THE ALI
Reporter

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ALI Projects to Hold First Project Meetings

In 2024, the first drafts will be produced and the first project meetings held for four new ALI projects. If ALI members have not yet done so, we encourage you to take a look at the project descriptions and consider joining one or more of the Members Consultative Groups (MCG) now. MCG members will be alerted via email when project drafts are available and will be invited to attend project meetings. To join any project MCG, please visit the projects page on the ALI website (*ali.org/projects*).

PRINCIPLES OF THE LAW, HIGH-VOLUME CIVIL ADJUDICATION
PROJECT MEETING SCHEDULED: MARCH 22, 2024

This project will address a serious challenge facing state courts: the adjudication of high-volume, high-stakes, low-dollar-value civil claims. These types of claims, which arise in such areas as debt collection, evictions, home foreclosure, and child support, comprise a significant proportion of state-court cases. These types of cases raise unique issues as they are frequently uncontested, resulting in high numbers of default judgments, and typically feature at least one party without a lawyer.

From the press release announcing the project, Reporter David Engstrom explained, "State-court dockets have become dominated by cases that, though smaller-scale and arguably less complex than other types of civil litigation, are decidedly high-stakes for many of the litigants. These cases are shaping the lives of millions of Americans, particularly women and people of color. The future of the civil justice system, and the legitimacy of the courts at its center, will turn on how—and how well—judges, court administrators, and an array of other policymakers respond to these new realities."

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THE DIRECTOR'S LETTER
BY DIANE P. WOOD

Update on Our Projects

You have probably heard of the expression "drinking from a fire hose." That is how I feel, now that I am halfway through my first fall project meeting season as ALI Director. What a treat it has been! It's an exciting time here at the ALI, as we work toward the completion of several long-standing projects and embark on new ones.

We have a long tradition of thoughtful and high-spirited engagement, and I am happy to say that our first meetings this fall have more than lived up to that standard. Our Copyright and Torts: Miscellaneous Provisions project meetings were well attended, and I was inspired by the collegial discussion among our Reporters, Advisers, Liaisons, and members on difficult and sometimes contentious topics. As my predecessor Ricky Revesz once said, "When problems are hard, smart people disagree." Our membership's willingness to take on some of the most difficult legal issues and work together to find solutions, while maintaining civility and respect for one another, is a hallmark of The American Law Institute and a distinguishing characteristic in our polarized world. This process works best when we are in the same room together, in person, enjoying a cup of coffee or a dinner, and working in concert to capture exactly the right concepts and words that we need. For me, participating in these meetings is a gratifying and stimulating intellectual feast. I hope that it is for you, too.

As I write this letter, we are preparing for project meetings on Property, Conflict of Laws, and Torts: Remedies this year, with several more to follow in the spring. To our members who are already serving on one or more consultative groups, I thank you for your time and invaluable input. For new members, or those whose projects have completed, I encourage you to join a project. This is an especially good time to look around, because in addition to our ongoing projects, we have four new projects that have not yet had a

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ALI PROJECTS TO HOLD FIRST PROJECT MEETINGS CONTINUED FROM PAGE 1

PROJECT TO COMPLETE RESTATEMENT OF THE LAW FOURTH, THE FOREIGN RELATIONS LAW OF THE UNITED STATES
PROJECT MEETING SCHEDULED: APRIL 19, 2024

The new Restatement will cover topics not addressed in the previous volume of the Restatement of the Law Fourth, The Foreign Relations Law of the United States: Selected Topics in Treaties, Jurisdiction, and Sovereign Immunity, as well as select topics that have emerged since publication of the Restatement Third. The Reporters will determine the scope of work for the project, and the Chairs will provide guidance to the Reporters throughout the project.

U.S. Foreign Relations Law in Chicago
Advisers and project participants will join Reporters for the project's first meeting on April 19, 2024, at University of Chicago Law School in Chicago, Illinois. It has been a while since a project meeting has taken place in the Windy City. We hope our members, especially our Midwest members, take the opportunity to participate in one of the Institute's newest projects.

Members Consultative Groups Are Open
If you are interested in being a part of a project from the beginning, now is the perfect time to join the Members Consultative Group (MCG) for any of these four projects. High-Volume Civil Adjudication and U.S. Foreign Relations Law are slated to meet in spring 2024. Constitutional Torts and Election Litigation will meet in fall 2024. ALI members can join the MCG by visiting project pages at *ali.org/projects.* MCG participants will be notified of future drafts and meetings.

RESTATEMENT OF THE LAW, CONSTITUTIONAL TORTS
PROJECT MEETING SLATED FOR FALL 2024

The project will examine the law of 42 U.S.C. § 1983, which provides an individual the right to sue state-government employees and others acting "under color of state law" in federal court for violations of federal law. Actions under § 1983 are the dominant vehicle for securing money damages for federal rights, especially constitutional rights. The project also will cover *Bivens* actions, the analogous cause of action for violations by a federal officer. Among other topics, the Restatement will cover governmental immunities from suit, local-government liability for official policy or custom, and restrictions on § 1983 actions imposed by the Prison Litigation Reform Act and the overlapping law of federal habeas corpus.

Together with the core components of litigation under § 1983, there are several subsidiary topics to be covered. These include the relation of § 1983 to the Eleventh Amendment and the circumstances in which a suit properly pleaded against a state officer will nevertheless be found to be against the state itself and thus barred; damages (nominal, compensatory, and punitive); the meaning of 42 U.S.C. § 1988(a), which provides that certain "deficiencies" in federal law be filled by the law of the state where the federal court sits; the application of this approach to statutes of limitation; and the invalidity under the Supremacy Clause of certain state-law provisions affecting § 1983, including substitution of remedies, notice-of-claim statutes, and exhaustion of remedies.

The Restatement will also include two boundary constraints: the Prison Litigation Reform Act of 1995, codified at 42 U.S.C. § 1997e(a); and the overlap between § 1983 and federal habeas corpus, which has resulted in curtailment of the former for some situations in which both might apply. The Restatement will not cover the provision of attorney's fees under § 1988(b).

RESTATEMENT OF THE LAW, ELECTION LITIGATION
PROJECT MEETING SLATED FOR FALL 2024

The Restatement's goal is to provide guidance to federal- and state-court judges adjudicating election disputes, focusing on the areas governed by equitable principles and guided by judicial common law. Topics will include the "*Purcell* principle" on timing of judicial intervention, the preservation of preestablished conditions for election conduct, the roles of state and federal courts in election disputes, administrative flexibility for emergencies, remedies for failed elections, and claims over exclusion of parties from the ballot and lack of voter access. The Restatement will not address broader questions bearing on the substance of election law.

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THE DIRECTOR'S LETTER CONTINUED FROM PAGE 1

draft produced. It is a great opportunity for you to step in and lend your voice from the beginning. (To learn more about the four new projects, see page 1.) Although we love to see our project participants in person, we encourage our members of the consultative groups who may not be able to make the trip to consider joining us virtually; our conference room capabilities allow for a fully interactive hybrid experience. And we occasionally hold meetings in a virtual-only format, as we plan to do with our Torts: Remedies meeting in November.

Joining a project and participating in our meetings gives all members the opportunity to meet and interact with Reporters, Advisers, and other members and to contribute substantively to the Institute's work.

Once drafts are presented to participants in project meetings (often more than once, as our Reporters may return updated material to Advisers for additional guidance), the next step is to present revised Sections to ALI's Council in a Council Draft. Approval of a draft by ALI Council at a Council meeting completes the first step in our bicameral process.

At this fall's October Council meeting, the Council will review drafts from five projects: Children and the Law, Corporate Governance, Property, Torts: Miscellaneous Provisions, and Torts: Medical Malpractice. Like all project drafts, Council drafts are posted to the relevant project's page on our website and are available for member consultative group comment. Once approved, Sections from these drafts are presented to our full membership in a Tentative Draft for review and approval at an Annual Meeting—the second step of our bicameral process.

Council approval is an important moment in all of these projects, but I'd like to take a moment to recognize a potential milestone for two in particular.

With Council approval of the October Council draft, all Sections of Medical Malpractice will have been approved by Council. This means that project Reporters Nora Freeman Engstrom of Stanford Law School, Michael D. Green of Washington University in St. Louis School of Law, and Mark A. Hall of Wake Forest University School of Law, may be in a position to present the project for final membership approval at the 2024 Annual Meeting.

Likewise, the current Council Draft for Children and the Law contains all remaining Sections of the project. With approval by Council, the presentation of these Sections to members at the Annual Meeting may be the final time that we are asked to consider this project (pending member approval, of course). This project began in 2015, and is led by Reporter Elizabeth S. Scott of Columbia Law School and Associate Reporters Richard J. Bonnie of University of Virginia School of Law, Emily Buss of University of Chicago Law School, Clare Huntington of Columbia Law School, Solangel Maldonado of Seton Hall University School of Law, and David D. Meyer of Brooklyn Law School (who served the project from 2015 to 2020).

The final Annual Meeting approval of a project is a particularly thrilling moment. The 2024 Annual Meeting may be the last time that ALI members have a chance to add their voices to these two projects. And that won't be all—we will have several other projects on our agenda (to be determined and announced after our January 2024 Council meeting).

ALI's 2024 Annual Meeting is scheduled to begin on May 20, in San Francisco. Please mark your calendars now and plan to join us on the West Coast. Our projects' value and credibility depend on our members' input and guidance—the Institute simply can't do its work without you.

It has been wonderful to be with you in person at our project meetings and the Annual Meeting. I look forward to seeing many more of you in the next year and beyond.

Conflict of Laws

JOINING A PROJECT AND PARTICIPATING IN OUR MEETINGS GIVES ALL MEMBERS THE OPPORTUNITY TO MEET AND INTERACT WITH REPORTERS, ADVISERS, AND OTHER MEMBERS AND TO CONTRIBUTE SUBSTANTIVELY TO THE INSTITUTE'S WORK.

Torts: Defamation and Privacy

Copyright

ALI's Second Century Campaign

Focus on: Planned Giving

One century ago, The American Law Institute was founded by visionaries who thought that the ALI's Restatements "should not only be to help make certain much that is now uncertain and to simplify unnecessary complexities, but also to promote those changes which will tend better to adapt the laws to the needs of life."

Since then, ALI and its members have produced work that has improved access to justice; promoted safe, predictable, reliable commerce for businesses and consumers; and even changed the way institutions are able to invest in their future, thus meeting and even surpassing the vision of our founders.

As we reflect on what we have already accomplished, we ask you to also look ahead at all of the work that still needs to be done, and in doing so, we ask you to consider making ALI a part of your own legacy.

By including ALI in your estate plans, you will create a lasting impact on U.S. law and the administration of justice for generations to come. Your legacy gift will help perpetuate the standards of excellence that the legal community and society have come to expect from ALI. As the Institute progresses through its second century and beyond, your generosity will allow us to remain responsive to an ever-changing world and to continue advancing the rule of law, which is essential to our democracy.

To learn more about including ALI in your estate plans or to notify us of a planned legacy gift, please contact ALI Deputy Director Eleanor Barrett at *ebarrett@ali.org*. Additional information about planned giving is available at *ali.org/plannedgiving*.

To donate now, scan the QR code or visit us online at *ali.org/anniversary* to learn more. If you would like more information about making a general donation to the Second Century Campaign, please contact ALI Deputy Director Eleanor Barrett at *ebarrett@ali.org*.

Your Support Matters: Make a Year-End Gift Today

As a member of The American Law Institute, you understand how crucial ALI's work is to the legal profession and to the legal system. Our publications have been cited in published decisions by U.S courts more than 220,500 times. And their influence is as strong now as ever: in its most recent term, the U.S. Supreme Court cited fourteen different ALI publications—twelve Restatements, a Principles project, and the Model Penal Code—in sixteen separate opinions, written by six justices, across fourteen cases.

Continuing financial support from our members is critical to the ALI's operations and mission. We had forecast for several years that changes in the publishing industry would affect ALI, and, unfortunately, we are now experiencing significant declines in the publication revenues that historically have funded so many of our activities. Adapting to this new reality means we will need to rely more and more on our members' support to continue to produce work at the high level of excellence for which the Institute is known.

To ensure the Institute will be able to continue producing our essential work over the next 100 years, we have embarked on a major fundraising effort—the Second Century Campaign—to secure the Institute's future. We hope you will join us in this effort, which concludes on December 31, 2023. One of the simplest ways you can support the Second Century Campaign is by including the Institute in your year-end giving plans.

You can make an end-of-year charitable contribution to ALI, or learn more about the Second Century Campaign, by returning the envelope enclosed in this newsletter, visiting *ali.org/support*, or calling 215-243-1660. Your gift will have a significant impact on the ALI—helping us to continue our work and serving 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 2024.

Thank You for Supporting the Second Century Campaign

Donors to The American Law Institute's Second Century Campaign play a vital role in funding the Institute's future. Our goal is to raise $35 million by the end of 2023. We are incredibly grateful for the generosity of those who have already contributed.

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ALI to Celebrate its New Life Members: The Class of 1999

In May 2024, The American Law Institute will welcome a new class of Life Members—the Class of 1999. 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 1999, together with ALI's new 50-year members, will be honored at a special luncheon during the 2024 Annual Meeting in San Francisco, CA. Members of the Class are given the opportunity to commemorate this quarter-century milestone by making a contribution to the 1999 Life Member Class Gift.

Now in its 13th year, the Class Gift program has raised more than $2 million to support key aspects of ALI's mission, including the MCG Travel Assistance program and the Judges and Public-Sector Lawyers Expense Reimbursement program—two vital components of the Institute's efforts to minimize financial barriers to member participation.

The Class Gift 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, the program helps cover some of the costs associated with maintaining the high level of quality that distinguishes the Institute's work.

Class members **Steven K. Balman** of Shook & Johnson; **Gary Brian Born** of WilmerHale; **John G. Buchanan, III**, of Covington & Burling LLP; **Ernest Calderón** of Calderón Law Offices, PLC; **Carol Rose Goforth** of University of Arkansas School of Law, Leflar Law Center; and **James E. Pfander** of Northwestern University Pritzker School of Law have graciously volunteered to serve on the 1999 Life Member Class Committee and will present the Class Gift to the Institute during the luncheon.

The 1999 Life Member Class Gift Campaign is now underway. Contributions received by December 31, 2023, will also be included in ALI's Second Century Campaign. For more information, please visit *www.ali.org/classgift* or contact Senior Development Manager Kyle Jakob at 215-243-1660 or *kjakob@ali.org*.

1999 LIFE MEMBER CLASS

José Enrique Alvarez, New York, NY
Ellen Patricia Aprill, Los Angeles
Steven K. Balman, Tulsa, OK
Michael St. Patrick Baxter, Washington, DC
Sara Sun Beale, Durham, NC
Anita Bernstein, Brooklyn, NY
Patrick J. Borchers, Omaha, NE
Gary Brian Born, London, England
Ronald A. Brand, Pittsburgh, PA
Susan E. Bromm, Washington, DC
Harvey G. Brown, Jr., Houston, TX
John G. Buchanan, III, Washington, DC
Ernest Calderón, Phoenix, AZ
Reginald J. Clark, Atlanta, GA

Columbia Law School Hosts Conference on Children and the Law

On September 22, Columbia Law School hosted a day-long event to reflect on the Restatement of the Law, Children and the Law, and celebrate its (near) completion.

The morning was devoted to a discussion of issues and themes that have recurred during the years of work on the Restatement. After introductory remarks from Reporter **Elizabeth S. Scott** of Columbia Law School, project Adviser and ALI Council Emerita **Susan Frelich Appleton** of Washington University School of Law moderated the conversation with the projects' Reporters and attendees.

In the afternoon, two panels focused on family regulation and youth crime regulation. Afternoon introductory remarks were provided by Dean **Gillian L. Lester** of Columbia Law School and ALI Director **Diane P. Wood**.

Panel on the Family Regulation System

Moderator: Project Adviser **Josh Gupta-Kagan**, Columbia Law School

Reporters' Introduction:
Associate Reporter **Clare Huntington**, Columbia Law School
Associate Reporter **Solangel Maldonado**, Seton Hall Law School

Panelists:
Carlyn M. Hicks, Hinds County Youth Court, Mississippi
Tehra Coles, Executive Director, Center for Family Representation, New York
Shereen A. White, Director of Advocacy & Policy, Children's Rights, New York
Rhonda Serrano, Senior Attorney, ABA Center on Children & the Law, Washington D.C.

Louis R. Cohen, Washington, DC
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Avelino V. Cruz, Makati City, Philippines
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Alvin C. Warren, Jr., Cambridge, MA
Gregory Howard Williams, Hastings On Hudson, NY
Andrew J. Wistrich, Ithaca, NY
Margaret L. Workman, Charleston, WV
David P. Yaffe, Los Angeles, CA

Every attempt has been made to publish an accurate list of each member's location. If a change is required, please contact the ALI Membership Department at 215-243-1624 or membership@ali.org.

Panel on Youth Crime Regulation

Moderator: Associate Reporter **Emily Buss**, University of Chicago Law School

Reporters' Introduction:
Reporter **Elizabeth S. Scott**, Columbia Law School
Associate Reporter **Richard J. Bonnie**, University of Virginia School of Law

Panelists:
Kim Berkeley Clark, Court of Common Pleas, Allegheny County, Pennsylvania
Project Adviser **Kristin Nicole Henning**, Georgetown University Law Center, Washington D.C.
Jimmy Hung, Chief Deputy Prosecutor - Juvenile Division, King County, Seattle Washington
Marsha Levick, Juvenile Law Center, Philadelphia

Panel on the Family Regulation System

Josh Gupta-Kagan, Shereen A. White, Tehra Coles, Rhonda Serrano, and Carlyn M. Hicks

Reflecting on ALI's Western Pennsylvania Roots

In October, the U.S. District Court of the Western District of Pennsylvania hosted the event "Reflections on the Influence on The American Law Institute of Early Members from the Western District of Pennsylvania." Organized by Judge Joy Flowers Conti (W.D. Pa.), the event featured remarks by ALI Council Member Judge Thomas M. Hardiman (3d Cir.), Chief Judge Mark R. Hornak (W.D. Pa.), and University of Pittsburgh School of Law Professor Ron Brand, as well as a panel presentation honoring the following early members of The American Law Institute:

John G. Buchanan by panelists William R. Newlin, retired CEO-Buchanan Ingersoll & Rooney, and John G. Buchanan III of Covington & Burling

David A. Reed and **H. Eastman Hackney** by panelist Daniel I. Booker of ReedSmith

George E. Alter, **William S. Dalzell**, and **Charles H. English** by panelist Jay N. Silberblatt, PBA Immediate Past President

Eugene B. Strassburger by panelist E.J. Strassburger of Strassburger McKenna Gutnick & Gefsky

Abridged remarks of Judge Thomas M. Hardiman from the event follow.

The American Law Institute is celebrating its 100th year and Western Pennsylvanians have been involved since its inception. The organization was founded at the urging of a group of prominent judges, lawyers, and professors because of the American public's growing dissatisfaction with the administration of justice. That group—known as the Committee on the Establishment of a Permanent Organization for the Improvement of the Law—was chaired by Elihu Root and included legal luminaries such as: Benjamin Cardozo, Arthur Corbin, Learned Hand, Roscoe Pound, and Samuel Williston.

After careful examination, the Committee issued a report that identified and discussed the source of the public's dissatisfaction with the justice system, which the Committee termed the "two chief defects in American law."

The first defect was the law's uncertainty, the "most potent" cause of which was "the lack of agreement among lawyers concerning the fundamental principles of the common law[.]" This uncertainty bred dissatisfaction with the law, according to the Committee, for reasons that are still relevant today:

ALI Deputy Director Eleanor Barrett, Thomas M. Hardiman, Mark R. Hornak, and Joy Flowers Conti

- It made it more difficult for people to enforce their rights;
- It generated "useless litigation;"
- It led to unnecessary delay and expense;
- It worked to the advantage of those who were willing to abuse the system—or, as the Committee put it, to the advantage of those who were willing to test "all the novel legal theories which skilled ingenuity [could] invent to show that [their obligations] need not be performed"; and, finally,
- It confounded law-abiding citizens who were looking for guidance on how to act.

The second defect was the unnecessary complexity of U.S. law, which resulted from, among other things, the law's unsystematic development and the number of "independent source[s] of law" that existed in the United States. Such complexity, the Committee asserted, "tend[ed] to make the administration of justice a game in which knowledge and skill [were] more important for obtaining victory than a just cause."

But, the Committee warned, even this was not the most serious consequence of the law's uncertainty and complexity. In words that might sound eerily applicable to our times, the Committee found that the resulting dissatisfaction with the law had bred a general lack of respect for the law, which in turn encouraged anti-social conduct by the rich and poor alike. And so, motivated by the belief that the members of the bar had an obligation to "take informed action to better" the administration of justice, the Committee recommended the formation of a legal organization dedicated to improving the law. So, The American Law Institute was created.

The work of the ALI is as essential today as it was 100 years ago.

We live in a dynamic world that presents many challenges to lawyers, judges, academics, and the Republic we serve. In 1952, Director Herbert Goodrich had to explain why the ALI was embarking on a second round of Restatement projects a mere five years after completing the first round. In his Annual Report, Director Goodrich wrote:

> [T]he life of law books is such in this day and age that unless a book, no matter how authoritative, is constantly looked over for necessary revision, it soon becomes obsolete. By obsolete it is not meant that what was said is necessarily no longer the law. Some legal principles change very slowly[.] But without fresh assurance of continuous examination, the user can never depend upon the current authenticity of a statement. Even more he is in danger of losing out on some new development or ramification of an old principle. These developments are important in many instances. The Restatement, if it is to speak contemporaneously, must include them.

Consumer contracting, especially in the digital age, illustrates Goodrich's point. Technological advances have made it easier for businesses to draft, disseminate, and routinely modify contracts. Think of the difference between buying something from a supermarket 20 years ago, which involved "very few standard contract terms (and many legally supplied gap-fillers)," versus Amazon or Apple today. As many have noted, "[t]he proliferation of [such] lengthy standard-term contracts . . . [has made] it practically impossible for consumers to scrutinize the terms and evaluate them prior to manifesting assent[,]"and this, in turn, led to years of debate and litigation over what was required for a given term to be enforceable. Recognizing the confusion that existed over how the courts were applying the classic contract law principles embodied in the Second Restatement, in 2011, the Institute launched its Restatement of the Law, Consumer Contracts project—which I'm proud to say was recently completed, bringing much needed clarity to this area of the law.

This is but one example of how the considerations that motivated the Institute's founders remain relevant today. Uncertainty abounds in the law. And this uncertainty breeds unnecessary expense and confounds law-abiding citizens. And the law is more complex than ever given the proliferation of statutes and common law variations in the fifty States.

As Professor Brand will explain in more detail, after 100 years the ALI remains just as relevant now as it was at the time of its founding—which is a testament to the foresight of its founders and early members. With that in mind, I hope that you are looking forward, as I am, to learning more about the Western Pennsylvanians who bequeathed us this legacy and whose ample shoes we must try to fill.

Fall Project Meetings

Copyright *September 28*

Copyright project participants joined in person and virtually for our inaugural fall project meeting to review Preliminary Draft No. 9, which includes 11 Sections from five Chapters: Copyright Rights and Limitations (Chapter 6); Copyright Infringement (Chapter 7); Secondary Liability (Chapter 8); Safe Harbors, Copyright Protection Systems, and Copyright Management Information (Chapter 10); and Procedural Issues and Relationship to Other Bodies of Law (Chapter 11).

Torts: Miscellaneous Provisions *September 29*

Project participants engaged in a thoughtful discussion on the contents of Torts: Miscellaneous Provisions Preliminary Draft No. 4, which covers subjects on Concerted Action: Agreements to Engage in Negligent Conduct; Statutes of Limitations and Statutes of Repose; Wrongful Pregnancy, Birth, and Life; Dram Shop and Social Host Liability; and Negligence Liability of Product Suppliers.

Property *October 6*

Preliminary Draft No. 10 includes Sections on the topics of Concurrent Ownership (Chapters 1 and 2 of Volume 4, Division II) and Leasing (Chapters 2, 9, 11-13 of Volume 4, Division III).

ALI Director Diane P. Wood with Reporter Henry E. Smith of Harvard Law School, and Associate Reporters Yun-Chien Chang of Cornell Law School and Thomas W. Merrill of Columbia Law School at the Property project meeting

The Institute in the Courts: State Supreme Courts Adopt ALI Work

This year, several state supreme courts have adopted ALI work, including some of the Institute's more recent Restatements. Some examples follow:

In *Cornell v. Desert Financial Credit Union*, 524 P.3d 1133 (Ariz. 2023), the Arizona Supreme Court adopted Restatement of the Law, Consumer Contracts § 3 (Tentative Draft No. 2, 2022) in holding that consumers were not required to have actual notice of modifications businesses made to standardized contracts in order for those modifications to be enforceable. In a class-action lawsuit brought by a customer against a bank, the Arizona Supreme Court answered a question certified by the U.S. District Court for the District of Arizona in determining whether arbitration provisions added unilaterally by the bank to the bank's terms of service were enforceable. In this case, the court explained, the modifications were valid and enforceable, so long as the customer received "express and reasonable notice of the [bank's] right to unilaterally modify the agreement"; the customer obtained reasonable notice of the modified terms and a reasonable opportunity to opt out without penalty; and the parties continued "the business relationship past a reasonable opt-out period." Adopting § 3 was appropriate, observed the court, because it reinforced prior court decisions "recognizing effective modification through silent conduct," and imposed "safeguards to protect consumers from unfair exploitation."

In *Beldock v. VWSD, LLC*, 2023 WL 4280767 (Vt. June 30, 2023), the Supreme Court of Vermont adopted Restatement of the Law Third, Restitution and Unjust Enrichment § 2 in holding that the existence of a valid contract displaced unjust-enrichment claims if those claims arose from matters within the scope of the contracting parties' express contract. In this case, a purchaser of solar-power projects sued, among others, the seller, alleging that the seller was unjustly enriched when the seller received the purchaser's assistance in acquiring deliverables and did not pay compensation. The Supreme Court of Vermont reversed and remanded the trial court's entry of summary judgment against the purchaser, holding that, while the seller was obligated under the parties' purchase agreement to convey deliverables to the purchaser, the court was "unable to determine whether the subject matter of the express agreement encompass[ed]" the purchaser's unjust-enrichment claims, because the agreement was ambiguous and did not contemplate the purchaser's provision of assistance in acquiring the deliverables. The court observed that the rule set forth in § 2 was "well-reasoned" and preserved the purchaser's right to obtain equitable relief without subverting contractual principles.

In *L&D Investments, Inc. v. Antero Resources Corp.*, 887 S.E.2d 208 (W.Va. 2023), the Supreme Court of Appeals of West Virginia adopted Restatement of the Law Third, Restitution and Unjust Enrichment § 29 in expanding the common-fund doctrine to permit counsel for certain named plaintiffs to receive attorney's fees and costs from a separate group of "unknown" plaintiffs who benefited from counsel's representation of the named plaintiffs, even though counsel did not have a contractual relationship with the "unknown" plaintiffs. In this case, counsel, during a quiet-title action arising from unpaid oil-and-gas royalties, represented identified heirs of the original owners of interests in oil-and-gas leases, but was unable to reach the remaining heirs in order to enter into an express representation agreement; counsel, having established the individual percentage ownership interests of all of the heirs whose interests were aligned, separately negotiated settlements for counsel's clients as well as for the "unknown" heirs, and sought an award of fees and costs from both settlement funds.

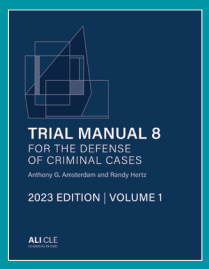
The Supreme Court of Appeals of West Virginia reversed and remanded the trial court's denial of counsel's request for attorney's fees and costs from the "unknown" heirs' settlement award. The court held that, while counsel and the "unknown" heirs did not have a contractual relationship, counsel in this circumstance was entitled under the common-fund doctrine to compensation for work performed on the "unknown" heirs' behalf. The court adopted Restatement of the Law Third, Restitution and Unjust Enrichment § 29 as a guideline in expanding the doctrine, observing that:

> The American Law Institute's formulation of the common fund doctrine . . . sets forth a logical and orderly approach to be utilized in determining whether a claimant is entitled to recover fees and costs expended in creating or enhancing a fund that benefits . . . non-parties whose interests are aligned.

In this case, explained the court, granting counsel's request despite the lack of a contractual relationship with the "unknown" heirs was appropriate, because the "unknown" heirs would not "have to make a net payment in cash"; the value of each "unknown" heir's share of the common fund exceeded each "unknown" heir's liability to counsel; and counsel acted diligently to protect the "unknown" heirs' interests by bringing the "unknown" heirs into the litigation as parties.

New Edition of the *Trial Manual* Is Available

We are excited to share that *Trial Manual 8 for the Defense of Criminal Cases*, authored by Anthony G. Amsterdam and Randy Hertz, both of NYU School of Law, is now available in print (at *Amazon.com*) and electronic format (at *ali.org/trial-manual*). The *Trial Manual* is a guidebook for criminal defense lawyers at the trial level.



Purchase on Amazon now:

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 allocation of material among the four volumes of the book is intended to facilitate defense attorneys' use of the book:

Volume One (Chapters 1-16) provides an overview of criminal procedure and then focuses on the issues a defense attorney is likely to confront, and the steps s/he will need to take, at the early stages of a criminal case, including: the first steps to be taken to locate, contact and protect a client who has been arrested or summoned or who fears s/he is wanted for arrest; arguing for bail or other forms of pretrial release; conducting the initial client interview; developing a theory of the case; dealing with police and prosecutors; planning and overseeing the defense investigation; conducting the preliminary hearing; grand jury practice; handing arraignments; and plea bargaining. This volume also addresses the additional considerations that may arise when representing a client who is mentally ill or intellectually disabled.

Volume Two (Chapters 17-27) begins with a checklist of matters for counsel to consider between arraignment and trial, and then focuses extensively on pretrial motions practice. In addition to discussing strategic and practical aspects of drafting motions and handling motions hearings and non-evidentiary motions arguments, this volume covers the substantive law and procedural aspects of each of the types of motions that defense attorneys commonly litigate in criminal cases: motions for discovery (along with a discussion of all other aspects of the discovery process); motions to dismiss the charging paper; motions for diversion or for transfer to juvenile court; motions for a change of venue or for disqualification of the judge; motions for severance or for consolidation of counts or defendants; and motions to suppress tangible evidence, to suppress statements of the defendant, and to suppress identification testimony. These chapters provide detailed information about federal constitutional doctrines and a large number of state constitutional rulings that confer heightened protections.

Volume Three (Chapters 28-40) starts with the immediate run-up to trial: issues relating to the timing of pretrial and trial proceedings; interlocutory review of pretrial rulings; and the concrete steps that counsel will need to take to prepare for trial, including working with expert witnesses where appropriate. It then begins the book's coverage of the trial stage, discussing the decision to elect or waive jury trial; jury selection procedures and challenges before and at trial; general characteristics of trials; opening statements; evidentiary issues and objections; techniques and tactics for handling prosecution and defense witnesses; and trial motions. Issues, procedures, and strategies unique to bench trials are discussed in tandem with the parallel aspects of jury-trial practice.

Volume Four (Chapters 41-49) concludes the coverage of the trial by discussing the renewed motion for acquittal; closing arguments; requests for jury instructions; objections to the court's instructions; and jury deliberations. This volume then discusses posttrial motions and sentencing and concludes with a short summary of appellate and postconviction procedures and a précis of the first steps to be taken in connection with them.

The structure and presentation of material are designed to facilitate the conversion of text into defense motions and other types of briefing. Three of the documents in the text are available for direct downloading from the ALI website: section 2.5's flow-chart of procedures in summary, misdemeanor, and felony cases; section 4.5's questionnaire for obtaining information pertinent to bail from the client; and section 6.15's checklist for interviewing the client. The bail questionnaire and the interview list are in Word format that can be edited and thus customized to an individual user's practice and/or turned into a form for use in taking notes in real time during client interviews.

Notes About Members and Colleagues

Floyd Abrams of Cahill Gordon & Reindel, **Jeannie Suk Gersen** of Harvard Law School, **Lyrissa Barnett Lidsky** of University of Florida, Levin College of Law, and **Jeffrey Rosen** of the National Constitution Center participated in the National Constitution Center's National First Amendment Summit to discuss threats to freedom of expression and celebrate the Center's new First Amendment gallery.

Rosemary Alito of K&L Gates, **W. Neil Eggleston** of Kirkland & Ellis, **Kenneth C. Frazier** of Merck & Co., Inc., **John Gleeson** of Debevoise & Plimpton, and **Roberta D. Liebenberg** of Fine, Kaplan and Black are recipients of the 2023 Lifetime Achievement Award from *The American Lawyer*. **Neal Katyal** of Hogan Lovells and **William D. Savitt** of Wachtell, Lipton, Rosen & Katz are finalists for Litigator of the Year.

Deborah N. Archer of NYU School of Law is a recipient of the 2023 Outstanding Advocate for Clinical Teachers Award from the Clinical Legal Education Association.

Thomas E. Baker of Florida International University College of Law has authored *A Primer on the Jurisdiction of the U.S. Courts of Appeals, 3rd Edition* (Federal Judicial Center August 2023), a brief introduction to subject-matter jurisdiction of the U.S. courts of appeals.

The Supreme Court of Justice Evaluation Commission of the Republic of Moldova has unanimously elected **Scott Bales** of the Arizona Supreme Court (Retired) as its chair.

Michael M. Berger of Manatt, Phelps & Phillips has been awarded the Jefferson B. Fordham Lifetime Achievement Award from the ABA's Section of State and Local Government Law.

José A. Cabranes of the U.S. Court of Appeals for the Second Circuit received the 2023 Devitt Distinguished Service to Justice Award.

Shauna Johnson Clark of Norton Rose Fulbright US and **Judy Perry Martinez** of Simon, Peragine, Smith & Redfearn have been inducted into the 2023 Class of the Tulane Law Hall of Fame.

The attorney fee matrix developed by **Brian T. Fitzpatrick** of Vanderbilt Law School, which replaces the Laffey Matrix in fee-shifting cases against the federal government, has now been adopted by the U.S District Court for the District of Columbia.

James Forman Jr. of Yale Law School and **Catherine A. MacKinnon** of University of Michigan Law School have been elected to the American Philosophical Society.

Sherrilyn Ifill has joined Howard University as the inaugural Vernon E. Jordan, Jr., Esq. Endowed Chair in Civil Rights.

LAW CLERK SELECTION AND DIVERSITY: INSIGHTS FROM FIFTY SITTING JUDGES OF THE FEDERAL COURTS OF APPEALS

In November 2022, former U.S. District Judge for the Northern District of California and Executive Director of the Berkeley Judicial Institute Jeremy Fogel, Associate Professor of Law at Pepperdine Caruso School of Law and Co-Director of the William Matthew Byrne Jr. Judicial Clerkship Institute Mary Hoopes, and ALI Council Member and California Supreme Court Associate Justice Goodwin Liu authored "Law Clerk Selection and Diversity: Insights From Fifty Sitting Judges of the Federal Courts of Appeals." The study examined why, despite good faith efforts, there is a persistent lack of diversity in law clerk hiring in the federal courts, particularly at the appellate level.

The authors engaged in dialogue with judges, law school clerkship advisors, and researchers, exploring how to improve outcomes in this area. The report addresses factors that may be narrowing the pool of competitive applicants, such as inadequate mentorship or potential applicants not being sufficiently aware of the range of opportunities available to them.

The study is available on SSRN and will be published in an upcoming issue of the Harvard Law Review: https://ssrn.com/abstract=4290102.

Below is the abstract:

Judicial clerkships are key positions of responsibility and coveted opportunities for career advancement. Commentators have noted that the demographics of law clerks do not align with the student population by law school, socioeconomic background, gender, race, or ethnicity, and that ideological matching is prevalent between judges and their clerks. But extant studies draw on limited data and offer little visibility into how judges actually select clerks. For this study, we conducted in-depth individual interviews with fifty active judges of the federal courts of appeals to learn how they approach law clerk selection and diversity. Our sample, though not fully representative of the judiciary, includes judges from all circuits, appointed by Presidents of both parties, with average tenure of fourteen years. The confidential interviews, which drew in part upon the peer relationship that two of us have with fellow judges, yielded rich and candid insights not captured by prior surveys.

60 YEARS OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW

At the East Room of the White House, on August 28, 2023, President Biden hosted a ceremony commemorating the 60th anniversary of the founding of the Lawyers' Committee for Civil Rights Under Law. **Michael Traynor** of Cobalt LLP, who formerly served on the board and is now an honorary lifetime trustee, attended the ceremony.

The Lawyers' Committee is a nonpartisan, nonprofit organization, formed in 1963 at the request of President John F. Kennedy to mobilize the nation's leading lawyers as agents for change in the Civil Rights Movement. Today, the Lawyers' Committee uses legal advocacy to achieve racial justice, fighting inside and outside the courts to ensure that Black people and other people of color have the voice, opportunity, and power to make the promises of our democracy real. The Lawyers' Committee implements its mission and objectives by marshaling the pro bono resources of the bar for litigation, public policy, advocacy and other forms of service by lawyers to the cause of civil rights.

Watch of video of the ceremony:

A transcript of President Biden's remarks is available on The White House website.

Photo: Michael Traynor with President Biden
Photograph by Kristin Bronson, Executive Director of the Colorado Lawyers Committee

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This Article reports our findings, among them: (1) With few exceptions, appellate judges hire clerks as an "ensemble" and assign positive value to diversity, although judges vary significantly in the dimensions of diversity they seek. (2) Most judges disclaim any interest in ideological alignment when hiring clerks; we situate this finding in the context of factors that contribute to ideological segmentation of the clerkship market. (3) Republican appointees, compared to Democratic appointees, more often identified socioeconomic diversity as the primary dimension of diversity they seek. (4) Judges who graduated from law schools outside the U.S. News & World Report top twenty are significantly more likely than other judges to hire clerks from schools outside the top twenty. (5) Almost all judges in our sample consider gender in clerkship hiring, and many have specific goals for gender balance. Republican appointees reported more difficulty drawing women into their applicant pool than Democratic appointees. (6) Most judges in our sample assign positive value to racial diversity and consider race to some degree in evaluating applicants, although it is important to note that some judges believe strongly that such consideration is inappropriate. (7) Many judges who view racial diversity positively nonetheless reported difficulty hiring Black and Hispanic clerks. The judges with the most robust records of minority hiring are those who make affirmative efforts to draw minority candidates into their applicant pool or place greater emphasis on indicators of talent besides grades and law school rank, or do both. (8) Black judges are particularly successful in hiring Black clerks; we estimate that Black judges, who comprised less than one-eighth of active circuit judges during our study, accounted for more than half of the Black clerks hired each year in the federal courts of appeals.

These findings have implications for judicial selection; in short, diversity among judges affects diversity among clerks. Further, one of our most consistent findings is that judges do not discuss clerk hiring or diversity with each other. This silence reflects norms of judicial culture that foster collegiality and mutual deference while tending to inhibit peer-to-peer discussion of how judges select their clerks. Yet many judges want to hire more diverse clerks and would like to learn from their colleagues' practices. We propose measures to increase transparency, facilitate peer exchange, and increase judges' capacity to achieve their hiring objectives, whatever they may be.

New Members Elected

On September 21, the Council elected the following 27 persons.

Kate Andrias, New York, NY
Mark A. Aronchick, Philadelphia, PA
Denise E. Backhouse, New York, NY
Margo A. Bagley, Atlanta, GA
Thad H. Balkman, Norman, OK
Lisa S. Blatt, Washington, DC
Betsy Cavendish, Washington, DC
Steven A. Dean, Boston, MA
Ralph R. Erickson, Fargo, ND
Maggie Gardner, Ithaca, NY
J. Maria Glover, Washington, DC
Steve C. Gold, Newark, NJ
Margaret Lee, Washington, DC
Maegen Peek Luka, Orlando, FL
Noah Benjamin Novogrodsky, Laramie, WY
J. J. Prescott, Ann Arbor, MI
Alexander A. Reinert, New York, NY
W. Keith Robinson, Winston-Salem, NC
Victoria Shannon Sahani, Boston, MA
Erin Adele Scharff, Phoenix, AZ
Katherine Elaine Shea, Raleigh, NC
Norman Eli Siegel, Kansas City, MO
Lahny R. Silva, Indianapolis, IN
Aaron D. Simowitz, Salem, OR
Jessica K. Steinberg, Washington, DC
Elizabeth Weeks, Athens, GA
Kelli Alces Williams, Tallahassee, FL

In Memoriam: Philip S. Anderson

Philip S. Anderson died on August 15, 2023. He was elected to the Institute in 1975 and to ALI Council in 1982. During his time as an ALI member, he attended 39 Annual Meetings, served as an Adviser to the Restatement of the Law Third, Trusts: Prudent Investor Rule and Restatement of the Law Third, The Law Governing Lawyers, as well as an MCG participant to Restatement of the Law, Consumer Contracts.

As an ALI Council member, Anderson was a member of the Executive Committee for almost two decades and the Investment Committee for six years, and served as Chair of the Membership Committee for 13 years.

The below is excerpted from Anderson's final remarks as Chair of the Membership Committee at the 1997 Annual Meeting:

"I also wish to express my respect and admiration for every member of the Institute in attendance today. You all have one thing in common: You excelled in college and in law school, you showed great promise, and you have fulfilled that promise in everything that you have done in this profession. You are without question the finest in the bar, and it has been my honor and great pleasure to meet with you every May to pursue the important work of this remarkable organization. Thank you for that. Thank you for all that you have done in pursuit of new members for this organization, and for your kind attention to these remarks this morning."

Anderson was a founding partner of Williams & Anderson, retiring in 2019. His practice areas included business litigation, media law, and corporate law. He represented the Arkansas Democrat-Gazette, a newspaper of statewide circulation, and served on the board of directors of the newspaper and its parent company. He represented media clients on First Amendment issues, including access and defamation.

He served as president of The American Bar Association from 1998 to 1999. During his tenure as ABA President, Anderson focused on increasing public trust and confidence in our system of justice, as well as improving civics education, topics he highlighted during his remarks at the 1999 ALI Annual Meeting in San Francisco, California.

Anderson received his B.A. from the University of Arkansas and his LL.B. from the University of Arkansas School of Law. He was a member of the Arkansas Supreme Court Committee on Jury Instructions and coauthor of the Arkansas Model Jury Instructions. He was a Fellow and Chairman of the Arkansas Bar Foundation and the recipient of a special award from the Arkansas Bar Association. In 1978-79, Anderson was a member of the U.S. Circuit Judge Nominating Panel for the Eighth Circuit.

In Memoriam

ELECTED MEMBERS

Jonathan Cuneo, Washington, DC; **Charles B. Gibbons**, Pittsburgh, PA; **Reed L. Martineau**, Kaysville, UT

LIFE MEMBERS

JoAnne A. Epps, Philadelphia, PA; **Norman L. Epstein**, Los Angeles, CA**; Harvey C. Koch**, New Orleans, LA; **Cecil Crawford Kuhne, Jr.**, Lubbock, TX; **Anthony Paul Lester**, London, England; **Malcolm A. Moore**, Seattle, WA; **Charles J. Ogletree**, Cambridge, MA; **Richard N. Pearson**, Marlborough, MA; **Alan R. Schwartz**, Miami, FL; **John A. Sebert**, Silver Spring, MD

NOTES CONTINUED FROM PAGE 13

The Civil Justice Academy at George Mason University Antonin Scalia Law School hosted the "Civil Justice Preview of the Supreme Court's 2023-2024 Term," with **John H. Beisner** of Skadden, Arps, Slate, Meagher & Flom and **Robert S. Peck** of the Center for Constitutional Litigation as panelists, with **Donald J. Kochan** of GMU Antonin Scalia Law School as moderator, in a discussion and Q&A on the Supreme Court's upcoming term. A recording of the event is available online, courtesy of the law school.

From left to right: Donald J. Kochan, Robert S. Peck, and John H. Beisner. Photograph by Law & Economics Center

Samuel Issacharoff of NYU School of Law has authored *Democracy Unmoored, Populism and the Corruption of Popular Sovereignty* (Oxford University Press 2023), a book analyzing populism's effects on political bodies and democracies around the world.

Monte A. Jackel of Jackel Tax Law has authored *Partnership Tax Reform: Combined Tax Notes Material*, written in response to the General Accounting Office issued report describing the poor audit performance of the IRS in the auditing of what are known as "large partnerships." Jackel has also written a review of ALI's *Centennial History* book.

Renee Knake Jefferson of the University of Houston Law Center has launched *Legal Ethics*, a weekly newsletter on legal and judicial ethics.

Linda A. Klein of Baker, Donelson, Bearman, Caldwell & Berkowitz has become a Fellow of the American College of Construction Lawyers.

Harold Hongju Koh of Yale Law School received the 2023 Raphael Lemkin Rule of Law Guardian Medal from the Bolch Judicial Institute of Duke Law School.

Iris Lan is the new general counsel for NASA.

The Max Planck Society has awarded **Ruth Mason** of UVA School of Law the Max Planck Law Fellowship where she will research the role of interstate solidarity in federations.

Roberta Cooper Ramo of Modrall Sperling received the 2023 Henrietta Pettijohn Award from the New Mexico Women's Bar Association.

Meetings Calendar At-A-Glance

Below is a list of upcoming meetings and events. For more information, visit *ali.org.*

2023

October 26
Restatement of the Law Third, Conflict of Laws
Philadelphia, PA

November 17
Restatement of the Law, Third, Torts: Remedies
Virtual

2024

January 18-19
Council Meeting - January 2024
Philadelphia, PA

February 29
Restatement of the Law, Corporate Governance
Philadelphia, PA

March 22
Principles of the Law, High-Volume Civil Adjudication
Philadelphia, PA

April 19
Restatement of the Law Fourth, The Foreign Relations Law of the United States
Chicago, IL

May 20-22
2024 Annual Meeting
San Francisco, CA

October 17-18
Council Meeting - October 2024
Philadelphia, PA

Steven R. Ratner of University of Michigan Law School is currently serving as a member of the UN Human Rights Council's International Commission of Human Rights Experts on Ethiopia. Members are charged by the Council with investigating human rights violations during Ethiopia's civil conflicts and offering advice on future accountability and transitional justice.

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

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