THE ALI
Reporter

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The ALI Legacy Continues with Restatement Fourth of U.S. Foreign Relations Law

Sarah H. Cleveland, Paul B. Stephan, William S. Dodge, Curtis A. Bradley, Edward T. Swaine, and David P. Stewart at the 2016 Annual Meeting.

In the mid-1950s, lawyers, judges, and legal scholars gathered in New York City to discuss ALI's possible work on a project in the field of foreign relations law. Future project Reporter Adrian S. Fisher noted that, at the time of its introduction, this Restatement presented two issues nonexistent in previous Restatements. First, foreign relations law was more the concern of the government attorney, and less the concern of the private attorney, than any of the other fields covered by a Restatement. Second, in order for this work to be of lasting value, it needed to be persuasive to lawyers in other countries.

It was precisely these two hurdles that made ALI the right organization to assemble a study of utility in understanding foreign relations law. The Institute held a level of objectivity and detachment that no government group could possess, and inviting lawyers from other countries to serve as participants in the drafting of the Restatement assured that the Institute's reputation of having a diversity of experience from the best legal minds remained intact. The result of this effort was the Restatement Second of U.S. Foreign Relations Law, published in 1965.

ALI entered this area of law without compromising the integrity and authority for which Restatements had been known. The Restatements Second and Third (1987) have been enormously influential. But the world continues to change and with it so does the rule of law.

A reexamination of this Restatement began in October 2012. When the Council approved the project, it decided not to launch a full revision of the Restatement Third at that time. Instead, it limited the scope of the project to

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READ MORE ABOUT THE RESTATEMENT FOURTH ON PAGES 4-8.

THE DIRECTOR'S LETTER BY RICHARD L. REVESZ

Restatements and Diversity Jurisdiction

Two law professors with leadership roles at the ALI—Samuel Issacharoff, a member of the ALI Council and Reporter on the already completed Principles of Aggregate Litigation, and Florencia Marotta-Wurgler, a Reporter on our ongoing Restatement of Consumer Contracts—recently have written an important article that might be a harbinger of a significant shift in the way in which the ALI does its work in producing some of its Restatements in the future. Their piece, The Hollowed Out Common Law, focuses on the electronic marketplace—an important subset of the transactions covered by our Restatement of Consumer Contracts.

Florencia and Sam describe two important shifts in the manner in which contract claims involving the electronic marketplace are adjudicated:

> "One arises from a steady decline in the number of cases adjudicated in state court relative to federal courts, which by 2015 adjudicate the vast majority of cases. The other stems from a rise in class actions, which is intimately tied to the migration of cases to federal court. The result is that today the vast majority of cases are class actions brought in federal court. The increase in class actions is not surprising given the relatively small stakes of most transactions and the little incentive that creates for individual consumer litigation."

The dominance of the federal district courts as the adjudicators of these claims has significant consequences for the development of the common law:

> "[T]he common law is being elaborated in federal court in suits arising under

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Upcoming Meetings & Events

For more information and all upcoming meetings and events, visit *www.ali.org*.

OCTOBER 2018

October 25
Principles of the Law, Compliance, Enforcement, and Risk Management for Corporations, Nonprofits, and Other Organizations
Philadelphia, PA

October 26
Principles for a Data Economy
Philadelphia, PA

NOVEMBER 2018

November 2
Principles of the Law, Data Privacy
Philadelphia, PA

November 8
Restatement of the Law, The Law of American Indians
New York, NY

November 9
Restatement of the Law Third, Conflict of Laws
Philadelphia, PA

November 15-16
Principles of the Law, Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities
New York, NY

MAY 2019

May 20-22
96th Annual Meeting
Washington, DC

Fall Project Meetings

Our 2018 fall project meeting season started with two projects potentially meeting for the last time.

The U.S. Law of International Commercial and Investor-State Arbitration

September 14 in Philadelphia, PA

The membership vote approving Tentative Draft No. 6 at the 2018 Annual Meeting marked the approval of all individual Sections of this project. This project meeting provided the opportunity for project participants and Reporters to revisit several updated Sections. Pending Council approval in January 2019, the full project will be presented for final approval by the membership at the 2019 Annual Meeting. Members may access Preliminary Draft No. 11 online to learn more about the topics addressed at this meeting.

Linda J. Silberman of NYU School of Law

Charitable Nonprofit Organizations

September 21 in Philadelphia, PA

Participants discussed Chapter 4 on Gifts: Solicitation, Restrictions on Charitable Assets, and Enforcement of Pledges, as well as part of Chapter 5 on Government Regulation of Charities. Pending Council approval in January 2019, the Reporters plan to present the remaining Sections of this project for membership approval at the 2019 Annual Meeting. Members may access Preliminary Draft No. 5 online to learn more about the topics addressed at this meeting.

Thomas A. Tupitza of Knox McLaughlin Gornall & Sennett

THE DIRECTOR'S LETTER CONTINUED FROM PAGE 1

> diversity jurisdiction. In turn, those federal courts are largely bereft of any state law moorings as they develop the common law of the electronic marketplace. *Erie Railroad v. Tompkins* notwithstanding, the common law is driven by federal court decisions, building incrementally on each other rather than state law."

And, because the common law in this area is developing in federal court rather than in state court "there is no apex court that can define conclusively the law of any jurisdiction." This litigation pattern poses a significant challenge to the traditional view of state supreme courts as the primary expositors of the common law: "Diversity jurisdiction allows federal courts to predict how they believe state common law would develop, but binds no state courts in the affected jurisdiction, and does not even bind federal courts in the same Circuit ...." How do dominant rules emerge under these conditions?: "[W]e identify a 'tournament effect' in which the law settles on one or a few influential decisions, regardless of the state law that the case may have arisen under."

As Florencia and Sam recognize, these shifts affect the way in which the ALI produces Restatements: "[T]he traditional ALI approach has been to identify the majority rule from the most recent decisions of the highest state courts." But in the electronic marketplace, the situation is quite different: "The normal process of hierarchical filtration does not occur. Looking at high state courts in this area would offer only a stale and incomplete reflection of current law."

So, how does a legal rule become dominant under these circumstances? Florencia and Sam explain:

> "[T]he weight of decisional law is how innovative, dispositive and persuasive it is. This translates into a constant tournament for authority, unlike the normal hierarchy of state law controlled by the state supreme court. Law likes clarity and in the absence of clarity through hierarchy, there is clarity through tournament. But, as with the U.S. Open, the first rounds are entertaining, but at some point we need to reach the finals. The law's search for clarity in the absence of hierarchy might increase the likelihood of producing tournament winners."

They suggest that for cases that are viable only as class actions and are therefore adjudicated primarily in federal court under diversity jurisdiction (a pattern they attribute to multidistrict litigation and the Class Action Fairness Act), the ALI must search for these tournament winners to determine its Restatement rules. And, they point out that empirical techniques are well suited for this task.

This new pattern of cases does not require a reconceptualization of the ALI's work. The goal remains the same. In the words of our Style Manual, Restatement rules must be "clear formulations of common law," which "reflect the law as it presently stands or might appropriately be stated by a court." Regardless of how claims are adjudicated, our Restatements are designed to guide the exercise of judicial discretion. But somewhat different techniques are called for to determine what rules should form part of Restatements when the relevant litigation takes place primarily in the federal courts under diversity jurisdiction: simply counting how many state supreme courts adopted a particular rule will not do the trick.

THE ALI LEGACY CONTINUES

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three areas: the United States law of jurisdiction, of immunities, and of treaties. And, with respect to these areas, it determined that work should proceed only on selected Sections.

Citations to Tentative Drafts after last year's Annual Meeting can be found on pages 6-7. That these updated Sections of the Restatement Fourth have already been cited shows once more that the desire for clarification in the law remains.

Restatement Fourth of U.S. Foreign Relations Law Official Text

The Restatement Fourth of U.S. Foreign Relations Law, may be pre-ordered now. This publication addresses the U.S. approach to three areas of foreign relations law, with limitations:

- **Treaties** but not other forms of international agreements
- U.S. views on **Jurisdiction**, but not generally on separation of powers or federalism
- **Sovereign Immunity**, but not other immunities required or regulated by international law

Additional areas of the Restatement Third are likely to be addressed in future discrete projects within the Fourth Restatement.

VISIT WWW.ALI.ORG TO PRE-ORDER NOW.

Q&A with Restatement Fourth, The Foreign Relations Law of the U.S. Coordinating Reporter Paul B. Stephan

At the 2017 Annual Meeting, ALI Members voted to approve the Jurisdiction, Treaties, and Sovereign Immunity portions of the Restatement of the Law Fourth, The Foreign Relations Law of the United States. Paul B. Stephan of University of Virginia School of Law served as a Coordinating Reporter along with Sarah H. Cleveland of Columbia Law School.

What was it like to be a Coordinating Reporter on the Restatement, particularly with a large team of Reporters on three distinct areas of foreign relations law?

I believe this is the first ALI project that used coordinating Reporters, so Sarah and I had no precedents to guide or constrain us. We spent a lot of time at the beginning making sure we had the best possible colleagues to work with, most importantly the Reporters but also Counselors (another innovation with this project) and the members of the Advisory Committee. Happily, we selected well. The Reporters were terrific colleagues who both worked hard and had excellent judgment (which is to say we never found ourselves in a position where we felt someone had gone astray even a little). When we disagreed about something, our conversations always were enlightening and helpful and we always ended up in a place that everyone found satisfying. We tried to listen hard to the counselors and Advisers and to address their concerns. We didn't succeed every time, but I don't think anyone felt that we had rejected legitimate arguments or produced unacceptable outcomes.

Perhaps the greatest benefit to me was the opportunity to learn from some of the finest people in the field. I thought I knew something about foreign relations law when this project began, but this was like taking part in a high-level seminar. I'll leave it to others to judge whether I learned all I should, but the opportunity certainly was there.

You have said that The American Law Institute helped establish foreign relations law as a field. Can you tell me why you believe that to be true?

If you think of foreign relations law as the place where international law encounters domestic law, then there were people thinking seriously about this subject since the McKinley Administration, if not earlier. But the first ALI project, the Second Restatement (so named because it came after the Second Restatement of Torts) gave the field a systematic treatment that it previously had lacked and spoke in a language that judges and practitioners, not just academics, could understand and take on board. The Third Restatement advanced the ball greatly by showing the connection between foreign relations law and a number of issues of immediate relevance to policymakers and practitioners, especially those involving the protection of individual rights. Not everyone has agreed with all of the Third Restatement's positions, either at the time of its publication or today, but no one can quarrel with the basic point that it has framed many important conversations about the path of the law.

Many people may not realize that foreign relations law is quite vast. What would you like readers who do not teach or practice in this area to know?

There is a lot of constitutional and administrative law, but also a surprising amount of law that bears on transactional work (business, family, etc.) as well. In a world where people are in contact with others around the world and where the economy is organized on a global basis, lawyers need to understand how international and foreign law affect and shape U.S. law. That in a nutshell is what the Restatement is about.

Why was it necessary to launch the Restatement Fourth of Foreign Relations Law? What differs in these three areas from Restatement Third?

The great accomplishment of the Third Restatement is its enduring relevance across many important issues. As the world we live in has become more interconnected and international, the law that functions as a kind of portal between U.S. law and the law of the rest of the world has mattered more. As a result, there is more foreign relations law, and some of the provisional solutions offered by the Third Restatement have become out-of-date, or at least in need of refinement. In all three areas that we address, there simply is a lot more law affecting high-profile questions than there was 30-some years ago. I see what we've done as pruning and reshaping, but not throwing out whole bodies of positions.

I think the biggest difference between the Third and Fourth Restatements is that our predecessors framed a number of issues as grounded in international law, which is to say legal obligations to do or not do something. We affirm much of what they did, but we also identify instances where international comity rather than international law applies. By that I mean that particular choices made at the national level are not dictated by an international legal obligation, but that there are opportunities to cooperate reciprocally by reaching certain legal outcomes even in the absence of international legal compulsion.

Are there Sections in this Restatement that have become particularly important in the current political climate, and U.S. foreign relations policies?

This question is a little bit like asking which of one's children one likes the best. Just going by the amount of discussion with our Advisers and the Council, some special significance might attach to §§ 310 (self-executing treaties); 404 (presumption against extraterritoriality) and 454 (commercial-activities exception to sovereign immunity)[see black-letter text below]. But there are several strands that run throughout the project, such as its emphasis on context and granularity and the separation (sometimes) between normatively desirable outcomes and judicial competence.

§ 310. Self-Executing and Non-Self-Executing Treaty Provisions

(1) A treaty provision is directly enforceable in courts in the United States only if it is self-executing. Whether a treaty provision is self-executing concerns how the provision is implemented domestically and does not affect the obligation of the United States to comply with it under international law. Even when a treaty provision is not self-executing, compliance with the provision may be achieved through judicial application of preexisting or newly enacted law, or through legislative, executive, administrative, or other action outside the courts.

(2) Courts will evaluate whether the text and context of the provision, along with other treaty materials, are consistent with an understanding by the U.S. treatymakers that the provision would be directly enforceable in courts in the United States. Relevant considerations include:

(a) whether the treaty provision is sufficiently precise or obligatory to be suitable for direct application by the judiciary; and

(b) whether the provision was designed to have immediate effect, as opposed to contemplating additional measures by the political branches.

If the Senate's resolution of advice and consent specifies that a treaty provision is self-executing or non-self-executing, courts will defer to this specification.

(3) Courts will also regard a treaty provision as non-self-executing to the extent that implementing legislation is constitutionally required.

§ 404. Presumption Against Extraterritoriality

Courts in the United States interpret federal statutory provisions to apply only within the territorial jurisdiction of the United States unless there is a clear indication of congressional intent to the contrary.

§ 454. Claims Based upon Commercial Activity

(1) Courts in the United States may exercise jurisdiction over a claim against a foreign state based upon:

(a) a commercial activity carried on in the United States;

(b) an act performed in the United States in connection with a commercial activity carried on outside the United States; or

(c) an act performed outside the United States in connection with a commercial activity carried on outside the United States if the act causes a direct effect in the United States.

(2) For the purposes of determining whether a foreign state is immune from suit:

(a) a claim must be based upon the particular conduct that constitutes the gravamen of the suit;

(b) commercial activity means a foreign state's participation in the marketplace in the manner of a private party. The nature of the conduct, not its purpose, is determinative;

(c) commercial activity is carried on in the United States if it has substantial contact with the United States; and

(d) a direct effect is one that follows as an immediate consequence of the act.

(3) Under international law, a state is not required to recognize the immunity of another state from the jurisdiction of its courts with respect to a claim based upon a variety of commercial activities.

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The Institute in the Courts: Courts Cite Foreign Relations 4th

Two courts recently cited the Restatement of the Law Fourth, The Foreign Relations Law of the United States, the official text of which is scheduled to be published this fall. Summaries of those opinions are provided below.

In *Philipp v. Federal Republic of Germany*, 894 F.3d 406 (D.C. Cir. 2018), the U.S. Court of Appeals for the District of Columbia Circuit cited Restatement of the Law Fourth, The Foreign Relations Law of the United States – Sovereign Immunity § 455 (Tentative Draft No. 2, 2016).

In that case, heirs of several Jewish art dealers who were based in Frankfurt, Germany in the 1930s brought an action against the Federal Republic of Germany and the agency that administered the museum where a valuable art collection was being exhibited, seeking to recover the art collection and/or $250 million. The plaintiffs alleged that the collection was taken by the Nazis through the art dealers' sale of the collection to the Nazi-controlled State of Prussia for barely 35 percent of its actual value. A German commission that had been created to resolve Nazi-era art claims had previously concluded "'that the sale of the [collection] was not a compulsory sale due to persecution' and [that] it therefore could 'not recommend the return of the [collection] to the heirs.'" The district court denied the defendants' motion to dismiss, in which they claimed that they were immune from suit under the Foreign Sovereign Immunities Act (FSIA), that international comity required the court to decline jurisdiction until the plaintiffs exhausted their remedies in German courts, and that the plaintiffs' state-law causes of action were preempted by U.S. foreign policy. The Court of Appeals affirmed in part and remanded, holding, inter alia, that the plaintiffs had no obligation to exhaust their remedies in Germany.

The Court of Appeals rejected the defendants' argument that allowing the plaintiffs to bypass Germany's courts before they exhausted their remedies would undermine Germany's dignity as a foreign state. In making its decision, the court looked to the U.S. Supreme Court's decision in *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250 (2014), in which the Court rejected Argentina's claim of immunity from post-judgment discovery as a matter of international comity, explained that nothing in the FSIA's plain text provided for such immunity, and noted that, after the enactment of the FSIA, "'the Act—and not the pre-existing common law—indisputably governs the determination of whether a foreign state is entitled to sovereign immunity.'"

The Court of Appeals noted that in *Fischer v. Magyar Allamvasutak Zrt.*, 777 F.3d 847 (7th Cir. 2015), the Seventh Circuit had required survivors of the Hungarian Holocaust and heirs of other Holocaust victims to exhaust any available Hungarian remedies or show a legally compelling reason for their failure to do so, and had distinguished that case from *NML Capital* by reasoning that the defendants did not need to rely on the FSIA and could invoke the "well-established rule," drawn from Restatement Third, Foreign Relations Law § 713, that exhaustion of domestic remedies was preferred in international law as a matter of comity. The D.C. Circuit

Courts Apply Restatement Fourth

Courts across the country have already begun citing to the Restatement Fourth's Tentative Drafts on Jurisdiction, Sovereign Immunity, and Treaties. Below is a list of Tentative Draft citations; the Official Text will be available soon.

KT Corporation v. ABS Holdings, Ltd., 2018 WL 3364390, United States District Court, S.D. New York, July 10, 2018

> Citing and quoting Restatement of the Law Fourth, The Foreign Relations Law of the United States – Jurisdiction § 401, Comment *e*, and citing § 404 (T.D. No. 1, 2014)

Philipp v. Federal Republic of Germany, 894 F.3d 406, United States Court of Appeals, District of Columbia Circuit, July 10, 2018

> Citing and quoting Restatement of the Law Fourth, The Foreign Relations Law of the United States – Sovereign Immunity § 455, Reporters' Note 9 (T.D. No. 2, 2016)

Upper Skagit Indian Tribe v. Lundgren, 138 S.Ct. 1649, Supreme Court of the United States, May 21, 2018

> Dissent quoting Restatement of the Law Fourth, The Foreign Relations Law of the United States – Sovereign Immunity § 456(2) (T.D. No. 2, 2016)

Doe v. Mattis, 889 F.3d 745, United States Court of Appeals, District of Columbia Circuit, May 7, 2018

> Citing Restatement of the Law Fourth, The Foreign Relations Law of the United States – Jurisdiction § 211, Comment *f* of § 211, and Comment *a* of § 214 and quoting § 213 (T.D. No. 2, 2016)

AlbaniaBEG Ambient Sh.p.k. v. Enel S.p.A., 73 N.Y.S.3d 1, Supreme Court, Appellate Division, First Department, New York, February 8, 2018

> Quoting Restatement of the Law Fourth, The Foreign Relations Law of the United States – Jurisdiction § 402, Reporters' Note 3 (T.D. No. 1, 2014)

Leidos, Inc. v. Hellenic Republic, 881 F.3d 213, United States Court of Appeals, District of Columbia Circuit, February 2, 2018

> Citing Restatement of the Law Fourth, The Foreign Relations Law of the United States – Jurisdiction § 420 (T.D. No. 3, 2017)

stated, however, that it had previously explained that "that '[Restatement Third] provision addresses claims of one state against another,'" and noted that Restatement Fourth, Foreign Relations Law – Sovereign Immunity § 455 (Tentative Draft No. 2, 2016) confirmed its interpretation, given the explanation in Reporters' Note 9 that "the rule cited by the [Seventh Circuit] applies by its terms to 'international . . . proceedings.'"

In *R (on the Application of The Freedom and Justice Party) v. Secretary of State for Foreign and Commonwealth Affairs*, [2018] EWCA Civ 1719 (Eng. & Wales), the Court of Appeal cited the Restatement of the Law Fourth, The Foreign Relations Law of the United States, in deciding whether, under customary international law, the receiving state had to grant, for the duration of a special mission's visit, the privileges of personal inviolability and immunity from criminal proceedings in the same way that members of permanent missions were entitled to such immunities under the Vienna Convention on Diplomatic Relations, 1961, and whether such immunities were recognized by the common law.

In that case, the appellants alleged that an individual was responsible for torture in the course of events that led to the downfall of the Egyptian government, of which they were former members. The Foreign and Commonwealth Office (FCO) accepted the visit of the individual and other members of his delegation as a special mission, and, while the appellants requested that the individual be arrested, the FCO and Crown Prosecution Service guidance stated that special-mission members were immune from arrest, and no action was taken against the individual. The Divisional Court found that "customary international law obliges a receiving State to secure, during the currency of the mission, the inviolability and immunity from criminal jurisdiction of a member of a special mission whom it has accepted as such."

Dismissing the appeal, the Court of Appeal noted that the Divisional Court had examined the decision of the U.S. District Court for the Southern District of Florida in *United States v. Sissoko*, 995 F. Supp. 1469 (S.D. Fla. 1997), in which the court cited Restatement Third, Foreign Relations Law § 464 in rejecting a claim for immunity by a member of a special mission that had not been accredited as such, and observing that the United Nations Convention on Special Missions, 1969—which provides that special missions should automatically have not only the core immunities but also other immunities extending beyond the immunities that the particular special mission might need for its visit—was not customary international law.

In determining whether there was a rule of customary international law, the Court of Appeal held that there was sufficient evidence "to conclude that the state practice of the United States recognises special missions and that members of them are entitled to the core immunities." Specifically, it concluded that "the Divisional Court was correct to hold that a rule of customary international law has been identified which now obliges a state to grant to the members of a special mission, which the state accepts and recognises as such, immunity from arrest or detention (i.e. personal inviolability) and immunity from criminal proceedings for the duration of the special mission's visit." The Court of Appeal also concluded that such immunities are recognized by the common law. It made note that "the ALI is currently working in this field and the Restatement of the Law Fourth, Foreign Relations Law of the United States, approved by the ALI in 2017 awaits publication," thereby giving "a signal to future readers of this judgment that there may be more up to date and valuable material from the ALI in [the] future."

Simon v. Republic of Hungary, 277 F.Supp.3d 42, United States District Court, District of Columbia, September 30, 2017

Quoting Restatement of the Law Fourth, The Foreign Relations Law of the United States – Sovereign Immunity § 455, Reporters' Note 7 (T.D. No. 2, 2016)

JPMorgan Chase Bank, N.A. v. Herman, 168 A.3d 514, Appellate Court of Connecticut, August 22, 2017

Quoting Restatement of the Law Fourth, The Foreign Relations Law of the United States – Jurisdiction § 302, Comment *a* (T.D. No. 2, 2016)

Republic of Marshall Islands v. United States, 865 F.3d 1187, United States Court of Appeals, Ninth Circuit, July 31, 2017

Citing and quoting Restatement of the Law Fourth, The Foreign Relations Law of the United States – Treaties § 110, and quoting § 110, Comment *b* (T.D. No. 2, 2017)

De Csepel v. Republic of Hungary, 859 F.3d 1094, United States Court of Appeals, District of Columbia Circuit, June 20, 2017

Concurring and Dissenting Opinion: Citing and quoting Restatement of the Law Fourth, The Foreign Relations Law of the United States – Sovereign Immunity § 455 and Reporters' Note 6 (T.D. No. 2, 2016)

Bolivarian Republic of Venezuela v. Helmerich & Payne Intern. Drilling Co., 137 S.Ct. 1312, Supreme Court of the United States, May 1, 2017

Quoting Restatement of the Law Fourth, The Foreign Relations Law of the United States – Sovereign Immunity § 455, Reporters' Note 12 (T.D. No. 2, 2016)

Citations from 5/2017 to 9/13/2018

Q&A WITH PAUL B. STEPHAN

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From your perspective as Coordinating Reporters on the Restatement Fourth what comes next for Foreign Relations Law and ALI?

In his introduction to the Restatement, Ricky Revesz says that he expects the ALI to take up additional topics in this field. The choice of which three things to address that the Institute made in 2012 reflected caution about what we could pull off, given the considerable level of controversy as to parts of this field. I think we have demonstrated that scholarly and political differences have not prevented us from successfully completing our assignment. In my view, there are some obvious topics that need to be addressed, including defining international law as a general matter; considering the constitutional separation of powers and federal structure as it affects foreign relations law; international agreements that do not take the form of Article II treaties; and the immunities of international organizations and diplomats. Other topics that might be addressed include the ways that the U.S. legal system addresses customary international law and the immunity of foreign officials. Also under discussion are substantive topics, which the second volume of the Third Restatement comprised. One question is whether to bring substantive topics into one Restatement, as the Third Restatement did, or instead recommend to the ALI that it take up particular areas as stand-alone projects, as it already has done with International Arbitration.

I should add that we don't take for granted that the ALI, if it decides to go ahead, necessarily will ask us to undertake the job. We hope so, of course, but at my age I appreciate that there are no guarantees!

In addition to Coordinating Reporters Sarah H. Cleveland (also a Reporter on Treaties) and Paul B. Stephan (also a Reporter on Jurisdiction), the project Reporters are Jurisdiction: William S. Dodge of University of California, Davis School of Law, and Anthea Roberts of Australian National University; Sovereign Immunity: David P. Stewart of Georgetown University Law Center and Ingrid Wuerth of Vanderbilt University Law School; and Treaties: Curtis A. Bradley of Duke University School of Law and Edward T. Swaine of George Washington University Law School.

Sokol Colloquium: January 2019

The University of Virginia School of Law is holding the 31st Sokol Colloquium on January 11-12, 2019. The event will focus on the Restatement of the Law Fourth, The Foreign Relations Law of the United States.

UVA Law's Gustave Sokol Program on Private International Law was established in 1976 under a grant from the Gustave Sokol Fund. The Sokol colloquia bring together distinguished scholars, practitioners, and government officials from the United States and abroad to discuss in detail a current topic of private international law. An earlier Sokol Colloquium, held in Charlottesville in 2012, was devoted to foreign court judgments in the U.S. legal system and served as a foundation for Chapter Eight of the Fourth Restatement.

CONFIRMED SPEAKERS OR CONTRIBUTORS INCLUDE:

Daniel Abebe, University of Chicago Law School

Sir Jack Beatson, Court of Appeal of the United Kingdom (ret.)

Anthony J. Bellia Jr., Notre Dame Law School

Curtis A. Bradley, Duke Law School

Bradford R. Clark, George Washington University Law School

Kristina Daugirdas, Michigan Law School

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Jean Galbraith, Penn Law School

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Chimène Keitner, UC Hastings College of the Law

Ralf Michaels, Duke Law School

Georg Nolte, Humboldt University of Berlin

Jide O. Nzelibe, Northwestern Pritzker School of Law

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David P. Stewart, Georgetown University Law Center

Edward T. Swaine, George Washington University Law School

Bakhtiyar Tuzmukhamedov, Diplomatic Academy of the Ministry of Foreign Affairs of the Russian Federation

Ingrid Wuerth, Vanderbilt University Law School

Project Spotlight: Principles of the Law, Policing

By Barry Friedman, Policing Project Reporter, NYU Law Jacob D. Fuchsberg Professor of Law and Affiliated Professor of Politics, and founding director of NYU Law's Policing Project

The Principles of the Law: Policing project is providing guidance to legislative bodies, courts, and policing issues where there is the most need, including where research, technology, and experience are rendering current approaches to policing obsolete. This project has already generated interest from police departments and others. We presented the first set of Principles on Use of Force at the May 2017 Annual Meeting. Those Principles were adopted at the Meeting, and we since have sent them to many people in response to inquiries.

As with all ALI projects, the Policing project benefits by the diversity of the wisdom and experience of ALI's members. Now is a great time for members to get involved. The most recent draft—on issues ranging from street encounters to police questioning to suspicionless searches—is going before the Council this month, and we have our next project meeting scheduled in April 2019. If you are not familiar with the project or this area of law, here is some essential information about the scope of the project that will provide context.

When reading a Policing Principles draft, it is vital to remember that we are *not* synthesizing the rules of constitutional law (something that even the Reporters forget at times). As we all know, constitutional law provides a floor for government conduct, but in no way limits additional regulation that police departments or government entities may impose on policing practices. Although nothing we propose in this project dips below the constitutional floor, on some occasions we exceed that floor, at least as the Constitution has been defined by the courts. When we do so, our Comment and Reporters' Notes make that clear.

More commonly, we simply are taking a different approach from that of constitutional doctrine. Police departments (and other entities that engage in policing practices) are complex bureaucracies that cannot possibly be governed in their entirety by a limited set of constitutional doctrines. Instead, what is needed are principles that address much of what constitutional law leaves untouched. To give but one example, if something is not a "search" or "seizure" within the meaning of the Fourth Amendment, there is virtually no constitutional regulation of the practice. But many of the policing technologies presently being deployed, from Automatic License Plate Readers (ALPRs) to body cameras, to facial recognition, do not constitute a "search" or "seizure" within existing doctrine, and thus are unregulated by constitutional law (or much of any law) entirely. There are signs some of this is changing, as witnessed by the Supreme Court's decision this past Term in *Carpenter v. United States*, 138 S. Ct. 2206 (2018), holding that government acquisition of long-term cell-site location tracking information is a search requiring a warrant. But even as constitutional law evolves, it never will provide a basis for the day-to-day rules that are needed to assure that officers are adequately trained to use these technologies, and that there are policies in place to address accuracy, data recording and retention, data-sharing with other agencies, and the like. The enormous value of this ALI project—which we hear from all quarters regularly, including the many police officials on our Advisers group—is the deep need for guidance on these issues.

I hope to see you at a future project meeting.

PROJECTED OVERALL TABLE OF CONTENTS

ALI members may join the Members Consultative Group for this project at *www.ali.org/projects*. The next project meeting is in April 2019.

LOS ANGELES & SAN FRANCISCO
Daily Journal
www.dailyjournal.com
FRIDAY, SEPTEMBER 14, 2018
PERSPECTIVE

Law risk: past is prologue

By Howard B. Miller

There is a new kind of risk in California law that affects the way cases should be analyzed, on appeal, in trial, through settlement considerations and mediation, and in their early evaluation.

In the last six months several decisions of the California Supreme Court have modified existing precedents and expectations. Though these cases are usually reported and analyzed within their own area, their greater significance is what they indicate about the approach to decision making of the court. We are amid a change impacting rights, opportunities, risks and expanding liabilities throughout the entire California legal culture.

Regents of the University of California v. Superior Court, 2018 DJDAR 2629 (March 22), imposed new duties on universities to protect students from harm caused by other students. *Dynamex Operations West, Inc. v. Superior Court*, 2018 DJDAR 3856 (April 30), announced a new bright-line rule that presumes workers to be employees rather than independent contractors. *Lopez v. Sony Electronics, Inc.*, 2018 DJDAR 6658 (July 5), applied an extended tolling period for claims of prenatal toxic tort injuries. *Troester v. Starbucks Corporation*, 2018 DJDAR 736 (July 26), determined the California de minimus rule did not apply to worker wage claims. *De La Torre v. Cash- Call, Inc.*, 2018 DJDAR 8022 (Aug. 13), permitted a claim by debtors that an interest rate could be unconscionable on loans over $2,500. There was no dissent from the decision in any of these cases, consistent with the remarkable cohesion the court has shown generally in its decisions.

Though each case, of course, is subject to argument on its own facts and terms, the opinions have followed a general method of decision making that included less weight to the stare decisis effect of previous California cases than for out-of-state authorities the Supreme Court agreed with, especially American Law Institute Restatements. The opinions seem to have responded to a changed generational sense of what Justice Oliver Wendell Holmes described as the dominant force in judicial decision making: "the felt necessities of the times."

All of which raises a critical question about the legal culture, judging and stare decisis: The past may be prologue, as is often said, but for us today, *which* past? The true prologue to the developing present culture is not the more recent quarter century period before 2010 of the courts of Chief Justice Malcom Lucas and Chief Justice Ronald George, but a more distant past, of which I have a poignant memory.

My introduction to California legal culture occurred with a yearlong daily commute. I was beginning a one-year clerkship with Justice Roger J. Traynor. It was before he was chief justice with its public and administrative responsibilities. We both lived in Berkeley, and Justice Traynor invited me to drive across the Bay Bridge with him to the court, then as now in the San Francisco Civic Center. And so every work day of the year morning and evening we commuted together. There were

Justice Roger J. Traynor

no cellphones, and we did not listen to the radio. For hundreds of hours, in an environment more relaxed than his chambers but no less intellectually electric, we talked about the law. On argument days it was case specific, evaluating the briefs and arguments and the lawyers who had argued cases, with advice on appellate advocacy. Other days it was reviewing the thought and court process that had gone into cases he had previously decided.

The discussion was often a mutual Socratic dialogue, in turn questioning and answering, on a subject Justice Traynor had spent his whole judicial life considering: In the context of analyzing history, precedent and current values, when was it appropriate for a supreme court to change or modify existing legal doctrine? His opinions had done so many times, notably his concurring opinion in *Escola v. Coca-Cola Bottling Company*, 26 Cal. 2d 453 (1944), that began the product liability revolution and culminated in his opinion in *Greenman v. Yuba Power Products*, 59 Cal. 2d 57 (1963); his opinion in *Perez v. Sharp*, 32 Cal. 2d 711 (1948), which to widespread criticism of the time held a ban on interracial marriage unconstitutional, 19 years before *Loving v. Virginia*, 388 U.S. 1 (1967); in *Bernhard v. Bank of America*, 19 Cal. 2d 807 (1942), which by ending the requirement of mutuality for res judicata began the creation of the modern law of claim preclusion; and in *Muskopf v. Corning Hospital District*, 55 Cal. 2d 211 (1961),which abolished the doctrine of sovereign immunity in California. All those cases were subject to criticism, some intense when they were issued. All have stood the test of time.

Governor Jerry Brown clerked for Justice Mathew Tobriner when Traynor was chief justice. Before making his initial appointment, the governor was reported by the Los Angeles Times, on February 14, 2011, to have told people he wanted his Supreme Court appointment "to be in the mold of such historic state high court justices as Roger J. Traynor and Mathew Tobriner, legally creative jurists who left strong marks on the law nationally."

Pendulums do not stop in the middle. We are in era that will seem new only to those whose experience may not have gone beyond the quarter century before 2010 and the appointment of Chief Justice Tani Cantil-Sakauye, followed by the more recent appointments by Gov. Brown. More important than each individual case, present or past, is the culture of the law in which the decision is made.

The Supreme Court, in another opinion within the last six months, has been transparent about its decision- making culture. The chief justice, writing for a unanimous court, set forth its views on stare decisis:

"'[T]he doctrine of stare decisis' is 'a fundamental jurisprudential policy that prior applicable precedent usually must be followed even though the case, if considered anew, might be decided differently by the current justices.' (*Moradi-Shalal v. Fireman's Fund Ins. Companies* (1988) 46 Cal.3d 287, 296.) But the policy is just that — a policy — and it admits of exceptions in rare and appropriate cases. Factors that have contributed to our reconsideration of precedent include: 'a ... tide of critical or contrary authority from other jurisdictions' (*Freeman & Mills, Inc. v. Belcher Oil Co.* (1995) 11 Cal.4th 85, 100); our precedent's 'divergence from the path followed by the Restatements' (*Riverisland Cold Storage, Inc. v. Fresno-Madera Production Credit Assn.* (2013) 55 Cal.4th 1169, 1179); and our concern that no 'satisfactory rationalization has been advanced' for the decision at issue (*Bernhard v. Bank of America* (1942) 19 Cal.2d 807, 812 [overruling mutuality requirement for issue preclusion])." *Samara v. Matar*, 2018 DJDAR 6181 (June 25).

The chief justice's statement is a gift to California lawyers. It is a road map for understanding the Supreme Court, for appellate briefs and advocacy, and for amicus briefs as well.

Counsel need to consider more than existing California case authority. Research must be done on other jurisdictions. If a majority, or a significant number, or respected courts, disagree with the California rule then those cases should be analyzed, and if they help a position, argued.

The relevant ALI Restatements need to be consulted. This court has shown great respect for the Restatements as a source of guidance. If the Restatement rule, though contrary to California law, helps a position, it should be argued. If a position is contrary to existing California cases, counsel must analyze whether there has been a "satisfactory rationalization" advanced for the California rule. The citation by the chief justice to the *Bernhard* opinion for this is a clear connection to the Traynor court culture.

The chief justice also wrote in *Samara*, "We are reluctant to overrule precedent when '[d] oubtless many people' have entered into transactions in reliance upon that precedent." How that concern will be otherwise applied, however, needs to be considered in the context of the court's analyses in *Dynamex* decided eight weeks earlier, and *CashCall* decided seven weeks later. Though the court does reexamine previous conduct and holdings, what is decisive are its consideration of first principles and the "felt necessities of the times."

For the California Supreme Court, the last six months of decisions are a culmination, not an aberration. California legal culture is changing. The change will affect all areas of the law, all analysis of law risk, and all stages of litigation from early evaluation through trial and appellate argument. We need to understand the new culture, and bring to the task thoughtfulness, discipline, and a constant search for fairness, reason and justice.

Howard B. Miller *is a JAMS mediator and arbitrator. He is a past president of the State Bar of California and a former professor of law at the USC Gould School of Law. He began his career as law clerk to Justice Roger J. Traynor of the California Supreme Court. He can be reached at hmiller@jamsadr.com.*


MILLER

Children and the Law *October 5 in Philadelphia, PA*

Project participants discussed Preliminary Draft No. 5, which contained portions of Children in Families, Children in Schools, and Children in the Justice System. Sections of the project already reviewed by participants are being considered at the October 2018 Council meeting in Council Draft No. 3. Both drafts are available to members on the project page of the ALI website.

Children and the Law participants gathered in Philadelphia to discuss the current project draft.

Kristin Nicole Henning of Georgetown University Law Center comments on the draft.

ALI Establishes Fund in Memory of Geoffrey C. Hazard, Jr.

The American Law Institute is pleased to announce the creation of a special fund established in memory of longtime ALI Director Geoffrey C. Hazard, Jr., who died in January 2018.

The Geoffrey C. Hazard, Jr., Fund, which will help to carry on Professor Hazard's commitment to the Institute's mission, was initiated through a major gift provided by ALI Council Emeritus member Mary Kay Kane, a professor emeritus at the University of California Hastings College of the Law. Professor Kane also served as Dean from 1993 to 2006 and as Chancellor from 2000 to 2006. She is a recognized expert in the field of federal civil procedure.

Professor Hazard and Professor Kane worked together in many capacities; Geoff was a friend and a UC Hastings colleague for the last decade of his academic career.

"I established this fund to recognize his exemplary directorship of the ALI during his 15 years in that position," Professor Kane said of Professor Hazard. "He oversaw numerous traditional Restatement projects, guided less traditional projects, such as the Complex Litigation Project on which I was a Co-Reporter, and moved the Institute into embracing international projects with global participants. I had the great privilege to observe his efforts first-hand as a Reporter, a Council member, and as an Adviser during his last stint as a Reporter for the Transnational Rules Project. In all these settings he was simply masterful."

The fund will provide ALI Directors the necessary resources to execute special initiatives that will further the Institute's important and influential work of clarifying and improving the law for the better administration of justice.

"Geoff did not suffer fools gladly, but he supported his Reporters and their work with grace, skillful political savvy, and carefully crafted suggestions to find common ground among competing ideas," Professor Kane said. "Most important, he believed passionately in the Institute's work. I know he would be most supportive of the idea of providing a discretionary source of funds for his successor Directors to aid them in continuing to meet the challenges and opportunities ahead, and thus I wanted to recognize his legacy to the Institute during this 100th Anniversary campaign in a way that would allow him still to be connected to the ongoing work of the ALI."

Professor Hazard was a graduate of Swarthmore College and Columbia Law School, where he was Reviews Editor of the *Columbia Law Review*. He began his career in private practice in Oregon, serving also as deputy legislative counsel for the State of Oregon and executive secretary of the Oregon Interim Committee on Judicial Administration. Professor Hazard's teaching career spanned almost six decades, beginning at the University of California, Berkeley School of Law, in 1958, then at the University of Chicago Law School, Yale Law School, the University of Pennsylvania Law School, and the University of California, Hastings College of the Law.

While at University of Chicago Law School, Professor Hazard was also executive director of the American Bar Foundation. During his tenure at Yale, he served variously as associate, acting, and deputy dean of the Yale School of Organization and Management. He also was Reporter for the American Bar Association Model Rules of Professional Conduct (promulgated in 1983) and draftsman-consultant for the ABA Model Code of Judicial Conduct

(promulgated in 1972). He served since 1994 as a member and a consultant on the Standing Committee on Rules of Practice and Procedure, Judicial Conference of the United States. In recent years, he advised the European Law Institute on its proposal to develop European rules of civil procedure from the ALI/UNIDROIT Principles of Transnational Civil Procedure. Notwithstanding his many professional interests and responsibilities, Professor Hazard found time to serve as a consultant and expert witness on legal ethics, including legal malpractice, and to write. He was coauthor of a fundamental treatise and a casebook on civil procedure and also on professional ethics, as well as the author or coauthor of many other books and articles.

An ALI member for 52 years, Professor Hazard served for nine years as the Reporter for the Restatement Second of Judgments, published in 1982. He succeeded Herbert Wechsler as ALI's fourth Director in 1984, skillfully guiding the ALI's already-begun Principles of Corporate Governance and Restatement Third of Foreign Relations Law to completion. Many new ALI projects were begun under his leadership, including Restatement Third works on Agency, The Law Governing Lawyers, Property, Restitution, Suretyship, Torts, Trusts, and Unfair Competition; and Principles of the Law projects on Family Dissolution, Transnational Civil Procedure, and Transnational Insolvency. In 1999, after stepping down as Director, Professor Hazard was elected to ALI's Council and served until he took emeritus status in August 2015. He also was Co-Reporter for the ALI/UNIDROIT Principles of

Special Gifts to the Institute

BEQUEST SOCIETY: GEOFFREY C. HAZARD, JR.

The Institute expresses its deep appreciation of Director Emeritus Geoffrey C. Hazard, Jr., who was 88 at the time of his passing in January 2018. Professor Hazard chose to make the Institute part of his legacy by generously including ALI in his estate plans to ensure that our work continues without compromise. Professor Hazard's gift will have a significant impact in furthering our law-reform work.

THE GEOFFREY C. HAZARD, JR., FUND

We are pleased to recognize the following individuals who made gifts in memory of Geoffrey C. Hazard, Jr., which, in addition to Professor Hazard's bequest, have been allocated to the endowment fund established by Professor Kane in his honor:

Anonymous
Carolyn F. Corwin
Deborah A. DeMott
Michael D. Green
Conrad K. Harper
Edwin E. Huddleson
Mary Kay Kane
William Charles Powers, Jr.
Michael Traynor

THE DANIEL J. MELTZER FUND

We would like to thank the following individuals who made gifts to the Daniel J. Meltzer Fund, which was recently established by David F. Levi to help carry on Professor Meltzer's dedication to advancing the Institute's mission:

Lincoln Caplan and Susan L. Carney
Michael D. Green
Conrad K. Harper
Carol F. Lee
David F. Levi
Lance Liebman
Myles V. Lynk

The Institute is proud to receive gifts that honor or memorialize dear friends and loved ones.

For more information about establishing an endowment fund or to contribute to the Geoffrey C. Hazard, Jr., or Daniel J. Meltzer Funds, please contact Beth Goldstein at 215-243-1666 or bgoldstein@ali.org.

Transnational Civil Procedure (2006), which has become a path-breaking model of civil procedure for international commercial disputes.

"We are very thankful that Mary Kay has chosen to honor Geoff's memory and leadership of the Institute by establishing this fund," said ALI Deputy Director Stephanie A. Middleton. "He was one of the most brilliant legal scholars and teachers of his generation, and he played a major role in ALI as an institution, accepting significant burdens as the Director, and kept the Institute on a steady course as the greatest private law-reform organization in the world."

The Geoffrey C. Hazard, Jr., Fund is currently accepting initial gifts from friends, colleagues, and anyone else inspired by Professor Hazard's extraordinary dedication to the law. For more information or to contribute to the fund, please contact Beth Goldstein, ALI Membership Director, at 215-243-1666 or bgoldstein@ali.org.

GET YOUR ALI TIES AND SCARVES

Long-time members of ALI are undoubtedly familiar with the contributions of Geoffrey C. Hazard, Jr. But, you may not know that when he ended his tenure as Director, each Council member unexpectedly received a box containing a handmade tie or scarf.

Many members who have noticed these original ties and scarves have inquired about how they could purchase one. Unfortunately, Professor Hazard's designs were one of a kind.

In response to these member requests, ALI has reissued ties and scarves with an updated design. These limited-edition items are available for purchase on the ALI website. The accessories are handcrafted and sold at cost.

Visit www.ali.org/store to place your order.

Fables In Law *By D. Brock Hornby*

U.S. District Judge D. Brock Hornby of the District of Maine is an Emeritus member of the ALI Council. He wrote these Fables In Law for publication in The Green Bag. *They are reprinted here by permission.*

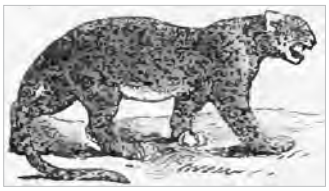
Chapter 5, Legal Lessons From Field, Forest, and Glen

WHAT THE BEAVER KNEW AND WHAT THE DONKEY DID

Professor Beaver had taught and written about Evidence law for many years. Some of his stock lectures became so famous that they were used regularly in continuing legal education for advocates in the Forest Glen and elsewhere. His lectures were very popular. Beaver came to believe that his academic knowledge would make him an excellent trial advocate, and he took on some high-profile cases. But his success rate at trial was abysmal because, despite his academic knowledge, he was unable to engage jurors.

At the same time, the renowned Donkey of Barnyard fame had a stellar record of winning difficult high-profile cases. The Magpies always covered his successes even though he was from a different jurisdiction. As Donkey aged and became tired of the pressures and stresses of trial advocacy, he cut back the number of cases he took and obtained a position as adjunct law professor at the law school where Beaver taught. Although the Gophers (law students) loved to hear Donkey's self-aggrandizing tales about his courtroom exploits, it turned out that he was not adept at conveying information in a way that was organized and easy to remember and apply. So although Donkey was popular, his Gopher students did not learn much beyond his stories.

Moral: Knowledge of a subject does not guarantee the ability to use it successfully in practice; conversely, those who possess practical skills are not necessarily able to convert their natural abilities into lessons that others can learn and apply.



THE COUGAR AND THE WOLF SCORCH THE FOREST(OR AT LEAST THEIR CLIENTS)

Advocates in the Forest Glen handled most of their lawsuits collegially, kept them simple, avoided running up unnecessary expenses in preparing for trial, and obtained an early trial date from Owl. But a lawsuit over the effects of acid rain on the forest and its denizens involved such high stakes that one side brought in WolfPack and the other side brought in Cougar Group, expensive advocates from outside the Glen, to prosecute and defend the case. WolfPack and Cougar Group had never practiced in the Forest Glen previously. They fought over every possible issue, from what documents they should disclose, to who the experts should be. They refused to agree on even modest extensions of time, filed multitudinous motions, took depositions of everyone they could think of, accused each other of professional malfeasance, and generally made Owl's existence painful. The process delayed the proceedings and cost their clients huge amounts of money.

Moral: Advocates who regularly confront each other in disputes generally learn to behave with civility and collegiality, but advocates who work in a larger and more anonymous environment tend to misbehave and try to take advantage of each other.

THE OWL'S NEW RITUAL

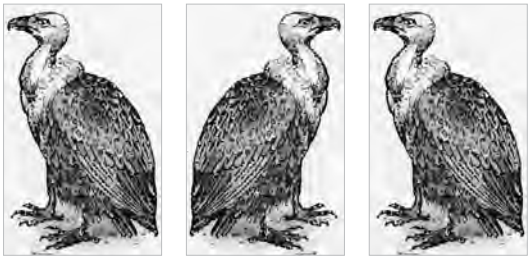
When Owl was still a new jurist, Fox and Snake asked her to conduct a settlement conference of a civil dispute. They both provided confidential settlement memoranda to Owl in advance, and came to the conference with their clients. Owl prepared thoroughly, studied all the case documents, read the confidential memoranda, and researched what Forest Glen juries had awarded in similar cases previously. As a result, she believed that she knew exactly where the case would/should settle. She told the parties her view at the outset of the conference and received nothing but objection and argument from clients and advocates on both sides. After almost a full day of wrangling, Owl did settle the case in the general neighborhood of what she had originally predicted, but everyone was unhappy.

Thereafter, Owl decided not to reveal at the outset her views about where a case should settle, but instead invite the parties and their advocates to explain

their positions and their case values first, and then gradually inject her views into the ensuing discussion. The parties and their advocates were much more content with their resulting settlements.

Moral: There is a ritual to bringing opposing parties to agreement. It is important that clients hear their advocates make their best arguments and also hear their opponents' best arguments to produce a more realistic risk assessment; advocates want their clients to see how vigorously they have advanced their interests before urging a compromise.

THE VULTURES' FACTORS



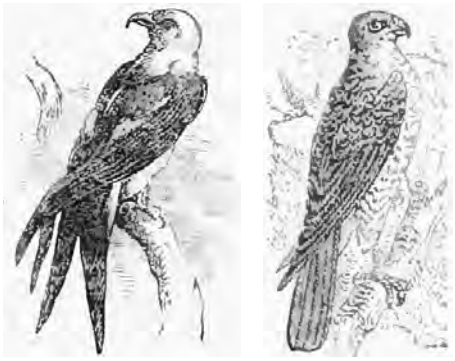
In explaining a decision, the Three Vultures sometimes enumerated several factors that they deemed worthy of consideration in resolving a particular legal issue, even though one or two of them alone should have been determinative of the outcome. As a result, in similar controversies the Glen advocates and Owl felt it necessary to collect and consider evidence on all the Vulture-listed factors, and often they were unable to predict the outcome because of the number of factors and the different directions in which they pointed. Those cases therefore became far more complicated and time-consuming to resolve, clients had to pay more, and other cases before the trial tribunals got delayed.

Moral: Decision-making rules devised to achieve the best possible justice in an individual case may, if they are too complex, end up reducing and delaying justice at large.

THE WISE FOX AND HER PRESENTATION ASSISTANT

Woodchuck was challenged when it came to exhibits. He could never find the right one. Early in his career, he used large blowups on poster-board, but he routinely lost track of them, and spent measurable time before the Forest Glen jurors looking for the correct one. With electronic evidence presenters, he never became comfortable with the zoom feature or the highlighting function that a witness could use, or with a laptop for maintaining all his exhibits electronically. As a result, the jurors were distracted in their ability to follow Woodchuck's case. Fox was equally challenged by exhibits and electronics. But she realized early that she needed help, and always brought an assistant who could find the exhibits, highlight electronically via a laptop, and generally make the electronic evidence presenter work. As a result, Fox's presentations were much easier for the jurors to understand.

Moral: It is a serious error for an advocate to ignore the physical mechanics of presenting the case.



THE SECURITY OF THE HAWKS

The Hawks were charged with maintaining security at the Forest Glen tribunal, maintaining custody of prisoners, protecting witnesses, and ensuring the safety of the arbiter and the jurors. They were professional and highly respected. They prided themselves on keeping abreast of developments in their profession everywhere. As the Hawks learned of violent attacks on trial tribunals in other jurisdictions, they urged increasingly elaborate security precautions in the Forest Glen to reduce the risk there to witnesses, tribunal personnel, and attendees. It was difficult for Owl and her colleagues to resist any measure that promised safety, and they therefore acquiesced. But as a result of these new security measures, the advocates could no longer easily approach Owl, and a separation grew between the arbiter and the advocates. Moreover, the security apparatus that Glen denizens had to penetrate in order to observe proceedings deterred them from attending court as observers. Despite the relative calmness of the Forest Glen, Owl herself grew more apprehensive because of the information about events elsewhere. As a result, Owl's tribunal grew more and more remote from both the advocates and the citizens.

Moral: Ensuring physical security for a tribunal sometimes carries a negative civic and social cost.

Notes About Members and Colleagues

In an "Insights" piece for *Bloomberg Law*, **Kenneth S. Abraham** of UVA School of Law and **Robert L. Rabin** of Stanford Law School examine the current system for handling accidents involving driverless vehicles.

Susan Frelich Appleton of Washington University in St. Louis School of Law was awarded the Michael Cunningham Prize and republication in the *Dukeminier Awards Journal*, recognizing the best legal scholarship on sexual orientation and gender identity issues of 2017, for her article "*Obergefell*'s Liberties: All in the Family." The article was originally published in *Ohio State Law Journal*.

Scott Bales of the Arizona Supreme Court has received from the American Judges Association the 2018 Chief Justice Richard W. Holmes Award of Merit, which recognizes "a judge for outstanding contributions to the judiciary." He also has been selected as the 2018 recipient of the Ernest C. Friesen Award of Excellence, presented by the Justice Management Institute, recognizing his leadership and achievements in enhancing and improving the administration of justice.

Complimentary CLE for All Members

Through the LawPass portal (**CLE for Members** on the *www.ali.org* Members page), ALI members enjoy complimentary access to a vast database of ALI CLE's premier professional development content, including:

- Webcasts
- On-demand video programs
- On-demand audio/MP3 downloads
- On-line course materials
- Articles and forms

In addition to having access to free online courses, ALI members may attend ALI CLE multi-day, in-person courses at a discounted rate of $699 (courses regularly priced at $1,299-$1,899).

To take advantage of this member benefit, visit *www.ali-cle.org* and use coupon code **ALIMCLE**. Members may share this discount with friends and colleagues.

AVAILABLE ON-DEMAND NOW:

In collaboration with the National Association of Corporate Directors, ALI CLE recently produced *Best Practices for Board Members: Mitigating Risk and Preventing Workplace Issues*.

In "Should Judges and Juries Look for Remorse?," a segment from NPR's radio show *To the Best of Our Knowledge*, **Susan A. Bandes** of DePaul University College of Law shared her opinions on the topic of remorse in the courtroom.

William R. Bay of Thompson Coburn has been elected chair of the ABA House of Delegates. The two-year post of chair is the second-highest office in the ABA.

Jeffrey Beaver of Miller Nash Graham & Dunn received the Lifetime Achievement Award from the Loren Miller Bar Association.

The July/August 2018 edition of the *New York State Bar Journal* featured an article by **Joseph W. Bellacosa** titled "Rockefeller's 'Vaulting Ambition': Attica and The Drug Laws. A Rueful Judicial Perspective."

William E. Butler of Penn State Dickinson Law – Carlisle received an honorary doctorate of laws at Uppsala University (Sweden) and recently published the Second Edition of *Russian Law and Legal Institutions* (Wildy, Simmonds & Hill 2018).

Ronald A. Cass of Cass & Associates and Chairman of the Center for the Rule of Law, **Lucas Guttentag** of Stanford and Yale Law Schools, **Olatunde Johnson** of Columbia Law School, **Cristina M. Rodriguez** of Yale Law School, and **Christopher S. Yoo** of University of Pennsylvania Law School will participate in the *University of Pennsylvania Law Review*'s symposium titled "The History, Theory, and Practice of Administrative Constitutionalism" on October 19-20.

Erwin Chemerinsky of UC Berkeley School of Law, **Jesse H. Choper** of UC Berkeley School of Law, **Richard L. Hasen** of UC Irvine School of Law, **Goodwin Liu** of the Supreme Court of California, **Alexandra Natapoff** of UC Irvine School of Law, and **Nina Totenberg** of National Public Radio, participated in the 8th Annual Supreme Court Term in Review, hosted by UC Irvine School of Law.

The Litigation Daily profiled **Evan R. Chesler** of Cravath, including interviewing him about his first SCOTUS appearance, which ended in victory for his client, American Express.

Ronald Chester of Boston College Law School gave a talk on October 21, at the Litchfield Law School, the nation's first law school, which closed in 1833, but is maintained as a historical site and museum. His subject, "The Legal Philosophy of Tapping Reeve," examined the thought of the law school's founder. A shortened version of the talk will appear in the Litchfield Historical Society's forthcoming manual celebrating Litchfield Law School and the "Golden Age of Litchfield" in the early 19th century.

Donald Earl Childress III of Pepperdine University School of Law will be serving as the Counselor on International Law to the Legal Adviser at the U.S. State Department for the 2018-2019 year. On August 30, Professor Childress argued before the International Court of Justice in The Hague, Netherlands.

John S. Cooke has been appointed the eleventh director of the Federal Judicial Center.

Deborah W. Denno of Fordham Law School wrote an article titled "Will the Death Penalty Solve America's Opioid Crisis" for *Fordham Law News*.

Norman L. Epstein of the California Second District Court of Appeal retired in August 2018, after 45 years of judicial service.

Barry Friedman of NYU School of Law received the ABA Silver Gavel Award for his book *Unwarranted: Policing Without Permission*.

In an article for *Newsweek*, **Risa L. Goluboff** of UVA School of Law shared her thoughts on who could be the new swing vote in the wake of U.S. Supreme Court Justice Anthony Kennedy's retirement.

Associate Justice Elena Kagan and John F. Manning
Credit: Lorin Granger

In September, U.S. Supreme Court Associate Justice **Elena Kagan** sat down with Harvard Law School dean **John F. Manning** and the university's new law students to share her advice, anecdotes, and personal wisdom on how to best navigate law school.

Nelly Khouzam of the Florida Second District Court of Appeal was sworn in as Treasurer of the Florida American Board of Trial Advocates. She will become president of the organization in 2020.

Linda A. Klein of Baker Donelson was named the *Daily Report*'s attorney of the year during the Georgia Legal Awards.

Roberta Liebenberg of Fine Kaplan and Black has been elected to the national Board of Directors of YWCA USA. It is one of the oldest and largest women's organizations in the country, serving over two million women, girls, and their families.

David H. Marion of White and Williams was named one of *The Philadelphia Inquirer*'s 2018 Influencers of Law in the area of Litigation and Dispute.

Margaret H. Marshall of Choate was presented the Yale Medal for her years of dedicated service to Yale University.

Law360 sat down with **Michele C. Mayes** of The New York Public Library to discuss her career, from serving in the U.S. Department of Justice as an assistant U.S. attorney, to her current work serving as vice president, general counsel and secretary for NYPL.

Margaret M. McKeown of the U.S. Court of Appeals for the Ninth Circuit delivered the keynote address at the Intellectual Property Society of Australia and New Zealand in Queenstown, New Zealand. Her topic was "Censorship in the Guise of

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In Memoriam: Ian Fletcher

Ian Fletcher of University College London, Faculty of Laws passed away on July 25, at the age of 74. A member of ALI since 1997, Professor Fletcher served as Co-Reporter with Bob Wessels, emeritus professor of international insolvency law at the University of Leiden in the Netherlands, for Transnational Insolvency: Global Principles for Cooperation in International Insolvency Cases, a joint project of ALI and the International Insolvency Institute. The project culminated in a Report to ALI (2012) whose recommendations have been influential in Europe. The project's purpose was to adapt the principles that ALI had developed in its earlier 2003 insolvency project, which dealt with insolvency issues among the NAFTA countries, for use throughout the world.

"Ian has always impressed me with non-political views, being pragmatic, embracing integrity and standing for independent thinking," said Dr. Bob Wessels. "It was a joy to know and to work with someone who was so honest both as a person and intellectually. It was a great tragic for him, his wife Letitia and their sons Daniel and Julian, when he slowly lost his strength due to a malignant condition. I extend my deep sympathies with them. Ian left his mark on the insolvency world. I will miss him and always remember him."

Professor Fletcher also served as an Adviser, from 1999 to 2003, for ALI's earlier insolvency project, Transnational Insolvency: Cooperation Among the NAFTA Countries, specifically on the volume subtitled "International Statement of United States Bankruptcy Law." (The project's other three volumes were a volume of general principles of cooperation among the NAFTA countries, a statement of Mexican bankruptcy law, and a statement of Canadian bankruptcy law. They were published by Juris Publishing in 2003.)

In 2002, Professor Fletcher was elected an International Fellow of the American College of Bankruptcy. He was also a member of International Association of Restructuring, Insolvency & Bankruptcy Professionals (INSOL) International and was the founding Chairman of its Academics' Group from 1994 to 2015. Additionally, he served as a member of the Insolvency Lawyers' Association, INSOL Europe (formerly the European Insolvency Practitioners' Association) and the International Insolvency Institute. He was an overseas member of the United States National Bankruptcy Conference from 1995 to 2001, and served as a member of the Task Force formed by the World Bank to develop principles and guidelines for effective insolvency systems.

NOTES CONTINUED FROM PAGE 17

Intellectual Property: Harmonizing Copyright, Trademark and Free Speech."

In a podcast from the University of Virginia, **John Norton Moore** of UVA School of Law offers his analysis on the complex nature of war. This talk was held as part of the 26th National Security Law Institute hosted by the Center for National Security Law.

Juliet M. Moringiello has been named Associate Dean for Research and Faculty Development of Widener University Commonwealth Law School.

Judith Resnik of Yale Law School received an honorary doctorate of laws from UCL Faculty of Laws.

Judith Resnik | Credit: Robert Chadwick

Richard L. Revesz of NYU School of Law published an article in *The Regulatory Review* titled, "Challenging the Anti-Regulatory Narrative."

Marshall S. Shapo of Northwestern University School of Law was the recipient of an honorary degree of doctor of humane letters from the University of Miami.

Kenneth W. Simons of UC Irvine School of Law was named the recipient of the 2019 William L. Prosser Award by the Association of American Law Schools (AALS) Section on Torts and Compensation Systems. Professor Simons will receive the award at the AALS Annual Meeting in January 2019.

Robert Allen Stein of Gray Plant Mooty was presented with the Albert Nelson Marquis Lifetime Achievement Award by *Marquis Who's Who* for his achievements, leadership qualities, and the credentials and successes he has accrued in his field.

Paul B. Stephan, Coordinating Reporter for the Restatement Fourth of the Foreign Relations Law of the United States, shared his experience working on the Restatement project in a piece for UVA School of Law.

Bryan Stevenson of the Equal Justice Initiative in Montgomery, Alabama, was presented with the American Bar Association's highest honor, the ABA Medal, at its Annual Meeting.

Jeffrey S. Sutton of the U.S. Court of Appeals for the Sixth Circuit published a new book, *51 Imperfect Solutions: States and the Making of American Constitutional Law*.

Peter Urbanowicz was appointed to serve as Chief of Staff for the U.S. Department of Health and Human Services following the Senate confirmation of Alex M. Azar II as HHS Secretary. Prior to his appointment Mr. Urbanowicz was a Managing Director with Alvarez & Marsal. During the administration of President George W. Bush, he served as Principal Deputy General Counsel at HHS.

Palmer Gene Vance II of Stoll Keenon Ogden is the 2018-2019 Chair of the ABA Section of Litigation. With nearly 50,000 litigators, judges, and arbitrators, it is the largest section of the ABA.

Former FBI and CIA director **William H. Webster** wrote an op-ed piece for *The New York Times*, titled "I Led the F.B.I. Mueller Is Just Doing His Job."

Christiane Wendehorst has been appointed co-chair of the German Data Ethics Committee. The Committee is a newly established body whose mission is to advise the German government and develop ethical guidelines, along with suggestions for their implementation, in areas such as artificial intelligence, algorithmic decision making, and the data economy.

Nicholas J. Wittner of MSU College of Law was appointed to lead the university's new Office of Enterprise Risk Management, Ethics and Compliance. Professor Wittner is the office's acting director and the university's chief compliance officer.

Donald N. Zillman of University of Maine Law School was the lead editor and an author of *Innovation in Energy Law and Technology* (Oxford University Press 2018) (with Godden, Roggenkamp, and Paddock) and *Living the World War—Volume Two* (Vandeplas Publishing 2018) (with Elizabeth Elsbach).

If you would like to share any recent events or publications in the next ALI newsletter, please email us at *communications@ali.org*.

In Memoriam

ELECTED MEMBERS

Ian F. Fletcher, London, England, **Rex Robert Perschbacher**, Davis, CA; **Samuel C. Ullman**, Miami, FL

LIFE MEMBERS

David Campion Acheson, Washington, DC; **Arthur R. Albrecht**, San Francisco, CA; **Verner F. Chaffin**, Athens, GA; **Sheldon S. Cohen**, Washington, DC; **John P. Fullman**, Philadelphia, PA; **Seymour Glanzer**, Washington, DC; **Edwin J. Jacob**, New York, NY; **Henry L. King**, New York, NY; **Howard R. Sachs**, Chestertown, MD; **Stephen M. Shapiro**, Chicago, IL; **Robert Whitman**, Hartford, CT

We Changed Our Look

This month, in an effort to share more information about our happenings, we are launching a new homepage design at *www.ali.org*. Access to membership information, including the membership dashboard, project drafts, and meeting information, remains unchanged.

New Members Elected

On July 19, the Council elected the following 35 persons.

Kerry Abrams, Durham, NC
Jonathan H. Adler, Cleveland, OH
Amy Bach, San Francisco, CA
Thomas A. Balmer, Salem, OR
Mario Barnes, Seattle, WA
Theodore J. Boutrous, Jr., Los Angeles, CA
Maxine A. Burkett, Honolulu, HI
Gregory P. Butrus, Birmingham, AL
Paul D. Clement, Washington, DC
Brian M. Hoffstadt, Los Angeles, CA
Brian Anthony Jackson, Baton Rouge, LA
Peter A. Joy, St. Louis, MO
David J. Kessler, New York, NY
Beth J. Kushner, Milwaukee, WI
Glynn S. Lunney, Jr., Fort Worth, TX
Timothy D. Lytton, Atlanta, GA
John F. Manning, Cambridge, MA
Steven L. Mayer, San Francisco, CA
Carlos Eduardo Mendoza, Orlando, FL
Marjorie A. Meyers, Houston, TX
Erin Ann O'Hara O'Connor, Tallahassee, FL
Frank A. Pasquale, Baltimore, MD
Benita Y. Pearson, Youngstown, OH
D. Theodore Rave, Houston, TX
Austin James Riter, Salt Lake City, UT
James J. Sandman, Washington, DC
Christopher H. Schroeder, Durham, NC
Sudha Narayana Setty, Springfield, MA
Neil S. Siegel, Durham, NC
Morris Silberman, Tampa, FL
Amy J. St. Eve, Chicago, IL
Keith A. Swisher, Tucson, AZ
Amanda L. Tyler, Berkeley, CA
Francisco Valdes, Miami, FL
Lawrence J. Vilardo, Buffalo, NY

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.

2018

October 18-19
Council Meeting - October 2018
New York, NY

October 25
Principles of the Law, Compliance, Enforcement, and Risk Management for Corporations, Nonprofits, and Other Organizations
Philadelphia, PA

October 26
Principles for a Data Economy
Philadelphia, PA

November 2
Principles of the Law, Data Privacy
Philadelphia, PA

November 8
Restatement of the Law, The Law of American Indians
New York, NY

November 9
Restatement of the Law Third, Conflict of Laws
Philadelphia, PA

November 15-16
Principles of the Law, Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities
New York, NY

2019

January 17-18
Council Meeting - January 2019
Philadelphia, PA

March 7-8
Restatement of the Law, Copyright
Philadelphia, PA

March 29
Principles of the Law, Government Ethics
Philadelphia, PA

April 4
Principles of the Law, Policing
Philadelphia, PA

May 3
Restatement of the Law Third, Torts: Intentional Torts to Persons
Philadelphia, PA

May 20-22
96th Annual Meeting
Washington, DC

(ISSN 0164-5757)
THE AMERICAN LAW INSTITUTE
4025 CHESTNUT STREET
PHILADELPHIA, PA 19104-3099

When Was the Last Time You Heard From ALI?

IT IS IMPORTANT TO ALL OF US AT ALI THAT WE STAY IN TOUCH WITH OUR MEMBERS AND PROJECT PARTICIPANTS. OUR PRIMARY METHOD OF DOING SO IS EMAIL.

You should be receiving emails about our project meetings, draft notifications, administrative notifications, and other news items of interest.

To ensure that you receive our electronic communications, please add our domain (***ali.org***) to your spam filter's whitelist, also called the approved or safe-sender list. Doing so will ensure proper delivery of emails to your inbox. Because all spam filters are different, you may need to contact your technology team or service provider helpdesk for assistance in accessing your spam settings.

DID YOUR EMAIL ADDRESS CHANGE?
If your email address changed recently, please send us your new one by updating your member profile at www.ali.org.