The Lost World: Of Politics and Getting the Law Right

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I. INTRODUCTION

*The Lost World* is one of Sir Arthur Conan Doyle's less famous works.¹ Deservedly so. Better to read any Sherlock Holmes story than this implausible tale. Its hero is the amazing Professor Challenger, who combines the world's greatest intellect and a passionate devotion to science with a massive ego, prodigious physical strength, and a strong dose of disdain for his inferiors. After figuring out that a natural Jurassic Park exists on a lofty plateau somewhere in the Amazon, Challenger locates the plateau, obtains proof that prehistoric animals still exist, and returns to England in triumph.

As I thought about the outcry that followed the insurance industry's campaign to protect itself and the law from the ALI, Challenger's plateau came to mind. It was a place insulated from forces at work on the rest of the planet, such as those that wiped out the dinosaurs. ALI members seem to think that their organization also perches far above the fray, so that forces acting elsewhere cannot reach it. The truth is otherwise. Because the ALI is an influential body, it should expect to be a target of interest group activity and repeatedly has been.² Although the ALI may see itself as sacrosanct, interest groups do not see it that way, especially when it embarks upon a program of reform that is intended to change settled law and to upset important economic relationships.

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¹ See SIR ARTHUR CONAN DOYLE, THE LOST WORLD (1912).
² Others have made this point before. See Address by the Honorable Richard A. Posner, Chief Judge of the United States Court of Appeals for the Seventh Circuit, 72 A.L.I. PROC. 321, 325 (1995) (“It is more and more difficult for the Institute to engage with important questions . . . without crossing the line that separates technical law reform from politics.”).
The controversy surrounding section 215 of the Restatement (Third) of The Law Governing Lawyers shows that interest groups can shake up the ALI when the need arises. Insofar as I am concerned, that is not a bad thing. In this Article, I will offer my perspective on the debate over section 215 and the related politics. I will also reflect upon the connection between interest groups, social choice processes, and scholarship.

II. THE IADC/DRI STUDY OF DEFENSE LAWYERS' PROFESSIONAL OBLIGATIONS

In the summer of 1994, Kent Syverud and I received a grant from the International Association of Defense Counsel ("IADC") and the Defense Research Institute ("DRI") to undertake the first comprehensive academic study of the professional responsibilities of insurance defense lawyers. The money was not good. The grant replaced summer research funds that we would have received in any event from our law schools. It also covered limited travel and other expenses. I could have made ten times as much by consulting.

Even so, I was thrilled about the project, as was Kent. We knew that it was important, and we had the right combination of skills to make it a success. Kent studied the law and economics of liability insurance, was the author of the leading article on the duty to settle, and taught professional responsibility on the side. I had recently decided to make the study of lawyering a full-time endeavor, and I also had a background in liability insurance. Plus, both of us taught and wrote about complex litigation and civil procedure. It was easy for us to see how insurance, professional responsibility, and procedure intertwined. We were (and are) also great friends.

The only thing we lacked was experience. Fortunately, the IADC and DRI members who were to work with us had plenty of that. They were long-time insurance defense lawyers, coverage attorneys, and counsel for insurance companies who had access to all of the factual information about claims handling procedures, insurance policies, defense practices, and policyholder concerns we could want.

They were smart too. David Beck, the chair of the IADC's Special Committee on Professionalism and the original proponent of the study,
was the author of a monograph on Texas legal malpractice law. Ron Mallen co-authored the leading treatise on legal malpractice, which contained a lengthy chapter on insurance defense. Dick Neumeier edited the *Defense Counsel Journal* and had written an article on defense ethics. Bill Barker, a closet academic, was the leading lawyer-commentator on procedural issues in insurance litigation and the author of numerous articles. Michael Pope, then the head of the IADC, and John Biancheri, of Continental Insurance, published an exchange discussing professionalism issues from their respective sides. Louis Potter, the recently deceased and greatly missed Executive Director of the DRI, was at the center of the storm surrounding *Atlanta International Insurance Co. v. Bell,* a Michigan case that tore the DRI apart. Ed Schrenk, legal counsel for United Services Automobile Association, was a moving force for professionalism in the industry and is one of the most savvy lawyers I know. The other members—there were at least ten more of them—were no less able, no less analytical, and no less familiar with the great battles of the day. They knew so much and were so thoughtful that I felt as though I was under a microscope. I knew I’d have to work hard just to keep up with the group, much less to impress them. I also knew that flaws in my work were likely to be discovered and condemned.

It seemed to me that the project could not fail to improve the way lawyers, judges, and academics thought about the professional responsibilities of insurance defense lawyers. With luck, it would advance their thinking considerably. Having studied the subject carefully in 1993, I knew that it was ripe for reconceptualizing. A large and basically sound body of case law had developed over the century-long period during which liability insurance has been sold in this country. Unfortunately, a sizeable number of aberrant cases spoiled the landscape.

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There was also considerable confusion about the basics, such as the number of clients a defense lawyer represents and whether a lawyer owes a higher duty of loyalty to a policyholder than an insurer. The task ahead of Kent and me was to answer these basic questions in a coherent way that helped sort out the cases and to persuade first the members of the committee and then the larger legal community that we were right.

An impressive body of literature made our job easier than it might have been. In the 1940s, '50s, and '60s, Professor (now Judge) Robert E. Keeton published a series of foundational articles on liability insurance that identified and explained the major doctrinal developments and offered cogent ways of thinking about the defense and settlement of insured claims.\(^\text{12}\) We could also draw upon a wealth of specialized Reporters, articles by lawyers, scholarly treatises, Robert Jerry’s thoughtful book, *Understanding Insurance Law*,\(^\text{13}\) and the works by Ron Mallen and Bill Barker mentioned above.\(^\text{14}\) Although we had to use these building blocks with care, we did not have to start from scratch.

The project was also greatly helped by an insight Ron Mallen expressed at the first committee meeting that Kent and I attended. Mallen saw that it would be better to start with a separate assessment of full-coverage representations instead of throwing excess exposure and disputed coverage cases into the mix. His argument was that full-coverage cases are both more common and more basic than limited- or disputed-coverage situations, and that defense lawyers’ responsibilities can be discussed more clearly without the overlay of coverage issues. The longer we worked on the project, the more certain we were that Mallen was right.

What happened after that is a blur. Kent and I produced short working drafts of arguments and partial sections of the final report. The committee members read them and, at meetings held every few months, took them apart. The discussions were freewheeling. Usually, they were friendly and respectful, but often they were heated, and more than a few shouting matches occurred. The disagreements neither surprised nor dismayed Kent and me. We knew that the stakes were great, and we reveled in the clash of ideas. We also knew that we were educating the members, and that they were teaching us. All of us lost arguments from time to time, all of us had to think more deeply about the issues than we

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14. See supra notes 6, 8.
ever did before, and Kent and I had to make innumerable revisions.

What made the committee’s deliberations truly remarkable was the freedom Kent and I enjoyed to say and write whatever we wanted. The members hit us from all directions and refused to relent until we responded to their arguments and complaints, but it was always clear that they expected us to make up our own minds. We were supposed to do our best to get the facts, the theory, and the law right, whatever our final conclusions might be. It was an academic experience in the best sense, an ongoing colloquium with no predetermined right answer and no date by which the debate had to end. The quality of our final report, a version of which appeared as an article in the *Duke Law Journal*, reflects the committee’s collective desire to get to the bottom of things.\(^\text{15}\)

I will always be grateful to the members of the Special Committee on Professionalism. They were reliable sounding boards for ideas, wonderful sources of insights and advice, and true professionals. Without them, I could not have made the most of the opportunity the IADC and the DRI gave me to do sustained scholarship in this important field.

## III. Silver Fails to Persuade the Reporters

Two events led David Beck to see that the time was right for a scholarly project on defense lawyering. The first was the Michigan Supreme Court’s decision in *Atlanta International Insurance Co. v. Bell*.\(^\text{16}\)
The second was The American Law Institute’s release of a draft of section 215 of the Restatement (Third) of The Law Governing Lawyers.\(^\text{17}\) *Atlanta International* generated considerable uncertainty among defense lawyers by holding as a matter of law that no attorney-client relationship existed between a defense lawyer and a defending insurer.\(^\text{18}\) The rule had long been otherwise, as Mallen’s treatise makes clear.\(^\text{19}\) Shortly thereafter, the ALI promulgated Tentative Draft No. 4 of the Restatement (Third) of The Law Governing Lawyers, in which section 215 also indicated that an insurance defense lawyer represents only an insured.\(^\text{20}\) These events caused considerable turmoil among defense lawyers and

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18. See Atlanta Int’l, 475 N.W.2d at 297.
liability carriers. In 1993, the Federation of Insurance and Corporate Counsel devoted an entire meeting to the subject of professionalism in an effort to sort things out.\textsuperscript{21}

Some people think that the issue of greatest concern to defense lawyers and insurers was the right of primary carriers to assert legal malpractice claims. To believe this is to misunderstand their fears. The most pressing issue was whether insurers could continue to work hand-in-glove with defense lawyers, as they had for decades. Insurers rarely sue defense lawyers, but hundreds or thousands of times every day they rely on them to protect their financial interests, to keep confidences, to provide sound advice on trial strategies and settlement opportunities, and to follow instructions. For insurance companies, defense lawyers have value because they can be expected to defend policyholders zealously while also loyally and diligently protecting insurers.

\textit{Atlanta International} and section 215 of the Restatement threatened to tear apart these close working relationships. If carriers were not clients, what right did they have to receive or impart confidences, to give instructions, to regulate defense budgets, or to rely on defense lawyers for unbiased advice? If the policyholder was the only person a defense lawyer represented, shouldn’t the lawyer be concerned about and loyal to the policyholder alone? And shouldn’t the policyholder be in charge of the defense? It is black letter law that a non-client, third-party payor has no right to interfere with a lawyer’s representation of a client.\textsuperscript{22} How, given this, could it be right for insurance companies to exert so much influence over the representation of insureds?

These were the questions lawyers and insurers were asking. Defense lawyers were in a no-win situation. They could ignore \textit{Atlanta International} and section 215 and continue on as they had before. Or they could change the way they did business with insurers. The first option put them in danger of being charged with unprofessionalism. The second forced them to risk alienating their largest sources of business. Insurance companies faced a similar predicament. By carrying on as before, they faced the prospect of being sued for breach of the duty to defend and bad faith. By putting greater distance between their defense lawyers and themselves, they would lose valuable claims-handling services and enjoy less control of defense and settlement costs. \textit{Altanta

\begin{itemize}
  \item \textsuperscript{22} See \textit{Model Rules of Professional Conduct} Rule 1.8(f)(2) (1998) (prohibiting third-party payor relationships unless “there is no interference with the lawyer’s independence of professional judgment or with the client-lawyer relationship”).
\end{itemize}
International and section 215 were trouble for everyone, including policyholders who would have to pay higher premiums to cover increased costs.

There was little Kent and I could do about Atlanta International, but we thought we could do a lot with the ALI. The Restatement was years away from becoming final, so there was plenty of time to communicate with Professors John Leubsdorf, Thomas Morgan, and Charles Wolfram, the Reporters. Although neither of us knew any of the Reporters well, we had great regard for them. By corresponding with them and providing them copies of our working drafts, we hoped to improve their understanding of insurance defense issues as we improved our own. As academics, they would then naturally change section 215 to conform to their new views.

We were optimistic about our future dealings with the Reporters partly because they knew little about liability insurance or insurance defense practices. We thought they would see us as doing them a favor by plowing this field. Although we were fascinated by insurance issues, we had no illusions that others were. Insurance is more fun than a tonsillectomy, but it’s not for everyone.

Things got off to a good start. Kent and I wrote the Reporters as soon as the IADC/DRI project commenced, telling them who we were and what we were up to and identifying our source of support. We also sent them copies of articles we prepared for a symposium issue of the Texas Law Review on bad faith law. They responded warmly and we soon learned that Professor Morgan had the lead on section 215. We therefore directed future correspondence to him with copies to the other Reporters and to Professor Geoffrey Hazard, the Director of the ALI.

Soon thereafter, and despite the best of intentions on all sides, progress stopped. We made little headway with Professor Morgan through the end of 1994. The stumbling block was a matter that seemed uncontroversial to me and that had nothing to do with insurance law, in the first instance at least. It was whether the nature of a defense lawyer’s relationship with a primary carrier is fixed by law or by agreement when the lawyer is retained. To me, the latter alternative seemed (and still seems) correct. It comports with agency law and with the cases on attorney-client relationships, both of which hold that principal-agent relationships arise by mutual consent. It is also the only option supported

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by section 26 of the Restatement, which identifies judicial appointment and mutual consent as the only means of creating attorney-client relationships.\textsuperscript{25}

It took me awhile to persuade Professor Morgan on this point. He did, however, finally agree that an insurance company and a defense lawyer can decide for themselves whether the lawyer is to act as counsel for the company only, as counsel for the company and the insured, or as counsel for the insured alone. By selecting the last option, a carrier assumes the position of a third-party payor.\textsuperscript{26}

With that matter resolved, I felt confident that we could move ahead. I therefore sent Professor Morgan a letter laying out what I perceived to be the implications of our agreement for the Restatement. I suggested several changes designed to make explicit the possibility that a defending insurance company can be a client and to eliminate what I perceived as the Restatement's \textit{de jure} assignment of insurers to the category of third-party payor.

Professor Morgan did not respond to my letter as I expected. In a courteous but brief reply, he stated that nothing in the Restatement needed to be changed because nothing prevented an insurer from being a co-client instead of a third-party payor. This seemed plainly wrong to me. The only extensive discussion of insurance defense ethics was found in section 215, entitled "Fee Payment by a Third Person."\textsuperscript{27} The text of this section did not state that a defending liability carrier could be anything but a third-party payor, and the title suggested that one could not be. There was also a public statement by the Reporters that in

\textit{aff'd}, 633 F.2d 206 (2d Cir. 1980); United States \textit{ex rel.} Mitchell v. Thompson, 56 F. Supp. 683, 687 (S.D.N.Y. 1944) ("An attorney-client relationship is created by the grace of the client and consent of the attorney."); RESTATEMENT (SECOND) OF AGENCY § 15 (1984) (stating that mutual consent between the principal and agent is necessary for an agency relationship to be created).


\textsuperscript{26} The most recent version of section 215 endorses this view:

\begin{itemize}
  \item (1) A lawyer may not represent a client under circumstances in which someone other than the client will wholly or partly compensate the lawyer for the representation, unless the client consents . . . with knowledge of the circumstances and conditions of the payment.
  \item (2) A lawyer's professional conduct on behalf of a client may be directed by someone other than the client when:
    \begin{itemize}
      \item (a) the direction is reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer; and
      \item (b) the client consents to the direction . . .
    \end{itemize}
\end{itemize}


\textsuperscript{27} See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 215 (Tentative Draft No. 4, 1991).
representations falling under section 215 "the lawyer represents the client and not the fee payer." 28

No other section of the Restatement corrected the impression that a defending liability carrier could be only a third-party payor. Section 209, which set out the law governing conflicts of interests between co-clients, said nothing about insurance defense representations. 29 Section 26, which discussed the consensual nature of attorney-client relationships, did not indicate that a defending primary carrier could become a client by mutual agreement. 30

It seemed to me that Professor Morgan had conceded a point that required a sea change in the Restatement. The mistaken impression that all insurance defense representations fell under section 215, and under this section alone, had to be erased by explicitly recognizing a liability carrier's right to be a defense lawyer's client. Moreover, if Professor Morgan really believed that insurers could be clients as well as third-party payors, what harm could there be in saying so in the Restatement? Two knowledgeable readers and the lawyers and insurance companies they worked with were worried that the document would predispose judges to treat insurers as non-client, third-party payors. If the Reporters did not want this to happen, why not change the draft to make the point clearer?

It is not as though the point was a small one. Every professional responsibility teacher knows that there is a world of difference between being a client and not being one. Lawyers owe clients many duties, but they owe non-clients few. Most importantly, the duty of loyalty runs only to clients. A lawyer who represents co-clients may not assist one at the expense of the other, but a lawyer may and even must put a sole client's interests ahead of those of a third-party payor. 31 The long and short of it was (and is) that if carriers can be clients, defense lawyers can continue working with them as before. If they cannot be clients, insurance defense practices must change radically. It was therefore crucial that the Restatement recognize the right of insurance companies to become clients by agreement.

Recent versions of section 215 make this acknowledgment. 32 How

32. See Restatement (Third) of the Law Governing Lawyers § 215 (Proposed Joint
this and other language came to be included is an interesting story, the
details of which are better known to the Reporters and Bill Barker than
to me. However, I am reasonably certain that my correspondence with
Professor Morgan prompted few of the changes. Although I occasion-
ally wrote the Reporters and sent them publications after receiving the
last letter from Professor Morgan mentioned above, I did little in the
way of talking substance with them after 1994. I had lost hope of per-
suading them to change the Restatement, and the IADC/DRI project was
occupying far too much of my time. I focused on finishing the full-
coverage project, which Kent and I completed in May 1995, and on pre-
paring a draft for submission to a law journal later that year.

IV. SILVER COMES UNGLUED

The article Kent and I wrote was published by the Duke Law Jour-
nal at the end of 1995. It is the longest scholarly work on the profes-
sional responsibilities of insurance defense lawyers and the most com-
prehensive. The article is a single source that scholars, lawyers, and
judges can turn to for a thorough introduction to the subject and for help
with a host of practical problems. The basics are thoroughly canvassed,
including the functions served by essential provisions of standard liability
contracts, the means by which primary carriers acquire the power to
appoint defense lawyers for insureds, the number of clients defense
lawyers represent, the source and content of insurers’ right to control
the defense, and the duty to communicate information to carriers and
insureds. Related and advanced topics are also taken up. Is a defending
liability carrier a policyholder’s fiduciary? Or may the carrier properly
consider its own interests, including its interest in controlling defense
costs, rather than just the interests of its insured? Can a defense lawyer
ever impeach a policyholder’s testimony on the stand? Must defense
lawyers obtain conflict waivers in all cases? If not, when must they get
them? These questions, and many others, are addressed.

33. See Silver & Syverud, supra note 15.
34. See id. at 269.
35. See id. at 280.
36. See id. at 273.
37. See id. at 284-85.
38. See id. at 299.
39. See id. at 286.
40. See id. at 316.
41. See id. at 334.
The article operates on two levels: doctrinal and theoretical. At the doctrinal level, it performs the ordinary but crucial tasks of identifying the principles that govern particular matters and parsing the cases and other materials in which the principles are set out. At the theoretical level, the article offers a rich normative account of what defense lawyering is and should be about. The account draws upon the law and economics of insurance, principal-agent relationships, and professional responsibility. It also draws upon information we collected about the manner in which insurance companies and defense lawyers handle liability claims.

The normative account of defense lawyering characterizes the lawyer as an agent who is brought into an existing legal and economic relationship between a policyholder and a carrier pursuant to the bargain they struck and for the purpose of giving that bargain effect. The bargain is the liability insurance contract, the relevant functions of which are to transfer the financial risks and costs associated with liability claims from the policyholder to the carrier and to provide the carrier the tools it needs to minimize these risks and costs. The toolbox contains, among other things, the right to control the defense, discretion to settle (usually without the consent of the insured), discretion to investigate, and the policyholder's duty of cooperation. Insurance companies engage defense attorneys in the course of employing one of these tools—the right to control the defense—and for the purpose of getting full value from all of them. In other words, they hire defense lawyers as part of the effort to minimize payouts on liability claims and with the expectation that defense lawyers will further this effort. They do not hire defense lawyers for any other purpose. In particular, they do not expect defense lawyers to prevent them from using the tools effectively or to provide legal services that are not covered by the insurance contract and for which their policyholders have not been charged.

This normative account of the defense lawyer's role rests on important foundational principles. One principle is that the terms of insurance contracts identified above are enforceable. This is a matter governed by insurance law. Another is that an insurance company and a defense lawyer have considerable freedom to set the terms and scope of the lawyer's engagement as they wish. This is a matter of agency law and professional responsibility law. Both principles seem to me to be propositions of law that are true (in the sense that the cases actually embrace them) and sound (in the sense that they are supported by compelling reasons).

The normative account of the defense lawyer's role has important
implications. Chief among them are that the terms of the lawyer's engagement are (1) that the carrier will instruct the lawyer; (2) that the policyholder will not instruct the lawyer; (3) that the lawyer will defend the liability claim; (4) that the lawyer will not deliver other services, such as coverage advice or assistance with the insured's affirmative claims, to the carrier or the insured, except perhaps by separate arrangement; and (5) that the lawyer will provide the carrier all information received from any source that bears materially on the defense or settlement of the liability claim. Terms (3) and (4) are the subject of little debate. Terms (1), (2), and (5) are more controversial.

For present purposes, my aim is not to convince readers of the merits of our specific conclusions but to focus attention on the structure of the argument Kent and I laid out. The argument is systematic. It begins with a foundational understanding of insurance contracts and agency relationships, and it builds to conclusions on the basis of careful readings of legal materials and reliable factual information about insurance practices. This structure of argument is as important a contribution to the literature on professionalism as the particular conclusions Kent and I embrace. The structure sets a standard for well-crafted arguments in this field. No longer can one say "I read the cases and the rules, therefore I have intelligent things to say about defense lawyers' obligations." Instead, one must have a deep theory of the field that generates and justifies one's conclusions, that makes them coherent, and that sorts the cases and other sources of doctrine into the good and the bad. Anything less seems shallow and ad hoc.

The reader may now see why I blew my stack when I read Council Draft No. 11 of the Restatement, which was released in late September 1995. The account of defense lawyers' professional duties contained therein was completely ad hoc. Some elements of the account were right, many were badly wrong, and none of it fit together in anything approaching a thoughtful way. The language reflected fundamental misreadings of cases and a complete absence of anything that might be considered a view of the field. A Restatement of The Law Governing Lawyers modeled after Council Draft No. 11 could easily have changed the landscape of the law governing insurance defense lawyers, which really needed only weeding and pruning.

 Having corresponded with the Reporters previously and having


sent them copies of my articles, it was clear to me that I would accomplish little by sending them a critique of Council Draft No. 11. This belief was strengthened by the fact that before releasing the Council Draft, the Reporters never contacted Kent, me, or anyone else working on the IADC/DRI project to discuss section 215, even though they knew of our considerable interest in it and even though Ron Mallen and others were members of the ALI. As I wrote in an exchange with Professors Morgan and Wolfram:

[Their] signal mistake was in promulgating Council Draft No. 11 and pushing it through the Council of the ALI without giving the interested public an opportunity to review or comment on revised § 215. They offered the Council Draft to the world as a fait accompli, leaving [me] no choice but to criticize their work publicly and rally the opposition.44

With the appearance of Council Draft No. 11, push came to shove. Those of us who cared about the field and had carefully worked our way through it had to choose. We could attack section 215 in courts and advisory committees across the country after Council Draft No. 11 became Final Draft No. 1, knowing that we would lose many battles and maybe the war. Or we could make a stand against section 215 in the ALI and possibly keep the war from starting. We chose the latter course.

I supported the effort to prevent section 215 from becoming final by providing some of the ordnance needed to fight effectively. Everyone understood that our opposition to the Council Draft was and had to be principled. The point was to get the law right, not to flex muscles. Because we had spent years studying the professional responsibilities of insurance defense lawyers, our group had a large supply of arguments in store. We needed only to draft a manifesto and an alternative to section 215 for use in rallying the troops.

It turned out to be an easy matter to prepare a manifesto. By coincidence, Michael Sean Quinn joined me as a colleague at the University of Texas School of Law around the time Council Draft No. 11 came out. Michael was the perfect person to work with. He had a Ph.D. in philosophy from the University of Pittsburgh, one of the country's outstanding departments. As a lawyer, he had handled insurance coverage and bad faith cases for more than ten years. He had also published widely on insurance law. Michael was bright, literate, funny, a veteran of litigation wars, a good fellow, an entertaining speaker, and a person with good connections to insurance lawyers, insurance companies, and

44. Id. at 50.
editors of journals that published articles on insurance law.

In no time, Michael got up to speed on the issues and had us engaged to publish a series of articles in Coverage, a review that reaches an audience of insurance lawyers. We intended the essays to be as subtle as a poke in the eye. The first article, "Wrong Turns on the Three Way Street: Dispelling Nonsense About Insurance Defense Lawyers," was a wide-ranging attack on views we thought dotty, including some expressed by Professor Hazard in a newspaper interview. The aggressive tone of this article prompted two readers to complain. When the editor published their letters, we filed a lengthy response that was even more inflammatory, which was also published.

Having warmed up the readership, we submitted Are Liability Carriers Second-Class Clients? No, but They May Be Soon—A Call to Arms Against the Restatement (Third) of The Law Governing Lawyers. The title was the tamest part of the piece. To balance the presentation, the editor invited Professors Morgan and Wolfram to respond. After receiving their comment, the editor asked us for a reply. We gladly accommodated. Carrying forward the message that the Restatement treated liability insurers shabbily, we drew on the novel Animal Farm and titled our rejoinder All Clients Are Equal, but Some Are More Equal than Others.

When I reread the Coverage essays prior to writing this piece, I was pleased with them. Their tone is polemical, but their content is analytical and their force is overwhelming. It could not be clearer, to me at any rate, that we had a coherent position supported by sound first principles and a careful reading of the cases and that Professors Morgan and Wolfram did not. The Reporters got insurance law wrong. They took positions in section 215 that conflicted with basic principles set out

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50. GEORGE ORWELL, ANIMAL FARM (1946).
51. See Silver & Quinn, supra note 43.
in other sections. They recommended special rules of professionalism for insurance defense lawyers while citing cases that held defense lawyers to ordinary rules. They ignored long-standing authorities. They used technical terms loosely. They missed important distinctions, running together information that bears on insurance coverage only with information that also bears on the defense or settlement of liability claims. They identified five questions as basic while seeming to pluck them out of thin air.

The Reporters were greatly offended by the Coverage articles. I have been told that they were especially angry about the uses made of deposition testimony Professor Wolfram gave as an expert witness in a legal malpractice case against an insurance defense lawyer.\(^5\) I shall therefore explain why we used the deposition. We hoped to accomplish two things. First, we wanted to give insurance carriers and defense lawyers a taste of the future that awaited them in bad faith and related malpractice cases if the Restatement became law in its then-current form. The point of the essays was to motivate readers to take a stand against section 215. An obvious way to arouse them was by showing them that their self-interest was at stake. Second, we wanted to highlight the fact that the Reporters were flat wrong about defense lawyers’ duties. How better to do that than by setting out Professor Wolfram’s sworn testimony and pointing out his mistakes? These seem like legitimate uses of deposition testimony to me, for I can only assume that Professor Wolfram gave the jury the benefit of his sincerely held and most reflective opinions.

With the articles in place, the time was right for a speaking tour. I gave more public presentations and participated in more debates than I can remember. Some of these occurred at continuing legal education programs. Others took place at meetings of insurance companies or their trade associations. Often, Ed Schrenk and Jon Palmquist of USAA planned the insurance company activities. Still other presentations were sponsored by private bar associations, such as the IADC, the Texas Association of Defense Counsel, and the Pennsylvania Defense Institute. A Texas law firm with a large insurance practice invited me to address an audience of almost one thousand claims adjusters. I weighed in on Counsel Connect, an on-line forum for lawyers. I was compensated for few of these engagements, but this was academic work, not consulting. I was educating people about the professional responsibilities of defense lawyers and the dangers posed by the Restatement, and I was hoping

\(^{52}\) See Silver & Quinn, supra note 48, at 24.
that they would consider taking steps on their own.

Other than writing the Coverage essays and giving lectures, my role in the battle to change the Restatement was small. From time to time I discussed strategy at meetings of the IADC’s Professionalism Committee, but I usually just reminded members of my failed efforts to influence the Reporters. Sometimes, I offered the names of ALI members who might be enlisted to help the cause. I also commented on letters Bill Barker sent to the Reporters and drafts of amendments to section 215 that he prepared.

I also tried, without success, to convince two ALI members not associated with the IADC/DRI to consider offering a motion to amend section 215.53 The person we most wanted to sponsor the amendment was Judge Keeton. Although we had not corresponded with him previously, we were confident that he would side with us on the merits, our views being close to his. We also thought that section 215 would be doomed if he led the opposition. Most ALI members probably knew little about section 215, did not regard it as a priority, and would not be impressed by an industry-led movement against it. But Judge Keeton could cause many to sit up and take notice. He was a giant in the field who could not be dismissed as a crackpot or written off as an industry shill.

Judge Keeton agreed that insurance defense issues were treated poorly in Council Draft No. 11. In the end, he chose to sponsor his own amendment. From our perspective, that was as good or better than an offer to put his name on the text Bill Barker prepared because it put more distance between him and our group. Keeton’s motion would have deleted all references to insurance issues from the text and amended uses made of agency concepts.54 On learning that Judge Keeton would play an active role, I became confident of winning a floor fight in the ALI.

Even so, I did not look forward to the confrontation. To the contrary, I took steps to avoid it. I contacted Professor Charles Alan Wright, the President of the ALI and a colleague at the University of Texas School of Law. I gave him my views on section 215, told him that trouble was brewing, and urged him to give the matter his attention. I also asked him to arrange a meeting between the Reporters and repre-

53. The individuals were Professor Charles Reitz of the University of Pennsylvania, who had offered sensible criticisms of section 215 in prior ALI debates, and Sheldon Raab, a New York attorney with a special interest in professionalism.

sentatives of the IADC/DRI. He declined to do so, partly because of an upcoming trip. I do not know whether he regrets this decision, but I do know that he was offended by the “get out the vote” campaign that the insurance industry later launched against section 215.

Other ALI members were also put off. Because I do not belong to the ALI, I did not attend the May 1995 meeting at which the drama played itself out. My knowledge of members’ reactions derives from press accounts of the meeting and from conversations with ALI members like Gibson Gayle, Esq. Mr. Gayle is a great supporter of my law school and other causes, an outstanding lawyer, and an adjunct professor of legal professionalism whose opinions I find helpful and illuminating. Like many Texans of his generation, he is an expert at applying the smell test and has an abundance of good sense. Although Mr. Gayle was interested in the merits of section 215, he regarded the industry’s effort to prevent its passage as foul play, and he told me so plainly. I hope I have made it clear to him (and other ALI members) that the “get out the vote” campaign was a last step taken by serious, principled people after efforts to work with the Reporters failed. It was the only way we could see to preserve the integrity of an important body of law.

Also in an effort to avoid the confrontation, Bill Barker, one of the true heroes of this story, strove to build a relationship with the Reporters and to draft a replacement for section 215. Having burned my bridges by publishing the Coverage articles, I could not handle this task. Bill, by contrast, was perfect for it. He knew the final IADC/DRI report inside and out and contributed important insights to it. His own works on insurance procedure and professionalism were both numerous and outstanding. He was unflappable, in person and in print. And in the IADC/DRI committee he had often demonstrated adeptness at finding compromises that maintained the integrity of the analysis while addressing valid concerns. Bill worked tirelessly to close the gap before the ALI’s summer meeting. He almost succeeded, as he explains in his contribution to this Symposium, but not before the “get out the vote” campaign was launched.  

V. THE DIFFICULT MADE (NEARLY) IMPOSSIBLE

I feel justified in describing the IADC/DRI project and the articles that came out of it as academic works. The contract with the sponsors gave Kent Syverud and me complete freedom to write what we wished

and to use our ideas as we saw fit. The sponsors had the right to end the project early subject to a minimum funding constraint, a copyright in the final report, and the right to require us to disclaim that our opinions carried their endorsement. When I sent for review the article that later appeared in the *Duke Law Journal*, I was confident that I had maintained my academic independence and integrity. I continue to feel that way. No one but us had any power to control the text, and we put our reputations as scholars behind everything we said.

My judgment of the scholarly quality of the essays is reflected in the opinions of others. After the *Duke Law Journal* article came out, Professor Mary Daly and Dean Michael Kadens, then the chairs of, respectively, the Professional Responsibility and Insurance Law Sections of the Association of American Law Schools ("AALS"), asked me to run a joint program on the ethics of defense lawyering. I agreed on condition that scholars with diverse views participate. The invitees included, inter alia, Professors Tom Baker, Robert Jerry, Nancy Moore, Tom Morgan, and Stephen Pepper, all of whom I expected to disagree with me. Professor Morgan was responsible for section 215 and was my opponent in the *Coverage* debate. 56 Professor Baker had written an article that took a pro-policyholder position on claims handling. 57 Professor Jerry argued with my position at length in the revised edition of *Understanding Insurance Law*, 58 a draft of which I had read and commented upon. Professor Moore backed the quasi-client approach to professional ethics that I attacked in my *Texas Law Review* article in 1994. 59 Professor Pepper, who crossed swords with me on Counsel Connect, was (and is) convinced that I have a deeply flawed understanding of professional responsibility law.

The cast did not let me down. The debate is a model of the sharpness and clarity with which opposing viewpoints can be posed. No one who reads the essays, which are to be published in the *Connecticut Insurance Law Journal*, 60 is likely to accuse me of making things easy on myself. If I am guilty of anything, it is of being insufficiently strategic. For a short time, I had the field largely to myself. Now it is crowded with scholars whose thoughtful positions are at odds with my own.

56. See Morgan & Wolfram, supra note 49.
58. See Jerry, supra note 13.
59. See Silver, supra note 11, at 1602-03.
Disagreement is a hallmark of academic debate and a source of scholarly progress. Consensus is fine when scholars independently reach the same conclusions, but academic debates that generate real insights and that stir people to think are successes whether or not consensus is reached. By contrast, without some level of consensus, there cannot be a Restatement, for a Restatement becomes final when approved by the ALI. The consensus need not be complete. A majority of the Council and the voting members can bind the ALI. This raises interesting questions. First, is a Restatement a scholarly writing or a piece of legislation? Second, what incentives does the ALI’s approval mechanism create and are its voting rules, like other social choice mechanisms, manipulated for the sake of self-interest?

Taking the second question first, I begin by noting that Alan Schwartz and Robert E. Scott have studied the ALI’s voting rules from a social choice perspective. Their conclusions give one little reason to hope for Restatements that are models of analytical clarity or coherence, although they do not rule out the possibility. Schwartz and Scott depict the ALI as an institution captured by organized interest groups that use their dominance to control the content of ALI products. Capture, they contend, explains why “Article 9 [of the Uniform Commercial Code (“UCC”)] explicitly ‘purports to promote the interests of those industries that helped create and lobby for it,’” and why “opposition from the railroad and insurance industries” led to the exclusion of regulations on railroad car trusts and insurance from the original Article 9. It also accounts for the failure of the Corporate Governance Project to restrict the discretion directors have to block hostile takeover bids, despite an academic consensus in support of limiting rules. Opposition from corporate counsel and their employers caused the Reporters to back down. Schwartz and Scott also cite capture as the reason that Article 3 of the UCC elevates the interests of organized bankers above those of disorganized consumers. Organized banking interests were well-represented in the ALI; disorganized consumers were not.

If Schwartz and Scott are right about the extent of interest group activity within the ALI, there is nothing unique about the insurance industry’s campaign to defeat section 215. At worst, the campaign was

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62. Id. at 639 (quoting Robert E. Scott, The Politics of Article 9, 80 Va. L. Rev. 1783, 1823 (1994)).
63. See id. at 642.
64. See id. at 644-45.
just one of many efforts by interest groups to influence the ALI. At best, it was public and principled and subjected to scrutiny in a way that behind-the-scenes politicking often is not. Because the “get out the vote” campaign was undertaken in public, insurance companies had to offer reasons for their opposition to section 215, reasons that could then be debated within the ALI. The industry’s campaign thus contributed to the operation of the marketplace of ideas within the ALI. Behind-the-scenes politicking need not be principled or contribute to debate precisely because it occurs out of public view. The “get out the vote” campaign is therefore less troubling than the activity discussed by Schwartz and Scott.65

If the public nature of the campaign prevented the industry from being unprincipled, there might still be a fear that the industry would use its economic power to defeat section 215. It is one thing to have arguments. It is another thing to have arguments that convince people to vote in support of one’s position. Threats to retaliate against lawyers who voted in favor of section 215 could encourage many members to endorse the industry’s position even though they found its arguments unconvincing. In social choice processes, economic power can convert losing arguments into winners.

Insofar as I am aware, the concern just discussed is entirely hypothetical. No threats were made. Nor could threats easily have been carried out. The ALI does not record how individual members vote. To take revenge on lawyers who voted for section 215, the industry would have needed a web of spies on the floor of the ALI. To my knowledge, the industry had no one there taking names.

Readers prone to compare the insurance industry to the Soviet KGB may not be reassured by my representations. They may suspect the industry of planting spies in secret. Fine. Let’s indulge that hypothesis. Suppose the industry did have spies. What then? In this age of technological wizardry, surely the ALI could preserve confidentiality by allowing members to vote in secret. Shouldn’t the Institute try such expedients before criticizing the insurance industry for contributing to the free flow of ideas?

Schwartz and Scott’s social choice analysis also forces one to consider the possibility that another organized interest had captured the committee working on the Restatement of The Law Governing Lawyers before the insurance industry became active, the other interest being the organized bar. Lawyers dominate the ALI. Lawyers also profit from

65. See id. at 650-52.
professionalism rules that force purchasers of legal services to spend more. It was therefore strongly in the interest of the bar to ensure that the Restatement included rules requiring bulk purchasers like insurance companies to be generous.  

Coincidentally, the Restatement was in production at precisely the time insurance companies began subjecting defense lawyers to managed care regimes. After insurers successfully used innovative arrangements to encourage doctors to reduce medical costs, they began attacking defense costs. They had to. Legal costs were rising at double-digit rates. To moderate future increases, liability carriers began using fixed fees, budgets, itemized billing statements, audits, cross-firm comparisons, work concentrations, outside counsel guidelines, and bigger staff counsel operations. These developments hurt defense lawyers and plaintiffs' attorneys by making it cheaper for carriers to defend claims. Because managed care is bad for lawyers’ finances, a committee dominated by the organized bar would naturally oppose it.  

The content of section 215 is consistent with the hypothesis that a desire to force insurance companies to write bigger checks to lawyers was at work. The section enables defense lawyers to use duties to policyholders to gain leverage over insurers. Paragraph (1) would condition all third-party payor relationships on client consent given “with knowledge of the circumstances and conditions of the payment.” With this provision in place, a defense lawyer would have to sit down with a policyholder and explain the proposed compensation arrangement in some detail. If the policyholder withheld approval, for example, out of fear that a budget or fixed fee arrangement interfered with the lawyer’s independent judgment, the lawyer could then use the policyholder’s decision to pressure the insurer to spend more. The insurance company would then be forced to deny a defense and risk a bad faith claim, to argue with the policyholder, or to provide a costlier defense.  

This is an unenviable position for an insurer to be in. It is also a predicament the Reporters seem to go out of their way to create. There

66. Others have also argued that the domination of the ALI by lawyers and law professors leads to products that advance the economic interests of these groups. See Larry E. Ribstein, The Mandatory Nature of the ALI Code, 61 Geo. Wash. L. Rev. 984, 1020-30 (1993).  
68. See id. § 215 cmt. b. The Supreme Court of Kentucky prohibited insurance companies from using fixed fees on this ground. See American Ins. Ass’n v. Kentucky Bar Ass’n, 917 S.W.2d 568, 572 (Ky. 1996). For a critique of this decision, see Charles Silver, Flat Fees and Staff Attorneys: Unnecessary Casualties in the Continuing Battle over the Law Governing Insurance Defense Lawyers, 4 Conn. Ins. L.J. 205 (1997-1998).
is no general basis for conditioning a defense lawyer’s representation on an insured’s informed consent to a payment structure. Lawyers rarely, if ever, obtain such consent today, and they are usually right to ignore the matter. Few insureds have reason to care about compensation arrangements. In most cases, insurance companies bear all defense and indemnity costs. Consequently, it is a matter of indifference to insureds how their lawyers are paid. Nor do the Reporters cite a case in which a defense lawyer was disciplined or found liable in malpractice for failing to discuss the terms of compensation with an insured, and I am aware of none. Given the lack of analytical and case support, one can only wonder why the requirement is in section 215. A possibility is that its purpose is to impede insurers’ efforts to control defense costs.

Illustration 4 to section 215 continues the theme. It asks whether a defense lawyer who recommends taking additional depositions at an expected cost of $5,000 can honor a carrier’s rejection of the request. The answer is a qualified “yes.” The lawyer can acquiesce if and only if he “reasonably believes that the additional depositions can be forgone without violating [a] duty of competent representation owed by [the] Lawyer to [the] Policyholder.” The lawyer is supposed to consider whether it would be an act of malpractice against the insured to forgo the depositions.

One problem with this answer is that it lacks case support. Policyholders have held defense lawyers liable for malpractice on several grounds but, insofar as I am aware, never for honoring an insurer’s rejection of recommended services. None of the cases cited in the reporter’s note makes this point. A second problem is that a defense lawyer who abides by a carrier’s decision should bear no liability to a policyholder. When it comes to spending clients’ money, lawyers are advisors, not decision-makers (except when their clients want them to be). By recommending that the depositions be taken, the lawyer did his job and, one may suppose, exercised the required level of care. As a client, the carrier is entitled to make up its own mind. If the carrier wrongly rejects the recommendation and thereby harms the insured, the insured’s proper and sole remedy should be an action against the carrier

69. This requirement may be appropriate in specific cases, e.g., when insureds are required to cover defense costs up to the limit of a deductible, or when insureds are covered by defense-within-limits policies.


71. See id. § 215 reporter’s note.
for negligently handling the defense.\textsuperscript{72} Having made the right recommendation, the lawyer should be liable to no one.

By subjecting the lawyer to liability for failing to convince the insurer to spend more lavishly, the Restatement would undermine the insurer's contractual right of control, which includes the right to decide whether and how money is to be spent. It would also discourage defense lawyers from providing accurate advice. To appreciate these effects, consider the lawyer's options after the carrier rejects his recommendation. The lawyer may acquiesce, threaten to withdraw unless the carrier changes its mind, or ask the policyholder to pay for the depositions.\textsuperscript{73}

The first option forces the lawyer to run the risk of being sued for malpractice by the insured. Predictably, the lawyer will be unhappy in this situation and will be angry with the carrier for saving its own money at the lawyer's expense. To make matters worse, the lawyer will have set himself up for the policyholder's malpractice claim by recommending that the depositions be taken. A strategic lawyer will therefore think twice before making suggestions that cost money. At some point in time, self-interest will lead such a lawyer not to make a recommendation that should be made, thereby denying the insurer the benefit of the lawyer's candid advice and depriving the insured of competent representation. The possibility that this strategic conduct may result in a malpractice suit brought by the carrier or the insured shows that there is no safe harbor for defense lawyers, not that the problem is solved.

The second option forces the carrier to find a new lawyer or reverse its decision. Discharging the lawyer will signal the insured that something is wrong and will set the insurer up for a bad faith claim in which its former lawyer, now disgruntled, is set to testify against it. The second alternative will result in the carrier spending more on legal services than it thinks it should. Neither outcome is pretty.

The third option, asking the policyholder to pay, will create bad blood between the carrier and the insured. The carrier will have made its decision and want to stick to it. The policyholder will want the carrier to pay for the depositions. The policyholder may even charge the carrier with attempting to transfer defense costs back to the policyholder by strategically refusing to pay for services that the liability contract obli-

\textsuperscript{72} The case law on this cause of action is well-developed. See Joseph E. Edwards, Annotation, Liability Insurer's Negligence or Bad Faith in Conducting Defense as Ground of Liability to Insured, 34 A.L.R.3d 533 (1970 & Supp. 1997).

\textsuperscript{73} I rule out the possibility, which seems ludicrous to me, that the lawyer must take the depositions at his own expense. Lawyers do not generally have to perform services for which clients refuse to pay.
gates it to provide. If the carrier gives in, it will lose control of the defense. If it holds fast, it will have set itself up for a bad faith claim.

The long and short of it is that section 215 would make it more difficult for insurers to use their contractual right to control the defense to reduce legal costs. It would do this by enabling defense lawyers to use obligations to policyholders as sources of leverage over insurers. It is not clear that policyholders would benefit in this situation. Policyholders have to pay higher premiums when defense costs rise. But lawyers would be better off.

Schwartz and Scott’s social choice approach may also explain why the Reporters abandoned or moderated some of their more reform-minded positions after the insurance industry mobilized its forces. Schwartz and Scott predict that Restatements will tend to maintain the status quo when organized groups with conflicting interests compete for members’ support. If the organized bar once had sole control of the committee overseeing the Restatement, it lost that when the insurance industry contacted large numbers of lawyers with economic ties to it. Thereafter, the Reporters retreated to a position closer to the status quo.

All of this is conjecture. I have not studied interest group activity in the ALI, and I do not pretend to know what drove Professors Morgan and Wolfram to their earlier or more recent positions. However, there is another implication of the social choice approach that seems to be one of hard fact. It is that Restatements are not scholarly works but are instead more like statutes, regulations, and other political outputs.

To me, scholarship involves commitments to honesty, factual accuracy, and analytical rigor. By offering a document as a scholarly work, I affirm my belief in the truth and soundness of the statements it contains. For example, if I state without qualification that A logically implies B, or that A is a true proposition of law, readers are entitled to infer that I believe these assertions and to criticize me if I am wrong. Readers are also entitled to criticize me for ducking subjects that an intellectually honest scholar would have addressed. For example, if I were to sidestep an issue for fear of angering a client or prejudicing a client’s case, other scholars would be justified in pointing out my sin of omission.

Schwartz and Scott’s social choice analysis suggests that Restatements often may not qualify as scholarship under this definition. They may contain propositions that some or many of their authors disbelieve, and they may omit material for inappropriate reasons. The authors of a Restatement include the Reporters and other ALI members who partici-

74. See Schwartz & Scott, supra note 61, at 636-37.
pate in the review process that precedes final approval. All of these persons are authors because Restatements are published as having been “adopted and promulgated” by the ALI as a whole. But no single member controls the content of a Restatement or is likely to agree with everything in it. The Reporters draft the text, but the Advisers, the Council, and the members can modify or reject their positions. A disgruntled Reporter can fight internally to restore language originally proposed, but the decision to fight is up to the Reporter and there is no guarantee of success. Consequently, although the ALI stands behind a Restatement, no individual may be willing to vouch for the entire package in the manner that an author vouches for the whole of a scholarly work.

The review process may also encourage Reporters to act strategically. A Reporter who believes that Proposition A is correct but who fears that the Advisers, the Council, or the members will reject any text expressing it must decide whether to play the game straight or to strategize. Strategizing may include leaving out Proposition A or proposing Proposition $A'$ that is more ambiguous than $A$ but also more likely to get through. The path taken is up to the Reporter, but the desire to produce a document that secures final approval will always push toward consensus and away from controversy.

Fractured control of content and interest group capture are more likely to produce compromises than good scholarship, which is why I say that Restatements may resemble legislative products more so than scholarly works. This is not to deny that some Restatements may be quite scholarly. A Reporter who insists on conceptual clarity and analytical rigor may do wonderful work. The point is that Reporters will feel pressure to compromise and that how they react to this pressure is up to them. Some may stick to their guns, not caring whether the ALI gives its stamp of approval to their work. One wonders how often persons with this personality trait are asked to serve as Reporters. Others may yield on many points for the sake of bringing a project to a close. The latter group may include many scholars who compromise without intending to do so. People do not always realize when incentives have corrupted their judgment.

The ALI claims to produce scholarship, not legislation. The motion to found the ALI stated that its “object 'shall be ... to encourage and carry on scholarly and scientific legal work.'” The organization also

75. See id. at 596.
76. Id. at 603 n.20 (quoting William Draper Lewis, History of The American Law Institute
compares itself to scientific "institutions founded to investigate the cause of disease." I doubt the accuracy of this characterization. To me, the ALI looks more like a private legislature. It uses social choice processes to turn out products, and it makes value-laden choices on policy matters where there is nothing approaching a consensus on right answers.

Still, the fact that the ALI sees itself as a scholarly institution probably explains why the insurance industry's campaign against section 215 caused as much uproar as it did. When it comes to matters of truth and principle, an academic organization is poorly served by being portrayed in public as a forum for interest group activity. An overt campaign to manipulate a vote would cause people to wonder how deeply devoted to scholarship the ALI really is. In turn, such questions would diminish the ALI's prestige, making the organization less influential and membership in it less valuable. Members therefore sought to preserve the ALI's scholarly image by condemning the insurance industry's "get out the vote" campaign.

Some ALI members who are law professors complained loudest of all. One reportedly compared insurance companies to the tobacco industry. As a participant in the State of Texas's lawsuit against Big Tobacco, I can say with authority that the analogy is strained. That law professors engaged in rhetorical excess does not surprise me, however, and not just because my colleagues engage in it all the time. Law professors have a great deal at stake in the ALI's reputation as a scholarly institution. If the ALI comes to be seen as a place where the Business Roundtable, the American Insurance Association, the American Trial Lawyers Association, and other interest groups pursue policy agendas, the professoriat will wonder why legal academics are giving political bargains the stamp of scholarly approval. That is a question law professors who are actively involved in the ALI may not want to have asked.

VI. CONCLUSION

Paraphrasing Clemenceau, law has become much too serious a thing to be left to lawyers. Organized groups have significant financial interests in law. When it is to their advantage to find ways to influence the ALI, they will do so. The ALI's tradition of leaving clients at the

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and the First Restatement of the Law: "How We Did It," in RESTATEMENT IN THE COURTS 1, 3 (1945).

If the ALI is intent on keeping its current structure, it should drop the pretense of being insulated from politics and should present itself to the world as a source of legislation that is sophisticated, if not exactly scholarly. Otherwise, it should consider making radical reforms, such as eliminating voting processes and forbidding Reporters from accepting consultancies relating to their projects. No reform, however, is likely to insulate the ALI completely as long as it continues to admit members, including law professors, with economic ties to interest groups. The stakes have become too large to expect self-interested groups to exercise restraint, especially, but not only, when the ALI threatens to upset the status quo by endorsing reformist positions. If you are inclined to think otherwise, there’s a Jurassic Park in the Amazon that I’d like to sell you.