

## ALI Council Approves Seven Project Drafts at October Meeting

During its meeting in New York City on October 17 and 18, the ALI Council reviewed and approved drafts or portions of drafts for seven Institute projects. All approvals are subject to the discussion at the meeting and to the usual prerogative to make nonsubstantive editorial improvements.



Ivan K. Fong of 3M Co.  
(Children and the Law session)

**Children and the Law:** Reporter Elizabeth S. Scott and Associate Reporters Emily Buss, Solangel Maldonado, and David D. Meyer presented Council Draft No. 4. The Council approved § 2.22 from Chapter 2, State Intervention for Abuse and Neglect; § 4.10 from Chapter 4, Emancipation of Minors; §§ 8.10 and 8.11 from Chapter 8, Student Speech Rights; and §§ 10.10 and 10.20 from Chapter 10, School Searches, subject to the Reporters working with an ad hoc group of Council members to revise §§ 8.10 and 8.11 and to confirm that the revised material is consistent with the discussion at the Council meeting.

The Reporters also will revise §§ 9.10 and 9.20 from Chapter 9, Religion in Public Schools, and submit the revised versions at a future meeting.



Richard L. Revesz and Troy A. McKenzie of NYU School of Law  
(Children and the Law session)

**Compliance, Risk Management, and Enforcement:** Council Draft No. 3 was submitted by Reporter Geoffrey P. Miller and Associate Reporters Jennifer H. Arlen and Claire A. Hill. The Council approved §§ 5.09 and 5.18-5.36 of

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THE DIRECTOR'S LETTER BY  
RICHARD L. REVESZ

## When Legislatures and Agencies Rely on Restatements of the Law

The ALI has been keeping tabs on judicial citations to Restatements of the Law since the early days. At the 1937 Annual Meeting, for instance, Herbert Goodrich reported that as of that time, “there were 459 citations by the Federal Courts, [and] 3023 by the state courts, making a total of 3482 court citations.”

Today, our Institute staff carefully tracks and categorizes each judicial citation to a Restatement. The numbers are impressive—as of July 2019, there were more than 210,000 judicial citations to the Restatements. Judge Goodrich, I am sure, would be proud.

We focus on judicial citations because Restatements are primarily addressed to courts and are drafted from the perspective of a common-law judge. Information about judicial references to Restatements helps us to gauge the value of our work to judges, as well as its influence on the continuing development of American common law. Citations are an easy way to mark the influence or use of our work product; we also know that the Restatements and other projects are frequently used by judges and their law clerks to further understanding even when there is no occasion to cite specific language or Sections.

But other institutions, particularly legislatures and administrative agencies, find value in our Restatements as well. A survey of some examples underscores the wide-ranging and less-well-understood impact of the ALI's work.

Perhaps most importantly, there are instances in which legislatures have codified a Restatement rule directly into a statute. Congress notably did so when it passed the

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## THE DIRECTOR'S LETTER CONTINUED FROM PAGE 1

National Childhood Vaccine Injury Act of 1986, which contains a section modeled on Comment *k* to § 402A of the Restatement Second, Torts. This Comment states that a seller should not be held strictly liable for harm caused by “unavoidably unsafe products,” such as certain vaccines, and the Act’s legislative history makes clear that the statute was crafted to “set[] forth the principle contained in Comment *k*.”

At the state level, I previously have written about the influence of the Restatement Third, Trusts, on state codification of the “prudent investor rule.” The ALI’s publication of this Restatement in 1992 ushered in a wave of state legislative change, and by 2006 every state had enacted law that aligned with the position of the Restatement. In some of these states, this significant shift in the legal regime was accomplished through passage of the Uniform Prudent Investor Act, which itself had been influenced by the Restatement. Similarly, the Uniform Powers of Appointment Act, which has been enacted by nine states, “draws heavily” on the Restatement Third, Property (Wills and Other Donative Transfers).

In other cases, Restatements have influenced the legislative text. For example, the House Report accompanying the Foreign Sovereign Immunities Act of 1976 indicates which provisions are consistent with the Restatement Second, Foreign Relations Law of the United States. Restatements have played similar roles at the state level. For example, this year Nevada enacted legislation strengthening its requirements for certain professionals to report suspected child abuse or neglect. One subsection of the law pertains to the duties of attorneys; in crafting this provision, the Nevada legislature considered the Nevada Rules of Professional Conduct, which generally prohibit an attorney from revealing confidential client information, except “to the extent the attorney reasonably believes necessary to prevent a criminal act that is likely to result in reasonably certain death or substantial bodily harm.” The legislative history shows that in interpreting “substantial bodily harm,” lawmakers found useful the discussion in Comment *c* to § 66 of the Restatement Third, The Law Governing Lawyers, which explains that “serious bodily harm” includes the consequences of child sex abuse. Drawing on this Comment for support, Nevada law now provides that attorneys are required to report suspected abuse or neglect “[t]o the extent the attorney reasonably believes necessary to prevent the further sex trafficking or sexual abuse of the child.”

Administrative agencies likewise rely on Restatements for a wide variety of purposes. One of these is to draw on ALI definitions of key terms. A prominent example is the definition of “trade secret” from the first Restatement of Torts, which appears in Comment *b* to § 757. This definition has been adopted in rules promulgated by several federal agencies, including the Occupational Safety and Health Administration, the Environmental Protection Agency, and the Mine Safety and Health Administration. Regulations in four states—Arkansas, Ohio, Texas, and Washington—similarly incorporate or reference Comment *b*’s definition of “trade secret,” for purposes generally relating to chemical safety disclosure requirements. In another instance of definitional borrowing, the U.S. Department of Housing and Urban Development has derived a definition of the term “waste” from the Restatement Third, Property (Mortgages), for use on standardized closing forms and documents for certain Federal Housing Administration programs. And, the Securities and Exchange Commission relies on the Restatement Third, The Law Governing Lawyers, in defining terms relevant to standards of professional conduct for attorneys

## Upcoming Meetings

For more information, visit [www.ali.org](http://www.ali.org).

### JANUARY 2020

**January 16-17**  
Council Meeting - January 2020  
Philadelphia, PA

### MARCH 2020

**March 12-13**  
Restatement of the Law Third, Torts:  
Concluding Provisions  
Philadelphia, PA

**March 20**

Restatement of the Law, Corporate Governance  
New York, NY

**March 26**

Principles of the Law, Compliance, Risk  
Management, and Enforcement  
New York, NY

**March 27**

Restatement of the Law, Copyright  
Philadelphia, PA

### MAY 2020

**May 18-20**  
97th Annual Meeting  
San Francisco, CA

**VIEW ALL UPCOMING MEETINGS  
AND EVENTS ON PAGE 19.**

who practice before the Commission. At the state level, the Indiana Natural Resources Commission in 1993 borrowed the definition of “lake,” set forth in § 842 of the Restatement Second, Torts, in determining in an administrative adjudication whether a particular body of water was a “lake” for purposes of the state’s Lakes Preservation Act. Two years later, the Commission “adopted the essence of the Restatement ‘lake’ definition by rule.” And in 2008, the Indiana legislature actually codified the definition by statute.

Aside from borrowing definitions, agencies routinely rely on a Restatement for a basic expression of a rule of law relevant to the agency’s rulemaking. For example, in a rule promulgated by HUD’s Office of Federal Housing Enterprise Oversight, relating to minimum capital requirements for Fannie Mae and Freddie Mac, the agency cited § 204 of the Restatement Second, Contracts, for the point that, “agreements may be legally binding even when there is a lack of specificity on all terms.” The agency relied on this principle to justify its decision, in connection with the purchase or securitization of mortgages, not to restrict the term “commitment” with references to specifics such as price, volume, and fees. In a different regulatory context, the Bureau of Indian Affairs cited the Restatement Second, Conflict of Laws, to support the proposition that a child of unwed parents generally has the same domicile as the custodial parent for purposes of the Indian Child Welfare Act.

In a non-rulemaking context, the International Trade Administration in 2000 issued Safe Harbor Privacy Principles, which were meant to be evaluated by the European Commission for “adequacy” under European law. Once deemed adequate, the Principles then could “serve as authoritative guidance to U.S. companies and other organizations receiving personal data from the European Union.” In response to a request by the European Commission for clarification on some questions of American privacy law, the International Trade Administration set forth a detailed exposition of the law, relying heavily on the Restatement Second, Torts, which, with respect to issues of invasion of privacy in particular, the agency described as providing “an authoritative overview of the law in this area.”

State regulations also sometimes invoke our Restatements. In Missouri, for example, the Attorney General administers and enforces the state’s Merchandising Practices Act, and has issued rules to define the meanings of certain key enforcement terms and to provide notice of their application. In several of these rules, the Attorney General cites Sections of the Restatement Second, Contracts, for support. In one example, the regulation establishes that it is an unfair trade practice to violate the duty of good faith, citing § 205 of the Restatement, which sets forth a black-letter statement of the duty of good faith and fair dealing. And in another instance, the Attorney General cites Restatement § 208 to support the regulation’s definition of the term “unconscionable.”

Advisory opinions issued by bar authorities likewise regularly draw on ALI work, in particular from the Restatement Third, The Law Governing Lawyers, which has proven a trustworthy guide for state and local ethics authorities since its publication in 2000. Examples include New York City’s early reliance on Comment *c* to § 203 in Proposed Final Draft No. 1 (subsequently renumbered § 123 in the official text), explaining why attorneys “of counsel” to one another should be deemed a single unit for purposes of determining conflicts of interest, in an opinion concluding that “affiliated” attorneys and firms must follow this same rule; Nebraska’s reliance on § 68, defining communications protected by the attorney–client privilege, in an opinion relating to a lawyer’s representation of undocumented immigrants before the Nebraska Workers’ Compensation Court; Utah’s reliance on §§ 99 and 100 in analyzing whether an attorney may contact employees of an organization, when that organization is represented by counsel in litigation against the attorney’s client; and Oregon’s reliance on § 122, covering client consent to a conflict of interest, in discussing whether a lawyer may advise a married couple on estate-planning issues where one spouse would have an elective share claim against the other spouse’s separate property.

There is also a significant body of administrative adjudicatory material in which Restatements of the Law are referenced. As early as the 1930s and 1940s, decisionmakers at federal departments and agencies, including the Department of the Interior, the National Labor Relations Board, and the Securities and Exchange Commission, were citing volumes from the first Restatement series. Today, citations to Restatements regularly appear in many different types of decisions, including by the Administrator of the Federal Aviation Administration, DOJ administrative law judges deciding cases under the Immigration and Nationality Act, and ALJs at the Commodity Futures Trading Commission. Similarly, at the state and municipal levels, Restatements frequently are cited by decisionmakers on public employment relations boards, public utilities commissions, and tax tribunals, to name just a few examples.

These varied examples of the influence of our Restatements serve as a striking and welcome reminder of how deeply the ALI’s work is woven into the fabric of American law, and how our Restatements can serve as resources in just about any legal context, whether legislative or administrative, at both federal- and state-government levels. The broad influence of our work underscores the value of the time and effort that our Members, Advisers, and Reporters, as well as our Institute staff, devote to each of our Restatement projects.

**Editor’s Note: A version of this Director’s Letter, featuring citations to the materials referenced in the main text, is posted on the News page of the ALI website: [www.ali.org/news](http://www.ali.org/news).**

## ALI COUNCIL APPROVES SEVEN PROJECT DRAFTS AT OCTOBER MEETING CONTINUED FROM PAGE 1

Chapter 5 on Compliance, as well as the definitions in Chapter 1 that were not previously approved. (Portions of Chapters 1 and 5 were approved at the 2019 Annual Meeting.) There was insufficient time to complete the discussion of Chapter 4 on Risk Management and Chapter 6 on Liability and Enforcement. The Reporters will work with an ad hoc group of Council members to revise Chapter 6 in accordance with the discussion.

**Copyright:** Reporter Christopher Jon Sprigman and Associate Reporters Daniel J. Gervais, Lydia Pallas Loren, R. Anthony Reese, and Molly S. Van Houweling submitted Council Draft No. 3. The Council approved §§ 1.01, 1.03, 1.04, 1.08, 1.09, and 1.11 from Chapter 1 on Subject Matter and Standards and §§ 2.03 and 2.08 from Chapter 2 on Subject Matter of Copyright: Scope of Protection. The Reporters will revise §§ 2.04-2.07 and submit those Sections at a future meeting.

**Policing:** Associate Reporters Brandon L. Garrett and Christopher Slobogin presented Council Draft No. 4. The Council approved the two Chapters contained in the draft: Chapter 6 on Policing Databases and Chapter 9 on Forensic Evidence Gathering.

**Property:** The Council approved Council Draft No. 1, submitted by Reporter Henry E. Smith and Associate Reporters Sara C. Bronin, Thomas W. Merrill, and Christopher M. Newman. The draft included material from Volumes 1, 3, and 7 on General Definitions, Possession, Bailments, Zoning, Planning, and Subdivision.

**Sexual Assault and Related Offenses:** Reporter Stephen J. Schulhofer and Associate Reporter Erin E. Murphy presented Council Draft No. 9. The Council approved Sections 213.7 (Offensive Sexual Contact), 213.9 (Sex Trafficking), and 213.10 (Permission to Use Force), subject to the Reporters, in collaboration with an ad hoc group of Council members, revising Section 213.9 to address comments from the Advisers and Members Consultative Group regarding tangential actors.

Sections 213.8, 213.11, and 213.12 were included in Council Draft No. 9 only for discussion. These Sections also were discussed at the project meeting for Advisers and the Members Consultative Group on October 24.

**Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities:** Council Draft No. 2 was submitted by Reporter Vicki C. Jackson and Associate Reporter Suzanne B. Goldberg. The Council approved Chapter 4 (Inquiries and Investigations) and Chapter 5 (Informal Resolution of Sexual-Misconduct Reports and Complaints) of the Council Draft, but there was insufficient time to consider §§ 6.1 to 6.3d of Chapter 6 (Formal Resolution of Sexual-Misconduct Complaints).

As announced previously, discussion of Council Draft No. 6 of the project on **Intentional Torts to Persons** was postponed until the January 2020 Council meeting. Project participants can access the revised draft at [www.ali.org](http://www.ali.org).



*Laura Stein of The Clorox Company  
(Compliance session)*



*Pierre N. Leval of the U.S. Court of Appeals, Second Circuit  
(Copyright session)*



*Carol F. Lee of Taconic Capital Advisors LP  
(MPC: Sexual Assault session)*



RIGHT  
*Myles V. Lynk of the District of Columbia Office of  
Disciplinary Counsel (Children and the Law session)*

# A Message about ALI's 2020 Annual Meeting

*From ALI Deputy Director Stephanie A. Middleton*

ALI's 2020 Annual Meeting promises to be an exciting one. We are taking the Meeting to the West Coast. This will be the third time that the Annual Meeting has assembled in San Francisco in this century, convening there in 2007 and 2011. Our Annual Meetings in Washington, D.C., draw so many members from the East Coast, so we expect to see many of our West Coast members at next year's Meeting. It is not a competition, but I do want to encourage all members from all over the U.S. and abroad to save the date and start making plans to attend the Meeting. I cannot emphasize strongly enough how important it is that our members attend, listen to and participate in the discussion and debates, and then, perhaps most importantly, vote on the drafts and the issues presented on the floor.

We will have a very full work agenda. At this point we hope to present drafts of the entire Article 213 of the Model Penal Code: Sexual Assault and Related Offenses; all of Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities; and the completion of the Restatement of the Law of American Indians. We also will have drafts of portions of several other projects. After the January 2020 Council Meeting we will be able to share the full list of projects and more information about speakers and the Sunday programs.

Most people think about Restatements when they think about ALI. Restatements are an important resource for busy judges and practitioners, and for law professors and students. These groups rely on the Restatements because they know our members and project participants work hard to help the Reporters "get it right," and the drafting is not subject to economic or ideological pressure from outside groups. A Restatement is simply a clear and concise explanation of the law, whether it is well established or rapidly evolving. At the 2020 Meeting there will be thoughtful debate among people who respect the law and each other, and genuinely know what they are talking about—how refreshing!

With our other types of projects—Principles of the Law and Model Codes—we have an opportunity to shape and improve the law in areas that are complex, and often confused or controversial. Criminal sexual assault, sexual misconduct on campus, consent, government ethics—what could be more topical or controversial? But with a shared commitment to the rule of law, due process, and fairness, we can expect that members eventually will get to common ground and clarity of expression.

We need you to be there with us. So I encourage members and project participants who will have to travel a long way, to please start making plans to attend this year's Annual Meeting. Our work is important and it cannot be done without you. We rely on our members to show so that all perspectives are heard. The level of excellence for which we are known is not possible without your dedication.

It will not be all work and no play. We are planning dynamic programs on Sunday, May 17, 2020; an exciting line-up of speakers; and plenty of time to network and catch up with old friends.

Please mark your calendars. I hope to see you in San Francisco.

## ALI'S 97TH ANNUAL MEETING

MAY 18-20, 2020

THE WESTIN ST. FRANCIS  
SAN FRANCISCO, CALIFORNIA

The Annual Meeting is scheduled during the week before Memorial Day weekend. If you are planning to arrive early, or stay through the long weekend, the hotel is conveniently located in Union Square, near San Francisco's shopping and theater districts.

Several museums are within walking distance from the hotel, including the San Francisco Museum of Modern Art and the Museum of the African Diaspora.

A short ride to North Beach will take you to Fisherman's Wharf, whose historic ships and sea lions basking in the sun are some tourist favorites.

A mile and a half off the coast of Fisherman's Wharf, Alcatraz, now a historic landmark, was the site of the first lighthouse built on the Pacific Coast, then a federal prison for such notorious convicts as Al Capone. Now it is one of the city's most popular attractions.

If you are planning to explore more of California, Napa Valley is only 60 miles north of the city. Producing wine for more than a century, Napa Valley has eight distinctive small communities that offer exceptional food, arts, and wellness activities as well as wine.



# Project Meeting Updates

## Model Penal Code: Sexual Assault and Related Offenses

*October 24 in Philadelphia, PA*

Preliminary Draft No. 10 includes Proposed §§ 213.8, 213.11, and 213.12 of Article 213.



*Aya Gruber of University of Colorado Law School*



*Lee H. Rosenthal of the U.S. District Court, Southern District of Texas*

## Conflict of Laws

*November 15 in Philadelphia, PA*

Preliminary Draft No. 5 includes topics from Chapter 5-Choice of Law; Chapter 7-Property; and Chapter 8-Contracts.



*William S. Dodge of UC Davis School of Law*

## 2019 Updates to Trial Manual 6 Are Now Available

*ALI Continues Its Efforts to Provide Assistance to Public Defenders*

In 1967, a *Trial Manual for the Defense of Criminal Cases* was published by the ALI-ABA Joint Committee on Continuing Legal Education. The product of the combined effort of ALI-ABA (now ALI CLE), the American College of Trial Lawyers, and the National Defender Project of the Legal Aid and Defender Association, the *Manual* was designed for use in Course of Study to be conducted throughout the country and as a working document for lawyers involved in the defense of persons accused of crime.

In 2016, authors Anthony G. Amsterdam and Randy Hertz released the Sixth Edition of the *Trial Manual for the Defense of Criminal Cases*, an update of the widely used guide for handling criminal court cases. The *Manual*, last published in 1988, is designed as a how-to-do-it exposition for the general practitioner of the law and practice of criminal defense. It gives the lawyer who is relatively inexperienced in criminal proceedings a compact guide through the stages of a criminal case, from arrest and investigation to appeal. It identifies critical points in the proceedings, warns of rights to be asserted and interests to be protected at each stage, describes the practices and procedures necessary or useful for the assertion of those rights and the protections of those interests, and, in both narrative and checklist form, suggests steps to be taken or considered by defense counsel at the various stages.

Professors Amsterdam and Hertz have updated the Sixth Edition with their 2019 Supplement. Public defenders may request a free electronic copy of the *Manual* and 2019 Supplement. Please email [communications@ali.org](mailto:communications@ali.org) to request the free PDF Volumes.

### **From the authors:**

The primary goal of the *Manual* has always been—and continues to be—to serve as a resource for criminal defense lawyers at the trial level. It covers the information a defense attorney has to know, and the strategic factors s/he should consider, at each of the stages of the criminal trial process. It is organized for easy access by practitioners who need ideas and information quickly in order to jump-start their work at any given stage.

# The Institute in the Courts: Northern Mariana Islands Court Relies on Foreign Relations 4th

Recently, in *Kim v. Park and Globuil Holdings*, No. 15-0131-CV (N. Mar. I. Commw. Super. Ct. Sept. 27, 2019), the Superior Court for the Commonwealth of the Northern Mariana Islands relied on the Restatement of the Law Fourth, The Foreign Relations Law of the United States, as required by Commonwealth law, 7 N. Mar. I. Code § 3401, “in the absence of written law or local customary law to the contrary,” in declining to recognize a Korean appellate court’s criminal conviction on the ground that doing so would violate the common-law “penal law rule,” which prohibited courts in the United States from recognizing and enforcing the penal laws of another country.

In *Kim*, the seller of shares in a hotel sought a declaratory judgment and damages against an individual buyer and a company that later purchased the shares from the buyer based on allegations that the shares never transferred to the buyer because the buyer did not pay the balance of the purchase price. The company filed a motion for summary judgment, arguing that the issues were precluded by the doctrines of res judicata and collateral estoppel because they had already been litigated. Before this instant action, the seller had attempted to bring a criminal action in the Republic of Korea against the buyer, but the Korean authorities instead brought a criminal action against

the seller for making a false report against the buyer. After the Korean trial court found the seller not guilty, the appellate court, “using only the documentary record, overturned the trial court’s not guilty verdict based on [] *de novo* findings of fact and convicted [the seller] without a new trial”; the seller was subsequently sentenced to six months in prison, which he served, and the judgment became final.

The Superior Court for the Commonwealth of the Northern Mariana Islands noted that, under Restatement of the Law Fourth, The Foreign Relations Law of the United States § 481, generally, “a final, conclusive, and enforceable judgment of a court of a foreign state granting or denying recovery of a sum of money, or determining a legal controversy, [was] entitled to recognition by courts in the United States.” The court explained, however, that there were exceptions to that general rule, including under § 483(a), which provided that U.S. courts would not recognize a foreign state’s judgment if “the judgment was rendered under a *judicial system* that [did] not provide impartial tribunals or procedures compatible with fundamental principles of fairness,” and § 484(h), which provided that U.S. courts were permitted to not recognize a foreign state’s judgment if “the *specific proceeding* in the foreign court leading to the judgment was not compatible with *fundamental principles of fairness*.”

Rejecting the company’s argument that the court could recognize the criminal judgment because the penal law rule only prevented the court from enforcing foreign criminal judgments, the court explained that § 489 “prohibit[ed] courts in the United States from *recognizing and enforcing* foreign penal judgments” and that the court had to “adhere to § 489’s interpretation of the penal law rule.” The court explained that, “in the absence of written or local law, as [was] the case here, ‘the rules of the common law, as expressed in the restatements of the law approved by the American Law Institute and, to the extent not so expressed as generally understood and applied in the United States, shall be the rules of decision in the courts of the Commonwealth,’” (quoting 7 N. Mar. I. Code § 3401).

Declining to recognize the criminal judgment and denying the company’s motion for summary judgment, the court found “(1) that recognizing the Korean criminal judgment would violate the penal law rule as defined by Restatement (Fourth) of the Foreign Relations Law of the United States § 489; and (2) that the subsequent criminal conviction of [the seller] by a Korean appellate court even after an acquittal by a Korean trial court [did] not comport with the Commonwealth’s heighten[ed] protection against double jeopardy and [was] not compatible with ‘fundamental principles of fairness’ and United States public policy.”



## 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](http://www.ali.org/store) to place your order.

# Member Spotlight: Lord John Thomas of Cwmgiedd

## First Vice-President of the European Law Institute

Lord John Thomas was a practicing barrister in England and Wales until 1996, a Judge of the High Court and Court of Appeal of England and Wales (1996–2013), and then Lord Chief Justice of England and Wales (2013–2017). He was President of the European Network of Councils for the Judiciary (ENCJ) (2008–2010). He is Chairman of the Welsh Government's Commission on Justice in Wales, Chairman of the UK Financial Markets Law Committee, President of the Qatar International Court, Chancellor of Aberystwyth University, an Honorary Fellow of Trinity Hall, Cambridge, and a Fellow of the Universities of Bangor, Cardiff, and Swansea. He retired as Lord Chief Justice in October 2017. He is a member of the House of Lords.

He serves as a Chair on ALI-ELI Principles for a Data Economy. He is one of the European Law Institute's Founding Members and currently serves as its First Vice-President. We sat down with Lord Thomas at ALI's Data Economy October project meeting.

### When did you decide you wanted to go to law school?

I was asked, by the university to which I went, to go up and see what it was like reading law. That was because in the U.K. in the 1960s there was a recession in the legal profession and the Universities could not get enough people to go to law school—a fact which people do not these days believe actually existed. I went and I found it quite interesting. I had thought of doing economics for a year before turning to law, but I was persuaded not to do so.

### What persuaded you to pursue your J.D. at the University of Chicago Law School?

It was thought to be a good idea at a time when there was plenty of money around and there were comparatively very few people in law schools or at university as a whole. The Ford Foundation had a very generous scholarship for someone from the U.K. each year and someone from either Australia or New Zealand. It was at Chicago where I had the great privilege of being taught by Richard Posner and the great Chicago School of Economists backing him up. Geoffrey Hazard was also there. He taught civil procedure. Grant Gilmore taught legal history. It was a wonderful time to be at Chicago, and I met my wife there. It was a good episode in my life.

### How did you make your way to a career in the U.K. courts?

I first did a three-month period with a judge as his Marshal. The concept of a Marshal is completely different in the U.K. I was asked once when giving expert evidence in the US what a Marshal did. When I explained that really the Marshal helps the judge with his social calendar, people were somewhat shocked, but your privilege as a Marshal was to see, by sitting on the judge's bench, and then discussing with the judge how to conduct or not to conduct a trial, or see how a case was summed up



to a jury. I didn't have to do much research because there was not much law in the cases that the judge I was with did. It was great fun, I saw a good bit of the country with him, and learnt a huge amount. After that, I joined a commercial set of chambers, at which I remained until I became a judge.

### Tell us about your involvement in the European Law Institute (ELI).

The European Law Institute is founded on the model of the ALI. I had a hand in setting it up in 2011. We started by looking at projects immediately. The first project was on the European Commission's proposal for a Common European Sales Law. During the early stages of that project it became apparent to me that the changes brought about by the technological revolution would have a profound effect on the law. When considering what other things we should investigate, it was obviously appreciated that data needed to be looked at because it was something of enormous economic importance and was not easily governed by the existing law.

### For those unfamiliar with the ALI/ELI joint project, Principles for a Data Economy, can you give us an overview?

The project tackles data, which is a new form of commodity, asset, property . . . whatever you like to call it, which is incredibly valuable as we know from the success and operations of a number of very large companies. The project aims to set out principles, which will govern the way data is used and responsibilities in respect of data. It does not touch areas where the law is already clear. For example, it does not touch privacy. It has to avoid that because there are different views between different countries. It does not tackle the position of consumers because that is regulated very differently in different countries. It does not tackle remedies, and it tries to veer away from traditional concepts, such as property.

The important aspect of the project from my point of view has been the very interesting collaboration between the systems in Europe, civil-based, with some influence from the common law of the United Kingdom and the systems in the United States. What has been very refreshing is that we broadly see all the principles from a common perspective and are able to see how we make sure concepts that we understand from our own systems can fit together to produce a regime that works for all. It is very easy to be a comparative lawyer and see the differences between everything. My experience of practice has always been that actually, although there are differences, they are very small in comparison to the enormous similarities.

**You spend a lot of time with organizations that try to initiate conversations about the law across borders. Why is that important to you?**

Most of my work as a lawyer and judge has been international in scope. I have seen over the years the importance of trying to build an international consensus. One of the areas, for example, in which I am quite heavily engaged at the moment, and engaging with the courts here, is to try and get the commercial courts, the international commercial courts of the world, to work together, because the problems all of us face are broadly the same. How do you make the procedure go more quickly? How do you cut down the cost? How do you make judgments enforceable?

Those sort of issues are common to judges throughout the world. The same I think is true of the Data Economy Project. The principles in relation to transactions in data have to reach a common solution. When you look at what the Japanese have suggested

and the Danes have suggested, there is a very large degree of commonality of approach, and we need to make certain that what we produce here represents something that is clear, concise, elegant, and adaptable for the future.

**In addition to your time in Philadelphia for the Data Economy meeting, you also attended the American Inns of Court meeting in Washington, D.C. Why was it important to you to attend that meeting?**

The American Inns of Court was established after Chief Justice Burger encouraged its founding in the 1980s on the basis that trial lawyers were not civil enough to one another. He thought it would be much better for the American legal system if there were Inns of Court scattered across the country where people would meet. The notion being that if you're friendly with someone you would still fight hard but you wouldn't be rude in the process.

Every year in Washington, the American Inns of Court has a National Conversation on Civility. This year they varied it slightly and had a conversation on wellness, focusing on the sort of disillusionment with young lawyers about practice in large firms and also one or two senior lawyers who have committed suicide.

If you go and work for one of the great big law firms in any of the big cities, you tend to be a cog in a big machine. You never get to do what you went to law school to do. You never get to do anything on your own. You just get allocated a little bit of something. I think people can find that very depressing and dehumanizing.

Another example of one of the things people do which dehumanizes the practice of law is to send emails to each other even if the office is next door, instead of getting up and walking in. I understand emailing people from time to time if you are a considerable distance away, but not emailing someone who is just down the corridor or maybe upstairs; it's much better to walk and see them. That is why having lunch together is very important as well. You must get people to talk to one another and have human contact, as human life is at the center of all law.

## Data Economy *October 31 in Philadelphia, PA*

Preliminary Draft No. 3 includes portions of all six Parts: General Provisions; Data Transactions; Data Generated in a Commercial Context; Security Interests in Data; Third Party Aspects; and Multi-State Issues.

CENTER  
*Christiane C. Wendehorst of University of Vienna*

RIGHT  
*Steven O. Weise of Proskauer Rose LLP and Anuj C. Desai of University of Wisconsin Law School*



# The International Reach of the *Restatement (Third) Property: Servitudes*

By John A. Lovett

For years American property law scholars have debated the merits of the *Restatement (Third) Property: Servitudes* (2000). Some have praised it as a bold attempt to streamline and rationalize an outdated and confusing area of law. Others have criticized it for having too much of a reformist agenda. Most scholars agree, however, that one of the boldest aspects of the *Restatement (Third)* was its attempt to suppress ancient doctrines like privity of estate and touch and concern, which control the kinds of promises that can be imposed on future land owners. For some scholars, this move revealed a striking “contract-like conception of servitudes,” one that focuses on the intent of the original contracting parties and that limits long-term enforceability through contractual defenses like restraint of trade, unconscionability, and violation of public policy. Thomas Merrill & Henry E. Smith, *Why Restate the Bundle?: The Disintegration of the Restatement of Property*, 79 *BROOK. L. REV.* 681, 694 (2014).

A fair number of these scholars also repeat an apparent conventional wisdom about the *Restatement (Third)*; namely, that U.S. courts have “largely ignored” the most innovative features of the text and still apply the old common law doctrines that patrol whether promises respecting use of an estate will run with the land. Merrill & Smith, 79 *BROOK. L. REV.* at 694. For those who might be interested in exploring whether this conventional wisdom is accurate, Professor Gerald Korngold’s comprehensive, one-volume treatise, *Private Land Use Arrangements: Easements, Real Covenants and Equitable Servitudes* 387-88, 404-06, 410 (2016) might be a good place to start.

Other parts of the *Restatement (Third)* have, of course, frequently been cited and relied upon by U.S. courts. Section 4.8(3), for example, which provides for the unilateral relocation of easements by a servient estate owner when the relocated easement provides a functionally equivalent benefit to the easement holder, was adopted by the Colorado Supreme Court and the Supreme Judicial Court of Massachusetts, *Roaring Fork Club, L.P. v. St. Jude’s Co.*, 36 P.3d 1229 (Colo. 2001); *M.P.M. Builders L.L.C. v. Dwyer*, 809 N.E.2d 1053 (Mass. 2004), among other courts. The partial reception of Section 4.8(3) into U.S. law has recently led the Uniform Law Commission (also known as the National Conference of Commissioners on Uniform State Laws) to start drafting a Uniform Easement Relocation Act, a project for which I serve as Reporter. Somewhat less notably, many U.S. courts also cite and discuss Sections 2.16 and 2.17 of the *Restatement (Third)* and their detailed comments, all of which provide useful guidance in disputes involving prescriptive easements.

Finally, and perhaps least well known of all, many scholars and law reformers working abroad have examined and used the *Restatement (Third)*. To these scholars the *Restatement (Third)* presents a coherent, but not radically libertarian, conception of servitudes, one that acknowledges the importance of freedom of contract but also recognizes the dangers of idiosyncratic and eventually obsolete land use promises. As Cathy Sherry (University of New South Wales) put it, the *Restatement (Third)* reveals the underlying roots of judicial control of servitudes and helps courts and legal scholars see the underlying policy choices presented by demands to recognize new servitudes, particularly those that impose affirmative obligations on successive owners and those that allow for the creation of strong communities of interest. As Sherry notes, the *Restatement (Third)* also helps clarify the policy choices involved in addressing demands to modify or terminate servitudes. Cathy Sherry, *Land of the Free and Home of the Brave?: The Implications of United States Homeowners Association Law for Australian Strata and Community Title*, 2014 *Australian P. L.J.* 17.

Personally, I started to appreciate the international reach of the *Restatement (Third)* when I began to interact with property law scholars from places like Scotland, England and Wales, Canada, Australia, South Africa, Israel, and the Netherlands, in the mid-to-late 2000s. As I talked with these scholars, read their books and law review articles, and studied law commission reports they authored, I began to realize that the *Restatement (Third)* has had a lasting international impact. Examples can be found in many places.

Consider the extensive work of the Law Commission of England and Wales. In 2008, the Law Commission published a comprehensive Consultation Paper entitled *Easements, Covenants and Profits à Prendre*, full of citations to the *Restatement (Third)*. In 2011, the same law commission published its final report to Parliament entitled *Making Land Work: Easements, Covenants and Profits à Prendre*, complete with a detailed Draft Bill. In this work, the Law Commission repeatedly refers to the *Restatement (Third)* for both substantive reform suggestions and to frame the basic policy debates facing English property law. Interestingly, the Law Commission borrowed directly from Section 2.15 of the *Restatement (Third)* in one important area—the law of implied easements. It did so by adopting a simplified test for the creation of such easements focused on whether the claimed easement “is necessary for the reasonable use of the land” at the time of disposition of the land. *Making the Land Work*, ¶¶ 3.43-3.47, at 35-36.

When the Law Commission turned to the vexing problem of whether to allow covenants that impose positive obligations to run with the land, it relied heavily on the *Restatement (Third)* to frame the problem, admitting candidly that it “had drawn inspiration from that work.” Although the Law Commission ultimately stuck with the traditional touch and concern test, the *Restatement (Third)* certainly left its mark on the English debate. *Making Land Work*, ¶¶ 5.31-5.33, 5.51-5.77, at 103-104, 108-113.

Eleven years earlier, the Scottish Law Commission also engaged deeply with many of the key reform ideas found in the *Restatement (Third)*. In its *Report on Real Burdens* (2000), which led directly to the new Scottish Parliament’s adoption of the Title Conditions (Scotland) Act 2003, the influence of the *Restatement (Third)* is clearly apparent. Not only did the *Restatement (Third)* clarify the different ways that land burdens can be policed (*i.e.*, through *ex ante* or *ex post* controls), but it also provided useful terminology that transcends particular forms of land burdens. In the end, although Scotland did not adopt a completely unified system of land burdens as the *Restatement (Third)* proposed, the impact of the *Restatement (Third)* can be seen in the policy arguments reviewed in the *Report on Real Burdens* and in the drive to modernize the traditional system. As Kenneth Reid, the primary author of the *Report on Real Burdens*, has noted, Scotland finally appreciated that it could encourage innovative land development practices while limiting problematic real burdens through existing creation tests, and meanwhile it could achieve strong *ex post* judicial control through existing specialized land tribunals that had the power to modify or terminate obsolete land burdens in much the same way that the *Restatement (Third)* recommends. Ken Reid, *Modernising Land Burdens: The New Law in Scotland*, in *TOWARDS A UNIFIED SYSTEM OF LAND BURDENS?* 63-79 (Sjef van Erp and Bram Akkermans, Eds.) (2006).

With enough time, one could certainly find other instances of law reform reports and academic studies that either learned from or even directly borrowed concepts from the *Restatement (Third)*. So, what characteristics of the *Restatement (Third)* account for its international influence? I have several intuitions.

First, recall that the *Restatement (Third)* was preceded by a lengthy, especially high quality and spirited academic debate prior to its publication. This fact, combined with the work’s modest reform agenda, helped make the ultimate product inherently interesting to property law academics in other countries. Moreover, for academic property lawyers serving on official law reform commissions, the *Restatement (Third)* provided a particularly well packaged source of new ideas, systematically arranged, and amply supported by detailed, authoritative comments and reporter’s notes that set forth the historical development of English and American property law. In addition, the comprehensiveness, the analytical clarity and the very accessibility of the *Restatement (Third)* made it an

irresistible source, especially when compared to the alternatives —dusty law review articles and the quagmire of case law from multiple U.S. jurisdictions that would be difficult for any foreign academic to locate, let alone digest and synthesize. Finally, the code-like qualities of the *Restatement (Third)* may partially have accounted for its appeal. Not only did the *Restatement (Third)* actually adopt the Roman law concept of *the servitude* as its unifying model for the law of easements, covenants, and profits à prendre, but the text itself often achieves a code-like simplicity of style and generality of principle that would naturally appeal to property law academics exposed to actual civilian codifications of property law or to less elegant common law statutory codifications, and to academics who work in jurisdictions like Quebec, Scotland, Israel and South Africa where civil law and common law ideas about property often come into direct contact.

Although it may be impossible to prove the extent to which the *Restatement (Third)* has been directly transplanted into foreign legal systems by legislatures or courts, I am confident that it has influenced foreign law professors who (one hopes) have influenced their students. Some of those students, no doubt, now serve as judges or legislators themselves. My hunch is that the *Restatement (Third)* will continue to influence the thinking of these individuals even after The American Law Institute publishes its *Restatement (Fourth) of Property*.

**John A. Lovett is the De Van D. Daggett, Jr. Distinguished Professor at Loyola University New Orleans College of Law and Visiting Professor at the University of Edinburgh Law School. He currently serves as the Reporter for the Uniform Law Commission’s Easement Relocation Act Drafting Committee.**



## Join the MCG

The Restatement of the Law Fourth, Property project is an ongoing project at ALI. Members interested in joining the Members Consultative Group may do so by logging into the ALI website and visiting the project page.

# ALI to Celebrate its New Life Members: the Class of 1995

In May, The American Law Institute will welcome a new class of Life Members—the Class of 1995. Each year, ALI members who have contributed 25 years of service to the Institute are granted Life Member status. Life Members are no longer required to pay dues or adhere to the Institute’s participation requirement, but they continue to enjoy all the rights and privileges of elected membership.

The Class of 1995 will be honored at a special luncheon held during the 97th Annual Meeting in San Francisco, which will feature remarks by 1995 Class Member **Pamela S. Karlan** of Stanford Law School. New Life Members are given the opportunity to commemorate this quarter-century milestone by contributing to the 1995 Life Member Class Gift, which will be presented to the Institute by the 1995 Life Member Class Gift Committee during the luncheon.

The 1995 Life Member Class Gift campaign will be chaired by **H. Rodgin Cohen** of Sullivan & Cromwell LLP. Fellow class members **José I. Astigarraga** of Reed Smith LLP, **John G. Cameron, Jr.**, of Dickinson Wright PLLC, **José A. Cárdenas** of Arizona State University, and **Kathryn A. Oberly** of the District of Columbia Court of Appeals (Retired), have graciously volunteered to serve with Mr. Cohen on the special committee for the campaign.

Now in its ninth year, the Class Gift program has raised more than \$1.2 million to support key aspects of ALI’s mission, including the MCG Travel Assistance program and the Judges & Public-Sector Lawyers Expense Reimbursement program—two vital components of the Institute’s efforts to minimize financial barriers to member participation.

The Class Gift initiative also provides funding for the Early Career Scholars Medal and annual conference program, which raises awareness of the Institute’s work while engaging up-and-coming legal academics. Additionally, as ALI continues to expand the breadth of its law-reform endeavors, the Class Gift program helps cover some of the costs associated with maintaining the high level of quality that distinguishes the Institute’s work.

The 1995 Life Member Class Gift campaign is now underway. For more information about the campaign, please contact Senior Development Manager Kyle Jakob at 215-243-1660 or [kjakob@ali.org](mailto:kjakob@ali.org). Or, to learn about ALI’s other ongoing fundraising initiatives, please visit [www.ali.org/support](http://www.ali.org/support).

## 1995 LIFE MEMBER CLASS

**Eric G. Andersen**, Provo, UT; University of Iowa College of Law (Emeritus)

**José I. Astigarraga**, Miami, FL; Reed Smith LLP

**Taunya Lovell Banks**, Baltimore, MD; University of Maryland, Francis King Carey School of Law

**Jon M. Barnwell**, Greenwood, MS; Mississippi Chancery Court, 7th Judicial District

**Harvey Bartle III**, Philadelphia, PA; U.S. District Court, Eastern District of Pennsylvania

**David E. Bartlett**, Broomfield, CO; Law Offices of David E. Bartlett

**Fortunato P. Benavides**, Austin, TX; U.S. Court of Appeals, Fifth Circuit

**Michael Joachim Bonell**, Rome, Italy; UNIDROIT

**Daniel I. Booker**, Pittsburgh, PA; Reed Smith LLP

**Margaret F. Brinig**, Notre Dame, IN; Notre Dame Law School

**Lissa Lamkin Broome**, Chapel Hill, NC; University of North Carolina School of Law

**Karen B. Brown**, Washington, DC; George Washington University Law School

**Kathleen B. Burke**, Shaker Heights, OH; U.S. District Court, Northern District of Ohio

**Robert L. Byer**, Pittsburgh, PA; Duane Morris LLP

**John G. Cameron, Jr.**, Grand Rapids, MI; Dickinson Wright PLLC

**José A. Cárdenas**, Tempe, AZ; Arizona State University, Office of General Counsel

**James H. Carter**, New York, NY; WilmerHale

**Stephen H. Case**, Bethesda, MD; Emerald Development Managers LP (Retired)

**Gilbert F. Casellas**, Chevy Chase, MD

**David W. Clark**, Jackson, MS; Bradley Arant Boult Cummings LLP

**H. Rodgin Cohen**, New York, NY; Sullivan & Cromwell LLP

**William T. Coleman III**, Penn Valley, PA; Law Office of William T. Coleman III

**James C. Dauksch, Jr.**, Orlando, FL

**Gordon L. Doerfer**, Needham, MA; JAMS (Retired)

**Phyllis Kay Dryden**, San Francisco, CA; Energy Dispute Solutions, LLC

**Ira Mark Ellman**, Berkeley, CA; Arizona State University (Retired)

**Jane E. Fahey**, Atlanta, GA; Presbytery of Greater Atlanta (Retired)

**K. Bruce Friedman**, San Francisco, CA; Friedman McCubbin Law Group LLP

**Haley J. Fromholz**, Pasadena, CA

**Daniel A. Gecker**, Richmond, VA; Urban Development Associates

**Janine P. Geske**, Milwaukee, WI; Marquette University Law School (Retired)

**Barry P. Goode**, Point Richmond, CA; Superior Court of Contra Costa County (Retired)

**Roy Goode**, Oxford, England; St. John’s College

**Robert L. Graham**, Chicago, IL; Jenner & Block, LLP

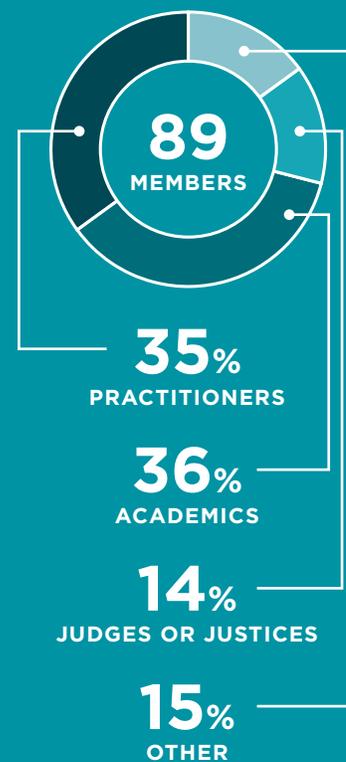
**Donna Coleman Gregg**, Arlington, VA; The Free State Foundation

**Robert J. Grey**, Richmond, VA; Hunton Andrews Kurth LLP

**Robert E. Harrington**, Charlotte, NC; Robinson, Bradshaw & Hinson, P.A.

**Robert M. Hart**, Bronxville, NY; Duke University School of Law

# Class of 1995 Facts & Figures



**38 SERVED ON THEIR LAW SCHOOL'S LAW REVIEW, INCLUDING 4 AS EDITOR-IN-CHIEF**

**30 HELD JUDICIAL CLERKSHIPS OR FELLOWSHIPS, INCLUDING 9 FOR THE U.S. SUPREME COURT**

**15 WERE ORDER OF THE COIF**

**6 SERVED IN THE UNITED STATES MILITARY**

**3 ARE ALI COUNCIL MEMBERS**

**2 HAVE SERVED AS ALI PROJECT REPORTERS**

**45 ALI PROJECTS WORKED ON, AS ADVISERS OR MCG MEMBERS**



**27**  
DIFFERENT STATES,  
DISTRICTS, OR TERRITORIES

**5**  
DIFFERENT  
COUNTRIES

**40**  
DIFFERENT LAW SCHOOLS  
ATTENDED

**Candace J. Heisler**, San Bruno, CA  
**Lemuel Hewes**, Atlanta, GA; King & Spalding LLP  
**George A. Hisert**, Berkeley, CA; Bingham McCutchen LLP  
**Peter R. Jarvis**, Portland, OR; Holland & Knight LLP  
**Robert H. Jerry, II**, Columbia, MO; University of Missouri-Columbia School of Law  
**Vincent R. Johnson**, San Antonio, TX; St. Mary's University School of Law  
**Pamela S. Karlan**, Stanford, CA; Stanford Law School  
**Henry R. Kaufman**, New York, NY; Henry R. Kaufman, P.C.  
**Randall L. Kennedy**, Cambridge, MA; Harvard Law School  
**Jody S. Kraus**, New York, NY; Columbia Law School  
**Simeon M. Kriesberg**, Washington, DC; Mayer Brown LLP  
**Richard W. Langerman**, Phoenix, AZ; Law Offices of Richard Langerman  
**Jeffrey Sean Lehman**, New York, NY; NYU Shanghai  
**Noëlle Lenoir**, Paris, France; Kramer Levin Naftalis & Frankel LLP  
**Lili Levi**, Coral Gables, FL; University of Miami School of Law  
**Timothy K. Lewis**, Pittsburgh, PA; Schnader Harrison Segal & Lewis LLP  
**Lynn M. LoPucki**, Los Angeles, CA; University of California, Los Angeles School of Law  
**Kerry Lynn Macintosh**, Santa Clara, CA; Santa Clara University School of Law  
**David W. Maher**, Chicago, IL; Public Interest Registry (Retired)  
**Anthony Mason**, Sydney, Australia  
**Charles E. McCallum**, Grand Rapids, MI; Warner Norcross & Judd LLP  
**Theodore A. McKee**, Philadelphia, PA; U.S. Court of Appeals, Third Circuit  
**J. W. Montgomery, III**, Pittsburgh, PA; Jones Day  
**Beverly I. Moran**, Nashville, TN; Vanderbilt University Law School  
**Samuel K. Murumba**, Brooklyn, NY; Brooklyn Law School  
**Kathryn A. Oberly**, Palm Beach, FL; District of Columbia Court of Appeals (Retired)  
**David Orentlicher**, Las Vegas, NV; University of Nevada, Las Vegas, William S. Boyd School of Law  
**Elizabeth Hayes Patterson**, Washington, DC; Georgetown University Law Center (Retired)  
**Dennis M. Perluss**, Los Angeles, CA; California Court of Appeal, 2nd Appellate District, Division 7  
**Rafael A. Porrata-Doria, Jr.**, Bala Cynwyd, PA; Temple University Beasley School of Law  
**Sarah H. Ramsey**, Oxford, MD; Syracuse University College of Law (Retired)  
**R. J. Robertson, Jr.**, Carbondale, IL; Southern Illinois University School of Law  
**Eduardo C. Robreno**, Philadelphia, PA; U.S. District Court, Eastern District of Pennsylvania  
**Michael A. Ross**, New York, NY; CitiGroup Inc.  
**Karen H. Rothenberg**, Baltimore, MD; University of Maryland, Francis King Carey School of Law (Retired)  
**Vanessa Ruiz**, Washington, DC; District of Columbia Court of Appeals  
**Margaret V. Sachs**, Athens, GA; University of Georgia School of Law  
**David A. Schlueter**, San Antonio, TX; St. Mary's University School of Law  
**Elizabeth M. Schneider**, Brooklyn, NY; Brooklyn Law School  
**Theodore J. Schneider**, Tuscon, AZ; University of Arizona, James E. Rogers College of Law  
**Thomas J. Schoenbaum**, Washington, DC; George Washington University Law School

# Help Protect and Promote the Rule of Law: Make a Year-End Gift Today

As a reader of *The ALI Reporter*, you understand how crucial The American Law Institute's Restatements of the Law, Principles of the Law, and Model Codes are to the legal profession and to society. In the last year alone, ALI's work was cited more than 3,100 times by federal and state courts, including citations in 13 U.S. Supreme Court cases in the Court's 2018 Term. These works would not be possible without the generous financial support of members like you. As we look toward 2020, we ask that you help protect and promote the rule of law by including the Institute in your year-end giving plans.

Your gift to ALI will provide critical funding to support all aspects of our work, including travel-assistance programs that provide opportunities for members to participate in our drafting process and share important perspectives, regardless of their financial means. Your support will also ensure that our work remains independent and free from the appearance of outside influence.

You can make an end-of-year charitable contribution to ALI by completing and returning the envelope enclosed in this newsletter, visiting [www.ali.org/support](http://www.ali.org/support), or calling 215-243-1660. Your gift will help us continue our work through which we serve the legal profession, the judiciary, and society as a whole, both now and in the future.

Thank you in advance for your generosity and best wishes for a happy and healthy 2020.

## ALI TO CELEBRATE ITS NEW LIFE MEMBERS CONTINUED FROM PAGE 13

**Gary E. Sherman**, Madison, WI; Wisconsin Court of Appeals District IV (Retired)

**Cathy R. Silak**, Boise, ID; Hawley Troxell Ennis & Hawley, LLP

**Margaret Poles Spencer**, Richmond, VA; Circuit Court of City of Richmond (Retired)

**Donald I Strauber**, New York, NY; Norton Rose Fulbright US LLP

**John M. Townsend**, Washington, DC; Hughes Hubbard & Reed LLP

**Bowen H. Tucker**, Chicago, IL

**David E. Van Zandt**, New York, NY; The New School

**Allan W. Vestal**, Des Moines, IA; Drake University Law School

**Jerome T. Wolf**, Kansas City, MO; Dentons US LLP

**Alfred M. K. Wong**, Honolulu, HI; Takushi Wong Lee & Yee

## NEW 50-YEAR MEMBERS

**Mark Harry Berens**, Chicago, IL; K&L Gates LLP

**George C. Christie**, Durham, NC; Duke University School of Law

**James D. Crawford**, Philadelphia, PA; Schnader Harrison Segal & Lewis LLP

**Richard F. Dole, Jr.**, Houston, TX; University of Houston Law Center

**Arthur Fleischer, Jr.**, New York, NY; Fried, Frank, Harris, Shriver & Jacobson LLP

**Robert A. Helman**, Chicago, IL; Mayer Brown LLP

**Seth M. Hufstедler**, Los Angeles, CA; Morrison & Foerster LLP

**Harry V. Lamon, Jr.**, Atlanta, GA; Palmer & Cay Inc. (Retired)

**Peter W. Low**, Charlottesville, VA; University of Virginia School of Law

**Morris G. Shanker**, Cleveland, OH; Case Western Reserve University School of Law

**Michael I. Sovern**, New York, NY; Columbia Law School

**Shale D. Stiller**, Baltimore, MD; DLA Piper US LLP

**Hiller B. Zobel**, Boston, MA; Middlesex County Superior Court (Retired)

*Effective May 2020*

*Every attempt has been made to publish an accurate list of each member's location and company. If a change is required, please contact the ALI Membership Department at 215-243-1623 or [membership@ali.org](mailto:membership@ali.org).*

## Notes About Members and Colleagues

**Philip S. Anderson**, a founding partner of Williams & Anderson, has retired after more than 30 years with the firm.

**Rachel E. Barkow** of NYU School of Law and **Michael T. Cahill** of Brooklyn Law School participated in a talk entitled “Criminal Justice and Injustice In One of the Most Imprisoned Democracies In the World: America.” The discussion was part of the Brooklyn Book Festival, one of America’s premier book festivals and the largest free literary event in New York City.



*Rachel E. Barkow comments during “Criminal Justice and Injustice In One of the Most Imprisoned Democracies In the World: America”*  
Credit: Shea Furey-King

**Joseph W. Bellacosa**, Retired Judge of the New York State Court of Appeals, published several book reviews including “The Institutional” a review of *The Chief: The Life and Turbulent Times of Chief Justice John Roberts* by Joan Biskupic, to be published in the December 2019 Issue of the *New York State Bar Association Journal*, and three reviews published earlier this year in the *New York Law Journal*, “A Call for Higher Education Reform” a review of *The Assault on American Excellence* by Anthony T. Kronman; “A Call to Bring Sacred Values into the Fabric of a University” a review of *Standing for Reason: The University in a Dogmatic Age* by John Sexton; and “John Marshall Biography Shows How Nation Landed in Good Hands” a review of *John Marshall: The Man Who Made the Supreme Court* by Richard Brookhiser.

In “What’s Federalism Got to do With Regulatory Takings?” published in 8 Bringham-Kanner Property Rights J. 9 (2019) (augmenting a conference presentation from two years earlier), **Michael M. Berger** of Manatt, Phelps & Phillips, accurately predicted the U.S. Supreme Court’s June 2019 conclusion in the *Knick v. Township of Scott* decision, 139 S. Ct. 2162 (2019).

**Anita Bernstein** of Brooklyn Law School has been selected to receive the 2020 William L. Prosser Award by the AALS Section on Torts and Compensation Systems. She will be presented with the award at the AALS Annual Meeting in January 2020.

**Susan Bisom-Rapp** of Thomas Jefferson School of Law received the 2019 Paul Steven Miller Memorial Award at the 14th Annual Colloquium on Scholarship in Employment and Labor Law at the University of Nevada, Las Vegas, William S. Boyd School of Law. The award recognizes outstanding academic and public contributions to the field of labor and employment law scholarship.

**Curtis A. Bradley** of Duke University School of Law, **Oona A. Hathaway** of Yale Law School, **David Pozen** of Columbia Law School, **Sudha Narayana Setty** of Western New England University School of Law, and **Paul B. Stephan** of UVA School of Law participated in a roundtable discussion hosted by Duke Law in partnership with UVA Law entitled “Transparency, Secrecy, and Monitoring in Foreign Relations Law.” The event featured a series of panels addressing topics such as tradeoffs of transparency and secrecy in foreign-relations law, and the ability of Congress and the courts to monitor executive-branch conduct relating to foreign affairs.



*“Transparency, Secrecy, and Monitoring in Foreign Relations Law” participants* | Credit: Duke Law School

**Timothy W. Burns** of Perkins Coie was appointed to the Uniform Law Commission by Wisconsin Governor Tony Evers.

**William E. Butler** of Penn State Dickinson Law was awarded the Gold Medal of the National Academy of Sciences of Ukraine “For Scientific Achievements” and was honored with a “Festschrift” by Ukrainian and Russian colleagues.

**Stephen L. Carter** of Yale Law School visited Bard College at Simon’s Rock to discuss his book, *Invisible: The Forgotten Story of the Black Woman Lawyer Who Took Down America’s Most Powerful Mobster*.



*Stephen L. Carter*  
Credit: Elena Seibert

**Colleen V. Chien** of Santa Clara University School of Law testified before the Senate Judiciary IP Subcommittee, on October 30, based on her empirical work on patents and patent quality, in answer to the question, “How can Congress prevent the issuance of poor quality patents?”

**Danielle Citron** of Boston University School of Law was named a 2019 MacArthur Fellow in recognition of her work as a leading privacy- and constitutional-law scholar “[a]ddressing the scourge of cyber harassment by raising awareness of the toll it takes on victims and proposing reforms to combat the most extreme forms of online abuse.”

## New Members Elected

On October 17, the Council elected the following 50 persons.

**Alan D. Albright**, Waco, TX  
**Rosemary Alito**, Newark, NJ  
**Elizabeth A. Andersen**, Washington, DC  
**Bridget Bade**, Phoenix, AZ  
**Allison Bennington**, San Francisco, CA  
**Elizabeth L. Branch**, Atlanta, GA  
**Rachel L. Brand**, Bentonville, AR  
**Peter Bray**, Houston, TX  
**Elizabeth S. Chestney**, San Antonio, TX  
**Cary Coglianese**, Philadelphia, PA  
**Thomas F. Cotter**, Minneapolis, MN  
**Robert E. Denham**, Los Angeles, CA  
**Albert Diaz**, Charlotte, NC  
**Michael R. Dimino**, Harrisburg, PA  
**Marek Dubovec**, Tucson, AZ  
**Shay Dvoretzky**, Washington, DC  
**Regina S. Edwards**, Louisville, KY  
**Kurt D. Engelhardt**, New Orleans, LA  
**Caroline Rose Fredrickson**, Washington, DC  
**Joshua Alexander Geltzer**, Washington, DC  
**Julia Smith Gibbons**, Memphis, TN  
**David Goddard**, Wellington, New Zealand  
**Holly J. Gregory**, New York, NY  
**Sarah Hammer**, Philadelphia, PA  
**Barbara J. Howard**, Cincinnati, OH  
**Kevin D. Jewell**, Houston, TX  
**Dalié Jiménez**, Irvine, CA  
**Jeffrey A. Kaplan**, Houston, TX  
**Jessie K. Liu**, Washington, DC  
**Thomas S. Lue**, Mountain View, CA  
**Sherri A. Lydon**, Columbia, SC  
**Lark Mallory**, Columbus, OH  
**Ernest Martin, Jr.**, Dallas, TX  
**Caryn Coppedge McNeill**, Raleigh, NC  
**Annette L. Nazareth**, Washington, DC  
**Austen L. Parrish**, Bloomington, IN  
**Huyen Pham**, Fort Worth, TX  
**Robert Lee Pitman**, Austin, TX  
**Maibeth J. Porter**, Birmingham, AL  
**Elizabeth B. Prelogar**, Washington, DC  
**Marlon A. Primes**, Cleveland, OH  
**Reena Raggi**, New York, NY  
**Fernando Rodriguez, Jr.**, Brownsville, TX  
**Rodolfo Rodriguez, Jr.**, Irving, TX  
**David J. Schenck**, Dallas, TX  
**Dan Shefet**, Paris, France  
**Meredith C. Slawe**, Philadelphia, PA  
**Carl E. Stewart**, Shreveport, LA  
**Robert H. Thomas**, Honolulu, HI  
**Emily Gold Waldman**, White Plains, NY

## NOTES CONTINUED FROM PAGE 15

**Charles J. Cooper** of Cooper & Kirk, **Justin Driver** of Yale Law School, and **Mark R. Killenbeck** of University of Arkansas School of Law participated in the Leon Silverman Lecture Series. Sponsored by the Supreme Court Historical Society, the series features lectures about unique and interesting events in the history of the Supreme Court. The theme for 2019 was “Dissenting at the Supreme Court—New Perspectives.”

**Charles R. Eskridge III** was confirmed to the U.S. District Court for the Southern District of Texas.

**Paul L. Friedman** of the U.S. District Court for the District of Columbia presented The Eleventh Annual Judge Thomas A. Flannery Lecture in Washington, D.C., with additional remarks from **Jessie K. Liu**, U.S. Attorney for the District of Columbia.

**Kem Thompson Frost**, Chief Justice of the Texas Court of Appeals, 14th District, was named 2019 Outstanding Texas Leader and inducted into the Texas Leadership Hall of Fame by the John Ben Shepperd Public Leadership Institute at The University of Texas-Permian Basin.

**Ruth Bader Ginsburg** of the Supreme Court of the United States delivered the inaugural Herma Hill Kay Memorial Lecture at UC Berkeley School of Law. Justice Ginsburg spoke in conversation with her former clerk, and Berkeley Law professor, **Amanda L. Tyler**.



*Amanda L. Tyler and Ruth Bader Ginsburg | Credit: Berkeley Law*

**Fatima Goss Graves** of the National Women’s Law Center was interviewed by *The Daily Princetonian* about how she has devoted her career to advancing women’s rights; specifically her work at the National Women’s Law Center and her co-founding, housing, and running of the TIME’S UP Legal Defense Fund.

**Benjamin E. Griffith** of Griffith Law Firm achieved recertification as a civil trial advocate from the National Board of Trial Advocacy.

**Adam L. Hoeflich** of Bartlit Beck and professor at Northwestern Pritzker School of Law was appointed to Northwestern University’s Board of Trustees.

**Jill R. Horwitz** of UCLA Law presented “Restatement on Charities” at the joint conference of the National Association of Attorneys General

(NAAG) and the National Association of State Charity Officials (NASCO). Professor Horwitz presented alongside Karin Kunstler Goldman, New York Assistant Attorney General, and Mark A. Pacella, Pennsylvania Chief Deputy Attorney General.

**William C. Hubbard** of Nelson Mullins was appointed Chair of the ABA Standing Committee on the Federal Judiciary. This committee evaluates the qualifications of nominees for federal judgeships for competence, integrity, and temperament and reports those findings to the Senate Judiciary Committee.

**Elena Kagan** of the Supreme Court of the United States delivered the 2019 Stein Lecture at the University of Minnesota Law School. Justice Kagan sat down in conversation with professor and former Minnesota Law School dean **Robert A. Stein** to share her thoughts on the common misconceptions surrounding how the Court operates.



Robert A. Stein and Elena Kagan | Credit: Tony Nelson

**Joseph A. Kanefield**, previously of Ballard Spahr, was appointed Chief Deputy and Chief of Staff to Arizona Attorney General Mark Brnovich.

**Mark R. Killenbeck** of University of Arkansas School of Law delivered a talk as a preview for his Honors College Signature Seminar entitled “Church and State,” which outlined the increasingly contested relationship between religious practice and civic life. Professor Killenbeck also gave an interview about this topic on KUAJ, a local Arkansas NPR affiliate.

**Renee Knake** of the University of Houston Law Center sat down with author Malcolm Gladwell to talk about his most recent book *Talking to Strangers*.



Renee Knake and Malcolm Gladwell



Leondra R. Kruger

The National Constitution Center and *The George Washington Law Review* hosted a free public symposium on the institution of Supreme Court clerkships, which featured a number of ALI members including: **Cheryl Ann Krause** of the U.S. Court of Appeals for the Third Circuit; **Leondra R. Kruger** of the California Supreme Court; President and CEO of the National Constitution

Center **Jeffrey Rosen**, who moderated the panel on Clerkships and the Constitution; **Kannon K. Shanmugam** of Paul, Weiss, Rifkind, Wharton & Garrison, who moderated the panel on Clerkship Experiences; **Jeffrey S. Sutton** of the U.S. Court of Appeals for the Sixth Circuit; and **Diane P. Wood** of the U.S. Court of Appeals for the Seventh Circuit.



Jeffrey S. Sutton, Jeffrey Rosen, and Diane P. Wood

**Thomas S. Leatherbury** of Vinson & Elkins has been selected as director of the new Southern Methodist University (SMU) Dedman School of Law First Amendment Clinic, which will launch in the fall of 2020. The clinic will focus on First Amendment issues including free speech, freedom of the press, and freedom of assembly and petition.

**David F. Levi** of Duke Law School delivered the keynote address on the importance of impartiality in the American judiciary at “The Fair and Impartial Judiciary Symposium,” hosted by the University of Pennsylvania Carey Law School. Other ALI members who participated in the event include: Retired U.S. Supreme Court Justice **Anthony M. Kennedy**, **Stephanos Bibas** of the U.S. Court of Appeals for the Third Circuit, **Stephen B. Burbank** of University of Pennsylvania Carey School of Law, **Paul D. Clement** of Kirkland & Ellis, **Charles G. Geyh** of Indiana University, Maurer School of Law, **Linda Greenhouse** of Yale Law School, **Phoebe A. Haddon** of Rutgers Law School–Camden, **Robert C. Heim** of Dechert, **Theodore A. McKee** of the U.S. Court of Appeals for the Third

## NOTES CONTINUED FROM PAGE 17

Circuit, **Marjorie O. Rendell** of the U.S. Court of Appeals for the Third Circuit, **Jeffrey Rosen** of the National Constitution Center, **Theodore Ruger** of University of Pennsylvania Carey School of Law, **Anthony J. Scirica** of the U.S. Court of Appeals for the Third Circuit, and **Kathleen M. Sullivan** of Quinn Emanuel Urquhart & Sullivan.

**Roberta D. Liebenberg** of Fine, Kaplan and Black was named by the *Philadelphia Business Journal* as one of the “Best of the Bar: Philadelphia’s Top Lawyers” for 2019 in the Business Litigation category. This award honors lawyers who have distinguished themselves in their practice areas based on significant and recent achievements. Ms. Liebenberg was also the 2019 inductee to the American Antitrust Institute’s Private Antitrust Enforcement Hall of Fame. The Hall of Fame recognizes practitioners for distinguished service to the private antitrust enforcement community; commitment to the enforcement of the antitrust laws; and success in fighting for competition, consumers, and workers.

**Gerard E. Lynch** of the U.S. Court of Appeals for the Second Circuit delivered the 2019 James Madison Lecture at NYU School of Law on “Complexity, Judgment and Restraint.”

**Myles V. Lynk** of the DC Bar’s Office of Disciplinary Counsel Appellate Group was a panelist in a “rule of law town hall” on Constitution Day, hosted by the International Bar Association Foundation, the Sandra Day O’Connor Institute, and the Sandra Day O’Connor College of Law at Arizona State University. The nonpartisan conversation addressed the benefits, responsibilities, and economic significance of preserving the rule of law and the principles it embodies.



*Myles V. Lynk*

**Randy J. Maniloff** of White and Williams authored an article for Law.com detailing his interview with Haben Girma and the true story that inspired her autobiography, *Haben: The Deafblind Woman Who Conquered Harvard Law*.

**James A. McKenna**, formerly of the State of Maine Office of the Attorney General Consumer Protection Division, had his article “Mr. Joad and the Repossessed Car” published in the Summer 2019 issue of the *Maine Bar Journal*.

**Robert J. Miller** of Sandra Day O’Connor College of Law at Arizona State University was named the school’s Willard H. Pedrick Distinguished Research Scholar.

**Amy B. Monahan** of University of Minnesota Law School has been inducted as a fellow of the American College of Employee Benefits Counsel, an organization dedicated to elevating the standards of employee benefits law.

**Karen Nelson Moore** of the U.S. Court of Appeals for the Sixth Circuit delivered the Fall 2019 Justice Lester W. Roth Lecture at USC Gould School of Law entitled “Evolving Technology and Changing Circumstances—Impacts on the Law and the Work of Judges.”

**Priscilla R. Owen** became Chief Judge of the U.S. Court of Appeals for the Fifth Circuit.

**Robert C. Post** of Yale Law School delivered a free talk on “Understanding *Citizens United*: The Constitutional Question of Campaign Finance Reform” at the Branford Forum. The talk continued the conversation on many of the topics addressed in Professor Post’s 2016 book, *Citizens Divided: Campaign Finance Reform and the Constitution*.

**Norman M. Powell** of Young Conaway has been appointed to a two-year term on the Board of Directors of the Working Group on Legal Opinions Foundation.

**Venus McGhee Prince** joined Wind Creek Hospitality as its Chief Compliance Officer.

**L. Song Richardson** of UC Irvine School of Law was the recipient of the Friend of the Community Award, presented by the Korean Community Lawyers Association at its 13th Annual Installation and Awards Dinner.

**Jeffrey Rosen** of the National Constitution Center published a new book, *Conversations with RBG: Ruth Bader Ginsburg on Life, Love, Liberty, and Law*. The book provides readers with an intimate look at the life, career, and personal philosophies of U.S. Supreme Court Associate Justice **Ruth Bader Ginsburg**, as told in her own words.

On *Legal Speak*, a podcast by Law.com, **Nicole A. Saharsky** of Mayer Brown shared her predictions for the 2019 Supreme Court term.

American University Washington College of Law hosted “A Global Lawyer: Celebrating the Contributions of Herman Schwartz to the Rule of Law,” a symposium honoring Emeritus Professor **Herman Schwartz** and his contributions to the legal community over the course of his distinguished career.

**Christopher Jon Sprigman** of NYU School of Law was featured on the PBS News Hour report “How big data became a silent colleague for artists and designers.”

**Lawrence W. Waggoner**, Emeritus Professor of the University of Michigan Law School, is consulting with Maine Senator Angus S. King’s staff to draft legislation eliminating the tax incentives for “dynasty trusts.”

# Meetings and Events Calendar At-A-Glance

For more information, visit [www.ali.org](http://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.

## 2020

### January 16-17

Council Meeting - January 2020  
Philadelphia, PA

### March 12-13

Restatement of the Law Third,  
Torts: Concluding Provisions  
Philadelphia, PA

### March 20

Restatement of the Law, Corporate  
Governance  
New York, NY

### March 26

Principles of the Law, Compliance,  
Risk Management, and Enforcement  
New York, NY

### March 27

Restatement of the Law, Copyright  
Philadelphia, PA

### May 18-20

97th Annual Meeting  
San Francisco, CA

### September 11

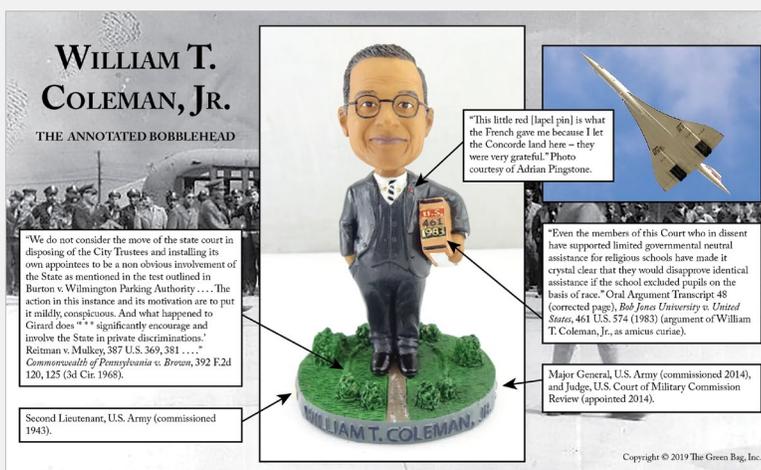
Principles of the Law, Policing  
Philadelphia, PA

### October 22-23

Council Meeting - October 2020  
New York, NY

### November 13

Restatement of the Law Third,  
Torts: Remedies  
Philadelphia, PA



## THE GREEN BAG HONORS WILLIAM T. COLEMAN, JR.

The *Green Bag* has released a new bobblehead in honor of the late William (Bill) T. Coleman, Jr. These bobbleheads honor notable figures in legal history. Originally, the bobbleheads primarily featured U.S. Supreme Court Justices. Recently, *The Green Bag* began making bobbleheads honoring non-Justices—first Belva Ann Lockwood, then a young Thurgood Marshall, and now William T. Coleman.

Mr. Coleman left behind an amazing legacy. A senior partner and the Senior Counselor of the law firm of O'Melveny & Myers in its Washington, DC, office, he was a main architect of the legal strategy leading to *Brown v. Board of Education* and the desegregation of schools and other public facilities throughout the United States. For almost 70 years he played a leading role in the effort to give reality to the principle of equality under law.

If you would like to share any recent events or publications in the next ALI newsletter, please email us at [communications@ali.org](mailto:communications@ali.org).

## In Memoriam

### ELECTED MEMBERS

David Schuman, Eugene, OR

### LIFE MEMBERS

William T. Allen, New York, NY; Jack G. Clarke, Naples, FL; Warren W. Eginton, Bridgeport, CT; Oscar S. Gray, Baltimore, MD; G. Conley Ingram, Marietta, GA; Eugene F. Lynch, San Francisco, CA; Arthur L. Nims, III, Washington, DC; George Bliss Reese, New York, NY



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# SAVE THE DATE

## 97TH ANNUAL MEETING

MAY 18-20, 2020  
THE WESTIN ST. FRANCIS  
SAN FRANCISCO