THE AMERICAN LAW INSTITUTE'S IMPENDING CREDIBILITY CRISIS: A REVIEW OF MODERN RESTATEMENTS OF THE LAW

Christopher E. Appel[*]

Abstract

For more than a century, the American Law Institute (ALI) has developed Restatements of the Law to educate judges and the broader legal community on the most carefully reasoned common law rules articulated by courts. The judiciary's frequent reliance on restatements has made the ALI one of the most influential private organizations in the development of American law. This Article explains that such reliance appears increasingly misplaced because the ALI has made a conscious decision in modern restatements to adopt provisions that plainly do not "restate" the law of any jurisdiction. Instead, the ALI has used modern restatements to advance novel, aspirational legal rules expressing what the law "ought to be." In doing so, the ALI has invited a potentially irreparable credibility crisis. This Article examines the evolution of modern restatements, detailing how the ALI has incrementally pushed—and at times openly defied—its own standards to invent new legal rules for courts to adopt. This Article concludes by proposing reforms to mitigate the ALI's self-inflicted reputational harm before judges and other users no longer rely upon restatements as authoritative.

* Christopher E. Appel is a Senior Counsel in Shook, Hardy & Bacon L.L.P.'s Washington, D.C.-based Public Policy Group. He is an American Law Institute (ALI) member and serves on the Members Consultative Group for numerous restatement projects. This Article is dedicated to the author's close friend, mentor, and colleague Victor E. Schwartz, who passed away during its preparation. Victor was an ALI Life Member whose humor, wisdom, kindness, and generosity continue to inspire all who knew him.

INTRODUCTION

Over the past century, the American Law Institute (ALI) has become one of the—if not *the*—most influential private organizations in the development of American law.[1] The ALI's influence with judges who decide a jurisdiction's common law rules (and its influence in the broader legal community) is tied directly to the organization's development of Restatements of the Law that propose "clear formulations of common law . . . as it presently stands or might appropriately be stated by a court."[2] Each year, judges across the nation cite ALI restatement provisions thousands of times in judicial opinions.[3] They rely on these educational treatises to accomplish what a "busy common-law judge, however

1. *See About ALI*, ALI, https://www.ali.org/about [https://perma.cc/JL8A-FRJC] ("The American Law Institute is the leading independent organization in the United States producing scholarly work to clarify, modernize, and otherwise improve the law.").

2. ALI, CAPTURING THE VOICE OF THE AMERICAN LAW INSTITUTE: A HANDBOOK FOR ALI REPORTERS AND THOSE WHO REVIEW THEIR WORK 3 (rev. ed. 2015) [hereinafter ALI STYLE MANUAL].

3. *See* ALI, THE AMERICAN LAW INSTITUTE 2022-2023 ANNUAL REPORT 22 (2023) (stating that the ALI's "Restatements and Principles of the Law have been cited in published decisions by U.S. courts over 220,500 times through June 2023") [hereinafter ALI ANNUAL REPORT].

distinguished, cannot," namely, to "engage the best minds in the profession" and "scan an entire legal field and render it intelligible by a precise use of legal terms" for courts to apply.[4] Accordingly, many judges treat restatements as a collection of the "best" legal rules articulated by courts, given the ALI's longstanding reputation for producing authoritative work products.[5]

But what if this judicial reliance on ALI restatements is misplaced? What if the ALI makes a conscious decision to no longer "restate" the most thoughtful common law rules developed by courts and instead uses restatements to make up rules that do not reflect the law of any jurisdiction? Would—and should—that change how judges and others use restatements, and whether restatements merit the same respect and influence they have long enjoyed in the legal community?

This Article examines these questions because that is precisely the situation confronting the ALI with respect to modern restatements. Over the past decade, the ALI has incrementally pushed the historic boundaries of restatements to endorse novel legal rules, and, on multiple occasions, openly defied the organization's standards for developing a restatement.[6] As this Article explains, what began as an occasional departure to insert a novel provision into a restatement volume that includes dozens of provisions and spans hundreds of pages—something that might be readily overlooked or simply ignored by courts—has metastasized in subsequent restatements. Some modern restatements are replete with novel provisions that do not reflect, or in some instances even attempt to restate, the law of any jurisdiction.[7] Rather, novel restatement provisions aim to create a new common law regime. This gradual evolution raises significant concerns about judges' continued reliance and use of restatements in developing the common law because many judges are unlikely to appreciate the nature of these changes and how the ALI has invited an eventual credibility crisis.

This Article explains how the ALI put itself on a collision course for a reckoning with judges and other users of restatements. Part I discusses the purpose, history, and influence of restatements in the development of American law. It also discusses the restatement development process, which has played a significant role in enabling novel and aspirational restatement provisions. Part II examines one of these novel, early departures in restating common law doctrine in which a restatement provision addressing the liability of land possessors for harm to

4. ALI STYLE MANUAL, *supra* note 2, at 5–6.

5. ALI STYLE MANUAL, *supra* note 2, at 6 (recognizing the Restatements' "quest to determine the best rule").

6. The ALI's standards for developing a restatement are set forth in the organization's Style Manual and discussed in Part I.A.

7. *See infra* Part IV.

trespassers plainly had no legal support but was nevertheless adopted by the ALI in 2012. It discusses a legislative backlash that ensued, in which at least twenty-five states—half the country—enacted legislation to codify traditional common law rules governing the duty of land possessors to trespassers to prevent courts from following this single restatement rule.[8] Part III explains how the ALI, instead of making a course correction in response to these legislative rebukes, "doubled-down" by adopting more novel, liability-enhancing provisions in the Restatement of the Law, Liability Insurance, completed in 2019. This Restatement similarly generated a legislative backlash.[9]

Part IV discusses how the ALI, again, declined to make a course correction and instead proceeded with another restatement constructed *primarily* of novel provisions aimed at reinventing common law doctrine. The Restatement of the Law, Consumer Contracts, which was published in 2024, endorses a new common law regime governing the adoption, interpretation, and enforceability of contracts between businesses and consumers where no court has articulated a separate set of common law rules that operate differently from the general law of contracts. Stated plainly, this restatement reimagines what the law "ought to be."[10]

Finally, Part V examines how this evolution in the approach and purpose of just a handful of modern restatements has effectively rendered the ALI standard-less with respect to the development of restatements. It explains how the traditional rules for developing a restatement may be circumvented or ignored at the discretion of the ALI-appointed law professors who draft restatements (called "Reporters") with limited organizational oversight. The section further discusses how this dynamic of increasingly agenda-driven restatements, which may reduce to an afterthought whether provisions are firmly grounded in existing law, continues to play out in pending restatements, such as a final part of the Restatement (Third) of Torts. Part V concludes with some recommendations for how the ALI can improve its processes to mitigate its self-inflicted reputational damage and stave off an irreparable crisis of credibility. Although many judges may not appreciate how radically the ALI has shifted gears in some modern restatements, it is only a matter of time until they do. When restatements can no longer be relied upon as an educational resource that does not require independent research and verification—or worse, a work product that misleads judges about

8. *See infra* notes 74–81 and accompanying text.

9. *See infra* notes 129–30 and accompanying text.

10. Kansas v. Nebraska, 574 U.S. 445, 475 (2015) (Scalia, J., concurring and dissenting in part) ("Over time, the Restatements' authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be."); *see also infra* notes 95–100 and accompanying text (discussing Justice Scalia's assessment of modern restatements); *infra* Part IV (discussing Consumer Contracts Restatement).

prevailing common law doctrine—it fundamentally changes the nature of what a "restatement" of the law means. It is a departure, which, if left unaddressed, warrants reexamination by judges and others about the role and value of modern restatements.

I. AMERICAN LAW INSTITUTE 101—WHAT RESTATEMENTS OF THE LAW PROPOSE TO DO AND HOW THEY DO IT

A. *The Purpose, Design, and Influence of ALI Restatements*

The ALI was founded in 1923 to promote clarity and uniformity in the law.[11] The organization's founding members viewed the common law as "unnecessarily uncertain and complex" and set out to improve this situation by creating a "restatement of the law that will have an authority much greater than . . . any existing encyclopedia or treatise."[12] To accomplish this mission, the ALI amassed a membership of distinguished judges, law professors, and practitioners to utilize their collective expertise to restate different topics of law to assist judges' development of state common law doctrine.[13]

ALI restatements propose to set forth "clear formulations of common law . . . as it presently stands or might appropriately be stated by a court."[14] The ALI, through its Style Manual, instructs restatement Reporters to "assume[] the perspective of a common-law court" to provide a "black-letter statement of legal rules . . . made with the care and precision of a well-drawn statute."[15] To fulfill this objective, the Style Manual directs Reporters to adhere to four "principal elements" in developing a restatement: (1) "ascertain the nature of the majority rule"

---

11. *See* ALI, *supra* note 1 (discussing ALI's creation and development).

12. REPORT OF THE COMMITTEE ON THE ESTABLISHMENT OF A PERMANENT ORGANIZATION FOR THE IMPROVEMENT OF THE LAW PROPOSING THE ESTABLISHMENT OF THE AMERICAN LAW INSTITUTE (1923), *reprinted in* AMERICAN LAW INSTITUTE 50TH ANNIVERSARY 3, 11, 21 (2d ed. 1973).

13. The ALI publishes three basic work products: (1) Restatements; (2) Model Laws; and (3) Principles. *See* ALI, *supra* note 1. Each work product has a specific purpose and audience, with restatements addressed to common law judges. *See* ALI STYLE MANUAL, *supra* note 2, at 3.

14. ALI STYLE MANUAL, *supra* note 2, at 4. Over the past decade, the ALI has taken a broader approach regarding the subject matter of restatements. In 2015, the ALI commenced a Restatement of the Law, Copyright, that restates judicial interpretations of the federal Copyright Act, and, in 2022, the organization commenced a Restatement of the Law, Constitutional Torts focused on individual rights' to sue government employees and others "acting under color of state law" under 42 U.S.C. § 1983 and *Bivens* actions. *See Restatement of the Law, Copyright Is Approved*, ALI: NEWS (May 20, 2025), https://www.ali.org/news/articles/restatement-law-copyright-approved [https://perma.cc/X2ZQ-WMSM]; *The American Law Institute Launches Restatement of the Law, Constitutional Torts*, ALI: NEWS (Oct. 20, 2022), https://www.ali.org/news/articles/american-law-institute-launches-restatement-law-constitutional-torts [https://perma.cc/H9EV-LNC5].

15. ALI STYLE MANUAL, *supra* note 2, at 5.

on a topic; (2) "ascertain trends in the law"; (3) choose the "specific rule [that] fits best with the broader body of law and therefore leads to more coherence in the law"; and (4) "ascertain the relative desirability of competing rules."[16]

Restatement Reporters are not required to adopt the "majority rule" on an issue of state common law doctrine, but are instructed to explain the rationale if endorsing a purportedly "better" minority rule.[17] Restatement provisions "are constrained by the need to find support in sources of law."[18] The organization's Style Manual also cautions that the ALI, as an unelected body, "has limited competence and no special authority to make major innovations in matters of public policy."[19] Reporters are further instructed that recommended "[w]ild swings [in law] are inconsistent with the work of . . . a Restatement."[20]

For most of the past century, these standards have provided a formula for success. Restatements authoritatively presented "a clear, precise, and succinct statement of the law" on numerous topics across core areas of law, such as contracts, torts, and property.[21] Judges, in turn, validated the influence of these treatises through citations and even verbatim adoption of specific restatement provisions.[22]

For example, section 402A of the Restatement (Second) of Torts is credited with helping usher in the doctrine of strict products liability in the United States.[23] When this Restatement was published in 1965, section 402A endorsed a clear minority rule.[24] This rule, though, also

16. ALI STYLE MANUAL, *supra* note 2, at 5

17. ALI STYLE MANUAL, *supra* note 2, at 7.

18. ALI STYLE MANUAL, *supra* note 2, at 6.

19. ALI STYLE MANUAL, *supra* note 2, at 6.

20. ALI STYLE MANUAL, *supra* note 2, at 6.

21. ALI STYLE MANUAL, *supra* note 2, at 6.

22. *See, e.g.*, Spear T Ranch, Inc. v. Knaub, 691 N.W.2d 116, 139 (Neb. 2005) ("We adopt Restatement (Second) of Torts §§ 858 and 850A (1979) for resolving disputes between users of hydrologically connected ground water and surface water."); State v. Heaney, 689 N.W.2d 168, 176 (Minn. 2004) ("[W]e conclude that conflict of laws related to the recognition of the privileges of foreign jurisdictions will be resolved under the 'significant relationship with the communication' approach outlined in Restatement (Second) of Conflict of Laws § 139."); Sword v. NKC Hosps., Inc., 714 N.E.2d 142, 147 (Ind. 1999) ("[W]e adopt the theory of apparent and ostensible agency formulated in the Restatement (Second) of Torts section 429 (1965).").

23. *See* Victor E. Schwartz & Christopher E. Appel, *Exporting United States Tort Law: The Importance of Authenticity, Necessity, and Learning from Our Mistakes*, 38 PEPP. L. REV. 551, 553–54 (2011) ("When the Restatement (Second) of Torts section 402A was finalized in 1965, it represented a major shift in legal theory regarding the manufacture and sale of products."); Dominick Vetri, *The Integration of Tort Law Reforms and Liability Insurance Ratemaking in the New Age*, 66 OR. L. REV. 277, 284 n.34 (1987) ("After the American Law Institute adopted section 402A in the RESTATEMENT (SECOND) OF TORTS, virtually every state has adopted some version of strict products liability.").

24. When ALI approved § 402A, only California had adopted strict products liability. California Supreme Court Chief Justice Roger Traynor, who also served as an adviser to the

reflected a clear case law trend, relying on warranty and other contract law principles, to advance strict liability beyond the sale of food and drink, and other product categories or specific products, to product sellers generally.[25] Section 402A made sense of the underlying tort principles with which some courts struggled.[26] Thus, section 402A advanced the ALI Style Manual's objectives to "ascertain the relative desirability of competing rules" and endorse the approach that "fits best" and "leads to more coherence in the law."[27] The strict product liability doctrine swept the nation within a decade or so following the publication of the Restatement (Second) of Torts. Courts relied on section 402A in hundreds of cases,[28] which is a testament to—and perhaps high-water mark of—the ALI's influence.[29] Indeed, the Restatement (Second) of Torts continues to be cited by courts more than a half-century after its publication.[30]

Other restatements may be less celebrated, although they remain similarly influential. Many courts, including the U.S. Supreme Court, continue to rely on restatements as an authoritative distillation of prevailing common law doctrine across numerous areas of law.[31] Courts in every state have relied on a restatement when developing state common law.[32] Some jurisdictions go even further in their reverence for

---

Restatement (Second) of Torts, authored Greenman v. Yuba Power Prods., Inc., which provided the case on which to base § 402A. *See* 377 P.2d 897 (Cal. 1963).

25. *See* RESTATEMENT (SECOND) OF TORTS § 402A reporters' notes (ALI 1965) (citing case law supporting strict liability for food and drink products, products for "intimate bodily use," specific products such as automobiles, airplanes, electric cables, herbicides, power tools, playground equipment and household appliances, and products generally).

26. *Id.* at cmt. b, m (discussing historical evolution of product liability theories and explaining rationale for imposition of strict liability that "is purely one of tort").

27. ALI STYLE MANUAL, *supra* note 2, at 5.

28. A Westlaw search of state and federal court cases of the term "restatement" within four words of "402A" between 1965 and 1975 returns more than 500 case results. *See also* Diane Carter Maleson, *Negligence Is Dead But Its Doctrines Rule Us From the Grave: A Proposal to Limit Defendants' Responsibility in Strict Products Liability Actions Without Resort to Proximate Cause*, 51 TEMP. L.Q. 1, 38–39 (1978) (reporting that by 1978, at least twenty-nine states had adopted § 402A and another nine states and the District of Columbia had adopted a version of the doctrine of strict liability in tort).

29. *See id.*; *see also* Vetri, *supra* note 23, at 284 n.34.

30. *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM FOREWORD (ALI 2012) ("The ALI's work on Torts is [its] most-used, most-cited achievement." (quoting ALI Director Lance Liebman)).

31. *See, e.g.*, Vidal v. Elster, 602 U.S. 286, 299 (2024) (citing RESTATEMENT (THIRD) OF UNFAIR COMPETITION § 9 cmt. e (ALI 1993)); New York v. New Jersey, 598 U.S. 218, 224–25 (2023) (citing RESTATEMENT (SECOND) OF CONTRACTS § 33 cmt. d (ALI 1979)); Pereida v. Wilkinson, 592 U.S. 224, 239 n.6 (2021) (citing RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. f (ALI 1982)).

32. *See, e.g.*, Bassichis v. Flores, 189 N.E.3d 640, 646 (Mass. 2022) (noting that "[n]early every State . . . has adopted the formulation of the [litigation] privilege set forth in the Restatement

restatements: in Arizona, courts will generally default to the restatement rule in the absence of a controlling statute or case law;[33] and in the Virgin Islands, restatement provisions constitute governing law in the absence of local rules to the contrary.[34]

B. *The Restatement Development Process*

The restatement development process begins with the ALI's Director selecting an area of law to restate and identifying prospective project Reporters.[35] Reporters, who are almost always law professors, structure the project and prepare drafts containing portions of the larger project.[36] They present these installment drafts initially to a group of ALI-appointed Advisers with expertise in the subject area being restated, as well as a Members Consultative Group of ALI members with an interest in the project.[37] Together, these advisory groups may recommend changes to restated provisions, although the Reporters are under no obligation to follow any recommendations.[38]

Drafts are then presented for approval by two bodies: (1) the ALI Council, an elected group of around sixty or so members that operates similar to a board of directors and convenes privately to discuss each installment restatement draft;[39] and (2) the ALI general membership, a group of around 4,700 practitioners, academics, and judges invited to convene at an annual meeting.[40] Restatements require approval by both

---

(Second) of Torts"); Miller v. Miller, 956 P.2d 887, 900 (Okla. 1998) ("The tort of intentional infliction of emotional distress has now been adopted in almost every state, and the vast majority of those states have adopted the Restatement formulation.") (citation omitted); *see also* ALI, *supra* note 1 (stating that the organization's projects are "enormously influential in the courts and legislatures, as well as in legal scholarship and education").

33. *See* CSA 13-101 Loop, L.L.C. v. Loop 101, L.L.C., 341 P.3d 452, 456 (Ariz. 2014) ("Absent controlling authority to the contrary, we generally follow the Restatement when it sets forth sound legal policy."); *see also In re* Sky Harbor Hotel Props., LLC, 443 P.3d 21, 23 (Ariz. 2019) (same); Cramer v. Starr, 375 P.3d 69, 74–75 (Ariz. 2016) (same).

34. *See* V.I. CODE ANN. tit. 1, § 4 (2025).

35. *See ALI's Projects – The Work: How Does ALI Choose What Projects to Work on?*, ALI: FAQ, https://www.ali.org/faq/ [https://perma.cc/2DYH-Y6FT] (last visited Oct. 15, 2025) (describing initial process for proposing a restatement project).

36. *See ALI's Projects – The People: Who Works on ALI Projects?*, ALI: FAQ, https://www.ali.org/faq/ [https://perma.cc/2DYH-Y6FT] (last visited Oct. 15, 2025) (describing restatement development process).

37. *Id.*

38. *Id.*

39. The ALI includes a listing of current Council members in each restatement draft. The ALI also has several dozen Council Emeriti, former Council members who may participate in Council discussions but not vote. *See* ALI, BYLAWS § 4.04 (2018). The ALI's bylaws require that the Council consist of at least forty-two members and no more than sixty-five members. *Id*.

40. ALI ANNUAL REPORT, *supra* note 3, at 26 (reporting membership of 2,796 Elected Members, 1,715 Life Members (*i.e.*, members of 25 years or more), and 234 Ex Officio Members as of June 30, 2023).

the ALI Council and membership, so either body may compel Reporters to modify a proposed restated provision.[41] In practice, however, most restatement provisions meet little or no resistance in obtaining Council and membership approval.[42]

Once all of a restatement's installment drafts obtain dual approval, a final vote is taken to complete the project and proceed to publication.[43] From beginning to end, the restatement development process takes years, sometimes decades.[44] For instance, the first completed restatement, the Restatement (First) of Contracts, was published in 1932, nine years after work began.[45] The growing complexity of many topics of law over time has likely contributed to longer development periods, particularly for updated editions of earlier restatements. For example, the ALI began work on the Restatement (Third) of Torts in the early 1990s with a standalone restatement of products liability law and subsequently developed a half dozen separate volumes on tort topics, including apportionment of liability, liability for physical and emotional harm, economic harm, intentional torts, and medical malpractice.[46] Only now, thirty years later, are the final volumes of this Restatement nearing completion.[47]

The ALI's methodical approach to restating the law has enhanced its reputation for producing comprehensive and authoritative work products.[48] Some courts have regarded the restatement development process as "the expression of the law by the legal profession."[49] As the next several sections explain, this sterling reputation appears to have

41. *See ALI's Projects – The Process: How Does a Project Get to an Annual Meeting?*, ALI: FAQ, https://www.ali.org/faq/ [https://perma.cc/2DYH-Y6FT] (last visited Oct. 15, 2025) (stating that "ALI is bicameral").

42. *See Project Life Cycle*, ALI, https://www.ali.org/project-life-cycle [https://perma.cc/PQR4-XDV2] (last visited Oct. 15, 2025) (stating that review "ordinarily is limited to consideration of whether changes previously decided upon have been accurately and adequately carried out").

43. *See id.*

44. *See* ALI, *supra* note 41 ("Because of the deliberative nature of [the ALI's] work, it takes years to complete a project.").

45. Herbert Goodrich, *The Story of the American Law Institute*, 1951 WASH. U. L. Q. 283, 288–89 (1951).

46. The Third Restatement of Torts includes standalone restatements on Products Liability (1998), Apportionment of Liability (2000), Liability for Physical and Emotional Harm (2010 & 2012) (two volumes), Liability for Economic Harm (2020), Intentional Torts to Persons (completed in 2021), and Medical Malpractice (completed in 2024).

47. The final volumes of the Restatement (Third) of Torts include standalone restatements on "Defamation and Privacy," "Remedies," and "Miscellaneous Provisions."

48. *Cf.* Stanley v. Turtle Mountain Gas & Oil, Inc., 567 N.W.2d 345, 348 (N.D. 1997) ("The Restatements of Tort are carefully studied and precisely stated summaries of basic principles of law."); Gomes v. Hameed, 184 P.3d 479, 491–92, 495 (Okla. 2008) (Opala, J., dissenting) (recognizing that "restatement process is slow and deliberative").

49. Poretta v. Superior Dowel Co., 137 A.2d 361, 373 (Me. 1957).

created a temptation for some Reporters to "dine out" on that reputation in the pursuit of aspirational rules that do not reflect the law of any jurisdiction.[50]

II. A TOE IN THE WATER—THE ALI PROPOSES TO REVISE THE COMMON LAW DUTY OF LAND POSSESSORS TO TRESPASSERS

At the beginning of the twenty-first century, the ALI began work on a portion of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm that addressed the liability of land possessors.[51] This Restatement sought to part ways with the approach of the Restatement (Second) of Torts, which had restated the duty owed by a land possessor based on a land entrant's status as an invitee, licensee, or trespasser.[52]

These traditional status-based classifications establish a sliding scale of common law duty rules. A land possessor owes to someone invited onto the property the highest duty of care, which includes investigating potential hazards and addressing known or reasonably knowable dangerous conditions to make the premises safe.[53] Licensees, individuals allowed on the property, are owed a lesser duty that includes the land possessor warning of known dangerous activities or conditions that the licensee is unlikely to appreciate.[54] Trespassers, individuals with no authority to be on the property, are generally owed no duty except that the land possessor refrain from causing a willful or wanton injury.[55] The Restatement (Second) of Torts identifies several exceptions to this general "no duty" to trespassers rule, for example, where a known trespasser is likely to encounter a highly dangerous artificial condition or where a child trespasser encounters a dangerous artificial condition that constitutes an "attractive nuisance."[56]

The Restatement (Third) of Torts expressed dissatisfaction with these status-based duties and endorsed the imposition of a "unitary duty of reasonable care on land possessors, applicable to all entrants on the

50. *See* Victor E. Schwartz & Christopher E. Appel, *The American Law Institute at the Cross Road: With Power Comes Responsibility*, 2 NAT'L FOUND. FOR JUD. EXCELLENCE 1, 1 (2017) (stating "a new wind appears to have blown at the ALI" in which "[s]ome Reporters appear to see their mission not simply as 'restating' the most sound existing legal rules, but rather creating novel legal rules in line with their view of what the law 'should be'").

51. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM ch. 9, scope note (ALI 2012).

52. *See id*. § 51 (2012); RESTATEMENT (SECOND) OF TORTS §§ 329–332 (ALI 1965) (defining invitee, licensee, and trespasser).

53. *See* RESTATEMENT (SECOND) OF TORTS §§ 341A, 343, 343A (ALI 1965); *see also id.* § 343B (providing special rule applicable to child licensees and invitees).

54. *See id.* § 341.

55. *See id.* § 333 (restating general "no duty" to trespassers rule).

56. *See id.* §§ 334–339 (restating exceptions to general "no duty" to trespassers rule).

land."[57] The Restatement asserted this approach promotes greater "harmony with modern tort law" and is consistent with a "unitary" approach that—according to the Reporters' 50-state survey—most states adopt.[58] But, in surveying states' land possessor duty rules, the Reporters treated those states that merged only the duties owed to invitees and licensees as adopting a "unitary" approach, even where the jurisdiction maintained a separate "no duty" rule with respect to trespassers.[59] In fact, the Reporters' survey identified only a handful of jurisdictions as adopting a unitary duty of reasonable care across all three categories of land entrants, meaning the Restatement's approach endorsed a clear minority rule.[60] Also, almost all of the jurisdictions adopting this minority approach did so during the 1960s and 1970s, meaning the Restatement's purported twenty-first century approach did not reflect any modern trend in the law.[61]

The Restatement, though, went beyond endorsing a minority rule that had obtained no traction for decades to state an entirely new land possessor's duty to trespassers.[62] The proposed rule stated that land possessors owe a duty of reasonable care to prevent injury to trespassers, except for "flagrant trespassers."[63] Under this approach, land possessors owe no duty to flagrant trespassers except to refrain from causing an intentional, willful, or wanton injury and to exercise reasonable care should a flagrant trespasser appear in peril and defenseless.[64]

Critically, this "flagrant trespasser" classification appears nowhere in the law governing the duties of land processors that has developed over the previous centuries.[65] It is a pure invention of the ALI.[66] In this regard, the provision is different in kind from other pioneering restatement provisions such as section 402A of the Restatement (Second) of Torts,

57. *See* RESTATEMENT (THIRD) OF TORTS: PHYSICAL & EMOTIONAL HARM § 51 cmt. a, c.

58. *See id*. § 51 reporters' note cmt. a.

59. *See id.*

60. *See id.*

61. *See id.* After the 1970s, the Restatement's survey of states adopting a unitary approach across all three traditional categories of land entrants lists only Montana (1981) and Nevada (1994). *See id.* Both states have since rejected this approach and adopted a general "no duty" to trespassers rule. *See infra* notes 77, 79, and accompanying text.

62. *See id.* §§ 51–52.

63. *See id.* § 52.

64. *See id.*

65. *See* David A. Logan, *When the Restatement Is Not a Restatement: The Curious Case of the "Flagrant Trespasser*," 37 WM. MITCHELL L. REV. 1448, 1467–82 (2011) (stating that the Restatement Reporters appreciated they had "created a legal category where one never existed before"); Ellen M. Bublick, *A Restatement (Third) of Torts: Liability for Intentional Harm to Persons—Thoughts*, 44 WAKE FOREST L. REV. 1335, 1346 (2009) (recognizing that "Reporters created the new category 'flagrant trespasser[]'").

66. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 52 cmt. a (ALI 2012) ("the concept of a flagrant trespasser is new to the Restatement of Torts"); *see also supra* note 65.

which was grounded in at least some existing case law to meet the ALI's baseline standard that a proposed rule is "constrained by the need to find support in sources of law."[67] Flagrant trespasser, in contrast, is a classification created out of whole cloth to address dissatisfaction with the existing common law rules.

The Restatement also does not define this proposed new land entrant classification (developed as part of a rule seeking to eliminate land entrant classifications) other than to convey that flagrant trespassers are "particularly egregious trespassers" whose presence appears "offensive" to the rights of the land possessor.[68] The Restatement includes some illustrations of this "concept of a flagrant trespasser" in which the land possessor would not, or might not, owe a duty of reasonable care, such as where a burglar or other trespassing individual engaging in aggravated criminal conduct sustains an injury.[69] Rather than provide more definitive guidance on how this novel concept applies and promotes "more coherence in the law,"[70] the Restatement simply encourages courts to apply the proposed rule however they see fit to expand trespassers' ability to sue land possessors compared to the prevailing common law.[71]

As the Restatement neared completion, this liability-enhancing goal became quite clear when the project's senior reporter teamed up with a former president of the Association of Trial Lawyers of America (now known as the American Association for Justice) to write an article in the trial lawyer group's monthly publication, *Trial*.[72] In the article, titled "The new restatement's top 10 tort tools," the authors touted the new land possessor duties as one of the "most important updated provisions" personal injury lawyers can use to "[their] clients' advantage."[73]

Around the same time, some state legislatures expressed concern about how judicial adoption of the ALI's proposed shift to a unitary duty to all land entrants, except the amorphous flagrant trespasser, could upend centuries of law and impose costly new burdens on property owners.[74] In

67. ALI STYLE MANUAL, *supra* note 2, at 6; *see also supra* notes 23–29 and accompanying text (discussing § 402A).

68. RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 52 cmt. a (ALI 2012) ("This Chapter does not attempt to define flagrant trespassers or prescribe the precise line on the continuum that distinguishes ordinary trespassers from flagrant trespassers.").

69. *See id.* at illus. 2, 3.

70. ALI STYLE MANUAL, *supra* note 2, at 5.

71. *See* RESTATEMENT (THIRD) OF TORTS: PHYS. & EMOT. HARM § 52 cmt. a (ALI 2012) ("[D]ifferent jurisdictions that adopt the rule in this Section will have different values about the relative importance of protecting the safety of entrants on land and protecting the rights of land possessors and will, accordingly, select different points at which to draw the line.").

72. *See* Michael D. Green & Larry S. Stewart, *The New Restatement's Top 10 Tort Tools*, 46 TRIAL MAG. 44, 44 (2010).

73. *Id.*

74. *See, e.g.*, Joe Forward, *Trespasser Liability: Wisconsin Legislature Votes to Codify Existing Law*, INSIDETRACK (State Bar Wis.), Nov. 16, 2011, https://www.wisbar.org/News

2011, with the publication of this Restatement looming, six states enacted legislation to codify existing land possessor duties to trespassers and prevent courts from adopting the ALI's novel approach.[75] By 2016, fifteen other states enacted similar laws.[76] Nevada, for example, went further by overruling a 2012 Nevada Supreme Court decision in which the court became the first—and only—state high court to adopt the Restatement's unitary duty rule and flagrant trespasser exception.[77]

Since 2011, at least twenty-five states have enacted legislation to codify traditional, status-based land possessor duties to trespassers.[78] Montana, for instance, enacted legislation in 2021 to restore its general "no duty" to trespassers rule, forty years after the state high court

---

Publications/InsideTrack/Pages/Article.aspx?Volume=3&Issue=22&ArticleID=7968 [https://perma.cc/UNZ4-C7VG] (discussing bipartisan legislation to "preempt Wisconsin courts from adopting a standard of care on par with the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm*" based on concerns the Restatement approach would adversely impact owners and renters of residential property).

75. These states include North Carolina, North Dakota, Oklahoma, South Dakota, Texas, and Wisconsin. *See* H.B. 542, 2011 Gen. Assemb., 2011 Sess. (N.C. 2011) (codified at N.C. GEN. STAT. §§ 38B-1 to -4 (2025)); H.B. 1452, 62nd Legis. Assemb., Reg. Sess. (N.D. 2011) (codified at N.D. CENT. CODE §§ 32-47-01 to -02 (2025)); S.B. 494, 53rd Legis., Reg. Sess. (Okla. 2011) (codified at OKLA. STAT. tit. 76, § 80 (2025)); H.B. 1087, 2011 Legis. Assemb., 86th Sess. (S.D. 2011) (codified at S.D. CODIFIED LAWS §§ 20-9-11.1 to -11.6 (2025)); S.B. 1160, 82nd Leg. Sess., Reg. Sess. (Tex. 2011) (codified at TEX. CIV. PRAC. & REM. CODE ANN. § 75.007 (2025)); S.B. 22, 2011-2012 Leg., Sept. 2011 Spec. Sess. (Wis. 2011) (codified at WIS. STAT. § 895.529 (2025)).

76. These states include Alabama, Arizona, Georgia, Indiana, Kansas, Michigan, Missouri, Nevada, Ohio, South Carolina, Tennessee, Utah, Virginia, West Virginia, and Wyoming. *See* Ala. S.B. 342 (2012) (codified at ALA. CODE § 6-5-345 (2025)); Ariz. S.B. 1410 (2012) (codified at ARIZ. REV. STAT. § 12-557 (2025)); Ga. S.B. 125 (2014) (codified at GA. CODE ANN. § 51-3-3 (2025)); Ind. S.B. 306 (2015) (codified at IND. CODE §§ 34-31-11-1–§ 34-31-11-5 (2025)); Kan. H.B. 2447 (2014) (codified at KAN. STAT. ANN. § 58-821 (2025)); Mich. H.B. 5335 (2014) (codified at MICH. COMP. LAWS ANN. § 554.583 (2025)); Mo. S.B. 628 (2012) (codified at MO. REV. STAT. § 537.351 (2025)); Nev. S.B. 160 (2015) (codified at NEV. REV. STAT. § 41.515 (2025)); Ohio S.B. 202 (2012) (codified at OHIO REV. CODE ANN. § 2305.402 (2025)); S.C. H.B. 3266 (2015) (codified at S.C. CODE ANN. § 15-82-10 (2025)); Tenn. S.B. 2719 (2012) (codified at TENN. CODE ANN. § 29-34-208 (2025)); Utah H.B. 347 (2013) (codified at UTAH CODE ANN. §§ 57-14-102, 57-14-301 (2025)); Va. H.B. 2004 (2013) (codified at VA. CODE ANN. § 8.01-219.1 (2025)); W. Va. S.B. 3 (2015) (codified at W. VA. CODE § 55-7-27 (2025)); Wyo. H.B. 2018 (2015) (codified at WYO. STAT. ANN. §§ 34-19-201–34-19-204 (2025)).

77. *See* Foster v. Costco Wholesale Corp., 291 P.3d 150, 153 (Nev. 2012), *superseded in part by statute*, Act of May 30, 2015, ch. 302, 2015 NEV. STAT. 1525 (codified at NEV. REV. STAT. § 41.515 (2015)).

78. In addition to the twenty-one jurisdictions cited in footnotes 75 and 76, Idaho, Iowa, Mississippi and Montana enacted legislation after 2015 to codify the duty of land possessors to trespassers. *See* H.R. 658, 64th Leg., 2d Reg. Sess. (Idaho 2018) (codified at IDAHO CODE §§ 6-3101 to -3103 (2025)); H.R. 260, 87th Gen. Assemb., Reg. Sess. (Iowa 2017) (codified at IOWA CODE § 462.1 (2025)); H.R. 767, 131st Leg., 2016 Reg. Sess. (Miss. 2016) (codified at MISS. CODE ANN. § 95-5-31 (2025)); H.R. 338, 67th Leg., 2021 Reg. Sess. (Mont. 2021) (codified at MONT. CODE ANN. § 27-1-708 (2025)).

recognized a unitary duty of reasonable care to all land entrants.[79] In addition, four other states previously codified traditional land possessor duties to trespassers in the decades preceding the development of this Restatement, bringing the total to nearly thirty states.[80] Thus, as a direct result of this Restatement, most state legislatures, not common-law courts, now define the duty of land possessors to trespassers. These states have determined that the general "no duty" to trespassers rule reflects the "best" law and public policy, not the ALI's novel, ill-defined, and untested approach.[81]

III. A DIP IN THE POOL—THE ALI PROPOSES TO RESHAPE INSURANCE LAW IN RESTATEMENT OF THE LAW, LIABILITY INSURANCE

When states started to move *en masse* to prevent courts from adopting the ALI's proposed land possessor duty to trespassers, the ALI's first-ever project specific to insurance was just underway.[82] This project, called "Principles of the Law of Liability Insurance," began as a different ALI work product than a restatement.[83] ALI "Principles" projects are unlike restatements because they are typically addressed to legislators and administrative agencies, not judges, and set forth guiding principles that aim "to unify a legal field without regard to whether the formulations conform[] precisely to present law."[84] Principles projects give Reporters latitude to develop aspirational rules and principles of what the law "should be" on a particular topic.[85]

This ALI foray into liability insurance law proceeded as a Principles project for four years, past the project's halfway point, when most of its contemplated principles had obtained approval by the ALI Council and

79. *See* Limberhand v. Big Ditch Co., 706 P.2d 491, 496 (Mont. 1985) (stating that landowners are required to exercise "ordinary care in the circumstances" to all land entrants). *Compare* MONT. CODE ANN. § 27-1-708(a) ("a landowner owes a trespasser no duty of care with respect to the condition of the property"), *with* RESTATEMENT (THIRD) OF TORTS § 52 reporters' note a (ALI 2012) (listing Montana as a jurisdiction adopting a unitary duty of care for all land entrants and citing Corrigan v. Janney, 626 P.2d 838 (Mont. 1981)).

80. These states include Arkansas (1993), Colorado (1986), Florida (1999), and Kentucky (1976). *See* ARK. CODE § 18-60-108 (West 2025); COLO. REV. STAT. § 13-21-115 (2025); FLA. STAT. § 768.075 (2025); KY. REV. STAT. ANN. §§ 381.231–32 (West 2025).

81. *See* MONT. CODE ANN. § 27-1-708(a) (2025) ("a landowner owes a trespasser no duty of care"); David A. Logan, *When the Restatement Is Not a Restatement: The Curious Case of the "Flagrant Trespasser*," 37 WM. MITCHELL L. REV., 1448, 1449 (2011) (ALI's trespasser rule is "a novel formulation").

82. *See* RESTATEMENT OF THE LAW, LIAB. INS. ix (ALI, Proposed Final Draft No. 2, 2018) (stating that ALI Council approved project as a Principles project in May 2010).

83. *See id.*

84. ALI STYLE MANUAL, *supra* note 2, at 13. Principles projects may also be addressed to courts "when an area is so new that there is little established law," although that is not the case with respect to liability insurance law. ALI STYLE MANUAL, *supra* note 2, at 13.

85. *See* ALI STYLE MANUAL, *supra* note 2, at 13.

membership.[86] Near the end of 2014, however, the ALI leadership converted the project into the Restatement of the Law, Liability Insurance (RLLI).[87] This decision was unprecedented in the ALI's history.[88] The decision may have been motivated, in part, by broad criticisms from members of the insurer community—including withdrawal of an appointed insurer liaison to the project—that numerous project innovations threatened to disrupt longstanding liability insurance law practices and dramatically expand insurers' liability.[89] Recasting the project as a restatement offered a means to revisit controversial aspirational provisions that had previously obtained approval and subject them to the purportedly more demanding standards for a restatement.[90] Change to a restatement also meant increasing the project's likely influence, because restatements, as the ALI's signature work product, are relied upon to a far greater extent in the legal community than Principles.[91]

The project's conversion of often-aspirational principles into black-letter restatement rules proved rocky to say the least. The initial draft of the RLLI retained many of the novel provisions that had generated concerns when the project was Principles.[92] Insurers, whose interests were represented in part by a new insurer liaison appointed to the project, objected to numerous provisions on the basis that the RLLI's proposed rule formulations failed to reflect existing law.[93]

The release of the initial RLLI draft in 2015 also happened to coincide with the ALI attracting some unwanted attention in a U.S. Supreme Court opinion. In *Kansas v. Nebraska*, the late Justice Antonin Scalia authored

86. *See* PRINCIPLES OF THE LAW, LIAB. INS., introductory note (ALI, Tentative Draft No. 2, 2014).

87. *See* RESTATEMENT OF THE LAW, LIAB. INS. ix (ALI, Proposed Final Draft No. 2, 2018) (providing overview of project development, including project's 2014 change from Principles to Restatement).

88. The ALI leadership also approved a project conversion in the opposite direction. The ALI's Restatement of Data Privacy Principles project, which was unique in including both the "Restatement" and "Principles" labels, was changed into a Principles project in 2014 and retitled the Principles of the Law, Data Privacy. RESTATEMENT OF DATA PRIVACY PRINCIPLES (ALI, Preliminary Draft No. 1, 2014). This Principles project was completed in 2019.

89. *See* Victor E. Schwartz & Christopher E. Appel, *Restating or Reshaping the Law?: A Critical Analysis of the Restatement of the Law, Liability Insurance*, 22 U. PA. J. BUS. L. 718, 724–27 (2020) (discussing RLLI's conversion from a Principles project).

90. *See id.*

91. *See* Schwartz & Appel, *supra* note 50, at 2 (discussing a likely purpose of RLLI conversion to "increase the project's influence with judges via the 'Restatement' label").

92. *See* RESTATEMENT OF THE LAW, LIAB. INS., ix (ALI, Preliminary Draft No. 1, 2015) (summarizing the few "significant changes" from the previous Principles).

93. *See* Letter from Laura Foggan, RLLI Insurer Liaison, to RLLI Reporters (Apr. 20, 2015) (on file with author) (urging Reporters not to present draft Restatement for vote at 2015 ALI Annual Meeting based on concerns with project).

a separate opinion, concurring and dissenting in part, that called attention to the ALI's approach in modern restatements, stating:

> [M]odern Restatements . . . are of questionable value and must be used with caution. The object of the original Restatements was 'to present an orderly statement of the general common law.' Over time, the Restatements' authors have abandoned the mission of describing the law and have chosen instead to set forth their aspirations for what the law ought to be.[94]

Justice Scalia referenced a provision of the Restatement (Third) of Restitution and Unjust Enrichment addressing the availability of a disgorgement remedy, which both the majority and dissenting opinions of the Court had discussed, as "illustrative" of this modern trend.[95] He explained that the provision "constitute[d] a 'novel extension' of the law that finds little, if any, support in case law."[96] He added that when restatement provisions attempt to revise rather than restate existing law, they "should be given . . . no more weight regarding what the law ought to be than the recommendations of any respected lawyer or scholar."[97] Justice Scalia concluded with a more sweeping indictment of modern restatements that goes to the heart of their utility, stating, "it cannot safely be assumed, without further inquiry, that a Restatement provision describes rather than revises current law."[98]

Justice Scalia's statements clearly registered with the ALI. In fact, they were read aloud during a Rutgers Law School symposium on the pending RLLI that took place three days later and included the project's Reporters and ALI's Deputy Director.[99] The unresolved question, though, was whether this view expressed in a U.S. Supreme Court opinion would serve as a proverbial "wake up" call for the ALI to more closely monitor the development of restatement provisions and ensure that provisions adhere to existing law, or instead lean into proposing novel rule formations that express a view on what the law "ought to be."[100]

---

94. Kansas v. Nebraska, 574 U.S. 445, 475 (2015) (Scalia, J., concurring and dissenting in part) (citations omitted).

95. *Id.* at 476; *see also id.* at 461–62 (discussing RESTATEMENT (THIRD) OF RESTITUTION AND UNJUST ENRICHMENT § 39 (ALI 2010)); *id.* at 482 (Thomas, J., dissenting) (same).

96. *Id.* at 476.

97. *Id.*

98. *Id.*

99. *See* Jay M. Feinman, *The Restatement of the Law of Liability Insurance as a Restatement: An Introduction to the Issue*, 68 RUTGERS L. REV. 1 (2015) (discussing Rutgers Law School conference held on February 27, 2015). The U.S. Supreme Court decided Kansas v. Nebraska, 574 U.S. 445 (2015), on February 24, 2015.

100. *Kansas*, 574 U.S. at 476 (Scalia, J., concurring and dissenting in part).

The RLLI's development over the next several years suggests the latter approach prevailed.[101] The project's reporters proposed some truly radical changes to liability insurance law, including those affecting basic rules.[102] One of these basic rules provides that unambiguous insurance policy terms be interpreted according to their "plain meaning."[103] This rule promotes predictability and consistency in the interpretation of insurance agreements by precluding the introduction of extrinsic evidence of other proposed interpretations of a policy term where that term's meaning is already clear "on its face."[104] The RLLI proposed a new approach to the traditional plain meaning rule called the "plain-meaning presumption."[105] Under this approach, an insured would be permitted to introduce extrinsic evidence of a policy term's "plain meaning," and overcome a presumption against allowing consideration of extrinsic evidence, whenever the "extrinsic evidence shows that a reasonable person in the policyholder's position would give the term a different meaning" that was "more reasonable."[106] The approach, which does not reflect the law of any jurisdiction, threatened to turn the plain-meaning rule on its head by allowing the introduction of extrinsic evidence to challenge an unambiguous policy term.[107] This major

101. *See* Schwartz & Appel, *supra* note 89, at 725–28, 742–66 (explaining that most of the RLLI's fifty sections "generated some level of concern" with respect to novel proposed rule formulations and analyzing "ten RLLI topics that generated significant controversy").

102. *See* Schwartz & Appel, *supra* note 89, at 729–42 (discussing novel and/or extreme proposed RLLI provisions that were ultimately modified on topics that include plain meaning rule, misrepresentation doctrine, breach of the duty to defend, prejudice requirement to enforce policy conditions, one-way attorney fee shifting, liability for aggravated fault, and punitive damages standard for bad faith).

103. *See* Schwartz & Appel, *supra* note 89, at 729–32 (discussing evolution of RLLI's approach to plain meaning rule).

104. *See* JORDAN R. PLITT ET AL., COUCH ON INSURANCE § 21:1 (3d ed. 2010) (describing the analytical steps courts take in ascertaining the meaning of terms and conditions in an insurance policy and stating that a court will first determine whether the terms at issue are defined in the policy or have a meaning that is plain on its face); *see also* RESTATEMENT OF THE LAW, LIAB. INS. § 3 cmt. a (ALI 2019) (The plain-meaning approach promotes consistency of interpretation of insurance policies . . . .").

105. RESTATEMENT OF THE LAW, LIAB. INS. § 3 (ALI, Proposed Final Draft, 2017).

106. *Id.*

107. *See, e.g.*, Letter from Harold Kim, ALI Member, to ALI Council (Jan. 5, 2018) (on file with author) (stating that RLLI's proposes plain meaning presumption "appears predicated on the assumption that there may be multiple 'plain meanings' of a policy term when the plain meaning rule exists to refer to the plain meaning of a policy term"); Letter from Alan Rutkin, ALI Member, to RLLI Reporters (Jan. 2, 2018) (on file with author) (criticizing the RLLI's rejection of the plain meaning rule); Letter from Jackson & Campbell, P.C., to RLLI Reporters (Sept. 6, 2017) (on file with author) (expressing concern regarding the way in which the RLLI addresses the concept of latent ambiguity); *see also* Laura A. Foggan & Rachel Padgett, *Rules of Policy Interpretation Reflect Lingering Policyholder Bias in the ALI's Restatement of the Law*, *Liability Insurance*, 50 BRIEF 26 (2020) (article by ALI-appointed insurer liaison to RLLI).

proposed change in law, to effectively allow for multiple "plain meanings" of a policy term, was ultimately jettisoned, but only after years of criticisms prompted a last-minute, face-saving change before the ALI membership voted to complete the RLLI at the 2018 Annual Meeting.[108]

The final version of the RLLI retained a host of novel provisions—some minor and some potentially major.[109] An example on the more extreme end is the RLLI's treatment of the relationship between an insurer and an attorney it hires to defend an insured. The RLLI includes a provision setting forth two novel bases for a direct liability claim against an insurer for the negligence of the counsel it hires: (1) where the insurer fails to take reasonable care in selecting counsel to defend a legal action; and (2) where the insurer directs the conduct of the counsel in a manner that "overrides the duty of the counsel to exercise independent professional judgment."[110]

With regard to the first liability theory, the RLLI proposes that courts recognize a duty "that turns on the insurer's efforts to assure that the lawyer has adequate skill and experience in relation to the claim in question."[111] This rule appears to envision a new policing function on the part of insurers, separate from the state bar associations that exercise oversight over the practice of law in a jurisdiction.[112] Under this approach, an insurer's failure to adequately monitor a selected attorney for signs of job impairment, such as a missed court appearance or unreliability due to substance abuse, would give rise to direct liability against the insurer for that attorney's negligence.[113] In addition, the RLLI references an insurer's selection of an attorney with "inadequate" professional liability insurance as another potential basis for triggering

108. *See* Schwartz & Appel, *supra* note 89, at 730–31 (explaining how "battle over this basic insurance policy interpretation provision . . . waged for years" and that "[i]t was not until April 2018, only a month before the ALI membership's final approval of the RLLI . . . that a draft removing this proposed rule and replacing it with a comparatively straightforward formulation of the plain meaning rule was unveiled"); Michael F. Aylward, *Should the American Law Institute Restate or Rewrite the Rules of Interpreting Insurance Policies?*, 59 FOR DEF. 22, 23–29 (2017) (discussing the history of the debate over the RLLI's plain meaning provision).

109. *See* Schwartz & Appel, *supra* note 89, at 742–66 (examining ten RLLI topics that generated significant controversy).

110. RESTATEMENT OF THE LAW OF LIAB. INS. § 12 (ALI 2019).

111. *Id.* at § 12 cmt. b.

112. *See id.*

113. *See id.* at § 12 cmt. b, illus. 1–3. The illustrations provided in earlier RLLI drafts each related to attorney substance abuse issues. *See* RESTATEMENT OF THE LAW OF LIAB. INS. § 12 cmt. b, illus. 1–3 (ALI, Proposed Final Draft No. 2, 2018). The final RLLI makes clear, though, that the "subsequent revision of the Illustrations to remove the references to substance abuse does not represent a judgment by the Institute regarding the implications of retaining an impaired attorney to represent an insured." RESTATEMENT OF THE LAW, LIAB. INS. § 12 reporters' note b (ALI 2019).

direct liability for the selected attorney's negligence.[114] Critically, the RLLI cites no case law adopting these open-ended liability rules and obscures their novelty.[115] A "busy common-law judge" would need to wade through the RLLI's Reporters' Notes to learn that "there are no judicial decisions that have held an insurer liable in tort for negligent selection of counsel."[116]

The second liability theory, in which an insurer may be deemed negligent for overriding the independent judgment of its hired counsel, likewise lacks case law support. Here, the Reporters simply surmise that the "dearth of cases likely has to do with the special professional obligations owed by attorneys to their clients."[117] They argue that because attorneys hired by insurers to represent an insured "are not understood to be agents of the insurers" under courts' current thinking, "vicarious, apparent-authority, and negligent-supervision liability claims would not make sense."[118] They theorize that if "an insurer were to take steps to override the normal professional independence of defense counsel, this prevailing presumption against vicarious and direct liability of the insurer would be overcome," and the RLLI's proposed rule would be justified.[119] This strained theory, though, is pure conjecture, not existing law, and it is used to prop up a rule in a Restatement of the Law.

Another example with potentially massive implications on liability insurance law involves the RLLI's treatment of punitive damages. The RLLI proposes a rule in which an insured who has been punished by a court for *their* reprehensible behavior can, in bringing a successful claim for the insurer's breach of the duty to make reasonable settlement decisions, shift that entire punishment onto the insurer.[120] No court has adopted such a rule.[121] The RLLI identifies five cases in which courts considered the approach, each of which rejected it.[122] As the California

114. RESTATEMENT OF THE LAW OF LIAB. INS. § 12 cmt. c (ALI 2019) (suggesting "a court could find that an insurer's decision to select defense counsel who does not have adequate liability insurance constitutes a form of negligent selection").

115. *See id.* at § 12 reporters' note b (citing cases for the general proposition that an insurer's duty to defend includes hiring competent counsel, but not cases that adopt the specific direct liability rules set forth in the RLLI).

116. *Id.*

117. *Id.* at § 12 reporters' note d.

118. *Id.*

119. *Id.*

120. *See id.* at § 27 cmt. e.

121. *See id.* at § 27 reporter's note e.

122. *See id.* The cases include three state high court decisions, see PPG Indus., Inc. v. Transamerica Ins. Co., 975 P.2d 652, 658 (Cal. 1999); Lira v. Shelter Ins. Co., 913 P.2d 514, 517–18 (Colo. 1996); Soto v. State Farm Ins. Co., 635 N.E.2d 1222, 1224–25 (N.Y. 1994), and two Federal Circuit decisions predicting state law, see Wolfe v. Allstate Prop. & Cas. Ins. Co., 790 F.3d 487, 493 (3d Cir. 2015) (applying Pennsylvania law); Magnum Foods, Inc. v. Cont'l Cas. Co., 36 F.3d 1491, 1506 (10th Cir. 1994) (applying Oklahoma law).

Supreme Court explained, such a rule would allow an insured to "shift to its insurer, and ultimately to the public, the payment of punitive damages awarded . . . against the insured as a result of the insured's intentional, morally blameworthy behavior . . . ."[123] Among other public policy concerns, the court continued, this approach would "defeat the purposes of punitive damages, which are to punish and deter the wrongdoer."[124]

Undeterred, the RLLI supported the adoption of this novel rule based on two dissenting opinions.[125] The RLLI argues public policy reasons, such as encouragement of reasonable settlement decisions by insurers, support this "better rule,"[126] even though no jurisdiction accepts that public policy rationale.

These and other novel aspects of the RLLI, combined with other liability-enhancing rules with at least some case law support, culminated in a project that clearly left members of the insurer community dissatisfied.[127] When viewed in its entirety, the RLLI proposes to increase insurers' liability and costs at every stage of the insurance procurement and claims handling process.[128] Frustration, or outright disbelief, with the project's direction prompted some insurers to pursue corrective action in state legislatures responsible for setting public policy. Since 2018, the year before the RLLI's publication, at least eleven states have adopted laws[129] or resolutions[130] saying that the RLLI does not constitute the public policy of the state or should otherwise not be followed by courts. These enactments mark the first time state legislatures have rejected, or at least called into question, an entire ALI restatement. If states' movement to codify land possessors' duty to trespassers could be

123. *PPG Indus., Inc.*, 975 P.2d at 658.

124. *Id.*

125. *See* RESTATEMENT OF THE LAW OF LIAB. INS. § 27 reporter's note cmt. e (citing *PPG Indus., Inc.*, 975 P.2d at 658–62 (Mosk, J., dissenting); *Lira*, 913 P.2d at 520–22 (Lohr, J., dissenting)).

126. *See supra* notes 16 through 17 and accompanying text.

127. *See* Schwartz & Appel, *supra* note 89, at 720 (discussing "growing volume of media coverage, articles, symposiums, judicial education programs, and legal scholarship [that] have examined aspects of the RLLI").

128. *See* Schwartz & Appel, *supra* note 89, at 766–70 (providing overall assessment of RLLI).

129. *See* ARK. CODE ANN. § 23-60-112 (2025); ARIZ. REV. STAT. § 20-110 (LexisNexis 2025); MICH. COMP. LAWS ANN. § 500.3032 (West 2025); N.C. GEN. STAT. § 58-1-2 (2025); N.D. CENT. CODE § 26.1-02-34 (2025); OHIO REV. CODE ANN. § 3901.82 (2025); OKLA. STAT. tit. 12, § 2411.1 (2025); Utah CODE ANN. § 31a-22-205 (LexisNexis 2025); *cf.* TENN. CODE ANN. § 56-7-102 (2025) (clarifying rules of insurance policy interpretation and insurer duty to defend in light of RLLI). In addition, the National Conference of Insurance Legislators has adopted model legislation on the issue. *See* MODEL ACT CONCERNING INTERPRETATION OF STATE INS. L. (NAT'L CONF. OF INS. LEGISLATORS 2024).

130. *See* H.R. Con. Res. 62, 121st Gen. Assemb., Reg. Sess. (Ind. 2019); S. Res. 149, 2019 Leg., Reg. Sess. (La. 2019); H.R. 222, 2018 Gen. Assemb., Reg. Sess. (Ky. 2018).

considered a "wake-up" call to the ALI about endorsing novel liability-enhancing rules, this stepped-up legislative backlash served as a pounding-on-the-door plea for the ALI to make a course correction. As the next section explains, that did not happen.

IV. SWIMMING OUT TO SEA—THE ALI PROPOSES TO REINVENT CONTRACT LAW IN THE RESTATEMENT OF THE LAW, CONSUMER CONTRACTS

The ALI's first-ever insurance-specific restatement overlapped with the development of another first-of-its-kind restatement, the Restatement of the Law, Consumer Contracts. This Restatement, which the ALI published in 2024, proposes to "restate" contract law specific to agreements entered into between a business and a consumer.[131] The project recommends common law rules for courts to adopt to address what it describes as "a fundamental challenge to the law of contracts" where businesses contract with consumers, namely "asymmetry in information, sophistication, and stakes between the parties to these contracts."[132] The basic problem with this approach—reiterated throughout the project's development—is that courts have not articulated a separate set of "consumer contract" rules that operate differently from the general law of contracts.[133] Accordingly, this entire Restatement resorts to reimagining what the common law "ought to be" and, in doing so, proposes to usher in a new common law regime.[134]

The Restatement begins by framing *all* situations in which a consumer contracts with a business as a "David versus Goliath" scenario. It states that "[o]n one side stands a well-informed and counseled business party" and "[o]n the other side stand consumers who are informed only about some core aspects of the transaction, but rarely about the list of standard

131. *See* RESTATEMENT OF THE LAW, CONSUMER CONTS. Intro. (ALI 2024).

132. *Id.*

133. *See, e.g.*, Letter from 27 General Counsel to David F. Levi, ALI President (Dec. 1, 2017) (on file with author) (expressing fundamental concerns with proposed Restatement of the Law, Consumer Contracts); Letter from Harold Kim to ALI Council (Oct. 17, 2018) (on file with author) (sharing "major concerns about the [Restatement] blurring the line between recommending what the law 'should be' and 'restating' existing law"); Letter from 13 Trade Ass'ns and Bus. Orgs. to ALI Council (Jan. 15, 2019) (on file with author) ("Conceptually, this Restatement is fundamentally flawed."); Letter from Gen. Couns. of Corps. and Reps. of Leading Trade Ass'ns to ALI Council (Jan. 19, 2022) (on file with author) (referencing numerous "collective prior submissions, as well as numerous submissions by ALI members and others, [that] explain why this proposed Restatement is conceptually flawed and may cause lasting reputational harm to the ALI if adopted").

134. *See* Christopher E. Appel, *The American Law Institute's Unsound Bid to Reinvent Contract Law in the Proposed Restatement of the Law, Consumer Contracts*, 32 LOY. CONSUMER L. REV. 339, 362, 364 (2022) (providing section-by-section analysis of proposed Restatement that "reveals the remarkable extent to which this project fails to satisfy the ALI's most basic standards for a developing a Restatement").

terms."[135] This homogenous treatment, however, fails to consider that many businesses do not fit this paradigm.

The vast majority of businesses in the United States—some 99.9%—are small businesses.[136] In 2024, for example, the U.S. Small Business Administration reported that there were 34.8 million small businesses, employing around half of the nation's private workforce.[137] Most of these small businesses had either no paid employees (e.g., employer-owned and operated) or fewer than twenty employees (e.g., "mom and pop" businesses).[138] They are hardly the highly sophisticated, imposing corporate forces for which the Restatement develops specialized rules to combat.

Nevertheless, the Restatement proceeds with the premise that it is "both irrational and infeasible for most consumers to keep up with the increasingly complex terms provided by businesses in the multitude of transactions, large and small, entered into daily."[139] It reasons that "[b]ecause consumers typically lack the information, sophistication, and incentive to monitor" contracts they enter voluntarily with businesses, "there is concern that businesses will include terms that are unreasonably one-sided, unfair, and inefficient."[140] The Restatement "offers a roadmap" for courts to address these concerns at the "front end" when contracts are formed and at the "back end" when parties seek to enforce or invalidate the contract's terms.[141]

The Restatement consists of ten sections in total.[142] In general, the Restatement's "front-end" sections endorse the adoption and modification of "core deal terms" as well as "standard contract terms" (e.g., "fine print" or "boilerplate") when a consumer has manifested assent to the transaction after receiving reasonable notice and opportunity to review the agreement's terms.[143] This permissive approach tracks traditional contract law principles, including those set forth in the Restatement (Second) of Contracts.[144] Beyond these provisions,

---

135. RESTATEMENT OF THE LAW, CONSUMER CONTS. Intro. (ALI 2024).

136. U.S. SMALL BUS. ADMIN. OFF. OF ADVOC., 2024 SMALL BUSINESS PROFILE 1 (2024) https://advocacy.sba.gov/wp-content/uploads/2024/11/United_States.pdf [https://perma.cc/FJA9-4P5B].

137. *Id.* (reporting that in 2024 small businesses employed 59 million employees constituting 45.9% of the U.S. workforce).

138. *See id.* at 2.

139. RESTATEMENT OF THE LAW, CONSUMER CONTS. Intro. (ALI 2024).

140. *Id.*

141. *Id.*

142. *See id.* (summarizing each section).

143. *See id.* §§ 2, 3.

144. *See id.* § 2 cmt. 15 (explaining relationship of Restatement rule governing adoption of standard contract terms with Restatement (Second) of Contracts); *id.* § 3 cmt. 11 (same for Restatement rule governing modification of standard contract terms).

however, the Restatement of the Law, Consumer Contracts innovates at virtually every opportunity.[145]

For starters, the Restatement includes a novel section on "Interpretation and Construction of Consumer Contracts" that, if adopted by courts, would fundamentally change how contract terms are interpreted.[146] The black-letter rule states that standard contract terms must be interpreted to effectuate "the reasonable expectations of the consumer," regardless of whether those expectations differ from the unambiguous language of the contract term.[147] This approach would permit a consumer to challenge, and potentially invalidate, countless contract terms on the basis that the term did not comport with that consumer's expectations.

This black-letter rule also provides that "[i]n choosing among the reasonable meanings of a standard contract term, the meaning that operates *against the business* supplying the term is preferred."[148] The rule further states that any ambiguities in "the process by which standard contract terms are adopted [are] resolved *against the business* using the process."[149] Taken together, these interpretation rules propose intentionally one-sided judicial treatment of contracts between businesses and consumers to disadvantage the business regardless of whether the terms of an agreement are unambiguous and objectively reasonable from the consumer's perspective. Under the Restatement's approach, consumers could simply allege a term is inconsistent with their "reasonable expectations" regarding any product or service agreement and pick a different presumptively "preferred" interpretation that sounds reasonable and favors them at the expense of the business, regardless of what their contract says.[150] Suffice it to say, no court has adopted such a collection of one-sided interpretation rules.[151]

The history behind this novel Restatement rule lays bare the ALI's need for stronger institutional safeguards. The ALI membership approved this potentially transformative provision after discussing it exactly one

145. *See* Appel, *supra* note 134, at 351–61 (analyzing novel aspects of proposed "back end" consumer contract rules prior to the ALI's adoption of additional novel section (§ 4) addressing interpretation and construction of consumer contracts).

146. *See* RESTATEMENT OF THE LAW, CONSUMER CONTS. § 4 (ALI 2024).

147. *Id.*

148. *Id.* (alteration in original) (emphasis added).

149. *Id.* (emphasis added).

150. *Id.*

151. *See id.* § 4 reporters' notes (identifying some case law that addresses, in a general sense, some aspect of Section 4's collection of black-letter rules, such as the duty of good faith and fair dealing, interpretation of ambiguous (but not unambiguous) contract terms against the drafter, and notion of objectively reasonable contract expectations, but no legal support for combining these concepts into a rule specific to contracts between businesses and consumers).

time after ten years of this Restatement's development.[152] The black-letter rule was introduced via a last-minute motion made during the 2022 ALI Annual Meeting, in which this entire Restatement was scheduled for a final vote to complete the project.[153] The Reporters opposed the motion because the rule departs radically from existing law, but the ALI membership approved its addition to the project anyway.[154]

The lack of any methodical vetting of this black-letter rule also exposed other process concerns. Restatement provisions include three basic components: (1) the black-letter rule; (2) comments explaining the rule's intended effect or application; and (3) Reporters' Notes that do not constitute the ALI's official position, but provide the underlying legal support for the restated rule.[155] The adopted motion to add a new section to the Restatement regarding the interpretation and construction of consumer contracts included only the black-letter rule.[156] This meant that the rule's supporting comments and Reporters' Notes needed to be drafted *after* the ALI Annual Meeting, in which this Restatement was slated for completion.[157] One might presume that the natural consequence of this development would be that the Reporters go back and draft the commentary—which, like the black-letter rule, represents the ALI's official position—to present to the ALI membership for approval at the next Annual Meeting. However, that is not what happened. Instead, the ALI leadership proceeded as if the ALI membership had voted to complete the Restatement of the Law, Consumer Contracts, even though a key portion of the project—comments to an entirely new section of this Restatement's ten total sections—had not even been drafted.[158]

The ALI took the position that never-before-seen comments that explained the effect of a never-before-seen black-letter rule with potentially massive implications, adopted the day the Restatement was apparently completed, were non-substantive and, therefore, did not

152. *See* Larry S. Stewart, Motion to Amend by Adding a New Section 2, "Interpretation and Construction" and Renumbering Subsequent Sections (presented at 2022 ALI Annual Meeting) (approved motion later renumbered Section 4).

153. *See id.*

154. *See* RESTATEMENT OF THE LAW, CONSUMER CONTS. xiii (ALI, Revised Tentative Draft No. 2, 2022) (stating Consumer Contracts Restatement "was approved at the 2022 Annual Meeting, subject to the approved motion to add a new § 2, the discussion at the Meeting, and the usual editorial prerogative").

155. *See ALI's Projects – The Work: What Is in a Restatement?*, ALI: FAQ, https://www.ali.org/faq/ [https://perma.cc/2DYH-Y6FT] (last visited Oct. 15, 2025) (describing what is in a Restatement).

156. *See* Stewart, *supra* note 152.

157. *See* RESTATEMENT OF THE LAW, CONSUMER CONTS. xiv (ALI Revised Tentative Draft No. 2, 2022) (post-Annual Meeting revised draft summarizing "main revisions" to Restatement to include new comments supporting black-letter rule on interpretation adopted at Annual Meeting); *see also id.* § 4 (including placeholder for Reporters' Notes "TO BE ADDED").

158. *See* Stewart, *supra* note 152.

require approval by the ALI membership.[159] In other words, the ALI membership was deemed to have voted to approve comments representing the organization's official position on a controversial rule before they came into existence. When the comments were later drafted, they were made available on the ALI's website, but the membership never convened to discuss them.[160] Many ALI members likely never saw the language they ostensibly approved.

Beyond this glaring example of a novel restatement provision and its questionable means of adoption are other glaring examples of provisions that make no serious attempt to restate the law of any jurisdiction.[161] One of the more egregious examples is the Restatement's provision titled "Deception," which proposes a new common law rule predicated on *statutory* consumer protection laws.[162] The proposed black-letter rule states that any "contract or term adopted as a result of a deceptive act or practice by the business is unenforceable," language appropriated directly from state consumer protection acts.[163] This rule additionally deems an act or practice deceptive, and therefore unenforceable, if it has the effect of "contradicting or unreasonably limiting" a contract term or promise made by the business or of "obscuring" a charge or the overall cost to a consumer, or a material benefit that a consumer reasonably expects.[164]

As with other provisions discussed, no court has adopted such a rule.[165] It is a pure invention of the ALI, one which cobbles together different, hand-picked aspects of consumer protection statutes that were enacted to address unfair trade practices in the marketing and sales of products and services—not as a basis for the law of contracts.[166] The Restatement ignores the separate purpose of these statutes to construct a broad common law rule that gives "the consumer. . . the power to avoid

159. *See id.*; *see also* Letter from Harold Kim, ALI Member, to Dir. Revesz and Consumer Conts. Restatement Reps. (July 28, 2022) (on file with author) (explaining that post-Annual Meeting "draft introduces five entirely new comments in a purportedly final version of the project that no one in the ALI has ever seen at any point in the project's decade-long history" and that these "new comments plainly incorporate substantive changes").

160. *See* Memorandum to "Project participants for Restatement of the L., Consumer Conts., and 2022 Ann. Meeting attendees" (June 2022) (on file with author) (seeking comments by August 1, 2022, on changes to draft that included all new comments on Section 4 on "Interpretation and Construction of Consumer Contracts").

161. *See* Appel, *supra* note 134, at 351–61 (providing section-by-section analysis of Consumer Contracts Restatement's proposed enforcement provisions).

162. *See* RESTATEMENT OF THE LAW, CONSUMER CONTS. § 7 reporters' note a (ALI 2024).

163. *Id.* § 7.

164. *Id.*

165. Appel, *supra* note 134, at 355.

166. *See* Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. KAN. L. REV. 1, 5–15 (2005) (discussing tort law basis of state consumer protection statutes, and origins of Federal Trade Commission Act to address competition between businesses and other issues unrelated to contract law).

any contract or term that is a result of a deceptive act or practice."[167] If adopted by courts, this novel and untested common-law "deceptive contract" theory could provide a basis for consumers to challenge countless agreements based on vague assertions that a contract or term is "deceptive" or "unreasonably limiting," or that it obscures some cost or benefit to the consumer.[168] The provision, if followed, could fundamentally reshape the common law of contracts.[169]

The Restatement is less than forthcoming about this provision's lack of support. A comment suggests the rule merely "elaborates on the rules" of the Restatement (Second) of Contracts governing misrepresentation doctrine, but those rules contain no mention of deception or deceptive acts or practices.[170] Another comment states that the rule "is consistent with federal and state anti-deception law, but it restates only the common law consequences of deception";[171] a potentially misleading description given that statutory law is not supposed to be the province of a restatement of common law doctrine, and the proposed rule is relying on that statutory anti-deception law to propose common law consequences for deception.

Only when a "busy common-law judge"[172] carefully examines the Restatement's Reporters' Notes, which again do not represent the ALI's official position, will the novelty and breadth of this proposed deceptive contract theory become apparent.[173] The Reporters' Notes state that "deceptive acts and practices give rise to lawsuits that raise both contract-law claims and claims under the relevant consumer protection statute," and that in recognition of "the similarity between those bodies of law" the Restatement "explicitly incorporates doctrines originally developed under federal and state anti-deception law, (specifically, § 5 of the Federal Trade Commission Act . . . and state unfair-and-deceptive-acts-and-practices statutes)."[174] The Reporters' Notes then rely *entirely* on consumer protection statutes and other regulatory law, such as Federal Trade Commission policy statements, to support the proposed rule.[175] Conspicuously absent is any case law that even hints at a common law

167. RESTATEMENT OF THE LAW, CONSUMER CONTS. § 7 cmt. 1 (ALI 2022).

168. *Id.* § 7 cmts. 1–2.

169. *See* Letter from Gen. Couns. of Corps. and Reps. of Leading Trade Ass'ns to ALI Council, *supra* note 133, at 2 ("Every aspect of this proposed rule, which no jurisdiction follows, appears antithetical to the purpose of a restatement.").

170. RESTATEMENT OF THE LAW, CONSUMER CONTS. § 7 cmt. 1 (ALI 2022) (citing RESTATEMENT (SECOND) OF CONTRACTS §§ 159–173) (ALI 1981)).

171. *Id.* § 7 cmt. 8.

172. *See* ALI STYLE MANUAL, *supra* note 2, at 5.

173. *See* RESTATEMENT OF THE LAW, CONSUMER CONTS. § 7 reporters' note a (ALI 2024).

174. *Id.*

175. *See id.*

deceptive contract rule specific to agreements between a business and a consumer.

The Restatement's departures from restating existing common law do not end there. The project's treatment of the parol evidence rule provides yet another glaring example.[176] The parol evidence rule is a basic contract law doctrine that generally precludes consideration of extrinsic evidence not contained in an integrated agreement, which is a written contract intended to constitute the final expression of the agreement's terms.[177] The rule protects integrated agreements against claims that one or more terms conflict with prior oral or written statements or agreements.[178] The Restatement recognizes that "[c]onsumer contracts, like all contracts, are subject to the parol-evidence rule . . . " and that "the finality provided by the parol-evidence rule protects an important interest of the business in certainty and security."[179] The Restatement, however, proceeds to cast aside this important interest by endorsing novel rules that would nullify the parol evidence rule in the context of contracts between a business and a consumer.[180]

The Restatement adopts a black-letter rule stating that any "standard contract term that contradicts, unreasonably limits, or fails to give the effect reasonably expected by a consumer to a prior affirmation of fact or promise by a business . . . *does not have the effect under the parol-evidence rule* of discharging obligations that would otherwise arise."[181] This blanket provision runs counter to both common law and statutory law throughout the United States. This includes the common law as restated by the ALI in the Restatement (Second) of Contracts, which makes clear that "[a] binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them,"[182] and the parol evidence rule codified in the Uniform Commercial Code governing contracts for the sale of goods.[183] The Restatement of the Law, Consumer Contracts, though, "denies . . . effect of the parol evidence rule" because the finality the rule provides "*might* undermine the interest of consumers in enforcing their reasonable expectations as formed by affirmations of fact or promises made outside the standard contract terms."[184]

---

176. *See id.* § 9 (section addressing "Standard Contract Terms and the Parol-Evidence Rule").

177. *See Parol Evidence Rule*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/parol_evidence_rule [https://perma.cc/TYJ2-7RWP] (last visited Sept. 29, 2025).

178. *See* RESTATEMENT OF THE LAW, CONSUMER CONTS. § 9 cmt. 1 (ALI 2024).

179. *Id.*

180. *See id.* § 9; *see also id.* § 8 (related section addressing "Affirmations of Fact and Promises that Are Part of the Consumer Contract").

181. *Id.* § 9 (emphasis added).

182. RESTATEMENT (SECOND) OF CONTS. § 213(1) (ALI 1981).

183. *See* U.C.C. § 2-202 (ALI & UNIF. L. COMM'N 2023).

184. RESTATEMENT OF THE LAW, CONSUMER CONTS. § 9 cmt. 1 (ALI 2024) (emphasis added).

Other Restatement provisions similarly work to transform the common law in ways that disadvantage businesses that contract with consumers. For example, the Restatement proposes to broaden the centuries-old contract doctrine of unconscionability through a novel, highly amorphous rule that would permit consumers to invalidate a contract or term that is "unreasonably one-sided" or "results in unfair surprise."[185] The proposed rule also incorporates ambiguous standards to deem any term substantively unconscionable if its effect is to "unreasonably exclude or limit the business's liability or the consumer's remedies" or "unreasonably expand" the business's remedies or enforcement powers.[186] The Restatement further proposes that courts recognize each of the project's novel rules as "mandatory rules" that cannot be derogated by agreement of the parties, and that judges rely on these rules to assert unprecedented authority to reform contracts involving consumers.[187]

The final work product—a reimagined common law environment—bears no resemblance to the ALI's stated mission to develop restatements that set forth "clear formulations of common law . . . as it presently stands or might appropriately be stated by a court."[188] The Restatement of the Law, Consumer Contracts simply ignores the ALI Style Manual's "four principal elements" for developing a restatement in favor of advocating for new laws that propose precisely the "major innovations in matters of public policy" and "[w]ild swings" in law that restatements traditionally avoided by design.[189] In doing so, the Restatement is far more likely to mislead judges on existing common law doctrine. This raises the fundamental question of what, if any, utility does such a modern restatement provide other than as a thought experiment.

This aspirational Restatement approach may also lead to broader rebukes of ALI restatements by state legislatures. In 2022, a few months after this Restatement's approval by the ALI membership, Missouri enacted legislation stating that a "secondary source" such as a legal treatise or other explanatory text (e.g., an ALI restatement) "does not constitute the law or public policy of this state to the extent its adoption would create, eliminate, expand, or restrict a cause of action, right, or remedy" in a manner inconsistent with, or not addressed by, existing state

185. *Id.* § 6.

186. *Id.*

187. *Id.* § 10; *see also* Gen. Couns. of Corps. and Reps. of Leading Trade Ass'ns, *supra* note 133 ("As with other sections, [the final section of] the proposed Restatement grasps onto other sources of law, such as the Uniform Commercial Code, as well as law review articles to bolster this particular policy view of what the common law ought to be.").

188. ALI STYLE MANUAL, *supra* note 2, at 3.

189. ALI STYLE MANUAL, *supra* note 2, at 6.

law.[190] In other words, Missouri law expressly directs courts against adopting *any* restatement provision that expands or restricts liability. If other states follow a similar approach, the ALI risks having its signature work product stripped of its persuasive authority with courts. That may be the price of the ALI's approval of restatement provisions that do not reflect existing law.

V. THE ALI'S IMPENDING CREDIBILITY CRISIS AND WHAT CAN BE DONE TO ADDRESS IT

The Restatement of the Law, Consumer Contracts, represents the culmination of a gradual erosion of the ALI's standards for developing restatements. Earlier departures where the ALI made up a common law rule, such as a "flagrant trespasser" category of land entrant,[191] have devolved over time into more frequent and brazen departures. The ALI leadership and a majority of the Council and voting membership, at best, acquiesced to these departures and, at worst, enthusiastically supported them. The increased frequency of these departures also cannot be brushed aside as attributable to a rogue restatement or a few bad apples over the course of a century of otherwise authoritative work products. The trend of restatements "abandon[ing] the mission of describing the law,"[192] as Justice Scalia observed nearly a decade ago, is how modern restatements are increasingly perceived because that perception is correct. As more judges come to this realization, it is only a matter of time until a critical mass of the judiciary loses faith in the value of restatements and the ALI faces a full-blown credibility crisis.

This crisis may already be unfolding within the current U.S. Supreme Court. The ALI has long made a point of highlighting U.S. Supreme Court citations of restatements as evidence of the enduring influence of restatements within the judiciary,[193] but this influence appears to be waning. Between 2019 and 2024, the Court cited restatements in sixty opinions, including majority, concurring, and dissenting opinions.[194] Only fourteen of these opinions—less than one-fourth—cited a provision

190. MO. REV. STAT. § 1.016 (2022).

191. *See supra* Part II.

192. Kansas v. Nebraska, 574 U.S. 445, 475 (2015) (Scalia, J., concurring and dissenting in part).

193. *See, e.g.*, ALI, THE AMERICAN LAW INSTITUTE 2022-2023 ANNUAL REPORT 3 (2023) (President's Message stating that "in the October 2022 term alone, the United States Supreme Court cited 12 different Restatements in 11 opinions"); ALI, THE AMERICAN LAW INSTITUTE 2021-2022 ANNUAL REPORT 23 (2022) (listing U.S. Supreme Court citations of ALI work products during October 2021 Term); ALI, 2020-2021 ANNUAL REPORT: THE AMERICAN LAW INSTITUTE 15 (2021) (same for October 2020 Term).

194. This total, and the author's breakdown of restatement citations, was derived from a Westlaw search of the U.S. Supreme Court database using the search: "restatement & DA(aft 12-31-2018 & bef 01-01-2025)".

from a restatement published this century.[195] Within this group, only seven cited a restatement published within ten years of the Court's decision.[196]

In addition, on two occasions since 2019, Justices expressed concerns about restatement provisions failing to reflect existing law. In *Herrera v. Wyoming*,[197] Justice Alito authored a dissenting opinion joined by Chief Justice Roberts and Justices Thomas and Kavanaugh, criticizing a provision of the Restatement (Second) of Judgments, stating it "appears that in this portion of the Second Restatement, the Reporters adopted a prescriptive rather than a descriptive approach."[198] Justice Alito added that, "[i]n such situations, the Restatement loses much of its value" and cited Justice Scalia's opinion in *Kansas v. Nebraska*, calling into question the value of modern restatements.[199] In *Liu v. Securities and Exchange Commission*,[200] Justice Thomas delivered a more cynical critique of the Restatement (Third) of Restitution and Unjust Enrichment's "novel extension" of the remedy of disgorgement, stating "Restatement is an inapt title for this edition of the treatise."[201] "Like many of the modern Restatements, its 'authors have abandoned the mission of describing the law, and have chosen instead to set forth their aspirations for what the law ought to be.'"[202]

A. *The ALI Isn't Doing Itself Any Favors to Avert Crisis*

The ALI has done little to change the growing perception by judges that the organization's signature work products should not be viewed as authoritative. There has been no shortage of opportunities to course-correct modern restatements to avert a crisis of credibility that threatens the ALI's mission and the organization's relevance in the legal community. However, the ALI continues to propose novel rules in pending restatements, most notably the Restatement (Third) of Torts: Miscellaneous Provisions. This Restatement, which was completed at the 2025 ALI Annual Meeting and is being finalized for publication,[203] is a "grab bag" of different tort law rules not included in earlier restatements.

---

195. *Id.*

196. *Id.*

197. 587 U.S. 329 (2019).

198. *Id.* at 365–66 (Alito, J., dissenting).

199. *Id.* at 366 (citing Kansas v. Nebraska, 574 U.S. 445, 475 (2015) (Scalia, J., concurring in part and dissenting in part)); *see also supra* notes 94 through 98 and accompanying text.

200. 591 U.S. 71 (2020).

201. *Id.* at 97 (Thomas, J., dissenting).

202. *Id.* (quoting *Kansas*, 574 U.S. at 475 (Scalia, J., concurring in part and dissenting in part)).

203. *See* Press Release, The American Law Institute, Torts: Miscellaneous Provisions is Approved (May 19, 2025), https://www.ali.org/news/articles/torts-miscellaneous-provisions-approved [https://perma.cc/TNX8-9TNH].

Perhaps, because the project addresses uncharted restatement territory, it has provided fertile ground for novel proposed expansions of tort law.[204]

For example, this pending Restatement endorses a novel rule allowing a tort claimant with no present physical injury to recover medical monitoring expenses based on an alleged increased *possibility* of sustaining an injury in the future.[205] While some courts have permitted such a claim, the trend in the law is against recognition of such claims.[206] More importantly, no jurisdiction has adopted the Restatement's rule formulation, which endorses a broad scope of recovery for unimpaired claimants based on any purported risk-increasing activity.[207]

This Restatement also endorses a novel and expansive theory of "negligent misrepresentation causing physical harm," a tort claim for which only a "paucity of precedent" exists.[208] The proposed rule would have courts jettison two crucial limitations on negligent misrepresentation claims, namely the basic tort law requirement that a claimant demonstrate the existence of a duty owed by the defendant and that a claimant's reliance on an alleged misrepresentation be reasonable.[209] Instead, this Restatement takes the approach that any communication of a false statement that, when relied upon, poses a risk of physical harm satisfies a duty analysis, regardless of whether the

---

204. *See, e.g.*, Victor E. Schwartz & Christopher E. Appel, *The Restatement (Third) of Torts Proposes Abandoning Tort Law's Present Injury Requirement to Allow Medical Monitoring Claims: Should Courts Follow?*, 52 SW. U. L. REV. 512, 512 (2024) (discussing Miscellaneous Provisions Restatement's proposed treatment of medical monitoring for unimpaired claimants); Mark Behrens & Christopher Appel, *Why Courts Should Continue to Reject Innovator Liability Theories That Seek to Hold Branded Drug Manufacturers Liable for Generic Drug Injuries*, 52 SW. U. L. REV. 580, 583 (2024) (discussing Miscellaneous Provisions Restatement's proposed treatment of negligent misrepresentation doctrine).

205. *See* RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS 1 (ALI, Tentative Draft No. 3, 2024) [hereinafter TD 3]. This provision was tentatively approved by the ALI membership at the organization's 2024 Annual Meeting.

206. Since 2020, three state supreme courts have addressed the availability of a medical monitoring remedy for the unimpaired and each court expressly rejected it. *See* Baker v. Croda, Inc., 304 A.3d 191, 197 (Del. 2023); Brown v. Saint-Gobain Performance Plastics Corp., 300 A.3d 949, 952 (N.H. 2023); Berry v. City of Chi., 181 N.E.3d 679, 689 (Ill. 2020); *see also* Smith v. Terumo BCT, Inc., 2025 WL 3029699, at *7 (Colo. Ct. App. Oct. 30, 2025) ("In recent years … a trend has emerged as courts throughout the country have repeatedly held that a toxic tort claim cannot proceed in the absence of a present physical injury.").

207. *See* Schwartz & Appel, *supra* note 204, at 517–30 (discussing development and novelty of Miscellaneous Provisions Restatement's medical monitoring provision).

208. TD 3, *supra* note 205, § 18A cmt. b.

209. *See* TD 3, *supra* note 205, § 18A cmt. d, h (discussing duty and reliance elements with respect to negligent misrepresentation claims); *see also* Behrens & Appel, *supra* note 204, at 596–97 (discussing novelty of Miscellaneous Provisions Restatement's negligent misrepresentation theory).

speaker has any relationship with, or even knowledge of, the recipient.[210] The Restatement rule further relaxes the tort theory's requirements, when no court has done so, by endorsing liability when a claimant *unreasonably* relies on a false statement and physical harm results.[211]

Another provision in this pending Restatement invents a new "special" rule of vicarious liability that "did not previously exist and is contrary to hornbook law on vicarious liability."[212] Under the proposed rule, an employer would be subject to vicarious liability for a sexual assault (*i.e.*, battery) committed by an employee against a "vulnerable" third party, regardless of whether the employee acted with any purpose to serve the employer's interests.[213] This approach departs from the "classic motive-to-serve-the-employer test" that provides a principal justification for imposing vicarious liability, namely that the employer obtains some benefit, or intended benefit, from the employee's tortious conduct.[214] Here, the employee commits an intentional tort for self-gratification or some other purely self-serving interest that is contrary to the employer's interests, and the employer is subject to vicarious liability—meaning strict liability regardless of the employer's culpability.

The Restatement concedes that "no single jurisdiction" had adopted the proposed black-letter rule.[215] Nevertheless, the Restatement theorizes, without support, that strict liability will enhance what may be employers' existing "adequate incentives to vet and manage employees" against sexual assault.[216] The proposed new tort claim is based on a public policy desire to promote compensation against employers because "[w]ith some frequency, the highly culpable employee who commits a sexual assault ends up being incarcerated and . . . often has limited assets."[217]

This proffered rationale for an untested strict liability tort claim is questionable for several reasons.[218] First, the fact that a tort defendant

---

210. *See* TD 3, *supra* note 205, § 18A cmt. d (arguing "because there is an affirmative act (i.e., the communication), resort to a basis for an affirmative duty . . . is unnecessary.").

211. *See* TD 3, *supra* note 205, § 18A cmt. h, illus. 5.

212. RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS § 5A cmt. a (ALI, Preliminary Draft No. 5, 2024) [hereinafter PD 5]; *see also* RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS § 11 cmt. a (ALI, Tentative Draft No. 4, 2025) [hereinafter TD 4].

213. Memorandum from Nora Freeman Engstrom & Michael D. Green to ALI Membership (May 13, 2025) (on file with author) (setting forth revised black-letter rule adopted at 2025 ALI Annual Meeting).

214. PD 5, *supra* note 212, § 5A cmt. b.

215. TD 4, *supra* note 212, § 11 cmt. d.

216. TD 4, *supra* note 212, § 11 cmt. c.

217. TD 4, *supra* note 212, § 11 cmt. c.

218. *See* Memorandum from Malcolm E. Wheeler, Adviser, to ALI Council, *Comment on Restatement of the Law Third, Torts: Miscellaneous Provisions, Revisions to § 11, Council Draft No. 7, Vicarious Liab.: Other Types of Liab.* (Feb. 21, 2025) (on file with author) (detailing

may have insufficient assets is not unique to individuals who commit sexual assault. It exists with "some frequency" across the entire universe of tort claims.[219] Second, a policy-based tort predicated on the singular policy of promoting compensation risks undermining many countervailing beneficial public policies.[220] For instance, the imposition of strict liability against nonprofits, businesses, and other employers could result in fewer entities working with underserved and vulnerable populations, such as those of lower socio-economic levels, the elderly, persons with disabilities, or those of different races or genders.[221] Risk-averse employers would be incentivized to bar or discourage interactions with vulnerable individuals, which could deny them access to critical services and support.[222] Third, the costs of services to vulnerable persons that employers cannot reduce or eliminate to avoid liability exposure would predictably increase under the Restatement's proposed rule. The added resource strain could be devastating for many industries, such as those that employ nurses or skilled caregivers and must already contend with nationwide staff shortages.[223]

The Restatement's proposed rule omits any discussion of these, and other, very predictable adverse, unintended consequences.[224] The

"multiple fundamental problems" with the Restatement's proposed "Special Rule on Vicarious Liability for Sexual Assault").

219. *Id.*

220. *See id.* (arguing that Restatement's proposed rule, if followed by courts, would "Have Catastrophic Consequences for the National Population's Physical Health, Mental Health, Education, and Employment Opportunities and for the Nation's Economy").

221. *See* Proposed Amendment to Have Institute Take No Position with Respect to Section 11 "Special Rule on Vicarious Liability for Sexual Assault" in Restatement of Torts, Third: Miscellaneous Provisions (2025 ALI Annual Meeting motion submitted by Christopher E. Appel, Carla van Dongen & David R. Geiger), at 2–3 (discussing public policy implications of proposed "Special Rule on Vicarious Liability for Sexual Assault") (on file with author).

222. *See id.*

223. *See* Moira K. McGhee, *A Crisis by the Numbers: Nursing Shortages in 2025 by State*, MIA. HERALD: BUS. (Feb. 24, 2025), https://www.miamiherald.com/news/business/article 300886239.html [https://perma.cc/3XAP-T9KN] (discussing "persistent nursing shortage across U.S. health care systems" and estimating "gap between nurse graduates and job openings of more than 800,000 in 2031"); Markie Martin, *Nearly Half of US States Risk a Caregiving Crisis, Study Warns*, NEWSNATION (May 28, 2025), https://www.newsnationnow.com/health/nearly-half-of-us-states-risk-caregiving-crisis-study/ [https://perma.cc/J2EB-P7US] (reporting on Columbia University Mailman School of Public Health study finding that "U.S. is currently short 1.8 million care workers, including both medical and non-medical roles").

224. *See, e.g.*, Comment by Carla van Dongen to ALI Council, "Restatement of the Law Third, Torts: Miscellaneous Provisions, Revisions to Section 11, Council Draft No. 7" (Feb. 25, 2025) (questioning whether an employer seeking to mitigate liability risk under proposed Restatement rule would need to "limit newer, less experienced employees' exposure to more senior, more knowledgeable employees to avoid all possible risk that those more senior employees will take advantage, thereby denying the newer hires mentoring and training, not to mention mere opportunity?") (on file with author); Comment by Phil Goldberg and Christopher Appel to ALI Council, "Proposed Vicarious Liability for Sexual Assault Provision of Miscellaneous Provisions

Restatement instead plows ahead in fashioning a new tort claim to support a major public policy innovation for which the ALI has long recognized it "has limited competence and no special authority to make."[225] That the ALI has reached a point of even entertaining such a proposal, let alone adopting it, shows how far the ALI has gone off the rails and disregarded any semblance of meaningful standards.[226]

B. *Proposals to Reform the ALI*

The ALI could mitigate its self-inflicted reputational harm and restore credibility in the value of modern restatements through several straightforward reforms. All that appears lacking is the collective will to change; inertia that increasingly threatens to push the organization past a point of no return, where judges and other users of restatements never again look at modern restatements as authoritative work products that do not require independent legal research and verification. The following reforms would reverse the ALI's downward spiral.

1. Require Restatements to Restate Existing Common Law Without Exception

The adage that "the simplest solution is often the best one" applies to preventing the ALI's endorsement of novel restatement provisions. To address this concern, the organization need only tweak its Style Manual to state unequivocally that all restatement provisions must reflect the existing common law of a jurisdiction—that is, the project's Reporters must be able to point to at least one jurisdiction that has actually adopted the restatement's rule formulation. This low threshold would bar restatement provisions that do not reflect existing law, while preserving the ability of the ALI to endorse a minority rule—even a rule followed only by a single jurisdiction. It would also foreclose the practice of Reporters hand-picking the most permissive, liability-enhancing aspects of existing legal rules to construct a novel restatement rule that no

---

Restatement" (Feb. 27, 2025) (on file with author) (discussing how proposed Restatement rule would make employers "reticent to hire anyone charged or convicted of any sexual misconduct or other physical crime and was imprisoned, thereby defeating the concept of rehabilitative justice").

225. ALI STYLE MANUAL, *supra* note 2, at 6.

226. The ALI's "Special Rule on Vicarious Liability for Sexual Assault" proved so controversial that it even generated disagreement among the Reporters of the Miscellaneous Provisions Restatement. When the provision was unveiled, one Reporter took the extraordinary measure of dissenting from its inclusion out of "concern for the legitimacy of the American Law Institute in the legal community to which it speaks." Memorandum from Reps. for Miscellaneous Provisions to Advisers and Members Consultative Grp. Members, "Advice on Section 5A, Addressing Vicarious Liability for Sexual Assault" (Aug. 28, 2024) (on file with the author).

jurisdiction follows and then present the rule as "consistent with" existing law.[227]

This straightforward approach would eliminate controversy over whether proposed rules are truly consistent with existing law and avoid characterizations in restatements that mislead judges and others as to a proposed rule formulation's underlying support. This approach would also more precisely deliver what a "busy common-law judge" and other users expect from these treatises, namely "clear formulations of common law . . . as it presently stands or might appropriately be stated by a court."[228]

2. Give Restatement Advisory Committees Meaningful Authority

As discussed in Part I, restatements are developed with input from two advisory committees, a group of appointed Advisers, and participants of a Members Consultative Group.[229] Both groups, however, have no real power to modify restatement provisions. Rather, the Reporters control the drafting of restatement provisions. They can reject or ignore any advisory committee recommendation, including an objection that a proposed rule fails to satisfy the bare requirement that rules "are constrained by the need to find support in sources of law."[230] A sensible reform would be to adjust this one-sided power dynamic to provide a meaningful check on Reporters who advance aspirational rules that reflect individual policy preferences and not existing common law.

One way to provide a needed check without gumming up the restatement development process would be to vest the advisory committees with a limited authority to require changes solely with respect to novel restatement provisions. Under this approach, Reporters would be obliged to revise novel provisions to conform to existing law but retain their traditional drafting control in executing that directive. Empowering the advisory committees in this manner may also improve members' engagement, which, in turn, would likely improve the ultimate work product.

3. Strengthen ALI Council Oversight of Restatements

The sixty or so elected ALI Council members provide perhaps the most important check in the modern restatement development process.[231]

---

227. *See, e.g.*, *supra* notes 57–60 and accompanying text (discussing ALI's adoption of unitary land possessor duty of reasonable care to all land entrants except "flagrant trespassers"); *supra* notes 170–75 and accompanying text (discussing the Consumer Contracts Restatement's deceptive contract provision).

228. ALI STYLE MANUAL, *supra* note 2, at 3.

229. *See supra* note 37 and accompanying text.

230. ALI STYLE MANUAL, *supra* note 2, at 6.

231. *See supra* notes 39 and 41 and accompanying text.

As discussed, the Council must approve each restatement draft, so its sign-off is just as important as the ALI membership at large.[232] But, because the Council also serves as the organization's *de facto* board of directors, it plays a vital role in protecting the long-term interests of the ALI as an institution. This institutional interest includes protecting the organization against potential reputation-damaging impulses of restatement Reporters or ALI members.

In theory, the Council has all the power it needs to save the ALI from itself. In practice, though, most Council members work a day job and likely do not have the bandwidth to vet independently each provision of a restatement draft spanning hundreds of pages, let alone do so for the dozen or more restatements pending at any time.[233] The Council also only meets a few times a year to discuss and tentatively approve restatement drafts.[234] The Council considers multiple projects at its meetings, which can spread thin even the most dedicated Council member. As a result, Council members may not appreciate the novelty of certain proposed restatement provisions, especially when they are presented as "consistent with" existing law or a minority approach when that is not the case.[235]

To alleviate the burdens on Council members, the Council could establish a compliance committee whose sole purpose would be to flag which proposed restatement provisions *may* not satisfy the ALI's written standards.[236] Such a group would independently review the underlying support for a proffered provision to educate the Council—many of whom may not possess expertise in the subject area being restated—on nuances in black-letter rule formulations or comments elaborating a rule that go beyond existing law or otherwise appear novel. This addition would alert the Council to provisions that could cause reputational harm to the ALI and make for a more fully informed Council when deciding whether to approve restatements.

---

232. *See supra* note 41 and accompanying text.

233. A list of current ALI Council members and Council meriti is included at the beginning of restatements drafts. *See, e.g.*, RESTATEMENT OF THE LAW, CONSUMER CONTS. v–viii (ALI, Revised Tentative Draft No. 2, 2022).

234. The ALI Council typically holds two-day meetings in January and October of each calendar year. *See Meetings*, ALI, https://www.ali.org/meetings [https://perma.cc/U4JU-WXSU] (last visited Oct. 4, 2025) (listing all the upcoming ALI meetings for the next 2 years).

235. *See, e.g.*, *supra* note 227 and accompanying text.

236. The ALI Council is authorized to appoint standing committees and prescribe their duties and authority, or appoint a special committee "to give advice on any matter." *Committees*, ALI, https://www.ali.org/about/governance/committees [https://perma.cc/SM6L-EG9L] (last visited Sept. 29, 2025).

4. Assure Balance in Reporter Selection Process

The ALI's Director and Council each play a role in the selection of restatement Reporters.[237] The Director investigates potential restatement projects and Reporters, and may seek a project prospectus from a proposed Reporter(s).[238] A standing "Projects Committee" then offers its advice and recommendation to the Council, which approves the project and Reporter(s).[239] There are no formal requirements for Reporters, although they are almost always law professors.[240] Choosing an academic rather than a judge or practitioner within the ALI's ranks tends to ensure a Reporter has the time and resources to research and prepare restatement drafts, and may avoid conflicts of interest that could arise for those directly involved with litigation.

The lack of clear requirements for Reporters and a behind-the-scenes selection process can result in the appointment of Reporters whose ideological views diverge sharply from the broad consensus of the legal community that the ALI targets with restatements. Some Reporters, who prior to their appointment may not have been ALI members, may see their role very differently than judges who have traditionally relied on restatements to clarify prevailing common law doctrine. Reporters may view restatements as vehicles for them to promote innovative, new legal theories, rather than capture what courts have done. And savvy Reporters understand their control over the restatement drafting process enables them to advance extreme or novel positions with relatively limited oversight—advisory groups the Reporter can choose to ignore, a Council that may not be well-positioned to appreciate the novelty of proposed provisions, and a membership that, as discussed in greater detail below, appears increasingly willing to indulge Reporters regardless of the consequences with respect to the ALI's reputation.

A commonsense reform would be to establish formal Reporter selection requirements that provide reasonable assurances of balance. This could be accomplished by requiring the Director or Council to reject proposed Reporters who have espoused extreme positions or innovative changes in favor of appointing agnostic, middle-of-the-road Reporters, or by appointing Reporters on opposing ends of the ideological spectrum such that they need to work together and agree on a consensus work product. The current ad hoc approach to Reporter selections creates an unreasonable risk that the ALI hands the keys to drafting a restatement

237. *See* ALI, *supra* note 35.

238. *See* ALI, *supra* note 35.

239. *See* ALI, *supra* note 35.

240. *See ALI's Projects – The Work: How Are Project Participants Selected?*, ALI: FAQ, https://www.ali.org/faq/ [https://perma.cc/2DYH-Y6FT] (last visited Oct. 15, 2025) ("Reporters, who are typically the leading academics in their field, are identified by ALI's Director on the basis of their subject matter expertise and are approved by ALI's Council.").

over to someone with different goals that will impair, not enhance, the organization's standing in the legal community.

5. Improve ALI Membership Engagement

Although the ALI has more than 4,700 members,[241] only a small fraction of those members actively participate in the restatement development process. ALI member participation in restatement advisory committee meetings may consist only of a few dozen individuals and a handful of member comments submitted online.[242] When Reporters present restatement drafts for tentative approval at an ALI Annual Meeting, the fate of controversial provisions may be determined by a few hundred members (or fewer)—many of whom have not closely followed the restatement's development and may be seeing proposed rules for the first time.

Regrettably, the vast majority of ALI members appear to be members in name only.[243] They list the accolade of membership on their resume without lending their talents to the development of restatements or other ALI work products. Many members appear content to attend an occasional Annual Meeting to network or see elite speakers that the ALI attracts. This lack of consistent, meaningful participation creates significant problems with respect to safeguarding the ALI's reputation within the legal community.

First, because casual ALI members do not follow the years-long development of restatements, they may be completely unaware of the controversial rules approved by a small subset of the organization's membership. Accordingly, controversial provisions or extreme positions may be adopted even if the vast majority of the ALI's more than 4,700 members strongly disagree with them. Second, the casual members who do show up to an Annual Meeting may be ill-prepared to vote on draft restatements when they have not participated in any of the discussions leading up to that vote. They may simply defer to Reporters' choices or be swayed by reasonable-sounding arguments that lack context or provide incomplete or distorted treatment of an issue. Or they may simply not care whether the ALI disregards its standards and makes up new legal rules to advance in restatements.

Compounding matters, the small group of ALI members who actively participate in the restatement development process and show up to vote at Annual Meetings can exert outsized influence with respect to the

241. *See supra* note 40 and accompanying text.

242. *See* Norman L. Greene, *The American Law Institute: A Selective Perspective on the Restatement Process*, 62 HOW. L.J. 511, 519–20 (2019).

243. *See* ALI, *supra* note 36; *How ALI Works*, THE ALI ADVISOR, https://www.thealiadviser.org/how-ali-works/ [https://perma.cc/T9LT-3K6B] (last visited Oct. 1, 2025).

adoption of controversial restatement provisions. For many restatement projects, this dedicated group appears dominated by academics and members of the plaintiffs' bar,[244] both of which may readily encourage the ALI to give its imprimatur to innovative new legal theories. Active ALI members who can provide the perspective of civil defendants, on the other hand, may be few and far between and "drowned out."[245]

In this regard, the ALI should make a concerted effort to elect members who: (1) are poised to actively contribute to the restatement development process; and (2) provide greater overall balance to the ALI's membership ranks. At least in the short term, the organization should prioritize greater defense bar engagement that appears increasingly lacking. The ALI should also take action to rouse its dormant members, for example, by setting clear membership engagement expectations or even conditioning membership on a pledge to participate meaningfully.

The consequences of inaction go beyond loss of credibility by the judiciary. If restatements continue to recommend novel rules and those rules consistently operate to increase liability, restatements will be increasingly viewed as a one-sided tool for plaintiffs' lawyers. Defense lawyers who comprise the other half of the practitioner marketplace for restatements will refrain from relying on or citing restatements that lack balance and credibility, which will further marginalize the utility of restatements.

* * *

Each of these outlined reforms targets vulnerabilities in the ALI's processes because the organization's current approach of turning a blind eye to the traditional standards for developing a restatement, essentially at the whims of Reporters or a small faction of active members, is a recipe for irreparable reputational harm. The lack of institutional oversight has allowed a troubling situation to get out of control, and, in the process, made prescient Justice Scalia's observation a decade ago about the ALI abandoning its mission with respect to modern restatements. Chief Justice Roberts and several other Justices have since expressed the same basic concern, which suggests the judiciary is catching on to what has been going on within the ALI. Although the ALI cannot undo the

244. *See, e.g.*, Memorandum of Reps. Mark Hall, Nora Engstrom, and Michael Green to ALI Council (Jan. 3, 2023) (on file with the author) (recognizing that former plaintiffs' lawyer Larry Stewart "has been our most engaged Adviser" on the Restatement of Torts, Third: Miscellaneous Provisions).

245. Mark Behrens, *ALI, Bar Groups Need More Defense Engagement for Balance*, LAW360: INS. AUTH. (June 12, 2023, 17:54 PM ET), https://www.law360.com/insurance-authority/articles/1686909/ali-bar-groups-need-more-defense-engagement-for-balance [https://perma.cc/C2RE-KEBL] (stating the "lack of balance . . . is palpable" within ALI and encouraging greater defense bar participation).

reputational harm it has caused itself, the organization's leadership can learn from it and adopt reforms to mitigate lasting harm that the organization can never recover. The first step, though—one that may be hard for an elite century-old legal institution to confront—is admitting there is a problem that must be addressed to protect the credibility and relevancy of modern restatements of the law.

CONCLUSION

The ALI does important work in developing restatements of the law, but this work has become increasingly compromised by proposed restatement provisions that simply make up new legal rules. As this Article explains, what began as an occasional lapse in the ALI's purported standards has escalated in frequency and degree to the point that the ALI now appears standard-less. Reporters propose aspirational rules they openly admit do not reflect the law of any jurisdiction, and no one—not the ALI leadership, Council, or membership—acts as a reliable check to require that novel provisions conform to existing law. As a result, the ALI has invited a credibility crisis, and one that already appears to be gaining momentum within the judiciary. Rather than confront this impending crisis head-on and adopt reforms to restore credibility and avert irreparable reputational harm, the ALI has consistently rejected opportunities to course-correct—even after numerous rebukes of its work products by state legislatures—and instead allowed the situation to worsen. This Article identifies reforms the ALI could readily adopt to mitigate the coming credibility crisis and find a way forward. If the ALI does not act soon, these once invaluable educational resources will struggle to find any utility or relevance in the legal community.