

DEDICATED TO CLARIFYING AND IMPROVING THE LAW

## ► The President's Letter

### A Few Words about Leadership of The American Law Institute

Because we meet just once a year as a body, and because even then not all our members are able to attend, I thought it might be good to close out this year with a few words about the ALI Council. Each and every one of them participates in ALI's work in just the way you would rightly expect. Their careful and thoughtful review of our project drafts gives practical insight that allows the Restatements, Principles, model codes, and studies we produce to earn their justly deserved accolades.

That accomplishment would be extraordinary enough if they were just the busy lawyers, judges, and scholars that you know them to be. The fact that they are sought out as leaders by so many entities, in so many places, makes us especially appreciate their devotion to the work of the ALI. In just the last few months, several of our Council members have been entrusted with

serious new responsibilities that I would like to highlight for you. In fact, I could go through the entire Council (and maybe sometime I will, in story and song—well, not so much the song part), praising their amazing records and current undertakings, but that would take more space than our quarterly newsletter allows. So I thought just highlighting a baker's dozen of our Council members, in no particular order, would give you the flavor of our extraordinary Council.

Judge **Yvonne Gonzalez Rogers**, formerly on the Alameda County Superior Court bench in California, is now federal Judge Gonzalez Rogers, the most recent addition to the trial bench of the U.S. District Court for the Northern District of California. She is the first Latina judge in that district. In her spare time she now chairs our Membership Committee.

**Ken Frazier** has been the CEO of Merck since January 2011, but he has just been asked by the Board of Trustees of Penn State University to chair the special committee that will investigate the terrible allegations of child abuse at that university. The board's trust in his integrity, his swift thoughtful actions in moving quickly to start the investigation, and the concern conveyed in his statements are not surprising to anyone who knows Ken. In addition to his corporate duties and other civic responsibilities, Ken has been an active Council member and serves on the Nominating Committee, which, as you know, has been very active in the last few years because of our governance changes.

**Marty Lipton** is the chair of our Investment Committee. We read very often about his

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### Sandra Day O'Connor Receives Henry J. Friendly Medal at ALI Council Dinner



*ALI President Roberta Cooper Ramo presents the Friendly Medal to Justice Sandra Day O'Connor.*

At a dinner on Thursday, October 20, during the ALI Council's meeting in New York City, retired U.S. Supreme Court Associate Justice Sandra Day O'Connor accepted The American Law Institute's Henry J. Friendly Medal for outstanding contributions to the law in the spirit of the Institute and the late Judge Friendly. The award recognizes her lifelong commitment to improving the administration of justice, focusing especially on her activities since retiring from the Supreme Court. ALI President Roberta Cooper Ramo presented the medal to Justice O'Connor, lauding her as a source of

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# California Justice Goodwin Liu Addresses Bay Area Members

by Jon S. Tigar, Judge of the Alameda County Superior Court



California Supreme Court Justice Goodwin Liu

Bay Area ALI members gathered on October 27 at the San Francisco offices of Shearman & Sterling (thanks to partner and ALI member Jim Donato) to hear from California's newest Supreme Court Justice, Goodwin Liu. After Judge Yvonne Gonzalez Rogers gave a brief overview of the Council's recent activities (including the admission of three new Bay Area ALI members), Justice Liu delivered an engaging address focusing on the relationship between legal academia and the bench.

As the touchstone of Justice Liu's address, he drew on the remarkable career of California Supreme Court Justice Roger Traynor, who served on the court for 30 years, from 1940 to 1970 (and whose son, Michael Traynor, was a distinguished President of the Institute from 2000 to 2008).

Prior to his service on the Supreme Court, Justice Traynor—like Justice Liu—had been a professor at Boalt Hall (now UC Berkeley Law).

Justice Liu noted that the number of law professors who are appointed to the appellate bench has declined over time, and that he was the first since Justice Traynor to be appointed to California's Supreme Court. Justice Traynor's career, however, demonstrated that the intellectual curiosity, rigor, and breadth of interests associated with legal scholarship are good preparation for the bench and helped produce some of California's most important legal precedents.

Justice Liu focused on three different ways in which Justice Traynor's academic background influenced his work as a Supreme Court justice.

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## O'Connor Receives Friendly Medal *continued from page 1*

inspiration for women lawyers and a model of moderation and civility during her 25 years on the Court.

Justice O'Connor told the assembly, "This [award] matters to me more than you could imagine. I'm just so deeply moved to receive an award from this organization." She praised the work of the ALI as the nation's leading law-reform organization and urged it to play a role in assisting other nations seeking to improve their system of justice.

Before the presentation, Judge Pierre N. Leval of the Court of Appeals for the Second Circuit, a former clerk of Judge Friendly, offered his personal and illuminating reflections on Judge Friendly. (*See excerpts from Judge Leval's remarks on page 6.*)

During its meeting on October 20 and 21, the Council reviewed drafts for two Institute projects. Reporter Ward Farnsworth of Boston University presented Council Draft No. 1 of Restatement Third, Torts: Liability for Economic Harm, covering the first five sections of Chapter 1 on Unintentional Infliction of Economic Loss. Council Draft No. 6 of Restatement Third, Employment Law, consisting of Chapter 3 on Employment Contracts: Compensation and Benefits and Chapter 7 on Employee Privacy and Autonomy, was presented by Chief Reporter Samuel Estreicher of New York University and Reporter Matthew T. Bodie of Saint Louis University. Because there was insufficient time to cover these drafts in their entirety, the Council will continue its discussion of them when it meets in Philadelphia in January.

A discussion of possible work on the Restatement Fourth, Foreign Relations Law of the United States, was led by Professor Sarah H. Cleveland of Columbia University. Professor Paul B. Stephan III of the University of Virginia and Professor Harold Hongju Koh of Yale Law School, currently Legal Adviser to the U.S. Department of State, participated by phone. In addition, Professor Neil B. Cohen, Director of Research for the Permanent Editorial Board for the Uniform Commercial Code, presented the PEB's pending report on the application of the UCC to assignment of mortgage notes.

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The ALI Reporter (ISSN 0164-5757) is published quarterly by The American Law Institute, 4025 Chestnut Street, Philadelphia, PA 19104-3099. Periodicals postage paid at Lancaster, PA.

POSTMASTER: Send address changes and any other communications to 4025 Chestnut Street, Philadelphia, PA 19104-3099.

practice at Wachtell Lipton and the impact of his comments and ideas in the areas of corporate governance, as well as his work for the betterment of New York City. Marty is also the chair of the Board of Trustees of NYU.

In addition to carrying out her duties as our Treasurer, Judge **Carolyn Dineen King** is of course active on the Fifth Circuit Court of Appeals, but she also serves as Secretary of the Board of Baylor College of Medicine in Houston.

**David Rivkin**, a litigation partner at Debevoise & Plimpton LLP, has chaired our ad hoc committee on International Members. Under our current two-year experiment, he chairs a subcommittee that reviews nomination of members from outside the United States and forwards its advice on those nominations to our Membership Committee. He has major responsibility in the International Bar Association as its Secretary General.

**Harvey Perlman** is the Chancellor of the University of Nebraska-Lincoln. Somehow he still finds the time to read drafts from our Reporters and make terrifically helpful additions and edits across the full spectrum of our work. He recently chaired an NCAA task force that called for management and financial reforms for postseason Division I college football bowls and recommended new academic standards to determine teams' eligibility for postseason play.

In her private practice at Skadden Arps, **Sheila Birnbaum** is justly known as one of the major forces in the defense bar. She is an active Council member who has given invaluable insights into our work in aggregate litigation and all manner of torts. Her reading of our other work as it comes to the Council is always practical and thoughtful. After completing her job as the court-appointed mediator in the cases of certain families who lost loved ones in the 9/11 attack, she was recently asked to serve as the special master to oversee the \$2.8 billion fund that Congress has appropriated for the first responders and others who have illnesses

resulting from exposure to toxic fumes, smoke, and dust after the attack.

**Doug Laycock**, the Robert E. Scott Distinguished Professor of Law, Horace W. Goldsmith Research Professor of Law, and Professor of Religious Studies at the University of Virginia, argued a major freedom-of-religion case, *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, before the United States Supreme Court in October. He is one of less than a handful of major scholars in this area. His recently published book, *Religious Liberty, Volume 2: The Free Exercise Clause*, should be required reading, not only for those who work in this important area of the Bill of Rights, but for any American interested in better understanding the complex way these issues make their way from concern to court. Doug is a Vice President of the ALI and thus is deeply involved in all of our work, both administrative and intellectual.

**Daniel Meltzer** returned from the White House, where he was Principal Deputy Counsel to the President, to Harvard Law School and, happily for us, to our Council. He is on our Nominating and Executive Committees and serves on the President's Intelligence Advisory Board. We can not imagine a more reasoned approach to important issues of national concern than Dan's.

Judge **Lee Rosenthal**, a federal trial judge in Houston, recently completed her term as chair of the Committee on Rules of Practice and Procedure of the Judicial Conference of the United States, which allowed her to become the chair of our Program Committee, the key committee that reviews proposals for new projects and oversees the work of all of our projects.

**Diane Wood**, judge on the Court of Appeals for the Seventh Circuit and Senior Lecturer in Law at the University of Chicago Law School, serves as the chair of our Nominating Committee and has been named to the Commission on the Humanities and Social Sciences, which was formed by the American Academy of

Arts and Sciences pursuant to a bipartisan request from Congress.

**Elizabeth Cabraser** somehow manages to have a major plaintiffs' class-action practice based in San Francisco at Lieff Cabraser and to be an adjunct faculty member at Columbia Law School. Elizabeth recently was honored with the ABA's Margaret Brent Award and joined many other Council members as a member of the American Academy of Arts and Sciences. Among a host of major multidistrict litigation matters in which Liz serves as lead plaintiffs' counsel is the BP Gulf Oil Spill case. We have imposed additional responsibility on Elizabeth by her appointment to our Ad Hoc Committee on Membership.

**Gerhard Casper's** major responsibilities are emblematic of many of our emeritus Council members. Gerhard, who is President Emeritus at Stanford, currently serves on many boards and recently finished a term as a member of the Yale Corporation. He has just been named to a one-year term as the Director of Stanford's Freeman Spogli Institute for International Studies and is deeply enmeshed in significant scholarly work and teaching at Stanford. Gerhard too will be on our Ad Hoc Committee on Membership.

My point is to note that our iconic founders and their successors in the last century would have complete confidence in the exemplary Council that now oversees our work. Because of our leaders and members, the ALI remains deeply important to the functioning of the American justice system and is admired around the world for its method, quality, and impact.

I wish you happiest year-end holidays, a healthy New Year, and, as always,

I wish you joy.

*Roberta*

Roberta Cooper Ramo  
President

## New Member Spotlight: A Q&A with One of ALI's Recently Elected Members



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*Name:*

**ROBERT F. CUSUMANO**

*Position:*

**General Counsel, ACE Group, New York, NY**

*Education:*

**B.A., Harvard University; J.D.,  
University of Pennsylvania Law School**

*Elected to Membership:*

**October 20, 2011**

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**What led you to become a lawyer?** The combination of competitive debate in high school and college with a major in government and economics made it seem natural. I think I had an affinity for the logic of the law and an interest in the balance between that logic and the need for flexibility and a human touch. At the time, I did not really expect to become a lifelong lawyer, but was more interested in government.

**What was your favorite class in law school?** The differences between law-school classes for me were all about the teachers. The classes in contract and labor law were wonderfully presented and came alive.

**Who has been your greatest professional mentor or role model? Why?** Roy Reardon at Simpson Thacher probably had the greatest effect on how I came to define the institutional mission of lawyers and the role of an individual lawyer. He conveyed a confidence that lawyers are part of a calling that is above the day-to-day controversies we deal with, a patience with human nature, and a confidence that people will almost always reciprocate respect. He also managed to embed all of our logical, analytical lawyer concepts in a narrative—always emphasizing “the story”—an approach that became a core feature of my litigation style. That approach is entirely consistent with what we now know to be the basic architecture of human cognition and of the ability to persuade. Roy could be an intense battler, but it was always with courtesy and deep respect for the system, and his weapons were always his stories.

**What made you decide to pursue ALI membership?** In the last decade or so, my work has made clear to me the fact that this thing we call “the law” gets made in all kinds of different ways. I have participated in many of those law-making enterprises at home and abroad, but always as part of my day job and always on behalf of a client who had a particular interest to express. ALI inhabits an unusual niche in law-making in that its Restatements (and other work) tend to act as a moment of clarification in the otherwise

messy development of the common law. Such clarification—the distillation of long strands of analysis and, often, contradictory bodies of case law—is critically important in making the law actually work in the real world. My time in our profession has been spent entirely on that flash point between the law as an exercise in logic, consistency, and abstract notions of fairness and justice on the one hand, and practical application to the unimaginably complicated affairs of real people on the other. Much of what ALI does lives there, too.

**What benefits do you hope to get from your ALI membership?**

I think that this is a terrific forum in which to express, and perhaps to test, my own mental model about how the law governs, and is governed by, human nature and the structure of societies.

**You have some experience with the work of the Institute as an Adviser to the Principles of Liability Insurance project. What have you enjoyed most in that role (or when you attended the first meeting)?** When I joined the Advisers, I appreciated the reminder that people are supposed to think on behalf of the project and not be lobbyists for particular interests. If that works well, it means that people’s views are influenced by where they come from—their knowledge, their experience, and the problems they have faced—but they are not there trying to “win” some issue on behalf of a constituency. While I liked the idea, I was a little skeptical that it could really work. But it does seem to work, and the all-day meeting we had about insurance law was an impressive exercise in “nonpartisan” thinking.

**What was the last book you read, and would you recommend**

**it?** Steven Pinker, *The Better Angels of Our Nature: Why Violence Has Declined*. The opening sentence of this book touts its subject as the most important in the world, and that seems about right. Few people would think that violence is in decline in the world, but the evidence is irrefutable, and the decline has been massive. One explanation is the adaptability of human behavior to the

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environments set by humans as a whole. Whether through the advance of societal interaction, or capitalism, or communication, or—and I think this is most important—the relentless development of a flexible and reasonably fair rule of law, I think we are now at a place where we can finally say that it is not airy or excessively idealistic to think about peace being ascendant. So does Pinker, and he does a pretty good job of proving it. This work dispels the notion that people are either “good” or “evil,” and shows that the better way to think about such things lies in evolutionary psychology: We are both good and evil, and the side that gets manifested depends entirely on our environment, most importantly the way in which whole societies accept, reject, or define bad behavior. This has huge, perhaps transformational, implications for the law, particularly the criminal law.

**E-book or hard copy?** Hard copy always.

**As the founder of ACE Rule of Law Fund, what would you like ALI members to know about it?** Our Rule of Law Fund was designed as a community symbol of the higher calling of the practice of law and a reminder that we are

independent advisors with our own professional “constituency,” i.e., each other. We created the fund to be participatory via voluntary contributions by individual lawyers. Those contributions are matched by me and by the company (several times over), and by many of our outside counsel firms. The fund can support five or ten meaningful projects every year. We focus on “one-off” projects with a definable beginning and end, most often concerning some important event or crisis that can be tackled in a specific way. For its first project, the fund financed the investigation of the “kids for cash” scandal in Pennsylvania (with two judges now incarcerated and thousands of children’s criminal records now expunged). We have financed legal conferences in Iraq, Afghanistan, South America, and Africa; put an advisor into Tajikistan to persuade the government there that the best way to handle an adolescent who has been raped is not to then lock her up to be raped some more; arranged for translators for East Asian women going to court in New York City; and financed, through an outfit called Independent Diplomat, the provision of diplomatic services to Southern Sudan as it migrated to independence.

**What is the most interesting matter you have worked on professionally?**

For cocktail conversation, it would be the libel case brought against the author of the book *Den of Thieves* by various interests aligned with Michael Milken. It was a fascinating mix of legal ambiguity, factual uncertainty, and “follow the money” intrigue. For hard-core practical lawyering, it would be the six-year effort to arrange an asbestos bankruptcy settlement among about 35 insurers covering 50 years of coverage for three manufacturers—an incredibly complex analytical project, with dynamic spreadsheets liquidating uncertainties about legal or factual issues. But it was much more interesting for the politics of complex negotiation—a massive multi-dimensional conflict, huge dollars at stake, in a context where no one believed it could be done (which lack of faith became the main obstacle to be overcome).

**What special feature would you like to share about yourself? For example, your proudest achievement, an unusual skill, an interesting hobby, a favorite activity?** Favorite phrases: “Life intrudes” and “Sisyphus rests.”

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## *Goodwin Liu Addresses Bay Area Members* continued from page 2

First, Justice Traynor frequently looked to law-review articles and other scholarly works, and was very comfortable citing academic sources in his opinions. Justice Traynor also believed social science and policy analysis could bring rationality to the law. For example, in the landmark 1948 case *Perez v. Sharp*, 32 Cal. 2d 711, 198 P.2d 17, Traynor, citing a variety of sociological, psychological, and anthropological research to show that the racial categories in California’s anti-miscegenation law were not grounded in reality, wrote the opinion that struck down the law.

Second, Traynor’s academic background let him “see the forest and not just the trees”—he could see the whole breadth of the law, and not merely each case in isolation. Justice Liu said, “Traynor employed this

perspective to canvass accumulated precedent, to question the continuing relevance of the principles or policies underlying the precedent, and to clarify or reformulate the law where needed.”

Third, “like most people who have spent time in legal academia, Traynor approached the law with a healthy dose of legal realism. He believed in law as a means of solving human problems, and he believed law should be adapted to the needs of the age.” Traynor’s ability to combine legal realism, judicial reasoning, and the lessons of experience—and his deep understanding of the public-policy concerns that animate the law—were behind some of California’s most important decisions, including *People v. Cahan*, 44 Cal. 2d 434, 282 P.2d 905, the 1955 case that established the exclu-

sionary rule in California and significantly influenced the same holding by the U.S. Supreme Court six years later in *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961).

After his remarks, Justice Liu answered questions from the audience on topics ranging from the way justices communicate with each other about pending cases to the role legal scholarship currently plays in influencing the court.

The reception with Justice Liu was a high-water mark in an evolving tradition of Bay Area membership events, and the ALI looks forward to future gatherings of its Bay Area members.

# Who Was Henry Friendly?

Excerpts from Remarks on the Award of the Henry Friendly Medal to Justice Sandra Day O'Connor  
(footnotes omitted)

by Pierre N. Leval, Judge of the U.S. Court of Appeals, Second Circuit



Judge Pierre N. Leval reminisces about Judge Henry Friendly at the Council's dinner October 20.

President Ramo called me a couple of days ago with a problem. Young people today (and this includes youngsters up to the age of 50) apparently do not know who Henry Friendly was or why The American Law Institute awards a medal in his name. Would I address those questions tonight?

At first I was astonished by Roberta's proposition. Friendly was revered as a god in the federal courts from 1958 to his death in 1986.

In every area of the law on which he wrote, during a quarter century on the Second Circuit, his were the seminal and clarifying opinions to which everyone looked as providing and explaining the standards.

Most of us who earn our keep by judging can expect to be deservedly forgotten *within weeks* after we kick the bucket or hang up the robe and move to Florida. But for one whose judgments played such a huge role, it is quite surprising—and depressing—that the memory of him has so rapidly faded. . . .

Harvard's great Professor Paul Freund, speaking of Friendly's student days, described him as a "legend in his own time," whose attainments were "part of the lore of [Harvard] University." (This referred to Friendly's arrival at the college at age 16, his dazzling of the History faculty, which sought to keep him for their own, and his entry instead to the Law School where he had what is believed to be the highest average ever attained.) . . .

When Justice Brandeis had Friendly as his clerk in 1928, recommended by then-Professor Frankfurter, Frankfurter called the Justice to ask how Friendly was doing. Brandeis answered, "Don't you ever send me another such man as Friendly. If I have another man like him, I would not have to do a lick of work myself."

And a superb biography of Friendly by David Dorsen, soon to be published by the Harvard University Press, proclaims him the greatest judge of his time.

To those of us who had the privilege of clerking for him, his genius was all the more astonishing—because we saw the ease and speed with which he produced his great opinions. He carried virtually all of law in his head. What is more, in his head he saw clearly the junctions, intersections, overlaps, and disputed territories of the seamless web. And his mind worked with the speed of computer circuitry—that is, on the computer's good days.

When it came to writing an opinion, Friendly would sit himself at a writing table surrounded by the briefs and appendices. Having quickly read through these, he knew them cold. He would sit with a pad of lined paper and begin to write by hand. As he sat down to the task, the entire opinion had already been organized and written in his head. He would write, single spacing, from the left-hand edge of the page to the right, leaving no room at all for modifications. He would write at approximately the same speed as if he were copying an existing text. Indeed, he was. . . .

In this fashion, he regularly produced, as rapidly written first drafts, perfect final opinions. Apart from the occasional addition of a few *certs denied*, no changes were needed. For many opinions, the clerks had practically no role. New research was rarely needed—unnecessary, as it was all in his head. Their only significant offices for Friendly were two: to keep him in touch with what the great professors were thinking in the law schools, and occasionally to challenge some part of Friendly's analysis. . . .

So why has this greatest of judges slid into obscurity barely a quarter century past his death? . . .

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Friendly was not a flashy judge; not a headline grabber; not one to look for the quotable one-liner. He shunned rhetorical flourishes designed to make rulings look more obvious, indisputable, or necessary than they are. He presented the questions in their full complexity. His opinions made difficult reading—often requiring intense concentration to understand. And their complexity made them difficult to explain to nonlawyers.

Nor was he a judge (in today's mold) who sought opportunities to discard governing precedent in favor of results more to his liking. He was constantly engaged in explaining, rationalizing, and improving the state of the law as a living, functioning organism, whose rules have purposes, limits, and interactions with other rules—all of which must be understood to make them function effectively. Not glamorous, but immensely useful.

A final reason for Friendly's puzzling obscurity today was his powerful inclination toward moderation. He was not interested in intellectually pure, but extreme and impractical, solutions. He was always attuned to the practical consequences of rules of law, and of the tendency of abstract principles to push beyond their utility. He was keenly aware of the value of precedent and of how ill-suited courts and judges are to chart the course for society, except when profound injustices require correction. . . . His rulings were not destined to make headlines—nor to be extolled in editorials. They were, nonetheless, the finest exemplars of the judicial craft.

And so, at his death, 25 years ago, inspired and led by Michael Boudin, who had been Friendly's best and favorite law clerk—like a son to the judge—the Friendly clerks planned and endowed the Henry Friendly Medal to be awarded from time to time by The American Law Institute for outstanding contributions to the law in Judge Friendly's great tradition. . . .

It is not my office to sing the praises of the person who receives this honor named for Henry Friendly. That privilege belongs to others. I will, however, allow myself a tiny trespass. Justice O'Connor, your practical wisdom, your sage reluctance to break the molds and toss over precedent, your appreciation of the enormous value of modesty, moderation, and compromise in judging, make you a particularly wonderful and gratifying choice to be honored by The American Law Institute in Henry Friendly's name.

## New Members Elected

On March 11, the Council elected the following 44 persons as the newest members of the Institute:

**Mark D. Agrast**, Washington, DC; **Elizabeth K. Ainslie**, Philadelphia, PA; **Veronica M. Bates**, Dallas, TX; **Lanny A. Breuer**, Washington, DC; **David H. Brown**, Houston, TX; **Timothy W. Burns**, Madison, WI; **Catherine C. Carr**, Philadelphia, PA; **Colm F. Connolly**, Wilmington, DE; **Nina Maria Dethloff**, Bonn, Germany; **Allyson K. Duncan**, Raleigh, NC; **Thomas M. Flanagan**, New Orleans, LA; **Claudio Grossman**, Washington, DC; **Kendyl T. Hanks**, New York, NY; **Allison Hayward**, Alexandria, VA; **Paul Herrup**, Harpers Ferry, WV; **Ricardo H. Hinojosa**, McAllen, TX; **Phyllis J. Holmen**, Atlanta, GA; **Richard G. Johnson**, Cleveland, OH; **Edwin S. Kneedler**, Washington, DC; **Corinna Barrett Lain**, Richmond, VA; **Matthew Howard Lembke**, Birmingham, AL; **Douglas N. Letter**, Washington, DC; **Susan M. Liss**, Chevy Chase, MD; **Paul A. Lombardo**, Atlanta, GA; **Erik Luna**, Roanoke, VA; **Solangel Maldonado**, Newark, NJ; **Holiday Hart McKiernan**, Indianapolis, IN; **Jennifer L. Mnookin**, Los Angeles, CA; **Charles R. A. Morse**, New York, NY; **Robert L. Nelson**, Chicago, IL; **Sean Olivas**, Albuquerque, NM; **Elizabeth Pendo**, St. Louis, MO; **Richard C. Reuben**, Columbia, MO; **Daniel C. Richman**, New York, NY; **Jack L. Rives**, Chicago, IL; **Margret G. Robb**, Indianapolis, IN; **Reginald L. Robinson**, Silver Spring, MD; **Vincent D. Rougeau**, Newton Center, MA; **Karen J. Sarjeant**, Silver Spring, MD; **Ann Shalleck**, Washington, DC; **Anne Minnette Tamar-Mattis**, Cotati, CA; **Marc Tejtel**, Washington, DC; **Thomas D. Waterman**, Des Moines, IA; **William Arthur Webb**, Raleigh, NC

On October 20, the Council elected the following 52 persons as the newest members of the Institute:

**Elizabeth Alexander**, Washington, DC; **Matthew T. Bodie**, St. Louis, MO; **Richard Briffault**, New York, NY; **Mary Patrice Brown**, Washington, DC; **David N. Calvillo**, McAllen, TX; **Robert P. Charrow**, Washington, DC; **Julianna M. Childs**, Greenville, SC; **Robert F. Cusumano**, New York, NY; **Kenneth Glenn Dau-Schmidt**, Bloomington, IN; **Marguerite M. Elias**, Itasca, IL; **Robert Shenton French**, Canberra, Australia; **Eric J. Friedman**, New York, NY; **Richard M. Gergel**, Charleston, SC; **Laurence Gold**, Washington, DC; **Rebecca A. Gregory**, Fort Worth, TX; **James C. Ho**, Dallas, TX; **David A. Hoffman**, Philadelphia, PA; **Diane E. Hoffmann**, Baltimore, MD; **Duncan B. Hollis**, Philadelphia, PA; **Kathleen J. Hopkins**, Seattle, WA; **Robert H. Hu**, San Antonio, TX; **Robert L. Kehr**, Los Angeles, CA; **Jeff Kichaven**, Los Angeles, CA; **Harry C. Lee**, Chicago, IL; **Richard A. Leo**, San Francisco, CA; **Penina K. Lieber**, Pittsburgh, PA; **Orly Lobel**, San Diego, CA; **Meghan Howett Magruder**, Atlanta, GA; **Colin P. Marks**, San Antonio, TX; **Paul E. McGreal**, Dayton, OH; **Kevin H. Michels**, Ewing, NJ; **Paul W. Mollica**, Chicago, IL; **Melissa E. Murray**, Berkeley, CA; **Arden J. Olson**, Eugene, OR; **R. Hewitt Pate**, San Ramon, CA; **Stephen Patrick Pate**, Houston, TX; **Steven Plitt**, Phoenix, AZ; **Norman M. Powell**, Wilmington, DE; **Robert L. Pratter**, Philadelphia, PA; **Lawrence D. Rosenthal**, Highland Heights, KY; **Michael D. Rubenstein**, Houston, TX; **Alan S. Rutkin**, Uniondale, NY; **Frederick P. Schaffer**, New York, NY; **Leslie Scott**, Jackson, MS; **Nathaniel S. Shapo**, Chicago, IL; **Kathryn A. Stephens**, San Antonio, TX; **Edna Sussman**, New York, NY; **Sjef van Erp**, Maastricht, Netherlands; **Victor D. Vital**, Dallas, TX; **Stephan Wilske**, Stuttgart, Germany; **Christopher S. Yoo**, Philadelphia, PA; **Robert Alan Zauzmer**, Philadelphia, PA



# Notes About Members and Colleagues

• **Peter C. Alexander**, a professor and former dean of Southern Illinois University School of Law in Carbondale, has been selected as the founding dean of Indiana Tech's new law school, scheduled to open in Fort Wayne in the fall of 2013.

• In October, **James M. Beck** of Philadelphia received the Product Liability Advisory Council's John P. Raleigh Award. The highest honor given by the organization to one of its members, the award is granted only when the prior recipients deem someone worthy of receiving it. Mr. Beck's involvement in ALI's Principles of the Law of Aggregate Litigation project was one of the reasons cited for his receiving the award.

• In September, Maryland Legal Aid celebrated its centenary by recognizing 100 Champions of Human Rights and Justice. Three Baltimore ALI members—**Robert M. Bell**, Chief Judge of the Maryland Court of Appeals, **Benjamin R. Civiletti**, and **Albert J. Matricciani, Jr.**, Judge of the Maryland Court of Special Appeals—were among the top 25, selected for their outstanding achievements. Other ALI members included among the 100 champions were **Karen Czapanskiy**, a professor at the University of Maryland, Francis King Carey School of Law, in Baltimore; **Karen J. Sarjeant**, of Silver Spring, Maryland; and **Shale D. Stiller** of Baltimore.

• **Dennis Jeffrey Block** has joined the law firm of Greenberg Traurig, in its New York City office, as senior chairman of its global mergers and acquisitions practice. He previously was a senior partner in the corporate practice group of Cadwalader Wickersham & Taft.

• **Stephen Calkins**, associate vice president for academic personnel at Wayne State University in Detroit and a professor at the university's law school, has been appointed a member of the Competition Authority of Ireland, Ireland's chief trade-regulation agency, and head of its Mergers Division. When the Competition Authority merges with Ireland's National Consumer Agency in 2012, Professor Calkins, who is taking a leave of absence from the university, will have responsibility for both competition and consumer-protection regulation.

• **Sheila Carmody** of Phoenix, Arizona, was recognized in September as Outstanding Alumna for the Arizona State University Sandra Day O'Connor College of Law, class of 1981.

• In November, the following ALI members participated, as chairs or panelists, in a conference in Chicago discussing the Institute's work on the Restatement Third, Employment Law: **Kenneth Glenn Dau-Schmidt**, a professor at Indiana University Maurer School of Law in Bloomington; **Matthew W. Finkin**, a professor and the director of the program in comparative labor and employment law and policy at the University of Illinois College of Law

in Champaign; **Catherine L. Fisk**, a professor at the University of California, Irvine School of Law; **Alan Hyde**, a professor and scholar at Rutgers University School of Law–Newark; **Orly Lobel**, a scholar and professor at the University of San Diego School of Law; **Robert L. Nelson**, director and research chair in the legal profession for the American Bar Foundation in Chicago, and professor of sociology and law at Northwestern University; **Charles A. Sullivan**, a professor and director of the Rodino Law Library at Seton Hall University School of Law in Newark; and **Lea S. VanderVelde**, a professor at University of Iowa College of Law in Iowa City. The meeting was sponsored by the Labor Law Group, the American Bar Foundation, Northwestern University School of Law, and Loyola University Chicago School of Law.

• **Anne S. Emanuel**, a professor at Georgia State University College of Law in Atlanta, has published a new biography entitled *Elbert Parr Tuttle: Chief Jurist of the Civil Rights Revolution* (University of Georgia Press 2011). Professor Emanuel served as a law clerk for Judge Tuttle from 1975 to 1976.

• **Richard O. Faulk** of Houston is the author of the core chapter, "Writing Appellate Briefs," of *Appellate Practice in Federal and State Courts* (Law Journal Press 2011). He was the only environmental attorney included in the *Texas Super Lawyers 2011 Top 100 Lawyers in Houston* listing.

• ALI Council member **Kenneth C. Frazier** of Whitehouse Station, New Jersey, was named chair of Penn State's committee to investigate allegations of child sexual abuse at the university. Mr. Frazier has served as president, CEO, and a member of the board of directors for Merck & Co., Inc., since January 2011.

• In September, U.S. Supreme Court Associate Justice **Ruth Bader Ginsburg** was interviewed before a live audience at the University of California Hastings College of the Law for a segment of *Legally Speaking*, a series of probing interviews with prominent lawyers, judges, and academics, co-produced by UC Hastings and *California Lawyer*.

• Former U.S. Attorney General Judge **Alberto R. Gonzales** has joined the Nashville firm of Waller Lansden Dortch & Davis as Of Counsel. In addition, he will fill the newly established Doyle Rogers Distinguished Chair of Law at the new Belmont University College of Law in Nashville, effective January 2, 2012.

• On November 15, **Yvonne Gonzalez Rogers** of Oakland, an Alameda County Superior Court judge and a member of the Institute's Council, was confirmed by the Senate for the U.S. District Court for the Northern District of California, where she will become the first Latina federal judge in the Bay Area. She fills the vacancy created by U.S. District Judge **Vaughn R. Walker's** retirement in February.

*continued on page 9*



- **Linda Greenhouse**, a senior research scholar in law, a distinguished journalist in residence, and a lecturer in law at Yale Law School, participated in November in a panel discussion at Princeton University entitled “Before (and After) *Roe v. Wade*: New Perspectives on Backlash.” Ms. Greenhouse’s new book, *The U.S. Supreme Court: A Very Short Introduction*, will be published by Oxford University Press early in 2012.
- In November, **Antonia Hernández** of Los Angeles, president and chief executive officer of the California Community Foundation, received the Valerie Kantor Award for Extraordinary Achievement, the highest honor bestowed by the Mexican American Legal Defense and Educational Fund.
- In October, **Jennifer J. Johnson** of Portland, Oregon, became the new Erskine Wood, Sr., Professor of Law at Lewis & Clark Law School. A member of the faculty since 1980, she was installed in the Wood Chair at a public ceremony that included her lecture entitled, “Fleeing Grandma: A Regulatory Ponzi Scheme?”
- **Gregory A. Kalscheur, S.J.**, a professor at Boston College Law School, took his profession of final vows as a Jesuit priest in September. Father Kalscheur, who received a master of divinity degree and licentiate of sacred theology from Weston Jesuit School of Theology, teaches courses on church and state and civil procedure.
- In October, **Paul M. Kurtz**, associate dean for academic and student affairs and a professor at the University of Georgia School of Law in Athens, received the Athens Justice Project’s Milner S. Ball Social Justice Award. He was honored for his outstanding and continued support of the Project, as well as for his work on behalf of indigent criminal defense in Georgia, on reform of family law nationally, and for countless community organizations and causes.
- **Stephen H. Legomsky**, a professor at Washington University School of Law in St. Louis, Missouri, has taken a leave of absence from the law school to assume the position of chief counsel for the U.S. Citizenship and Immigration Services in Washington, D.C. He will manage a staff of 160 attorneys, advise the agency’s director on legal and policy issues, and serve as a member of the Department of Homeland Security and USCIS leadership teams.
- **William H. Levit, Jr.**, of Godfrey & Kahn in Milwaukee lectured during October 2011 on international commercial arbitration at the Law and Management Institute of Vladivostok State University of Economics & Service in Vladivostok, Russia.
- **Douglas R. Marvin** of Washington, D.C., an alumnus of Lafayette College in Easton, Pennsylvania, was elected to its board of trustees and began a five-year term on July 1.
- **James R. Maxeiner**, a professor and the associate director of the Center for International and Comparative Law at the University of Baltimore School of Law, is the author (with Gyooho Lee and Armin Weber) of *Failures of American Civil Justice in International Perspective* (Cambridge University Press 2011). The book provides a comparative critical introduction to civil-justice systems in the United States, Germany, and Korea.
- At the spring meeting of the ABA’s Business Law Section, **Elizabeth S. Miller**, a professor at Baylor Law School in Waco, Texas, received the section’s Jean Allard Glass Cutter Award, which recognizes an exceptional woman business lawyer who has made significant contributions to the profession and the Business Law Section.
- **Jacob M. Monty** of Houston, Texas, is the author of *The Gringo’s Guide to Hispanics in the Workplace* (Antaeus Books, Inc. 2011). The book targets employers, business owners, and human-resources professionals, and educates them about employment, labor and immigration law, and Hispanic cultural issues.
- **R. Patrick Vance** of New Orleans has been admitted to the American College of Trial Lawyers. In November he also was elected to a one-year term as president of the New Orleans Bar Association.
- **Bob Wessels**, a professor of international insolvency law at Leiden University in the Netherlands and a co-Reporter of the Institute’s Transnational Insolvency project, has been elected a fellow of the European Law Institute. In addition, he was elected an honorary member of INSOL Europe, a European organization of professionals who specialize in insolvency, bankruptcy, and business reconstruction and recovery.
- In November, Judge **Diane P. Wood** of the U.S. Court of Appeals for the Seventh Circuit, a member of the Institute’s Council, was named to the Legal Services Corporation Board’s Pro Bono Task Force, formed to identify best practices for enhancing pro bono services to low-income Americans.
- The University of Florida Levin College of Law honored alumnus **Stephen N. Zack** of Miami, Florida, the American Bar Association’s immediate past president and a speaker at ALI’s 2011 Annual Meeting, with the naming of Stephen N. Zack Hall on the university campus in September. The ceremony also established the Stephen N. Zack Endowment, which will provide funds for academic programs that advance student knowledge of legal ethics and professionalism and increase diversity.
- In September, **Michael J. Zimmer** of Evanston, Illinois, a professor at Loyola University Chicago School of Law, was awarded the Paul Steven Miller Memorial Award for scholarly contributions to the field of labor and employment law.

# New Report Released on UCC's Application to Mortgage Notes

by Neil B. Cohen, Director of Research for the Permanent Editorial Board for the UCC

On November 14, 2011, the Permanent Editorial Board for the Uniform Commercial Code (PEB) issued its report "Application of the Uniform Commercial Code to Selected Issues Relating to Mortgage Notes." The Report is available online at [www.ali.org](http://www.ali.org).

Recent economic developments have brought to the forefront complex legal issues about the enforcement and collection of mortgage debt. Many of these issues are governed by local real-property law and local rules of foreclosure procedure, but others are addressed in a uniform way throughout the United States by provisions of the Uniform Commercial Code (UCC).

Although the UCC provisions are settled law, it has become apparent that not all courts and attorneys are familiar with them. In addition, the complexity of some of the rules has proved daunting. The PEB Report advances the understanding of this statutory background by identifying and explaining several key rules in the UCC that govern the transfer and enforcement of notes secured by a mortgage in real property. Issues relating to the transfer, ownership, and enforcement of mortgage notes are primarily governed by two Articles of the UCC: Article 3, which governs the obligations of parties on mortgage notes that are negotiable instruments, and Article 9, which governs how ownership of nego-

tiable and non-negotiable notes may be transferred and the effect of transfer on the ownership of the notes and the mortgages that secure them.

The PEB Report explains the application of the rules in those Articles to issues such as who may enforce a mortgage note, what steps must be taken to transfer ownership of a mortgage note or use the note as collateral for an obligation, the effect of a transfer of a mortgage note on the mortgage securing it, and what steps a person to whom a mortgage note has been transferred may take in order to become an assignee of record of the mortgage note if that step is necessary for nonjudicial foreclosure.

## ALI Publishes Final Volume of Property Restatement

The third and final volume of the Restatement Third, Property (Wills and Other Donative Transfers), is now available for purchase. The publication completes a 20-year project to update the law of wills and succession. The latest volume provides a comprehensive and detailed account of the rules governing class gifts, powers of appointment, future interests, and perpetuities. The Reporters who drafted this Restatement are Professor Lawrence W. Waggoner of the University of Michigan Law School and Professor John H. Langbein of Yale Law School.

The 757-page hardbound text, product code 1R3WDTV3OT, costs \$131. To order, visit the Publications section at [www.ali.org](http://www.ali.org) or call the ALI Customer Service Department at 1-800-253-6397. Volumes 1 and 2 also are available for purchase.

**Special offer for ALI members:** Order by January 31, 2012, and save 20% on the latest volume (member price \$104.80). Buy all three hardbound volumes and save 25%.\*

*\* This offer is good only for new purchases of hardbound volumes of the Restatement of the Law Third, Property (Wills and Other Donative Transfers). To receive the 25% discount, all three volumes must be purchased in the same transaction. Prices exclude shipping and handling. This offer is nontransferable. To receive the discount when ordering online, ALI members must log in during checkout using the e-mail address on file in their ALI membership records.*

## In Memoriam

*Elected*

**David C. Baldus**, Iowa City, IA; **James K. Robinson**, Washington, DC; **Daniel W. Shuman**, Dallas, TX

*Life*

**Anthony J. Correro, III**, New Orleans, LA; **William L. Garwood**, Austin, TX; **James C. Gibbens**, Oklahoma City, OK; **J. Thomas Greene**, Salt Lake City, UT; **John O. Honnold**, Kennett Square, PA; **Katherine Brash Jeter**, Shreveport, LA; **Richard S. Lombard**, Tucson, AZ; **Robert J. McGee**, Londonderry, NH; **Charles M. Metzner**, Sarasota, FL; **George R. Poehner**, Tehachapi, CA; **Thomas R. Sheppard**, Los Angeles, CA; **Jerome J. Shestack**, Philadelphia, PA; **Harry H. Wellington**, New York, NY; **Percy D. Williams**, Austin, TX; **Bernard Wolfman**, Cambridge, MA

## The Institute in the Courts

The U.S. Supreme Court recently cited Restatement Third, Torts: Liability for Physical and Emotional Harm § 29 and Comment *b* in holding that the proper jury charge in a Federal Employers' Liability Act case did not incorporate "proximate cause" standards developed in nonstatutory common-law tort actions, but instead tracked the language Congress employed—i.e., that a defendant railroad caused or contributed to a plaintiff employee's injury if the railroad's negligence played any part in bringing about the injury. The court, discussing the "notoriously confusing" nature of the term "proximate cause," and studies showing that jurors frequently misunderstood proximate-cause instructions, said it was not surprising that the Restatement Third eschewed the term, instead limiting liability to "harms that result from the risks that made the actor's conduct tortious." **CSX Transp., Inc. v. McBride**, 131 S. Ct. 2630, 180 L. Ed. 2d 637 (June 23, 2011).

The Third Circuit Court of Appeals recently looked to the Institute's Principles of the Law of Aggregate Litigation for guidance in regard to the factors to be considered in determining whether to certify an "issue only" class on liability. In an action by village residents against a chemical company concerning residents' alleged exposure to vinyl chloride, the federal district court denied class certification both for plaintiffs' proposed medical-monitoring class and for their property-damage class, each of which failed for the same reason—the "common" evidence for trial did not adequately typify the specific individuals who composed the two classes, and thus individual issues predominated over common issues. The Third Circuit cited the principles and factors set forth in Principles of the Law of Aggregate Litigation §§ 2.02–2.05 and 2.07–2.08 before affirming the district court's finding that liability was inseverable from other issues that would be left for follow-up proceedings, i.e., fact of damages, amount of damages, causation, and extent of contamination.

The court noted that, in choosing to follow the "sound guidance" of the Principles, as well as the approach taken in an earlier decision by the court, it would join neither camp in a circuit disagreement over the extent to which the ability to certify issue classes altered the predominance requirement. The court cited § 2.02, Comment *d*, in holding that evidence of exposure of hypothetical, composite persons could not be substituted for evidence of exposure of actual class members in order to gain class certification. **Gates v. Rohm and Haas Co.**, 655 F.3d 255 (3d Cir., August 25, 2011).



## Calendar of Forthcoming Meetings

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

### January 2012

26-27 **Council Meeting.** ALI Headquarters, Philadelphia, PA

### February 2012

3 **Young Scholars Meeting—Consumer Protection (by invitation only).** New York University, New York, NY

### March 2012

- 1 **Principles of the Law of Liability Insurance. Advisers.** ALI Headquarters, Philadelphia, PA
- 2 **Principles of the Law of Liability Insurance. Members Consultative Group.** ALI Headquarters, Philadelphia, PA
- 23 **Model Penal Code: Sentencing. Advisers and Members Consultative Group.** ALI Headquarters, Philadelphia, PA

### May 2012

- 21 **Council Meeting.** The Mayflower, Washington, DC
- 21-23 **Annual Meeting.** The Mayflower, Washington, DC

### June 2012

- 8 **Principles of the Law of Nonprofit Organizations. Advisers.** New York, NY
- 9 **Principles of the Law of Nonprofit Organizations. Members Consultative Group.** New York, NY
- 15 **Restatement of the Law Third, Employment Law. Advisers.** ALI Headquarters, Philadelphia, PA
- 16 **Restatement of the Law Third, Employment Law. Members Consultative Group.** ALI Headquarters, Philadelphia, PA

### September 2012

- 14 **Restatement of the Law Third, The U.S. Law of International Commercial Arbitration. Advisers.** ALI Headquarters, Philadelphia, PA
- 15 **Restatement of the Law Third, The U.S. Law of International Commercial Arbitration. Members Consultative Group.** ALI Headquarters, Philadelphia, PA

### October 2012

18-19 **Council Meeting.** New York, NY

### May 2013

20-22 **Annual Meeting.** The Ritz-Carlton (22nd & M, NW), Washington, DC



(ISSN 0164-5757)  
The American Law Institute  
4025 Chestnut Street  
Philadelphia, PA 19104-3099

Periodicals  
Postage Paid  
Lancaster, PA

## Statement of Ownership, Management, and Circulation

Actual No. Copies of Single Issue  
Published Nearest to Filing Date

1. Publication Title: The ALI Reporter.
2. Publication No. 01645757.
3. Filing Date: October 1, 2011.
4. Issue Frequency — Quarterly — Winter, Spring, Summer, Fall.
5. No. of Issues Published Annually — 4.
6. Annual Subscription Price — No Charge.
7. Complete Mailing Address of Known Office of Publication: 4025 Chestnut Street, Philadelphia, PA 19104-3099.
8. Complete Mailing Address of Headquarters or General Business Office of Publisher: Same.
9. Full Names and Complete Mailing Addresses of Publisher, Editor, and Managing Editor: Publisher — The American Law Institute, 4025 Chestnut Street, Philadelphia, PA 19104-3099; Editor — Marianne M. Walker, same address; Managing editor — None.
10. Owner: The American Law Institute (a nonprofit corporation), 4025 Chestnut Street, Philadelphia, PA 19104-3099.
11. Known Bondholders, Mortgagees, and Other Security Holders Owning or Holding 1 Percent or More of Total Amount of Bonds, Mortgages, or Other Securities: None.
12. Tax Status (For completion by nonprofit organizations authorized to mail at nonprofit rates): The purpose, function, and nonprofit status of this organization and the exempt status for federal income tax purposes have not changed during preceding 12 months.
13. Publication Title: The ALI Reporter.
14. Issue Date for Circulation Data Below: Summer 2011.

### 15. Extent and Nature of Circulation

| Average No. Copies Each Issue During Preceding 12 Months                                                                   |      | Actual No. Copies of Single Issue Published Nearest to Filing Date |      |
|----------------------------------------------------------------------------------------------------------------------------|------|--------------------------------------------------------------------|------|
| a. Total No. Copies ( <i>Net Press Run</i> )                                                                               | 4833 |                                                                    | 4800 |
| b. Paid and/or Requested Circulation (By Mail and Outside the Mail)                                                        |      |                                                                    |      |
| (1) Paid/Requested Outside-County Mail Subscriptions Stated on Form 3541. (Include advertiser's proof and exchange copies) | 0    |                                                                    | 0    |
| (2) Paid In-County Subscriptions Stated on Form 3541 (Include advertiser's proof and exchange copies)                      | 0    |                                                                    | 0    |
| (3) Sales Through Dealers and Carriers, Street Vendors, Counter Sales, and Other Non-USPS Paid Distribution                | 0    |                                                                    | 0    |
| (4) Other Classes Mailed Through the USPS                                                                                  | 0    |                                                                    | 0    |
| c. Total Paid and/or Requested Circulation [Sum of 15b.(1), (2), (3), and (4)]                                             | 0    |                                                                    | 0    |
| d. Free Distribution by Mail and Outside the Mail ( <i>Samples, Complimentary, and Other Free</i> )                        |      |                                                                    |      |
| (1) Outside-County as Stated on Form 3541                                                                                  | 4297 |                                                                    | 4269 |
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| (3) Other Classes Mailed Through the USPS                                                                                  | 216  |                                                                    | 236  |
| (4) Free Distribution Outside the Mail ( <i>Carriers or Other Means</i> )                                                  | 125  |                                                                    | 130  |
| e. Total Free Distribution (Sum of 15d.(1), (2), (3), and (4))                                                             | 4640 |                                                                    | 4637 |
| f. Total Distribution (Sum of 15c. and 15e.)                                                                               | 4640 |                                                                    | 4637 |
| g. Copies Not Distributed                                                                                                  | 193  |                                                                    | 163  |
| h. Total (Sum of 15f. and g.)                                                                                              | 4833 |                                                                    | 4800 |
| i. Percent Paid and/or Requested Circulation (15c./15f.x100)                                                               | 0    |                                                                    | 0    |

16. This Statement of Ownership will be printed in the Fall 2011 issue of this publication.

17. Signature and Title of Editor, Publisher, Business Manager, or Owner

MARIANNE M. WALKER, *Editor*

Date: October 1, 2011

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