

THE ALI Reporter

THE QUARTERLY NEWSLETTER OF THE AMERICAN LAW INSTITUTE

VOLUME 39 NUMBER 2

SPRING 2017

Council Elects Officers, Reviews 11 Project Drafts at January Meeting

At its meeting in Philadelphia on January 19 and 20, the ALI Council elected two officers, approved the nominations of 14 candidates for reelection to the Council, and reviewed 11 project drafts, most of which are slated for discussion or approval at the 2017 Annual Meeting, which takes place May 22 to 24 in Washington, DC.



ALI Council members gather for the winter Council Meeting in Philadelphia, PA.

On the recommendation of the Nominating Committee, the Council elected outgoing ALI President Roberta Cooper Ramo to a three-year term as chair of the Council, the term to begin at the conclusion of the 2017 Annual Meeting. ALI Treasurer Wallace B. Jefferson was reelected to a second three-year term, also beginning at the close of the Annual Meeting.

The Council also approved the nominations of current Council members Kim J. Askew, Kenneth C. Frazier, William C. Hubbard, Michele C. Kane, Carolyn B. Kuhl, Carol F. Lee, David F. Levi, Daniel B. Rodriguez, Lee H. Rosenthal, Robert H. Sitkoff, Jane Stapleton, Larry S. Stewart, Steven O. Weise, and Diane P. Wood for reelection to a five-year term. Council members Kenneth S. Abraham, D. Brock Hornby, and Harvey S. Perlman will assume Council Emeritus status when their terms expire at the close of the 2017 Annual Meeting.

On January 19, the Council approved drafts of §§ 6x.04 (collateral consequences), 6.14 (victim-offender conferencing), and 7.09 (appellate review of sentences) of the **Model Penal Code: Sentencing** as presented in the Reporters' Memoranda to the Council. Reporter Kevin R. Reitz and Associate Reporter Cecelia M. Klingele are preparing a Proposed Final Draft of the entire Sentencing project for membership approval at this year's Annual Meeting.

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THE PRESIDENT'S LETTER

Looking Ahead

I just took a moment to see where we were in the summer of 2008 when I wrote to you as President of the ALI for the first time. For us as an organization from then to now all fine news. We have a robust membership that is more diverse in every way, building upon the successful leadership of my predecessors. Because of the generosity of our members, we have a firm foundation upon which to build significant additional capital needed to continue funding our projects with complete independence and to ensure that the full panoply of legal minds are participating in our meetings without regard to their economic circumstances.

Because of the governance changes led by Mike Traynor and Bob Mundheim, our Council has seated 42 distinguished new members since 2008. Happily those same governance changes have allowed and encouraged our emeritus members to continue to participate fully in Council's work. The Council has had an enormous workload recently as we have labored to advance 20 projects, at least five of which may in the next two Annual Meetings come to you for their last votes. This will allow us to have a more reasonable workload, which seems to be around 15 projects.

We have also transitioned from Lance Liebman, who retired three years ago as our Director, to Ricky Revesz, who is this spring completing his first (of many we hope) sterling three-year term as our Director. Throughout this time, Stephanie Middleton has led the effective staff at our headquarters in Philadelphia. We have a very committed but amazingly small staff for the number of projects, meetings, programs, and publications that we advance every single year.

But in the last eight years we have also had a social revolution that is in large part technologically driven and that has set up challenges for the democracy and for the ALI. In 2008, I was worried more about the impact of the spiraling downturn in the economy than

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THE PRESIDENT'S LETTER CONTINUED FROM PAGE 1

in the inability of Americans to talk to one another about our most pressing issues. My concerns were about making sure that the best young academics were interested in and involved in our work (happy news on that front too, see Ricky Revesz's letter in this issue), that firms were willing to support their best lawyers in doing our work, and that judges at all levels were both interested and able to dig into our projects.

Today I am worried about protecting our culture of reasoned civil discourse, without which we simply could not do the work of the ALI, in a world taken over by social media. We must learn to deal with and take advantage of the ability of members to engage with the substance of our projects and communicate with other members that social media permits. But we also must protect the ALI culture that produces our carefully considered work so effectively.

Over the last two years Ricky and I, with Ricky taking the laboring oar, often with Stephanie, have had 11 regional meetings from California to Vermont and from Texas to Chicago. At those meetings (which will continue over the next years) we have had important conversations with hundreds of you to clarify how our process works, impress upon you the transparent nature of our work, and to discuss how social media has occasionally played out in particularly high profile projects.

What is clear in those meetings is the high quality of our membership. You express great interest in making sure that the ALI continues its work and the need in this technological age to continue the high touch, in person meetings and, most importantly, in our decision-making at our Annual Meetings.

Our Founding Fathers brought the U.S. Constitution and our country into being by trekking across hill and dale and mountain and river to get to Philadelphia to argue out and compromise deep issues (some of them tragic mistakes that resulted in the Civil War) because they believed in the idea of the United States of America. This country would be a new world democracy held together by the slender brilliance of the Constitution and the Bill of Rights. Presciently, they understood that the independence of the courts and the willingness of lawyers and citizens to take our grievances to the courts and then abide by those decisions would be required for us to survive. I believe that the brilliant understanding of the founders of the ALI is also a key to unifying our country from a legal point of view by promulgating our Restatements, our model codes, and our Principles projects. We take our Country's knottiest legal problems and follow our mission to clarify and restate for better use by our courts and our lawyers to the benefit of our fellow citizens. This requires that we not shy away from those areas that we know to be contentious, but instead work over years to find reasoned grounds for stating black letter or offering up best solutions based upon the research of our scholars and the experience of our judges and lawyers.

Nine years ago I did not foresee how key our work or American Lawyers would be in the current political climate, but I am grateful that we are here for the American legal system and proud of our members for their participation not only in our work but in the work of the country right now. The appellation "Member of The American Law Institute" means not only that we each are honored by being selected to join, but that we have a responsibility to

participate in our work. We need you to come over hill and dale and airport delays and through TSA to participate in our projects, but especially to come to the Annual Meetings, to discuss and vote on our work. We are not a social organization (though I think we are very sociable); we are a body with the responsibility to make sure that our work is correct, helpful, and understandable. This is not possible without the diversity of experience and thought represented by the membership being brought to bear on each of our Restatements and other projects. The last eight years I have sat at the front of our Annual Meeting wishing very often that the American People could see what civil debate that comes to resolution of problems looks like; how facts are brought to bear and representation of many points of view are fused into one; how experts and those who are not learn from one another.

It has been the singular honor of my professional life to lead such an astonishingly great group of those who have given their lives to the law. As an American lawyer and an American citizen, I thank you for your work and your support.

I am honored for all of us that Dean David Levi will lead us into our next 100 years and I thank him in advance. Easy spring. See you in May.

Roberta

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THE DIRECTOR'S LETTER BY RICHARD L. REVESZ

The American Law Institute's Early Career Scholars Medal

Last month, at a meeting at the Supreme Court of California, the ALI's Young Scholars Committee, which Justice Mariano-Florentino Cuéllar chairs, selected its 2017 winners of the Young Scholar Medal: Professors Colleen V. Chien of Santa Clara University and Daniel Schwarcz of the University of Minnesota. It was the culmination of a process that began last April with a letter to all the deans of schools approved by the American Bar Association asking each to nominate one faculty member on the basis of the excellence of that individual's scholarship and its potential to influence improvements in the law, and to suggest three pieces of the nominee's scholarship for the committee to read. Eighty-eight deans submitted nominations.

The committee's 16 members—all leading judges, practicing lawyers, and academics—then undertook the arduous task of winnowing the field. First, pairs of committee members read the works of roughly eight nominees each, and selected the one or two strongest in every group. Then, all the committee members read the works of the 11 semifinalists and narrowed the field to six. The works of these faculty members were discussed at some length at the in-person meeting in San Francisco, which I attended together with Stephanie Middleton, our spectacularly talented Deputy Director. I was enormously impressed by the dedication and commitment that the committee members brought to this endeavor, which stretched over almost one year and involved the careful evaluation of a staggering amount of work.

This award, which is bestowed every two years, was established in 2009 in order to bring individuals who are still at relatively early stages of their academic careers into contact with the ALI as an institution and with its work. The prior winners have been Professors Oren Bar-Gill, then at New York University (now at Harvard) and Jeanne C. Fromer, then at Fordham (now at New York University) in 2011; Adam J. Levitin of Georgetown and Amy B. Monahan of the University of Minnesota in 2013; and Michael Simkovic of Seton Hall (moving to the University of Southern California) and Elizabeth Chamblee Burch of the University of Georgia in 2015.

The ALI works hard to amplify the impact of each winner's scholarship. As a result, each winner makes a presentation at a plenary session of the Annual Meeting, therefore garnering an audience of several hundred people. And we organize a large all-day conference, with a high-profile keynote speaker, a dozen or so panelists, and 50 or so members of an invited audience of experts in the field, to grapple with the winner's work, particularly its policy recommendations. Past keynote speakers have included Justice Stephen G. Breyer of the Supreme Court of the United States; Commissioner Julie Brill of the Federal Trade Commission; Judge Anthony J. Scirica of the United States Court of Appeals for the Third Circuit; and U.S. Senator

Elizabeth Warren, a former ALI Vice President, who co-authored an article with one of the winners and was a mentor to another.

Professor Schwarcz, one of this year's winners, has used theory, empirical methods, and analysis of doctrine to make extensive contributions to our understanding of insurance law and regulation. For example, he challenges the conventional wisdom that homeowners' insurance policies are standardized across competing companies. Instead, they differ significantly with respect to multiple important coverage provisions. And consumers cannot compare these differences before purchasing a policy, because the information is currently not provided to them. His work presents a range of regulatory and legislative options for responding to this lack of transparency and offers strategies for coverage attorneys to challenge the enforceability of non-standard exclusions.

Largely in response to Schwarcz's research, the National Association of Insurance Commissioners established a working group to study the transparency of consumer-oriented insurance markets and propose reforms. A number of states, including Nevada, Missouri, and California, developed practices for making publicly available the policies of competing carriers, frequently working with Schwarcz on these efforts. And a recent Federal Insurance Office report extensively described his work and embraced many of his proposed reforms. Schwarcz testified about his findings in several U.S. congressional hearings and his work was discussed in leading publications, including the *New York Times* and *Wall Street Journal*.

Professor Chien, the other winner, is a creative and prolific scholar of intellectual property. Among other contributions, she coined the now-ubiquitous term "patent assertion entity" to describe entities that use patents primarily to obtain license fees rather than to support the development and transfer of technology. Her work presents a sophisticated analysis of the impact of these entities on patent markets, including their effects on startups, venture capitalists, and consumers, and incorporates legal analysis, narrative, and empirical approaches, including surveys and descriptive statistics.

Following a survey and related work on frivolous demand letters that Chien carried out in 2012, 32 states have adopted legislation to deal with this practice. She has testified twice before the House Judiciary Committee and numerous times before federal agencies. Her work has been the basis of studies and policy initiatives by the Federal Trade Commission, Congress (in the America Invents Act), and the White House, which recruited Chien to work on patent reform from 2013 to 2015 as a Senior Advisor on Intellectual Property and Innovation. Chien has published influential articles in the *New York Times*, *Wall Street Journal*, and *Washington Post*,



Fables In Law *By D. Brock Hornby*

U.S. District Judge D. Brock Hornby of the District of Maine is a member of the ALI Council. He wrote these Fables In Law for publication in The Green Bag. They are reprinted here by permission. Look for additional chapters in upcoming issues of The ALI Reporter.

Chapter 4, Legal Lessons From Field, Forest, and Glen



THE FOX'S PROFESSIONALISM

Fox was representing one of the Magpies on a charge that the Magpie had defamed Snail

in calling him slow. This Magpie had left her position as a reporter on the *Forest Glen Gazette* in order to become a full-time blogger, and it was on her blog that she made the comment about Snail. The Magpie had little money, and Fox discovered that the legal issues about whether a blogger should be treated like a traditional journalist were uncertain and difficult. Fox could not charge the Magpie for all that she did on the case, but Fox gave it abundant attention nevertheless, because she found the controversy interesting and the challenge professionally fulfilling.

Moral: A true professional is motivated by more than material gain.



THE GOPHER'S ENLIGHTENMENT

Owl needed to appoint an advocate for a destitute creature who was challenging her eviction from her den, because Raccoon

(who usually took such cases) was unavailable. Owl persuaded Law Professor Beaver to take the case for free, using Gopher, one of his law students, for assistance and for the educational value it would provide Gopher. In the first conference before Owl, Gopher was in terror, having an image of arbiters as stern and unforgiving. But when Beaver and Gopher walked into Owl's chambers along with the opposing advocate Snake, Owl opened the proceedings by thanking Beaver and Gopher for taking the case and expressing the tribunal's gratitude. Snake was not only cordial, but made helpful suggestions to Gopher about advocacy as the case progressed. Although Owl and Snake never realized it, Gopher was dumbfounded, altered her views about the nature of advocacy, decided that unfettered aggression was unnecessary, and resolved to live her professional life with collegiality and courtesy. Gopher became a fine advocate and eventually succeeded Owl as a respected arbiter.

Moral: Never miss an opportunity to be cordial and to exemplify proper professional behavior in the presence of young professionals.



THE IRONY IN THE OWL'S COURTROOM

Advocates litigating civil cases in Owl's tribunal charged their clients high rates, and many earned a lot of money. But the stakes were high, the clients expected to win, the advocates had to go through much tedious pre-trial preparation such as discovery and motion practice,

matters were often highly contentious and, as a result, many of the advocates became disillusioned or at least professionally dissatisfied with their day-to-day work life. Advocates defending criminal cases by court appointment, on the other hand, earned only a modest income, and they and their clients seldom expected to actually win a case. Instead, those advocates' goal was to ensure a fair process and to obtain the best outcome available to a particular defendant under the circumstances. Although their clients often faced dire prospects, these defense advocates obtained professional satisfaction in helping them as best they could, their clients were often (not always) grateful, and the advocates received accolades from the arbiters and courthouse personnel for their dedication to justice.

Moral: Satisfaction comes more frequently to those with sensible and modest goals.

THE BENEFICIAL RITUAL

When a Forest Glen creature wanted to plead guilty to a criminal charge rather than go to trial before Owl, Owl required answers to a lengthy list of questions to ensure that the creature was acting voluntarily and intelligently, understood the rights the creature was giving up by pleading guilty, and had in fact committed the offense. Indeed, the Three Vultures insisted that Owl be assiduous in asking these questions. Since the advocates knew all the questions in advance and coached their clients on the correct responses, the process became ritualistic and predictable. Nevertheless, in preparing their clients on how to answer, the advocates were compelled to educate them on all their rights and risks, and the danger of an uninformed plea was reduced to near zero.

Moral: Ritual has a purpose when preparing for the ritual compels a defendant to consider carefully the choices to be made.

THE DAMAGING DONKEYISMS



Snake decided that it was time to improve his trial advocacy. He signed up for a course taught by a famously successful advocate who was not from the Forest Glen, namely,

Donkey, of Barnyard fame. Snake and other junior advocates spent a week with Donkey in the Barnyard, learning and practicing his techniques. By the time Snake returned to the Forest Glen, he had unconsciously adopted Donkey's mannerisms, his folksy style and accent, and even uttered the occasional hee-haw. But at Snake's next trial in the Glen, the jurors were distracted by these Donkey characteristics, finding them counterfeit coming from Snake.

Moral: It is important for an advocate to be authentic. Jurors quickly detect phoniness.

THE BOASTFUL WOODCHUCK



Like many advocates, Woodchuck was a garrulous fellow. He loved to talk about his cases and to dress them up in a

way that made him shine. After a little wine, he was particularly entertaining. One evening at a dinner party he regaled listeners with what he depicted as his great successes in representing Chipmunk, a longtime client. Woodchuck did not actually disclose confidential information but, when Chipmunk heard through the Forest Glen grapevine that Woodchuck had been talking about him and his legal affairs, he was offended. Thereafter, Chipmunk (who had always paid Woodchuck promptly and without question) took his legal business to Frog, and told Frog why. Frog was careful not to repeat Woodchuck's error.

Moral: Circumspection on the part of an advocate is not only ethically appropriate, but also good business.



THE UNRELIABLE OTTER

In law school, Woodchuck's professors drummed into him the strategy of pleading in the alternative and arguing two defenses simultaneously even if they were somewhat inconsistent. ("The stoplight wasn't working; alternatively, if it was working, it was green.")

Woodchuck found that the strategy worked well in his summary judgment motions before Owl and in appellate briefs before the Three Vultures, and that frequently he could win a motion or an appeal on one of his alternatives even if the other failed. But now Woodchuck had his first case where he was defending his client before a jury.

The case was this: Woodchuck's client, Professor Beaver, did extracurricular consulting on engineering and water issues. The dispute at trial was whether Otter, who worked part-time in Beaver's consulting business, had obtained discarded pine logs from the Forest Glen managers on the basis that in exchange Beaver's business would inspect and repair the Forest Glen dam at no cost. As it turned out, Beaver submitted a substantial bill for the inspection and repair services and, as a result, the Glen managers wanted payment for the logs. They sued Professor Beaver, and Woodchuck defended him.

In the course of the trial, Woodchuck called Otter to the witness stand.

Woodchuck: What was the market value of these logs?

Otter: Nothing. It was a favor to remove them, for most folks would have charged good money to take them away.

Woodchuck: Did you say anything to the Glen managers about a quid pro quo for the discarded logs?

Otter: Absolutely not.

Woodchuck: Did you say to them that Beaver would do a complimentary inspection and repair of the dam in exchange for the logs?

Otter: Of course not. As I recall, we never talked about the dam.

On cross-examination, Otter was shaken in his testimony that the dam inspection and repair and what it might cost had never been discussed at all. As a result, Woodchuck called him back on redirect to clarify:

Woodchuck: If you had discussed dam inspection and repair with the Glen managers, would you have had authority from Beaver to say that he would perform those services for free?

Otter: No, I would not. Beaver always wanted all his money.

Woodchuck followed the argument-in-the-alternative strategy in his closing argument, urging the jury that the evidence showed that the logs were worth nothing, that Otter never spoke to the Glen managers about a complimentary inspection and repair by Beaver and, if Otter did speak about it, that Otter had no authority from Beaver to do so.

In deliberations, the jurors concluded that the various denials and statements were unlikely all to be true. They therefore lost confidence in Otter's testimony and Woodchuck's defense and gave their verdict against Beaver.

Moral: Alternative versions of the facts may work for judges and lawyers who are trained to compartmentalize their thinking, but jurors applying common sense generally prefer a single consistent narrative.

94th Annual Meeting Preview

We hope you can join us at this year’s Annual Meeting, taking place May 22–24 at The Ritz-Carlton in Washington, DC. There are ten projects on the agenda, four of which may be completed at the Annual Meeting with membership approval. We have assembled an exciting lineup of distinguished speakers, including Associate Justice Ruth Bader Ginsburg of the United States Supreme Court.

The Annual Meeting is a critical step in our mission of clarifying and improving the law, and we rely on our members to make our Meeting a success. It’s also a terrific opportunity to reconnect with old friends as well as make some new ones.

Speakers

Ruth Bader Ginsburg, Associate Justice of the United States Supreme Court

Thomas C. Goldstein, Goldstein & Russell, P.C., and co-founder and publisher of SCOTUSblog

Linda A. Klein, American Bar Association President; Baker, Donelson, Bearman, Caldwell & Berkowitz, PC

David W. Rivkin, Immediate Past President of the International Bar Association; Debevoise & Plimpton LLP

Wesley S. Williams, Jr., Lockhart Companies Inc.



FROM LEFT TO RIGHT, TOP TO BOTTOM
Ruth Bader Ginsburg, Thomas C. Goldstein, Linda A. Klein, David W. Rivkin, and Wesley S. Williams, Jr.

HENRY J. FRIENDLY MEDAL



This year’s Friendly Medal will be presented to Conrad K. Harper.

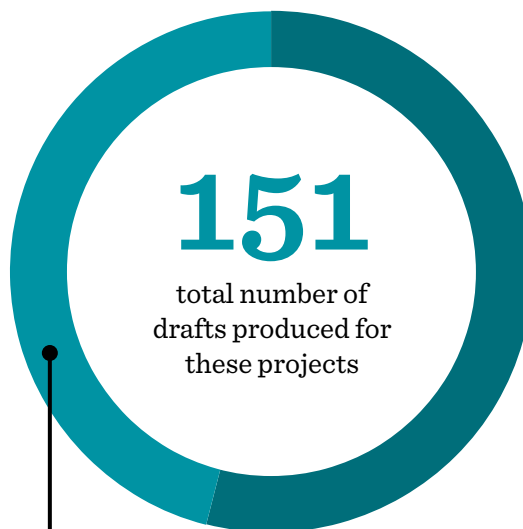
D. Brock Hornby of the U.S. District Court for the District of Maine will present the award to Mr. Harper on Tuesday, May 23.

FOR MORE INFORMATION OR TO REGISTER NOW, PLEASE VISIT THE ANNUAL MEETING WEBSITE AT WWW.ALI.ORG/ANNUAL-MEETING-2017.

The Road to The Annual Meeting

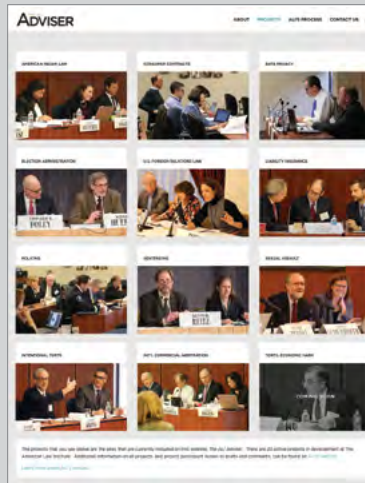
TENTATIVE PROJECT LIST

- Charitable Nonprofits** *(Tentative Draft for approval)*
- Consumer Contracts** *(Discussion Draft)*
- Election Administration** *(Tentative Draft for approval)*
- U.S. Foreign Relations Law** *(Tentative Draft for approval)*
- Intentional Torts** *(Tentative Draft for approval)*
- International Commercial Arbitration** *(Tentative Draft for approval)*
- Liability Insurance** *(Proposed Final Draft for approval)*
- MPC: Sentencing** *(Proposed Final Draft for approval)*
- MPC: Sexual Assault** *(Tentative Draft for approval)*
- Policing** *(Tentative Draft for approval)*



Project participants have reviewed **69 Preliminary Drafts** in the ten projects that will be discussed at the Meeting.

The ALI Adviser Adds New Projects



Since our last publication of *The ALI Reporter*, ALI has added more projects to the online project forum. Be sure to visit www.thealiadviser.org to learn more.

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

Liability Insurance has had the highest number of comments posted with 161 comments.

562

Since 2015, there have been a total of 562 comments posted on the project pages of these projects.

Sexual Assault comes in second with 110 comments.



The oldest project is **Sentencing** (approved to begin in 2001).



The newest project is **Policing** (2015).



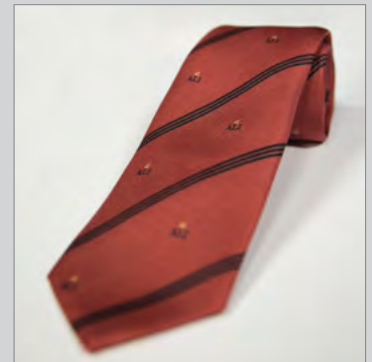
The project with the most Annual Meeting discussions is **Sentencing** with nine visits.



This year will be the first visit to the Annual Meeting for **Policing** (TD No. 1 for approval) and **Consumer Contracts** (Discussion Draft).

ALI Ties and Scarves Now Available for Sale

Long-time members of ALI are undoubtedly familiar with the contributions of Professor Geoffrey C. Hazard, Jr., who served as ALI Director from 1984 to 1999. One thing that everyone may not know is that when he ended his tenure as Director, each Council member unexpectedly received a box containing either a tie or scarf, both handmade.



Many members who have noticed these original ties and scarves on ALI Council members, or others to whom they have been passed, have inquired how they could get one. Unfortunately, Professor Hazard's designs were one of a kind.

However, ALI has responded to member requests by reissuing the ties and scarves with an updated design. These limited-edition ties and scarves are available for purchase on the ALI website, and will also be available at the Annual Meeting. The accessories are handcrafted and sold at cost.

SHARE YOUR PASSION FOR CLARIFYING AND IMPROVING THE LAW. ORDER YOURS TODAY AND WEAR IT TO THE NEXT ANNUAL MEETING, AND KEEP AN EYE OUT FOR THE ORIGINAL TIES AND SCARVES.

ENGAGE WITH ALI

REFORM:

Join the MCG for a Restatement, Principles, or Model Code project

Attend the Annual Meeting

Read Project Drafts and submit Comments online

Attend a project meeting

EDUCATION:

Earn free CLE through LawPass

Serve as faculty for ALI CLE

Teach the next generation of lawyers about new Restatements, Principles, Model Codes, and the ALI process

COMMUNITY:

Attend a regional reception

Engage with ALI member Judges, Lawyers, and Academics

Make personal connections

Use the online member directory

Follow us on Twitter

SUPPORT:

Make a charitable donation

Become a Sustaining Member

Host an event in your community

Nominate an outstanding candidate for membership

Use the Restatements, Principles, Model Codes, and UCC

*By Teresa Wilton Harmon of Sidley Austin LLP,
Chair of ALI's Membership Committee*

Many of our members are unaware of the myriad ways to engage with the Institute. Joining the Members Consultative Group for an ongoing project is just one way to contribute to ALI's law reform efforts and network with your fellow members.

All members are encouraged to attend the Annual Meeting in May. By attending, members can lend their voices and their votes to each of the projects on the agenda. This year is particularly exciting; not only are four projects potentially going to be completed, but one of our newest projects (Policing) will be voted on for the first time. The Annual Meeting also offers several social events where members can reconnect with old friends, get to know lawyers, scholars, and judges from around the world, and welcome ALI's newest members.

The Annual Meeting isn't the only time that we gather as a membership. Each project has a meeting approximately once a year, and our members and their organizations host regional member receptions around the country.

Looking to connect with ALI, but can't attend an event? Consider using the online member directory to find old friends or collaborate with new ones. You can comment on project drafts on ALI's website or follow ALI on social media. You can learn from ALI CLE or make a financial contribution to support ALI's ongoing work.

There are many ways to engage with ALI and take advantage of your membership. Please see the chart to the left for a list of more ways to engage in ALI today.

**94TH ANNUAL MEETING
MAY 22-24 | WASHINGTON, DC**

**VIEW ALL UPCOMING MEETINGS
AND EVENTS ON PAGE 23 OR
VISIT WWW.ALI.ORG/MEETINGS.**

TO LEARN MORE ABOUT HOW TO GET INVOLVED, CONTACT ALI@ALI.ORG.

Project Spotlight: Conflict of Laws

Internationalizing the Conflict of Laws Restatement: Duke Law School Symposium Concerning the Restatement of the Law Third, Conflict of Laws

By Marc Dietrich and Austin Pierce, current students at Duke University School of Law

From November 4 to November 5, 2016, the *Duke Journal of Comparative & International Law* (DJCIL) hosted a symposium, cosponsored by The American Law Institute, at Duke Law School under the title “Internationalizing the Conflicts of Laws Restatement.” ALI President-Designate and Dean of Duke Law School David F. Levi provided opening remarks. The Restatement of the Law Second, Conflict of Laws, was concerned with the relationship of the different U.S. states to each other but largely ignored the international perspective. Accordingly, Ralf Michaels (Duke Law School), Adviser for the Conflict of Laws Project, in his introduction, voiced the concern that the new Restatement, undergoing drafting since 2014, should take greater account of the international perspective, and should also turn an eye towards comparative law. This was the objective of the symposium. The three Reporters, Kermit Roosevelt III (University of Pennsylvania Law School), Laura E. Little (Temple University Beasley School of Law) and Christopher A. Whytock (University of California, Irvine School of Law), made the journey to Durham to give insight into the current state of work and to record the outcomes of the discussions.

The topic of the first panel was “Comparative Law and International Law in the New Restatement.” Symeon C. Symeonides (Willamette University College of Law/NYU School of Law), Adviser for the Conflict of Laws Project, provided an overview of the nearly 200 PIL codifications and conventions adopted in the last 50 years. He described how they strive to find the optimum equilibrium between certainty and flexibility and how they temper the pursuit of conflicts justice with considerations of material justice. Professor Symeonides suggested that the new Restatement should draw from the rich European experience in rule drafting, such as by adopting rules protecting consumers and employees. He also suggested, however, that the Restatement should continue to police party autonomy through the public policy limits of the *lex causae* rather than the *lex fori* in contract conflicts, and should retain the distinction between conduct-regulation and loss-allocation issues in tort conflicts.

Thereafter, Donald Earl Childress III (Pepperdine University School of Law) concentrated on the topic “International Law and International Conflict of Laws.” He began by discussing the impact that international law has had on judicial decision-making. He explained that U.S. courts mainly take account of international law through the doctrine of international comity,

and focus by the Restatement on this area may improve the law. He next examined how courts deal with international conflicts that may arise under federal and state law. While, in the application of federal law, rules will only be applied extraterritorially if there is a clear congressional intent, extraterritoriality becomes more ambiguous when state law is involved. When applying rules, U.S. courts in the past have struggled with the issue, mainly because they lacked sufficient guidance. The new Restatement could offer guidance in this area. Professor Childress also suggested differentiating between small and big conflicts – the latter involving regulatory interests of different countries while the former lacking the need to balance these interests. He further suggested that the new Restatement might undertake more comparative analyses in each of its Sections.



*Panel discussions at the Duke Law School Symposium
Photos courtesy of Duke Law School*

Hannah L. Buxbaum (Indiana University Maurer School of Law), MCG participant for the Conflict of Laws Project, and Horatia Muir Watt (SciencesPo École de Droit) approached the topics “Unilateralism versus Multilateralism in International Cases” and “Conflict of Laws in Supranational and Federal Systems” under the heading “International versus Interstate Conflicts” in the second panel. Professor Buxbaum clarified at the beginning of her presentation that choice-of-law analysis involves two separate inquiries: first, the scope of the laws in question must be determined, usually by interpretation; second, in the event of multiple applicable laws, rules of priority determine which law will actually be applied. Professor Buxbaum explained that in current practice the delineation

PROJECT SPOTLIGHT: CONFLICT OF LAWS CONTINUED FROM PAGE 9

between these two inquiries is often blurry. Nevertheless, rules of priority are dominant. She then discussed the current draft's mandatory two-step approach, and analyzed the role of the "presumption against extraterritoriality" in determining the scope of legal rules. Professor Buxbaum differentiated between three groups of cases: conflicts between federal law and foreign law; conflicts between state law and foreign law; and conflicts between state laws, and showed the different conflicts of interest afterwards.

Professor Watt continued by discussing the role of federalism for European conflict of laws. She emphasized that, in Europe, conflict of laws is regulated by supranational instruments and that the Court of Justice of the European Union (CJEU) has produced significant case law interpreting those instruments. The development of choice of law in Europe felt strong U.S. influence. She mentioned not only the influence of The Hague Convention but also consultations with U.S. experts while drafting EU regulations on the other – e.g., Professor Symeonides was involved in the drafting process of the Rome II Regulation. Additionally, she highlighted that there is a recent development in Europe to split conflict of laws into intra-EU conflicts and international conflicts. The driving force behind this development are Regulations governing international jurisdiction, with the Brussels II bis Regulation taking the lead. The European Union managed to keep the diversity of its Member States' national laws by harmonizing choice of law, and thereby preserved its federalist character.

Election Administration

December 9, 2016 in Philadelphia, PA

This project is on this year's Annual Meeting agenda.



Patricia M. Wald, formerly of the U.S. Court of Appeals, D.C. Circuit, provides input during the project discussion.

Panel 3 addressed several specific conflict of laws issues in the context of transnational cases: jurisdiction, party autonomy, and tort and contract. Linda J. Silberman of NYU School of Law and Adviser for the Conflict of Laws Project (in her paper with Nathan Yaffe) identified two areas where the "transnational case" might deserve special consideration: judicial jurisdiction over foreign defendants and party autonomy in choosing the applicable law. On the question of judicial jurisdiction, Professor Silberman pointed out that the modern two-step constitutional test for specific jurisdiction articulated in *Asahi Metal Industry Co., Ltd. v. Superior Court* (480 U.S. 102 [1987]) – "minimum contacts" and then "reasonableness" – involved a foreign defendant. Although the lower courts appear to embrace that same standard with respect to both domestic and foreign defendants, she suggested that the factors identified by the court in the "reasonableness" analysis best reflect comity concerns that are most relevant when the case is against a foreign defendant. To that end, the authors sampled 400 cases since 2000 that showed that courts effectively only dismiss for lack of jurisdiction on "reasonableness" grounds when the defendant is foreign. As for general jurisdiction, Professor Silberman pointed out that Justice Ginsburg in her opinion in *Daimler AG v. Bauman* (134 S.Ct. 746 ([2014])) rejected as unnecessary any role for "reasonableness" in light of the "at home" standard now required for general jurisdiction over corporations. She noted an irony in that Justice Ginsburg discussed concerns about comity and foreign relations in articulating the new standard but explicitly referenced "sister-state" as well as "foreign-country" corporations in the opinion.¹ On the question of party autonomy and choice of law in contracts, Professor Silberman highlighted the Supreme Court's emphasis on party autonomy in the international context and argued that more leeway should be given to the parties to choose the applicable law in an international commercial contract.

Afterwards, ALI member Richard Fentiman (University of Cambridge, Queens' College) concentrated on questions of party autonomy. Drawing from an English background, he argued that cross-border disputes that go to litigation usually involve either major commercial disputes or substantial class actions. According to his view, smaller disputes are rarely found at this stage because cross-border disputes are too expensive to efficiently litigate smaller cases. Correspondingly, he was of the opinion that agreements by the parties regarding forum and applicable law are beneficial and should be enforced because they provide certainty. The same holds true if consumers are involved in the contract because the higher level of certainty for the business will translate to lower prices for consumers. He suggested that, for the Third Restatement, a choice of forum or law by the parties should be enforced even if there is no other connection to the dispute. Again, he used England as an example and explained that parties often choose English law or English fora because of the reputation even if there is otherwise no connection to the transaction.

As the last speaker of the third panel, Patrick J. Borchers (Creighton University School of Law), MCG participant

on the Conflict of Laws Project, addressed conflict of laws regarding torts and contracts. He articulated that the essential task of the Third Restatement is to establish legal certainty and predictability. Both were neglected after the conflicts revolution. He observed that the Second Restatement contained many presumptive rules. However, courts in applying the Second Restatement preferred its general rules. The benefit of the Third Restatement is, according to his view, that it starts out with specific rules and thereby creates more predictability. However, courts might use the residual rule in § 6.07 to get creative and move away from predictability again. Accordingly, it should be rephrased for more precision.

The fourth panel was dedicated to family matters. Ann Laquer Estin (University of Iowa College of Law), MCG participant on the Conflict of Laws Project, started by discussing marriage and divorce in the context of conflict of laws. This field of law has been substantially affected by the introduction of non-fault divorce. In the wake of this introduction, conflict of laws has seen fewer public policy problems in cross-border contexts. Furthermore, as more couples decide in favor of non-marital cohabitation, more children are raised in non-marital relationships. Additionally, the number of same-sex relationships is increasing. According to her, it is important to note that more and more couples are frequently changing their country of residence. Correspondingly, the Third Restatement should, in contrast to the Second Restatement, contain rules that take cultural particularities into account in the recognition of marriages. It should also contain similar rules for the recognition of civil unions and their equivalents. Especially important for civil unions are rules regulating recognition, status, and proprietary relations. In reverse, these areas also need regulation on the recognition of foreign divorces.

Louise Ellen Teitz (Roger Williams University School of Law), MCG participant on the Conflict of Laws Project, continued

by presenting conflict of laws issues relating to children. She stressed that the domestic law relating to children is often shaped by international treaties, regional instruments, and in the U.S., uniform state law and some federal statutes. For example, the 1996 Hague Child Protection Convention, which has been signed but not ratified by the U.S., will, when implemented (by amendments to the UCCJEA), require recognition of foreign judgments (“measures of protection”) and cross-border cooperation. She pointed out that, in the international context, specific problems arise because matters relating to children are often significantly influenced by differences in religion, culture, and morals. This has been especially visible with the interaction between Western legal traditions and Islamic personal law. In the U.S., state anti-foreign law statutes (which are often mainly intended to target “Sharia Law”) could have significant impact on family law and conflict with international instruments.

In the U.S., international treaties and domestic uniform laws have harmonized this area of law to a certain extent. However, problems can arise because civil law and private international law outside the U.S. rely on habitual residence, whereas U.S. law commonly refers to domicile. She explained the need to acknowledge the differences in wholly domestic and cross-border cases and that embracing that difference will produce more consistent results that will support harmonization in this critical area, helping to allow children to move seamlessly from one country to another without raising significant issues of private international law.

At the end of the symposium, Mathias Reimann (University of Michigan Law School) summarized his impressions in a short closing statement.

The majority of the contributions will be published in a forthcoming issue of the *Duke Journal of Comparative & International Law*.

¹ One state supreme court decision, *Tyrrell v. BNSF Railway Co.*, 373 P.3d 1 (S.Ct. Mont. 2016) held that the *Daimler* rule did not apply to a U.S. corporate defendant, but the Supreme Court of the United States has granted certiorari to review that holding, 2017 U.S.Lexis 686 (Jan. 13, 2017).

Policing December 8, 2016 in Philadelphia, PA

This project is on this year's Annual Meeting agenda.



Kamie Chavis Simmons of Wake Forest University School of Law addresses Reporters.



J. Scott Thomson of the Camden County Police Department engaged in conversation with fellow project participant.

Member Spotlight

IN THIS MEMBER SPOTLIGHT, WE SPOKE WITH TWO JUDGES WHO HAVE PRESIDED OR CURRENTLY PRESIDE IN SMALLER JURISDICTIONS.

Beverly Winslow Cutler

Alaska Superior Court, Third Judicial District

When did you first become interested in becoming a judge? Tell us about your career leading to the Alaska Superior Court.

I don't think I thought much about becoming a judge when I was in law school, perhaps primarily because I went to an "elite East Coast law school" where the emphasis was on appellate judging whenever judging was discussed. Maybe appellate judging seemed more like just an extension of being a student to me?

When I first thought about becoming a trial court judge, I had been out of law school fewer than five years, and had been a state public defender for about three years, all in Anchorage, Alaska. The circumstances simply were fortuitous and ripe. The only female judge in Anchorage was retiring from the trial bench. I thought, "We need to fill that void!" Remarkably there was only a requirement to have practiced law for one year before applying to be a state limited jurisdiction judge. In fact, there were already a few young male judges under 30 years of age so I thought it was possible. This was the Alaska of 1974, when the pipeline construction was just starting, and Alaska was expanding on every conceivable front. There was (and still is) no law school in Alaska, so the young lawyers were solicited to come there from all over—for everything ranging from judicial clerkships to law firm work—and did. Many were from equally elite East Coast law schools or strong West Coast schools, so it was a great legal community, with lots of us doing public sector law too, such as for Alaska Legal Services.

Luckily our enlightened poet/governor did not assume that an ex-public defender, if appointed to the bench, would spring all the deadbeats from jail, so I got the judgeship, and was a limited-jurisdiction trial-court judge in Anchorage for five years before I got the position of Superior Court Judge (general jurisdiction). But even in the limited jurisdiction position I did many jury trials (six-person juries), and was busy in court every day with all manner of civil and criminal cases.

In what way did being the first woman named to the Superior Court in Alaska contribute to your approach on the bench?

I had already been a trial court judge for five years in a limited jurisdiction court before being appointed to Superior Court, so I would say my approach to being on the bench was already set from those five years. However, I did feel it was very important to try to avoid any mistakes of a decisional nature, a leadership nature, or of a courtroom manager and courthouse leader nature, so that no one in the state would be able to say that women were okay in limited positions but shouldn't be in general jurisdiction positions. (I always thought this handicap was similar to what the first women professors anywhere must have faced—the double standard that you're good enough to slave away at teaching school to school kids, but probably not the intellectual quality and leadership we want in our professors.) I also tried very hard, because our state is very "male macho," to dress in neutral colors, wear no makeup or much jewelry (that's my nature anyway), and not be seen with painted nails or getting massages!



When you were on the bench, how did the Restatements/Model Penal Codes contribute to your case analysis?

These certainly were important sources when our state law didn't have an easy answer, but my state, being a new western state, had a lot of modern laws anyway.

Which Restatement projects currently underway are you most interested in seeing completed?

Model Penal Code, particularly Sentencing, Sexual Assault, and Campus Response to Sexual Assault.

You have participated in MCG meetings via phone, which isn't surprising since you live in Alaska. Can you share with members, particularly those who feel that travel and time prevent them from joining an MCG, your experience with project meetings via teleconference?

Attendance by phone is never more than second best, to be sure, but it is so much better than not attending at all that it should be worth everyone's consideration. I fortunately have had

decades of experience with telephonic court appearances and court sessions (as well as now videoconference, Skype, and similar things) because the huge geographical expanses of our state made these choices practical decades ago for some types of hearings and meetings—just as soon as the technology was invented. I find it is particularly wonderful and easy to conduct proceedings by phone, or participate in an ALI meeting telephonically, when you have had the chance already to attend in person one such meeting, or to have already met in person the leaders, Reporters (litigants, lawyers) at some point. If so, you can actually picture, while you are listening and participating,

who is speaking and what is going on. Yet while doing or considering doing ALI meetings or court sessions electronically, I do try to be careful about remembering there's no substitute for actual physical in-person interaction between people (especially including witnesses) and think we need to be very careful about "throwing out the baby with the bath" lest most meetings and court sessions become virtual ones. But truly, balancing the cost and time savings, it has been necessary to modernize in this way and cut this corner occasionally because, let's face it, our entire justice system is way, way overpriced—and often the worst overpricing is for those who need it most.

Richard Franklin Boulware II

U.S. District Court for the District of Nevada

When did you first become interested in becoming a judge? Tell us about your career leading to the U.S. District Court for the District of Nevada.

I first became interested in becoming a judge right after I was asked by a person involved in the selection process for my state if I was interested in becoming a federal judge. At the time I was an Assistant Federal Public Defender in Las Vegas. As there were (and still are) few former federal defenders on the federal bench, it did not seriously occur to me that such an opportunity would be available to me. I still wake up every day surprised to be on the federal bench and wearing my black robe.

Which Restatement projects currently underway are you most interested in seeing completed? Which do you think will be most useful to your docket?

I am most interested in two projects. First, I am anxiously anticipating the finalization of the Restatement Third of Torts: Liability for Economic Harm. In my jurisdiction, the Nevada Supreme Court (and hence the federal court sitting in diversity) relies heavily upon the Restatements when approaching the ever-evolving area of economic torts. As the Nevada Supreme Court has not had as many opportunities as other, larger jurisdictions to develop state-law jurisprudence in this area, the Restatements can provide useful guidance and reasoning in novel fact scenarios.

Second, as a relatively new federal judge, I have followed with interest the project on sentencing. Determining a fair and just sentence, based upon individual facts and informed by social science and policy, is the greatest consistent challenge I face as a judge. While my analysis of federal sentences begins with the federal sentencing guidelines, I welcome the opportunity to review the collective thoughts of others in considering the various factors that I must before imposing a sentence. We live in a unique moment in history with respect to sentencing reform that includes a revisiting of old or established paradigms about the objectives and effects of incarceration. As a former public defender who witnessed, for over a decade, the impact of the blunt instrument of incarceration on my clients, their families, and the communities to which offenders are released, I am encouraged by a renewed discussion about how sentencing can be more tailored—balancing punishment/deterrence with rehabilitation/reintegration based on the unique facts of each case.



When not on the bench, I understand that you focus on educating young people about the federal court system. What attracted you to this area of community engagement?

I believe that we (judges) must be actively involved in educating our communities about our court system and how it operates. It should not be left just to a few chapters in a textbook in a civics class. I try to have at least two to four different schools come to my courtroom every month to discuss the role and function of the courts—both state and federal. Many in our communities do not directly encounter the court system until it acts upon them in a civil or criminal case. I believe this experience can be less jarring if individuals have had some prior, less stressful experience with the courts. Providing such experiences to members of our communities promotes an appreciation and respect for the principles upon which our court system is based. I also learn—from the questions asked by these students—what aspects of our system seem particularly abstruse or foreign to nonlawyers. In this way, I can remain engaged in my community notwithstanding the social separation that is associated with being a judge.

The Institute in the Courts: Oregon and New Jersey Adopt Restatement Sections

The Supreme Court of Oregon recently adopted Restatement Third of Torts: Liability for Physical and Emotional Harm § 48 in *Philibert v. Kluser*, 385 P.3d 1038 (Or. 2016). In that case, two minor children brought a negligence action, through a guardian ad litem, against a pickup truck driver, alleging that they suffered severe emotional distress as a result of witnessing the death of their seven-year-old brother, who was run over by the pickup truck when the driver negligently drove through a crosswalk where the three children were walking. The trial court dismissed the action and the court of appeals affirmed, both relying on Oregon’s “impact” rule, which required a plaintiff seeking emotional-distress damages to show that he or she suffered some physical, as well as emotional, injury. Reversing the decision of the court of appeals and remanding to the trial court for further proceedings, the state supreme court abandoned the “impact” rule and instead adopted the bystander-recovery rule set forth in § 48 of the Restatement. The court noted that “the Restatement identifies Oregon as one of only four states that continue to apply the impact rule Indeed, the impact test has been disfavored for decades.” Section 48 was, the court stated, “[p]robably the most thoughtful recent formulation” of a test for bystander recovery and “best promotes principled outcomes while avoiding the prospect of imposing potentially unlimited liability on defendants for the emotional distress that their negligence may cause.” Applying § 48 to the facts of the case, the court held that the plaintiffs stated a negligence claim under an emotional-distress theory because they contemporaneously witnessed the violent death of a close family member—a death caused by the defendant’s negligence—and, as a result of that experience, the plaintiffs, aged eight and twelve at the time of the accident, both suffered severe emotional distress, depression, post-traumatic stress disorder, aggression, and severe anxiety.

The Supreme Court of New Jersey, in what it described as “a natural progression in our conversion from the governmental-interest test to the Second Restatement,” recently adopted Restatement Second of Conflict of Laws § 142 in *McCarrell v. Hoffmann-La Roche, Inc.*, 2017 WL 344449 (Jan. 24, 2017). In that case, an Alabama resident who was prescribed and took the acne medication Accutane developed inflammatory bowel disease. As a result, he filed a products-liability action in New Jersey against the drug’s manufacturers—New Jersey corporations who “designed, manufactured, distributed, and labeled” the drug in New Jersey—alleging that his disease was a result of ingesting the drug and that he would not have taken the drug had its warning labels adequately informed him of its risks and dangers. The trial court applied New Jersey law and entered judgment on a jury verdict awarding the plaintiff damages. The court of appeals reversed and dismissed the plaintiff’s action on grounds that, based on the substantial-relationship test, Alabama law applied, and the action was therefore barred by Alabama’s statute of limitations. The state supreme court reversed the appellate court’s judgment and reinstated the jury verdict, adopting Restatement Second § 142 in holding that New Jersey’s statute of limitations, which unlike Alabama’s had an equitable-tolling feature, applied to this case. The court reasoned that, under § 142, “the statute of limitations of the forum state—here, New Jersey—applies if that state has a substantial interest in the maintenance of the claim and there are no ‘exceptional circumstances’ that ‘make such a result unreasonable,’” and, here, New Jersey had a “substantial interest in deterring its manufacturers from placing dangerous products in the stream of commerce.” The court stated, “We hold that section 142 of the Second Restatement is now the operative choice-of-law rule for resolving statute-of-limitations conflicts because it will channel judicial discretion and lead to more predictable and uniform results that are consistent with the just expectations of the parties.”

Charitable Nonprofits

November 18, 2016 in Philadelphia, PA

This project is on this year’s Annual Meeting agenda.



Melanie DiPietro of Seton Hall University School of Law and Mark A. Pacella of the Pennsylvania Office of Attorney General, Charitable Trusts and Organizations Section

The Institute is currently working on other portions of the Restatement Third of Torts and on the Restatement Third of Conflict of Laws. To join the Members Consultative Group for these or other projects, visit the projects page on the ALI website at www.ali.org/projects.

Criminal Trial Manual: Then and Now

Some Interesting History *By ALI Deputy Director Stephanie A. Middleton*

American Law Institute Continuing Legal Education (ALI CLE) has just published the sixth edition of the *Trial Manual for the Defense of Criminal Cases*, an update of the widely used how-to guide for handling criminal court cases that was initially published in 1967 and last updated in 1988.

The *Manual* has an interesting history. In 1964, because of an urgent national need for lawyers who could defend criminal cases, Bernard G. Segal, President of the American College of Trial Lawyers, appointed Hicks Epton to chair a Committee on Professional Education in Trial and Appellate Practice to work with ALI-ABA (now ALI CLE) to prepare publications on elementary and advanced criminal trial practice. The National Defender Project of the Legal Aid and Defender Association, the American College of Trial Lawyers, and ALI-ABA provided the funding. The sponsors asked Professor Anthony G. Amsterdam, then a member of the faculty of the Law School of the University of Pennsylvania, to serve as Chief Reporter for the project. An adviser group of lawyers from across the country collaborated with the Reporters.

Randy Hertz, Vice Dean and Professor of Clinical Law at NYU, worked closely with Professor Amsterdam, now University Professor and Professor of Law Emeritus at NYU, to bring us the 2016 version of the *Manual*. Professor Hertz, who regularly works pro bono on briefs in criminal appeals, brought a wealth of experience and wisdom to the update.

Much has changed since 1988. Criminal defense practice has had to respond to vast changes in science and technology. Police and prosecutors rely on an array of devices, new fields of forensic science, and forensic experts. Defenders must understand these developments and use technology in the courtroom to present evidence and exhibits effectively. Traditional cross-examination, direct examination, objections, opening statements, and closing arguments can now be tied to concepts of narrative theory. The *Manual* covers basic information a defense attorney must know, as well as the strategic factors to be considered at each stage of the trial process.

There is no empirical data to measure the degree to which the *Manual* has advanced the competence of lawyers to defend criminal cases, but the pervasive influence of this work is not disputed. It has contributed immeasurably to advancing the cause of criminal trial advocacy in the United States, and to increasing access to justice in the criminal justice system.

Working with Professors Amsterdam and Hertz on this project made me want to learn more about the lawyer, who championed the first edition, Bernard G. Segal and Hicks Epton.

Bernard G. Segal, a life member of ALI, was a Chancellor of the Philadelphia Bar Association before he went on to become the President of the American Bar Association and President of the American College of Trial Lawyers. He argued nearly 50 cases before the Supreme Court of the United States. In 1963, after Mr. Segal called Attorney General Robert F. Kennedy and asked why the President was not marshaling lawyers to help the civil rights movement, President Kennedy convened a meeting of 244 prominent lawyers suggested by Mr. Segal and established the Lawyers' Committee for Civil Rights Under Law, with Mr. Segal as cochairman. The Committee sent lawyers to defend civil rights workers in southern states and advanced civil rights in the north as well. Mr. Segal also chaired an Advisory Committee on the National Legal Services Program under President Lyndon B. Johnson. Devoted to the principle that all defendants deserve a defense, in 1953, he organized the defense of nine Philadelphians denounced as Communists.

Hicks Epton, also an ALI member, made notable contributions to the law as well. In 1946, he organized, with the Seminole County Bar Association, a program on "Know Your Courts-Know Your Liberties" to pay tribute to the American system of justice and to counterbalance communist celebrations held annually on that day. "Law Day" observances spread, and in 1957, American Bar Association President Charles S. Rhyne, who was special counsel to President Eisenhower for a time and who later became a life member of ALI, also envisioned a special day for celebrating our legal system. He went over the draft proclamation with President Eisenhower, who in 1958 officially established Law Day, and in 1961 by joint resolution, Congress designated May 1 as the date for celebrating it.

Whenever I look at ALI history, I have a new appreciation for the ALI members who contributed so much to our legal system through their involvement in ALI and in so many other ways. I also have a deep appreciation for Professors Amsterdam and Hertz, who have been generous with their time and talent in updating the new *Trial Manual*.

It is clear that much has changed since the first edition of the *Manual*, but one thing remains the same: there is insufficient funding for criminal defense for the vast majority of defendants. Knowing that this publication would help public defenders, but that defenders work with limited budgets, Professors Amsterdam and Hertz asked ALI CLE to provide the updated *Manual* electronically to public defenders at no charge. Others may purchase the book at ali-cle.org.

Members Receptions: New York and Houston

The American Law Institute recently held members receptions in New York and Houston this winter. The receptions give our members the opportunity to network and discuss ongoing projects with ALI Council members and leadership.

Cravath, Swaine & Moore LLP and Council member **Evan R. Chesler** hosted the New York reception.

Judge Jed S. Rakoff of the U.S. District Court, Southern District of New York, spoke about the need for federal and state statutes prohibiting insider trading because enforcement of what is now judicially-created law has grown complicated and uncertain. He noted that the U.S. has fallen behind foreign regulators in Europe that have straightforward insider-trading statutes.

ALI President Roberta Cooper Ramo urged members to participate in ALI's work and attend the Annual Meeting because broad member participation is what distinguishes ALI publications. ALI Director Richard L. Revesz spoke about ALI's projects and state and federal courts' reliance on Restatements.



(Standing) Joan G. Wexler of Brooklyn Law School; Sheila L. Birnbaum of Quinn Emanuel Urquhart & Sullivan LLP; Bettina B. Plevan and Robert M. Kaufman, both of Proskauer Rose LLP; Helaine M. Barnett, New York, NY; (Seated) Michael N. Simkovic of Seton Hall Law School; C. Scott Hemphill of NYU School of Law; and David W. Rivkin of Debevoise & Plimpton LLP

Smyser Kaplan & Veselka LLP and **Lee L. Kaplan, Craig Smyser,** and **David R. Dow** hosted the Houston Reception.

Judge Carolyn Dineen King of the U.S. Court of Appeals, Fifth Circuit, and Chief Judge Lee H. Rosenthal of the U.S. District Court, Southern District of Texas, welcomed everyone and thanked them for their participation in ALI's work, which, they said, is relied upon by judges in the state and federal courts.

Judges King and Rosenthal reminded attendees that "ALI is you," and it needs broad participation of academics, practitioners, and judges to ensure we have the wisdom of crowds in crafting Restatements, Principles, and the Model Penal Code.

Richard L. Revesz discussed the current 20 projects and the ways members can participate in those projects. Roberta Cooper Ramo spoke of her experience as a young Texas lawyer, including learning that putting blue backing on pleadings is key to getting documents filed, and about the importance of ALI's culture of civil, informed discourse.

ALI is grateful to see members who help us stay in touch during the year and outside the Annual Meeting. The enthusiasm of members for the work of the ALI increases when they meet other members from their hometowns and hear that courts and other institutions rely on ALI to produce independent, carefully considered guidance on important legal issues and doctrines.



TOP

Lee L. Kaplan, Craig Smyser, and David R. Dow (not pictured) of Smyser Kaplan & Veselka hosted the event.

BOTTOM

Lee H. Rosenthal of the U.S. District Court, Southern District of Texas, addresses the reception attendees.

LEFT

Carolyn Dineen King of the U.S. Court of Appeals, Fifth Circuit; Craig Smyser of Smyser Kaplan & Veselka; Roberta Cooper Ramo of Modrall Sperling; Lee H. Rosenthal of the U.S. District Court, Southern District of Texas; Stephanie A. Middleton of ALI; Richard L. Revesz of NYU School of Law; and Lee L. Kaplan of Smyser Kaplan & Veselka



Notes About Members and Colleagues

Catherine M. Amirfar of Debevoise & Plimpton and **John B. Bellinger III** of Arnold & Porter participated in the first installment of the American Society of International Law (ASIL) series, *International Law and the Trump Administration: A Live Online Briefing Series*. In part one of the series, which drew nearly 600 people, Ms. Amirfar and Mr. Bellinger examined the status of treaties and other international agreements under both international and U.S. domestic law, the obligation of nations to comply with the agreements into which they have entered, and the procedures under which they are permitted to withdraw from such agreements or repudiate their obligations under them.

In the *Daily Business Review* article, “From Bailiff to Banking Law to Arbitration,” **José I. Astigarraga** of Astigarraga Davis shares details of his life from fleeing Cuba at age seven to becoming a founding partner and prominent international-practice attorney.

James M. Beck of Reed Smith is part of the firm’s team of lawyers focused on the legal issues raised by 3D printing. The team has published a 55-page report examining the legal implications raised by the new technology.

Vicki Lynn Been has stepped down as commissioner of the NYC Department of Housing Preservation and Development. She will be returning to NYU as the Boxer Family Professor of Law and Faculty Director of the Furman Center.

John B. Bellinger III of Arnold & Porter presented the Sixth Annual Lloyd N. Cutler Lecture. In his lecture, “Law and the Use of Force: Challenges for the Next President,” Mr. Bellinger discussed the domestic and international law limits on the use of force by the president, reflecting on the last two presidencies and looking ahead to the legal challenges for the next president.

Jeffrey L. Bleich of Dentons US LLP and former U.S. Ambassador to Australia will be joining the board for global tech company, Nuix. Mr. Bleich served as U.S. Ambassador to Australia from 2009 to 2013.

In his recently published *University of Illinois Law Review* article, “The Best Way Out Is Always Through: Changing the Employment At-Will Default Rule to Protect Personal Autonomy,” **Matthew T. Bodie** of Saint Louis University School of Law develops the employee autonomy themes in § 7.08 of the Restatement of the Law, Employment Law.

José A. Cabranes of the U.S. Court of Appeals for the Second Circuit wrote the op-ed, “If colleges keep killing academic freedom, civilization will die, too,” published in *The Washington Post*. Judge Cabranes addressed the importance of the balance between freedom of expression and due process on college campuses.

Doneene Keemer Damon of Richards, Layton & Finger received the Delaware Barrister Association’s 2016 Thurgood Marshall Award. The annual award is presented to a member of the bar who has been a dynamic and progressive leader, and who has tirelessly sought to improve and facilitate the administration of justice for all.

James J. Edelman has been appointed to the High Court of Australia following the promotion of Justice Susan Mary Kiefel to Chief Justice. Justice Edelman served as a judge of the Supreme Court of Western Australia from July 2011 and then as a judge of the Federal Court of Australia from April 2015.



Barry Friedman of NYU School of Law is the author of *Unwarranted: Policing Without Permission* (Farrar, Straus and Giroux). The book tells the stories of ordinary people whose lives were torn apart by policing—by the methods of cops on the beat and those of the FBI and NSA.

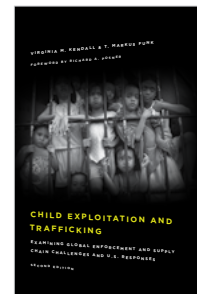
T. Markus Funk of Perkins Coie and **Virginia M. Kendall** of the U.S. District Court for the Northern District of Illinois have published the second edition of their book, *Child Exploitation and Trafficking: Examining Global*

Enforcement and Supply Chain Challenges and U.S. Responses (Rowman & Littlefield) (Foreword by **Richard A. Posner** of the U.S. Court of Appeals for the Seventh Circuit). The book has been widely cited in the courts, as well as in scholarly and mainstream articles, and is used in various training contexts within and outside of the United States.

Philip S. Goldberg has been named managing partner for Shook, Hardy & Bacon’s Washington, D.C., office. He is cochair of the firm’s National Amicus Practice and has more than 25 years of experience advocating on liability-related public policy, public affairs, and public relations issues.

Linda Greenhouse of Yale Law School has been unanimously elected as the 37th president of the American Philosophical Society, the nation’s first and oldest learned society. Ms. Greenhouse, who will serve as the society’s first female president, currently is the Knight Distinguished Journalist in Residence and Joseph Goldstein Lecturer in Law.

Rachel A. Harmon of the University of Virginia School of Law talked to *UVA Today* about the role arrests play in law enforcement. Professor Harmon provides insight on the topic of policing and why she believes making fewer arrests would result in a better criminal-justice system.



NOTES ABOUT MEMBERS AND COLLEAGUES

CONTINUED FROM PAGE 17

An op-ed piece coauthored by **Jill R. Horwitz** of UCLA School of Law has been published in *The New York Times*. The piece, “How Donald Trump’s Health Secretary Pick Endangers Women,” coauthored with Allison K. Hoffman, discusses the potential effect of the President’s selection of Tom Price as secretary of health and human services on women’s health services.

Dean **Stacy L. Leeds** of the University of Arkansas School of Law has joined the board of directors of Arvest Bank in Fayetteville. “Stacy Leeds is an outstanding legal mind whose advice and service is in high demand,” said Donny Story, president and CEO for Arvest Bank.

John B. Lewis of BakerHostetler has coauthored the article, “Waiver and Revival of Arbitral Rights—An Important Issue for Future Employment Litigation,” published in the Winter 2016 issue of the *Labor Law Journal*. In the piece, Mr. Lewis and coauthor Dustin M. Dow examine when waived arbitration rights can be revived based upon the drastic and unexpected amendment of a complaint or when a change in law reinvigorates a right to arbitrate that would otherwise have been futile.

Roberta D. Liebenberg of Fine, Kaplan and Black received the Martha Fay Africa Golden Hammer Award from the American Bar Association’s Law Practice Division at the ABA Mid-Year Meeting in Miami. The award honors individuals or entities that have achieved professional excellence and demonstrated a commitment to diversity. Ms. Liebenberg is a senior partner at her firm, focusing her practice on class actions, antitrust and complex commercial litigation, and white-collar criminal defense.

In an article for *The Recorder*, **Goodwin Liu** of the California Supreme Court examines the interaction between judicial federalism and state constitutionalism, guided by Justice William Brennan’s *Harvard Law Review* article, “State Constitutions and the Protection of Individual Rights.”

Margaret Colgate Love of the Law Office of Margaret Love was cited in a *Harvard Law Review* commentary by then President Barack Obama. The commentary addresses criminal-justice reform and cites Ms. Love, a former pardon attorney for the Department of Justice, on the subject of clemency.

Dean Emeritus **Cynthia E. Nance** of the University of Arkansas School of Law has been appointed to the Arkansas Advisory Committee to the U.S. Commission on Civil Rights. Established by the Civil Rights Act of 1957, the commission’s mission is to enhance the enforcement of federal civil-rights laws and inform the development of national civil-rights policy.

President **Janet Napolitano** of the University of California has penned an op-ed in *The New York Times*. The piece, “The Truth About Young Immigrants and DACA,” sheds light on how the Deferred Action for Childhood Arrivals program fits into U.S. immigration policy. President Napolitano formerly served as U.S. Secretary of Homeland Security, Governor of Arizona, Attorney General of Arizona, and U.S. Attorney for the District of Arizona.

The Dwight D. Opperman Foundation presented the Edward J. Devitt Distinguished Service to Justice Award to **Jon O. Newman** of the U.S. Court of Appeals for the Second Circuit. The award, presented at the Supreme Court of the United States on December 8, is the American judiciary’s longest-running and its highest honor that is bestowed upon an Article III federal judge. It was created 34 years ago by the late Dwight D. Opperman, then president and chairman of the West Publishing Company.

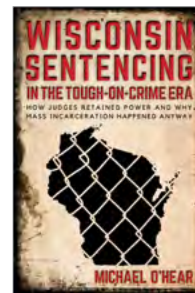
Copyright Law

November 10 and 11, 2016 in
Philadelphia, PA



Robert Kasunic and Sarang Damle of the U.S. Copyright Office

David J. O’Callaghan has been appointed to the Federal Court of Australia. Justice O’Callaghan commenced in the Melbourne registry on February 1. He signed the bar roll in 1986 and was appointed Senior Counsel in 2003.



Michael M. O’Hear of Marquette University Law School released his book, *Wisconsin Sentencing in the Tough-on-Crime Era: How Judges Retained Power and Why Mass Incarceration Happened Anyway* (University of Wisconsin Press), in

January. Professor O’Hear tracks the effects of sentencing laws and politics in Wisconsin from the eve of the imprisonment boom in 1970 up to the 2010s.

Kathleen M. O’Sullivan of Perkins Coie has been appointed chair of the firm’s national Commercial Litigation practice.

Stephanie E. Parker of Jones Day was named “Litigator of the Week” by *The AM Law Litigation Daily* for leading the team that attained a record-breaking \$2.54 billion patent-infringement verdict. Ms. Parker’s victory, in the first intellectual-property case she has tried, is the largest infringement verdict in U.S. history.

R. Ashby Pate of Lightfoot, Franklin & White has been selected by the *Birmingham Business Journal* as a “Top 40 Under 40” professional. The list comprises up-and-coming business leaders dedicated to shaping the future of Birmingham and their industries.

Richard L. Revesz of NYU School of Law was featured in an article by Chelsea Harvey in *The Washington Post*. The piece, “The Coming Battle Between Economists and the Trump Team Over the True Cost of Climate Change,” discusses the Trump administration’s potential approach to the “social cost of carbon,” a measure, in dollars, of the long-term damage done by a ton of carbon-dioxide emissions in a given year.

Immediate Past President of the International Bar Association **David W. Rivkin** of Debevoise & Plimpton was recently featured in *The American Lawyer*. The article, “The Better Bar Association,” recognizes the additional value that the IBA has placed on international human rights during Mr. Rivkin’s tenure as president.

In “Showdown Over Law Schools’ Bar Pass Standard Set for Feb. 6,” featured in *The National Law Journal*, Dean **Daniel B. Rodriguez** of Northwestern University Pritzker School of Law raises his concerns over the ABA’s bid to strengthen its bar-passage requirement for law schools.

Sharon K. Sandeen, director of Mitchell Hamline School of Law’s Intellectual Property Institute, has been awarded the university’s Robins Kaplan LLP Distinguished Professorship in Intellectual Property Law. This Distinguished Professorship is the first in the field of intellectual property at the law school and one of only a few dedicated to IP law in the nation.

Nicole France Stanton of Quarles & Brady has been appointed to the Board of Visitors of the University of Arizona James E. Rogers College of Law. As a board member, Ms. Stanton will have the opportunity to influence the development of the law with fellow attorneys and academics by spreading awareness of the college’s innovative scholarships, courses, and degrees.

In part three of Philly.com’s 12-part series on the Bill of Rights, **Geoffrey R. Stone** of the University of Chicago Law School addresses freedom of speech. Professor Stone identifies three critical free-speech issues facing our nation: (1) the support of the suppression of offensive speech on college campuses; (2) the increased existence of intentionally false statements; and (3) the influence of money in the political process.

Patricia M. Wald (retired) of the U.S. Court of Appeals for the D.C. Circuit presented the O’Connor Justice Prize to former President Jimmy Carter. The prize, recognizing individuals who have made extraordinary contributions to advancing the rule of law, justice, and human rights, is administered by Arizona State University and named for retired U.S. Supreme Court Justice Sandra Day O’Connor.



Patricia M. Wald presenting the O’Connor Justice Prize to former President Jimmy Carter. Photo courtesy of Arizona State University Sandra Day O’Connor College of Law

H. Mark Stichel of Gohn, Hankey, Stichel & Berlage delivered a presentation to The Wranglers Law Club in Baltimore where he provided insights into ALI and the Restatement process.

There are long-standing connections between The Wranglers and ALI. The Wranglers Law Club, one of Baltimore’s historic law clubs, was founded in 1923, the same year as the ALI. One of the founders of The Wranglers, Judge Emory H. Niles, was an ALI member in his later years. William L. Marbury, Jr., a member of ALI Council for several decades, was a Wrangler. Several additional former and current Wranglers are current ALI members.



NOTES ABOUT MEMBERS AND COLLEAGUES CONTINUED FROM PAGE 19

Steven O. Weise of Proskauer Rose has been awarded the 2016 James J. Fuld Award by the Working Group on Legal Opinions Foundation. The award honors James J. Fuld, a leader in developing modern opinion-letter practice. It is presented to an individual or entity that has made a significant contribution to the field of legal opinions in business transactions, and is designed to honor and encourage individuals who write and educate in the area of legal opinions, as well as bar associations, law firms, and others who contribute to the development of the law or practice in the area of legal opinion.

Matthew Lee Wiener has been appointed a member and designated Vice Chairman of the Council of the Administrative Conference of the United States. Mr. Wiener has been Executive Director of the ACUS since 2012 and will continue to serve in that capacity. He will lead the agency until the appointment of a Chairman.

Ingrid Wuerth of Vanderbilt Law School presented the final 2016 lecture in the World Affairs Council series at the University of North Carolina at Asheville on December 6. Her talk, titled “International Law in the Age of Trump: A Post-Human Rights Agenda,” touched on the recent developments in human-rights law and its continuance as a global political benchmark.

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

New Members Elected

On December 29, the Council elected the following 61 persons:

Miriam H. Baer, Brooklyn, NY
Kristine Gerhard Baker, Little Rock, AR
Nannette A. Baker, St. Louis, MO
Shyamkrishna Balganes, Philadelphia, PA
William Baude, Chicago, IL
Turney Powers Berry, Louisville, KY
Jenny A. Brody, Washington, DC
Marc Wesley Brown, Houston, TX
Diana Bryant, Melbourne, Australia
Craig R. Bucki, Buffalo, NY
Alafair S. Burke, Hempstead, NY
David A. Collins, Beverly Hills, MI
Steven M. Colloton, Des Moines, IA
Samuel Wollin Cooper, Houston, TX
Richard Olaf Cunningham, Washington, DC
Tom Alan Cunningham, Houston, TX
Angela J. Davis, Washington, DC
Robert P. Deyling, Washington, DC
R. Stanton Dodge, Englewood, CO
Kristi K. DuBose, Mobile, AL
Alice Beck Dubow, Philadelphia, PA
Ronald Eisenberg, Philadelphia, PA
Anthony Paul Farley, Albany, NY
James A. Feldman, Washington, DC
Stephen P. Garvey, Ithaca, NY
Chiara Giorgetti, Richmond, VA
Laura E. Gómez, Los Angeles, CA
Michele Bratcher Goodwin, Irvine, CA
Kate E. Hargrove Ramundo, New York, NY
Eric L. Hirschhorn, Washington, DC
Sherrilyn Ifill, New York, NY

Kristin N. Johnson, Newark, NJ
Neal Katyal, Washington, DC
Leigh Martin May, Atlanta, GA
Michele C. Mayes, New York, NY
Timothy Meyer, Nashville, TN
Steven G. Poskanzer, Northfield, MN
Jill A. Pryor, Atlanta, GA
Adam Raviv, Washington, DC
Catherine M. Recker, Philadelphia, PA
Christopher P. Reynolds, Plano, TX
Steven R. Rodgers, Santa Clara, CA
Teresa Wynn Roseborough, Atlanta, GA
Stephen E. Sachs, Durham, NC
Matthew R. Segal, Boston, MA
Virginia A. Seitz, Washington, DC
Charles V. Senatore, Boston, MA
Elizabeth J. Shapiro, Washington, DC
Bradford L. Smith, Redmond, WA
Bryan Stevenson, New York, NY
Jim Odell Stuckey, II, Cayce, SC
Jerome T. Tao, Las Vegas, NV
Heath P. Tarbert, Washington, DC
Lawrence P. Tu, Studio City, CA
Frederick Tung, Boston, MA
Michael Vatis, New York, NY
Michael S. Wald, San Francisco, CA
John H. Walsh, Washington, DC
S. Albert Wang, Los Angeles, CA
Merle Weiner, Eugene, OR
John Valery White, Las Vegas, NV

In Memoriam

Roger C. Cramton



Photo courtesy of Cornell University

ALI Emeritus Council member, Roger C. Cramton, former dean of Cornell Law School and the Robert S. Stevens Professor Emeritus of Law, died on February 3, 2017. He was 87.

Professor Cramton received his A.B. degree, *magna cum laude*, from Harvard University in 1950 and was elected to Phi Beta Kappa. He earned his law degree from the University of Chicago Law School in 1955, where he served on the law review and was elected to the Order of the Coif.

He began his teaching career in 1957 as an assistant professor at the University of Chicago Law School and then at the University of Michigan Law School, teaching ethics and torts. He became dean of the Cornell Law School in 1973, following work with the Administrative Conference of the U.S. and the U.S. Department of Justice.

In 1970, President Richard M. Nixon appointed Professor Cramton as chairman of the Administrative Conference of the United States, an independent federal agency dedicated to improve federal administrative procedures. In 1972, President Nixon appointed him as assistant attorney general in charge of the Office of Legal Counsel in the Department of Justice. President Gerald Ford appointed him as the first chairman of the Legal Services Corporation, the single largest funder of civil legal aid for low-income Americans in the nation, a post he held from 1975 to 1978.

A dedicated member of ALI, Professor Cramton joined the ALI Council in 1975. He served as an Adviser for the Principles of the Law of Family Dissolution: Analysis and Recommendations; Restatement of the Law Third, Torts: Products Liability; and Restatement of the Law Third, The Law Governing Lawyers projects, and on the Members Consultative Group for Restatement of the Law Third, Torts: Liability for Physical and Emotional Harm. He also was a member for many years of the ALI Special Committee on Conflicts of Interest, and he served on the Arden House III Steering Committee Advisory Board, which dealt with issues concerning the continuing education of the bar.

ELECTED MEMBERS

Bradley D. Jesson, Fort Smith, AR;
E. Bruce Leonard, Toronto, Canada;
Willis R. Tribler, Chicago, IL

LIFE MEMBERS

Paul Henry Anderson, Atlanta, GA; **George Beall**, Baltimore, MD; **Richard Scrivener Beatty**, Washington, DC; **Peter M. Brown**, Stonington, CT; **Victor Brudney**, Cambridge, MA; **Richard J. Cardamone**, New York, NY; **Robert Carswell**, New York, NY; **Ansel B. Chaplin**, Truro, MA; **Roger C. Cramton**, Ithaca, NY; **Norris W. Darrell**, New York, NY; **Gordon B. Davidson**, Louisville, KY; **H. Stewart Dunn, Jr.**, Washington, DC; **Martin Evans**, New York, NY; **Haliburton Fales, 2d**, New York, NY; **Ben C. Fisher**, Washington, DC; **Leonard I. Garth**, Newark, NJ; **Gibson Gayle, Jr.**, Houston, TX; **Sarah Dickinson Grant**, Phoenix, AZ; **J. Foy Guin, Jr.**, Birmingham, AL; **Sheldon W. Halpern**, Philadelphia, PA; **Vester T. Hughes, Jr.**, Dallas, TX; **M. Minnette Massey**, Coral Gables, FL; **Albert Mintz**, New Orleans, LA; **James D. Monteith**, Charlotte, NC; **Albert G. Norman, Jr.**, Atlanta, GA; **Robert M. Pitler**, New York, NY; **Forrest A. Plant**, Sacramento, CA; **Jerome Preston, Jr.**, Damariscotta, ME; **Bruno A. Ristau**, Washington, DC; **Sol Schreiber**, New York, NY; **William W. Schwarzer**, San Rafael, CA; **Theodore M. Space**, Hartford, CT; **E. Blythe Stason, Jr.**, DeKalb, IL; **James A. Strazzella**, Wynnwood, PA; **John P. Weitzel**, Chestnut Hill, MA; **Kenneth B. Wright**, Ojai, CA

Vester T. Hughes



Vester T. Hughes, ALI Emeritus Council member and partner at K&L Gates, passed away on January 29, 2017, in Dallas, Texas. He was 88.

Mr. Hughes graduated, *cum laude*, from Harvard Law School and was editor of the *Harvard Law Review*. His years in private practice spanned many aspects of federal taxation - income, estate, gift, and excise - individual and corporate. Mr. Hughes testified before Congress and argued two cases before the Supreme Court of the United States.

He was a visiting professor of law at Southern Methodist University Law School and has penned numerous publications on the subject of federal taxation.

Mr. Hughes was a dedicated member of ALI, serving on the Council for 42 years. During his tenure at ALI, Mr. Hughes worked on the 1974 Federal Income Tax Project and served as a member of the Investment Committee. He was also part of a study to decide whether generation-skipping transfers are a problem under the Federal Estate Tax provisions of the Internal Revenue Code.

COUNCIL ELECTS OFFICERS, REVIEWS 11 PROJECT DRAFTS AT JANUARY MEETING

CONTINUED FROM PAGE 1

Reporter Kermit Roosevelt III and Associate Reporters Laura Elizabeth Little and Christopher A. Whytock presented their first Council Draft for the **Restatement of the Law Third, Conflict of Laws**, consisting of an introductory first Chapter, Chapter 2 on domicile, and Chapter 5 on choice of law. The Council approved Chapter 1 and §§ 2.01-2.07 of Council Draft No. 1, but did not have time to consider the remainder of the draft. This project is not on the agenda for the 2017 Annual Meeting.

The Council also approved Council Draft No. 3 of the **Restatement of the Law, Liability Insurance**, submitted by Reporter Tom Baker and Associate Reporter Kyle D. Logue. The draft covers portions of Chapter 2 on the management of potentially insured claims and Chapter 3 on general principles regarding the risks insured, and all of Chapter 4 on enforceability and remedies. Liability Insurance will be on this year's Annual Meeting agenda as a Proposed Final Draft, potentially completing the project.

Coordinating Reporters Paul B. Stephan and Sarah H. Cleveland, with Reporters David P. Stewart, William S. Dodge, Curtis A. Bradley, and Edward T. Swaine, presented drafts for all three topics covered in the proposed **Restatement Fourth, The Foreign Relations Law of the United States**. The Council approved Council Draft No. 3 of Sovereign Immunity, dealing with immunity of foreign states from jurisdiction to adjudicate, Council Draft No. 3 of Jurisdiction, dealing with prescriptive jurisdiction, jurisdiction to adjudicate in criminal cases, and enforcement, and Council Draft No. 2 of Treaties, covering the status of treaties under U.S. law. Membership approval of the three drafts at the Annual Meeting would complete this project.

Council Draft No. 3 of **Principles of the Law, Election Administration**, submitted by Reporter Edward B. Foley and Associate Reporter Steven F. Huefner, also received Council approval for submission to the membership at the upcoming Annual Meeting. The draft covers principles for the resolution of ballot-counting disputes; its approval by the membership in May would conclude this project.

On January 20, the Council approved Council Draft No. 5 of the **Restatement of the Law, The U.S. Law of International Commercial Arbitration**, for submission for membership approval as a Tentative Draft at the Annual Meeting. The draft, presented by Reporter George A. Bermann and Associate Reporters Jack J. Coe, Jr., Christopher R. Drahozal, and Catherine A. Rogers, deals with the judicial role in investor-state arbitration. The Council also reviewed Council Draft No. 3 of the **Restatement of the Law, Consumer Contracts**, submitted by Reporters Oren Bar-Gill, Omri Ben-Shahar, and Florencia Marotta-Wurgler. The draft, as revised to incorporate the discussion at the Council meeting, is expected to be presented as a Discussion Draft at the 2017 Annual Meeting.

There was insufficient time for the Council to consider all of Council Draft No. 5 of the **Model Penal Code: Sexual Assault and Related Offenses**, presented by Reporter Stephen J. Schulhofer and Associate Reporter Erin E. Murphy. The Council approved §§ 213.0(7) (defining sexual penetration), 213.1 (forcible rape), and 213.2 (sexual penetration without consent) for submission to the membership as a Tentative Draft at the 2017 Annual Meeting.

Finally, Reporters Marion R. Fremont-Smith and Jill R. Horwitz and Associate Reporter Nancy A. McLaughlin submitted Council Draft No. 3 of the **Restatement of the Law, Charitable Nonprofit Organizations**. The draft, which includes sections on insolvency and bankruptcy, the role of state attorneys general, and standing of private parties, was approved for submission to the membership as a Tentative Draft at the 2017 Annual Meeting.

Council Meeting

January 19 and 20, 2017 in Philadelphia, PA



Conrad K. Harper retired partner of Simpson Thacher & Bartlett and Margaret H. Marshall of Choate, Hall & Stewart

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

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

September 8 (JOINT)

Restatement of the Law Third,
Torts: Liability for Economic Harm
Philadelphia, PA

September 14–15 (JOINT)

Model Penal Code: Sexual Assault
and Related Offenses
New York, NY

October 5 (JOINT)

Restatement of the Law,
Charitable Nonprofit Organizations
Los Angeles, CA

October 12–13 (JOINT)

Restatement of the Law Fourth,
Property
Philadelphia, PA

October 19–20

Council Meeting - October 2017
New York, NY

October 26 (JOINT)

Principles of the Law, Compliance,
Enforcement, and Risk Management
for Corporations, Nonprofits, and
Other Organizations
Philadelphia, PA

October 27 (JOINT)

Restatement of the Law Third,
Conflict of Laws
Philadelphia, PA

November 9 (JOINT)

Principles of the Law, Policing
Philadelphia, PA

November 10 (JOINT)

Restatement of the Law,
The U.S. Law of International
Commercial Arbitration
Philadelphia, PA

December 1 (JOINT)

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

December 7 (JOINT)

Restatement of the Law, Copyright
Philadelphia, PA

THE DIRECTOR'S LETTER CONTINUED FROM PAGE 3

and she has been a catalyst for significant efforts to reform the patent system, organizing important conferences and bringing together leading scholars to focus on reform efforts.

These days, some commentators decry the state of legal scholarship by saying that what professors write is not useful to judges. The assertion that leading professors are not primarily providing doctrinal guidance to the courts is perhaps true. But their work, as evidenced by the scholarship of all eight winners and of the vast majority of the finalists is certainly useful to other important institutions, including the U.S. Congress, state legislatures, and federal and state administrative agencies—all of which are institutions to which the ALI aspires to provide guidance. And I find it difficult to believe that having a more sophisticated understanding of the nature of homeowner policies or of the impact of patent assertion entities will not eventually prove useful to the courts. Participating in this selection process and reading a great deal of work of both very high quality and significant public policy importance made me feel very good about being a law professor!

At last month's meeting, Justice Cuéllar's committee also decided to make three recommendations, subsequently approved by the Executive Committee, for prospective changes to the program. First, the letter to the deans soliciting nominations will stress the ALI's interest in having a diverse group of nominees. Second, whereas until now, nominees needed to have graduated from law school within the last 15 years and have been full-time faculty members for no more than 10 years, the first requirement will be eliminated for future competitions so that all individuals at an early stage of their academic careers regardless of their prior career path can compete for the award. And, third, in light of this latter change, the Young Scholars Medal will now be renamed the Early Career Scholars Medal.

I very much hope that you'll be able to attend the Annual Meeting this year and hear Professor Schwarcz's presentation, and that you'll come as well in 2018 and hear Professor Chien's presentation. I'm confident that you won't be disappointed!



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Register Now for the Annual Meeting.



The website features the full agenda, speaker biographies, and event information.

Logged in ALI members or project participants can sign in to register to attend the Meeting or any of the special events.

Annual Meeting drafts will be posted on the site as they become available. Members will be notified via email as drafts are posted. If you haven't heard from us lately, don't forget to add ali.org as an approved sender to your email whitelist.

**VISIT THE ANNUAL MEETING WEBSITE ONLINE AT
 WWW.ALI.ORG/ANNUAL-MEETING-2017 TO LEARN MORE OR TO REGISTER.**