

# A BRIEF INTRODUCTION TO THE AMERICAN LAW INSTITUTE AND THE RESTATEMENTS OF TORTS

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Hon. Goodwin H. Liu\*

JUSTICE GOODWIN LIU:

Good morning. It is a pleasure to be here, and thank you to Dean Dickerson, Dean Byron Stier, Professor Christopher Robinette, and all the students who are in the audience today.

My role is to give you an introduction to the American Law Institute (ALI)<sup>1</sup> in my capacity as a member of the Council, the governing body of the ALI, on which I've had the honor of serving since 2013.<sup>2</sup> The shortest answer I can give to what the ALI is about is that this gathering is so emblematic of the ALI: A bunch of people spending a Friday nerding out about torts. That is the ALI's idea of a good time.

I am really a stand-in today for the true leaders of the organization whom I will mention: Diane Wood of the U.S. Court of Appeals for the Seventh Circuit, who recently agreed to be the next Director of the ALI,<sup>3</sup> succeeding Ricky Revesz, who had an amazing tenure as the ALI Director

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\* Associate Justice of the California Supreme Court; Elected member of the American Academy of Arts & Sciences, the American Law Institute, and the American Philosophical Society. I am grateful to ALI Law Fellow Will Tadros for his assistance in preparing these remarks.

1. The American Law Institute is the leading independent organization in the United States performing scholarly work to clarify, modernize, and otherwise improve the law. *See About ALI*, AM. L. INST., <https://www.ali.org/about-ali/> [<https://perma.cc/9JLV-BAFK>].

2. Justice Liu was elected to The American Law Institute in 2008, to the Council in 2013, and has served as Chair of the Projects Committee, as a member of the Executive Committee, and as Chair of the Special Committee on the ALI Young Scholars Medal. *ALI Members, Council Elected Member: The Hon. Goodwin Liu*, AM. L. INST., <https://www.ali.org/members/member/311652/> [<https://perma.cc/8E8L-TJYH>].

3. *ALI Members: Director, Council Emeritus, Life member, The Hon. Diane P. Wood*, AM. L. INST., <https://www.ali.org/members/member/103078/> [<https://perma.cc/EDV4-LZQZ>].

and is now working for the Biden administration.<sup>4</sup> We also have a new Deputy Director, Eleanor Barrett, whom we recruited from Penn Law School where she was Associate Dean for curriculum.<sup>5</sup> We are lucky to have such capable leaders for the organization.

We are gathered here today to discuss the Restatement of Torts, which is now a three-decade-long project of the ALI.<sup>6</sup> This is the Third Restatement, and we are going to hear from Mike Green and Nora Engstrom in a moment. But I want to give you some background about what the Institute is, what the purpose of a Restatement is, and how a Restatement comes into being.

Some of you may know that the ALI was founded 100 years ago—in fact, this year is the centennial<sup>7</sup>—at the urging of a committee of lawyers, judges, and professors,<sup>8</sup> who had come together to study the American public’s growing dissatisfaction with the administration of justice in the early part of the last century. After a careful examination, this committee issued a report identifying some causes of that dissatisfaction, which it labeled as the “two chief defects in American law.”<sup>9</sup>

The first was the law’s uncertainty, the most potent cause of which was the lack of a general agreement among lawyers concerning the fundamental principles of the common law.<sup>10</sup> This uncertainty, the committee said, bred dissatisfaction with the law for reasons that are still relevant today: It made it more difficult for people to enforce their rights, it generated useless litigation, it led to unnecessary delay and expense, it worked to the advantage of those who were willing to abuse the system; it confounded law-abiding citizens looking for guidance on how to act. The second defect was the unnecessary complexity of U.S. law.<sup>11</sup> The complexity, the committee said, tended to make the administration of justice a game in

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4. ALI Members, *Director Emeritus, Life Member: Richard L. Revesz*, AM. L. INST., <https://www.ali.org/members/member/100047/> [https://perma.cc/55RY-9LZQ].

5. ALI Members, *Deputy Director, Elected Member: Eleanor Barrett*, AM. L. INST., <https://www.ali.org/members/member/411166/> [https://perma.cc/YK3P-Q9M2].

6. The ALI “aims to complete an effort that began nearly three decades ago, when we started work on the Restatement of the Law Third, Torts: Products Liability.” ALI Director Richard L. Revesz, *Completing the Restatement Third of Torts*, AM. L. INST. NEWS (Apr. 4, 2019), <https://www.ali.org/news/articles/completing-restatement-third-torts/> [https://perma.cc/4RND-ZTRQ].

7. ALI President David F. Levi, *Thank You for Helping Us Celebrate the American Law Institute’s 100th Anniversary*, <https://www.ali.org/anniversary/> [https://perma.cc/4W5U-77PP].

8. Known as “The Committee on the Establishment of a Permanent Organization for the Improvement of the Law.” *About ALI*, *supra* note 1.

9. *Id.*

10. *Id.*

11. *Id.*

which knowledge and skill were more important for obtaining victory than a just cause. The most serious consequence of these defects, the committee explained, was the general lack of respect for the law. It was to address this overarching concern that the committee recommended the formation of a legal organization, the ALI, dedicated to improving the law.

As for the work that the organization should do, the committee was clear that the ALI should produce a Restatement of the Law that will not only help make certain much that is now uncertain, but also simplify the unnecessary complexities and promote those changes that tend to adapt the laws to the needs of life. I have always found it interesting that the work is not a “statement” of the law, but a “Restatement.” A Restatement, the committee said, should be at once analytical, critical, and constructive. *Analytical* in the sense that it should set forth the law rather than just give a history of its development, and it should do so by dividing up the topics in a particular field and subjecting it to careful study grounded in case law and what is actually happening in the courts. *Critical* in the sense that the work should not be simply a rote exposition of the law. Rather, it should involve a thorough examination of legal theory, setting forth the reasons for the law as it is and perhaps sometimes as it should be. *Constructive* in the sense that the Restatement, though largely based on court decisions and sometimes statutes, should also consider situations that are not yet discussed by courts or legislatures and might likely cause litigation in the future.

Torts was one of these fields identified by the committee as an area in need of a Restatement.<sup>12</sup> Torts was said to be full of the evil of uncertainty, and parts of the field—in particular, the notion of due care in the context of negligence—were so overelaborated, the committee said, that an emphasis on simple fundamental principles was needed. The committee recommended that the ALI begin its work there, in torts, and it did. Sixteen years later, in 1939, the first Restatement of Torts was completed.<sup>13</sup>

But the first Restatement did not end the ALI’s work on torts. As the committee said in 1923, the work of the ALI is not like the work of those who are building a house. There will never be a time when the work is done and labeled as a “complete Restatement of the Law.” The work of restating the law is akin to adapting a building to the ever-changing needs of those who dwell there. Such a task is, by definition, continuous. So, in the mid-1950s, the ALI began work on the Second Restatement of Torts, a

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12. The ALI began its work on Torts in June 1923. See *The Story of ALI*, AM. L. INST., <https://www.ali.org/about-ali/story-line/> [<https://perma.cc/J92V-9UQW>].

13. In 1939, the ALI published the fourth volume of Restatement of the Law of Torts, marking the completion of this 16-year endeavor. *Id.*

twenty-four-year-long project ending in 1979.<sup>14</sup> And just a decade later, the ALI began its work on the Third Restatement of Torts,<sup>15</sup> which we are gathered here to discuss today.

Over the decades, the Restatement of Torts has been the ALI's most cited work: over 90,000 total citations, with two-thirds by state courts and one-third by federal courts. The closest competitor is the Restatement of Contracts with just over 38,000 citations.<sup>16</sup> Thus, the Restatement of Torts occupies a very special place in the ALI's 100-year history. It can fairly be said that the Restatement of Torts is the ALI's marquee project.

With this background in mind, I want to offer a peek into how the sausage is made, so that you understand the level of care and effort that goes into the product. This is very high-quality sausage.

Each Restatement is authored by a Reporter or a set of Reporters—like Nora and Mike here—as well as sometimes Associate Reporters, all of whom structure the project, define its scope, prepare drafts, and present their work for review by various stakeholders.<sup>17</sup>

In the first step of the Restatement process, the Reporters prepare what is called a Preliminary Draft, which is some substantial segment of the project, and it is shared with two groups: (1) a set of Advisors who are a diverse group of individuals and subject matter experts from all sides, and (2) a self-selected group of ALI members, called the Members Consultative Group (MCG).<sup>18</sup> Both sets of participants provide feedback to the Reporters, who are then tasked with giving serious consideration to the comments in future drafts. Once the ALI Director deems a preliminary draft to be sufficiently advanced, the Reporters prepare what is called a Council Draft, which is shared with the ALI Council, the governing body.<sup>19</sup> The Council is responsible for approving or disapproving the substance of

14. Following the completion of the Restatement of Torts in 1939, the ALI later revisited the subject of Torts. The first Preliminary Draft of the Restatement Second of Torts was prepared in 1955. *Id.*

15. The Institute's function is centered on the ongoing reassessment of the law and the Restatements. To that end, the third series of Restatements started in 1978, beginning with Foreign Relations and later expanding to include Agency, the Law Governing Lawyers, Property, Restitution and Unjust Enrichment, Suretyship and Guaranty, Torts, Trusts, and Unfair Competition. *Id.*

16. See Richard L. Revesz, *Completing the Restatement Third of Torts*, THE ALI ADVISER (Apr. 3, 2019), <https://www.thealiadviser.org/inside-the-ali-posts/completing-the-restatement-third-of-torts/> [https://perma.cc/U68E-GT6G].

17. See *How the Institute Works*, AM. L. INST., <https://www.ali.org/about-ali/how-institute-works/> [https://perma.cc/EDT4-KEAV].

18. *Id.*

19. *Id.*

the work as the official position of the ALI. There is a lot of give and take in that process.

If the Council concludes that all parts of the draft should move forward, the Reporters prepare a Tentative Draft, incorporating any revisions directed by the Council. This draft is submitted to the entire ALI membership for consideration and approval at the Annual Meeting in May.<sup>20</sup> If you ever want to see what a parliamentary procedure looks like with 500 people in a ballroom, you can come to the ALI annual meeting and watch civil discourse governed by procedural rules. It is very lively, robust, and useful for sharpening the drafts. At some point in this process, the project is put forward for approval, sometimes with amendments that can be made by members from the floor of the annual meeting. Only when a project has garnered a majority vote of the entire membership present at the meeting does it then become an approved product of the ALI.

This entire process—from Preliminary Drafts to Council Drafts to Annual Meeting Drafts—continues until all parts of a Restatement have survived the gauntlet. The process is not quick, but it is very rigorous and would not work without the talent and dedication of our Reporters as well as our Advisors, Members, and Council Members—all of whom share their time and wisdom to ensure that the final product is of the highest quality.

Many of you here today are Reporters, Advisors, or ALI members, and the ALI is immensely grateful for all that you do to further the mission of clarifying, modernizing, and improving the law.

As a brief coda to these remarks, and as further contextualization for the work we do at the ALI, I cannot help but think about the headlines we have been reading this week about the judicial reforms proposed in Israel.<sup>21</sup> Last night I spoke to a colleague who is a law professor there, and she showed me videos of the massive protests and emotional speeches throughout the country. What I kept thinking about was not only how moving it was that ordinary people care so much about the rule of law, but also the hope that here too, in our country, our citizenry would care enough about the rule of law to recommit ourselves to the basic values of a constitutional democracy against whatever threats may arise.

So much of the work that the ALI does and that all of you do as part of the legal profession is designed to fortify and ensure our society's

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20. If the Council determines that the draft is not ready for membership voting but would benefit from discussion at an Annual Meeting, the Reporters may prepare a "Discussion Draft." Eventually, the Discussion Draft is revised and resubmitted as a Tentative Draft. *Id.*

21. See Ilan Rosenberg, *Thousands Join Israeli Judicial Protests Amid Soaring Tensions*, AL JAZEERA (Apr. 8, 2023), <https://www.aljazeera.com/news/2023/4/8/thousands-join-israeli-judicial-protests-amid-soaring-tensions> [<https://perma.cc/Q63L-85PS>].

unwavering dedication to the rule of law. That is the big picture of what we are doing here today.

I now welcome Mike and Nora to the podium. Thank you.