

## In Memoriam: Ruth Bader Ginsburg

United States Supreme Court Associate Justice Ruth Bader Ginsburg, the second woman appointed to the Court and a trailblazing advocate for gender equality, has died.

“Our nation has lost a justice of historic stature,” Chief Justice of the United States John Roberts Jr. said. “We at the Supreme Court have lost a cherished colleague. Today we mourn but with confidence that future generations will remember Ruth Bader Ginsburg as we knew her, a tireless and resolute champion of justice.” At ALI’s 2018 Annual Meeting, Chief Justice Roberts presented ALI’s Henry J. Friendly Medal to Justice Ginsburg.



A legal and cultural icon, Justice Ginsburg was a central figure of the legal fight for women’s rights in the 1970s. Prior to her appointment on the United States Court of Appeals for the District of Columbia Circuit in 1980, she was a leader in the courts and co-founded the Women’s Rights Project of the American Civil Liberties Union.

Justice Ginsburg maintained a sense of humor and humility about her fame. Upon receiving the Friendly Medal, she remarked, “I suppose young people latched onto me because they yearn for something advancing society’s welfare to believe possible. And I fit that bill because I had the good fortune to be alive and a lawyer when society was prepared to accord equal citizenship stature to women. Helping to propel that change was enormously satisfying.”

Justice Ginsburg served on ALI’s Council from 1978 to 1993. ALI’s Immediate Past President Roberta Cooper Ramo, Justice Ginsburg’s longtime friend, sat on stage with Justice Ginsburg at the 2017 Annual Meeting to discuss topics ranging from the Equal Rights Amendment to the opera. Justice Ginsburg told a story that demonstrated her continuing role in the fight for equal rights: “You will read a dissent from the bench if you think not only did the Court get it wrong, its error was egregious. That’s why I read the Lilly Ledbetter dissent from the bench. When one writes that kind of dissent, an immediate audience is in mind, and that audience is Congress. ... In the Lilly Ledbetter dissent, my last line was: The ball is now in Congress’ court to correct the error into which my colleagues have fallen. That bill ... passed with overwhelming majorities in both houses.”

Everyone at The American Law Institute who had the privilege to work with or learn from Justice Ginsburg extends our deepest condolences to her daughter, ALI member Jane Ginsburg, other family, friends, and colleagues.

**ALI COUNCIL MEMBERS PAY TRIBUTE TO JUSTICE GINSBURG ON P. 4.**

THE DIRECTOR’S LETTER BY  
RICHARD L. REVESZ

## The Role of Restatements: Views of a Founding Father

On June 30, 1923, William Draper Lewis addressed a gathering of the Maryland State Bar Association at Atlantic City, New Jersey. His speech was entitled, “The Work of The American Law Institute.” The ALI had then been in existence for four months, and Lewis—who had been Dean of the University of Pennsylvania Law School from 1896 to 1914—was serving as Director of the fledgling Institute. His comments at that early juncture provide remarkable insight into the ALI’s mission, as well as valuable gloss on the text of the February 1923 Report proposing the Institute’s establishment, of which Lewis was the primary author.

I would like to share some excerpts from Director Lewis’s address, relating to questions about the role of Restatements of the Law, which we continue to debate to this day and which I discussed in my Summer 2019 Director’s Letter. Interspersed with these excerpts are some lessons we can draw from Lewis’s early comments.

In his address, Lewis explains that:

“[T]here are two or three questions often asked which I would like to state and answer. One is: How far will the restatement change the law?”

“The idea of the man on the street is that there is always a pre-existing law for every situation. That of course we lawyers know is not true. There is not a statute or judicial decision applicable to every situation.

“If a situation on which at present there is no law is a situation that is likely to

*continued on page 3*

# The Institute in the Courts: Maryland Court of Appeals Adopts Section of Torts 3d: Liability for Economic Harm

In *Barclay v. Castruccio*, 230 A.3d 80 (Md. 2020), the Court of Appeals of Maryland decided to recognize the tort of intentional interference with a prospective inheritance or gift, and to adopt the standards for that tort as set forth in Restatement of the Law Third, Torts: Liability for Economic Harm § 19.

In that case, a residuary beneficiary of an estate filed, *inter alia*, a claim of intentional interference with an expectancy against the decedent's widow, alleging that the defendant "maliciously depleted [the plaintiff's] inheritance by forcing the Estate's expenditure of attorneys' fees to defend against [the defendant's] groundless lawsuits and efforts to initiate criminal charges" against her.

Before his death, the decedent and the defendant had divided their joint assets, and the decedent had bequeathed \$800,000 to the plaintiff, \$100,000 to two others, and the remainder of his estate to the defendant, so long as the defendant survived him, executed her own will prior to his death, and filed that will with a county's Register of Wills, but if the defendant failed to fulfill those terms, the residuary estate would pass to the plaintiff. At the time of the decedent's death, the defendant had not filed her will, and thus the plaintiff inherited the residuary estate. In her complaint, the plaintiff claimed that the defendant filed seven lawsuits against her and the estate in an effort to overturn the decedent's estate plan and tried to bring criminal charges against her. The circuit court granted the defendant's motion to dismiss the complaint, and the plaintiff appealed the dismissal of her claim of intentional interference with an expectancy. The Court of Special Appeals affirmed the dismissal, finding that "the complaint cannot support a claim for interference with expected inheritance, even if we were to recognize one."

Affirming, the Court of Appeals of Maryland held that it would recognize the tort of intentional interference with an inheritance or gift as set forth in Restatement of the Law Third, Torts: Liability for Economic Harm § 19. Citing § 19, Comment *a*, the court explained that "interfering with an expected inheritance is just a species of interference with economic expectancy," and "it is settled law in Maryland that one may recover for wrongful interference with contractual or economic relations." The court observed that the tort of intentional interference with an inheritance or gift has been recognized in about half the states (citing § 19, Reporter's Note to Comment *a*), and pointed out that, by "includ[ing] an explicit directive that the tort 'is not available to a plaintiff who had the right to seek a remedy for the same claim in a probate court,'" § 19(2), and Comment *c*, "plainly and fully addressed" the concern that the tort could interfere with probate jurisdiction.

The court proceeded to determine that the dismissal of the plaintiff's interference-with-inheritance claim was correct because the alleged interference occurred after the decedent's death, and the plaintiff did not claim that the defendant interfered with the decedent's designation of the plaintiff as the beneficiary. The court reasoned that the Illustrations in § 18 (Interference with Economic Expectation) "reveal that the core principle underlying the interference tort generally is that the defendant shall have taken some wrongful action that interferes with a contract, a business relationship or with a testator's or donor's relationship with the plaintiff," and that § 19 and Comment *b* thereto, as well as § 19's relevant Illustrations, "suggest[] that the defendant must interfere with an ongoing relationship, and therefore groundless litigation post-death will not suffice." The court was also persuaded by the fact that successful interference cases in Maryland, as well as other jurisdictions, arose from an interference with an ongoing or prospective relationship, rather than an interference occurring after the relationship had ended, such as in this case.

The concurring opinion agreed with the majority's adoption of § 19, noting that § 19 "closely mirrors the standard of liability for intentional interference with an economic relationship as articulated by this Court . . . and is narrowly tailored to provide a remedy only in limited circumstances where there is no remedy available within the probate process," but argued that § 19 required that the defendant interfere with the plaintiff's gift or expectancy, not the plaintiff's relationship with the decedent, and therefore did "not require that the predicate harm, which forms the basis for the cause of action, occur prior to death." The concurring judge nevertheless agreed that dismissal of the plaintiff's action was appropriate under § 19 because she had the right to seek a remedy for the same claim in a probate court.

The concurring opinion agreed with the majority's adoption of § 19, noting that § 19 "closely mirrors the standard of liability for intentional interference with an economic relationship as articulated by this Court . . . and is narrowly tailored to provide a remedy only in limited circumstances where there is no remedy available within the probate process," but argued that § 19 required that the defendant interfere with the plaintiff's gift or expectancy, not the plaintiff's relationship with the decedent, and therefore did "not require that the predicate harm, which forms the basis for the cause of action, occur prior to death." The concurring judge nevertheless agreed that dismissal of the plaintiff's action was appropriate under § 19 because she had the right to seek a remedy for the same claim in a probate court.

**The Institute is currently working on other projects that will complete the Restatement of the Law Third, Torts. Ongoing Restatement of the Law Third, Torts, projects include: Defamation and Privacy, Intentional Torts to Persons, Remedies, and Concluding Provisions. The subject of property torts will be addressed in the Restatement of the Law Fourth, Property. To join the Members Consultative Group for these or other projects, visit the projects page on the ALI website at [www.ali.org/projects](http://www.ali.org/projects).**

## THE DIRECTOR'S LETTER CONTINUED FROM PAGE 1

arise, the restatement will deal with it, and dealing with it will make new law."

Here, Lewis states clearly that a Restatement may address an issue on which courts have not yet ruled, if the issue is likely to arise. This comment links to a passage in the 1923 Report, which states: "The restatement should be constructive. . . . [W]hile necessarily largely based on the two official sources of the law, statutes and decisions, it should not be confined to examining and setting forth the law applicable to those situations which have been the subject of court action or statutory regulation, but should also take account of situations not yet discussed by courts or dealt with by legislatures but which are likely to cause litigation in the future."

In our current work, commentators sometimes insist that each Section of every Restatement must rest on some direct support in case law. While we nearly always adhere to this practice, it is not a mandate with grounding in the Institute's history. Sometimes, it is the ALI's ability to take the long view—anticipating issues on the horizon, and suggesting how existing law could be extended to apply to those issues, or, as Lewis states, even suggesting new legal rules—that allows a Restatement to best add value in an evolving area of the law.

And, while Lewis uses the phrase "make new law," he knew that Restatements do not constitute "law." In this context, Lewis uses the verb "make" to refer to the act of stating a legal rule that had not previously been applied by courts. Indeed, later in the address, Lewis says explicitly that he is referring to instances in which a Restatement may "suggest a modification" of the law.

Director Lewis continues on to say:

"Then there are situations where there is a conflict of law, because of conflicting decisions. The Institute will have to decide between them."

Lewis describes a situation we encounter with regularity: the courts have gone in different directions on a legal question, yet in the Restatement we must select one rule to restate in the black letter. Often, the cases are fairly closely divided, or the sample size of decisions is small, or there are very few rulings from state supreme courts, rendering it difficult to crown an indisputable "majority rule," making the analysis that much harder. In these scenarios, as Lewis explains, we must choose which rule to restate in the black letter. Fortunately, the ALI has over time developed guideposts for this process, most importantly the "working formula" set forth by Director Herbert Wechsler in the mid-1960s, under which "we should feel obliged in our deliberations to give weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs."

The need to discern the best rule from among competing approaches is a quintessential task of the common-law judge, which is why it likewise comprises a critical part of the ALI's work in producing Restatements. Our founding Director clearly recognized this need.

Lewis then moves on to his final point in answer to the question, "How far will the restatement change the law?" He asks:

"But suppose a principle already established by all cases or the weight of judicial authority is regarded by the drafters of the restatement as unsound, must they follow the cases or may they set forth what they believe the law ought to be?"

This question continues perennially to inspire debates with respect to ALI projects. Lewis begins his response to it by referring back to the 1923 Report proposing the ALI's establishment. He cites "the rather cryptic expression which I used" in the 1923 Report: to "make the law better adapted to the needs of life." In his address, he explains that:

"Where the great weight of public opinion desires the law as applied to a situation to produce a certain result and it does not do so; then the law within the meaning of the expression as used in the Report does not meet the needs of life."

He adds:

"[I]f the weight of existing case law supports a rule of law which is out of harmony with the end desired by the overwhelming weight of public opinion in the community, then the drafters of the restatement may refuse to follow the rule established by the weight of the decisions, and to this extent change the law."

Lewis emphasizes, however, that the ALI is not to be a "reforming" institution "in the popular sense of the word." He cautions that "[i]t would be fatal to our enterprise if the Bar and the public—primarily the Bar—get the false idea we are going to reform all law." Thus, going against the overwhelming weight of judicial authority, according to Director Lewis, was something that the ALI could (and should) do sometimes, but not often.

At the same time, Lewis recognized the importance of transparency: "Anybody reading [a Restatement's citations to authority] will not only get a complete, and we hope, scientific analysis of the problem presented, but also will obtain knowledge of the exact condition of the present law as shown by the decisions—of the confusion, if that exists, or of the certainty, if that exists—so that a person looking at the [full Restatement] can see to what extent, if any, the principles set forth in the restatement [would] modify the existing law."

As I discussed in the Summer 2019 issue of this newsletter, the ALI has continued to focus on these weighty issues over the course of our near-century of work, including through the leadership of Director Wechsler during the Restatement Second era and through our more recent clarifications to the Style Manual. Ultimately, we have ended up roughly where we started. This continuity underscores the impressive foresight of our founders.

**Editor's Note: A version of this Director's Letter, featuring citations to the materials referenced in the main text, is posted on the News page of the ALI website: [www.ali.org/news](http://www.ali.org/news).**

### EDITOR

Jennifer L. Morinigo  
(215) 243-1655  
jmorinigo@ali.org

### MANAGING EDITOR

Pauline Toboulidis  
(215) 243-1694  
ptoboulidis@ali.org

### ASSOCIATE EDITOR

Todd David Feldman  
(215) 243-1682  
tfeldman@ali.org

### ART & PRODUCTION

Kathleen A. Morton  
(215) 243-1612  
kmorton@ali.org

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

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

# In Remembrance and Appreciation of Ruth Bader Ginsburg

I first met Justice Ginsburg in the early 1980s at an American Law Institute Annual Meeting. I was a new Assistant U.S. Attorney. She was a somewhat newly appointed judge on the D.C. Circuit and was a member of the Council of the ALI. There was already a buzz around her. I was eager to meet her because she had been a student of Professor Gerald Gunther's at Columbia in the 1950s, and Professor Gunther had helped her get a clerkship, her first job, which was no small feat for a woman at that time. Gerry and Justice Ginsburg had become close friends. I, too, had been a student of Gerry's, also becoming a close friend.

It was not until I became President of the ALI many years later that I really became comfortable around Justice Ginsburg. She seemed formidable although, as I came to understand, in reality, she was just a little shy. In 2018, the ALI awarded the Henry J. Friendly Medal to Justice Ginsburg. Chief Justice Roberts, a Friendly law clerk, graciously made the presentation. It was wonderful to see Justice Ginsburg so pleased, touched, and happy. In introducing the Chief and Justice Ginsburg, I remarked on Justice Ginsburg's remarkable contributions to the law, particularly to gender equality. In receiving the award, in a bit of self-deprecating humor, she referred to her new found fame in the age of social media:

"A word about the notoriety I have recently attracted. It is amazing that at my advanced age, 85, so many people want to take a picture with me. T-shirts, tote bags, bibs, mugs, closet fresheners, coloring books, even tattoos bear my name and face. I suppose young people latched onto me because they yearn for something advancing society's welfare to believe possible. And I fit that bill because I had the good fortune to be alive and a lawyer when society was prepared to accord equal citizenship stature to women. Helping to propel that change was enormously satisfying."



One night at dinner in D.C. with the Justice and Neil Siegel, after one of Neil's programs with Justice Ginsburg at the Duke D.C. Summer Institute, she was in a lively and expansive mood. She was among friends. The small group included Neil, whom she was so fond of, Stephen Wiesefeld, one of her clients in the 1970s in a well-known case with whom she maintained a strong bond, Stephen's spouse Elaine, one of her grandsons, and me. She had personal and professional connections, from different points of her life and career, with everyone at the table. She was at ease, voluble, and engaging. We planned her next trip to North Carolina when she could come to Duke and also visit the Wiesefelds. Sadly because of her own illnesses and the coronavirus, this trip never happened.

In thinking of her, and trying to catch some aspect of her enormous influence, I would emphasize her professionalism as an appellate judge and Justice. Her opinions were clear and tightly reasoned. That's part of the craft. But there was something more, symbolized by her long and loving friendship with Justice Scalia. Their friendship seemed such a surprise to many. But why? They were both New Yorkers of a certain age who loved opera, travel, good conversation, and the law. Their disagreements over cases was just part of what made the work so absorbing, and, as Ruth often said, Nino's dissents made her opinions that much better. In the end, they were both judges, doing their job, enjoying the give and take— a model for the rest of us of professional civility and maturity in divisive times.

We will miss her example, her dedication to justice and the law, and her determination to give her all to her country, family, and profession.

**ALI President David F. Levi**  
Duke Law School



Justice Ruth Bader Ginsburg served on the Council of The American Law Institute from 1978 to 1992. In 1972 three men nominated her to an all-male nominating committee of the ALI. To their great credit, the Committee recognized a brilliant legal mind when they came across one, and she was elected to the ALI in 1972. Before she left the Council for the United States Supreme Court, she was an active participant in the work and debate of the ALI. But she never really left us. She came to almost every Sunday night Council dinner that I remember, even when the press of the end of term weighed heavily upon her. The only dinner I remember her missing was one Sunday night toward the end of her husband Marty's life. Marty too was an ALI member. In fact until his last year he regularly asked me why the ALI could not focus its great brain power on the U.S. Tax Code. I explained that I was a failure at selling that idea to any of the three Directors of the ALI that I knew. He never bought it.

One of the magnificent aspects of her personality and character that is rarely mentioned in the outpouring of writing about her, is her astonishing willingness to look far outside the bubble in which the Justices live for input about what life is like in and out of the law. Her encyclopedic knowledge of opera sometimes eclipsed the total joy that she found in the music, the productions, and everyone she met who was associated with this most complex art form. She wanted to meet and hear about not just the famous singers, but those just starting out, the directors and the stage managers. She wanted to make sure, when she had the time to speak at a law school that it wasn't just the "usual suspects" as she said to me once. Justice Ginsburg understood well what it meant to a law student and a faculty member of state law schools all across the country that never had other Justices speak.

While the summer was a vacation time, when she was in New Mexico she graciously agreed to speak to the New Mexico Bar



association, which moved its annual meeting to the week in August she came to Santa Fe, so that its members could hear her. More than 1000 lawyers, judges, law students, and their families came to see and hear her. They rose as one to cheer and welcome a person whom they felt, each and all, understood that the highest court in our democracy was truly for all of us; all colors, all choices about who we love, all religions and political persuasions, all backgrounds poor and rich, urban and rural. Maybe it takes someone who has herself been discriminated against and never accepted that discrimination as right or as the final word, to really sit in judgement of the momentous issues that affect us all. But to many of us, lawyers in practice, judges on the bench, and those in our government somehow forget what is lost to the country and the person when discrimination is allowed or even supported. Justice Ruth Bader Ginsburg never ever did to her last breath.

Justice Ginsburg loved her family, the law, the ideals of justice, the American democracy, opera, and The American Law Institute. Her legacy must live in how all of us live our lives as lawyers, as judges, and as American citizens. We must cherish not her fame, but her ideals. We must emulate her willingness to confront those limitations in the law and in American life that try to limit the potential of any American who does not fit some preconceived mold of who they are supposed to be, how they are supposed to vote, where there are supposed to live. In her memory our work must go on with even more rigorous engagement in improving the law; unafraid either of contentious legal issues or of the compromises necessary to bring progress. We do this also in her spirit of collegiality and respect for those who hold different viewpoints than our own. What a lucky break to have had her in our lives and the life of our cherished ALI.

**ALI Immediate Past President Roberta Cooper Ramo**  
Modrall Sperling

## IN REMEMBRANCE AND APPRECIATION OF RUTH BADER GINSBURG CONTINUED FROM PAGE 5

I'm often asked what it was like to clerk for Justice Ginsburg.

I first met Justice Ginsburg at my clerkship interview. I was excited, and nervous, so I asked a couple of former clerks for advice. They said they loved working with her, and they noted that she spoke softly and often paused between sentences, so I should be careful not to interrupt her. Over the years, I got used to her pace of conversation, but at the interview, I let so much time pass before responding to things she said that she must have thought I was waiting for translation.

The fact is that Justice Ginsburg was always very careful in choosing her words, written or spoken. If we were as careful as she was, we might slow down and pause more often too.

Ten minutes into the interview, she offered me the clerkship. I was so thrilled that the rest of the conversation was a blur. I do remember that she had read my writing sample, an obscure law review article titled “Social Security and the Treatment of Marriage.” She knew this topic inside and out because one of her favorite cases as a litigator was *Weinberger v. Wiesenfeld*, in which the Supreme Court struck down a Social Security provision that allowed widows but not widowers to collect survivor benefits. We found common ground in critiquing gendered breadwinning and caregiving roles, and now as a parent balancing work and home life, I often draw inspiration from the example that she and her husband Marty set for all of us.

During my year at the Court, the clerks had a regular basketball game on Tuesdays and Thursdays on the top floor of the building, “the highest court in the land.” During one game, I collided with a very genial and very tall Scalia clerk, and I badly sprained my ankle. As I lay in bed the next morning, the first

person to call to check on me was Justice Ginsburg—and as we know, she was not a morning person. She was incredibly thoughtful that way.

Another memory is the time Justice Ginsburg took me to the opera. I met her at her apartment, and we walked together to the Kennedy Center and back again afterward. This was well before she became a global celebrity. As we walked, she talked about her neighborhood routines and pointed out some of her favorite shops and her dry cleaner. In so many ways, she was an extraordinary person, but I was glad to see how she was ordinary too.

Justice Ginsburg was a meticulous writer and editor. During the clerkship, I happened to discover that in reading our bench memos, she regularly marked various typos and missing commas in faint pencil. She never returned those memos to us; it was just her way of demanding perfection in whatever writing was before her eyes. It taught me to be vigilant because every error, no matter how small, is a speed bump on the road of one's argument or analysis.

I clerked in the 2000 term, the year of *Bush v. Gore*. Throughout that controversy, Justice Ginsburg was a paragon of even temperament and collegiality. She analyzed the issues carefully and never lost her cool. Having now, as a judge myself, experienced disagreement over matters far less consequential than the presidency of the United States, I have even more regard for how she navigated that challenging period.

*Bush v. Gore* was perhaps the beginning of Justice Ginsburg's public identity as a “great dissenter.” In hindsight, this role was hardly foreordained. But she was resolute on matters of principle, and she grew into the role. Her notable dissents—

*Ledbetter, Shelby County, Epic Systems, Hobby Lobby, Carhart, Wal-Mart* and others—are studies in judicial craft. She was masterful at framing issues and using language. She knew what to say and what to leave unsaid. Her writing was never toxic, but powerful enough to sting.

Although dissents are sometimes seen as acts of futility, her dissents came to be viewed as acts of resistance, especially when she dissented against an all-male majority. She inspired countless women and girls to believe their voice matters and to have the courage to use it.

I clerked for Justice Ginsburg one year after she was diagnosed with colon cancer. During the clerkship, she underwent several rounds of treatment. None of it could have been pleasant, but she never missed oral argument and finished all her work on time. If she was ever anxious or in pain, she never let it show.

Over the years, there were multiple cycles of a health scare followed by intense media speculation, and then her successful recovery and return to work. Frankly I became a bit desensitized to worries about her health. She told me that one time, when she was a little slow in getting up from her seat at the end of oral argument, the press inquired whether she was ill. Not at all, she said—the reason was that she had kicked off her shoes during argument and was having difficulty putting one of them back on!

She appeared to be in good health all the way to this year. The last time I saw her was in February at a small dinner party in Washington. She was in good spirits and looking ahead to future plans. When she arrived that evening, she said her doctor had limited her to one glass of wine. By the end of dinner, she was on her third.



Despite her illnesses, she never stopped working and never stopped fighting until the very end. She understood that it is one thing to have a disease, but quite another for the disease to have you.

Justice Ginsburg dedicated her life to making America better, and she gave it her all. The massive outpouring of grief throughout the nation is truly extraordinary. The law books contain only part of her powerful legacy. The rest resides in the hearts and minds of the millions who love and admire this exceptional woman.

**Goodwin Liu**

California Supreme Court

*Adapted from an article posted on SCOTUSblog.com in September.*

I knew Ruth Bader Ginsburg only through The American Law Institute. It was a small segment of her full circle, but astonishingly rich, impressive, and warm.

The first part began in 1976, on joining the Advisers to the Restatement Second of Judgments. It was a small group of a dozen or so. The second was another Advisers group, this time the Complex Litigation undertaking, a slightly larger group. The third, overlapping the second, was in Council.

The great strength of the ALI lies in bringing together the practicing profession, judges, and academics. Ruth Ginsburg was all three in herself. Her intelligence, learning, experience, wisdom, and judgment served the ALI work admirably. Uncounted admirers know the works of Professor Ginsburg, advocate Ginsburg, Judge Ginsburg, Justice Ginsburg, and proceduralist Ginsburg. To work with her was to experience all of these characters and qualities, but even more to enjoy the depth of her humanity.



**Edward H. Cooper**

University of Michigan Law School



The little joke between Justice Ginsburg and me was that I was her “civil procedure teacher.” She would often call me that, with a twinkle in her eye, since we both knew who was the real expert in procedure. But it was a lovely way to recall our first meeting in the late 1980s, when she was a judge on the D.C. Circuit and I was a professor at the University of Chicago Law School, which was hosting a summer “continuing educational” program at which then-Judge Ginsburg was an attendee. We quickly became fast friends. In later years, I had the pleasure of traveling to the European courts with the Justice and her beloved husband, Marty, and I saw her frequently after I became a judge. She will always be an inspiration to me and to countless young women and men who saw her brilliance, determination, and humanity on display throughout her career. She holds a unique place in American history, and we are lucky to have known her.

**Diane P. Wood**

U.S. Court of Appeals, Seventh Circuit

## IN REMEMBRANCE AND APPRECIATION OF RUTH BADER GINSBURG CONTINUED FROM PAGE 7



I clerked for Justice Ginsburg in the 2003 term. She was a role model for me in law and in life. She taught me how to write, how to advocate, and how to stand by my work. She taught me how to be a teacher, a spouse, a mother, a mentor, and a friend. She worked harder than anyone I have ever met. She dressed better too. She was a proud Jewish American woman, often invoking the phrase from Deuteronomy—*Tzedek, Tzedek Tirdof*, “Justice, Justice shall you pursue” (the phrase aptly concludes: “that you may thrive”)—as a guiding force in her life. She was already famous when I clerked for her. But that she later became a feminist icon in her octogenarian years for millions of little girls around the world—including my own eight-year-old, who is named Ruth (for my mother, but a joyful and oft-celebrated overlap), is nothing short of extraordinary.

She would want us, always, to remember the work. Her once-radical vision of gender equality has been so successful that we take it for granted. But we should never forget that it was Ruth Bader Ginsburg’s case, *Reed v. Reed*, in 1971, that occasioned the U.S. Supreme Court to strike down a state law for the first time, under the Equal Protection Clause, based on sex discrimination. 1971. Just 50 years ago. That’s too recent to take for granted as we do, but it is because Justice Ginsburg was so relentlessly successful in driving that concept of gender equality into every aspect of American life that we have that precious luxury, which is now ours to safeguard.

Her vision was radical because she rejected the views of those who wanted women to get special—she would say “pedestal”—treatment. For Justice Ginsburg, equality meant the *same* treatment for women and men. And she believed that applied to personal life too. It was no accident that many of her famous cases had men in stereotypically women’s roles seeking the same benefits a woman would receive under the circumstances. One of her favorite cases, *Weinberger v. Weisenfeld*, involved a man who wanted to stay at home and care for his children after his wife passed.

For the next 45 years, she extended that vision of equality into every aspect of American life, from workplace, to education, to criminal procedure. And she lived it. Her marriage to the love of her life, Martin Ginsburg, was one for the ages, and it was a marriage that role-modeled for all of her clerks an insistent equality in parenting.

She was the Court’s titan of civil procedure, a course I teach to first-year law students. There comes a point in every semester, when we get to mid-90s or so, when I have to tell my students that the fact that almost every major opinion we read is authored by Justice Ginsburg is not due to a professor’s bias for her former boss. Justice Ginsburg defined the modern field of procedure. It was painful to see the Court’s 2020 Term open with *Ford Motor Co. v. Montana Eighth Judicial District*, a potentially major personal jurisdiction case that she surely would have shaped.

Age, and even health problems, only seemed to make her voice grow louder. Her famous dissents, especially beginning in the late 2000s, when she found herself the only female voice on the Court, often read like a wake-up call to her colleagues to empathize with perspectives and life experiences different from their own.

She was the most careful, deliberate, even-keeled, and graceful person I have ever met. She was as caring as she was strong. My house is littered with books disavowing princesses and such—gifts that arrived in her chambers from all over the world, and that she thoughtfully put aside for little Ruths everywhere to be inspired by. The U.S. Marshals had to take lessons to keep up with her horseback riding skills.

She lived a life full of the things she loved, often taking in an opera only to come back to her writing pad after midnight. She out-prepared every litigant who came before her, but gave every one of them the collegial respect they deserved. Her famous faxes came to us at all hours of the night. Her black coffee always brewed strong.

She was a force of nature on the Court until the very end. From her hospital bed in the Court’s latest gender equality case, heard in May 2020, she was the loudest voice asking the government to consider the realities of blocking access to contraception. As she repeatedly, ever more insistently, asked the attorneys how to justify that women’s “interests could be thrown to wind,” I texted my co-clerk to marvel at our Justice, still on fire. Her powerful dissent in that case came out just two months before her death.

Perhaps most remarkably, Ruth Bader Ginsburg did all of this with an unflagging optimism. She loved the Court, and always had faith in the Court and her colleagues to put our institutions, our country, and our Constitution first. In the now-famous *Scalia/Ginsburg* opera celebrating the pair’s storied relationship, she loved the final duet: “We are different, we are one.” As she put it; “The idea is that there are two people who interpret the Constitution differently yet retain their fondness for each other, and much more than that, their reverence for the institution that employs them.”

The enormity of Justice Ginsburg’s contributions are matched only by her remarkable character and heart, and the gaping hole, in both life and the law, that she leaves behind.

**Abbe R. Gluck**  
Yale Law School

*Parts of this remembrance were adapted from an essay Gluck co-authored in The New York Times in September.*

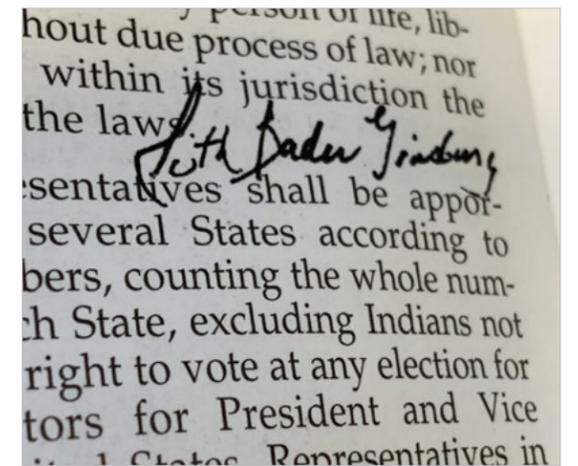


Presented with the Henry J. Friendly Medal by Chief Justice Roberts for her contributions to the law, Ruth Bader Ginsburg, with her customary wit and a nod to her recent notoriety, noted: “It is amazing that at my advanced age, 85, so many people want to take a picture with me.” Our members responded with appreciative laughter and a standing ovation. Ruth was devoted to our Institute and served on the Council and as an Adviser to the Restatement Second of Judgments. Precision, clarity, and cogent judgment characterized her opinions. She was sparing with dissents but when she dissented she was unsparing in her eloquence and fierce devotion to equality. I remember with affection our conversations over the years, our being fellow left-handers, and her friendly encouragement. Ruth was a great American. We celebrate her many gifts to our country and the chance that life gave us to know her.

**Michael Traynor**  
Cobalt LLP

Justice Ginsburg was a tremendous advocate for gender equality and an unparalleled, staunch protector of the rule of law. In 2010, as President of the ABA, I had the privilege of conveying the ABA Medal of Honor (the ABA’s highest honor) on Justice Ginsburg in recognition of her work as an academic, advocate, and jurist who had a profound impact on the development and advancement of gender equality in the law. Her contributions to the law and the profession are enduring and vast. The most laudatory dimension of Justice Ginsburg is that not only did she lead the legal fight to change the law but she worked tirelessly to open the door of opportunity for and act as a mentor promoting women. She also was a role model who inspired generations of women, and demonstrated repeatedly women can “do it all.” Her legacy of strength, tenacity, and brilliance as a lawyer—who loved and was devoted to her husband Marty and her family—will continue to inspire women for generations. We will all miss her profoundly—but we must devote ourselves to continuing her fight for equality and respect for the rule of law!

**Carolyn B. Lamm**  
White & Case LLP



I was fortunate to spend time with Justice Ginsburg, our Circuit Justice, at our annual Second Circuit Judicial Conferences, which she never missed. At one of these, we all watched *RBG* together—that was truly special.

But a moment that especially stands out was from early in my tenure as a judge, following her report of the Supreme Court’s term. I have long carried with me a pocket copy of the U.S. Constitution. For many years, beginning with an encounter with Betty Friedan in the taxi line at the Charles Hotel, I have asked people whom I admire to sign it on their favorite article or amendment. Justice Ginsburg smiled at the request, and not surprisingly, she signed it on the Fourteenth Amendment. A picture of this is framed in my chambers, that copy of the Constitution is in my desk, and they both inspire me each and every day—especially these days.

**Elizabeth S. Stong**  
U.S. Bankruptcy Court, Eastern District of New York

## IN REMEMBRANCE AND APPRECIATION OF RUTH BADER GINSBURG CONTINUED FROM PAGE 9



I had the great fortune to meet Justice Ginsburg in my final year at Georgetown Law School, when she was a professor at Columbia Law School and she graciously answered my plea for materials on sex discrimination. That generous gesture grew into a wonderful friendship over the years, through teaching together in France, exchanging many meals and family stories, and sharing a love of music.

She loved the law and was an incredible role model for me as a judge. Her writing was powerful, but never mean or caustic. In February 2020, I had the privilege of interviewing her about the 19th Amendment. Justice Ginsburg was an incrementalist who started a revolution. She forever changed the landscape of gender equality. She had a stunning intellect, warm heart, and playful spirit—and a moral compass that was all in for justice and equality. With many tears and thanks, goodbye Ruth.

**M. Margaret McKeown**  
U.S. Court of Appeals, Ninth Circuit

In the fall of 1980, Ruth Bader Ginsburg and I went to the White House with a group of women President Jimmy Carter had appointed to the federal bench. We were greeted by then Secretary of Education, and ALI Council member, Shirley Hufstедler, who had resigned her judgeship on the Ninth Circuit to become Carter's Secretary of Education. We all figured that one of us would end up on the Supreme Court, but we thought it would be Shirley. She escorted us to the Oval Office for a famous group photograph with the President. The photo became a fixture in Ruth's chambers and in mine. Carter, of course, never had a Supreme Court appointment. Others in the group included future distinguished Council members Patricia Wald and Carolyn King. Ruth, however, was the one who made it to the Court, and, when she was there, made us all proud.

**Mary M. Schroeder**  
U.S. Court of Appeals, Ninth Circuit

Justice Ginsburg was one of this country's most passionate and brilliant defenders of our Constitution and the American ideals of equality and democracy. On a very small personal note, I first met Justice Ginsburg in the 1980s. She was a judge on the U.S. Court of Appeals for the D.C. Circuit, I was an attorney in private practice in Washington, D.C., and she appointed me to serve on that court's Appellate Rules Advisory Committee. In addition to committee meetings, I met with then Judge Ginsburg in her chambers at least twice for one-on-one discussions about the Rules, in particular on how to encourage and facilitate pro bono representation for pro se litigants in the Court of Appeals. I remember that her chambers were the most tastefully furnished and graciously appointed of any judge's chambers I have ever been in. The space itself invited you to relax and think.

What I remember most, however, is how knowledgeable she was about the court's rules—she had taught civil procedure in law school—how soft-spoken yet inexorably forceful she was in the presentation of her views, and how considerate she was to this young(ish) lawyer, who, even then, was awed to be in her presence! Years later, I was always so touched when we would meet again at ALI dinners and events, and she remembered me. Justice Ginsburg gave her life to the law. She fought for us. Let us insure her legacy.

**Myles V. Lynk**  
District of Columbia Office of  
Disciplinary Counsel

Justice Ruth Bader Ginsburg was an esteemed member of our ALI Council for 15 years before her appointment to the Supreme Court, and she continued to honor us with her presence at Council dinners up to the time of her death. One of the highlights of our Council dinners during each Annual Meeting was the opportunity to visit with Justice Ginsburg.

Justice Ginsburg was generous to her Council friends in so many ways. She was constant in sending to many of us copies of her speeches and articles that she knew would be relevant to a class we were teaching or an article we were writing. In the last few years, when she was ill and busy with other projects, she generously authored a forward to a book that I coauthored about the rule of law.

Through her advocacy and opinions Justice Ginsburg brought about a more just and equal America that comes closer to our ideals. We have been privileged to know one of the greatest Justices in our nation's history.

**Robert A. Stein**  
University of Minnesota Law School

The Notorious RBG ... she of the push-ups, the fashionista, the wearer of silver sparkling high-heel shoes, the author of brilliant dissents and of VMI, the "diva dissenter" (a British magazine called her), she the adored and admired Justice, the icon for millennials, for young women lawyers.

There was another generation of women lawyers for whom Ruth Bader Ginsburg was an icon ... the law students of the early 1970s, my generation, the women for whom the revived feminist movement came to define our lives, who entered law school to give professional focus to our search for the equal treatment for women. When I started at Yale Law School in 1973, there were two women on the faculty, one tenured—the brilliant Ellen Peters, who had graduated first in her class at Yale—and one not yet tenured. But further south, there was Ruth Bader Ginsburg.

I came to this, my adopted country, from South Africa, where the oppressive treatment of the majority of people, enforced through the grotesque *apartheid* laws, had seared my soul. As a student activist there, the *Emancipation Proclamation* and *Brown v. Board of Education* had resonated with me, deeply. But it was here, in the United States, in the late 60s, that I "discovered" feminism. I arrived in Cambridge to read for a graduate degree in art history. I arrived in New Haven five years later, to read law, embarking on a new and most unlikely future.

The jurisprudential pickings for women at Yale were few—there were no courses on women and the law, no text or case book or collection of essays, no jurisprudential doctrine to guide our feminist thinking. But there was Ruth Bader Ginsburg. There was *Reed v. Reed*. "The sex-based classification in ... the Idaho Code, established for a purpose unrelated to any biological difference between the sexes, is a 'suspect classification' proscribed by the Fourteenth Amendment to the United States Constitution," began her brief in *Reed*. "The distance to equal opportunity for women in the United States remains considerable in face of the pervasive social, cultural and legal roots of sex discrimination," she continued, adding "... prior decisions of this Court have contributed to the separate and unequal status of women in the United States. But the national conscience has been awakened to the sometimes subtle assignment of inferior status to women by the dominant male culture." Powerful words addressed to powerful men. She was scathing of their response.

Writing in 1972 in the *Women's Rights Law Reporter*, she described the Court's decision in *Reed* as "a terse opinion," a "small step forward," one that did not so much as respond to her argument that "strict scrutiny" applied to claims of unequal treatment of women. The

"small" step of the Court, she wrote, "seems a fair indication that reliance on the judiciary for a firm, unequivocal constitutional commitment to equality of rights for men and women is at best a dubious one and certainly an arduous and enervating one." Was that arduous and enervating task, taking one small step at a time, worth the effort? Ruth Bader Ginsburg thought so, and Sharron Frontiero, Stephen Wiesenfeld, and Curtis Craig became an important part of our history—because of Ruth Bader Ginsburg. One small step at a time.



In 1966, Senator Robert Kennedy visited South Africa. Race ... the unequal treatment of the majority of people, was starkly visible everywhere I turned. Any attempt to change the *apartheid* system seemed so insignificant, so small. Robert Kennedy understood how my fellow students and I would feel—overwhelmed by the awesome power of the *apartheid* state, by the smallness of our insignificant gestures. He spoke to us about that. "[T]he danger of futility," Kennedy said, is "the belief there is nothing one man or one woman can do against the enormous array of the world's ills—against misery and ignorance, injustice and violence." "Yet," he continued, "many of the world's great movements, of thought and action, have flowed from the work of a single [person]."

And then Kennedy spoke words that I have never forgotten: "It is from numberless diverse acts of courage and belief that human history is shaped. Each time a [person] stands up for an ideal, or acts to improve the lot of others, or strikes out against injustice, he sends forth a tiny ripple of hope, and crossing each other from a million different centers of energy and daring those ripples build a current which can sweep down the mightiest walls of oppression and resistance."

Forty years later, Justice Ginsburg visited South Africa, in 2006. There, in the same packed hall where I had listened to Senator Kennedy, she explained to a younger generation that until 1971 the Supreme Court "turned away" every equal-protection claim based on sex. Her strategy? "We sought to spark judges' and lawmakers' understanding that their own daughters and granddaughters could be disadvantaged by the way things were," she told them. In 1971, she continued, "the Court turned in a new direction. The Justices began to respond favorably to the arguments of equal rights advocates who urged a more dynamic interpretation of the equality principle ..." Why? There was Ruth Bader Ginsburg. (The jabot she received in Cape Town on that visit was her "favorite," she later said.)

Senator Kennedy changed South Africa. Senator Kennedy changed me.

Ruth Bader Ginsburg changed the United States, one small step at a time. Ruth Bader Ginsburg changed me.

**Margaret H. Marshall**  
Choate Hall & Stewart LLP

## Fall Project Meetings

At ALI, fall traditionally marks the start of our busiest and most engaging season. Every year, we look forward to welcoming members and project participants to our discussions about the Institute's current projects. Although we have offered the option of joining these meetings telephonically for quite some time, many members and participants elect to join us in person. This year, the meetings are being held virtually. Though we highly value the in-person exchange of ideas and thoughtful conversation, the show must go on.

The season kicked off with **Intentional Torts to Persons**. Preliminary Draft No. 7 contains revised materials on consent to sexual conduct (§ 18); new Sections on the parental privilege and the teacher's privilege to use force (§§ 45 and 46); revised materials on comparative responsibility (§ 50); and a new Section on fraud causing harm to a person or property (§ 51). A revised draft of § 39, Law Enforcement Privilege, was sent to project participants after the Preliminary Draft No. 7 was distributed, and is also available on the Intentional Torts Project Page. There was enough time to review all sections of the draft and § 39 before the adjournment of the meeting. Assuming that these sections are approved by ALI Council before the next Annual Meeting, this meeting may have been the final Advisers and MCG meeting for this project.

The **Policing** project meeting covered new Sections on general principles (§§ 1.03, 1.09 & 1.10); revised materials on the general principles of searches, seizures, and information gathering (§§ 2.01-2.08); revised materials on policing with individualized suspicion (§§ 3.01-3.05); revised materials on informants and undercover agents (§§ 12.01-12.07); revised materials on the agency role in promoting sound policing (§§ 13.01-13.08); and a very preliminary version of Chapter 14—Role of Other Government Actors in Promoting Sound Policing.

September closed out with the **Copyright** project meeting. Preliminary Draft No. 6 contains revised materials on initial ownership, transfers, licenses, termination of grants, and abandonment (§§ 3.01, 3.08-3.11); revised materials on the duration of copyright (§§ 5.01-5.03, 5.05); revised materials on copyright rights and limitations (§§ 6.01, 6.02, 6.04-6.06); and new materials on copyright remedies (§§ 9.01, 9.02).

Project participants gathered from all over. Although we were not in the same room, the discussion of the drafts remained as spirited as ever. Thank you to all the members and project participants who came together in this new endeavor and continue to give their time to the work of the Institute. We look forward to seeing you in person soon.



*Intentional Torts to Persons, September 10*



*Policing, September 11*



*Copyright, September 17*

## PEB Releases New Commentary

In August, the Permanent Editorial Board for the Uniform Commercial Code (“PEB”) released a new PEB Commentary, *No. 22: Status of a Disposition Under Section 9-610 of the Uniform Commercial Code If the Transferee Does Not Act in Good Faith*.

The PEB acts under the authority of The American Law Institute and the Uniform Law Commission. From time to time the PEB issues supplementary commentary on the Uniform Commercial Code known as PEB Commentary. PEB Commentaries seek to further the underlying policies of the Uniform Commercial Code by affording guidance in interpreting and resolving issues raised by the Uniform Commercial Code and/or the Official Comments.

The new PEB Commentary is available on the ALI website at [www.ali.org/peb-ucc](http://www.ali.org/peb-ucc).

## When Was the Last Time You Heard from ALI?

It is important to all of us at ALI that we stay in touch with our members and project participants. Our primary method of doing so is email.

You should be receiving emails about our project meetings, draft notifications, administrative notifications, and other news items of interest.

To ensure that you receive our electronic communications, please add our domain ([ali.org](http://ali.org)) to your spam filter's whitelist, also called the approved or safe-sender list. Doing so will ensure proper delivery of emails to your inbox. Because all spam filters are different, you may need to contact your technology team or service-provider helpdesk for assistance in accessing your spam settings.

Did your email address change recently? If so, please be sure to update your member profile at [www.ali.org](http://www.ali.org).

## Project Spotlight: Model Penal Code: Sexual Assault and Related Offenses

Although the 2020 Annual Meeting was cancelled this year, the Reporters produced the fourth Tentative Draft (TD4) of Model Penal Code: Sexual Assault and Related Offenses (MPC:SA) and they are looking forward to receiving written comments. The Draft includes most Sections of the project, for example, Sections 213.8 (Sexual Offenses Involving Minors) and 213.11 (Collateral Consequences of Conviction) are not included. This article summarizes certain portions of the 1962 Model Penal Code (1962 Code) that are integral to understanding Sections of MPC:SA, and provides a very brief overview of points raised in past project meetings that may help members navigate this newest draft.

The MPC:SA will replace Article 213 of the 1962 Code. Except where expressly stated, MPC:SA should be read and understood to follow the provisions and definitions found within the 1962 Code.

### Where does the MPC:SA diverge from the 1962 Code?

At the 2016 Annual Meeting, ALI members approved a definition of “consent” as that term is used in what will be the new Article 213. This new definition differs from “Section 2.11 – Consent” of the 1962 Code. Visit *The ALI Adviser* to learn more about the evolution of the “consent” definition in MPC:SA ([bit.ly/consentdefinition](http://bit.ly/consentdefinition)).

Additionally, for the new Article 213, the 1962 Code Subsection (2) of Section 2.08 (Intoxication) is not presumed to apply. Instead, the revised Article expressly encourages the application of the general provisions of the criminal law and rules of evidence of the jurisdiction in resolving questions about the relevance and admissibility of evidence of intoxication.

TD4 grades each offense according to the template adopted in the Model Penal Code: Sentencing project, and thus attaches associated punishments for each of the offenses. The grading scheme of TD4 thus departs from the 1962 Code, but aligns with the recommendations in the new Model Penal Code: Sentencing, specifically Section 1.02(2) and Articles 6 and 7. As the Commentary to TD4 explains, the 1962 Code's approach to sentencing was a product of its time, and views about punishment have since shifted in important ways.

MPC:SA is conceived as a part of the comprehensive Model Penal Code, which also includes the MPC Sentencing project.

“In the process of revising Article 213, some members of the Institute advocated for re-examination of the existing provisions of general applicability. However, the Institute decided against reopening longstanding and serviceable definitions in favor of marginal improvements. Rather, revisions or adjustments pertaining to the general provisions of the 1962 Code were made only where important substantive reasons demanded.” (TD No. 4, p. 16)

## MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES CONTINUED FROM PAGE 13

**Overview of Select 1962 Code Provisions**

The foundational concepts that were first expressed in the 1962 Code have found widespread support in state criminal law. But those who have not studied every section and definition of the MPC may benefit from a review of several concepts integral to understanding TD4. The following is a brief overview of several pertinent provisions of the 1962 Code (see pp. 16-28 of TD No. 4 for a more in-depth discussion).

**Actus Reus (Model Penal Code Section 1.13)**

1962 Code Subsection 1.13(9) identifies the three kinds of actus reus elements found in criminal statutes:

(9) “element-of-an offense” means (i) such conduct or (ii) such attendant circumstances or (iii) such a result of conduct

(a) is included in the description of the forbidden conduct in the definition of the offense; or

(b) establishes the required kind of culpability; or

(c) negatives an excuse or justification for such conduct; or

(d) negatives a defense under the statute of limitations; or

(e) establishes jurisdiction or venue;

Conduct is further defined in subsection 1.13(5) as “an action or omission and its accompanying state of mind, or, where relevant, a series of acts and omissions”; the 1962 Code has no separate definitions of “attendant circumstances” or “results.” Typically, an attendant-circumstance element refers to a surrounding condition or fact that is essential to liability. A result element is an element that refers to proof of a consequence or outcome caused by an actor’s conduct.

Statutory provisions with result elements inherently also require proof of causation, or the legal and factual link between the actor’s conduct and the alleged result. (Tentative Draft No. 4)

**Mens Rea (Model Penal Code Section 2.02)**

The 1962 Code provides clear rules about mental states or *mens rea* - the intention or knowledge of wrongdoing that constitutes part of a crime:

**Model Penal Code § 2.02. General Requirements of Culpability.**

(See all of Section 2.02 at [www.ali.org/mpcsection202](http://www.ali.org/mpcsection202).)

(1) **Minimum Requirements of Culpability. Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.**

**UPCOMING PROJECT MEETING**

There is a Zoom project meeting scheduled on Thursday, November 5, 2020. The Reporters will present a draft that includes Sections 213.8 (Sexual Acts with Minors) and 213.11 (Collateral Consequences of Conviction). Members may join the Members Consultative Group by visiting the project page on the website.

“The parts of the 1962 Code that are essential interpretive principles in understanding and applying revised Article 213 are reproduced before the provisions of the revised Article. In restating those principles, the revised Code reprints verbatim the language adopted by the Institute in 1962, with one exception. The 1962 Code used gendered language and defaulted to the male pronoun as a shorthand for all persons. The version reprinted with revised Article 213 replaces this language with gender-neutral language.” (TD No. 4, p. 16)

*Section 2.12 De Minimis Infractions of the 1962 Code* “affords a basis for judicial dismissal of prosecutions deemed too trivial or inconsistent with the purpose of the law infringed to justify criminal sanctions. As the Reporters’ Note explains, provisions of this kind have particular application to trivial violations of sex-offense laws. Although *de minimis* dismissals are uncommon in current law, a court’s power to dismiss a prosecution for a technical but insignificant infringement of the law remains an important safeguard against prosecutorial overreach and thus merits inclusion in the revised Article 213.” (Tentative Draft No. 4, p. 26)

**(2) Kinds of Culpability Defined.****(a) Purposely.**

A person acts purposely with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause such a result; and

(ii) if the element involves the attendant circumstances, he is aware of the existence of such circumstances or he believes or hopes that they exist.

**(b) Knowingly.**

A person acts knowingly with respect to a material element of an offense when:

(i) if the element involves the nature of his conduct or the attendant circumstances, he is aware that his conduct is of that nature or that such circumstances exist; and

(ii) if the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result.

**(c) Recklessly.**

A person acts recklessly with respect to a material element of an offense when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.

**(d) Negligently.**

A person acts negligently with respect to a material element of an offense when he should be aware of a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that the actor’s failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.

The 1962 Code then explains in Subsection (3) how to interpret the code if no mental state is specified, and in particular requires proof of at least a reckless mental state (explicitly rejecting the floor of negligence) when a statute does not explicitly contain a contrary mens rea.

**(3) Culpability Required Unless Otherwise Provided.** When the culpability sufficient to establish a material element of an offense is not prescribed by law, such element is established if a person acts purposely, knowingly or recklessly with respect thereto.

Subsection (4) provides that a mental state expressly stated for one element is presumed to apply to all the other elements, absent a plain contrary legislative purpose:

**(4) Prescribed Culpability Requirement Applies to All Material Elements.** When the law defining an offense prescribes the kind of culpability that is sufficient for the commission of an offense, without distinguishing among the material elements thereof, such provision shall apply to all the material elements of the offense, unless a contrary purpose plainly appears.

1962 Code Section 2.02(1) states that culpability requires proof of every material element along with an accompanying culpable mental state:

**Section 2.02. General Requirements of Culpability.**

**(1) Minimum Requirements of Culpability. Except as provided in Section 2.05, a person is not guilty of an offense unless he acted purposely, knowingly, recklessly or negligently, as the law may require, with respect to each material element of the offense.**

## MODEL PENAL CODE: SEXUAL ASSAULT AND RELATED OFFENSES CONTINUED FROM PAGE 15

Subsection (5) makes it unnecessary to expressly include the lesser *mens rea* when a greater *mens rea* is required:

**(5) Substitutes for Negligence, Recklessness and Knowledge.** When the law provides that negligence suffices to establish an element of an offense, such element also is established if a person acts purposely, knowingly or recklessly. When recklessness suffices to establish an element, such element also is established if a person acts purposely or knowingly. When acting knowingly suffices to establish an element, such element also is established if a person acts purposely.

#### Relationship between Causation (MPC Section 2.03) and Mens Rea (From Tentative Draft No. 4, pp. 23-25)

Causation serves a core role in determining the scope of liability for a number of offenses defined in Article 213, including the most serious offenses of Sexual Assault by Aggravated Physical Force or Restraint. Doctrines of causation have longstanding pedigree in American law, and the concepts of “but for” and “proximate” or “legal” causation are familiar to every first-year law student.

Section 2.03 is the 1962 Code provision governing causation. Section 2.03(1)(a) embodies the familiar requirement that a result be the “but for” cause of the actor’s conduct, and Section 2.03(2) and (3) states the Model Penal Code’s preferred formulation for foreseeability, which includes that the result not be “too remote or accidental in its occurrence” to have a “just bearing” on liability or the gravity of the offense. Section 2.03 further provides additional guiding parameters. It states the basic principle that a result is not “too remote or accidental” if it is substantially the same as that designed, contemplated, or within the range of risk apprehended. Within established principles of causal culpability, an actor may be liable not only when the result is precisely that contemplated but also when it is substantially similar in the ways specified. Section 2.03 provides that the causal chain is not broken when: (i) only a different person or property within the range of risk is harmed; and (ii) the harm that results is less serious than that contemplated. The 1962 Code sets out separate Sections for these principles depending on whether the result was designed or contemplated (for situations in which an actor is purposeful or knowing as to a result), or within the zone of risk apprehended (for situations in which an actor is reckless as to a result).

Causation and mens rea often go hand in hand, although they serve different purposes and invoke different inquiries. Causation focuses on the chain linking the actions of the actor with a result required to be proven for liability under a statute. It effectively asks two questions: did the actor in fact cause the result (“but for” or “actual” causation); and is the connection between the actor’s conduct and the result sufficiently close that it is just to hold the actor responsible for that result (“proximate” or “legal” causation). This latter question is particularly important in cases in which the connection between the actor’s conduct and the result is attenuated, or in which intervening actors or causes contributed to the result, or in which a result is unexpected or unforeseeable. An enormous body of case law exists to guide these difficult but familiar questions of legal cause in criminal cases.

Mens rea, in contrast, focuses on the defendant’s expectations or intentions. For a result element, the mens rea element requires asking what the defendant’s mental state was with respect to producing the result that occurred. In theory, an actor may be purposeful about a result, knowledgeable, reckless, negligent, or held responsible even for results the actor had no reason to expect or took due care to avoid (strict liability). Causal inquiries intersect with mens rea inquiries in that our understanding of a person’s intentions often hinges in part on the probability that a result follows from conduct.

#### Brief Readers’ Guide to the Draft

##### Section 213.1. Sexual Assault by Aggravated Physical Force or Restraint and Section 213.2. Sexual Assault by Physical Force or Restraint

The concept of “physical force” plays two distinct roles in the Article 213 offenses. It is both an aggravating element and one of the facts that can make apparent consent ineffective. Importantly, “physical force” is defined with reference to the behavior of the actor, not the behavior of the other person. There is no requirement that the other person resist in order to prove the actor’s use or threat of physical force: both physical violence and physical restraint are illegitimate means to obtain sexual compliance, without regard to whether or how quickly they physically overcome the other person.

In general terms, physical force spans a continuum of physical actions that range from minimal contact at one end to the most extreme forms of violence (such as strangling or use of a deadly weapon) at the other end. Ideally, a statute would draw categorical lines along that continuum at varying degrees of severity.

But with respect to sexual offenses, three problems arise. First is the need to exclude from coverage forms of physical force that conventionally accompany consensual sexual encounters, even if they may result in physical discomfort, such as when one person’s body presses against the body of another. Second is the importance of including at the appropriate level of severity physical acts that *threaten* serious harm, even though the act itself, such as brandishing a deadly weapon or tying someone to a post, inflicts no physical injury. And third is the difficulty of classifying degrees of force in categories that signal meaningfully distinct levels of culpability.

##### Section 213.3. Sexual Assault of a Person Who is Incapacitated, Vulnerable, or Legally Restricted

As a matter of law, a person in one or more of the conditions described by this Section—such as sleep, unconsciousness, physical or mental incapacity, or custodial status—lacks the capacity to give valid, effective consent. Advisers to the project have worked with the Reporters to navigate the issue of the sleeping spouse who has given prior explicit consent.

##### Section 213.4. Sexual Assault by Extortion

An actor is guilty of Sexual Assault by Extortion if the actor purposely, knowingly, or recklessly makes a nonphysical threat and thereby causes the other person to submit to sexual penetration. Such threats are covered not only when made in explicitly threatening words or gestures, but also when the actor’s words or behavior suggests an implicit threat under all the circumstances. Illustrations from Tentative Draft No. 4 include threats to accuse someone of a criminal offense, to report an irregularity in a person’s immigration status, and to take or withhold official action of any kind (for example, revoking child custody).

##### Section 213.5. Sexual Assault by Prohibited Deception

This Section provides for criminal penalties when an actor induces another person to submit to or engage in sexual penetration or oral sex with the actor by making false medical representations to that person or by impersonating someone personally known to that other person. Proof of these circumstances causing the other person to submit to or perform the sexual act proves the absence of consent and makes any apparent consent ineffective.

##### Section 213.6. Sexual Assault in the Absence of Consent

The offense requires proof beyond a reasonable doubt of (1) an act of either sexual penetration or oral sex, (2) the absence of the complainant’s consent, and (3) the defendant’s recklessness as to each of these elements.

##### Section 213.7. Offensive Sexual Contact

This Section includes both (1) Offensive Sexual Contact by Physical Force or Surreptitious Incapacitation and (2) Offensive Sexual Contact.

##### Section 213.9. Sex Trafficking

This Section addresses sexual abuse through commercial exploitation of individuals who are underage, incompetent, or otherwise vulnerable to mistreatment or manipulation. The other reasons for vulnerability can include physical disability or psychological trauma; advanced age; immigration status or language barriers; flight from civil war, natural disaster, or family violence; addiction to a controlled substance; and a wide range of other circumstances that can be exploited for coercive effect.

A specific definition of “Coercion” is provided for purposes of Section 213.9(1), which reads,

**“An actor is guilty of Sex Trafficking if the actor knowingly recruits, entices, transports, transfers, harbors, provides, isolates, or maintains a person by any means, with the purpose of facilitating a commercial sex act involving that person ...”**

##### Section 213.10. Affirmative Defense of Explicit Prior Permission

This Section has been informally called “the BDSM provision” by the project’s Advisers. Although the use of physical force or threats to compel sexual submission is ordinarily and properly a serious felony, the parties to a sexual encounter sometimes agree to participate in sadomasochistic practices in which one of them, even in disregard of apparent protests, subjects the other to physical force, threats, or restraint, expecting that the encounter will prove sexually arousing for one or both of them. Section 213.10 removes criminal liability for a sexual offense when competent adults desire and freely agree to participate in this kind of encounter.

# Championing Access to Justice

Without equal access to the justice system, many Americans struggle with legal problems that can negatively affect their livelihood, health, housing, and families. Particularly in this time of crisis, the fair administration of justice has become a critical focus for all those working in the legal field. As the pandemic continues to affect our lives and work in dramatic ways, equal access to fair, timely, and effective justice services has become more important than ever.

One of the objectives of The American Law Institute, set forth in its certificate of incorporation, is “to secure the better administration of justice”; a justice system that efficiently delivers outcomes that are fair and accessible to all. It is no surprise that our members’ dedication to the fair administration of justice goes beyond the work of the Institute.

Below are highlights from a few of ALI’s members who have contributed to improving access to justice.

**Adam N. Steinman** of the University of Alabama School of Law is the co-recipient of The Pound Institute’s 2020 Civil Justice Scholarship Award. The award was presented to Professor Steinman at the Pound Fellows reception on Feb. 9 in New Orleans, during the winter convention of the American Association for Justice.



Professor Steinman received the award in recognition of his article “Access to Justice, Rationality, and Personal Jurisdiction,” 71 Vand. L. Rev. 1401 (2018), in which he analyzed the Supreme Court of the United States’ recent decisions on personal jurisdiction in civil litigation, examined the situations in which personal-jurisdiction doctrine is most likely to threaten access to justice and the enforcement of substantive law, and proposed ways to work within the Court’s case law to preserve meaningful access and enforcement.

The Pound Institute established the Civil Justice Scholarship Award in 2018 to recognize current scholarly legal research and writing focused on topics in civil justice, including access to justice and the benefits of the U.S. civil-justice system, as well as the right to trial by jury in civil cases.

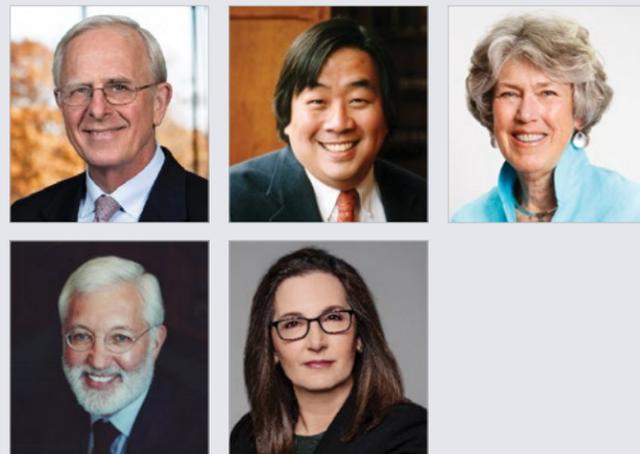
## THE RULE OF LAW FORUM: PRESERVING THE RULE OF LAW IN AN AGE OF DISRUPTION

The Rule of Law Forum, consisting of a series of fall conferences sponsored by the New York City Bar, examines underlying threats to the “Equal Justice Under Law” promised at the entrance to the Supreme Court of the United States. The forum includes panels of respected experts who will identify some of the greatest current challenges, discuss why they matter, and suggest remedies that help preserve the rule of law while confronting the challenges now facing our nation.

Conceived and organized by ALI member **Robert F. Cusumano**, along with Marcy Kahn, Joshua Dratel, and Jennifer Rodgers, the goal of the program is to have an ongoing and thought-provoking discussion with the legal profession, the academic community, and the public about what can and should be done to assure that America remains a nation governed by laws even in a time of crisis—or especially in a time of crisis—and to identify the actions necessary for our justice system to promote the impartial, equitable, and effective enforcement of those laws.



The series features the following ALI members:



**Donald B. Ayer**, McLean, VA  
**Charles Fried**, Harvard Law School (*not pictured*)  
**Harold Hongju Koh**, Yale Law School  
**Margaret Colgate Love**, Law Office of Margaret Love  
**Jed S. Rakoff**, U.S. District Court, Southern District of New York  
**Joyce White Vance**, University of Alabama School of Law

For a full list of participants, topics, and dates, please visit the ALI website.



The Texas Access to Justice Foundation (TAJF), which provides grant funding for civil legal aid in Texas, has announced former Texas Supreme Court Justice **Deborah G. Hankinson** as the new chair of its board of directors. Justice Hankinson began her three-year term on Sept. 1. As the fifth chair of TAJF’s Board, she will also be the first woman to serve in this position. She was first appointed to TAJF’s Board in 2003 and was its vice-chair from 2007.

“It’s an honor to be able to serve the Texas legal aid community as chair of the Texas Access to Justice Foundation board,” Justice Hankinson said. “Throughout my career I have advocated for disadvantaged Texans and have supported the successes of civil legal aid organizations across the state. I am eager and proud to now help guide the Foundation in its mission of equal justice for all.”

Justice Hankinson served on the Texas Supreme Court from 1997 to 2002 and spearheaded the creation of the Texas Access to Justice Commission, TAJF’s partner in increasing access to justice.

## LAUNCHING A NEW REPORT: “CIVIL JUSTICE FOR ALL”

On Sept. 24, the American Academy of Arts & Sciences hosted a discussion of “Civil Justice for All,” a new report from the project *Making Justice Accessible: Designing Legal Services for the 21st Century*.

The report illuminates the civil-justice gap, while recommending solutions in the form of programs, partnerships, innovations, and a significant shift in mindset that extends the duty and capacity to assist those with legal needs beyond lawyers.

The event featured project Co-Chairs **Kenneth C. Frazier** of Merck, **John G. Levi** of Sidley Austin, who is the Board Chair of the Legal Services Corporation, and **Martha L. Minow** of Harvard Law School, with **David M. Rubenstein** of The Carlyle Group serving as the moderator.

*Making Justice Accessible* provides a national overview of the crisis in legal services that focuses on four common categories of civil legal problems: family, housing, veterans affairs, and health care. By addressing these issues through case studies within the larger context of legal services, the project identifies practical recommendations to address challenges specific to particular court systems as well as solutions to problems that are common across the civil legal spectrum.

The project features a significant number of other ALI members including:

**Tonya L. Brito**, University of Wisconsin Law School  
**Mariano-Florentino Cuéllar**, California Supreme Court  
**Matthew Diller**, Fordham University School of Law  
**Risa L. Goluboff**, UVA School of Law  
**Nathan L. Hecht**, Texas Supreme Court  
**Benjamin W. Heineman, Jr.**, Harvard Law School; Harvard Kennedy School  
**William C. Hubbard**, University of South Carolina School of Law  
**David F. Levi**, Duke University School of Law  
**Lance M. Liebman**, Columbia Law School  
**Jonathan Lippman**, Latham & Watkins  
**Margaret H. Marshall**, Choate Hall & Stewart  
**Judy Perry Martinez**, Simon, Peragine, Smith & Redfearn  
**Harriet E. Miers**, Locke Lord  
**Andrew M. Perlman**, Suffolk University Law School  
**Paul L. Reiber**, Vermont Supreme Court  
**Judith Resnik**, Yale Law School  
**James J. Sandman**, Legal Services Corporation (retired)  
**Diane P. Wood**, U.S. Court of Appeals for the Seventh Circuit



PICTURED CLOCKWISE FROM LEFT TO RIGHT  
 Kenneth C. Frazier, John G. Levi, David M. Rubenstein, Martha L. Minow

## Member Spotlight: Michele Bratcher Goodwin

*University of California, Irvine School of Law*

Michele Bratcher Goodwin is a Chancellor's Professor at the University of California, Irvine and founding director of the Center for Biotechnology and Global Health Policy. Trained in sociology and anthropology, she has conducted field research in Asia, Africa, Europe, and North America, focusing on human trafficking for marriage, sex, organs, and other biologics. In addition to her work on reproductive health, rights, and justice, Professor Goodwin is credited with forging new ways of thinking in organ transplant policy and assisted reproductive technologies.

**You recently launched a podcast, *On the Issues with Michele Goodwin*. What motivated you to work in this medium and how has your experience been as a host? How do you select your topics and guests?**

I was motivated to start the *On the Issues with Michele Goodwin* podcast with *Ms. Magazine* because we are at an important inflection point in our nation and the world with regard to civil liberties, civil rights, and women's rights. I felt it was important to engage with listeners who are hungry to hear about critically important policy issues from a different perspective.

As far as our show topics, I work with a great team at *Ms. Magazine* and the University of California, Irvine. Kathy Spiller, the Executive Editor at *Ms. Magazine* and I are the show's executive producers. With collaboration from our producers Maddy Ponz, Roxy Szal, and Mariah Lindsay, we figure out themes for shows. This all started with a Saturday morning phone call between two friends and collaborators (me and Kathy).

We started mapping the show in June 2020—within a week or two we had figured out shows for the coming six months.

In thinking about who joins us, we all brainstorm—but we look for people who can speak directly and competently to the issues—not talking heads. I will often have people in mind by what they've written or policies they have proposed that align with what we are thinking about for a show. We're joined by terrific people who help us to bring our show to life, including my assistant, Stephanie Wilner

**Your background is in anthropology and sociology. What attracted you to pursuing a career in the law? How do you feel that your background has influenced your relationship with the law?**

I was living in Rome, Italy, performing research on African immigration into Europe in the late 1980s/early 1990s. One of the sites of my research and volunteer efforts was a refugee center, where I met so many immigrants and asylum seekers who simply wanted to get to a place of safety where they and their families could thrive. Many of these individuals were doctors, lawyers, pilots, and others who faced tragic and sometimes horrific circumstances in their homelands. Italy was most often a passageway to somewhere else. But, I also saw how they were exploited—not in Italy. The Italians were quite generous and kind to them in those days. Rather, these asylum seekers were being exploited by people who claimed to be immigration attorneys in the U.S. and Canada. I was mortified by what I saw up close. I wanted to do something about that.

**Portions of your work focus on new ways of thinking about supply, demand, and access to sophisticated medical technologies. How has the current pandemic affected your research on these areas?**

The current pandemic keeps me very busy. The pandemic exposes preexisting institutional and infrastructural inequalities and disparities in our society. We



have seen that through the rates of contraction and deaths that disparately impact Latinx, Indigenous, and Black communities in the United States. An aspect of this troubling problem can be explained by implicit and explicit biases in our healthcare systems—people of color that have died despite multiple trips to clinics and hospitals complaining of COVID-19 symptoms. Marking and tracking this and explaining it to various journalists and researchers keeps me busy.

We could also look at this through the lens of supply, demand, and access on myriad levels. That includes examining the medical deserts in communities where quality health care access, including technologies are simply unavailable—such as ventilators. And in some communities, masks were not available. Even more dramatic, there are indigenous communities without access to water in their homes. Equally, many of our nation's essential workers are people of color—working in hospitals, restaurants, grocery stores, meat packing, and agriculture—they are proportionately over-represented. If unaddressed the COVID-19 related infections and deaths were predictable. I have three law review articles forthcoming that relate to very distinct aspects of this.

**As a first-time attendee at ALI's Annual Meeting in 2019, what were your impressions of the ALI process? Is there anything you especially enjoyed about the Annual Meeting experience?**

The Annual meeting is a time in which one can engage with colleagues on the future of American law. It can be dynamic and engaging. It also is a time that highlights why differing opinions and voices are important to be heard. We can no longer pretend that men have a better lens on sexual assault than women—though centuries of American law were based on that notion. As we are in a period of thinking normatively about the law, it is an opportunity for broader participation and critical thinking about issues that are not mundane, lofty academy queries, but rather issues central to our legal systems and society.

**This fall, ALI will hold its first project meeting on one of its newest projects, *Restatement of the Law Third, Torts: Remedies*. This is your first project serving as an Adviser. What drew you to working on this project and what are you looking forward to with the virtual meeting in November?**

I am very excited about this. For the past 20 years, I have taught torts, trained lawyers who now litigate in cities across the nation, and think on these issues quite a bit in my scholarship. It was natural to be drawn to this by the very topic—and also the project's leaders—one of whom is my colleague Rick Hasen. It is always a pleasure to work with Rick. At our November meeting—we will be challenged by the matters at hand. [However, I'm sure we will also be thinking about the 2020 national and local elections.]

**What does it mean to you to be an ALI member? Among your many other projects and obligations, why do you feel it's important to give your time to the Institute?**

I am honored to be an elected member of The American Law Institute. It is a recognition by my colleagues in the field that I and my law school value. On a substantive note, this provides our opportunity to shape the future of American law. Given my concerns regarding the protection of civil liberties and the promotion of civil rights, few things in our profession could be more important in these times.



## New Member Orientation Sessions

To welcome our newest members and share with them meaningful ways to engage in our work, ALI recently hosted two orientation sessions via Zoom. More than 120 members elected in the past year and 30 Council members participated in the events.

The orientation sessions began with opening remarks by ALI President David Levi, ALI Director Richard Revesz, ALI Deputy Director Stephanie Middleton, and ALI Membership Committee Chair Teresa Wilton Harmon. Following the opening remarks, small groups of new members were moved into breakout rooms, with two ALI Council members serving as moderators in each room. The ALI Council members shared their knowledge of the Institute, discussed the benefits they derive from participating in our work, explained ways to get involved, and answered questions.

The New Member Orientation program, now in its 14th year, is usually held annually at ALI's Annual Meeting. However, due to the cancellation of the 2020 Annual Meeting and the ongoing pandemic, ALI chose to host this event virtually for the first time. While virtual events cannot fully replace the sense of community shared when we are together in person, new members reported that after the session they had a better idea of how to engage in ALI's work and that they enjoyed the opportunity to connect with some of our Council members and their fellow new members. Based on positive participant feedback, moving forward, ALI plans to host virtual new member orientation sessions after each election of new members (three times per year).

## Complimentary CLE for Members

Through the LawPass portal (*CLE for Members* on the ALI.org Members page), ALI members enjoy complimentary access to a vast database of ALI CLE's premier professional development content, including webcasts, on-demand courses, and online course materials.

In addition to having access to free online courses via LawPass, ALI members may take advantage of this member benefit by visiting ALI-CLE.org and using coupon code ALIWEB.

## Notes About Members and Colleagues

**Tom Baker** of the University of Pennsylvania Carey School of Law delivered a virtual lecture entitled “The Restatement of the Law of Liability Insurance,” hosted by the British Insurance Law Association.

**John H. Beisner** of Skadden was interviewed by Law.com in response to the firm being named 2020 D.C. Products Liability/Mass Torts Group of the Year by *The National Law Journal*.

**Joseph W. Bellacosa** of the New York State Court of Appeals (retired) has published two biography book reviews in the *New York Law Journal*: *Hubert Horatio Humphrey: Vice-President, Senator, Mayor, Pharmacist*, May 1, 2020 (reviewing Arnold A. Offner, *Hubert Humphrey: The Conscience of the Country* (Yale University Press 2018)), and *Budiansky’s Oliver Wendell Holmes, The Celebrity Justice*, July 14, 2020 (reviewing Stephen Budiansky, *Oliver Wendell Holmes: A Life in War, Law, and Ideas* (W. W. Norton & Co. 2019)). Judge Bellacosa also authored a commentary in the *New York Law Journal*: *A Bird’s-Eye View of John Roberts’ Institutional Integrity*, July 24, 2020. In addition, in the *New York State Bar Association Journal*, he published both an article titled *Overhauling New York’s Trial Courts - Chief Judge DiFiore and the Lesson of History*, Sept./Oct. 2020, vol. 92, No. 7 at 29-31, and another biography book review: *Guardian of the Institution*, December 2019 at 44 (reviewing Joan Biskupic, *The Chief: The Life and Turbulent Times of Chief Justice John Roberts* (Basic Books 2019)).

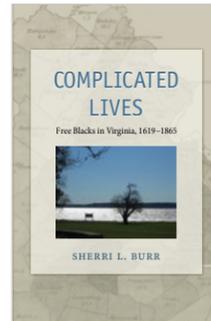
**Sheila L. Birnbaum** of Dechert was interviewed in a piece for Law.com, entitled “Talking Product Liability With Sheila Birnbaum, Dechert’s ‘Queen of Toxic Torts.’” In the piece, Ms. Birnbaum highlights recent changes in the mass torts world and discusses how the pandemic affected her product liability and mass torts practice at Dechert.

**Steven M. Bradford** of HNI Corporation has been elected chair of the Iowa Association of Business and Industry board of directors for its 2020 fiscal year.

**John G. Browning** of Spencer Fane was honored by the Texas Bar College with the Patrick A. Nester Outstanding Achievement in CLE Award. The award honors a Texas attorney for outstanding achievement in CLE as a course director, speaker, author, or creator of a new course.

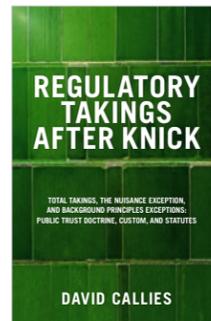
**Robert M. Brutinel** of the Arizona Supreme Court and **Bernice B. Donald** of the U.S. Court of Appeals for the Sixth Circuit joined *Judicature* as board members for the 2020-21 term, with **Don R. Willett** of the U.S. Court of Appeals for the Fifth Circuit serving as the new chair.

**Sherri L. Burr** of the University of New Mexico School of Law published *Complicated Lives: Free Blacks in Virginia, 1619–1865*. The book explores the complex history behind the beginning of slavery in America while deepening our understanding of the lives of free African Americans in Virginia.



**Naomi R. Cahn** joined the UVA School of Law faculty as the Justice Anthony M. Kennedy Distinguished Professor of Law and the Nancy L. Buc ’69 Research Professor in Democracy and Equity. Professor Cahn has also been tapped as the inaugural director of the Family Law Center at UVA Law School. The Center intends to provide resources to students who aspire to careers in family law, facilitate exchange among scholars, and create bridges to alumni in the field.

**David L. Callies** of University of Hawaii at Manoa, William S. Richardson School of Law published *Regulatory Takings after Knick: Total Takings, the Nuisance Exception, and Background Principles*. The book summarizes the Supreme Court’s decision in *Knick v. Township of Scott*, “which does away with the state action prong of the Court’s former ripeness test and what it means for the law of regulatory taking of property.”



The Indiana State Museum and Historic Sites named **Fred H. Cate** of Indiana University Maurer School of Law to its board of directors.

The Association of American Law Schools recently launched the Law Deans Antiracist Clearinghouse Project with the stated goal of establishing commitment to “a sustained Antiracist agenda.” The project was curated by ALI members and deans **Danielle M. Conway** of Penn State Dickinson Law, **Danielle Holley-Walker** of Howard University School of Law, **Kimberly Mutcherson** of Rutgers Law School, **Angela Onwuachi-Willig** of Boston University School of Law, and **Carla D. Pratt** of Washburn University School of Law.

**Anthony DiLeo** has been appointed by the President of the American Health Lawyers Association (AHLA) to the AHLA Review Board which rules upon challenges to arbitrators made by parties in disputes.

“A User’s Guide to the Restatement of the Law, Liability Insurance” by **Jay M. Feinman** of Rutgers Law School is now available on SSRN: <https://ssrn.com/abstract=3663207>. The piece was originally featured in *Connecticut Insurance Law Journal*, Vol. 26, No. 1, 2019.

In her article, “Devil in the Tiers,” **Robin C. Feldman** of UC Hastings College of the Law presents new evidence from an analysis of Medicare claims from one million patients over six years showing widespread formulary manipulations in today’s system.

**Judith K. Fitzgerald** of Tucker Arensberg has been selected to receive the 2020 American Inns of Court Bankruptcy Inn Alliance Distinguished Service Award. The award was developed as a way to recognize ongoing dedication to the highest standards of the legal profession and the rule of law, and the demonstration of personal ethics and integrity as expressed in the professional creed of the American Inns of Court, and is specifically dedicated to a judge or attorney who has practiced in the field of bankruptcy law.

**Edward B. Foley** of Ohio State University Moritz College of Law and Joanne Lipman, former editor in chief of *USA Today* coauthored *The Washington Post* op-ed piece “If we don’t dispel the falsehood of an election ‘delay’ now, we risk chaos in November.” The article rebuffed the claim that there is a “delay” if presidential election results are not declared on election night.

**Ivan K. Fong** of 3M and **Laura Stein** of The Clorox Company participated as speakers on the Leadership Council on Legal Diversity’s Language of Leadership webinar series.

**Barry Friedman** of NYU School of Law was recently quoted and heavily referenced in a *New York Times* article on policing reform. The piece “The message is clear: Policing in America is broken and must change. But how?” brings together “five experts and organizers in discussion about how to change policing in America in the context of broader concerns about systemic racism and inequality.” The article mentions Professor Friedman’s work on the Principles of the Law, Policing project and his forthcoming article in the *University of Pennsylvania Law Review*, “Disaggregating the Police Function.”



A number of ALI members, as well as several project participants from Principles of the Law, Policing, have been elected to the Council on Criminal Justice.

The Council on Criminal Justice’s mission is to “advance understanding of the criminal justice policy choices facing the nation and build consensus for solutions that enhance safety and justice for all.” This list includes members of the Council’s inaugural membership class, as well as members of its governing Board of Directors\* and advisory Board of Trustees\*\*.

### ALI members elected include:

**Rachel E. Barkow**, NYU School of Law  
**Tani Cantil-Sakauye\*\***, California Supreme Court  
**Paul G. Cassell**, University of Utah, S.J. Quinney School of Law  
**Steven L. Chanenson**, Villanova University School of Law  
**Angela J. Davis**, American University, Washington College of Law  
**James Forman, Jr.\*\***, Yale Law School  
**Sherrilyn Ifill**, NAACP Legal Defense and Educational Fund  
**Timothy K. Lewis**, Schnader Harrison Segal & Lewis LLP  
**John G. Malcolm**, The Heritage Foundation  
**Theodore A. McKee**, U.S. Third Circuit Court of Appeals  
**Patti B. Saris**, U.S. District Court, District of Massachusetts  
**Virginia E. Sloan\*\***, President Emeritus, The Constitution Project  
**Joyce White Vance**, University of Alabama School of Law  
**Ronald Weich**, University of Baltimore School of Law

### Project Participants include:

Hassan Aden, The Aden Group  
 Charles Ramsey\*\*, Former Police Leader, Chicago, Washington DC, and Philadelphia  
 Vanita Gupta, The Leadership Conference for Civil and Human Rights  
 Cynthia Lum, George Mason University  
 Nina Vinik, The Joyce Foundation, Gun Violence Prevention Program

On Aug. 17, the Center for Policing Equity, NAACP Legal Defense and Educational Fund, and UC Irvine School of Law held “From Police Reform to a New Public Safety Model.” The virtual event featured discussions on a number of important topics relating to police reform and included **Barry Friedman** of NYU School of Law, **Sherrilyn Ifill** of the NAACP Legal Defense and Educational Fund, and **L. Song Richardson** of UC Irvine School of Law as speakers.

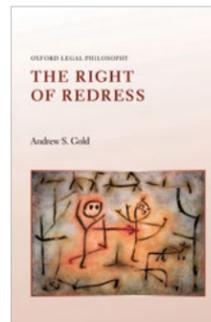
## NOTES CONTINUED FROM PAGE 23

**Meredith Fuchs** has been appointed General Counsel at Plaid, Inc. She previously was Senior Vice President and Chief Regulatory Counsel at Capital One.

**T. Markus Funk** of Perkins Coie published *Rethinking Self-Defence: The 'Ancient Right's' Rationale Disentangled*. The book, penned in the midst of a searing national debate on this core criminal law topic, offers a comprehensive value-centric approach to thinking about the defense's deeper rationale.

**W. Royal Furgeson Jr.** of UNT Dallas College of Law (Dean Emeritus), has been named the 2020 recipient of the Dallas Bar Foundation's Fellow Justinian Award, given annually to "honor an attorney who has achieved and consistently demonstrated the highest levels of professional excellence in a substantive area of the law."

**Andrew S. Gold** of Brooklyn Law School has published a new book, *The Right of Redress*, which offers readers a new theory on private law.



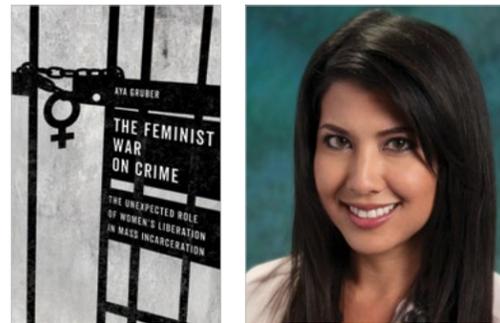
Recent op-ed pieces written by **Michele Bratcher Goodwin** of UC Irvine School of Law include "Pandemic Constitutional Rights: Not an All-Or-Nothing Proposition" for *Newsweek* and a *Ms.* Magazine piece entitled "Madame Speaker, It's Not Just Confederate Statues That Should Go. Start with Justice Taney."

**Laura E. Gómez** of UCLA Law has written a new book, *Inventing Latinos: A New Story of American Racism*, which offers a fascinating exploration of the Latino identity and how that identity plays a part in a larger conversation about race in America.



**Norman L. Greene** of Schoeman Updike Kaufman & Gerber coauthored "Careers in International Development: 2018 International Law Weekend Panel Addressing Law and Development Careers, Challenges, and Advice for Entering into the International Law Development Field." The article features reflections from panelists who participated in the 2018 International Law Weekend. The panel focused on "Careers in International Development" and consisted of a "roundtable discussion featur[ing] practitioners with experience in international development within the U[nited] S[tates] Government and other organizations involved in [international] development work."

**Paul W. Green** retired at the end of August after more than 15 years on the Texas Supreme Court.



**Aya Gruber** of the University of Colorado Law School has published a new book, *The Feminist War on Crime: The Unexpected Role of Women's Liberation in Mass Incarceration*, a rigorous exploration of the feminist relationship with issues of incarceration, victimhood, and policing.

**Rachel A. Harmon** of UVA School of Law was featured on an episode of the podcast *Conversations with Tyler* entitled, "Rachel Harmon on Policing."

**Richard L. Hasen** of UCI School of Law has been named an Election Law Analyst by CNN. In this role, Professor Hasen will appear on various CNN newscasts and television shows and offer analysis in CNN online stories related to the November U.S. Presidential Election through the end of the year, while continuing to serve on the faculty at UCI Law.

**D. Brock Hornby**, Senior District Judge for the District of Maine, published a series of essays in honor of Maine's 200th birthday as a state, after separating from Massachusetts in 1820, titled "History Lessons"—one about the country's first African American lawyer (Macon Bolling Allen admitted in Portland Maine in 1844) (Green Bag vol. 23 Spring 2020); the other about a public school bible reading controversy argued by Richard Henry Dana ("Two Years Before the Mast") in the Maine Supreme Court in 1854 and resulting in the tarring and feathering of Father John Bapst that year in Ellsworth, Maine (Green Bag vol. 23 Summer 2020); also "Requiem for *Harden v. Gordon*" in 51 J. of Maritime Law & Commerce (April 2020) about the participants in that case in which Justice Story announced the doctrine that seamen are "wards of the admiralty" (1st Cir. 1823).

**William C. Hubbard** of Nelson Mullins was named the new dean of the University of South Carolina School of Law, effective Aug. 1.

**Sherrilyn Ifill**, president of the NAACP Legal Defense and Educational Fund, appeared on *The Late Show with Stephen Colbert*.

Minnesota Law held a free webinar on "Policing, Racism, and the Law," which featured a discussion on current issues surrounding policing policy and racial injustice. Panelists included Minnesota Law Dean **Garry W. Jenkins** and Minnesota Law Professor **Maria Ponomarenko**, who serves as Associate Reporter for Principles of the Law, Policing.

**Linda A. Klein** of Baker Donelson has been recognized by the Anti-Defamation League with its 2020 Elbert P. Tuttle Jurisprudence Award. The award is given each year to a lawyer who best exemplifies ADL's mission "to secure justice and fair treatment for all."

**Troy A. McKenzie** of NYU School of Law was honored with a Distinguished Teaching Award from NYU. Professor McKenzie was one of six professors from the university to receive the award, which was established in 1987 to honor "selected outstanding members of the faculty."

*continued on page 26*

## In Memoriam



### Hans A. Linde

Hans A. Linde died of natural causes on August 31. He was 96. A member of the Institute since 1977 and of the ALI Council from 1982 to 2008, Justice Linde is considered one of the greatest jurists of the last century.

Following his World War II Army service, Justice Linde graduated from Reed College and then the University of California, Berkeley

School of Law. He clerked for Justice William O. Douglas in the Supreme Court of the United States. He was a lawyer in the Office of the Legal Adviser to the Department of State before serving as legislative assistant to Oregon Senator Richard L. Neuberger. In addition to work in government, he was a professor of law at the University of Oregon for more than 18 years and served as Associate Justice on the Oregon Supreme Court from 1977 to 1990.

**Melissa Murray** of NYU School of Law, **Risa L. Goluboff** of UVA School of Law, and **Jenny Rivera** of the New York State Court of Appeals were panelists at The National Association of Women Lawyers' 2020 Annual Meeting.

**Melissa Murray** of NYU School of Law interviewed *CNN's* Joan Biskupic on the podcast *Strict Scrutiny*. In the episode, "Five-Dimensional Chess," Professor Murray spoke with Ms. Biskupic about the upcoming 15th anniversary of **John Roberts'** appointment as Chief Justice of the United States and reflected on the Chief Justice's tenure on the Court as well as his legacy going forward.

**Alexandra Natapoff** joined the Harvard Law School faculty as the Lee S. Kreindler Professor of Law.

In the early 1970s, Justice Linde published articles urging lawyers to bring civil-rights cases in state courts and to make arguments grounded in the provisions of state constitutions. Jeffrey S. Sutton of the U.S. Court of Appeals for the Sixth Circuit explores Justice Linde's influence on the court in his book, *51 Imperfect Solutions: States and the Making of American Constitutional Law* (Oxford University Press 2018).

Justice Linde will be remembered for his wide-ranging scholarly and judicial work, commitment to education, and dedication to upholding the rule of law.

### ELECTED MEMBERS

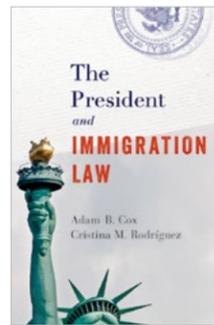
**William M. Hannay**, Chicago, IL; **Raj Marphatia**, Boston, MA

### LIFE MEMBERS

**Robert T. Brousseau**, Dallas, TX; **Glenn R. Coates**, Racine, WI; **Ruth Bader Ginsburg**, Washington, DC; **Gersham Goldstein**, Portland, OR; **John DeWitt Gregory**, Hempstead, NY; **Richard E.V. Harris**, Piedmont, CA; **Richard W. Hulbert**, New York, NY; **Arnold C. Johnson**, Washington, DC; **Hans A. Linde**, Venice, CA; **Morton M. Maneker**, New York, NY; **Fred S. McChesney**, Coral Gables, FL; **Edward S. Reid**, New York, NY; **Ralph J. Rohner**, Odenton, MD; **Morris G. Shanker**, Cleveland, OH; **Stephen D. Susman**, Houston, TX; **Stephen F. Williams**, Washington, DC

## NOTES CONTINUED FROM PAGE 25

**Cristina M. Rodríguez** of Yale Law School published *The President and Immigration Law*. Coauthored with Adam B. Cox of NYU School of Law, this work dives into the history of American immigration policy and shares the previously untold story of how the President became the immigration policymaker-in-chief, while also charting a path for reform.



**David B. Simpson** had his article entitled “Does Federalism Provide a Means to Circumvent Citizens United?” published in the Spring 2020 edition of the *UC Davis Business Law Journal*.

**Christopher Slobogin** of Vanderbilt Law School is the winner of the Harvie Branscomb Distinguished Professor Award. Paying tribute to Vanderbilt’s fourth chancellor, the award recognizes creative research and teaching, as well as service to students, colleagues, and society at large.

**E. Thomas Sullivan** of The University of Vermont has been elected by the faculty of

Cambridge University Clare Hall College (UK) as a Life Fellow Member with lifetime faculty privileges for teaching, research, and lectures at Cambridge.

**Peter A. Winograd**, Professor Emeritus at the University of New Mexico School of Law, received a three-year presidential appointment to the Council of the ABA’s Fund for Justice and Education.

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

## New Members Elected

On July 16, the Council elected the following 38 persons.

**Jerry L. Anderson**, Des Moines, IA  
**Jack M. Balkin**, New Haven, CT  
**Jonathan Biran**, Annapolis, MD  
**Robert M. Brutinel**, Phoenix, AZ  
**Arthur H. Bryant**, Oakland, CA  
**John K. Bush**, Louisville, KY  
**Jenny E. Carroll**, Tuscaloosa, AL  
**Jeffrey Bossert Clark**, Washington, DC  
**John Martin Conley**, Chapel Hill, NC  
**John Francis Coyle**, Chapel Hill, NC  
**Cara Hope Drinan**, Washington, DC  
**Paul F. Eckstein**, Phoenix, AZ  
**Dave Fagundes**, Houston, TX  
**James Goudkamp**, Oxford, England  
**Henry M. Greenberg**, Albany, NY  
**Lydia Kay Griggsby**, Washington, DC  
**Emily Hughes**, Iowa City, IA  
**Courtney G. Joslin**, Davis, CA  
**Lee B. Kovarsky**, Austin, TX  
**Steven P. Lehotsky**, Washington, DC  
**Darrell A.H. Miller**, Durham, NC  
**Eric E. Murphy**, Columbus, OH  
**Jide Okechuku Nzelibe**, Chicago, IL  
**Nathan B. Oman**, Williamsburg, VA  
**Stuart A. Raphael**, Washington, DC  
**Rod J. Rosenstein**, Washington, DC  
**Jim Roth**, Oklahoma City, OK  
**David M. Rubenstein**, Washington, DC  
**Chaim N. Saiman**, Villanova, PA  
**Nadia N. Sawicki**, Chicago, IL  
**Mortimer Newlin Stead Sellers**, Baltimore, MD  
**Nicholas F. B. Smyth**, Pittsburgh, PA  
**Sandra F. Sperino**, Cincinnati, OH  
**Amul R. Thapar**, Covington, KY  
**Laurance Browning VanMeter**, Lexington, KY  
**Andrew Verstein**, Los Angeles, CA  
**Howard M. Wasserman**, Miami, FL  
**Peter K. Yu**, Fort Worth, TX

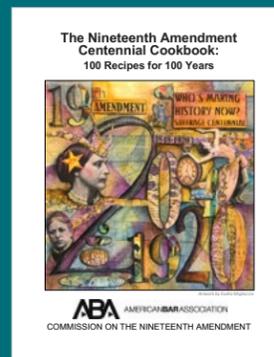
In honor of the 100th anniversary of the ratification of the 19th Amendment, the ABA released a digital cookbook, *The Nineteenth Amendment Centennial Cookbook: 100 Recipes for 100 Years*. The cookbook features recipes from five Supreme Court justices along with other luminaries from the legal world and mirrors similar cookbooks published by suffragists to gain support for the voting rights movement a century ago.

ALI council member **M. Margaret McKeown** of the U.S. Court of Appeals for the Ninth Circuit served as an editor to the project and also supplied the cookbook’s introduction.

Other ALI members who contributed include:

**Mark D. Agrast**, American Society of International Law  
**Elizabeth A. Andersen**, World Justice Project  
**Allen D. Black**, Fine, Kaplan and Black  
**Stephen G. Breyer**, Supreme Court of the United States  
**Tracie L. Brown**, California Court of Appeal, First District  
**Tani Cantil-Sakauye**, California Supreme Court  
**Erwin Chemerinsky**, University of California, Berkeley School of Law  
**JoAnne A. Epps**, Temple University  
**Merrick B. Garland**, U.S. Court of Appeals, District of Columbia Circuit  
**Heather Gerken**, Yale Law School  
**Jane C. Ginsburg**, Columbia Law School  
**Ruth Bader Ginsburg**, Supreme Court of the United States\*  
**Risa L. Goluboff**, University of Virginia School of Law

**Neil M. Gorsuch**, Supreme Court of the United States  
**Fatima Goss Graves**, National Women’s Law Center  
**Linda Greenhouse**, Yale Law School  
**Jeffrey R. Howard**, U.S. Court of Appeals, First Circuit  
**Linda A. Klein**, Baker, Donelson, Bearman, Caldwell & Berkowitz  
**Noëlle Lenoir**, Kramer Levin Naftalis & Frankel  
**Gillian L. Lester**, Columbia Law School  
**David F. Levi**, Duke Law School  
**Roberta D. Liebenberg**, Fine, Kaplan and Black  
**Margaret H. Marshall**, Choate Hall & Stewart  
**Jenny S. Martinez**, Stanford Law School  
**Judy Perry Martinez**, Simon, Peragine, Smith & Redfearn  
**Michele Coleman Mayes**, The New York Public Library  
**Janet Napolitano**, University of California  
**Sandra Day O’Connor**, Supreme Court of the United States (Ret.)  
**Eric A. Posner**, University of Chicago Law School  
**Ellen S. Pryor**, UNT Dallas College of Law  
**Roberta Cooper Ramo**, Modrall Sperling  
**Patricia Lee Refo**, Snell & Wilmer LLP.  
**Jack L. Rives**, American Bar Association  
**David W. Rivkin**, Debevoise & Plimpton  
**Vanessa Ruiz**, District of Columbia Court of Appeals  
**Mary M. Schroeder**, U.S. Court of Appeals, Ninth Circuit  
**Sonia Sotomayor**, Supreme Court of the United States  
**Sri Srinivasan**, U.S. Court of Appeals, District of Columbia Circuit  
**Debra L. Stephens**, Washington Supreme Court  
**Bryan Stevenson**, Equal Justice Initiative  
**Nina Totenberg**, National Public Radio  
**William M. Treanor**, Georgetown University Law Center  
**Timothy M. Tymkovich**, U.S. Court of Appeals, Tenth Circuit  
**Seth P. Waxman**, WilmerHale  
**Diane P. Wood**, U.S. Court of Appeals, Seventh Circuit



\*Submitted before her untimely death on September 18, 2020.

# Meetings and Events Calendar At-A-Glance

Below is a list of upcoming meetings and events. All upcoming 2020 meetings will be virtual via Zoom. For more information, visit [www.ali.org](http://www.ali.org).

## 2020

### October 29

Restatement of the Law Third, Conflict of Laws  
Zoom

### November 5

Model Penal Code: Sexual Assault and Related Offenses  
Zoom

### November 6

Restatement of the Law, Children and the Law  
Zoom

### November 12

Restatement of the Law, Corporate Governance  
Zoom

### November 13

Restatement of the Law Third, Torts: Remedies  
Zoom

### November 19

Principles of the Law, Compliance, Risk Management, and Enforcement  
Zoom

## 2021

### January 21-22

Council Meeting - January 2021  
Zoom

### March 25

Restatement of the Law, Corporate Governance  
Zoom\*

### May 17-20

2021 Annual Meeting  
Washington, DC

### October 21-22

Council Meeting - October 2021  
New York, NY

\*Closer to the meeting date, we will notify project participants whether the meeting will be held virtually or in person.



(ISSN 0164-5757)

THE AMERICAN LAW INSTITUTE  
4025 CHESTNUT STREET  
PHILADELPHIA, PA 19104-3099

NONPROFIT ORG  
U.S. POSTAGE  
PAID  
ALI

## Season Three of *Reasonably Speaking* Is Here!

We are pleased to announce the start of Season Three of *Reasonably Speaking*. Our first episode explores the unique post-election hurdles of this year's Election, and if pre-election volatility will play a significant role in post-Election Day events.

### *Election 2020: When Are Results Official and What Happens if Results Are Disputed?*

Every election year presents its own distinct set of challenges, but 2020 has been a uniquely challenging year. What can voters expect on and after Election Night?

- **Edward B. Foley**, director of the election law program at Ohio State University Moritz College of Law
- **Derek T. Muller**, University of Iowa College of Law
- **Franita Tolson**, University of Southern California Gould School of Law
- Moderator: **Steven F. Huefner**, Ohio State University Moritz College of Law

ALL EPISODES ARE AVAILABLE AT [WWW.ALI.ORG/PODCAST](http://WWW.ALI.ORG/PODCAST) AND THROUGH ANY PODCAST APPLICATION.