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In Search of the Law of Products Liability: the ALI Restatement Project

Marshall S. Shapo

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In Search of the Law of Products Liability: The ALI Restatement Project

Marshall S. Shapo*

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I. INTRODUCTION

The American Law Institute's ("ALI") involvement with the subject of products liability is developing as one of the most interesting sagas in the modern private law. This Article explores the ALI's efforts to rationalize the subject. Reviewing the ALI's contributions to the evolution of the law in this area, the Article also asks how the

Institute should treat the subject in the future, an inquiry that leads us to the broader question of the role of Restatements of the Law in the twenty-first century. In press as Congress considers proposals for sweeping federalization of products liability law, the Article raises the question of how far a private organization should enmesh itself in a heavy politicized branch of law.

II. THE PURPOSE OF A RESTATEMENT

The idea of “restating” the law derives from several sources, all resting on the premise that one can, in fact, improve the law.¹ Cardozo set up an ideal, in his characteristic rolling cadences, in a 1921 article proposing a “ministry of justice.”² The ALI first undertook Restatements in 1923, attacking simultaneously the subjects of contracts, torts, and conflict of laws.³ After the completion of the first round of Restatements, William Draper Lewis, director of the Institute, summarized the premise of those projects as “the belief that out of the mass of case authority and legal literature could be made clear statements of the rules of the common law today operative in the great majority of our States, expressed as simply as the character of our complex civilization admits.”⁴

The original Torts Restatement, for which Professor Francis Bohlen primarily served as reporter,⁵ yielded four volumes with 951 sections, published from 1934 to 1939.⁶ The effort did not go uncriticized: with his customary vigor, Leon Green suggested that the subject of torts did not lend itself well to the idea of a Restatement.⁷ As to the very idea of “restating torts,” Green said that the reporter and his associates had produced “a sort of dehydrated something, drained of nearly all the vitality found in such abundance in this, one of the most dynamic fields of government.”⁸ As to the Restatement’s classi-

1. For summaries of the history of these ideas, see, for example, Gerald L. Fetner, *Ordered Liberty: Legal Reform In The Twentieth Century* 51-54 (U. of Chicago, 1983); John W. Johnson, *American Legal Culture, 1908-1940* 52-72 (Greenwood, 1981).

2. Benjamin M. Cardozo, *A Ministry of Justice*, 35 Harv. L. Rev. 113, 114 (1921).

3. See William Draper Lewis, *History of the American Law Institute and the First Restatement of the Law*, in ALI, *Restatement in the Courts* 9 (ALI, permanent ed. 1945).

4. *Id.* at 19.

5. See *id.* at 14.

6. See Restatement of Torts, vols. 1 & 2 (1934); vol. 3 (1938); vol. 4 (1939).

7. See Leon Green, *The Torts Restatement*, 29 Ill. L. Rev. 582, 584 (1933).

8. *Id.* at 584-85. Green had foreshadowed this attack in his seminal “duty” articles in 1929, in which he condemned “a habit of long standing to think of the rules and theories developed by courts as involving ‘principles’” and of “insist[ing] upon the sanctity of principles” to which “adherence must be given at all costs.” Leon Green, *The Duty Problem in Negligence*

fication scheme, Green protested that it failed to appreciate the tendency of doctrines "to run all over the field."⁹ And as to its "technique of statement," he complained that "[t]he most striking feature of the *black letter* sections . . . is their stiffness and pompousness of expression," "smother[ing]" "important ideas . . . in a welter of insignificant ones raised by black letter to the same level of importance."¹⁰

The Restatement made its way into judicial decisions and classrooms over the 1940s and 1950s, and inspired a Second Restatement, begun in 1954 under the leadership of William L. Prosser as reporter.¹¹ This ambitious project consumed literally a quarter century; the 628-page fourth volume appeared, under the crest of John Wade as successor reporter, in 1979.¹²

The advent of the first in a series of planned projects under the heading of a Third Restatement,¹³ focusing on products liability, generates an important threshold question: what task does a "restatement of the law" set for itself at the end of a century that has seen remarkable dynamism in the law as well as turbulence in society?

One may identify three basic approaches to restatement. One is relatively literal. At its most reductionist, it involves counting the decisions and selecting the majority rule, at least where there are enough decisions on a particular issue to justify calling the rule a "majority" position.

But those who have wrangled over the contents of Restatements for more than half a century would not be satisfied with this answer. They would say that, since the purpose of Restatements is to improve the law, restaters should seek wisdom and excellence in their choice of legal rules.

It is worth pausing to identify the inarticulate premises here. When one restates the law, one works with controversy. The job of restatement does not begin until a number of litigants have been sufficiently engaged on a legal issue to generate a body of argument in appellate courts about that question.

Cases: II, 29 Colum. L. Rev. 255, 274, 280 (1929). I am grateful to Edmund Ursin for recalling this passage to me.

9. Green, 29 Ill. L. Rev. at 588.

10. *Id.* at 591-92.

11. See Herbert Wechsler, Introduction to 1 Restatement (Second) of Torts viii (1965) ("Restatement (Second)").

12. 4 Restatement (Second) (1979).

13. See Restatement (Third) of the Law, Torts: Products Liability, Tentative Draft No. 1 (April 12, 1994) ("Restatement Draft").

This implies that the problems at issue are real problems on which well-trained lawyers disagree as experts. It suggests, further, that the best way for society to deal with these problems is through judicial development. This requires reasoned argument, over time, focused on particularized issues against the background of precedent, both within state bodies of law and across the nation.

One must stress this fact with respect to the issues that become subjects of dispute in Restatement projects that deal with what are essentially common law bodies of jurisprudence. The rules that are the subject of these disputes are not, at least initially, barks on an open political sea. Rather, they have been the subject of intense interstitial argument, against the background of an assumption that the everyday law of a federal republic is capable of logical progression.

This approach to the law—case-centered, incremental, and focused on reasoned development—contrasts with a third approach to restating the law. We might term this the frank legislative approach. That approach assumes that a Restatement should be candidly responsive to competing political interests. Like a legislative body—although without its socially conferred power—the Institute in drafting a Restatement ultimately should seek a resolution that is politically viable, so long as it is not constitutionally irrational.

One may discern the tensions between the second and third approaches in the foreword written by the director of the ALI to the first tentative draft for a products liability Restatement: “[T]he basic task for legal formulation is to seek an appropriate balance, so far as it can be realized in tort law, between providing reasonable protection for consumer and worker interests and stating reasonably viable standards of conduct for producers of goods.”¹⁴ This declaration carefully preserves the idea of “legal formulation,” with its overtones of reasoned development. It implies a legislative purpose in its frank statement of the need to balance the interests of consumers and workers and those of producers. It suggests the extraordinary burden that a “Restatement” places on reporters, advisers, and ultimately the members of the ALI in the 1990s: the burden of reconciling the demands of law and politics.

14. Geoffrey C. Hazard, Jr., Foreword to Restatement Draft at xiii (“Hazard, *Foreword*”).

III. THE IDEA OF A PRODUCTS RESTATEMENT

A. *Springing Full-Blown: Section 402A*

We have initiated a discussion of the general considerations on which modern Restatements must be founded. The foregoing quotation from the ALI's director, drawn from the emerging effort to draft a products liability restatement, stimulates us to ask what ideas should ground such an effort.

The implicit faith of the drafters of the First Restatement of Torts, that one could cabin a subject called "torts" in one integrated set of volumes,¹⁵ carried forward into the Restatement Second. Herbert Wechsler, director of the ALI at the time, declared in his introduction to the first volume of the Restatement Second that the first Restatement had "been a vital force in shaping the law of torts," and said that the Restatement Second "preserves continuity with the original edition but is enriched in both its content and its scope."¹⁶

The historical progression from first to second Restatement was a relatively smooth transition. But it became especially evident by the late 1960s that some Restatement Second provisions were more equal than others. The most photographic of minds might reproduce the 951 sections of the Second Restatement, but by 1970 one of these had begun to stand out, a veritable Everest among a few other relatively tall peaks and hundreds of foothills. This was a provision on a subject that did not have a name when the drafters of the first Restatement began their labors. The name was "products liability." The section was 402A.

Professor Prosser worked the laboring oar in the development of this section, which passed through a series of tentative drafts and triggered spirited discussion on the floor of the Institute.¹⁷ This process culminated in a provision that imposed liability on sellers of products "in a defective condition unreasonably dangerous to the user" even when the seller had "exercised all possible care in the prepara-

15. Holmes was quizzical. See Oliver Wendell Holmes, *The Common Law* 63 (Little, Brown, 1963) (saying that "a general view . . . of the conduct which every one may fairly expect and demand from every other . . . is very hard to find").

16. 1 Restatement (Second) vii, ix (1965).

17. See, for example, ALI, 39th Annual Meeting: Proceedings 228-42 (1962) (reporting arguments, for example, over the concept of "intimate bodily use" in the then current draft). For a critical chronicle of this development, see George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. Legal Stud. 461, 512-18 (1985). A highly condensed capsule of the process appears in Marshall S. Shapo, 1 *The Law of Products Liability* ¶ 7.01[2] at 7-4 (Butterworth, 3d ed. 1994).

tion and sale” of the product and even though there was no contractual relationship between the seller and the consumer.

A single, powerful synthesis informed this provision: Prosser’s insight that a substantial number of cases in the years before 1960 had effectively achieved a form of strict liability for defective products under the heading of warranty. Prosser proposed, in a 1960 article, that it would be appropriate to classify these cases under a tort label.¹⁸ As reporter, he led the process—some would say that he dominated it—that enacted this view into the Restatement provision that became Section 402A.

The section proved controversial from the beginning. Predictably, some of the most wounded outcries came from the defense bar.¹⁹ However, if one were to judge a Restatement by its ability to state “rules . . . operative in the great majority of our States,” the section proved remarkable in its ability to attract adherents. Through the late 1960s and into the 1970s, it won support in most states.²⁰ Whether or not tort history had supported its adoption, Section 402A proved itself in the final marketplace for juridical ideas: the courts.

B. The Sixties and Seventies: An Idea Captures the Courts

Over the generation since the Institute’s adoption of Section 402A, the courts have published more than nine thousand decisions categorizing and rationalizing the law of products liability.²¹ They have explored a long series of links in the distributional chain, from manufacturers who place completed products in commerce²² through makers of components, large and small,²³ and including those who lease products,²⁴ license their use under trademarks,²⁵ or loan them

18. William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 *Yale L. J.* 1099, 1124-38 (1960).

19. See, for example, Thomas L. Dalrymple, *Brief Opposing Strict Liability in Tort* (Defense Research Inst., 1966).

20. See, for example, *Temple v. Wean United, Inc.*, 50 Ohio St. 2d 317, 364 N.E.2d 267, 271 n.3 (1977) (selectively listing decisions); *Codling v. Paglia*, 32 N.Y.2d 330, 298 N.E.2d 622, 628 (1973) (listing decisions “imposing strict liability in favor of nonusers”).

21. The CCH Products Liability Reporter, which reports cases by consecutive paragraph number, began with ¶ 5,001 in *Prod. Liab. Rep. (CCH) [Decisions, March 1963-June 1965]*. By early 1995, it was at paragraph number ¶ 14,098. See *Prod. Liab. Rep. (CCH), Report Letter No. 824* (Jan. 23, 1995).

22. See generally, Shapo, 1 *The Law of Products Liability* ¶ 12.03[1]-[5] at 12-6 to 12-18 (cited in note 17).

23. See *id.* ¶ 12.03[7][a] at 12-20 to 12-32.

24. See *id.* ¶ 12.08[1]-[2] at 12-59 to 12-66.

25. See *id.* ¶ 12.03[8][a] at 12-32 to 12-36.

for promoting the sales of other products.²⁶ A separate body of law, and commentary, has developed on the liabilities of those who sell used products.²⁷

Further along the chain of distribution and commerce, the courts have developed principles to govern the variations in status of those injured when they use or encounter products. In this area, tort law has maintained an uneasy coexistence with commercial law doctrine.²⁸

In their functional analysis of the distributional and consumer chains, courts have both drawn on relatively historic theories of liability²⁹ and developed the new strict liability doctrine.³⁰ The interplay between these theories has been fascinating, as the courts have sometimes mingled them, sometimes paralleled them, and sometimes found sharp contrasts between and among them.³¹

In the course of the battles over the meaning of both new and old doctrine, it has appeared that a crucial aspect of products liability law—perhaps the core concept, if any one idea may be described that way—lies in the definition of defect. If products liability law is a mirror held up to our inner selves, and indeed a reflector of our culture,³² the defect concept provides a cameo of our beliefs about achieving “the good [through] goods.”³³ From a legal point of view, it is a “multi-purpose separator of complex aspects of legal policy in products liability questions.”³⁴

The practically oriented questions of what factors a jury should receive as guides for determination of whether a product was defective—for example, balancing of risk against utility or the use of a “consumer expectations” test—underlie the trench-level struggles over what we as a society define as acceptable risk. These issues, along with such questions as whether the plaintiff in a products case must prove that the defendant could have employed a reasonable alternative design, are also at the heart of the policy arguments about the content of the proposed new Restatement.

26. See id. ¶ 12.08[4] at 12-67 to 12-69.

27. See generally id., ch. 18.

28. See generally id., ch. 16 (discussing “the consumer chain”).

29. See, for example, id., ch. 3 (express warranty), ch. 5 (negligence), ch. 6 (implied warranty).

30. See, for example, id., ch. 7.

31. See, for example, id., ch. 26.

32. This is my argument in Marshall S. Shapo, *Products Liability and the Search for Justice* (Carolina Academic, 1993).

33. Shapo, 1 *The Law of Products Liability* at vii (cited in note 17).

34. Id. ¶ 8.01 at 8-4.

Litigation about fibers and chemicals that allegedly have caused scores and even thousands of serious injuries, lawsuits that arise when people become paralyzed from dives into above-ground swimming pools, disputes about untoward effects ascribed to prescription drugs—such cases and many others frequently resolve themselves into the question, “Was the product defective?” In answering that question, judges become a surrogate for the moral, as well as economic, judgment of their fellow citizens.

Paralleling the issue of defect is the question of when and how sellers must warn of the dangers of their products. A particularly interesting set of arguments within the “duty to warn” issue, which also insinuates itself into other doctrinal categories, arises under the classification of dangers as “open and obvious.” When courts bar recovery for injuries caused by “obvious” hazards, they use that concept as a surrogate for a range of decisional elements.³⁵

The complex rules on proof in products cases are also importantly representative of judicial concepts of justice—at least as important as the liability theories and defect rules because their substantive effects shine through their technical character. Judicial responses to issues of proof represent a difficult set of guesses on matters with important substantive consequences. In dealing with these questions, courts must estimate probabilities in situations where they do not have good statistical information, and they must make those estimates in the context of other estimates: about the comparative dollar costs of securing reliable information and the justice costs, both measurable and unmeasurable, of guessing wrong.

C. Symbolic Confrontations in the Supreme Court

Emblematic of the emergence of products liability law as a symbolically important area of American jurisprudence is the journey of several products cases to the Supreme Court, a place where “private law” litigation does not usually appear. The bedrock of products litigation in sellers’ representations was evident in a plurality holding by four Justices that federal cigarette legislation did not preempt lung cancer claims “based on express warranty, intentional fraud and misrepresentation, or conspiracy.”³⁶ Three other justices

35. See text accompanying notes 237-43.

36. *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2625 (1992).

took the position that Congress did not intend to preempt any damage claims under state law.³⁷

The result of this judicial arithmetic was that, in addition to permitting conspiracy claims, the federal statute did not bar actions based on sellers' claims for their products that prove false. Viewed against the current generation of products liability cases, the significance of this holding is considerable, particularly with reference to the doctrine of express warranty. That theory is, in fact, a strict liability theory. It permits actions for statements purporting to be statements of fact that turn out to be untrue, even though they do not come burdened with the moral culpability that we tend to ascribe to "intentional fraud and misrepresentation."

The lower court opinions that led up to the Supreme Court's decision were substantively just as interesting. Judge Sarokin's several opinions for the district court³⁸ and the Third Circuit's comprehensive review of the case³⁹ inscribed important statements in the law of express warranty. Illustrative was the court of appeals' response to the manufacturer's advertising—so remarkable to modern ears—that "stated, without qualification, that 'NOSE, THROAT, and Accessory Organs [are] not Adversely Affected by Smoking Chesterfields.'"⁴⁰ The continuing barrage of the manufacturer's safety representations in those years featured the insistence by the entertainer Arthur Godfrey, in a radio commercial, that a medical study "was proof" that Chesterfields " 'never did you any harm.'"⁴¹ The Third Circuit rejected the manufacturer's attempt to characterize these statements as "represent[ing] only that short-term smoking was safe," and declared that a "reasonable jury could infer that an unqualified representation that smoking is safe creates a warranty that smoking for a long period of time is safe."⁴²

With respect to the issue of whether the law required reliance on such a warranty, subtle distinctions appeared in the opinions of the district court and the court of appeals. Judge Sarokin, reviewing the comments to the express warranty section of the Uniform Commercial Code (the "UCC"), concluded that the test for reliance was an objective one, rather than one centered on the subjective reac-

37. See *id.* at 2625-32 (Blackmun, J., concurring in part and dissenting in part).

38. See, for example, *Cipollone v. Liggett Group, Inc.*, 649 F. Supp. 664 (D. N.J. 1986); *Cipollone v. Liggett Group, Inc.*, Prod. Liab. Rep. (CCH) ¶ 11,637 (D. N.J. Oct. 27, 1987); *Cipollone v. Liggett Group, Inc.*, 693 F. Supp. 208 (D. N.J. 1988).

39. *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541 (3d Cir. 1990).

40. *Id.* at 548.

41. *Id.* at 575.

42. See *id.* at 575-76.

tion of the buyer, and that thus “[w]hether or not the statement actually induced a particular purchase is not relevant to a determination of whether the statement may constitute an express warranty.”⁴³

Judge Becker’s opinion for the Third Circuit took a somewhat different tack. He thought that the relevant state law, that of New Jersey, would require a plaintiff to prove that “she read, heard, saw or knew of the advertisement containing the affirmation of fact or promise.”⁴⁴ Within this framework, Judge Becker offered a two-edged analysis: On the one hand, he said that the manufacturer might be able to prove that the plaintiff “did not believe the advertisements that she saw”;⁴⁵ on the other hand, he concluded that there were issues of fact as to whether the plaintiff had “disbelieved the advertisements.”⁴⁶

Similarly complex legal issues presented outcroppings in litigations that engaged the Supreme Court on issues of proof and on the kind of harm necessary to make a products case in tort, as well as on an issue with especially high stakes for national defense. In one case with ramifications far beyond the products area, the Court adopted the approach of the Federal Rules of Evidence to questions of scientific proof. Although it rejected the idea that expert testimony on scientific questions must carry the imprimatur of general acceptance in the relevant field, the Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.* set out several criteria, including those of subjection to peer review and publication, and the “falsifiability” of the hypothesis at issue, as tests for the reliability of scientific evidence.⁴⁷

In another decision, with a much tighter focus on products jurisprudence, the Court barred tort recovery for economic loss in a maritime case—an area in which the Court deals with private law relatively frequently. Confronted with a case of malfunctions in ship turbines that damaged the turbines themselves but no other property, the Court insisted in *East River Steamship Corp. v. Transamerica Delaval, Inc.* that such a complaint was “most naturally understood as a warranty claim.”⁴⁸ Damage to the product itself, said Justice Blackmun for a unanimous Court, meant “simply that the product has

43. *Cipollone*, 693 F. Supp. at 213-14.

44. 893 F.2d at 567.

45. *Id.* at 569.

46. *Id.* at 570.

47. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S. Ct. 2786, 2794-97 (1993).

48. *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 872 (1986).

not met the customer's expectations, or, in other words, that the customer has received 'insufficient product value.'"⁴⁹

One other decision by the Court intermingled theorizing about the rationales of tort law with considerations of military necessity. In *Boyle v. United Technologies Corp.*,⁵⁰ a five-Justice majority immunized a government contractor against suits based on alleged design defects in military equipment. The Court established this immunity in situations in which the government had "approved reasonably precise specifications" to which the product conformed, and the supplier had warned the government of the dangers.⁵¹ Discerning a basis for the immunity in the discretionary function exception of the Federal Tort Claims Act, Justice Scalia declared for the majority that decisions regarding the design of military equipment often required "not merely engineering analysis but judgment as to the balancing of many technical, military, and even social considerations, including specifically the trade-off between greater safety and greater combat effectiveness."⁵² A dissent by Justice Brennan attacked what he viewed as the majority's premise "that any tort liability indirectly absorbed by the Government so burdens governmental functions as to compel us to act when Congress has not."⁵³ By contrast, Justice Brennan declared "[t]he tort system" to be "premised on the assumption that the imposition of liability encourages actors to prevent any injury whose expected cost exceeds the cost of prevention."⁵⁴

D. Limiting Principles on Restatements

This cluster of Supreme Court cases, ranging across a spectrum of issues peculiar to products law but with implications beyond it, underlies the densely fact-centered nature of products cases and the level of controversy about the particulars of the law. It also indicates the importance of providing room for courts to persuade one another about the desirability of rules contributing to the development of a vigorously evolving branch of the law. In current jargon, there remains a steep learning curve for disputed issues of products liability.

49. *Id.*

50. 487 U.S. 500 (1988).

51. *Id.* at 512.

52. *Id.* at 511.

53. *Id.* at 530 (Brennan, J., dissenting).

54. *Id.*

The Court's holding in *East River*, and subsequent judicial reference to that precedent, are instructive in this regard. At a very general level, the Court's analysis proved persuasive to a majority of state courts and federal tribunals applying state law.⁵⁵ In this sense, the Court's power to persuade was impressive, especially so because its decision in a case narrowly focused on maritime law influenced courts dealing with cases spread across the landscape of products liability.

However, even beyond the cases that disagree with *East River*,⁵⁶ other decisions in the wake of that case have indicated the room for argument around the basic question. Exemplary of the policy tensions that arise in this area is the case in which a helicopter owner sues for damages to the craft caused by a crash attributable to a defect. Should a court allow tort damages to the craft owner when lives were lost in the crash? Decisions of the same federal district court have sliced some very fine distinctions on these questions.⁵⁷

The case law thus teaches us caution in the effort at codification of branches of the law in which dispute is still sharp and discussion proceeds apace. This note of restraint must inform all efforts at restatement. Because of the nature of the subject, it should cabin the idea of a products Restatement in particular.

IV. THE EIGHTIES: A COMMON LAW SUBJECT BECOMES POLITICAL

As the refinement and extension of argument progressed through the seventies and into the eighties, an overlapping historical development appeared: the politicization of the law of products liability. "The law" as the original authors of Restatements viewed it, per-

55. See, for example, *Aloe Coal Company v. Clark Equipment Co.*, 816 F.2d 110 (3d Cir. 1987), overturning the precedent of *Pennsylvania Glass Sand Corporation v. Caterpillar Tractor Company*, 652 F.2d 1165 (3d Cir. 1981); *Cooperative Power Association v. Westinghouse Electric Corporation*, 493 N.W.2d 661, 663-66 (N.D. 1992) (applying the *East River* analysis to a certified question).

56. See, for example, *Washington Water Power Company v. Graybar Electric Company*, 112 Wash. 2d 847, 774 P.2d 1199, 1209 (1989) (criticizing *East River* for buying "increased certainty" at "too high a price," downplaying "safety concerns," and threatening loss of "a principal deterrent to unsafe practices").

57. Compare *Comind, Companhia de Seguros v. Sikorsky Aircraft*, 116 F.R.D. 397, 423-24 (D. Conn. 1987) (allowing insurer of helicopter to sue for destruction of craft in accident that killed 14 people) with *McKernan v. United Technologies Corporation*, 717 F. Supp. 60, 66-67 (D. Conn. 1989) (barring a suit for downtime and loss of income attributable to product modifications to correct hazardous defect) with *Icelandic Coast Guard v. United Technologies Corp.*, 722 F. Supp. 942, 948 (D. Conn. 1989) (allowing recovery for expenses of rescuing crewmen but not for replacement of aircraft, recovery of wreck, and loss of use).

haps more than it seems to us today, appeared to be capable of reduction to a set of rules—indeed, to “blackletter rules.” Not that the lawyers who labored on these early projects were unsophisticated about the complexities of law in society.

In 1921, the incomparable Cardozo, a towering figure in the early days of the Institute, had brilliantly set forth the way that law relates to the social institutions that surround it.⁵⁸ This insight developed over time with specific reference to torts. A generation later, Green made clear in the crisp homespun prose of essays published in 1959 and 1960 that tort law was “Public Law in Disguise.”⁵⁹ By 1986, Fred Zacharias was describing a “Politics of Torts.”⁶⁰

Giving practical point to this recognition of the political nature of a “private law” subject were events swirling around the subject of products liability. A benchmark in this history was the creation of the Interagency Task Force on Product Liability, centered in the Department of Commerce, in 1976.⁶¹ From that body came a comprehensive proposal for codification, in the form of model state legislation. This was the Model Uniform Product Liability Act, published in 1979.⁶²

There ensued a perpetual conveyor belt of “reform” ideas, regularly shuttling proposals for federal legislation on the subject to Congressional committees. This parade of bills began in the late 1970s⁶³ and continues to this writing.⁶⁴ Hearings in several Senate and House committees on the subject have provided a rich repetition and extension of the controversy from the points of view of diverse interest groups, state court judges, and academics.⁶⁵

58. See generally Benjamin N. Cardozo, *The Nature Of The Judicial Process* (Yale U., 1921).

59. Leon Green, *Tort Law Public Law in Disguise*, 38 Tex. L. Rev. 1 (1959) and 38 Tex. L. Rev. 257 (1960).

60. Fred C. Zacharias, *The Politics of Torts*, 95 Yale L. J. 698 (1986).

61. See Interagency Task Force on Product Liability, Dept. of Commerce, Final Report, I-1 to I-4 (1978).

62. Model Uniform Product Liability Act, 44 Fed. Reg. 62714 (Oct. 31, 1979).

63. See, for example, Product Liability, Hearings on H.R. 5571, H.R. 1061 and H.R. 1675 before the Subcommittee on Consumer Protection and Finance of the House Committee on Interstate and Foreign Commerce, 96th Cong., 1st Sess. (1979); Product Liability Reform, Hearings on S.2631 before the Subcommittee for Consumers of the Senate Committee on Commerce, Science and Transportation, 97th Cong., 2d Sess. (1982).

64. See, for example, The Product Liability Fairness Act, Hearing on S.687 before the Subcommittee for Consumers of the Senate Committee on Commerce, Science and Transportation, 103d Cong., 1st Sess. (1993).

65. See, for example, The Product Liability Reform Act, Hearing on S.1400 before the Senate Committee on the Judiciary, 101st Cong., 2d Sess. (1990); Product Liability Reform Act, Hearings on S.2760 before the Senate Committee on the Judiciary, 99th Cong., 2d Sess. (1986).

Even the processes of the ALI, originally conceived to “restate” “the law” in a time when people had rather more confidence in what “the law” was and that it was possible to “restate” it satisfactorily, found themselves enmeshed in interest group appeals. According to one report, besides receiving “comments and suggestions through the traditional channels” of the Institute, the reporters for the products restatement invited submissions from “groups such as the American Bar Association, the Association of Trial Lawyers of America, the Defense Research Institute, and the Product Liability Advisory Council.”⁶⁶

News accounts conflicted about the level of disagreement, and even the existence of disputed issues. A pair of examples provide a flavor of several tiers of controversy. Tentative Draft No. 1 for products liability (sometimes called “the Draft”) appeared under a date of April 12, 1994. An account in the BNA Product Safety and Liability Reporter cited spirited argument between the reporters and Institute members who expressed disagreement with the draft. For example, co-reporter Aaron Twerski was paraphrased as saying that “what some attorneys may unrealistically want is the ability to go into a case without an expert,” an assertion that American Trial Lawyers Association president Barry Nace termed “garbage.”⁶⁷

Puzzlingly to at least an informed reader, two defense lawyers wrote in the next week’s edition of the same publication that although “[m]any plaintiff’s attorneys were deeply concerned that the Reporters . . . would be in effect, creating federal product liability reform legislation to the detriment of injured plaintiffs,” those lawyers “have indicated that they are now satisfied with the Reporters and the process by which this document is being created.”⁶⁸ These writers explained that the reason for this evolving harmony was “that the Reporters have made every effort to receive input from the plaintiff’s bar and to incorporate those views, if they agree with them, into the proposed *Restatement*.”⁶⁹

Whatever misunderstandings may have existed about the level of peace and contentment concerning the draft, one thing was clear: Although the reporters were doing substantial amounts of case re-

66. Kenneth Ross and Hildy Bowbeer, *U.S. Product Liability Law Undergoing Revision*, 22 Product Safety & Liability Rptr. (BNA) 460, 460 (April 29, 1994).

67. Bruce S. Kaufman, *Attorneys Spar Over Restatement (Third) of Torts: ATLA to Mobilize Opposition to ALI Project*, 22 Product Safety & Liability Rptr. (BNA) 436, 437 (April 22, 1994).

68. Ross and Bowbeer, 22 Product Safety & Liability Rptr. at 463 (cited in note 66).

69. *Id.*

search and analysis on their own,⁷⁰ they had become, perforce, brokers of ideas advanced by contending political forces. As will appear, this is a very difficult task.

Of particular interest in this regard is the foreword to the Tentative Draft, written by Geoffrey Hazard, the ALI director. In this document of less than a page and one half, Professor Hazard refers thrice to the notion of balancing within the context of the idea that products liability law has "become a public law subject."⁷¹ As noted above, he refers, at one point, to the job of "seek[ing] an appropriate balance" between "consumer and worker interests" and "reasonably viable standards for conduct for producers."⁷² Again, he speaks of the reporters' task as "to express elementary legal concepts in language that appropriately balances severely conflicting social concerns," and commends the reporters for "work[ing] intelligently and conscientiously to capture the proper balance."⁷³ He refers frankly to "thoughtful advice from a wide range of commentators," including, inter alia, "plaintiffs' and defendants' bar groups . . . and other interest groups that have written us."⁷⁴

V. A PROBLEM DEFINED: CONTROVERSY ABOUT THE LAW

The political arguments surrounding products liability throw into relief the problem that confronts the effort to "restate" this area of the law. Those arguments, indeed, provide a frame for the ongoing controversy about what the law is. Director Hazard's references to the need for "balancing"⁷⁵ only confirm the existence of that dispute—or, rather, the many controversies in which courts are engaged about dozens of details of products liability law.

Discussions among scholars have reflected the complex strata of the problem. At a rather general level, some have focused on the economics of products liability⁷⁶ and others on its moral content,⁷⁷

70. For a random example, see Restatement Draft § 2, Reporters' Note, comment c, at 39-55 (cited in note 13) (noting multiple cases and secondary research supporting a single comment to the blackletter).

71. Hazard, *Foreword* at xiii (cited in note 14).

72. *Id.* A fuller quotation of this passage appears at text accompanying note 14.

73. *Id.* at xiv.

74. *Id.*

75. See text accompanying notes 14, 71-73.

76. See, for example, W. Kip Viscusi, *Reforming Products Liability* (Harvard U., 1991).

77. See, for example, David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 Notre Dame L. Rev. 427 (1993).

with this Author describing its development as a cultural mirror.⁷⁸ Academic commentary has continued to flower on very specific disputes about the law. Providing one set of examples are the arguments over the appropriate point of reference for design defect—in particular, whether the crucial standard is a “risk-utility” standard, or one focused on “consumer expectations,” or a combination of the two.⁷⁹ Another illustration appears in the disputes about whether it is appropriate to apply a true strict liability to cases of alleged failure to warn.⁸⁰ The new Restatement project has forced to the fore the question of whether a plaintiff suing for an alleged design defect must show the existence of a reasonable alternative design.⁸¹

The fierceness of the battle about what the law is appears sharply to the reader of products liability cases over time. One finds the continuing dispute over the cultural significance of products liability law, and its moral content, graphically mirrored in the different linguistic, conceptual, and policy approaches of many states:

- Alabama, with its “extended manufacturer’s liability doctrine”;⁸²
- Ohio, with its struggles over warranty and strict liability concepts;⁸³
- New Jersey, with its far-reaching extensions of strict liability, even under the warranty label that preceded its adoption of the

78. See generally Shapo, *Products Liability and The Search for Justice* (cited in note 32).

79. Compare, for example, James A. Henderson, Jr., *Renewed Judicial Controversy Over Defective Product Design: Toward the Preservation of an Emerging Consensus*, 63 Minn. L. Rev. 773 (1979) (advocating the risk-utility test) with F. Patrick Hubbard, *Reasonable Human Expectations: A Normative Model for Imposing Strict Liability for Defective Products*, 29 Mercer L. Rev. 465, 484-91 (1978) (positing “reasonable human expectations” as basis for “a more just compensation system”). Compare Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 Va. L. Rev. 1109 (1974) (focusing on product promotion), commentary in Gary T. Schwartz, *Foreword: Understanding Products Liability*, 67 Calif. L. Rev. 435, 476 (1979), Aaron D. Twerski, *From Risk-Utility to Consumer Expectations: Enhancing the Role of Judicial Screening in Product Liability Litigation*, 11 Hofstra L. Rev. 861, 898-99 (1983).

80. Compare, for example, the argument for a strict liability standard, even as to risks about which defendants could not have known, in W. Page Keeten, *Products Liability—Inadequacy of Information*, 48 Tex. L. Rev. 398 (1970) with James A. Henderson, Jr. and Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. Rev. 265, 271-78 (1990) (advocating negligence as the proper basis for failure to warn).

81. See, for example, Restatement Draft § 2, Reporters’ Note, comment d, at 55 (cited in note 13) (saying, in a Reporters’ Note, that “[a]uthority for the proposition that plaintiff must establish that a reasonable alternative design could have been adopted requires more than direct citation to cases and statutes that specifically set forth that requirement”).

82. See, for example, *Casrell v. Altec Industries*, 335 S.2d 128 (Ala. 1976).

83. See *Temple v. Wean United, Inc.*, 50 Ohio St. 2d 317, 364 N.E.2d 267 (1977) (the state supreme court’s final approval of Section 402A).

strict tort doctrine, and its legislative adoption of a standard interpreted to combine consumer expectations and risk-utility features;⁸⁴

- California, with its progression from the invention of strict liability for products through an inadequate "defect is defect" test through the two-pronged defect standard of the Barker decision, and its powerful stand against strict liability for prescription drugs;⁸⁵

- Montana, which recently held a marshmallow maker hable for failure to warn of the danger of its product to children;⁸⁶

- Massachusetts, with its persistent adherence to warranty as the theory of choice for products cases;⁸⁷

- New York, with its tortured progression from warranty to strict liability;⁸⁸

- Oregon, with its ongoing conceptual arguments about the meaning of defect and its emphasis on the distinction between "product" and "conduct,"⁸⁹ as well as its remarkable tradition of a multiplicity of opinions presenting varied distinctions on controversial matters;⁹⁰

- Washington, with an independent tradition that has produced distinctive opinions on consumer expectations,⁹¹ the duty to warn,⁹² and liability for economic loss when dangerous hazards are involved;⁹³

- Nevada, with a recent opinion of particular interest on the duty to warn and international hazard symbols;⁹⁴

84. Compare *Santor v. A&M Karagheusian, Inc.*, 44 N.J. 52, 207 A.2d 305 (1965) with *Dewey v. R. J. Reynolds Tobacco Co.*, 121 N.J. 69, 577 A.2d 1239, 1252 (1990) (discussing N.J. Stat. Ann. § 2A:58C-3a(2)).

85. See *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897 (1963); *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 501 P.2d 1153 (1972); *Barker v. Lull Engineering Company, Inc.*, 20 Cal. 3d 413, 573 P.2d 443 (1978); *Brown v. Superior Court*, 44 Cal. 3d 1049, 751 P.2d 470 (1988).

86. *Emery v. Federated Foods, Inc.*, 262 Mont. 83, 863 P.2d 426 (1993).

87. See, for example, *Swartz v. General Motors Corporation*, 375 Mass. 628, 378 N.E.2d 61 (1978).

88. See *Goldberg v. Kollsman Instrument Corporation*, 12 N.Y.2d 432, 191 N.E.2d 81 (1963) (temporizing with implied warranty); *Victorson v. Bock Laundry Machine Company*, 37 N.Y.2d 395, 335 N.E.2d 275 (1975) (confirming strict liability as theory of choice).

89. See, for example, *Heaton v. Ford Motor Company*, 248 Or. 467, 435 P.2d 806 (1967); *Phillips v. Kimwood Machine Company*, 269 Or. 485, 525 P.2d 1033 (1974).

90. See, for example, *Brown v. Western Farmers Association*, 268 Or. 470, 521 P.2d 537 (1974) (four opinions).

91. *Ryder v. Kelly-Springfield Tire Company*, 91 Wash. 2d 111, 587 P.2d 160 (1978).

92. See, for example, *Ayers v. Johnson & Johnson Baby Products Co.*, 117 Wash. 2d 747, 818 P.2d 1337 (1991).

93. See *Washington Water Power Company v. Graybar Electric Company*, 112 Wash. 2d 847, 774 P.2d 1199 (1989).

94. See *Fyssakis v. Knight Equipment Corporation*, 108 Nev. 212, 826 P.2d 570 (1992).

- Illinois, with its continuing adherence to a consumer expectations test⁹⁵ and its complex law on the issue of whether a plaintiff must show a reasonable alternative design; and⁹⁶

- Pennsylvania, with its ongoing adherence to a “guarantor” test for strict liability, and the lengthy warfare in its state and federal courts on the point.⁹⁷

My purpose in this very partial summary is to convey a sense of the richness of the national dialogue on the subject. The differing theoretical and conceptual approaches of state courts to the subject seem to mandate that a Restatement provide maximum flexibility for application of local doctrine. Early in the Draft, the reporters laid a potential foundation for such an approach with their emphasis on functional analysis, making it clear in their comments that the rules on defect “are stated functionally rather than in terms of the classic common law characterizations.”⁹⁸ Yet their insistence on relatively tight limitations on the definition of defect renders somewhat nugatory their statement that once a claim meets the requirements of their definitions, courts are free to use whatever doctrinal labels they choose.⁹⁹

The need to preserve flexibility for individual courts would seem especially apparent when one considers the diverse rationales advanced for liability for product injuries. The comments to Section 402A were especially broad-gauged in their development of the rationales for strict liability;¹⁰⁰ in the Tentative Draft, the reporters distinguish rather sharply between the rationales for liability for manufacturing defects, on the one hand, and those supporting liability for design defects and failures to warn.¹⁰¹ By contrast, the courts have tended to be rather expansive in their statement of rationales generally.¹⁰² Given judicial employment of the comments to Section 402A over the past thirty years, it is appropriate to preserve substan-

95. See, most remarkably, the interpretation of state law in *Todd v. Societe Bic, S.A.*, 21 F.3d 1402 (7th Cir. 1994), discussed at text accompanying notes 294-97.

96. See the Reporters' summary, Restatement Draft § 2, Reporters' Note, comment d, at 56 (cited in note 13).

97. Compare, for example, *Azzarello v. Black Brothers Company, Inc.*, 480 Pa. 547, 391 A.2d 1020 (1978) (spelling out meaning of “guarantor” terminology) with *Merriweather v. E. W. Bliss Company*, 36 F.2d 42, 44-46 (3d Cir. 1980) (distinguishing *Azzarello*).

98. See, for example, Restatement Draft § 2, comment j, at 30 (cited in note 13). See also *id.* at xxi.

99. See *id.* § 2, comment j, at 30.

100. See, for example, Restatement (Second) § 402A, comments c, f.

101. See Restatement Draft § 2, comment a, at 10-13 (cited in note 13).

102. See, for example, Shapo, 1 *The Law of Products Liability*, ¶ 7.05 at 7-31 to 7-39 (cited in note 17).

tial leeway for courts to choose the path of development of their underlying premises.

Any consideration of the variegated articulations of both concept and policy in this area must also take into account overseas developments. This seems especially important because critics of the present body of products liability law have expressed such strong concerns about the alleged destructive effect of the American law on domestic producers.

One may observe, in passing, that this line of argument does not take into account the subjection of foreign producers to American law on a long-arm basis. A more central point is that the other principal industrial powers have moved to relatively expansive conceptions of products liability. In particular, the products liability Directive of the European Community (the "Directive")¹⁰³ projects a conception of strict liability that is, if anything, more extensive and consumer-biased than virtually any American state jurisprudence. The stark terms of Article 4 of the Directive require the plaintiff to prove only "the damage, the defect and the causal relationship between defect and damage."¹⁰⁴ Especially remarkable, by comparison with the Tentative Draft, is the adoption by the Directive of a consumer expectations test with a short list of "circumstances" to be taken "into account," of which the first is "the presentation of the product."¹⁰⁵ Beyond the legislative details of the Directive, however, its most salient feature is the strength of the desire for consumer protection reflected in its overall architecture.¹⁰⁶

Also of particular interest in a comparative vein is an Explanation of Deliberation on the Products Liability System produced by the Civil Affairs Bureau of the Japanese Ministry of Justice (the "Explanation").¹⁰⁷ The Explanation, discussing "The Principle of Strict Liability," announces a rule of liability for damage to "life, body or property of others . . . by the defect of the movable which the producer produced and put into circulation."¹⁰⁸

103. Council Directive 85/374 of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, 1985 O.J. (L 210) 29.

104. *Id.* art. 4.

105. *Id.* art. 6(1).

106. See generally Marshall S. Shapo, *Comparing Products Liability: Concepts in European and American Law*, 26 *Cornell Int'l L. J.* 279 (1993).

107. Civil Affairs Bureau, Japanese Ministry of Justice, *The Explanation of the Result of Deliberation by the Civil Law Committee of the Legislative Council of the Ministry of Justice* (Jan. 17, 1994) (copy on file with the Author). I am grateful to Mr. Jun Masuda, The Counsellor, Civil Affairs Bureau, for sending me the English translation of this document.

108. *Id.* ¶ II(1).

With respect to the definition of defect, it is noteworthy that the drafters of the Explanation lamented "that it is practically difficult to stipulate a definition provision [for defect],"¹⁰⁹ and said that "[i]n order to realize adequate resolution on tort liability in the case of accidents resulting from defective products, it is appropriate to leave interpretation to the application of practice."¹¹⁰

Perhaps especially remarkable is a moral note that sounds in the Explanation, focusing on "consumers' trust."¹¹¹ This theme appears with reference to importers, those who place their trade names or trademarks on products, and those "who have indicated that they put the products into circulation as original sellers, exclusive sellers, and so on, by putting to the products marks such as names, trade names, trademarks and so on."¹¹² These parties, the drafters say, "shall be imposed defect liability because they have enhanced consumers' trust in safety of products."¹¹³ It is particularly interesting to find these straightforward ethical pronouncements in a government document of a competitor nation whose economic colossus has been such a subject of concern for American foreign policy.

VI. STRATEGIES FOR RESTATING PRODUCTS LIABILITY— A CRITICAL ANALYSIS

Against this background of developing law in both this country and its principal industrial counterparts, I undertake to suggest some basic ideas that should inform a "restatement" of the law of products liability. In this section and the following section, which deals with particular concepts now at issue in products law, I shall make reference to relevant parts of the Tentative Draft.¹¹⁴

A. *The Torts Frame*

At the threshold, I refer to an important problem of framing. This problem inheres in the fact that the strategy embodied in the

109. *Id.* ¶ II(2), at 5.

110. *Id.*, Note 2, subparagraph 2.

111. *Id.* ¶ II(3), Explanation, sections a, b.

112. *Id.*

113. *Id.*

114. Although the reporters and Council have been revising specific language of the Draft during the development of this Article, my critique focuses on the basic ideas and arguments that will remain at play during the ALI's consideration of the subject over the next several years. In a few cases, I have employed later drafts where they present important variations on basic issues.

Draft departs rather dramatically from the overarching conception of both the original Restatement of Torts and the Restatement Second. The latter conception, premising that there is a general law of torts, is implicit and indeed virtually explicit in Professor Wechsler's introduction, as director, to the first two volumes of the Restatement Second. He says there that those volumes "initiate the publication of a thorough revision of the Restatement of that subject," i.e., torts.¹¹⁵ The concept is also apparent in Professor Wechsler's references to "the law of torts,"¹¹⁶ and to the phenomenon of "enormous change in torts, reflecting new conceptions of the social function of this branch of law."¹¹⁷

The rationale for isolating products liability as the first subject for a Third Restatement, as formulated by director Hazard, focused on the idea that this body of law was "socially important and technically complicated."¹¹⁸ The controversial nature of this branch of the law surely was a motivating force in the decision to initiate the new Restatement with the subject. Doubtless, a practical consideration was that it would require enormous startup costs to restudy and recast the general conception of tort law developed throughout the 951 sections of Restatement Second.

The die appears cast for the present strategy. Yet anyone concerned for the intellectual coherence of the Restatement Third must continue to look to the basic principles of tort law for clues to the rules appropriate to a restatement of products liability.¹¹⁹ This is so, if for no other reason than the existence of all the rules embodied in the 950 sections apart from Section 402A of the Restatement Second, not to mention Section 402A itself. If there is a general law of torts, then presumably courts concerned with products liability cases will want to refer to that law when they confront especially difficult cases in the borderlands of products litigation. All things being equal, this would be the occasion for a comprehensive, foundations-up review of the principles of tort law. *Alia iacta est*, one must remind restaters, the Institute, and the judiciary that the general law of torts will overlook every sentence of a products restatement.

115. Wechsler, Introduction to 1 Restatement (Second) at vii.

116. *Id.*

117. *Id.* at ix.

118. Hazard, *Foreword* at xiii (cited in note 14).

119. I am grateful to Oscar Gray for an informal suggestion that has sharpened my view of this matter. I do not tax him with the specifics of this argument.

B. A Law of Products Liability

What are the characteristics of the law of products liability, now sought for restatement? At their most general, they do indeed partake of the general fabric of the law of torts. Products liability is highly fact oriented, a phenomenon manifest in the case law on defect, in issues of liability as they pertain to the position of parties in the distributional chain, in problems involving alleged failures to warn, and in questions of proof. In part because of this orientation, and also in this way reflecting the general law of torts, products law requires incremental development. It is a classic of case-by-case construction of lines of precedents, which courts constantly test against their own jurisprudence of the subject and indeed against the bodies of law developing in other states. It is the very model of the cross-country conversation about the law that is a salutary feature of American jurisprudence.

Other factors grounding the law relate more specifically to the process that brings products into sometimes injurious contacts with members of society. Here, we confront the elements of product portrayal, the availability of information about risk, and power relationships in the marketplace. We meet also the technological context of modern products markets and the difficulties of proof that often confront consumers who attribute injuries to complex products.

A necessary theme in any restatement of products liability would stress the need to weigh competing interests. At a general level, this involves computing the costs of injuries, considering the need to maintain incentives for the production of useful goods, and figuring in the social cost of benefits foregone from products for which manufacturers find the law to create prohibitive disincentives. Another set of factors to be weighed includes the incentives that legal rules will engender in both producers and consumers with respect to care in production, distribution, and use. In this regard, the foreword to the Tentative Draft explicitly deals with the need for balancing of large social interests.¹²⁰ The idea of balancing, of course, has provided an ongoing motif in the general law of torts.¹²¹

In setting a strategy for restatement, one confronts an historic tension between predictability and generality. Professor Hazard

120. Hazard, *Foreword* at xiii (cited in note 14), quoted more fully in text accompanying note 14.

121. See, for example, Marshall S. Shapo, *Changing Frontiers in Torts: Vistas for the 70's*, 22 *Stan. L. Rev.* 330, 340 (1970) (referring to "the kinds of weighing that torts has always taught the best").

refers, in his foreword, to the need for "reasonably viable standards of conduct for producers of goods."¹²² Precision is always a goal for those who make and interpret the law. Yet one need only repair to the standard of Section 282 of the Restatement Second to find one of the most general statements in all the law: the definition of negligence as "conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm."¹²³

C. How to Restate a Controversial Area of the Law

The tension between the natural human striving for crisp principle and the need for general statement leads to a simple guideline for the restatement of controversial areas of the law: In our search for certainty and predictability, we cannot avoid the need to preserve judicial flexibility. We will make more specific this injunction, which reflects significant differences of opinion between the reporters and ALI members who take positions critical of the Draft. To take one example at this point: When there is no clearly established judicial preference for a single factor to house the defect issue—for example the factor of risk-utility analysis—it would be much preferable to leave the question to the courts for further development.

With respect to some issues where this strategy seems wise, there simply is not enough sharply etched judicial opinion on the subject. With respect to others, there is sharp dispute on particular questions. Sometimes Restatements may successfully force the issue; perhaps the classic example is the drafting of Section 402A itself. However, concerning a subject about which there is both much texture and much controversy, a restatement that strives for particularity of ukase may achieve no more than the dignity of the decisions of a court of a fifty-first state. Forfeiting whatever claim it may have to be an authoritative pronouncement, it may reveal itself, in the words of a correspondent, as no more than "a treatise written by a committee."¹²⁴

D. Special Factors Associated with Restatements

In this connection, it may be well to mention some factual aspects of law reform peculiarly associated with the ALI's Restatement process. The first set of these factors concerns the players on various

122. Hazard, *Foreword* at xiii (cited in note 14).

123. Restatement (Second) § 282.

124. I owe the phrase to David Rebertson.

stages of the drama; the second, which is interlinked with the first, has to do with the format of a Restatement.

First, one should note that a document must pass through several stages of draft and voting to become a Restatement. Appointed by the director of the Institute with the approval of the Council or the executive committee,¹²⁵ the reporters are the wheel-horses for any Restatement project. It is they who are responsible for the bulk of research and for generating the drafts that will be the subject of discussion throughout the process. Because of the specialized demands of the law, the reporters must be persons learned in the particular area, and naturally will hold opinions on many substantive matters.

As has been noted, in matters as controversial as the products Restatement project, the reporters' mailboxes become virtual legislative hoppers for proposals and comments from a wide variety of interested people, including interest group representatives.

Aiding the reporters are a set of advisers and a members consultative group. The Institute names the advisers—nineteen of them for the products restatement, a cross-section of judges, practitioners and law professors. The consultative group is essentially self-nominated. The magnetic power of the subject of products liability is evident in the fact that the consultative group for products numbers just about two hundred.¹²⁶

The reporters meet periodically with the advisers, and separately with the consultative group, usually with the director and officers of the Institute in attendance. Discussion is often frank and focused, although the writer can testify that the size of the groups—even of the relatively small advisers platoon—presents a problem in the logical development of ideas through exchange. Whatever the substantive content of these discussions, it is clear that the reporters must make their own judgments about both the framework and the details of the draft.

After the advisers and the consultative group review a preliminary draft, the reporters do a revision, which they submit to the sixty member Council of the Institute ("the Council") as a Council Draft. After the Council reviews that document, it may qualify for submission as a Tentative Draft, Discussion Draft, or Proposed Final Draft. The Institute emphasizes that "[a]t each stage of the reviewing

125. See American Law Institute, By-laws ¶ 10.01 (1994).

126. See Restatement Draft at vii-xi (cited in note 13) (listing members of the consultative group).

process, a Draft may be referred back for revision and resubmission."¹²⁷ The three thousand person membership of the Institute ultimately votes to accept or reject a final draft.

Of particular interest, as one analyzes this process, are the differential levels of specialization at various stages of the process. The reporters usually are experts who have served their time in the metaphorical rowing galleys of the subject. Many of the advisers possess a similar level of expertise, although some—many judges for example—will be generalists. One may reasonably assume that because of the highly voluntary nature of attendance at consultative groups, persons who come to those meetings have a strong reason for doing so—born of academic or professional conviction.

The Council includes a highly selective group of jurists, practicing lawyers, and professors who, taken as a group, are generalists. Although a few may have a particularized interest and expertise in the subject of the Restatement—be it products liability or another topic—most will not. This fact has the virtues of its vices, and vice versa. While it tends to guarantee a fresh look at a subject, it also creates a setting in which the principal actors are not in close touch with the details in which the fabric of a subject resides.

The Institute itself is a many-faceted group that includes all the major categories of persons in the other groups. An Institute session that discusses, and perhaps votes on, a Draft will tend to include many people who have a particular interest in the subject. An important sorting principle, if not as predominant as with the consultative groups in particular, is likely to be self-selection for a variety of reasons. The membership that votes on a particular subject is likely to include a relatively slight fraction of the total membership of the Institute. In the first plenary discussion of the Tentative Draft on products, on May 17 and 18, 1994, the total count on the three teller votes ran between 272 and 303 persons.¹²⁸

A second important set of considerations relates to the format of a restatement. This includes a hierarchy of rules and commentary. Signally important is the blackletter, a brief, literally bold-faced statement of a legal principle in a kind of codal fashion. Following this are "comments," which seek to elucidate the meaning of the blackletter, sometimes with illustrations. The illustrations often encapsulate the facts of leading cases, but sometimes are rather fanci-

127. *Id.*, inside cover, box.

128. See *ALI Members Put Off Approval Until 1995 of Major Product Liability Provisions*, 22 *Product Safety & Liability Rptr.* (BNA) 521, 522 (May 20, 1994).

ful. "Reporters' Notes" present a body of research, principally in case law but also statutes, that helps to explain the reporters' views. One should note that when the Institute adopts a Restatement, it embraces not only the blackletter, but also the comments.¹²⁹ This is a fact of particular interest, because the comments may include intricate reasoning and rather controversial policy choices. In this regard, one should note that the controversy about such disputed provisions likely would divide many levels of commentators—not only members of the Institute, but also judges and legislators who might address the topic.

VII. CORE CONCEPTS IN A PRODUCTS RESTATEMENT

Having described the multi-level stage on which a Restatement drama plays out, we turn now to an analysis of the principal concepts that must inform a restatement of products liability.

A. *The Idea of Reasonableness*

A major governing standard for the Tentative Draft on products is an idea to which much of tort law frequently resorts: the idea of reasonableness. The director's brief foreword epitomizes this approach in his reference to a search for a balance "between providing reasonable protection for consumer and worker interests and stating reasonably viable standards of conduct for producers of goods."¹³⁰ He remarks that the concept of reasonableness is "firmly established in the law" of both warranty and negligence.¹³¹ Very early in the Draft, the reporters indicate that the important general sections on design defect and warnings, as well as those on prescription drugs and devices, "rely on a reasonableness test traditionally used in determining whether an actor has been negligent."¹³² This emphasis makes clear that one of the hoariest of torts concepts still possesses considerable vitality, even given its high level of generality. That generality, indeed, provides a broad roof for competing schools of thought—for

129. See, for example, Wechsler, Introduction to 1 Restatement (Second) at ix (explaining that the commentary was "no less carefully examined and debated by the Advisors, the Council and Institute than the black letter rules themselves").

130. Hazard, *Foreword* at xiii (cited in note 14).

131. *Id.*

132. Restatement Draft § 1, comment a, at 3 (cited in note 13).

example, those who view tort law as principally a vehicle for efficiency analysis and those who see it as embodying strong ethical content.¹³³

B. The Tripartite Division

Sections 1 and 2 of the Draft dictate its fundamental architecture, which depends on three supporting pillars. Section 1, after announcing a principle of liability applicable to one "who sells a defective product,"¹³⁴ says that "[a] product is defective if, at the time of sale, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings."¹³⁵

Section 2 spells out the definitions for each element of this tripartite classification scheme. Rather noncontroversially, it declares that there is a "manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product."¹³⁶

The notion of a warnings defect appears in blackletter that declares a product "defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced by the provision of reasonable instructions or warnings . . . and the omission of the instructions or warnings renders the product not reasonably safe."¹³⁷

This formula helps to capture the fact that products come to consumers with considerable information baggage. It would, perhaps, sharpen this point if one were to note that the reason that instructions or warnings are "inadequate" sometimes inheres in the image that accompanies the product to the consumer.

The warnings definition triggers a concern that one might view as purely linguistic, but which may have important conceptual features. This concern arises from the phrase "defects based on inadequate instructions or warnings." That language seems a misnomer. The idea of defect, in plain English, connotes physical or chemical properties inherent in a product. If the informational structure that accompanies the product to market misleads the consumer about those properties, then there may be grounds for seller liability. But

133. For a compendium of diverse rationales of tort law, see Special Committee on the Tort Liability System, *Towards A Jurisprudence of Injury: The Continuing Creation of a System of Substantive Justice in American Tort Law*, ch. 4 (A.B.A., 1984) (M. Shapo, Rptr.).

134. Restatement Draft § 1(a) at 1 (cited in note 13).

135. *Id.* § 1(b) at 1.

136. *Id.* § 2(a) at 9.

137. *Id.* § 2(c) at 9-10.

that is because the informational structure is inadequate; the physical properties of the product remain the same.

One can welcome the effort to make the definition of defect functional, and, in particular, one can be sympathetic to the attempt to view the informational structure as part of the product itself. But, suggesting that this is not simply a matter of taste, I would insist that it would be better to view the image of the product created by the seller as something that is conceptually different from the product itself. Insofar as one can distinguish "manufacturing defects" from "design defects," it is obvious that no manufacturer would want to change the composition of a product that does not have a manufacturing defect. And this would be so whatever informational structure surrounds the product. If the properties of the product do not make it unreasonably dangerous, or unsafe, then it is not "defective." The failure to give adequate information about those properties is a separate failing, but it is not a "defect."¹³⁸

Undoubtedly, the central zone of dispute concerning defect is Section 2(b) of the Draft, which I quote in full:

A product is defective in design when the foreseeable risks of harm posed by the product could have been reduced by the adoption of a reasonable alternative design by the seller or a predecessor in the commercial chain of distribution and the omission of the alternative design renders the product not reasonably safe.¹³⁹

This section deserves extended comment with respect to both its linguistic limitations and its broader implications. Preliminarily, I wish to suggest a concern related to the basic tripartite classification scheme. It is true that courts and commentators have found it convenient to separate manufacturing defects from design defects and to distinguish both from liability for failure to provide information about risk. I already have indicated my disagreement with the concept and locution of a "warnings defect." Now, emphasizing my understanding that the distinction between "manufacturing" and "design" defects is often a practical one, I express my dubiety about casting the distinction as ironclad. Sellers engage in analogous decisionmaking when they choose levels of product risk for the purposes of both design and

138. An Indiana appellate court appeared to recognize this point when it said, in effect, that the issue of adequacy of warning does not fall within the realm of defect under the state's products liability legislation. *Jarrell v. Monsanto Company*, 528 N.E.2d 1158, 1166 (Ind. App. 1988).

139. Restatement Draft § 2(b) at 9 (cited in note 13).

quality control. In both cases, they are aware of the level of statistical risk to which they expose the consumer.

The reporters confront this point directly. They declare that "[t]he element of deliberation in setting appropriate levels of design safety cannot be analogized to the setting of levels of quality control by the manufacturer."¹⁴⁰ They reason this way: In setting quality control levels, a manufacturer "is aware that a given number of products will leave the assembly line in a defective condition and may cause injury to innocent victims who can generally do nothing to avoid injury."¹⁴¹ The reporters view the process of "deliberately drawing lines with respect to product design safety" as being "different."¹⁴² They explain that "[a] reasonably designed product still carries with it elements of risk that must be protected against by the user or consumer," the risk being "appropriately transferred to a user population that is in a better position than the manufacturer to manage those risks efficiently."¹⁴³

The reporters' refusal to recognize the close parallel between these two kinds of deliberation and choice renders their justification an ipse dixit. Their explanation glosses over the problem when it introduces the assumption that a product is "reasonably designed." The salient point is that the choice of the level of design risk may make the product unreasonably unsafe, just as a product with a "manufacturing defect" is, as all would agree, unreasonably dangerous.

C. *The Risk-Utility Test*

These preliminary remarks about the potential flaws in the reporters' presentation of the generally accepted tripartite structure lead us to a consideration of the controversial ideas in the reporters' definition and interpretation of the concept of design defect.

My first point, which concerns the "risk-utility" test, is tangential to two other points discussed immediately below: the need to deal with the process of product promotion,¹⁴⁴ and the reporters' derogation of the notion of "consumer expectations" as a viable concept in dealing with products defect litigation.¹⁴⁵

140. *Id.*, comment a, at 13.

141. *Id.*

142. *Id.*

143. *Id.*

144. See text accompanying notes 165-71.

145. See text accompanying notes 173-88.

The term "risk-utility" does not appear in the Draft's blackletter definition of a design defect. Rather, the reporters announce in comment c that "[s]ubsection (b) adopts a reasonableness ('risk-utility' balancing) test as the standard for judging the defectiveness of product designs."¹⁴⁶ They immediately spell out this idea as including a requirement that the plaintiff show that the defendant "failed to adopt a reasonable alternative design,"¹⁴⁷ a subject that merits separate treatment.¹⁴⁸

The reporters declare that "[t]he balancing process requires a comparison between a proposed alternative design and the product design that caused the injury, undertaken from the viewpoint of a reasonable person."¹⁴⁹ In a separate comment, they refer to a "broad range of factors" that "may legitimately be considered in determining whether an alternative design is reasonable and whether its omission renders a product not reasonably safe."¹⁵⁰ These factors range from "the magnitude of foreseeable risks of harm" and "the nature and strength of consumer expectations" to "the effects of the alternative design on costs of production" and on "product function," and they include the "relative advantages and disadvantages of proposed safety features, product longevity, maintenance and repair, esthetics, and marketability."¹⁵¹

This formulation omits much that the history of products liability law indicates would be highly relevant to the question of whether a product design is "unreasonably dangerous," in the language of Section 402A,¹⁵² or "not reasonably safe," in the language of the Draft.¹⁵³ Indeed, one might fairly say that it omits more that is relevant than it includes. Indeed, the Draft arguably fences out of its new formula some substantial parts of the law of negligence, as well as of the law of strict liability. Moreover, it replaces the present focus of the law on the product at issue with a preoccupation with the phantom of the alternative design. Beyond that, by thus potentially excluding primary consideration of the risk and the utility of the product at issue, it offers considerable room for bootstrapping products out of the design defect category, no matter what their inherent hazards.

146. Restatement Draft § 2, comment c, at 15 (cited in note 13).

147. *Id.* at 16.

148. See text accompanying notes 189-97.

149. Restatement Draft § 2, comment c, at 16 (cited in note 13).

150. *Id.*, comment d, at 19.

151. *Id.*

152. Restatement (Second) § 402A(1).

153. Restatement Draft § 2(b) at 9 (cited in note 13).

In analyzing the Draft's spotlighting of the risk-utility concept, we should note that language like "risk-utility," which the reporters give a highly particularized meaning, has some much more general connotations in tort law generally and products liability law in particular. Even taking the concept on its own terms, it provides a risky foundation for sole reliance.

Certainly, tort law is full of the idea of weighing risk and utility, or of comparing "risks and benefits." These terms, which courts appear to use somewhat interchangeably, convey the idea that the court should balance the danger of a particular activity or product against the gains that it produces for society. In their initial analysis of products cases, the courts have focused on the comparative risks and utility of the product at issue rather than on those of an alternative design, either viewed by itself or as compared with the product at issue. The California Supreme Court made this clear in its important formulation of the second prong of its *Barker* test, when it said that "a product may . . . be found defective in design if the plaintiff demonstrates that the product's design proximately caused his injury and the defendant fails to establish, in light of the relevant factors, that, on balance, the benefits of the challenged design outweigh the risk of danger inherent in such design."¹⁵⁴ It is true that in some cases in which they fix on a risk-utility test, courts have brought the relatively low cost of an alternative design into the picture.¹⁵⁵ The focus of the inquiry, however, has been the product at issue. Illustrative is a Louisiana case in which the appellate court upheld a finding that an automobile was not "dangerous per se" although its exhaust system allegedly caused a fire.¹⁵⁶ Referring to the automobile as "the major method of transportation . . . in a highly mobile society," the court concluded that "the danger-in-fact (fire resulting from extreme circumstances) [did] not outweigh the utility of the product."¹⁵⁷

The idea that courts must at least begin by comparing the risks of the product at issue with its benefits is strongly apparent in the first two elements of a seven-factor analysis that Dean Wade presented during the early exegesis of Section 402A. In this much

154. *Barker v. Lull Engineering Company, Inc.*, 20 Cal. 3d 413, 573 P.2d 443, 456 (1978).

155. See, for example, *Camacho v. Honda Motor Co., Ltd.*, 741 P.2d 1240, 1249 (1987) (focusing on potential use of crash bars for motorcycle).

156. *Bloxom v. Bloxom*, 494 S.2d 1297, 1302 (La. App. 1986) (holding that where evidence "negated the possibility of alternative products or design," "plaintiffs must demonstrate that the product is unreasonably dangerous because of a failure to warn" or that "the danger in fact . . . outweighs the utility of the product," *id.* at 1303), *aff'd* 512 S.2d 839 (La. 1987).

157. *Id.*

cited article in the Mississippi Law Journal,¹⁵⁸ Dean Wade catalogued first the elements of “[t]he usefulness and desirability of the product—its utility to the user and to the public as a whole,” and “[t]he safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury.”¹⁵⁹ It was only in the third and fourth elements of his list that Dean Wade referred to the relevance of “[t]he availability of a substitute product” and “[t]he manufacturer’s ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility.”¹⁶⁰ Thus, this catalog, which has been quoted over and over by the courts, preserves an initial focus on the product itself. This point is important not only as it bears on the focus of the risk-utility test, but also because of its implications for the question of whether the plaintiff must always prove a reasonable alternative design,¹⁶¹ or may show more directly that a product is not reasonably safe because of its combination of dangers and benefits.

Perhaps the most extraordinary feature of the Draft in this regard is the fact that it arguably excludes the most significant aspects of negligence law as a balancing mechanism. One of the classic formulations of the negligence standard—a founding rock for the use of economic analysis in tort law—is the so-called Learned Hand test. Judge Hand set forth this idea in his opinion in *United States v. Carroll Towing Co.*¹⁶² That 1947 decision defined the duty of a barge owner to secure his vessel, with respect to the risk that it would break from its moorings, as depending on whether the “burden of adequate precautions” for avoiding the accident was less than the probability times the gravity of the injury.¹⁶³

So far as one can tell, the Draft simply does not allow for the possibility that a seller might be liable if it sells a product whose configuration is such that the only feasible way to avoid its dangers would be to adopt a substitute, rather than an “alternative design,” or to forego manufacture of that product.

By contrast, under a reasonable interpretation of a test that urges a comparison of risk and utility, one should be prepared to call

158. John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L. J. 825 (1973). Citations to this article now occupy more than six full columns in Shepard’s Law Review Citations, see *id.* at 851-52 (4th ed. 1986); 419 (1986-1990 Supp.); 520 (Jan. 1995 Supp.).

159. Wade, 44 Miss. L. J. at 837.

160. *Id.*

161. See text accompanying notes 189-97.

162. 159 F.2d 169 (2d Cir. 1947).

163. See *id.* at 173.

defective any product that is likely to cause damage beyond its measurable utility, without reference to possible design alternatives.

Even if one accepts a risk-utility formulation as representing the weight of case law, one must remark on the paucity of quantification in the opinions. To be sure, now and then courts do muster dollar figures concerning the cost of safety features,¹⁶⁴ but this is the exception rather than the rule. I make this point to underline the fact that the seeming mathematical precision of the term "risk-utility" is illusory.

D. Product Promotion

One of the most glaring omissions in the Draft, from the point of view of what everyone (including lawyers) knows, is its lack of positive reference to the process of product promotion, a central feature in the decision of consumers to use or encounter products.¹⁶⁵ I have spelled out at some length the centrality of this factor, not only in the common experience of all members of this society but in the case law. The reporters generously credit the source, but principally for the relationship of the argument to the "consumer expectation test."¹⁶⁶ I suggest that it would be well for any Restatement of products liability to acknowledge the pervasiveness of product promotion in consumer decision making. Products come to the consumer with an image, and a meaning, attached to them. The sources of this meaning include sales literature, media advertisements, and even the uses to which significant numbers of consumers put the product—the last being a point picked up by advertising in what becomes a continuing, and profitable, cycle.

We have noted that the European products liability Directive places this factor at the center of its defect definition: it lists "the presentation of the product" as the very first factor under its declaration that "[a] product is defective when it does not provide the safety which a person is entitled to expect."¹⁶⁷ As I have suggested else-

164. Compare, for example, *Valk Manufacturing Company v. Rangaswamy*, 74 Md. App. 304, 537 A.2d 622, 628 (1988) (specifically comparing \$2.5 million injury cost with cost of accident avoidance feature calculated at \$7) with *Roach v. Kononen*, 269 Or. 457, 525 P.2d 125, 130 (1974) (noting that proposed design alteration for auto hoods would cost \$5 to \$10 per car, and that there had been only 6 or 7 inadvertent hood openings reported in period of 7 or 8 years).

165. See Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 Va. L. Rev. 1109 (1974).

166. See Restatement Draft § 2, Reporters' Note, comment a, at 36 and comment c, at 44 (cited in note 13).

167. Directive, art. 6(1) (a) (cited in note 103).

where, this is entirely appropriate to a regime of products liability law designed for an age of technology, for the development of modern techniques of consumer persuasion parallels the increasing complexity of products.¹⁶⁸

This emphasis on product image appears, presciently, in some of the decisions of the late 1950s and early 1960s: the Ohio Supreme Court's reference in an express warranty decision to advertising descriptions of "the worth, quality and benefits" of products in "glowing terms and in considerable detail";¹⁶⁹ the New Jersey Supreme Court's spotlighting in *Henningsen* of the "advent of large scale advertising by manufacturers";¹⁷⁰ Justice Traynor's insistence in *Greenman v. Yuba Power Products* that "it should not be controlling whether plaintiff selected the machine because of the statements in the brochure, or because of the machine's own appearance of excellence that belied the defect lurking beneath the surface, or because he merely assumed that it would safely do the jobs it was built to do."¹⁷¹ An emphasis on product portrayal and product image, therefore, represents a synthesis of case law as well as of common experience and common sense.

E. Access and Capability Concerning Information

Our observations about the necessity of recognizing the process of product promotion lead us to remark about the need to recognize, more explicitly than does the Draft, the importance of access to information and the ability to use it. The Draft's provision on warnings implicitly takes these factors into account. But it would be well to highlight the importance of these factors throughout the law of defect, a point apparent when one attempts an overall synthesis of this body of law.¹⁷² It is a commonplace that knowledge is power. The point takes on bold face when we consider the power inherent in information about the science and the technology of products.

F. Consumer Expectations

A lamentable defect in the reporters' analysis lies in its downgrading of consumer expectations as a factor in judging design defect issues. Driven by their certainty that "risk-utility" is the sole central

168. Shapo, 26 Cornell Int'l L. J. at 292 (cited in note 106).

169. *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 147 N.E.2d 612, 615 (1958).

170. *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69, 77 (1960).

171. *Greenman v. Yuba Power Products, Inc.*, 59 Cal. 2d 57, 377 P.2d 897, 901 (1963).

172. See generally, for example, Shapo, 60 Va. L. Rev. at 1293-1362 (cited in note 165).

element for determining defect, the reporters insist that "consumer expectations do not constitute an independent standard for judging the defectiveness of product designs."¹⁷³ They specifically distinguish their views of manufacturing defects, proof of which, they specify, turns on the failure of a product "to function as a reasonable person would expect it to function."¹⁷⁴

The defect in the reporters' analysis is manifest in at least two respects. The first point flows from our emphasis above on the centrality of product promotion in consumer choice. A lack of recognition of the importance of product portrayal and product image leads to a lack of appropriate emphasis on the expectations that consumers reasonably develop about products.

The second point is more descriptive. It concerns the question of what the law is. The reporters argue forthrightly that "[a]n overwhelming majority of American jurisdictions rely on risk-utility balancing in design cases."¹⁷⁵ However, the authorities to which they make abundant reference leave considerable room for interpretation. Two published articles take issue with the reporters' assertion on this point.¹⁷⁶ This writer's informal, independent analysis of fourteen of the cases, done as stringently as possible, yielded as many as ten nuances among those decisions. I found only one to three decisions that give unequivocal support—or come close to giving unequivocal support—to the proposition that a risk-utility test is the sole or predominant ground of reliance by American courts.¹⁷⁷

173. Restatement Draft § 2, comment e, at 23 (cited in note 13).

174. Restatement Draft § 3 at 80. For the reporters' exegesis on this distinction, see *id.* at 23-24.

175. *Id.* § 2, Reporters' Nota, comment c, at 39.

176. See Roland F. Banks and Margaret O'Connor, *Restating the Restatement (Second), Section 402A—Design Defect*, 72 Or. L. Rev. 411, 415-20 (1993); Howard F. Klemme, *Comments to the Reporters and Selected Members of the Consultative Group, Restatement of Torts (Third): Products Liability*, 61 Tenn. L. Rev. 1173, 1173-76 (1994).

177. The universe I selected was 14 decisions that a critic, see Klemme, 61 Tenn. L. Rev. at 1177-82, had identified as "non-supporting cases" for the reporters' assertion that "[a]n overwhelming majority of American jurisdictions rely on risk-utility balancing in design cases," Restatement Draft at 39 (cited in note 13).

I proceeded this way: I asked my secretary to type out the citations of the 14 cases. I put this list on the shelf for a few days. I then went to the library and pulled each reporter. I read the cases without reference either to the reporters' capsule commentaries or to Klemme's interpretations, asking what test the court had used for defect.

The results were not neatly categorical, as the catalog below reveals. All that need be said here, by way of commentary, is that the cases certainly are not confirmatory of the broad proposition for which they are advanced by the reporters. Indeed, they fall along a continuous spectrum of ten categories.

The list below sets out the ten categories, which I present as a spectrum from cases least confirmatory of the reporters' argument to those most confirmatory. I preserve my informal terminology with reference to the question of whether the decisions were confirmatory:

Perhaps symbolically, in the days leading up to the Institute's first plenary meeting on the Draft, the Seventh Circuit capped a time-consuming set of arguments on the subject with a reading of consumer expectations as the principal ground of reliance for Illinois law.¹⁷⁸ One could easily multiply variations on the theme, with some courts adhering outright to a consumer expectations test and others ruling that the consumer expectations test and a risk-benefit or risk-utility test are not exclusive.¹⁷⁹

Representative of the ways in which expectations condition the defect decision are cases holding that custom imposes certain kinds of risks on purchasers.¹⁸⁰ There is even some authority that indicates that "consumer contemplation" language may be tailored to fit cases involving "bystander" plaintiffs.¹⁸¹ An Indiana appellate decision, construing such language in the state products liability statute, thought it could "give reasonable meaning to the requirement" by

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- (1) "No"
 - (a) *Skyhook Corporation v. Jasper*, 90 N.M. 143, 560 P.2d 934 (1977)
 - (b) *Casrell v. Altec Industries, Inc.*, 335 S.2d 128 (Ala. 1976).
 - (2) "Probably not"
 - (a) *Griebler v. Doughboy Recreational, Inc.*, 160 Wis. 2d 547, 466 N.W.2d 897 (1991).
 - (3) "Arguable"
 - (a) *Radiation Technology, Inc. v. Ware Construction Company*, 445 S.2d 329 (Fla. 1983).
 - (4) "Not clear to arguable or questionable"
 - (a) *McCollum v. Grove Manufacturing Company*, 58 N.C. App. 283, 293 S.E.2d 632 (1982).
 - (5) "Not clear"
 - (a) *Miller v. Todd*, 551 N.E.2d 1139 (Ind. 1990)
 - (b) *Peterson v. Safway Steel Scaffolds Company*, 400 N.W.2d 909 (S.D. 1987).
 - (6) "Balanced to no"
 - (a) *Turner v. General Motors Corporation*, 584 S.W.2d 844 (Tex. 1979).
 - (7) "Balanced, for example, between consumer expectations and risk-utility, or with other factors"
 - (a) *Phipps v. General Motors Corporation*, 278 Md. 337, 363 A.2d 955 (1976).
 - (b) *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066 (4th Cir. 1974) (interpreting Virginia law).
 - (c) *Nichols v. Union Underwear Company, Inc.*, 602 S.W.2d 429 (Ky. 1980).
 - (8) "Balanced to fully supported" (the term "fully supported" being represented in my notes by a check mark)
 - (a) *Toner v. Lederle Laboratories, A Division of American Cyanamid Co.*, 112 Idaho 328, 732 P.2d 297 (1987).
 - (9) "Fully supported to ambivalent"
 - (a) *Back v. Wickes Corporation*, 375 Mass. 633, 378 N.E.2d 964 (1978).
 - (10) "Fully supported"
 - (a) *Hull v. Eaton Corp.*, 825 F.2d 448 (D.C. Cir. 1987).
 - (b) *Todd v. Societe Bic, S.A.*, 21 F.3d 1402 (7th Cir. 1994), discussed at text accompanying notes 294-97.
 - (c) See, for example, *Besse v. Deere & Co.*, 237 Ill. App. 3d 497, 604 N.E.2d 998, 1001 (1992).
 - (d) See, for example, *Two Rivers Co. v. Curtiss Breeding Service*, 624 F.2d 1242 (5th Cir. 1980) (defective bull semen, custom imposes risk of genetic defects on herd owners).
 - (e) See, for example, *Masterman v. Veldman's Equipment, Inc.*, 530 N.E.2d 312, 317 (Ind. App. 1988).

“readily assum[ing] that the using or consuming public neither intends nor desires to cause undue injury to . . . foreseeable bystanders.”¹⁸² From this premise, the court reasoned that when a product “presents an unreasonable danger to foreseeable bystanders, and the unreasonableness of the danger is not contemplated by the user, we may properly say the requirement has been met.”¹⁸³

The reporters themselves recognize the power of a consumer expectations analysis in one discrete area—that involving the controversy over injurious objects in food products, for example, pieces of bone in chicken or meat. One of their most recent formulations on the subject declares that “[a] consumer expectations test in this special context rests upon culturally defined, widely shared standards which good products ought to meet.”¹⁸⁴ I applaud this recognition that the law of products liability is a cultural mirror,¹⁸⁵ but I suggest that the reporters are insufficiently cognizant of the power of this idea beyond the narrow compass of chicken bones in enchiladas.

One should stress that there is no reason that a court cannot blend “consumer expectations” or “consumer contemplation” analysis with a “risk-utility” concept. Some courts have, in fact, done this.¹⁸⁶ My principal point is that a Restatement should recognize explicitly the centrality of the process of product promotion in creating and conditioning consumer choices. I would add that a less exclusivist approach would avoid the artificiality of the reporters’ efforts to establish consumer expectations as a “factor” to “be considered in determining whether an alternative design is reasonable,”¹⁸⁷ and as “one factor, among many, in risk-utility balancing.”¹⁸⁸

G. The Requirement of a Reasonable Alternative Design

As distressing as the reporters’ decision to relegate the consumer expectations test to the supporting cast is their insistence that

182. *Id.*

183. *Id.*

184. Restatement (Third) of the Law, Torts: Products Liability, Council Draft No. 2 § 2, comment g, at 38 (Sept. 2, 1994) (“Council Draft No. 2”).

185. See, for example, Shapo, *Products Liability And The Search For Justice* at 198 (cited in note 32). See generally Marshall S. Shapo, *In the Looking Glass: What Torts Scholarship Can Teach us About the American Experience*, 89 *Nw. U. L. Rev.* ____ (Summer 1995) (forthcoming).

186. See, for example, *Phipps v. General Motors Corporation*, 278 Md. 337, 363 A.2d 955, 957-63 (1976); *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066, 1071-73 (4th Cir. 1974); *Nichols v. Union Underwear Company, Inc.*, 602 S.W.2d 429, 433 (Ky. 1980).

187. Restatement Draft § 2, comment d, at 19 (cited in note 13).

188. *Id.*, comment e, at 23.

plaintiffs in design cases must show that the risks of a product “could have been reduced by the adoption of a reasonable alternative design.”¹⁸⁹ In this discussion of the crucial deficiencies in this requirement, I elaborate on concerns briefly mentioned above.¹⁹⁰

My remarks go to the application of both strict liability and negligence theories, as well as warranty law, to design defect cases. First, concerning the theory of strict liability: There is nothing in the language of Section 402A, to which an overwhelming majority of courts subscribe in design defect cases as they do in products liability cases generally, that would remotely support a requirement that the plaintiff show a reasonable alternative design.

Second, it would appear that the Draft’s alternative design requirement conflicts with the general standards of implied warranty law—which, after all, is statutory under the UCC. Section 2-314 of the UCC, which establishes the standard for implied warranty of merchantability, includes six conjunctive elements, none of which faintly signal that a claimant must show an alternative design.¹⁹¹

Third, the requirement may be read to put aside the weighing inherent in the general body of negligence law in favor of a highly specific requirement. One may refer, in this regard, to the definition in Restatement (Second) Section 291, which declares that when there is a recognizable risk of harm, “the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.”¹⁹² This formula makes clear that courts deciding negligence cases should weigh the risk and utility of the allegedly culpable act in question, without necessarily making reference to alternative courses of conduct.

An astonishing result of the Draft’s requirement is that a plaintiff could show that the risks of a product outweigh its utility and still not prevail if the plaintiff is unable to show a reasonable alternative design. Because product manufacturers are by definition experts in product design and consumers are not, it seems perverse to argue that consumers should be required to prove both that an alternative design exists and that it is a reasonable one. A consumer con-

189. *Id.* § 2(b) at 9.

190. See text accompanying note 161 and text following note 163.

191. U.C.C. § 2-314 (1990). I am indebted to Oscar Gray for emphasizing this point to me. For a more general discussion of the relationship of a products restatement to the UCC, see text accompanying notes 233-36.

192. Restatement (Second) § 291.

fronted with such a requirement might well say to the manufacturer that argued in its favor, "I thought that was your job."

We already have noted that there is a siren attraction to the suggestively quantitative overtones of the "risk-utility" formula. One should add, however, that any frequent reader of negligence cases is aware that the definition of negligence has substantial moral composition. Try as advocates of economic analysis might to force negligence law into an efficiency framework, the fact is that courts reach beyond notions of economic optimality in making judgments about acceptable levels of risk. Although courts sometimes do focus on an efficiency-oriented brand of deterrence, on other occasions it is clear that their commitment to deterrence is a moralizing one.¹⁹³ One could tease this mode of judicial operation into the language of Restatement Section 291 by arguing that the concept of "utility" has components of social as well as economic judgment.¹⁹⁴ But, however, when one parses the words, the reality is that the idea of "risk-utility" comparisons involves judgments of legal, rather than economic, craft.

One of the most disturbing features of the reporters' commitment to a requirement of an alternative design is its tendency to allow defendants to create litigation-proof categories of product. One might epitomize this tendency by saying that the alternative design requirement permits a defendant to argue, on behalf of its product, "I am a product, therefore I have no design defect." Fleshed out a little bit, this formula would read, "I am a very special kind of product, and there are no reasonable alternative designs that do what I do; therefore, I am not defective."

There are some specialized product categories for which this argument arguably works pretty well. A good example would be a vehicle designed to carry a lot of passengers and luggage, which has a rear engine and sacrifices front-end collision protection in favor of more room for people and cargo.¹⁹⁵ Different persons might use various terms to explain a result for defendants in cases of this kind. Some might say "no negligence," others would intone, "no breach of merchantability," still others would say, "no defect," and another cadre of analysts would repeat the mantra "open and obvious."

193. See Special Committee, *Towards a Jurisprudence of Injury* at 4-3 to 4-12 (cited in note 133).

194. Restatement (Second) § 292(a) in fact identifies, as a relevant factor in determining "the utility of the actor's conduct," "the social value which the law attaches to the interest which is to be advanced or protected by the conduct."

195. See, for example, *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066, 1073-76 (4th Cir. 1974).

Perhaps the most direct explanation would be that the purchaser of such a product would know exactly what she was getting for the price, including a particular package of risks and benefits, and made a choice in favor of that package.

Beyond that justice-centered explanation, one should add, it is not at all clear that the case law supports a requirement that plaintiffs show an alternative design. The reporters contend that it does;¹⁹⁶ a memorandum circulated by Professor Frank Vandall presents a strong brief on the other side.¹⁹⁷ As a matter of counting jurisdictions, the point seems at least arguable.

H. Products That Are Simply Too Dangerous

A controversial byproduct of the alternative design requirement lies in its apparent bar to the argument that a product is unreasonably dangerous because of its very high degree of risk. The Institute adopted an ameliorating amendment at its 1994 annual meeting, permitting a court to hold a product "defective because the extremely high degree of danger posed by its use or consumption so substantially outweighs its negligible utility that no rational adult, fully aware of the relevant facts, would choose to use or consume the product."¹⁹⁸ Apart from this apparently rather limited exception to the alternative design requirement, the reporters evidently would contend that one should not be able to argue that a product is so dangerous as to be defective because of its particular risk characteristics. This argument is a corollary to the bootstrapping argument, "I am a (particular) product; therefore, I cannot be defective."

The most serious problem with this approach is that it could exclude from the defect category some products with the greatest harmful potential for large numbers of consumers. The most striking examples, indeed, are products that have been the subject of "mass tort" litigation.

A prime illustration is asbestos. It is true that many asbestos cases have focused on a theoretical framework of failure to warn.¹⁹⁹ Yet some decisions have raised directly the proposition that a product

196. See Restatement Draft § 2, comment d, at 55-62 (cited in note 13).

197. Frank J. Vandall, *The Restatement (Third) of Torts: Products Liability Section 2(b): The Reasonable Alternative Design Requirement*, 61 *Tenn. L. Rev.* 1407 (1994).

198. ALI, Restatement (Third), Torts: Products Liability, Tent. Draft No. 1, Addendum ¶ 1 (May 25, 1994).

199. See, for example, *Owens-Illinois, Inc. v. Zenobia*, 325 Md. 420, 601 A.2d 633, 641-42 (1992).

could be "unreasonably dangerous per se."²⁰⁰ The Louisiana Supreme Court included in this classification situations in which "a reasonable person would conclude that the danger-in-fact of the product, whether foreseeable or not, outweighs the utility of the product."²⁰¹

The Missouri Supreme Court referred to the general recognition of the dangers of asbestos in a 1991 decision; it observed that asbestos as an insulating material was "considered so dangerous" that asbestos insulation had not been sold since the early 1970s.²⁰² Indeed, the Missouri court noted that one defendant arguing for a risk-utility definition of "unreasonably dangerous" had not attempted "to show that its product had such utility that it could be rendered reasonably safe by an adequate warning."²⁰³

I focus on these decisions because asbestos, the subject of hundreds of thousands of lawsuits, is a product for which, in the ordinary use of language, there is no "reasonable alternative design." There are undoubtedly substitutes—other materials that can be used to provide insulation. But one cannot improve on asbestos as an insulating fiber in a way that is analogous to changing a mechanical design to make it safer. It appears that the Draft would rule out any finding that a product like asbestos is unreasonably dangerous for just that reason. This choice, I submit, is one unreasonably dangerous to society. It also flies in the face of the enormous current of litigation that, whatever its doctrinal base, has effectively been founded on the extreme hazards to health inherent in the use of asbestos as an insulating material.

The Dalkon Shield, also a generator of many thousands of tort suits, presents a closer question, for there existed arguably safer substitutes. On this issue, we may consult Peter Huber, a leading critic of the tort liability system and of products liability law in particular. Huber flatly declared that the "Dalkon Shield without question deserved to go. . . ."²⁰⁴ What he lamented was that although "that particular IUD unquestionably was inferior[,] . . . it was . . . all too easy to condemn IUDs in general, which courts and juries promptly did. . . ."²⁰⁵

200. See, for example, *Halphen v. Johns-Manville Sales Corporation*, 484 S.2d 110, 113-14 (La. 1986) (responding to certified question in 752 F.2d 124, 755 F.2d 393 (en banc) (5th Cir. 1985)).

201. *Id.* at 114.

202. *Hagen v. Celotex Corporation*, 816 S.W.2d 667, 674 (Mo. 1991).

203. *Id.* (remanding judgment against that defendant for more evidence on causation).

204. Peter W. Huber, *Liability: The Legal Revolution & Its Consequences* 162 (Basic Books, 1988).

205. *Id.* at 50.

Yet it is not an inherent characteristic of new types of products that there should be alternative designs for them. One can easily visualize a situation in which a Dalkon Shield-type product is the "only game in town"—in which it defines the product class. Yet the Draft apparently would rule out a suit against such an "unquestionably inferior" product, one that "without question deserved to go." At one point, Huber declares that "[t]he Dalkon Shield certainly was a bad IUD."²⁰⁶ Suppose it were the only IUD. Should that immunize it from suit?

One might raise an analogous set of questions about one of the newest apparitions on the mass tort front: silicone gel breast implants. Although recent medical evidence suggests that these products do not significantly increase the medical risks of women to whom they have been prescribed,²⁰⁷ the willingness of several major corporations to pay billions of dollars in settlement of implant suits²⁰⁸ provides at least an inference that these products might have been held unreasonably dangerous in tort suits. The Food and Drug Administration ("FDA") recently limited the use of silicone gel filled implants to patients for whom saline-filled, silicone inflatable implants are "medically unsatisfactory."²⁰⁹ If there were no alternative of saline-filled inflatable implants, does the Draft imply that silicone gel implants would be fully immunized from suit? Indeed, does the Draft mean that the use of a product for cosmetic purposes on a limited population should be immunized from litigation because there is no other way to achieve the same result?

Particularly interesting in this regard was a finding by the FDA in 1990 that a reasonable amount of knowledge existed about the risks and benefits of silicone gel implants, but that there was insufficient valid scientific data to support a risk/benefit analysis.²¹⁰ What would be the appropriate interpretation of Draft Section 2(b) in these circumstances, if there was no alternative product that achieved the purpose fulfilled by silicone gel implants? The case is a classic one of

206. Id. at 108.

207. See Sherine E. Gabriel, et al., *Risk of Connective-Tissue Diseases and Other Disorders After Breast Implantation*, 330 N. Eng. J. Med. 1697, 1701 (1994). But compare Sidney Wolfe and Joanne C. Mott, letter, N.Y. Times A16 (June 28, 1994) (remarking on small size of sample).

208. See, for example, Gina Kolata, *3 Breast Implant Makers Agree to Pay \$3.7 Billion*, N.Y. Times A28 (Feb. 20, 1994).

209. General and Plastic Surgery Devices; Effective Date of Requirement for Premarket Approval of Silicone Inflatable (Saline-Filled) Breast Prosthesis, 59 Fed. Reg. 23,037 (1994) (to be codified at 21 C.F.R. Part 878).

210. General and Plastic Surgery Devices; Effective Date of Requirement for Premarket Approval of Silicone Gel-filled Breast Prosthesis, 55 Fed. Reg. 20,571 (1990) (to be codified at 21 C.F.R. Part 878).

what I have called "market experimentation,"²¹¹ the well-accepted ongoing process of mass market tryouts of new products on consumers.

Consider a situation in which a manufacturer engages in market experimentation, with some inkling but not definitive knowledge of dangers of a product in addition to plausible reasons for believing that it will fill a market niche.²¹² Assume that after the product has been on the market for a few years, it transpires that it is responsible for several thousand injuries. In such a situation, almost by definition, it would be impossibly theoretical to speak of a reasonable alternative design. If there were one, presumably any rational manufacturer would have chosen it. What the manufacturer did was make a choice; perhaps not a choice that was probably negligent, but one with dangerous aspects and one that proved to be disastrous for thousands of people. Why should an unknowledgeable plaintiff have to design a winning product in order to recover in tort? In such a situation it would seem inappropriate, and indeed unjust, to require plaintiffs to show a better way. Again, it might seem appropriate for the consumer to remark to a manufacturer, "I thought that was your business." The problem inherent in the reporters' approach is that it permits a seller to create a product category that cannot be challenged as defective. The message is that if a particular product configuration is useful to a particular market, it effectively is immunized.

A late draft at least raises the question of whether the reporters ever would be willing to say that the appropriate prevention strategy is to forego the marketing of a product. They say that the requirement of a reasonable alternative design "is based on the common sense notion that liability should attach only when harm is reasonably preventable."²¹³ This way of putting the idea appears to suggest that not marketing a product is not a "reasonable" method of prevention.

I focus on this cluster of problems not only because they appear seriously to undermine the alternative design requirement, but because of their quantitative significance. The cases of asbestos, the Dalkon Shield, and the alleged hazards of silicone gel breast implants are symbols of modern injury litigation. All involve products with allegedly high levels of danger, levels that would at least present a colorable argument that the hazards of the product are so great that it

211. See generally Marshall S. Shapo, *A Nation of Guinea Pigs* (Free, 1979).

212. See, for example, Sandra Blakeslee, *Dow Corning Had Conflicting Findings on Silicones*, N.Y. Times A11 (May 9, 1994).

213. Council Draft No. 2 § 2, comment d, at 30 (cited in note 184).

could properly be said that they outweigh its benefits. Were the courts to require that plaintiffs show alternative designs in cases like this—the actual case of asbestos for insulation, the hypothesized case of an alternative-less Dalkon Shield, and the case of allegedly dangerous silicone gel implants, either as hypothesized without an alternative design or even as a product targeted to a limited population—what would be the result?

Products liability law would continue to apply to cases brought by small pockets of plaintiffs who could, sometimes at great expense, show alternative designs. But regiments, even whole divisions, of plaintiffs in asbestos-like cases would find themselves excluded from the litigation process. Justice Jackson crafted an analogue for this phenomenon in a great dissenting opinion on governmental immunity, which incidentally contained a prescient essay on modern products liability:²¹⁴ “The King can do only little wrongs.”²¹⁵

I. Intersection of Alternative Design Requirement and Products That Are Too Dangerous

It is now useful to underline the issues that exist at the intersection of the alternative design requirement and the category of products whose characteristics arguably would make them unreasonably dangerous without reference to design alternatives. The principal problem is that the alternative design requirement permits product makers to define their own product categories, in an almost metaphysical sense.

Having focused principally on real cases, we may indulge here the enduring torts recreation of the fanciful hypothetical. Assume that the cheapest “stepladder” currently on the market sells for fifteen dollars. I place the word “stepladder” in quotes because the word is, after all, just a word we use to describe a general concept: a portable object, with steps, that conveniently allows persons to climb gradually to a height above the ground.

Let us further assume that Firm A designs a product that has all the outward physical characteristics of what is commonly called a “stepladder.” By contrast with even the cheapest “stepladder” currently marketed, however, Firm A’s product has a twenty-five percent

214. *Dalehite v. United States*, 346 U.S. 15, 51 (1953) (Jackson, J., dissenting) (saying “[t]his is a day of synthetic living”).

215. *Id.* at 60.

chance of collapsing during the first ten uses. The good news is that Firm A will sell its product for \$9.99.

It would seem easy enough for a plaintiff, injured when Firm A's product collapses, to argue that there is a reasonable alternative design—a conventional fifteen dollar "stepladder." But suppose that Firm A insists that its product—which I carefully have avoided calling a "stepladder" above—is not, in fact, a "stepladder." It calls it an "economy stepladder," or a "quasi-stepladder," or a "height enhancer."²¹⁶ If this is a permissible designation, then Firm A has created a separate product category, and rendered fifteen dollar stepladders—"real stepladders"—a more expensive substitute and not a "reasonable alternative design."

There are some situations, involving what I have termed "product continuums,"²¹⁷ in which the courts properly permit this kind of solution. I have referred, for example, to the case of a microbus-type vehicle.²¹⁸ A recent case that in effect draws on this line of argument is an Eighth Circuit decision involving a bulletproof vest that featured certain advantages, but also presented certain safety disadvantages relative to other models of vest.²¹⁹ Reversing a substantial jury verdict for the plaintiff, the court referred to the "trade-offs" to be made along the continuum of bullet-proof vests.²²⁰

Yet even the product continuum problem presents a good example of the kind of situation in which the courts should make the crucial choice. It is judges, and sometimes juries, who should make the decision about the risk-utility comparison—as well as the reasonable consumer expectations—associated with a particular product. A "Restatement" should not limit that decision to cases in which a claimant can show a reasonable alternative design.

If there is only "bad asbestos," and no "good asbestos" exists, the legal rule should not prevent judicial imposition of the defect label on "bad asbestos," which may be the only kind of asbestos. If the Dalkon Shield—a "bad product"—were the only kind of intrauterine contraceptive device, then courts should be able to call it defective even in the absence of a reasonable alternative design. If the only IUD were a "bad IUD," the nonexistence of a "good IUD" should not save "IUDs" from liability.

216. I owe the latter phrase to David Robertson.

217. Shapo, 1 *The Law of Products Liability* ¶ 9.09A at 9-28 to 9-30 (cited in note 17) (passim).

218. See text accompanying note 195.

219. *Linegar v. Armour of America*, 909 F.2d 1150, 1154-55 (8th Cir. 1990).

220. *Id.* at 1154.

The reporters have suggested, in correspondence, that the line of argument I have presented here invokes "hypothetical horrors" with no grounding in reality.²²¹ I respectfully suggest that the reality is all around us. When courts impose liability on products ranging from asbestos to particular intrauterine contraceptive devices, they are making judgments that the qualities of specific nongeneric products render them unreasonably dangerous, and sometimes they are doing that independently of the informational content of the product sale. It is axiomatic that consumers trade off dollars against safety when acquiring the specific packages of benefits and risks we call products. At some point, courts will insist that the trade-off is too detrimental, even if the consumer is well apprised of the risks. The obvious, and perhaps most seminal, case is that of automobile crash-worthiness.²²²

J. Deemed Knowledge, Hindsight, Unknowable Risks

We now examine the issue of whether the law should impose liability for designs solely on the basis of risks apparent at the time of trial, without reference to a product maker's knowledge, or even opportunity for knowledge, at the time of manufacture.

This is an especially vexing problem because the moral and economic stakes are so high. On the one hand, we must consider the fact that design cases by definition involve choice, with the implication that one should not be penalized for risk creation when he had no opportunity to make a choice about risk. On the other hand, one must consider that the kind of case in which knowledge of risks accumulates during a period of market experimentation is often just the type of case that involves large scale harm.

To be sure, history counsels us that the problem may be more theoretical than practical. Although there has been much criticism of decisions that purportedly imposed liability for "unknowable risks" on makers of asbestos products,²²³ many courts have satisfied themselves

221. Letter from James A. Henderson, Jr. and Aaron D. Twerski to Marshall S. Shapo (Sept. 25, 1994) (on file with the Author).

222. A truly generative case is *Larsen v. General Motors Corporation*, 391 F.2d 495 (8th Cir. 1968) (imposing a duty of care in automobile design with reference to "second collision" injuries).

223. The most discussed case is *Beshada v. Johns-Manville Products Corporation*, 90 N.J. 191, 447 A.2d 539 (1982) (disallowing a state-of-the-art defense).

that these firms engaged in culpable behavior with respect to known risks.²²⁴

Yet it is necessary to face up to the issue directly, for it implicates the basic concept of strict liability that the law should focus on the product itself and not on the seller's conduct. The Oregon Supreme Court has been instrumental in developing this idea: "In a strict liability case we are talking about the condition (dangerousness) of an article which is sold without any warning, while in negligence we are talking about the reasonableness of the manufacturer's actions in selling the article without a warning."²²⁵ In this intellectual matrix, one uses the negligence standard to test after the fact whether there is a defect in a product.²²⁶

The academic pedigree of a thoroughgoing strict liability is itself distinguished. In an often-quoted passage, Dean Keeton declared that "if the sale of a product is made under circumstances that would subject someone to an unreasonable risk in fact, liability for harm resulting from those risks should follow."²²⁷

Although the idea of applying a hindsight test to design defect litigation has elicited severe criticism, the courts have not dealt with large numbers of cases that frontally present the problem. Yet, if the question remains largely theoretical, it is worth discussing because it goes to the heart of the idea of strict liability.

Let us focus the question with a simple hypothetical: What would a court do with the Case of the Sudden Epidemic? In this situation, a manufacturer scrupulously observes all industry standards, and any reasonably applicable ethical principles, in its investigation and development of a new product, Product X. The firm markets the product very successfully, and, for fifteen years, without incident. In the first three months of the sixteenth year of marketing, thousands of consumers all over the country begin developing a particular kind of cancer, for which there is strong evidence of a causal association with Product X. We assume that courts surely would find a company negligent if it initially had marketed the product possessing the knowledge of risk that became apparent in the sixteenth year.

224. See, for example, *Johnson v. Celotex Corporation*, 899 F.2d 1281, 1288 (2d Cir. 1990) (upholding punitive damages award).

225. *Phillips v. Kimwood Machine Company*, 269 Or. 485, 525 P.2d 1033, 1039 (1974).

226. *Allen v. Heil Company*, 285 Or. 109, 589 P.2d 1120, 1126-27 (1979) (addressing whether a "reasonably prudent manufacturer, charged with knowledge" of dangerous condition, "would in the exercise of reasonable care" sell the product).

227. W. Page Keeton, *Products Liability—Inadequacy of Information*, 48 Tex. L. Rev. 398, 409 (1970).

What would American courts do with this case, litigated under the heading of design defect? Defendants would argue that the test for design defect is nothing more than the negligence test, requiring at least that the defendant "should have known" of the risk.²²⁸ Plaintiffs would say that the very essence of strict liability for products—and of the policy that supports it—requires the imputation of time-of-trial knowledge to a seller of a product that turns out to be unreasonably, even monstrously dangerous.

I suggest that the answer to the question of what the courts would do with this rather pure hypothetical—so far removed, for example, from the facts of the asbestos litigation as they have developed—is that we really do not know. Torn between the fairness arguments of defendants opposing liability for a truly unknowable risk and the justice arguments of plaintiffs grievously injured by a product whose seller they trusted, the courts would face a momentous choice, since we have very little in the way of directly relevant case law.²²⁹

Perhaps the answer lies in the nature of strict liability as practically applied. As it has developed in products litigation, the doctrine may principally provide a vector for decision in close cases. Arguably, this has been the function of strict liability doctrine in classic "manufacturing defect" cases; Traynor and Prosser provided a firm intellectual basis for this employment of the theory.²³⁰ Arguably, it has also been the principal function of strict liability in design defect cases, especially when (as is often the case in real life) it is difficult to segregate "design" from "manufacturing" defects; the California history is particularly instructive.²³¹

The tilt of the doctrine, as courts have applied it, has been to favor "consumer protection"; although that phrase does not appear often in the American decisions, the European Directive uses it in at

228. Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 Vand. L. Rev. 593 (1980), provides a leading synthesis on this point.

229. For a summary of the law weighing against this form of strict liability, see Ellen Wertheimer, *Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back*, 60 U. Cinn. L. Rev. 1183 (1992).

230. See *Escola v. Coca Cola Bottling Co. of Fresno*, 24 Cal. 2d 453, 150 P.2d 436, 440-41 (1944) (Traynor, J., concurring in the judgment); William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L. J. 1099 (1960).

231. Compare *Greenman v. Yuba Power Products, Inc.*, 377 P.2d at 9001 (announcing general principle of strict liability for defective products) with *Cronin v. J.B.E. Olson Corporation*, 8 Cal. 3d 121, 501 P.2d 1153, 1162-63 (1972) (setting out a very broad conceptualization of defect) with *Barker v. Lull Engineering Company, Inc.*, 20 Cal. 3d 413, 573 P.2d 443, 446 (1978) (articulating a two-pronged definition of defect, citing *Cronin* as "refut[ing]" the distinction between design and manufacturing defects).

least seven places in its Preamble.²³² If one had to make a forecast, one would reasonably predict the use of "strict liability" as a tie-breaker in the Case of the Sudden Epidemic.

K. Relationship to the UCC

An important aspect of mega-doctrine concerning a products restatement, counseling the preservation of a maximum degree of flexibility for state courts, concerns the role of the UCC in products liability law. A few jurisdictions have continued to adhere to the UCC as the theory of choice in products cases, although clearly Section 402A tort doctrine hovers around their decisions.²³³ Quite as importantly, commercial law notions continue to parallel tort ideas in the locutions of products law. The idea of the implied warranty of merchantability, in particular, continues to provide nutrients in the formulation of the defect concept,²³⁴ and many courts view the warranty and strict tort doctrines as functional equivalents.²³⁵

This Author leans toward the view that tort properly has won a large part of the field from contract, if not subscribing to the wry exaggeration of Professor Gilmore.²³⁶ However, it would seem that a products restatement must give full account to the continuing presence of UCC terminology and concepts—indeed law—in the products arena. If the warp of products law is tort, there is still some woof of contract. A recognition of this point seems prudent not only given the need for judicial flexibility, but also in light of the concurrent progress of a full scale revision of Article 2 of the UCC.

L. The "Open and Obvious" Hazard

The Draft presents at least two facets of the problem of the open and obvious risk. Under the heading of a condemnation of

232. Shapo, 26 Cornell Int'l L. J. at 328 (cited in note 106).

233. See, for example, *Cline v. Prowler Industries*, 418 A.2d 968, 971-80 (Del. 1980); *Swartz v. General Motors Corporation*, 375 Mass. 628, 378 N.E.2d 61, 63 (1978) (viewing "strict liability cases of other jurisdictions" as "a useful supplement to our own warranty case law"). Compare *Garcia v. Texas Instruments, Inc.*, 610 S.W.2d 456, 462 (Tex. 1980) (holding that the adoption of Section 402A does not repeal UCC "sections providing redress for personal injury").

234. See, for example, *Woodill v. Parke Davis & Company*, 58 Ill. App. 3d 349, 374 N.E.2d 683 (1978), *aff'd*, 79 Ill. 2d 26, 402 N.E.2d 194 (1980).

235. See, for example, *Blueflame Gas, Inc. v. Van Hoose*, 679 P.2d 579, 590 (Colo. 1984) (declaring that burden of proof considerations are "identical" in warranty and strict liability claims).

236. "We are told that Contract, like God, is dead. And so it is." Grant Gilmore, *The Death of Contract* 3 (Ohio St. U., 1974).

“conformance to consumer expectations as a defense,” the reporters declare that “[t]he mere fact that a risk presented by a product design is open and obvious, and that the product thus satisfies expectations, does not prevent a finding that the design is defective.”²³⁷ In a separate commentary under the warnings category, they say that “[i]n general, a warning or instruction is not required regarding risks and risk avoidance measures that should be obvious to foreseeable product users.”²³⁸ They reason that since a risk is obvious, and “the prospective addressee of a warning will or should already know of its existence,” then warnings “in most instances will not provide an effective additional measure of safety.”²³⁹

As a general matter, these statements are unexceptionable. Many courts have opposed the use of “open and obvious” notions as a defense to design defect cases, especially in the workplace setting. New York’s overruling of its prior law on this point provides perhaps the most striking illustration.²⁴⁰ And courts surely have invoked an obviousness defense against “duty to warn” complaints; on this point, one can cite small libraries of cases.²⁴¹

In this connection, I simply wish to underline the fact that judicial reliance on the idea of “obviousness” uses it as a “surrogate for intuitions about many things,” ranging from “empirical guesses about comparative availability of information concerning hazards” to “notions of moral responsibility.”²⁴² It begins to appear, indeed, that the obviousness idea shadows a long and diffuse frontier of overlap among theories of design defect and duty to warn as bases for recovery, misuse as a negation of the cause of action, and misuse, assumption of risk, and contributory negligence as affirmative defenses.²⁴³

237. Restatement Draft § 2, comment e, at 24 (cited in note 13).

238. *Id.*, comment g, at 26.

239. *Id.*

240. See *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 348 N.E.2d 571 (1976), overruling *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950).

241. See Shapo, 1 *The Law of Products Liability* ¶ 19.11[1][a] at 19-88 to 19-100 (cited in note 17) (*passim*).

242. *Id.* ¶ 19.11[1][b] at 19-103.

243. See *id.* ¶ 19.11 at 19-88 to 19-114 (*passim*).

VIII. GENERAL CONSIDERATIONS ABOUT RESTATEMENTS

A. *A Self-Restraint Guideline*

The Restatement idea is a special phenomenon. Restatements are entirely the creature of the ALI, a private organization that depends on members and private donors for its funding. As the product of a group of lawyers, addressed principally to lawyers, a Restatement relies entirely on its persuasive power, which depends partly on its claim to summarize the law as it is and partly on its ability to distill wisdom on hotly disputed matters. In the latter regard, it will often be prudent for the Institute to defer to the duly-constituted lawgiver: the judiciary. For a private organization, prudence counsels a high degree of self-restraint.

The maiden voyage of the Institute's project for a third torts Restatement, which focuses on the topic of products liability, would seem to underline these counsels of prudence. Manifesting the case for this cautionary advice are the interest of journalists in the subject and a resultant sense that public arguments on the topic have taken on the political texture of what is commonly called "spinning."

A brief narrative drawn from experience may be apt. The reporters presented Tentative Draft No. 1 to the Institute's meeting in May 1994. In accordance with the rules of the ALI, I submitted a proposed amendment for Sections 1 and 2 of the Draft.²⁴⁴ During the

244. The unexpurgated text of this admittedly tentative proposal provided that:

(1) One engaged in the business of selling products who sells any product in a defective condition unreasonably dangerous to users or those who otherwise encounter products is liable under any theory of liability applicable to defective products for any harm to person or property caused by the defect.

(a) "Defective condition" in § 1 includes

(1) A flaw or departure from the intended design of the product even though all possible care was exercised in the preparation and marketing of the product.

(2) Design features of the product that render it unreasonably unsafe to persons or property because

(i) The risk of the product outweighs its utility or benefits as defined by applicable law

(ii) The costs associated with the accident outweigh the costs of avoiding the accident, as determined by applicable law

(iii) The advertising, promotion and appearance of the product create an impression of safety that reasonably would be taken to influence decisions to use or encounter the product

(iv) The existence of a feasible alternative design would have significantly reduced the risk of harm to persons or property.

(2) One who sells a product that is unreasonably dangerous to the user or consumer because of inadequate provision of information concerning the hazards of the product, including inadequate warnings or instructions concerning its hazards, is liable

brief discussion of this proposal, at the end of a day that featured six hours of debate on Sections 1 and 2, former director Wechsler suggested that in light of the concerns raised by my proposal and other comments, it would be appropriate to refer the draft back to the Reporters for further consideration.

Press reports in at least two publications of the Bureau of National Affairs—*United States Law Week*²⁴⁵ and the *Product Safety and Liability Reporter*²⁴⁶—characterized my amendment as a “last-minute proposal.”²⁴⁷ However, the weeks between mid-April, when the Tentative Draft was circulated, and mid-May, when the ALI met, represented the very first time that anyone could have responded to the proposal configured as a tentative draft. These reports also spoke of the amendment as one that would “largely leave intact the provisions of . . . Sec. 402[A], and only tinker at the margins with it.”²⁴⁸ The description “largely leave intact” seems to the author of the amendment an odd way to describe a proposal approximately ninety percent of which consists of language that does not appear in Section 402A. The phraseology “only tinker at the margins” seems equally misdescriptive, given the effort of the amendment to define the conventionally phrased three categories of products liability.

The BNA report referred to unnamed “attorneys” who asserted that the “proposal . . . had already been considered and rejected by the reporters, the Institute’s 19 advisers, and the ALI’s governing body, the Council, on many occasions.”²⁴⁹ Speaking only with reference to my understanding of consideration of these matters by the advisers, my proposal was neither “considered,” let alone “rejected,” by that group. Up to the time of the Institute’s May 1994 meeting, the advisers had met only once, in June 1993. Finally, a box on the cover of the Tentative Draft makes clear that, however one characterizes the

for injuries to persons and property when the lack of information about the hazards of the product is a material factor in causing the injury.

(3) For the purposes of this section, the term “one engaged in the business of selling products” shall include parties whose economic function in placing products in commerce is analogous to that of sellers for the purposes of the law relating to liability for defective products.

(4) In interpreting this section, courts shall take into account the nature of the transaction by which the product enters commerce and the informational position and sophistication of the parties.

245. *ALI Hesitates on Lawyer Liability, Product Liability Restatement Efforts*, 62 U.S.L.W. 2734, 2736 (May 31, 1994).

246. *ALI Members Put Off Approval*, 22 *Product Safety & Liability Rptr.* at 522 (cited in note 128).

247. *Id.*; *ALI Hesitates*, 62 U.S.L.W. at 2736 (cited in note 245).

248. *ALI Members Put Off Approval*, 22 *Product Safety & Liability Rptr.* at 522.

249. *Id.*

Council, it is the Institute itself that decides whether a draft becomes a Restatement.²⁵⁰

The political frame that now surrounds the products project, symbolized by the press coverage of the Institute's first debate on the subject, makes especially necessary a working guideline that emphasizes restraint in the statement of legal principles. It also raises the question, discussed below, of to what degree the ALI should strive for consensus on the disputed issues it considers, and indeed of how one defines consensus.

B. The Conceptual Framework

It is useful to refer here to the question of whether, in the end, a third torts Restatement would be a more intact product, intellectually, if the ALI initially essayed a reappraisal of the conceptual framework of the Second Restatement. One should note that if a products restatement were to supplant Section 402A and perhaps even a few other sections of particular relevance to products law, more than nine hundred remaining sections of the Second Restatement still would remain as the position of the Institute.

In light of the choice to go forward with a Third Restatement on a more discrete subject-focused basis,²⁵¹ this issue is rather a moot one. However, it does shadow any attempt to restate particularized areas of tort. All lawyers are familiar with the tension between pragmatic problem solving and building theoretical frameworks. One is at least entitled to suggest that an emphasis on pragmatism at the expense of framework may prove befuddling when one confronts specific problems of application down the road.

C. The Jurisprudence of Restatements

We now confront the need to define the mission of those undertaking Restatements, who work under the sole auspices of the sole arbiter of Restatements—the American Law Institute. It is clear that in the most interesting cases, it will be difficult to provide a blackletter answer. Counting the cases, even creatively, or proposing the

250. "As of the date of publication, this Draft has not been considered by the members of the American Law Institute and does not represent the position of the Institute on any of the issues with which it deals." Restatement Draft, cover page, box (cited in note 13) (repeated, inside cover page).

251. See text accompanying note 118.

Institute's version of wisdom? "Restatement" or wish list? How far does the Institute's educational mission extend?

Here the question of consensus enters the picture. Because the ALI is a voting body, there is something inherently political about its processes. But the traditions of the body, including the notion that "you check your clients at the door," imply a higher ideal. Perhaps at their most idealistic, these traditions suggest Henry Hart's version of how an ideal Supreme Court would deliberate, its members striving in untrammelled sessions of free and open discussion to convince one another of the right answer.²⁵²

Perhaps a more practical way to put the question is, what is the meaning of consensus in the context of a Restatement? If the matter is simply one of voting on political preferences, one may resolve the question easily: count the votes. If it requires convincing specialists that a certain position most rationally aligns with practice and policy, a proper resolution of a disputed issue would take much more time, perhaps forever as human affairs are measured. A more pragmatic model would require that even if critics do not find themselves persuaded, arguments must be presented that all are at least willing to say have persuasive power, even if they are not personally convincing.

D. The Restatement and the Courts

This leads us to the question of what attitude the Restatement should take to heavily disputed issues that are the subject not only of great controversy but of ongoing development in judicial thought. One such issue is whether the risk-utility test or the consumer expectations test, or a combination of these, should govern the judgment of defect questions. Another arises from the Draft's requirement that plaintiffs show a reasonable alternative design.

In a situation where the law still appears to be in a process of dispute and development on these issues, it is appropriate to ask whether the Institute should use as its default rule an answer that it has given on a number of issues, including some issues covered in the Tentative Draft: leave the question to the developing case law.²⁵³ To

252. Henry M. Hart, Jr., *The Supreme Court, 1958 Term—Foreword: The Time Chart of the Justices*, 73 Harv. L. Rev. 84, for example, at 124-25 (1959).

253. See, for example, Restatement Draft § 2, comment 1, at 34 (cited in note 13) (discussing the burden of proof on misuse, modification, and alteration). Compare, for example, Restatement (Second) § 402A, comment o (saying that "[t]he Institute expresses neither approval nor disapproval of expansion of the rule" to cover nonusers and nonconsumers) with UCC § 2-318, comment 3 (1966), reprinted in 1A Uniform Laws Annotated 558 (West, 1989)

put the point more baldly, the ALI should not undertake to make law for judges.

The guideline here simply is that on matters where the law is truly in the process of development, a Restatement should maximize opportunities for courts to identify and resolve unsettled issues for themselves. As we have already indicated,²⁵⁴ this principle of self-restraint applies doubly when political overtones provide a substantial amount of background noise. Giving wry point to this observation is the remark of a colleague who expressed dubiety about the undertaking of a products restatement because of the political context of the subject. The constitutional analogue, he said, would be that "next, the ALI will undertake a Restatement of Abortion."²⁵⁵

The history of products liability law has provided an especially dramatic example of the advantages of this approach. That history has featured an ongoing process of judicial conversation among state and federal courts. Slowly, and sometimes painfully, they have created a body of law through confrontation with concrete cases. Where they have not reached consensus, it is imprudent to try to force the dialogue beyond what the cases clearly reveal.

A quarter century ago, in the years of the first blossoming of Section 402A, Herbert Wechsler declared that "what [the Restatements] have been and are in fact" is "a modest but essential aid in the improved analysis, clarification, unification, growth and adaptation of the common law."²⁵⁶ This description fits many, perhaps most, of the sections of the Draft. However, the Draft is at odds with this model in a few very important choices of policy and language, choices that either depart from the current of the law or sound unavoidably political overtones on issues on which courts are striving to find a relatively dispassionate legal solution. I have earlier identified and commented on these choices.²⁵⁷ They include, for example, the Draft's cast-iron insistence on the general requirement of a reasonable alternative design. They also include its exclusive reliance on a risk-utility test, set in a void of nonrecognition of the importance of product promotion to the decision of consumers to use or encounter products.

(saying that the section "is neutral and is not intended to enlarge or restrict the developing case law" on the scope of warranties).

254. See text accompanying notes 244-50.

255. The insight is that of Tom Merrill.

256. Herbert Wechsler, *Restatements and Legal Change: Problems of Policy in the Restatement Work of the American Law Institute*, 13 S.L.U. L. J. 185, 192 (1968).

257. See Part VII.

I should emphasize that my critique of these provisions does not imply criticism of the reporters' enormous efforts to provide codification and clarification concerning the many other issues covered in other parts of their drafts. Unfortunately, these few choices in the Draft come at checkpoints in the law that are so crucial that they represent a bid to revamp the law of products liability as it is in fact, both in judicial decisions and in practice.

The very recent history of the new products project, in which this writer has been a "participant-observer," gives point to the need to strive for consensus, and to be cautious about pushing beyond it. Among other things, with journalists somehow becoming inspired to speak of motions firmly anchored in Institute processes as "monkey wrenches,"²⁵⁸ a consensus-oriented approach would promote civility and mutual respect within an important deliberative body.

E. The Grayletter Law of Torts

An important substantive premise for the abstemious argument I develop here is that torts is principally grayletter law.²⁵⁹ Lawyers all understand the continuing tension in each branch of the law between supple factor analysis and relatively chiseled rules. I simply stress that, perhaps more than in most branches of law, torts demands an emphasis on facts and a suppleness of rules: that, indeed, flexibility is the hallmark of not only how courts act in tort cases, but of how they must act.²⁶⁰

By parity, I suggest that interpretative judgments about case law in torts are, on average, more controvertible than the judgments typically made in other areas covered by Restatements. This is so with respect to the most simple sounding rules on intentional torts.²⁶¹ It is surely so in the area where duty and proximate cause exist in uneasy dissonance.²⁶² And it is emphatically so when one deals with the law of products liability, in particular with such questions as the

258. This was one reporter's unattributed description to me of the motion I described at text accompanying note 244.

259. I am indebted to Richard Merrill for his conversational use of the phrase, in another legal context.

260. Illustrative of the continuing tensions between rule and fact-oriented foci are the California cases on liability of negligent parties to bystander witnesses. See, for example, *Thing v. La Chusa*, 48 Cal. 3d 644, 771 P.2d 814, 817-30 (1989) (summarizing precedents).

261. See, for example, Restatement (Second) § 8A (defining "intent").

262. See, for example, id. §§ 435-453 (containing rules, among others, on "causal relation," including "superseding cause").

hegemony of the risk-utility standard or the consumer expectations test.

I suggest, simply, that in this milieu, one ventures at his peril the more one pushes into the forest of the blackletter rule in torts.

IX. SPECIFIC CONCERNS ABOUT THE PRODUCTS RESTATEMENT

A. *A Change in Practice?*

Perhaps the most vexing aspect of the Draft lies in its potential to change the face of products liability law. The assertion that it would do so is itself controversial, for supporters of the Draft argue that the complaint itself represents a form of "spinning." At this point, one can only be reportorial, and note that a number of distinguished attorneys—on the record, so far, plaintiffs' attorneys—argue that the Draft significantly changes their ability to present complaints and evidence on behalf of plaintiffs who wish to sue for design defects. If one seeks to dismiss this perception as inhering only in the eyes of beholders, one must confront the fact that beholders sometimes may provide accurate expert testimony about present reality. If the assertion is true, then it would call into question the claim of the Draft to be a Restatement of the Law, at least as the law is practiced.

B. *The Rationales for Section 402A*

A related set of questions concerns the rationales for Section 402A. The reporters have made clear that they reject the consumer contemplation idea embraced by comment g to the Second Restatement, at least as a principal pillar for design defect judgments.²⁶³ We already have indicated that this seems an unfortunate retrogression in a day when mass media promotion becomes ever more subtle.

The other comments to Section 402A, in language sometimes almost orotund, set out a broad rationale of consumer protection. The drafters spoke in comment c of the product seller as having "undertaken and assumed a special responsibility toward any member of the consuming public who may be injured" by a product, and of a public that is "forced to rely upon the seller" and has the "right to and

263. Compare *id.* § 402A, comment g, with Restatement Draft § 2, comment e, at 23-24 (cited in note 13).

does expect . . . that reputable sellers will stand behind their goods.”²⁶⁴ They declared that “public policy demands that the burden of accidental injuries . . . be placed upon those who market” defective products, and that the consumer is “entitled to the maximum of protection at the hands of someone,” namely, the seller.²⁶⁵ The Draft does not make clear whether it considers these rationales to be unsophisticated, or plain wrong, either singly or collectively.

An important rationale that tends to be implicit in the comments, but which the courts have explicitly loaded onto Section 402A, is that of affecting seller conduct. This raises the question of what effects the body of law developed under Section 402A has had on product safety. It is difficult to secure precise behavioral evidence on this point, but it seems rather clear that development of the law since 1960 has significantly affected the decision making of manufacturers concerning design risks. A Rand Corporation report makes this clear in a single sentence, abstract but powerful: “Be careful, or you will be sued.”²⁶⁶ Many documents emanating from the manufacturing community speak of the disincentives to innovation that product makers perceive because of their reading of products liability law.²⁶⁷

Whether the law has purchased too much safety at the cost of product advances—which themselves might have positive health and safety properties—is a difficult empirical question. One is entitled to ask whether the ALI possesses the information to take a position on that question. One also must ask whether the reporters are able to identify, with any degree of precision, the dysfunctional effects on behavior caused by the law developed under Section 402A.

Another idea supporting the development of Section 402A inheres in the supposition that the traditional negligence rules of proof create hurdles that are too high for many plaintiffs with meritorious cases. The Draft accepts this point concerning manufacturing defect cases.²⁶⁸ With its requirement that plaintiffs show a reasonable alternative design, it implicitly rejects it in design cases. This represents a change in the underlying current of the law.

In general, the Draft at least implicitly raises the question of whether Section 402A is too generous in its commitment to consumer

264. Restatement Second § 402A, comment c.

265. *Id.*

266. George Eads and Peter Reuter, *Designing Safer Products: Corporate Responses to Product Liability Law and Regulation* viii (Rand, 1983).

267. See, for example, Committee for Economic Development, *Who Should Be Liable?* 89 (Committee for Economic Development, 1989) (noting that some products are never marketed because of fear of prohibitive liability).

268. See Restatement Draft § 2, comment a, at 10 (cited in note 13).

protection. It seems to imply that this is so, and that consumers are better able to take care of themselves than the Institute believed when it adopted Section 402A. It would be helpful to make that supposition explicit, if it exists, or in any event to speak to the issue.

*C. Comparing the Development of Section 402A
and the New Tentative Draft*

Tentative Draft No. 6 to Section 402A,²⁶⁹ dated April 7, 1961, bore the title "Liability of Persons Supplying Chattels for the Use of Others," and announced a strict liability principle for "one engaged in the business of selling food for human consumption who sells such food in a defective condition unreasonably dangerous to the consumer."²⁷⁰ This formulation represented a single penetrating insight, contained in Prosser's noteworthy article, "The Assault on the Citadel," published in the Yale Law Journal in 1960.²⁷¹ A caveat said that "[t]he Institute expresses no opinion as to," inter alia, whether this rule applied "to articles other than food."²⁷²

A preliminary "Note to Institute" in Tentative Draft No. 7,²⁷³ dated April 16, 1962, referred to "the interest and discussion which the Section has aroused."²⁷⁴ It added to food, as the sole subject of the strict liability principle, "other products for intimate bodily use," a category for which it gave as examples clothing, soap, and cosmetics.²⁷⁵

These apparently were the only tentative drafts that dealt with products liability. The Institute approved a final draft, which applied the strict liability principle to "all products," in May of 1964, for inclusion in the Restatement. Prosser, the reporter, said at the time that if the section were published that summer, "it will be on the edge of becoming dated before it is published."²⁷⁶ He referred to the developing case law since 1962, extending beyond "products for intimate bodily use," as "the speediest development in the law of torts" in his lifetime, "as well as being one of the most spectacular."²⁷⁷

269. Restatement (Second) of the Law, Torts: Tentative Draft No. 6 § 402A at 24 (1961) ("Tent. Draft No. 6").

270. Id.

271. Prosser, 69 Yale L. J. 1099 (cited in note 18).

272. Tent. Draft No. 6 at 24 (caveat) (cited in note 269).

273. Restatement (Second) of the Law, Torts: Tentative Draft No. 7 § 402A at 1 (1962).

274. Id. at 1.

275. Id. at 3, comment d.

276. ALI, 41st Annual Meeting, *Proceedings* 350-51 (1964) (remarks of William L. Prosser).

277. Id.

The signs of hurry implicit in this language should carry a lesson for the present Restatement project. The lesson should be especially apparent in light of the fact that the development of this single section, Section 402A, progressed through three full Institute discussions, spanning a period of four years. Against this background, it rings oddly to lament that the reporters, "busily drafting the next several sections," "might not have the surplus energy to revisit the earlier issues."²⁷⁸

D. Subtle Effects on Design Defect Law

If it is correct that a principal function of strict liability is to provide a tie-breaking principle for close cases,²⁷⁹ then an important effect of an explicit departure from strict liability for design defect cases will be to introduce an extra weight in the scale against design complaints. Because of the complexity of the technology, and the intricacy of the issues, such cases tend to begin with a strong presumption in favor of the manufacturer. The elimination of the theory as a recognized ground for complaint will have an effect at the most important margin—that of judicial decision—concerning the merit of design cases. Whether that effect would prove ultimately desirable from a social point of view is a question for which it is difficult to find a quantitative answer.

X. DERIVING A SOLUTION

I suggest here several principles that might well guide the development of a products restatement for the next century.

A. Evolution from Section 402A

Whatever the form adopted by the new Restatement, it would seem prudent to preserve at least the relevant foundations of Section 402A. This strategy entails a respect for judicial history and the choices of more than forty courts in hundreds and thousands of decisions. It conveys a sense of evolution rather than that of a sudden, dramatic change for which little supporting evidence is apparent.

278. *ALI Members Put Off Approval*, 22 *Product Safety & Liability Rptr.* at 522 (cited in note 128) (characterizing views of "most attendees interviewed" at 1994 meeting of ALI).

279. See text preceding note 230.

This approach seems especially important with respect to Section 402A. The Institute proudly proclaims that the Restatements have garnered 125,000 citations from the courts, of which 51,000 have been to the Torts Restatements.²⁸⁰ Several thousand of these citations have been to Section 402A. I am told that the ALI executive office estimates that there are 3,200 cases decided under the section. I speculate that this number is rather low, since the CCH Products Liability Reporter alone has published approximately eight thousand decisions since 1967. In any event, the number is a substantial one. Certainly, most of the courts that have handed down these decisions have adopted Section 402A—some in the first wave of enthusiastic response²⁸¹ and others after lengthy consideration.²⁸² They also have made abundant reference to many of the comments to Section 402A that receive short shrift in the Draft.

The Draft presents a new conceptual framework, with a completely new set of headings. Every lawyer knows that there is no magic in a name. But when the name represents a concept, and now signifies three decades of historical development, even an unsentimental observer would suggest that it would be the better part of common sense to establish a historical link to the named idea that the courts have adopted.

In this connection, a word is in order about the functional analysis the reporters have avowedly adopted.²⁸³ At least two decades ago, I indicated my own sympathies with the idea of dedoctrinalizing the law of products liability.²⁸⁴ Any scholar, trying to understand the roots of the law, must attempt to cut below the surface of doctrine. Yet there is a practical side to doctrine we should not ignore: its ability to provide a convenient verbal, as well as conceptual, packaging of ideas that facilitates legal discourse.

It is thus proper to ask how courts, with investments of twenty to thirty years in a doctrine fostered and sanctified by the ALI itself, will react to the news that the existing structure is slated for demolition. One suspects that judges will move only slowly from the grooves worn by the existing terminology. The more functional news is that products cases will tend to proceed in the grooves of reality dictated

280. See ALI, 71st Annual Meeting, *Annual Reports* 19 (May 1994).

281. See, for example, *Suvada v. White Motor Company*, 32 Ill. 2d 612, 210 N.E.2d 182, 187-89 (1965) (summarizing arguments in favor of strict liability that "coincide with the position taken in section 402A").

282. See, for example, *Ogle v. Caterpillar Tractor Co.*, 716 P.2d 334, 341-45 (Wyo. 1986).

283. See, for example, Restatement Draft § 2, comment j, at 30 (cited in note 13).

284. See Shapo, 60 Va. L. Rev. at 1369 (cited in note 165) (proposing "consumer tert" label).

by social thought and economic conditions, insofar as one differentiates reality from language.

One cannot forecast with certainty how courts would take to a new set of legal formulas for products liability. There is an ironic precursor, however. In the penultimate paragraph of his article *Palsgraf Revisited* in the *Michigan Law Review* in 1952, Prosser extols Leon Green—indeed suggesting that torts scholars owed Green “obeisance”—for his development of duty analysis in *Palsgraf*-type cases.²⁸⁵ But in the last paragraph, Prosser takes away what obeisance gave: he says that since the terminology of proximate cause has proved so attractive to courts and scholars, people might as well stick with it.²⁸⁶

There is a double irony in this. The first irony is in Prosser’s turnabout within two paragraphs—an obeisance to function and an embrace of form. The second irony—for me, as a student and colleague of Green’s—is that I should suggest that form may sometimes provide a convenient housing for reality. A Colorado decision captures the point with its reference to “the very social policies upon which section 402A is based.”²⁸⁷ My suggestion is deferential, but an intense judicial history of thirty years, involving thousands of cases, indicates that the framework—indeed the existence—of Section 402A provides an important reality for the drafters of a products restatement.

In summary, one must emphasize the need to give full recognition to the trade-off between function and familiarity, and to understand that sometimes reality and familiarity achieve a kind of practical fusion. One must also stress that Section 402A is, and was, the ALI’s product, adopted as the creature of the courts.²⁸⁸

B. Room for Judging

A second principle for restatement in this area is one that recognizes that courts are society’s principal agents for lawmaking in private disputes—in short, for judging. This principle draws both on the value of courts as sifting agents and learned disputants on close questions, and on the highly fact-specific nature of products cases. It

285. William L. Prosser, *Palsgraf Revisited*, 52 *Mich. L. Rev.* 1, 32 (1953).

286. *Id.*

287. *McHargue v. Stokes Division of Pennwalt*, 686 F. Supp. 1428, 1436 (D. Colo. 1988).

288. In this regard, one may distinguish such ALI creations as the Restatement of the Law Governing Lawyers, and the project on Corporate Governance, which have written on a cleaner slate than the one that faces the products restatement.

urges that courts be allowed to do their grayletter job, applying their own carefully developed principles of products liability law to particular fact situations.

I select just two examples to demonstrate the way that it may take prolonged consideration of a single case to adduce the correct principles—even the correct opposition of principles—applicable to a specific situation. One of these litigations produced a reported decision in the Michigan court of appeals,²⁸⁹ then drew two full sets of reported opinions in the Michigan Supreme Court.²⁹⁰ In this tragic case, in which a quadriplegic plaintiff ascribed his injuries to alleged design defects in an above-ground swimming pool, the supreme court remained bitterly divided at the end of its full rehearing, which like the first decision held for the defendant. But it is noteworthy that one writer of a dissenting opinion on first hearing changed his mind on rehearing and wrote the majority opinion.²⁹¹ Perhaps most satisfying from a standpoint of development of the law, though admittedly not litigation costs for the parties, was the development of ever more specific arguments on both sides of the case.²⁹² Disagreements between the two wings of the court on the characterization of the case²⁹³ reflect the difficulties inherent in overlapping notions of defect, duty to warn and “obviousness.”

289. *Glittenberg v. Wilcenski*, 174 Mich. App. 321, 435 N.W.2d 480, 483 (1989).

290. *Glittenberg v. Doughboy Recreational Industries, Inc.*, 436 Mich. 673, 462 N.W.2d 348, 366 (1990), on rehearing 441 Mich. 379, 491 N.W.2d 208 (1992).

291. See *Glittenberg*, 462 N.W.2d at 360 (Boyle, J., dissenting); 491 N.W.2d at 210 (Boyle, J., majority opinion).

292. See generally the opinions on rehearing, 491 N.W.2d at 210-19.

293. Compare, for example, *Glittenberg*, 462 N.W.2d at 356 (majority's disquisition on Michigan precedent as “merely relegat[ing] the ‘open and obvious danger’ rule” to cases involving “simple” products) with *id.* at 362 (Archer, J., dissenting) (saying that the obviousness of a risk is “only one factor to be considered in deciding whether a manufacturer has a duty to warn of product dangers and, therefore, cannot be the sole basis upon which a defective design case can be dismissed”). Compare also 491 N.W.2d at 216 (saying that “where the very condition that is alleged to cause the injury is *wholly* revealed by casual observation of a simple product in normal use, a duty to warn serves no fault-based purpose”) with *id.* at 226 (Levin, J., dissenting) (insisting that “[t]he simplicity or complexity of a product is not controlling” and that “[t]he pertinent inquiry is whether a danger is latent,” and commenting that “[i]f a simple product can never in principle present an obvious risk to users, then the definition of ‘simple product’ merely expresses the prejudice that no latent risk inheres”).

The reporters have commented to me that *Glittenberg* represents “straightforward struggling with a difficult law-fact problem,” that “[t]he law is not the problem” because “[a]lmost all courts adhere to the legal proposition that useless warnings need not be given” and that the question of at what point warnings become useless “is, and will remain, a difficult law-fact question.” Letter of James A. Henderson, Jr. and Aaron D. Twerski to Marshall S. Shapo (Sept. 25, 1994). The history of the litigation, I suggest, indicates that the law is sufficiently complicated that the text paragraph represents a reasonable description of relevant reality.

I mention the second case, *Todd v. Societe Bic, S.A.*,²⁹⁴ in part because of its symbolism to the ALI's consideration of products liability. The Seventh Circuit's resolution of this case was published just a few days before the Institute's first discussion of the Tentative Draft. Tellingly, despite the Draft's insistence on a risk-utility test as the sole basic formula for design defects, the federal court's opinion exhibits a pervasive sense of the complexity of Illinois law concerning the appropriate defect test. Though recognizing that "the Illinois Supreme Court has authorized use of the [risk-utility] test in some cases,"²⁹⁵ the court assumed "that the Illinois Supreme Court would not apply the risk-utility test to a simple but obviously dangerous product." It concluded that it was appropriate for the district court to decide that the lighter in question was "obviously dangerous, but not unreasonably dangerous, without reference to the risk-utility test."²⁹⁶ Judge Ripple complained, in dissent, of the employment of judicial resources on a panel decision, a full en banc hearing, an attempt at certification, and, finally, a second en banc consideration.²⁹⁷

Although sympathizing with Judge Ripple's lament—and at the same time generally favoring a consumer expectations test, at least as a full alternative to a risk-utility standard—I offer *Todd* as an example of the need for judicial running room rather than for the substance of its decision on the law. The long process that Judge Ripple so critically described is just one manifestation of the importance of allowing courts to work through disputed issues in this highly controversial area of the law.

C. Preserving Strict Liability

A third principle is that a products restatement should preserve the concept of strict liability. I state this point separately from the proposition that a new products restatement should preserve at least the framework of Section 402A. Although I have expressed my own support for the idea of dedoctrinalizing the law, I believe that both because of the tiebreaking nature of the doctrine and the familiarity of courts with the concept, it would be wise to preserve it in the Restatement itself. The reporters have in fact expressed a limited tolerance for strict liability, among other theories, within their newly

294. *Todd v. Societe Bic, S.A.*, 21 F.3d 1402 (7th Cir. 1994).

295. *Id.* at 1411-12.

296. *Id.* at 1412.

297. See *id.* at 1415 (Ripple, J., dissenting).

constructed functional mansion.²⁹⁸ However, one may seriously question whether that edifice would at all allow a court to apply the notions of strict liability that many courts apply in many design cases.

A generation of precedent indicates that judicial adoption of Section 402A encompassed a commitment to a higher level of consumer protection than did the prior law. A return to the standards prevailing before Section 402A presumably would entail a return to the level of consumer protection that existed then. One may reasonably question whether at this date, a Restatement should be making that choice. Yet the vector of the most crucial provisions of the Draft would appear to move in that direction.

D. A Flexible Standard for Design Defects

A products restatement should set broad, flexible standards for design defects that accord with actual judicial performance. Most American courts draw on a varied menu of factors in deciding whether a design defect case is meritorious. A Restatement should preserve the flexibility that will enable courts to continue dealing with these difficult problems, creating specific principles interstitially as they prove workable.

E. Warnings

The warnings principles of a products restatement should focus on adequacy of information, eschewing terminology that commingles the idea of duties and adequacy of warning with the concept of defect, and they should also focus on effectiveness of communication.

In this regard, one should emphasize that although the traditional triptych of manufacturing defects/design defects/failure to warn is convenient for discussion, a Restatement should avoid oversharpening the distinctions between those categories. There is considerable fuzziness along the boundary between design defects and manufacturing defects,²⁹⁹ as there is on the frontier between design defects and failure to warn.³⁰⁰

298. Restatement Draft § 2, comment j, at 30 (cited in note 13).

299. See, for example, *Cronin v. J.B.E. Olson Corporation*, 8 Cal. 3d 121, 501 P.2d 1153, 1155-56 (1972).

300. The full-blown development of the asbestos litigation has made this clear.

F. Focus on Information and Sophistication

A products restatement should declare, in blackletter when possible, the importance of the factors of information and sophistication relative to both sellers and consumers. This is important because these factors, which prove crucial in so many products cases, provide a meeting ground for considerations of both morality and efficiency. Analysts who fancy themselves tough minded economic savants may choose to fix solely on considerations of efficiency, but the ability to command and understand bodies of information has overtones of power of the sort that often influence courts.

G. Product Promotion

A products restatement should recognize, explicitly and emphatically, the central role of product promotion in creating impressions of safety that reasonably would be taken to influence decisions to use or encounter the product.

H. Functional Analysis of Distributional Roles

The courts have wrestled in hundreds of cases with the issue of whether defendants' distributional roles justify the imposition of liability.³⁰¹ This set of questions requires functional analysis, which conveniently may be focused on the question of whether a party's economic role is analogous to that of sellers for the purposes of imposing products liability.

XI. CONCLUSION: A MODERN LAW OF PRODUCTS LIABILITY

Like the law that has been developed by American courts, and the new law of the European Community, a products restatement should respond to the complexity of products technology, and to the subtlety of appeals used in product advertising. It should, moreover, preserve the flexibility of judging and the creativity accompanying it that have been the hallmarks of the judicial development of American products liability law.

301. See generally, for example, Shapo, 1 *The Law of Products Liability* ch. 12 (cited in note 17).

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CONDITIONAL POSTSCRIPT

As this Article goes to press, the House of Representatives is in the process of considering legislative proposals that would nationalize some features of products liability law. Certain features of these bills, as reported, would change parts of the general American law of products liability, rendering moot some issues in the debate over the proposed products Restatement. They also would render this Article more a historical commentary than a policy critique, at least with respect to its application to the substance of the proposed Restatement.

I would note, however, that in addition to its historical analysis and its critique of the Restatement process, the Article still would represent a policy commentary on any legislation that affected substantive products liability standards. Indeed, should any such proposals become law, the approach of this Article might help to provide an intellectual foundation for what surely will be the first wave of legislative amendments on the next turn of the political tide. In the uncertainty of the moment, this Author would remark only that politicization of the common law of torts is risky business, whether done by Congress or the American Law Institute.