and Necessary Medical Care; Part II (Children in Schools) includes the topic of Student Discipline; Part III includes several Chapters on Children in the Justice System, including Delinquency Proceedings and Juveniles in Criminal Proceedings, and provides tables that display by U.S. state and offense, the Age for Which a Juvenile Can Be Adjudicated in Criminal Court.



*FAR LEFT
Reginald L. Robinson of Howard University School of Law and Michael J. Kramer of Noble Superior Court*



*LEFT
Reporter Elizabeth S. Scott of Columbia Law School, and Associate Reporters Emily Buss of the University of Chicago Law School, Clare Huntington of Fordham University School of Law, and Solangel Maldonado of Seton Hall University School of Law*



Annual Report and Appeal

By now you should have received The American Law Institute's Annual Report in the mail, which highlights the Institute's achievements in fiscal 2015–2016. In particular, letters from President Roberta Cooper Ramo and Director Richard L. Revesz spotlight the engagement of ALI's diverse members through meeting attendance, project participation, and member receptions. Without the dedication of our members, Advisers, and project Reporters, who give so generously of their time, we would not be able to continue our great work.

We also, however, rely on the financial support of our donors. In the Annual Report, ALI recognizes those who generously made a charitable donation during the 2015–2016 fiscal year. We are especially grateful for the increasing number of members who have chosen to become Giving Circle donors.

We hope that every member will make an end-of-year charitable contribution to ALI by completing and returning the gift card that accompanied the Annual Report, or the envelope that is included in this edition of *The ALI Reporter*. Donations to the Institute can also be made online at www.ali.org/makeagift, or by calling Kyle Jakob, ALI Development Manager, at 215-243-1660.

Thank you in advance for your generosity and best wishes for a happy and healthy 2017.

You may view the Annual Report online at www.ali.org/AnnualReport.

Council Meeting

October 20 and 21 in New York, NY



ALI Treasurer Wallace B. Jefferson alongside MPC: Sentencing Reporter Kevin R. Reitz of the University of Minnesota Law School and Associate Reporter Cecelia M. Klingele of the University of Wisconsin Law School



Carol F. Lee of Taconic Capital Advisors LP, and Reporters for the Consumer Contracts Project Oren Bar-Gill of Harvard Law School, Omri Ben-Shahar of the University of Chicago Law School, and Florencia Marotta-Wurgler of NYU School of Law

International Commercial Arbitration Project Meeting

October 26 in Philadelphia, PA

Preliminary Draft No. 9 included Chapter 1, containing the definition of new terms and new provisions on Federal Preemption of State Law on International Commercial Arbitration; Chapter 3, an entirely new Chapter on the Judicial Role in Connection with International Commercial Arbitral Proceedings; and a revised draft of Chapter 5, on the Judicial Role in Connection with Investor–State Arbitration.



ALI Deputy Director Stephanie A. Middleton, Reporter George A. Bermann of Columbia Law School, and Associate Reporters Jack J. Coe, Jr. of Pepperdine University School of Law, Catherine A. Rogers of Penn State Law, University Park, and Christopher R. Drahozal of the University of Kansas School of Law

ALI Council Reviews Nine Project Drafts at October Meeting

At its meeting in New York City on October 20 and 21, the ALI Council reviewed drafts for nine of ALI's 20 current projects, reflecting progress made by project Reporters and their advisory groups on projects recently begun as well as projects close to completion. Drafts or portions of drafts for seven projects received Council approval, subject to the meeting discussion and to the usual prerogative to make nonsubstantive editorial improvements. It is expected that the agenda for the 2017 Annual Meeting will not be determined until after the Council's next meeting in January 2017.

The Council gave its approval to Council Draft No. 6 of the **Model Penal Code: Sentencing**, which is nearing completion. Reporter Kevin R. Reitz of the University of Minnesota Law School and Associate Reporter Cecelia M. Klingele of the University of Wisconsin Law School will submit a provision on restorative justice for consideration at the Council's meeting in January 2017. The Council also approved § 213.0(3), defining consent, in Council Draft No. 4 of the **Model Penal Code: Sexual Assault and Related Offenses**, submitted by Reporter Stephen J. Schulhofer and Associate Reporter Erin E. Murphy, both of NYU School of Law. The Council will consider §§ 213.0(7) and 213.1 to 213.4 of Article 213 when it meets in January 2017.

Drafts for both of the Institute's current Torts projects were on the Council's agenda. The Council approved Council Draft No. 4 of **Restatement of the Law Third, Torts: Liability for Economic Harm**. The draft, submitted by Reporter Ward Farnsworth of the University of Texas School of Law, covers interference with economic interests. Reporter Kenneth W. Simons of UC Irvine School of Law and Associate Reporter W. Jonathan Cardi of Wake Forest University School of Law presented Council Draft No. 3 of **Restatement of the Law Third, Torts: Intentional Torts to Persons**, containing Sections on battery, wrongful confinement, and instigation of or participation in an intentional tort. The Council approved Council Draft No. 3, except for §§ 109A and 109B, which will be discussed at a future Council meeting. Of two possible versions of § 109 in the draft, the second version was approved.

Reporter Elizabeth S. Scott of Columbia Law School and Associate Reporter Clare Huntington of Fordham University School of Law made their first appearance before the Council with Council Draft No. 1 of **Restatement of the Law, Children and the Law**. Associate Reporters Richard J. Bonnie of the University of Virginia School of Law, Emily Buss of the University of Chicago Law School, Solangel Maldonado of Seton Hall University School of Law, and David D. Meyer of Tulane University School of Law also were present. Council Draft No. 1, which covers the parental privilege to discipline children and the interrogation of juveniles, was approved by the Council.

Council Draft No. 1 of **Principles of the Law, Data Privacy**, comprising four Sections on purpose and scope, definitions, transparency, and notice, was submitted by Reporters Paul M. Schwartz of the UC Berkeley School of Law and Daniel J. Solove of George Washington University Law School. The Council voted to approve §§ 1 to 3, but there was insufficient time to consider § 4.

The Council also approved the first Council Draft for **Principles of the Law, Policing**. Council Draft No. 1, presented by Reporter Barry Friedman of NYU School of Law and Associate Reporters Rachel A. Harmon and Brandon L. Garrett of the University of Virginia School of Law, covers the use of force by law-enforcement officers.

Council Draft No. 2 of **Restatement of the Law, Consumer Contracts**, containing all nine Sections of the proposed Restatement, underwent a thorough discussion. Reporters Oren Bar-Gill of Harvard Law School, Omri Ben-Shahar of the University of Chicago Law School, and Florencia Marotta-Wurgler of NYU School of Law will revise the draft in accordance with the discussion and will submit their revised draft at the Council's meeting in January 2017.

Reporter Matthew L.M. Fletcher and Associate Reporter Wenona T. Singel, both of Michigan State University College of Law, and Associate Reporter Kaighn Smith, Jr., of Drummond Woodsum presented Council Draft No. 3 of the **Restatement of the Law, The Law of American Indians**, which deals with federal-tribal relations, tribal authority, and tribal economic development. No vote was taken on the draft, as time ran out before the discussion could be concluded. The Council will continue its review of the draft at a future meeting.



ALI Council members gather for the fall Council Meeting in New York City.

Lessons from Hamilton *By William Baude*

On September 22, 2016, William Baude of the University of Chicago Law School, an Adviser on the Conflict of Laws Project, delivered a speech to first-year law students discussing the challenges that await them as they begin their careers in law. Imparting his tips for succeeding in their new endeavor, Professor Baude shared some lessons from Alexander Hamilton. While the law and practice of law has transformed considerably since the days of Hamilton (and ALI has been a part of that change), these lessons still ring true for all lawyers.

LESSON NUMBER ONE: TAKE IDEAS SERIOUSLY. RELENTLESSLY QUESTION THE CONVENTIONAL WISDOM.

Say what you will about Alexander Hamilton, but he had audacity. He “wrote financial systems into existence.” He came up with a complicated scheme for the federal government to voluntarily assume massive state debts as a vehicle to ultimately propel the national government to political dominance over the states and to propel the republic to commercial greatness. (And it worked.)

He fought for the ratification of the Constitution, apparently convinced that if he could just write enough essays about what the Constitution meant and what the system looked like, his enemies would succumb. (That worked too.)

Before ratification, at the constitutional convention, he had proposed some radical alternatives to the constitutional structure. My favorite? He wanted the President to be elected for life. Yes, he wanted what he called an “elective Monarch,” arguing to the convention that the failure of such monarchs in the past “had been taken rather from particular cases than from general principles.” In other words, it had failed in practice so far, but maybe it would work in theory.

Now, to be fair to Hamilton he was pretty sure he was going to get George Washington as his elected King, which wouldn’t have been so bad. How would we fare under the same system today? I’ll let you do the math.

Not all of Hamilton’s ideas were good. Not all of his ideas were popular. But some of his ideas, and usually the better ones, changed the nation’s fate. And Hamilton did not get there by taking everything as given, or doing only what he was taught.

My first suggestion is that you take a little bit of Hamilton’s ... attitude with you into your classes. Law is partly about learning the rules, but it is also about arguing: arguing against the rules, arguing for new rules, devising new schemes within the rules or transcending them. When you read a new case, don’t forget to read the dissent. Frankly, I often start with the dissents, which may explain a lot about my views of the world. If there isn’t a dissent, write it. Or at least think about what it would say.

You will understand what work the rules are doing if you understand why people might disagree with them. You will understand your own arguments better if you understand what is wrong with them. Law school is the time to start asking those questions, and it is one of the things that this law school, in particular, excels at. Don’t be afraid to talk in class. Don’t be afraid if you find yourself trying out some crazy argument that questions the premise of some area of law, or even some premise of your own way of thinking. You can come back to your premises afterwards, if you still want to.

So follow Hamilton’s faith in the power of ideas, his willingness to question conventional wisdom.

But maybe ... no Kings.

NUMBER TWO: YOUR PROFESSIONAL LIVES START NOW. BUT WHAT I REALLY MEAN IS THAT YOU ARE ALREADY MAKING FRIENDS WHO WILL MATTER FOR THE REST OF YOUR LIFE AS A LAWYER.

For Alexander Hamilton, those early friends included Hercules Mulligan, the Marquis de Lafayette, and John Laurens, each of whom share with him the third song of Hamilton, My Shot!

Hamilton lived with Hercules Mulligan when he moved to New York, and Mulligan helped sway Hamilton to supporting the Revolution. Later on, thanks to their friendship, Mulligan went on to perform acts of espionage for the Revolution that saved General Washington from being captured, even from being killed, by British forces. Alexander Hamilton’s friendship with Hercules Mulligan saved George Washington’s life.

Hamilton spoke French and quickly befriended the Marquis de Lafayette. They, along with Laurens, were later described as being like Alexander Dumas’s Three Musketeers. Lafayette in turn fought with revolutionary forces, helped bring French military support to the Americans, and worked with Hamilton to rally state aid to the cause, and later to break through British fortifications at Yorktown. Hamilton’s work with Lafayette may have won the war.

John Laurens may have been Hamilton’s closest friend. He fought in the revolutionary war from his home state of South Carolina, where he wanted to arm and free the slaves if they would help fight the revolution. He was brave, but maybe too brave, and he was eventually captured and tragically killed toward the end of the war. But, even so, their relationship seems to have shaped Hamilton’s public and private conduct for the rest of his life.

Hopefully, we won't be fighting another American Revolution any time soon, but I think you see my basic point. Your classmates today will be your coworkers, clients, and confidantes tomorrow. Much of what you learn will be from each other, and much of the emotional and personal support you need will come from each other as well. Of course you all come to law school with relationships *outside* the law school that are equally or even more important, but you aren't done.

So start now to be the kind of lawyer you want to be, and to have the kind of professional relationships you want to have. Be patient when your classmates flub their first cold calls. It will happen to you too, and you want them to return the favor. Be civil when your classmates say things you think are wrong or wrongheaded. Be good to each other. Don't be so caught up in keeping your heads down or focusing on the path ahead that you forget to see who is beside you.

NUMBER THREE:

TRY, AT LEAST SOMETIMES, TO FOCUS ON THE LAW ON ITS OWN TERMS.

Now this one may be a bit abstract, but bear with me, because it's actually the most important thing I have to say to you tonight.

My lesson here doesn't actually come from Alexander Hamilton, but from *Hamilton's* creator, Lin-Manuel Miranda.

Lin-Manuel Miranda didn't just write a musical. He wrote a *great* musical. A musical that made a ton of money, for himself and for others; that gave huge opportunities to performers of color; that changed the conversation around race and theater; that showed how Americans today can recover founding-era history for their own purposes; that kept Alexander Hamilton on the ten-dollar bill; that won eleven Tony awards, a Grammy award, a Pulitzer Prize, and, for good measure, a MacArthur "Genius Grant."

But here's the funny thing.

To accomplish those things, Miranda had to focus on writing the best musical, *qua musical*, that he could. If he had focused, all the time, on writing whatever would be most profitable, or most likely to win

THE LAW HAS ITS OWN RULES, ITS OWN LANGUAGE, ITS OWN WAY OF THINKING, AND TO MASTER THAT YOU NEED TO FOCUS ON LAW.



all those prizes, I don't think he would have succeeded. If he had focused, all the time, on the political message he wanted to convey, I don't think he would have succeeded. I'm not saying he didn't want all those things—didn't "Burn" with desire for those things—I'm sure he did. But to get there, he had to write the best musical, on the musical's own terms.

Now think about law school. All of you are here for a reason. You have ambitions—whether to make money, change the world, serve the just, or "prove that you're worth more than anyone bargained for." But to do that, as lawyers, let me suggest that it will help if you immerse yourself into the law *qua law*. Don't be too focused on only learning the legal rules that will help you make money or serve the just. Don't be too focused on making sure every legal argument is on message.

The law has its own rules, its own language, its own way of thinking, and to master that you need to focus on law. When you graduate, you'll see that some other lawyers have this sixth sense for legal argument. It's not just about being able to remember the

statutory phrases from the internal revenue code or some obscure embargo case about quasi-War with France, or the four-part test for federal question jurisdiction. They can get what it really means and how it fits into the rest of the law and when it's a red herring, in a way that outsiders can rarely understand. This is your chance to start developing that sixth sense, and you can if you practice it.

But law is easiest to understand (maybe this is the only way to understand it, but I'm not sure) if you think of it as its own thing, not as an elaborate way to do something else.

Now I'm not saying you should each forget why you are here—if you know. Not for a minute. But I am saying this: You will be better lawyers, and therefore better at making money, changing the world, serving the just, if you've figured out how to get inside the head of a lawyer.

Try taking the law seriously on its own terms. Get *into it*.

I think it will be fun too.

Member Spotlight: David L. Mulliken

David Mulliken is a retired partner at Latham & Watkins LLP and the former chair of the firm's European Litigation Department.

Mr. Mulliken handled lawsuits and administrative enforcement proceedings involving air and water quality, hazardous waste and toxic substance management, Superfund site cleanups and natural resources damages claims, and environmental insurance coverage. He also spent considerable time in waste and energy project siting matters, and provided counseling on all types of environmental issues. He currently lives in Hawaii and is an active participant of ALI, serving as an Adviser on the Liability Insurance Restatement Project.

You currently live in Hawaii, yet you still make the time to travel all the way to the East Coast to attend ALI's project meetings. In fact, you recently attended the Liability Insurance project meeting. Can you explain why it is so important to attend these meetings in person?

I believe that attendance at the Advisers and MCG meetings is essential in promoting the robust deliberative process ALI seeks to encourage in both its Principles and Restatement projects. Of course many issues can be addressed via written comments, but they are no substitute for the dialogue and interaction amongst the entire group of Advisers, MCG, and Reporters that occurs face-to-face.

I was honored and pleased when Ken Abraham initially approached me, and Lance Liebman subsequently invited me, to serve as a project Adviser from the RLLI's inception as a Principles project. I welcomed the prospect of exchanging views over an extended period of time with many of the country's most knowledgeable practitioners, academics, jurists, and industry representatives as we sought to articulate rules that could lead to more coherence in a field of law that had engaged an important part of my career.

From my first Advisers meeting in March 2011, it was apparent that real-time discussion and exchange of ideas was the most effective way to identify emerging trends and debate the relative desirability of the competing rules being dealt with by the Reporters. Unsurprisingly, this has remained true from the onset of the RLLI project to its conclusion. As important as the Adviser/MCG/Reporter deliberations have been to this endeavor throughout the life of the project, it may be that it was even more valuable when it was styled a Principles project, since its different target audience (legislative bodies vs. judges) allowed the Reporters somewhat greater flexibility in enunciating rules grounded in policy considerations, even if not always supported by a tally of existing state-by-state precedent.



The importance of in-person attendance to engage one another was reason enough to come to the East Coast for our Advisers meetings. It has proven an added bonus that our RLLI Reporters and Advisers are a group who not only are extraordinarily bright and experienced advocates for differing points of view, but also are genuinely enjoyable people to spend time with and be around. And it's always nice to escape Hawaii, if only briefly, to be reminded of the weather much of the mainland deals with routinely.

In what ways do you think the Liability Insurance Restatement can be most helpful to practicing attorneys?

Because insurance coverage law is primarily a product of state common law and deviates from commercial contract law in important ways, it can be a considerable challenge to quickly grasp the range of often divergent approaches taken by state courts in resolving insurance coverage disputes, much less comprehending the policy rationales proffered in support of these divergent approaches. The RLLI goes a long way to addressing this problem. That said, I have the strong sense the RLLI will prove even more valuable to the state and federal trial court judges who preside over the lion's share of coverage disputes. Many of these judges come to insurance coverage cases with minimal background in this area, little if any appreciation for the myriad ways in which the principles governing insurance coverage disputes vary in important ways from those applicable to ordinary commercial contract cases, and insufficient time or resources to properly school themselves on these critical differences.

While the RLLI will occupy a valuable place in law libraries, I have little doubt it will be recognized as an invaluable bench book for trial judges nationwide. If so, it will have achieved the purposes ALI intended when this project was launched six years ago.

You were at the forefront of environmental litigation long before it became mainstream. Can you share your thoughts on the state of environmental regulation today?

I fully anticipate other attorneys might answer this question in different ways, but my strong sense is that over the past 40+ years the chasm that too frequently seemed to separate federal and state environmental agencies from the regulated community has narrowed dramatically. From a time in the 1970s and '80s when both sides viewed one another with massive suspicion, I perceive that most environmental agencies are increasingly seen by most regulated entities as being committed to even-handed enforcement of the laws on the books, and the regulated community is increasingly seen by the regulators as being largely committed to compliance. Of course this generality is subject to exceptions. Nevertheless, I find it interesting that a quite modest percentage (less than five percent according to current year reports) of EPA judicial and administrative enforcement actions appear to result in the imposition of civil fines and penalties.

An example of this changing perception that has implications for liability insurance is the growing recognition of governmental agencies that insurance resources can be a valuable additional asset contributing to the resolution of environmental disputes. This is a win-win for regulators, liable parties, and impacted communities.

What do you most miss about the practice of law?

My wife reminds me I haven't fully retired from the practice of law, so the best answer to your question may be to identify some pluses and minuses of being "mostly retired." I loved the constant intellectual stimulation, the camaraderie that accompanied being a lawyer in a large law firm populated with great lawyers who also were wonderful people, and working in a profession that valued using the law as a springboard for creative problem solving. Fortunately I still experience this, albeit to a lesser degree, with the limited amount of work I continue doing. My service as an Adviser to the RLLI project has been very important in this regard. What I don't miss are the administrative responsibilities that accompanied serving in various management roles at the firm.

Tell us something about Hawaii that would surprise nonlocals?

We experience the same traffic congestion in Honolulu as do most large mainland cities (of course anyone who saw *The Descendants* would know that, so perhaps that isn't much of a surprise). We also have snowplows in Hawaii (seriously!); they are used to clear the snow on the road leading to the Mauna Kea Observatories on the Big Island. I doubt any nonlocal (or most locals) would know that.



David L. Mulliken at the October Liability Insurance project meeting.



1,209 MEMBERS
ATTENDED ONE OR MORE
MEETINGS FROM FY 2015 TO 2016

Liability Insurance Project Meeting

October 6 and 7 in Philadelphia, PA

Preliminary Draft No. 3 contained the final portions of this project, including Chapter 4 on Enforceability and Remedies. A draft will be presented to the membership at the 2017 Annual Meeting for approval, potentially completing this project.



Randall T. Shepard of Indiana University, Robert H. McKinney School of Law, Vanita M. Banks of Allstate Insurance Company, Herbert P. Wilkins, formerly of the Massachusetts Supreme Judicial Court, and Kenneth S. Abraham of University of Virginia School of Law

ALI to Celebrate its New Life Members: the Class of 1992

Each year, The American Law Institute recognizes its members who have contributed 25 years of service by granting them Life Member status. Life Members are not required to pay dues or adhere to the Institute's participation requirement, yet continue to enjoy all the rights and privileges of elected membership and remain some of ALI's most involved and devoted members.

In May, the Institute will honor its new Life Members—the Class of 1992—at a special luncheon that will be held during the 2017 Annual Meeting and will include remarks by 1992 Class Member **Wesley S. Williams, Jr.**, the current President and Co-Chairman of Lockhart Companies Incorporated. New Life Members will have the opportunity to commemorate this milestone by making a contribution to the 1992 Life Member Class Gift.

Class members **Steven O. Weise** of Proskauer Rose LLP; **Gail B. Agrawal** of University of Iowa College of Law; **Mitchell A. Lowenthal** of Cleary Gottlieb Steen & Hamilton LLP; and **Gregory K. Palm** of Goldman, Sachs & Co. have graciously volunteered to serve on the campaign committee and will present the Class Gift to the Institute during the luncheon.

The Class Gift program enters its sixth year having raised more than \$650,000 to support key aspects of ALI's mission, including the MCG Travel Assistance program and the Judges & Public-Sector Lawyers Expense Reimbursement program, two vital components of the Institute's efforts to minimize financial concerns that inhibit member participation. This past year, these important programs provided 61 members a total of almost \$60,000 in assistance to attend project meetings and the 93rd Annual Meeting.

The Class Gift program has also provided funding for the Young Scholars Medal and symposium, which raises awareness of the Institute's work while engaging up-and-coming legal academics. Additionally, as the Institute has expanded the breadth of its endeavors, the Class Gift program has helped fund the numerous costs required to maintain the high level of quality that distinguishes ALI's work.

The Institute looks to continue the program's tremendous success with the 1992 Life Member Class Gift campaign, which is now underway.

For more information about the 1992 Life Member Class Gift campaign, please contact Development Manager Kyle Jakob at 215-243-1660 or kjakob@ali.org. To learn about ALI's other ongoing fundraising initiatives, please visit www.ali.org/support.

1992 LIFE MEMBER CLASS

Gail B. Agrawal, University of Iowa College of Law, Iowa City, IA
Mark L. Ascher, University of Texas School of Law, Austin, TX
Carter G. Bishop, Suffolk University Law School, Boston, MA
David S. Bogen, University of Maryland, Francis King Carey School of Law, Baltimore, MD
Jerry C. Bonnett, Bonnett, Fairbourn, Friedman & Balint, PC, Phoenix, AZ
Karen C. Burke, University of Florida, Levin College of Law, Gainesville, FL
Elena A. Cappella, Philadelphia, PA
Kathleen Michele Carrick, Case Western Reserve University School of Law, Cleveland, OH
William Richard Casto, Texas Tech University School of Law, Lubbock, TX
Helen Davis Chaitman, Chaitman LLP, New York, NY
Mary Ann Cohen, U.S. Tax Court, Washington, DC
James H. Coleman, Jr., Porzio, Bromberg & Newman P.C., Morristown, NJ
Ian M. Comisky, Blank Rome LLP, Philadelphia, PA
Dennis R. Connolly, Princeton, NJ
Joy Flowers Conti, U.S. District Court, Western District of PA, Pittsburgh, PA
James W. Dabney, Hughes Hubbard & Reed LLP, New York, NY
Donald L. Doernberg, Pace University School of Law, White Plains, NY
Mitchell F. Dolin, Covington & Burling LLP, Washington, DC
Christine Michelle Duffy, Pro Bono Partnership, Parsippany, NJ
Raymond L. Finch, U.S. District Court, Virgin Islands, St. Croix, VI
Michael R. Ford, Fellers, Snider, Blankenship, Bailey & Tippens, P.C., Oklahoma City, OK
Linda A. Friedman, Bradley Arant Boult Cummings LLP, Birmingham, AL
William C. Frye, Trenam, Kemker, Scharf, Barkin, Frye, O'Neill & Mullis, PA, Tampa, FL
Bryan A. Garner, LawProse, Inc., Dallas, TX
Paul Gewirtz, Yale Law School, New Haven, CT
L. Burda Gilbert, Newcastle, CA
Margaret Gilhooley, Seton Hall University School of Law, Newark, NJ
Victor James Gold, Loyola Law School, Los Angeles, Los Angeles, CA
Howard V. Golub, Nixon Peabody LLP, San Francisco, CA
David J. Grais, Grais & Ellsworth LLP, New York, NY
Paul H. Haagen, Duke University School of Law, Durham, NC
Harris L. Hartz, U.S. Court of Appeals, Tenth Circuit, Albuquerque, NM
Thomas E. Kauper, University of Michigan Law School, Ann Arbor, MI
W. H. Knight, Seattle University School of Law, Seattle, WA
Harold Hongju Koh, Yale Law School, New Haven, CT
William P. Kratzke, University of Memphis, Cecil B. Humphreys School of Law, Memphis, TN

Class of 1992 Facts & Figures



25

DIFFERENT STATES
REPRESENTED

13%

FROM NY

10%

FROM CA

7%

FROM PA



69

MEMBERS

3 COUNCIL MEMBERS

2 LAW SCHOOL DEANS

28%

ATTENDED
15 OR MORE
ANNUAL
MEETINGS

5 MEMBERS HAVE
SERVED AS JUDGES
OR JUSTICES

FORMER UNIVERSITY
PRESIDENT AND
PROJECT REPORTER



Seymour Kurland, Retired, Dechert LLP, Philadelphia, PA
Eric Lane, Hofstra University School of Law, Hempstead, NY
Howard A. Latin, Rutgers Law School, Newark, NJ
Mitchell A. Lowenthal, Cleary Gottlieb Steen & Hamilton LLP, New York, NY
Jonathan R. Macey, Yale Law School, New Haven, CT
Arthur Mead Martin, Jenner & Block, LLP, Chicago, IL
Kenneth James McIntyre, Dickinson Wright PLLC, Detroit, MI
Carrie J. Menkel-Meadow, University of California, Irvine School of Law, Irvine, CA
Judith A. Miller, Chevy Chase, MD
Richard S. Miller, University of Hawaii, William S. Richardson School of Law, Honolulu, HI
Erica Moeser, National Conference of Bar Examiners, Madison, WI
Nancy J. Moore, Boston University School of Law, Boston, MA
Gregory K. Palm, Goldman, Sachs & Co., New York, NY
William Charles Powers, Jr., University of Texas at Austin, Austin, TX
Deborah H. Schenk, New York University School of Law, New York, NY
Richard Schmalbeck, Duke University School of Law, Durham, NC
Karl E. Seib, Jr., Patterson Belknap Webb & Tyler LLP, New York, NY
David J. Seipp, Boston University School of Law, Boston, MA
Richard A. Silver, Silver Golub & Teitell LLP, Stamford, CT
Christopher Slobogin, Vanderbilt University Law School, Nashville, TN
Bradley Y. Smith, Davis Polk & Wardwell LLP, New York, NY
Carl A. Solano, Superior Court of Pennsylvania, Philadelphia, PA
Jeffrey W. Stempel, University of Nevada, William S. Boyd School of Law, Las Vegas, NV
Linda Alden Swanson, Law Offices of Linda Alden Swanson, Larkspur, CA
John K. Villa, Williams & Connolly LLP, Washington, DC
George K. Walker, Wake Forest University School of Law, Winston-Salem, NC
Edward W. Warren, Kirkland & Ellis LLP, Washington, DC
Robert C. Weber, Retired, IBM Corporation, Armonk, NY
D. Kelly Weisberg, University of California, Hastings College of the Law, San Francisco, CA
Steven O. Weise, Proskauer Rose LLP, Los Angeles, CA
Wesley S. Williams, Jr., Lockhart Corporation, Inc., St. Thomas, VI
Raymond H. Young, Hemenway & Barnes LLP, Boston, MA
James B. Zimpritch, Retired, Pierce Atwood LLP, Portland, ME

NEW 50-YEAR MEMBERS

Richard E. Deer, Barnes & Thornburg LLP, Indianapolis, IN
Fred N. Fishman, Retired, Kaye Scholer LLP, New York, NY
George Clemon Freeman, Jr., Retired, Hunton & Williams LLP, Richmond, VA
Ralph L. Halpern, Buffalo, NY
Jerome E. Hyman, Cleary Gottlieb Steen & Hamilton LLP, New York, NY
Maximilian W. Kempner, South Royalton, VT
William Hudson Leedy, H. G. Wellington & Co., Washington, DC
Charles L. Levin, Detroit, MI
Leon B. Polsky, New York, NY
George Slover, Jr., Retired, Johnson, Bromberg & Leeds, Dallas, TX
Herbert P. Wilkins, Concord, MA
J. Sam Winters, Austin, TX

Effective May 2017

Every attempt has been made to publish an accurate list of each member's current company and geographic location. If you wish to update your information, please contact Membership at 215-243-1623 or membership@ali.org.

THE DIRECTOR'S LETTER

CONTINUED FROM PAGE 3

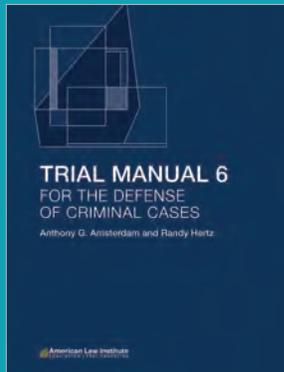
In turn, while state legislatures are the main audience for the Model Penal Code, the Supreme Court has relied on it repeatedly to determine the scope of federal criminal law. For example, the majority in *Voisine v. United States* relied on the Model Penal Code to determine that a federal law prohibiting gun possession by individuals convicted of a “misdemeanor crime of domestic violence” also applied to those convicted under state laws requiring only a reckless mens rea.

I hope that this letter as well as my previous one help paint a broader and more accurate picture of the ALI's influence than the view that our influence is confined to the states. We should be very proud of our work!

Editor's Note: A version of this Director's Letter that includes a bibliography of related material with links to relevant documents is posted on the News page of the ALI website: www.ali.org/news.



RESTATEMENT THIRD, U.S. FOREIGN RELATIONS LAW IS NOW AVAILABLE FOR PURCHASE IN RUSSIAN.



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The Institute in the Courts: State Supreme Courts Adopt Restatement Sections

The highest courts of two states recently adopted Sections of the **Restatement Second of Conflict of Laws** and the **Restatement Second of Judgments**. Summaries of those opinions follow.

In *Pacific Western Bank v. Badger*, 2016 WL 6650955, the Supreme Court of Nevada expressly adopted Restatement Second of Conflict of Laws § 68. In that case, the court, in considering a petition for a writ of mandamus filed by a creditor, was faced with the question of whether funds in a 26 U.S.C. § 529 account could be considered a “debt” and could be “subject to execution and garnishment in Nevada despite their physical location elsewhere.” The court, adopting § 68, answered that question in the affirmative, holding that, under that Restatement provision, “the funds contained in the 529 accounts [were] a debt, not a chattel. As such, the funds [were] subject to execution and garnishment in Nevada regardless of [the] location of the funds in New Mexico.” The court noted that it “consistently looks to the Restatement (Second) of Conflict of Laws for guidance, and has adopted its provisions on many occasions.”

In *Bowen ex rel. Doe v. Arnold*, 2016 WL 5491022, the Supreme Court of Tennessee adopted Restatement Second of Judgments §§ 29 and 85. In that case, a mother, individually and on behalf of her minor son who participated in a mentoring program affiliated with Big Brothers and Big Sisters of Tennessee, brought an intentional-tort action, inter alia, against her son's mentor, among others, alleging that the mentor sexually molested her son. While that action was pending, the defendant was convicted, in a separate criminal trial, of sexual battery and rape of the plaintiff's son, and that conviction was affirmed on appeal. The trial court in the instant case then granted the plaintiff's motion for partial summary judgment, finding that, based on the doctrine of collateral estoppel, the defendant was precluded—on the basis of his criminal conviction—from arguing that he did not rape and sexually batter the plaintiff's son. Affirming, this court held that it would “abolish the mutuality requirement for defensive and offensive collateral estoppel in Tennessee, adopt sections 29 and 85 of the Restatement (Second) of Judgments, and affirm the trial court's grant of partial summary judgment against [the defendant] on the issue of ‘whether he raped and sexually battered’” the plaintiff's son.

MPC: Sexual Assault Project Meeting

October 24 and 25 in New York, NY

Meeting participants discussed Preliminary Draft No. 7, which included Sections on Forcible Rape, Sexual Penetration Without Consent, Rape or Sexual Penetration of a Vulnerable Person, and Sexual Penetration by Coercion or Exploitation. These topics will be presented to Council in January 2017, and may appear on the 2017 Annual Meeting agenda.



Susan Frelich Appleton of Washington University School of Law



Nancy E. O'Malley of Alameda County District Attorney's Office

Campus Sexual Misconduct Project Meeting

October 28 and November 1 in New York, NY

Preliminary Draft No. 3 was discussed by the project participants. The draft includes Chapters on Sanctions, Appeals, Confidentiality and Disclosure, and Internal Student Discipline and the Criminal Justice System.



José A. Cárdenas of Arizona State University, Office of General Counsel and Vincent D. Rougeau of Boston College Law School



Reporter Vicki C. Jackson of Harvard Law School

Property Project Meeting

September 30 in Philadelphia, PA

Preliminary Draft No. 2 was discussed, which contains Chapters from Volume 2: Interferences with, and Limits on, Ownership and Possession; Volume 3: Powers and Duties Associated with Ownership; and Volume 6: Servitudes and Land Use.



Keith N. Hylton of Boston University School of Law addresses the panel during the project session.



Associate Reporter Sara C. Bronin of the University of Connecticut School of Law

Notes About Members and Colleagues

Joseph W. Bellacosa, retired Judge of the New York State Court of Appeals, authored an article entitled, “Devils and Angels of Judicial Integrity,” published in the Law Review of St. John’s University School of Law (Vol. 90 – Spring 2016 – No. 1 at pp.1-24). The subject is miscarriages of justice in the Salem Massachusetts Witch Trials of 1692, and in 1741 by British Judge Daniel Horsmanden in colonial Manhattan. The judicial activities result respectively in 20 and 34 death sentences, followed immediately by grotesque executions in this pre-Revolutionary period. The article draws on and quasi-reviews two important history books that provide in-depth expositions of these judicial travesties: *The Witches: Salem, 1692*, by Stacy Schiff (Little, Brown & Co. 2015); and *New York Burning: Liberty, Slavery and Conspiracy in Eighteenth-Century Manhattan*, by Jill Lepore (Vintage - Random House, 2005).

Sheila L. Birnbaum of Quinn Emanuel Urquhart & Sullivan LLP, **Evan A. Davis** of Cleary Gottlieb Steen & Hamilton LLP, **Emma Coleman Jordan** of Georgetown University Law Center, and **Stephen D. Susman** of Susman Godfrey LLP have been honored as Lifetime Achievers by *The American Lawyer*. The publication classifies its honorees as “men and women who have had extraordinary careers at some of the country’s most prominent law firms and other legal institutions, and whose public service contributions have had far-reaching impact.”

Susan Bisom-Rapp of Thomas Jefferson School of Law in San Diego released her newest co-authored book, *Lifetime Disadvantage, Discrimination and the Gendered Workforce* (Cambridge University Press). The book examines each stage of a woman’s lifecycle and considers how law attempts to address the problems that inhibit women’s labor force participation. Using their model of lifetime disadvantage, Professor Bisom-Rapp and her British co-author Malcolm Sargeant show how the law adopts a piecemeal and disjointed approach to resolving challenges with adverse effects that cumulate over time.

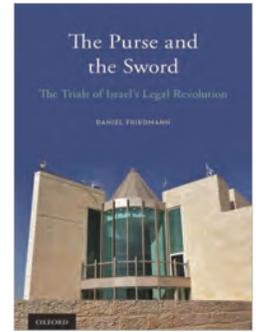
Eugene R. Fidell of Yale Law School has released his new book, *Military Justice: A Very Short Introduction*, through Oxford University Press. The book is part of Oxford’s Very Short Introductions line, which provides succinct introductions on a variety of topics.

Kenneth C. Frazier of Merck & Co. Inc. was honored by Community Hope at its 20th Annual Sparkle of Hope Gala in Garfield, New Jersey. He was recognized for “Merck’s support of our veterans by their spearheading of the Veterans Justice Initiative, established in 2011 to provide legal aid to the homeless veterans Community Hope serves.” Proceeds from the event will go to supporting Community Hope’s mission to help veterans and other individuals struggling with homelessness, mental illness, addiction, and poverty.

Paul L. Friedman of the U.S. District Court for the District of Columbia was presented with The Honorable Charles R. Richey Equal Justice Award from George Washington University Law School on October 26. Fellow ALI members **Alan B. Morrison** and **Stephen A. Saltzburg**, both of George Washington University Law School, joined Judge Friedman in conversation about his career, including reflecting on the decision to free John Hinckley.

In his new book, *The Purse and the Sword – The Trials of Israel’s Legal Revolution* (Oxford University Press),

Daniel Friedmann of Tel Aviv University Faculty of Law presents a critical analysis of the Israeli legal system in the context of Israeli politics, history, and the forces that shape Israel society. The book examines the extensive powers that Israel’s Supreme Court arrogated to itself since the 1980s, and traces the history of the transformation of the Israeli legal system and the shifts in the balance of power between the branches of government.



On June 30 and July 1, **Kenneth S. Gallant** of the University of Arkansas at Little Rock William H. Bowen School of Law presided at meetings of lawyers at the International Criminal Court in The Hague, Netherlands. Professor Gallant is also a member of the Executive Committee of the International Criminal Bar, an independent organization of lawyers and Bars from around the world that has advocated for projects like the ICCBA to support and improve representation of accused persons and victims at the ICC.

Joseph Goldberg of Freedman Boyd Hollander Goldberg Urias & Ward PA was awarded the Distinguished Achievement Award from the University of New Mexico School of Law. The purpose of the Distinguished Achievement Awards Dinner is to celebrate notable accomplishments and dedicated service by lawyers and others in the legal community to the UNM School of Law, the New Mexico legal community, and the greater community inside and outside of New Mexico.



Paul L. Friedman (center) with Alan B. Morrison (left) and Stephen A. Saltzburg (right) Credit: Zoe Tillman/ALM



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On October 16, *The Seattle Times* published a book review by **Kevin J. Hamilton** of Perkins Coie LLP on *The Devil's Defender: My Odyssey Through American Criminal Justice from Ted Bundy to the Kandahar Massacre*. Mr. Hamilton has been reviewing books for *The Times* since 2005.

On August 12, the Bench and Bar of the U.S. District Court for the District of Maine presented the portrait of **D. Brock Hornby** to the Court in a special reception at the U.S. Custom House on Fore Street in Portland. The portrait was painted by renowned portrait artist Kyle Keith of Jacksonville, Florida. It will be the first portrait to be displayed in Courtroom Two of the Edward T. Gignoux U.S. Courthouse, which Judge Hornby helped to design and where he has presided since its construction.



Portrait of D. Brock Hornby

The *ABA Journal* has named **William C. Hubbard** of Nelson Mullins Riley & Scarborough LLP one of this year's Legal Rebels, celebrating individuals who are "remaking their corners of the legal profession." In its Legal Rebels profile, the *ABA Journal* highlighted Mr. Hubbard's efforts during his ABA presidency (2014-15) in making the justice system accessible to more of the population through the implementation of nontraditional legal services and technology.

UC Berkeley School of Law's Ninth Annual Privacy Lecture featured **Robert C. Post** of Yale Law School, and **Eugene Volokh** of UCLA School of Law. The lecture, *Google Spain & the Right to be Forgotten: Bureaucracy, Civility, Democracy*, centered on Google Spain's recent choice to implement EU fair information practices on their search engines, sighting the "Right to Be Forgotten."

Alfred W. Putnam of Drinker Biddle & Reath LLP and **William T. Hangle** of Hangle Aronchick Segal Pudlin & Schiller were two of four advocates selected by the American College of Trial Lawyers to play in the invitation-only re-enactment of *Georgia v. Brailsford* (1794). The mock trial took place at Philadelphia's Old City Hall on September 19 and included the three-member U.S. Supreme Court panel of Chief Justice **John G. Roberts, Jr.**, Justice **Stephen G. Breyer**, and Justice **Samuel A. Alito, Jr.** Chief Justice Roberts said that the event was meant to "share experiences and keep current" on common legal roots between U.S. and U.K. jurists.

Roberta Cooper Ramo of Modrall Sperling was presented with Mother Attorneys Mentoring Association of Seattle's (MAMA) 2016 Betty Binns Fletcher Leadership and Justice Award at MAMA Seattle's Annual Banquet on October 26. The award is given each year to an individual who has paved

the way to success for, and has served as an inspiration to, other women attorneys striving to excel in their legal careers while balancing family demands.

James L. Robertson of Wise Carter Child & Caraway PA has been published in the *Mississippi College Law Review*. His piece, "Practical Benefits of Literature in Law, and Their Limits," discusses how and why judges can use literature to enrich the message of their adjudications.

Duke Law School's Journal of Comparative and International Law hosted a two-day symposium, titled "International Conflict of Laws and the Third Restatement," on November 4 and 5. The symposium featured Conflict of Laws Restatement Reporter **Kermit Roosevelt III**, of the University of Pennsylvania Law School, and Associate Reporters **Laura Elizabeth Little** of Temple University Beasley School of Law and **Christopher A. Whytock** of UC Irvine School of Law.

John S. Skilton of Perkins Coie LLP was honored with the Charles L. Goldberg Distinguished Service Award from the Wisconsin Law Foundation. The award, presented on October 18 at the Annual Recognition Dinner in Milwaukee, is the foundation's highest honor, and recognizes an individual for lifetime service to the legal profession and to the public.



John S. Skilton receiving the Charles L. Goldberg Distinguished Service Award

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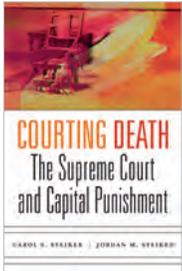
LawPass provides free CLE courses to ALI Members. Sign in to the site and visit the *CLE for Members* link on the Members page to access online courses, materials, and forms from ALI CLE.

NOTES ABOUT MEMBERS AND COLLEAGUES

CONTINUED FROM PAGE 17

Daniel J. Solove of George Washington University Law School and **Paul M. Schwartz** of the UC Berkeley School of Law, Reporters on the Data Privacy Principles project, hosted the Privacy & Security Forum in Washington, DC. The conference, held from October 24 to 26, included more than 300 seasoned leaders who spoke on a bevy of topics within the realm of privacy and security.

In August, **Jane Stapleton** of Christ's College received the Robert B. McKay Law Professor Award from the Tort Trial and Insurance Practice Section of the American Bar Association (at the Annual ABA Meeting in San Francisco).



Carol S. Steiker and Jordan M. Steiker's book on the American death penalty, *Courting Death: The Supreme Court and Capital Punishment*, was released by the Belknap Press of Harvard University Press. This book builds on the work that Carol and Jordan did for ALI in writing the report that led the Institute to withdraw the death penalty provisions of the Model Penal Code in 2009.

Elizabeth S. Stong of the U.S. Bankruptcy Court for the Eastern District of New York was named Honorary Chair for New York State Unified Court System's annual Mediation Settlement Day, held on October 13 at New York Law School.

In September, **Dennis J. Wall** of Winter Springs, Florida, who serves on the Members Consultative Group for the Liability Insurance Restatement, released his fourth book, *Insurance Claims and Issues*, published by Thomson Reuters. His previous book, *Lender Force-Placed Insurance Practices*, was published by the American Bar Association in 2015.

Matthew Lee Wiener of the Administrative Conference of the United States has been nominated by President Barack Obama to serve as chairman of the organization. He has been executive director of the ACUS since 2012. As chairman, Mr. Wiener will be responsible for leading the Conference, which is dedicated to "promot[ing] improvements in the efficiency, adequacy, and fairness of the procedures by which federal agencies conduct regulatory programs, administer grants and benefits, and perform related governmental functions."

In Memoriam

ELECTED MEMBERS

Jerome C. Hafter, Jackson, MS; **Norton L. Steuben**, Boulder, CO; **Margery Waxman**, Washington, DC

LIFE MEMBERS

M. Bernard Aidinoff, New York, NY; **Daniel O. Bernstine**, Newtown, PA; **E. Edward Bruce**, Washington, DC; **Frazer Durrett, Jr.**, Atlanta, GA; **James D. Ghiardi**, Milwaukee, WI; **Roy A. Hammer**, Boston, MA; **Gareth Jones**, Cambridge, England; **Phil C. Neal**, Chicago, IL; **Francis Patrick Neill**, London, England; **H. David Potter**, Norfolk, CT; **Janet Reno**, Miami, FL; **Marvin Schwartz**, New York, NY; **Romaine S. Scott, Jr.**, Birmingham, AL; **Edmund B. Spaeth, Jr.**, Philadelphia, PA

Member Dashboard

Visit the Member Dashboard to access your member information from one webpage.

- Project updates
- Scheduled meetings
- Messages from ALI
- Dues payments or charitable contributions
- Member profile edits

Sign in the ALI website and click on the Dashboard link today.

Compliance Project Meeting

September 22 and 23 in Philadelphia, PA

Preliminary Draft No. 2 included portions of each of the Chapters on Governance, Risk Management, and Compliance. The draft framework for the Chapter on Enforcement is available on ALI's website.



Participants discuss Preliminary Draft No. 2.

New Members Elected

On October 20, the Council elected the following 45 persons:

Katherine L. Adams, Morris Plains, NJ
Chris W. Altenbernd, Tampa, FL
Susan Anne Bades, Chicago, IL
William W. Barrett, Greenwood, IN
Neal S. Berinhout, Dallas, TX
Stacy D. Blank, Tampa, FL
Elissa F. Cadish, Las Vegas, NV
Naomi R. Cahn, Washington, DC
Sabine Chalmers, New York, NY
Sherman J. Clark, Ann Arbor, MI
Doneene Keemer Damon, Wilmington, DE
Anuj C. Desai, Madison, WI
Brian J. Egan, Washington, DC
Ann L. Estin, Iowa City, IA
Michael W. Fitzgerald, Los Angeles, CA
Kim Forde-Mazrui, Charlottesville, VA
Anne C. Foster, Wilmington, DE
Jonathan Gerber, West Palm Beach, FL
Deepak Gupta, Washington, DC
James S. Hill, Mandan, ND
Ellen Segal Huvelle, Washington, DC
Peter E. Leckman, Philadelphia, PA
David G. Leitch, Charlotte, NC
Margaret H. Lemos, Durham, NC
John G. Levi, Chicago, IL
Susan B. Lindenauer, New York, NY
Virginia A. Long, Lawrenceville, NJ
Kenneth W. Mack, Cambridge, MA
Nancy S. Marder, Chicago, IL
Merritt Ellen McAlister, Atlanta, GA
Fionnuala Ni Aoláin, Minneapolis, MN
R. David Proctor, Birmingham, AL
Robert L. Rabin, Stanford, CA
Usha R. Rodrigues, Athens, GA
Lauri Waldman Ross, Miami, FL
William B. Rubenstein, Cambridge, MA
Sharon K. Sandeen, St. Paul, MN
Laureen E. Seeger, New York, NY
Sean B. Seymore, Nashville, TN
Kathleen M. Sullivan, New York, NY
Sandra L. Tabor, Bismarck, ND
Pamela S. Tikellis, Wilmington, DE
Daniel P. Tokaji, Columbus, OH
Michael H. Ullmann, New Brunswick, NJ
Joseph A. Wetch, Jr., Fargo, ND

IF YOU WOULD LIKE TO SHARE ANY RECENT EVENTS OR PUBLICATIONS IN THE NEXT ALI NEWSLETTER, PLEASE EMAIL US AT NOTES@ALI.ORG.

Meetings and Events Calendar At-A-Glance

(for more information, visit www.ali.org)

Below is a list of upcoming meetings and events. This schedule may change, so please do not make travel arrangements until you receive an email notice that registration is open.

2017

January 19–20

Council Meeting - January 2017
Philadelphia, PA

February 1

ALI Members Reception: Houston
Hosted by Smyser Kaplan & Veselka, LLP, Lee L. Kaplan, Craig Smyser, and David R. Dow
Houston, Texas

February 9 (JOINT)

Restatement of the Law, The Law of American Indians
Philadelphia, PA

March 1

ALI Members Reception: New York
Hosted by Cravath, Swaine & Moore LLP and Evan R. Chesler
New York, NY

March 28

ALI Members Reception: Albuquerque
Hosted by Modrall Sperlring and ALI President Roberta Cooper Ramo
Albuquerque, NM

March 30 (JOINT)

Restatement of the Law Third, Torts: Intentional Torts to Persons
Philadelphia, PA

May 22–24

94th Annual Meeting
Washington, DC

June 14 (JOINT)

Restatement of the Law, Children and the Law
Philadelphia, PA

June 26 (MCG)

June 27 (Advisers)

Project on Sexual and Gender-Based Misconduct on Campus: Procedural Frameworks and Analysis
Philadelphia, PA

October 19–20

Council Meeting - October 2017
New York, NY



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The ALI Adviser Adds Three New Projects

Since our last publication of *The ALI Reporter*, ALI has added **three more projects** to the online project forum, increasing the number of covered projects to seven.

- Law of American Indians
- **Data Privacy**
- **Election Administration**
- Liability Insurance
- MPC: Sentencing
- MPC: Sexual Assault
- **Policing**

We would like to include articles by ALI members and Advisers. Please consider contributing a piece for the forum by emailing communications@ali.org.



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 TO LEARN MORE.**