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Restatement Redux

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BOOK REVIEW

Restatement Redux

PRODUCT LIABILITY. By Jane Stapleton.* Butterworths, 1994. Pp. xxvii, 384, index. \$50.00

*Reviewed by Anita Bernstein***

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* Fellow, Balliol College, Oxford University.

** Associate Professor of Law and Norman & Edna Freehling Scholar, Chicago-Kent College of Law, Illinois Institute of Technology. Thanks to Steven Heyman, David Partlett, Marshall Shapo, Rosemary Shiels, and Richard Wright for helpful comments; C. John Brannon for research assistance; and the Marshall D. Ewell Fund at Chicago-Kent for financial support.

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I. INTRODUCTION

American products liability buffs, who often have a predilection for history, may remember 1994 as a year of proclaimed harmonization, codification, and restatement. In April 1994 the American Law Institute released the first Council Draft of its *Restatement (Third) of Torts: Products Liability*. According to the Institute, "[p]roducts liability is highest in priority for reformulation" within the law of torts generally, "for it is socially important and technically complicated."¹ During the same year, the Republican party announced a Contract With America that promised national reform of products liability; after the November election, the new congressional majority attended promptly to the federalization of products liability law.²

Nineteen ninety-four also marked a less-heralded event in the annals of comprehensive treatments of products liability, the publication of *Product Liability* by Jane Stapleton of Balliol College at Oxford.³ Stapleton's book is in part commentary on another grand restatement, the European products liability reform statute.⁴ It also serves as a basic text of common-law doctrine. At a richer level, however, *Product Liability* is a great work of destruction, an attack not only on the basic dogma that there ought to be a separate law for harms caused by manufactured products but also, more obliquely, on the very idea of restatement.

1. Geoffrey C. Hazard, Jr., Foreword, *Restatement (Third) of Torts: Products Liability* xiii (Tentative Draft No. 1, April 12, 1994). This work product goes by many names, and, like many other commentators, I use "Third Restatement," "products liability restatement," and "Restatement (Third) of Torts: Products Liability" loosely and interchangeably.

2. See Peter Passell, *Civil Justice System is Overhaul Target*, N.Y. Times B7 (Jan. 27, 1995). The Republican statute, the Common Sense Product Liability Reform Act, created federal standards and rules to impose national consistency, as well as new restrictions on lawsuits, in all of products liability law. See Common Sense Product Liability Reform Act, H.R. 917, 104th Cong., 1st Sess. (Feb. 13, 1995). For an analysis of the statute, see Carl Tobias, *Common Sense and Other Legal Reforms*, 48 Vand. L. Rev. 699 (1995).

3. Jane Stapleton, *Product Liability* (Butterworths, 1994) ("*Product Liability*").

4. For the full text of the European products liability reform statute, see *Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products*, Council Directive 85/374, 1985 O.J. (L 210) 29.

Interpreting *Product Liability* as critique, this Book Review contrasts Stapleton's centrifugal treatment of products liability with the better-known, better-financed, and vogueish view that what this subject needs is reconciliation or synthesis—that is, restatement. Although Stapleton takes pains to state doctrine in detail, it is obvious that she disapproves of much of what she describes. Ultimately her book condemns the project of describing and improving all products liability in a single formulation. This argument is a timely response to the various products liability restatements of 1994, especially the ALI endeavor.⁵

Applying the word “restatement” to the European statute and American federalization of products liability law is not customary and may demand a working definition. A restatement, as I use the term here, is a codification, produced by a group of persons and subject to a vote, that purports to reconcile and improve the state of legal doctrine in a particular subject, where at least part of this doctrine derives from the common law. Since political power is implicit in this definition, a restatement must be the product of a legislature, influential institute, or quasi-governmental organization.

Created in response to the disarray that comes from multiple federal-style jurisdictions, semi-autonomous legal decisionmakers, conflicting scholarly commentary, and pluralist competitions for power, a restatement seeks improvement of the law through simultaneous ordering and change. Put another way, as was stated in the founding documents of the ALI, the goals of restatement are three: “clarification, simplification, and ‘adaptation [of the law] to the needs of life.’”⁶ The combination of *reconciliation* and *reform* underlies restatement and its near-synonyms: unification, codification, and (in European jargon) harmonization.

Having had occasion elsewhere to note the tensions of restatement or harmonization in the context of products liability reform,⁷ I

5. I use the common-noun “restatement” generically and the proper-noun “Restatement” to refer to the work product of the ALI. Compare by analogy, Arthur L. Corbin, *The Restatement of the Common Law by the American Law Institute*, 15 Iowa L. Rev. 19, 26 (1929) (calling the early work of the ALI “merely the latest” of many restatements).

6. N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 Law & Hist. Rev. 55, 81 (1990) (citations omitted). A similar declaration appears in the House report accompanying the Common Sense Product Liability Reform Act, H.R. Rep. No. 104-63, 104th Cong., 2d Sess. 8-12 (1995), and the preamble to the European directive, 1985 O.J. (L 210) at 29-30 (cited in note 4).

7. See Anita Bernstein, *A Model of Products Liability Reform*, 27 Valp. U. L. Rev. (1993); Anita Bernstein, *L'Harmonie Dissonante: Strict Products Liability Attempted in the European Community*, 31 Va. J. Intl. L. 673 (1991). I was influenced by Stapleton's outstanding critique of

continue to doubt that products liability restaters can simultaneously accomplish each of their stated objectives. Stapleton, an early critic of products liability reform efforts, now goes further, and *Product Liability* points to weaknesses inherent in all attempts at common-law harmonization. I discuss some of these weaknesses, as well as strengths, in Part II.

The value of restatement depends on antecedent conditions that vary from subject to subject. To be useful, a restatement must begin with a clearly-asserted problem (something more than "lack of uniformity"), articulate and observe normative boundaries, and address an audience that is receptive to its authority and guidance. Where these conditions are absent, the restatement will achieve neither clarification nor simplification nor adaptation of the law to the needs of life. All restatements, even those that do not fulfill these conditions, add some value. Variable prospects suggest, however, that given scarcity of resources, the areas of law to be restated should be selected carefully. In Part III, I argue, *pace* Stapleton, that products liability is a subject ill-suited to restatement.⁸

Yet efforts to improve products liability remain worthwhile, and Part IV commends *Product Liability* as an exemplar of products liability reform. Stapleton has offered suggestions for doctrinal reform built around a normative center. This structure takes a bit of effort to find because Stapleton (who is perhaps deliberately not a builder of edifices) scatters her arguments, repeats herself, and veers from her chapter headings. These occasional flaws do not hide the plain integrity of her work. Rather they suggest the unruly force of products liability itself, a force that cannot rest in peace, despite restatement.

II. THE VALUE OF COMMON-LAW RESTATEMENT: A RETROSPECTIVE

It is the purpose in making the Restatement to state the existing principles of the common law as they have been developed by the courts up to this time. Where a difference of opinion upon specific questions has arisen, the Institute necessarily is compelled to make a choice between the two positions. In

the European statute. See Jane Stapleton, *Product Liability Reform—Real or Illusory?*, 6 Oxford J. Legal Stud. 392 (1986).

8. Professor Shapo considered the same question a year ago in this *Law Review*, and reached conclusions that overlap partially with mine. See Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 Vand. L. Rev. 631, 691-97 (1995).

making [a] choice it endeavors to state, so far as possible, the consensus of the best legal thought⁹

This ALI mission statement, acknowledging the tension between reconciliation and reform, implies that the former is prior to the latter. Reform, no matter how good in theory, needs to be supported by multiple authorities, or “consensus.” This Part examines the drawbacks and benefits of an emphasis on reconciliation.

A. *The Restatement at Century's End*

Wesley Newcomb Hohfeld dreamed of academic “juristic centers” at law schools;¹⁰ in 1921, Benjamin Cardozo anticipated an American “ministry of justice.”¹¹ Two years later, these ideals gained form as the ALI. Unelected by the public yet influenced by quasi-legislative commitments, the ALI set out to combine the best elements of elitism and democracy.¹²

Since 1923, historians and commentators have continually published their disagreements about the nature of the ALI's famous work product. Their inquiries are fundamental. Was the Restatement designed to be a codification, or instead an amulet worn around the common law to repel codifiers?¹³ Were its writers—notably members of two new professions, full-time legal academics and corporate lawyers—reactionaries, or instead what Natalie Hull has called reformist “progressive-pragmatics”?¹⁴ Is the Restatement an end in itself, or a transition to full national codification *à la* the civil-law democracies,¹⁵ to a federal common

9. *What is the American Law Institute?* 2 (unpublished 1935) (on file with the Author). For a more recent elaboration on this theme by a prominent ALI member, see Shirley S. Abrahamson, *Refreshing Institutional Memories: Wisconsin and the American Law Institute*, 1995 Wis. L. Rev. 1, 18-21.

10. See Abrahamson, 1995 Wis. L. Rev. at 8 (cited in note 9).

11. Benjamin N. Cardozo, *A Ministry of Justice*, 35 Harv. L. Rev. 113 (1921).

12. See *This is the American Law Institute* (ALI, n.d.) (on file with the ALI) (describing the internal election of members and the practice of voting by membership).

13. See Nathan M. Crystal, *Codification and the Rise of the Restatement Movement*, 54 Wash. L. Rev. 239, 242-45 (1979) (summarizing the debate over whether the ALI restatements are codifications); Grant Gilmore, *The Death of Contract* 58-59 (Ohio State, 4th ed. 1977) (arguing that the restatements fended off “statutes all around—a universal, Benthamite codification”). Compare by analogy Lawrence M. Friedman, *A History of American Law* 676 (Simon & Schuster, 2d ed. 1985) (“The proponents [of restatement] were hostile to the very thought of codification”).

14. See Hull, 8 Law & Hist. Rev. at 83-85 (cited in note 6); Friedman, *A History of American Law* at 676 (cited in note 13).

15. See Mitchell Franklin, *The Historic Function of the American Law Institute: Restatement as Transitional to Codification*, 47 Harv. L. Rev. 1367, 1372 (1934).

law,¹⁶ or to more ambitious law reform?¹⁷ Rather than answer these large questions, the ALI has favored an approach of inclusion. This approach assumes that a restatement is both conservative and progressive, something like a code and something like a treatise, an arena for academics and lawyers alike, and an institution whose past and future contain paths headed in many possible directions.

I raise here a smaller version of the great questions pertaining to the specific goal of reconciliation. What is the reason for attempting to make order out of common-law disorder? Participants in early ALI efforts have left behind their answers to this question. These purposes, still current, help to site the restatement in a bygone age.

Defending the new ALI initiative, the great contracts scholar Arthur Corbin contended in a 1929 article that, although case law fits together quite well with a "high degree of uniformity" of precedents, some variation does exist.¹⁸ This variation can be either "ignorant and unintentional" or "the result of a conscious choice by the judges."¹⁹ Happily, a restatement comports with both sources of variation. As an authoritative declaration of the law, it may be depended on to reduce errors of ignorance. As an ongoing synthesis—Corbin believed that restaters should work slowly and continuously—a restatement stays ever alert to minority-view innovation and may in time divert "the stream of decisions."²⁰

Professor Corbin's dichotomy appears sensible enough. When judges stray from what Herbert Wechsler called the "preponderating balance of authority,"²¹ this departure may be either intended or unintended. Given these two reasons for nonconformity, a restatement can help. But the Corbin reasoning, although probably compelling in its time, falters today.²² There are now better measures than a re-

16. See Corbin, 15 Iowa L. Rev. at 25-26 (cited in note 5).

17. See Jerome Frank, *Law and the Modern Mind* 186-89 (Brentano's, 1930) (stating that codification "cannot create a body of rules which will exclude judicial innovation and thereby guarantee complete predictability"). See also William P. LaPiana, "A Task of No Common Magnitude": *The Founding of the American Law Institute*, 11 Nova L. Rev. 1085, 1105, 1107 (1987) (identifying Roscoe Pound's diagnosis of socio-legal ills as fundamental in the establishment of the ALI). Compare by analogy Geoffrey C. Hazard, Jr., *The American Law Institute: What it Is and What it Does* 10 (Roma, 1994) (characterizing the ALI as a "Vehicle for Conservative Reform").

18. See Corbin, 15 Iowa L. Rev. at 27 (cited in note 5).

19. *Id.*

20. *Id.* See also Herbert Wechsler, *Restatements and Legal Change: Problems of Policy in the Restatement Work of the American Law Institute*, 13 St. Louis U. L. J. 185, 190 (1968) (discussing the choice between "opposing lines of authority").

21. Wechsler, 13 St. Louis U. L. J. at 190 (cited in note 20).

22. One problem with the dichotomy is that it presumes a nice separation between the "facts" and the "law" of a case, the former destined to be applied to the latter. At least one

statement to reduce the incidence of error; and the second category of intentional variation, presupposes a consensus or mainstream that is more problematic now than in 1929.

1. The First Problem of Variation

When the possibility of writing common-law restatements was discussed in the first two decades of the century, lawyers were only beginning to recover from the embarrassment to formalism occasioned by the simple publication of judicial opinions. The nineteenth-century belief that judges “find” or “discover” the law by engaging their faculty for legal science could not withstand the revelation of inconsistent and erroneous judicial statements. No realist critic ever devastated Christopher Columbus Langdell more than the early output of the West Law Book Publishing Company.²³ Inaccuracies were rampant. An American Bar Association statistic of 1885 reported that half the cases that reached appellate courts were reversed.²⁴ According to ALI founders (who, it must be admitted, had a stake in what they were saying), in the early decades of this century lawyers wrote briefs, and judges rendered decisions of law, of appallingly low quality.²⁵

Accuracy at the turn of the century demanded slow human effort. Unknown at the time the ALI was founded were not only the electronic databases, spellcheckers, citators, videotape, and spreadsheets taken for granted at century's end, but also electric typewriters, microfilm records, audiotape, photocopiers, and ballpoint pens. Add to the primitive technology of recordkeeping such open questions of the day as how many states (with their court systems) would enter the Union; whether women and African-Americans could be admitted

important realist disagreed: “Perhaps nine-tenths of legal uncertainty is caused by uncertainty as to what courts will find, on conflicting evidence, to be the facts of cases.” *Zell v. American Seating Co.*, 138 F.2d 641, 648 (2d Cir. 1943) (Frank, J., writing for the court), rev'd, 322 U.S. 709 (1944). For an analysis of the law/fact distinction that explores similar themes, see Jeffrey C. Alexander, *The Law/Fact Distinction and Unsettled State Law in the Federal Courts*, 64 Tex. L. Rev. 157, 176-79 (1985). In this post-realist light, a judge could well contribute to uncertainty by her treatment of what she perceives to be the facts of a case, even if she possesses maximally accurate information about the law and intends never to depart from it.

23. See Hull, 8 Law & Hist. Rev. at 57 (cited in note 6). Langdell had a defense of sorts. He maintained that some judicial opinions were “useful and necessary,” others “useless and worse.” But he never explained exactly how to tell good from bad. See Daniel J. Klau, Note, *What Price Certainty? Corbin, Williston, and the Restatement of Contracts*, 70 B.U. L. Rev. 511, 515-16 (1990) (quoting C.C. Langdell, *A Selection of Cases on the Law of Contracts* v-vi (1871)).

24. *Report of the Special Committee Appointed to Consider and Report Whether the Present Delay and Uncertainty in Judicial Administration Can Be Lessened, and If So, By What Means*, 8 A.B.A. Annual Rep. 329-31 (1885).

25. See Hull, 8 Law & Hist. Rev. at 81 (cited in note 6).

to the bar; whether night law schools such as Minnesota and Iowa could be accredited; and what to do about the "horde of alien races" that threatened to enter the profession,²⁶ and one might sympathize with those who hoped that a restatement could, in the words of the products liability co-reporters, "settle troubled waters."²⁷ The problem of variation that Corbin identified was urgent in this time of upheaval and technological naïveté.

Today legal information technology, especially electronic data storage and retrieval, offers the single most powerful cure for Corbin's problem of unintended variation in case law, primarily because it eliminates many of the stages of human input in the communication of a judicial opinion to readers.²⁸ This technology is fast and accurate. The United States Supreme Court, for instance, can transmit opinions to one electronic publisher minutes after handing them down, and the opinions are loaded into databases within twenty minutes of receipt.²⁹ Software converts judicial opinions and other data into word-processing files.³⁰ Although the printed page is still integral to good research, each year more and more of what goes into a brief, a memorandum of law, a draft of a judicial opinion, or a law review article can be found without leaving one's computer.³¹

In addition to providing text relatively unvaried by the monk-like copying and scribing of another era, electronic publishers work to

26. *Id.* at 62-63 (quoting Harvard professor Joseph Beale, President of the Association of American Law Schools, in 1914: "within the last twenty years a horde of alien races from Eastern Europe and from Asia has been pouring in on us, accustomed to absolute government, accustomed to hate the law, and hostile above all to all wealth and power" (citation omitted)). In 1874, one lawyer suggested that Columbia Law School require either a Latin examination or a college diploma for admission: "This will keep out the little scrubs (German Jew boys mostly) whom the School now promotes from grocery counters in Avenue B to be 'gentlemen of the bar.'" Quoted in LaPiana, 11 *Nova L. Rev.* at 1124 n.155 (cited in note 17) (citation omitted).

27. James A. Henderson, Jr. and Aaron D. Twerski, *Will a New Restatement Settle Troubled Waters: Reflections*, 42 *Am. U. L. Rev.* 1257, 1257 (1993).

28. In the short run, the proliferation of information technology can produce additional variation and uncertainty. For instance, a freer market in case pagination, in derogation of the copyrighted and proprietary West page numbers, would be somewhat chaotic. Conflict also exists between print and electronic means of recording cases, insofar as the former lends itself to page breaks, while the latter encourages another type of break, perhaps at the paragraph level. For a good overview of some of these problems, see Anthony Aarons, *Cite-Fight: The War on West*, *Law Office Computing* 47 (April/May 1995). It seems reasonable to assume, however, that these transitional difficulties will be relatively easy to fix.

29. *How a Slip Opinion Becomes a Reported Case*, 15 *Password: The Newsletter for the Power Westlaw User* 7 (March 1995).

30. See Laura Peritore, *Congress Watching on LEXIS, WESTLAW, LEGISLATE and Congressional Quarterly's CQ Washington Alert*, Database 104, 105, 107 (Oct. 1993).

31. See Richard A. Matasar and Rosemary Shiels, *Electronic Law Students: Repercussions on Legal Education*, 29 *Valp. U. L. Rev.* 909, 926 (1995).

eliminate variation through editorial cleanup.³² Electronic publishers also give away time online, in exchange for early access to new opinions, to court personnel who create case law.³³ This exchange may contribute to uniformity. As developments in artificial intelligence progress, electronic media will continue to make the substance of case law more regularized.³⁴ The automation of common-law authority could never have been imagined by law reformers who worked to reduce variation in the early years of this century. Their cure for uncertainty, though sensible in 1923, must now be defended or continued for reasons other than reducing ignorant variation.

2. The Second Problem of Variation

Consider next Corbin's second category, variation with science, or deliberate departures from the consensus. Corbin dealt crisply with insider-reformers: "Those who believe that certain sections of the Restatement are ancient and out-of-date rules should at once get busy and prove it publicly. Such work forms the basis of the new and constant revisions that are to come."³⁵ Though perhaps progressive in 1929, this stance no longer looks forward. Instead, it recalls an earlier day.

The twentieth century—its realism, postmodernism, critical theory, legal sociology, and group politics—did great damage to the ALI's plan for integrated, *e pluribus unum*, certain, and unvarying restatements of the common law.³⁶ Legal realism maimed the notion that "cases can be arranged to make sense—indeed scientific sense."³⁷ Social movements, in challenging such American givens as racial

32. West estimates that it corrects over 80,000 errors a year in the opinions it received from judge-authors, and "guarantees [a high] level of accuracy in case law." 15 *Password* at 7-8 (cited in note 29). As a law clerk in the mid-1980s, I helped to write judicial opinions that were later published in West's *Federal Supplement*, and recall a couple of tactful phone calls during the year from West editors suggesting that our office might not have intended to write what we had written—they were correct.

33. *Id.*

34. For example, "relevance ranking," whereby a search program ranks retrieved documents in descending order of probable relevance may be a harbinger of intelligence to come. See Peritore, *Database* at 104 (cited in note 30).

35. See Corbin, 15 *Iowa L. Rev.* at 28 (cited in note 5).

36. Scholars debate whether the ALI ought to be identified with the Jacksonian era or instead with Progressivism. Compare LaPiana, 11 *Nova L. Rev.* at 1126 (cited in note 17) (stating that the ALI, "a twentieth century hottle holding distinctly nineteenth century wine," expressed "an idea of law unchanged" from the antebellum era), with Hull, 8 *Law & Hist. Rev.* at 84-85 (cited in note 6) (calling the founders of the ALI "progressive-pragmatist[s]" hostile to Langdell's formalism (citation omitted)).

37. Gilmore, *The Death of Contract* at 59 (cited in note 13).

inequality and empire-minded warfare, attacked Corbin's premise that non-majority viewpoints bear the burden to "get busy and prove" their claim to respect. Synthesis, an endeavor hailed in the Restatement, is no longer extolled.³⁸ Its decline is expressed variously in rejection of the metaphor of the melting pot, the scorn of integration and assimilation by proud minority-group leaders, and in the ascent of diversity as a value.³⁹ The academic debate over whether the Restatement stood in its time for reaction or reform scarcely affects the conclusion that at century's end its premises have become quaint.

Twentieth-century legal and jurisprudential history has also eroded the prestige of common-law doctrine, although probably not to the extent that some conservative commentators fear.⁴⁰ This loss of prestige has negative consequences for restatement. Stapleton uses the rather ungainly word "substantivism"⁴¹ to describe what she sees as a departure from the more formal doctrinal reasoning that used to prevail in the United States and still carries weight in the United Kingdom.⁴² In their post-Holmesian attention to social justice or other ends, she writes, American judges now regard legal rules as "a mere guide to decision making."⁴³ Accordingly, cases become particularized, of reduced interest except as to their facts, or perhaps specimens of individual thinking.

Similarly, critics have complained that judicial opinions are barely judicial at all, but rather the product of law reviewers who remain devoted to their footnotes, parentheticals, monochromatic prose style, and evenhanded contempt for both losing and winning litigants.⁴⁴ Rule-oriented legal writing has withered under the influ-

38. Professor Friedman, for instance, writes that the early draftsmen of the ALI "expended their enormous talents on an enterprise which, today, seems singularly fruitless, at least to those legal scholars who adhere to later streams of legal thought. Incredibly, the work of restating (and rerepeating) is still going on." Friedman, *A History of American Law* at 676 (cited in note 13).

39. See Benjamin Schwarz, *The Diversity Myth: America's Leading Export*, *Atlantic Monthly* 57 (May 1995).

40. See Friedman, *A History of American Law* at 692 (cited in note 13).

41. *Product Liability* at 70 (cited in note 3).

42. *Id.* As Professor Partlett has suggested, American substantivism can be attributed in part to the absence of public law reform institutions in the United States; institutions of this kind function powerfully in the United Kingdom and the Commonwealth. The American judiciary fills this void by engaging in law reform. See David F. Partlett, *The Common Law as Cricket*, 43 *Vand. L. Rev.* 1401, 1422 (1990).

43. *Product Liability* at 71 (cited in note 3).

44. See Richard A. Posner, *The Federal Courts: Crisis and Reform* 107-08 (Harvard, 1985). Compare by analogy John S. Elson, *The Case Against Legal Scholarship or, If the Professor Must Publish, Must the Profession Perish?*, 39 *J. Legal Educ.* 343 (1989).

ence of university departments—economics, philosophy, and English in particular—regarding what is considered original and important in the law.⁴⁵ The overt politicization of judicial selection has bred cynicism regarding the bounds of precedent.⁴⁶ If substantivism is at war with doctrine and has been winning that war in the United States, as Stapleton contends, then restatements become both harder to write and of less benefit. At century's end there may be too little, but also too much, to restate.

The same twentieth-century events that eroded consensus and doctrine affect another premise of the restatement enterprise: that the sectors competent to create legal rules, identified by the ALI as bench, bar, and academy, should come together to improve the law and benefit from the others' perspectives.⁴⁷ Constituencies with an interest in American law have changed since 1923 in several ways. First, there are more of them. Second, their memberships are more diverse—that is, fragmented—and accordingly less likely to gather in the genteel fraternity recalled by the ALI's nostalgic memoirists.⁴⁸ Third, they have been divided on the subject of money; the prospect of making a fortune in law has ceased to be the unmentionable, perhaps unthinkable, topic that it was among the 1923 elite. In a newer climate of candor, federal judges quit the bench for the sake of money;⁴⁹ the *American Lawyer* boldly prints data about firms' profits, revenues, and reversals;⁵⁰ and white-shoe lawyers fire their partners, jump ship, speak in management-school technobabble, and try to expand their "business."⁵¹ Undoubtedly this freer market has liberated many lawyers and benefited many clients, but to judge by recent publications, it has caused some members of the bench, bar, and academy to despise one another more than ever, making them suspicious that

45. Compare Donald B. Ayer, *Stewardship*, 91 Mich. L. Rev. 2150, 2157 (1993) (decrying the trend) with George L. Priest, *Social Science Theory and Legal Education: The Law School as University*, 33 J. Legal Educ. 437, 437-41 (1983) (approving the trend).

46. See Stephen L. Carter, *The Confirmation Mess* 116-18, 147-50 (Basic Books, 1994).

47. For an expression of this view, see Geoffrey C. Hazard, Jr., *Undemocratic Legislation*, 87 Yale L. J. 1284, 1286 (1978).

48. See Herbert F. Goodrich and Paul A. Wolkin, *The Story of the American Law Institute: 1923-1961* at 5-7 (ALI, 1961); William Draper Lewis, *History of the American Law Institute and the First Restatement of the Law: "How We Did It,"* in *Restatement in the Courts: Permanent Edition* 1 (ALI, 1945); Corbin, 15 Iowa L. Rev. at 20 (cited in note 5).

49. See David Rarii, *When Ex-Judges Return to Practice: Welcomed by Firms*, Natl. L. J. 1 (April 8, 1995); *Surviving Justice*, N.Y. Times A18 (Jan. 10, 1983) (describing the resignation of Judge Mulligan from the Second Circuit).

50. See Steven Brill and Karen Dillon, *A Marketplace in Turmoil*, Am. Law. 5 (April 1995).

51. See G. Howland Blackiston, *A Road Map for Quality in Legal Services*, 43 Emory L. J. 507 (1994); Francy Blackwood, *Going Global With Law*, 28 S.F. Bus. Mag. 30 (April 1993).

other lawyers, or other sectors of the profession, have gained at their expense.⁵² The common purpose of the law has become harder to state.

These rumblings have been amplified since 1987, after the defeat of Supreme Court nominee Robert Bork. Bench, bar, and the academy joined an affray that divided politically engaged lawyers throughout the United States and exposed a new harshness in high-level political appointments.⁵³ This attitude toward government service marks a transition from an earlier era. While the ALI continues to exalt the American legal elite—individuals who aspire to the best posts in government, the private practice of law, and the academy—a pall continues to cloud these lawyers when they seek the recognition of high level public service appointments. This post-Bork pall impugns their ambition, belittles their accomplishments as merely “political,” puts them through litmus tests and petty-sounding inquiries about their households, and, above all, implies that they are not outstanding individuals.⁵⁴ One need not necessarily mourn the fate of all who were Borked to note some consequences of political events to the project of restatement. The Reagan Justice Department and its heirs (or its liberal antagonists, if you would have it so) did damage to the reputation of lawyers by suggesting that, even at their best, they amount to little more than political booty. As the esteem of the

52. See generally Mary Ann Glendon, *A Nation Under Lawyers: How the Crisis in the Legal Profession Is Transforming American Society* (Farrar, Straus, and Giroux, 1994); Richard A. Posner, *Overcoming Law* (Harvard, 1995). For a federal judge's view of practice-academy hostility, see Harry T. Edwards, *The Growing Disjunction Between Legal Education and the Legal Profession*, 91 Mich. L. Rev. 34 (1992).

Bench-bar-academy rancor emerges now and then in the writings of those who describe their past service on uniform-laws task forces. In an early outburst, one professor labeled Article 4 of the Uniform Commercial Code, written by academics and practitioners, as “a deliberate sell-out” and “an unfair piece of class legislation . . . favoring the bankers over their customers.” Frederick K. Beutel, *The Proposed Uniform [?] Commercial Code Should Not Be Adopted*, 61 Yale L. J. 334, 335, 362 (1952). See also Donald J. Rapson, *Who is Looking Out For The Public Interest? Thoughts About the UCC Revision Process in the Light (and Shadows) of Professor Rubin's Observations*, 28 Loyola L.A. L. Rev. 249, 262 n.37 (1994) (giving a practitioner's viewpoint: “All too often those who teach one of the topics under revision sit silently, instead of participating and possibly improving the focus on public interest concerns. Only after enactment do they end their silence—frequently in an article that is critical”).

53. The harshness was not in fact new. Although the pillorying of judicial nominees based on their writings and ideology is associated with Judge Bork's nomination, liberals complained during the Reagan administration about the practice of targeting candidates nominated by Democratic senators. See Herman Schwartz, *Reagan Packs the Federal Judiciary*, *The Nation* 513 (May 4, 1985). See also Carter, *The Confirmation Mess* at 3-5 (cited in note 46) (describing the confirmation ordeal of Thurgood Marshall).

54. See Carter, *The Confirmation Mess* at 1 (cited in note 46) (“Borking for Fun and Profit”).

American legal elite diminishes, it becomes less obvious to the public that they are credible and trustworthy enough to restate the law.

B. *Some Benefits of Restatement*

Despite the political and social changes that have diminished the value of restatement, the endeavor still offers benefits. Perhaps most importantly, when viewed as a species of treatise, any restatement makes contributions to human knowledge.⁵⁵ Contributors tend to be talented and energetic and often produce work of a high quality. The prestige of a restatement effort often impels participants to donate their time or, in the case of ALI reporters, to work for much less money than their efforts would otherwise command.⁵⁶ Certainly some participants could produce good treatises on their own, but the lure of a restatement both attracts additional talent and encourages participants to spend their spare time improving the law, rather than pursuing some less altruistic alternative project.⁵⁷ By hypothesis, then, the restatement as quasi-treatise delivers more benefit to the law than would be possible in a world with treatises but without restatements.

In another treatise-like function, a restatement of a newly-crystallized area of the law can expand human knowledge by fixing that area of law as a separate subject.⁵⁸ This function was proclaimed in the *Georgetown Journal of Legal Ethics*, which published in its inaugural issue a sketch of the proposed Restatement of the Law Governing Lawyers by its chief reporter.⁵⁹ In this piece, Charles Wolfram wrote that "one may wonder why the Institute waited over sixty years before beginning an examination of this most obvious subject of inquiry."⁶⁰ To Professor Wolfram, the "law of lawyering" as a subject was already fixed by 1987 but, as he noted, some observers

55. Marshall Shapo has written that a failed restatement is "no more than a treatise written by a committee." Shapo, 48 Vand. L. Rev. at 654 (cited in note 8) (citation omitted). But it surely is no less.

56. See John W. Wade, *The Restatement (Second): A Tribute to its Increasingly Advantageous Quality, and an Encouragement to Continue the Trend*, 13 Pepp. L. Rev. 59, 83-84 (1985).

57. See *id.* at 84 ("The meetings . . . are eagerly anticipated by all participants and are exhilarating while they last. There is the good feeling of being engaged in pro-bono work for the benefit of the legal system as a whole, and of the country, too").

58. A not entirely facetious essay illustrates this function. Gretchen Craft Rubin and Jamie G. Heller, *Restatement of Love*, 104 Yale L. J. 707 (1994).

59. See Charles W. Wolfram, *The Concept of a Restatement of the Law Governing Lawyers*, 1 Geo. J. Leg. Ethics 195 (1987).

60. *Id.* at 196.

expressed surprise at the initiative.⁶¹ In the years following, the legitimacy of this subject—its fitness for restatement—grew clearer, such that even a critic of the project observed that the restatement-in-progress helpfully pointed up important matters of doctrine.⁶² Restatements that move into new territory also demonstrate the contingency of legal concepts and help to temper the excesses, and the stasis, of legal formalism.

Some restatements use their authority wisely and effectively. In his defense of the Second Restatement of Torts, John Wade argued that this compilation had achieved success on several points of doctrine precisely because of the unique authority of the Restatement. For example, he wrote, the misleading "attractive nuisance doctrine" needed to be banished, but common-law repetition and retrospection tended instead to perpetuate it.⁶³ Enter section 339 to the rescue. "Courts quickly recognized the validity of the change in language,"⁶⁴ and the law was improved more effectively than would have been the case if, say, a federal statute had been attempted. Wade also praised the Second Restatement for its intelligent treatment of constitutionalized defamation law⁶⁵ and for its general ability to find a persuasive shade of gray between black and white alternatives.⁶⁶

Comparative lawyers, who take an interest in restatements because of their similarity to European civil codes,⁶⁷ have pointed out that a restatement facilitates the borrowing of law by other nations.⁶⁸ Though skeptical about restatements, Arthur Rosett has described them as useful "monuments to indicate the substantive harmonization that has already occurred."⁶⁹ Another comparativist, James Gordley, has written that codification and restatement provide

61. *Id.*

62. See Ted Schneyer, *The ALI's Restatement and the ABA's Model Rules: Rivals or Complements?*, 46 Okla. L. Rev. 25, 44 (1993).

63. Wade, 13 Pepp. L. Rev. at 74 (cited in note 56).

64. *Id.*

65. *Id.* at 77-81.

66. *Id.* at 75-77.

67. See James Gordley, *European Codes and American Restatements: Some Difficulties*, 81 Colum. L. Rev. 140 (1981) (arguing that clarity and precision are not desirable goals for either American restatements or European civil codes).

68. See Arthur Rosett, *Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law*, 40 Am. J. Comp. L. 683, 683 (1992). See, for example, Hazard, *The American Law Institute* (cited in note 17) (a monograph by the director of the ALI, published in Italy, informing lawyers outside the U.S. about the work and authority of the Institute). The great precedent here may be the French Civil Code, a restatement of various civil-law traditions that in turn led to borrowing and rewriting elsewhere, notably in the German Civil Code.

69. Rosett, 40 Am. J. Comp. L. at 683-84 (cited in note 68).

“authoritative starting points” for fledgling legal systems as well as a useful reduction of starting points in more established settings.⁷⁰

In a related function, restatements can streamline entire areas of the law. They make research easier.⁷¹ Their division of content into black letter and comments saves time for the harried lawyer who must read quickly. Their neglect of a topic may well be salutary. Restatement, in short, yields practical, doctrinal, and epistemological benefits.

III. CAN PRODUCTS LIABILITY BE RESTATED? A THREE-QUESTION FRAMEWORK

The look at restatement thus far in this Book Review has produced a mixed judgment as to its value. Fitting precedent together and improving the law, I have suggested, function at cross purposes.⁷² Moreover, the restatement project rests on assumptions about consensus and deviation that after technological expansion, post-realist insights, and political change, are no longer current. Yet restatements have also improved and clarified the law. Given this mixed history, one may hypothesize that for some subjects the detriments of restatement will outweigh the benefits, while for other subjects the converse will be true.

This Part ventures a method of identifying which problems, or legal categories, are best suited to restatement. Three questions must be asked. First, what is the problem that the restatement seeks to cure? Second, to whom is the solution addressed? Third, do specific normative principles guide and constrain the solution? If the answers to these questions indicate a good prospect of synthesis and improvement, then restating is worthwhile and perhaps even necessary. More often, however, consideration of these variables will indicate trouble ahead. Extrapolating from Stapleton's work, I conclude that

70. Gordley, 81 Colum. L. Rev. at 156 (cited in note 67).

71. One of the earliest antagonists of restatement, Charles Clark, admitted rather grudgingly that they would probably reduce the bulk of case law that judges and scholars had to read. See Charles Clark, *The Restatement of the Law of Contracts*, 42 Yale L. J. 643, 654 (1933). This benefit becomes even more important as case law proliferates.

72. A contrary theme surfaces in Marshall Shapo's essay on the Third Restatement. Professor Shapo sketches an alternative vision of the restatement process, emphasizing deference to the judiciary, civility and mutual respect within the restating organization, and awareness of political pitfalls. See Shapo, 48 Vand. L. Rev. at 682-87 (cited in note 8). This idealized ALI could indeed fit case holdings together and improve the law, although the organization would move very slowly.

products liability, somewhat amenable to restatement in the past, now resists reconciliation and centralized improvement.

A. *What is the Problem?*

Restatements purport to cure problems of "variation" or "uncertainty." As was explained in Part II, however, case-by-case variation does not necessarily diminish in the presence of a restatement,⁷³ may be cured more effectively through technology,⁷⁴ and in contemporary judgment may not even be a problem.⁷⁵ In order to improve the law, then, a restatement must do more than paper over variation or condemn it. Restatements need goals that are derived from clearly-perceived problems.

Perhaps the most obvious example of a useful restatement is a successful revision of a predecessor. Here both the need for some kind of restatement and the problems with the incumbent are conceded. This situation does not exist in products liability, where scholars disagree as to both the inadequacy of section 402A of the Second Restatement of Torts⁷⁶ and the need to have any products liability restatement at all.⁷⁷ Once again, a contrasting example may be found in the area of attorney regulation.⁷⁸ The ABA's Kutak Commission, charged with the task of writing what would become the Model Rules of Professional Conduct, addressed a generally-accepted problem—the flaws of the predecessor Model Code of Professional Responsibility—and worked within a consensus that some rulebook for lawyers was necessary.⁷⁹ One could argue that the Code had not achieved certainty in its time, but more important to the validity of the Rules as restatement was its focus on specific problems.⁸⁰

73. See note 22.

74. See notes 28-34 and accompanying text.

75. See notes 36-39 and accompanying text.

76. See Oscar S. Gray, *The Draft ALI Product Liability Proposals: Progress or Anachronism?*, 61 Tenn. L. Rev. 1105 (1994); Larry S. Stewart, *The ALI and Products Liability: "Restatement" or "Reform"?*, 30 Trial 28 (Sept. 1994).

77. See William Powers, Jr., *A Modest Proposal to Abandon Strict Products Liability*, 1991 U. Ill. L. Rev. 639.

78. See notes 59-62 and accompanying text.

79. Professor Schneyer argues persuasively that the Model Rules constituted a "restatement-in-fact" in that they concern themselves with existing nondisciplinary doctrine and codify decisional law. Schneyer, 46 Okla. L. Rev. at 37-43 (cited in note 62).

80. Problems included the Code's narrow focus on litigation, its awkward division between serious rules and not-so-serious aspirations, and a structure that made amendments and updating difficult. See Deborah L. Rhode and David Luban, *Legal Ethics* 115-16 (Foundation Press, 2d ed. 1995).

Closer to our subject, another example of a restatement that was useful as response to a problem is section 402A itself, even though it has provoked controversy throughout its lifetime. Taking an outsider's fresh look at section 402A, Stapleton perceives its creation as a rather guileless solution to a problem: not of uncertainty, but of doctrinal weakness. As Stapleton tells it, William Prosser and his colleagues wrote the final draft of section 402A in 1964 simply to extend the law of sales warranties to non-privy purchasers.⁸¹ In support of her claim, she notes that manufacturing interests did not "seriously" fight section 402A when it was first promulgated,⁸² and she deems Prosser's admission that case outcomes would be unchanged by his new rule as far more honest than his bombastic talk about "the citadel."⁸³ Section 402A was intended to be modest,⁸⁴ and functioned modestly for many years. Only when fault-related problems such as the meaning of non-manufacturing defects and the standard of proof for design cases began to overwhelm the warranty purpose of section 402A did this modesty and simplicity fail.⁸⁵

In its origins, however, section 402A addressed an identified problem other than lack of certainty and thus fulfilled the first criterion of a good restatement. Privity rules, which incidentally were not uniformly applied in 1964,⁸⁶ posed an injustice to those who purchased goods that proved not to be of merchantable quality. Section 402A

81. *Product Liability* at 23-29 (cited in note 3). Specifically, Stapleton contends that the scope of § 402A indicates that the rule was intended as "an amendment of sales rules" rather than "a recognition of independent tort obligations." *Id.* at 26.

82. On this point, Stapleton overrelies on a few limited sources and thus neglects the moderately serious attack on § 402A which occurred upon publication of the Second Restatement in 1965. The Defense Research Institute objected to the adoption of strict liability, a minority rule at the time. Wechsler, 13 St. Louis U. L. J. at 188-89 (cited in note 20). In a formal "brief," this organization charged the ALI with departure from "its traditional role" and resorting to "mere prophecy." *Id.* (citations omitted). Though timid in comparison to the tort reform movement that would come in the next decade, this battle marked a crisis for the ALI and drew attention to the conflict between reconciliation and reform. *Id.* at 189-92.

83. *Product Liability* at 26 (cited in note 3) (citations omitted).

84. *Id.* (stating that § 402A was a "fast, interesting, but basically modest, adjustment to the liability rules governing the sale of goods").

85. See *id.* at 90-91 (arguing that the "focus on manufacturing errors allowed 402A and, more importantly, its Comments to be drafted in a way which did not carefully confine its scope to such cases. As the explosive potential of § 402A was later being realized in a flood of difficult design defect cases, defenders of the rule—now revealed as a much more extensive rule than its originators had foreseen—turned to more elaborate conceptual ideas").

86. See, for example, *id.* at 23 (describing the 1962 and 1966 UCC versions that contained varying rules about privity); *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960) (allowing a warranty action by a non-privy plaintiff); *Greenman v. Yuba Power Products, Inc.*, 27 Cal. Rptr. 697, 377 P.2d 897 (1962) (allowing a claim by a non-privy plaintiff who had also failed to give timely notice of breach).

extended warranty protection just one more step along the chain of distribution. Whether or not Stapleton is right to argue that the extension goes no further, interpreting section 402A as probably inapplicable to bystanders,⁸⁷ a fair reading of section 402A, with its caveats, comments, and contemporaneous scholarship, suggests that the original products liability restatement made a change in the law that was relatively small, and that focused on a particular aberration.⁸⁸ Drawing on the existing decisional law of warranty, section 402A linked traditions with policy imperatives and did not stray from the identified problem, although its lapses from good draftsmanship did lead to later straying.

By contrast, the Third Restatement wavers on the question of "What is the Problem?" and thus provokes speculation, not all of it fair, about the unspoken agenda of its co-reporters.⁸⁹ By way of a spoken agenda, Professors Henderson and Twerski have stated their mission in articles and published symposia, as well as in extensive comments to their ALI drafts. In these statements, they say that several doctrinal questions remain open or divided, find ambiguities and flaws in section 402A, and allude continually to the confusion and fear that bedevil products liability.⁹⁰

While these points are valid, Henderson and Twerski simultaneously promise too much and too little. As they admit, they cannot clean up much of the doctrinal mess.⁹¹ They do not explain why infelicitous passages in section 402A, such as the phrase "defective condition unreasonably dangerous" and the incoherent Comment k, should not simply be removed. If the anguish that accompanies products liability is the problem, Henderson and Twerski, clever partisans who

87. With customary scrupulousness, Stapleton admits that the evidence for her conclusion is mixed. See *Product Liability* at 27 (cited in note 3).

88. See *id.* at 90 (concluding that the framers of § 402A considered the reform "a limited tidying up of sales law, intellectually neat and attractive hut of relatively little practical importance").

89. See, for example, Philip H. Corhoy, *The Not-So-Quiet Revolution: Rebuilding Barriers to Jury Trial in the Proposed Restatement (Third) of Torts: Products Liability*, 61 *Tenn. L. Rev.* 1043, 1046-47, 1073-74 (1994) (arguing that Professors Henderson and Twerski mistrust the civil jury and seek to restrain it); Stewart, *Trial* at 30 (cited in note 76) (objecting to the co-reporters' restating tort reform statutes rather than case law); Jerry J. Phillips, *Achilles' Heel*, 61 *Tenn. L. Rev.* 1265, 1265-67 (1994) (arguing that an inconsistent focus coupled with political ambition has weakened the Third Restatement).

90. See James A. Henderson, Jr. and Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 *Cornell L. Rev.* 1512, 1527-28 (1992); Henderson and Twerski, 42 *Am. U. L. Rev.* at 1261-66 (cited in note 27).

91. Henderson and Twerski, 77 *Cornell L. Rev.* at 1530 (cited in note 90).

love a sharp argument and a good fight, are hardly the solution.⁹² (For me, the co-reporters' putting their work forward as emollient evokes a favorite word of theirs, chutzpah.⁹³) By choosing not to highlight one essential flaw of doctrine, Henderson and Twerski forfeit a chance to create a center for their project. Nor do they explain how a new restatement would function in the courts to solve the concatenation of smaller problems that they name. Absences of explicit purpose also characterize section 402A. Yet in section 402A, both reconciliation with a tradition, and reform of a discrete yet central doctrine, are patent.

More fundamentally, the Third Restatement lacks a conception of products liability as a discrete area of the law. Its peculiar title, Restatement of the Law: Torts: Products Liability, reveals confusion about whether products liability is (or should be) a bounded, separate category of the law. When the co-reporters provide a definition of "product," they do so diffidently, expressing doubt that such a definition is necessary, inasmuch as they have decreed that most products liability cases are resolved with reference to negligence.⁹⁴ Similar ambivalence appears in the one-sentence text of their section 10: "Whether a product defect caused harm is determined by the prevailing rules and principles governing causation in tort."⁹⁵ This provision, if not redundant, implies that a products liability rule can be contrary to a tort rule, but no such conflict ever materializes in the Third Restatement. This absence of conflict is consistent with the co-reporters' previously expressed view that "Products Liability" may

92. Professors Henderson and Twerski like to call themselves centrists. See, for example, James Henderson, *Revising Section 402A: The Limits of Tort as Social Insurance*, 10 *Touro L. Rev.* 107, 112 (1993) ("I am politically in the middle of the road"); Aaron D. Twerski, *A Moderate and Restrained Federal Product Liability Bill: Targeting the Crisis Areas for Resolution*, 18 *U. Mich. J. L. Ref.* 575, 628 (1985). However, several colleagues classify their stance as pro-defendant. See, for example, Howard Latin, "Good" Warnings, Bad Products, and Cognitive Limitations, 41 *U.C.L.A. L. Rev.* 1193, 1236 n.405 (1994) (attributing an "anti-liability orientation" and "solicitude for industry" to Professors Henderson and Twerski); Teresa Moran Schwartz, *Prescription Products and the Proposed Restatement (Third)*, 61 *Tenn. L. Rev.* 1357, 1363 (1994) (calling part of the Third Restatement "decidedly favorable to defendants").

93. The co-reporters commend this bit of Yiddish/Hebrew to their readers in James A. Henderson, Jr. and Aaron D. Twerski, *Products Liability: Problems and Process* 23 (Little, Brown, 2d ed. 1992), and in Henderson and Twerski, 77 *Cornell L. Rev.* at 1513 (cited in note 90).

94. The definition of a "product" appears in § 4 of the most recent Tentative Draft. Restatement (Third) of Torts: Products Liability 137-38 (Tentative Draft No. 2, Mar. 13, 1995) ("Given that design and warnings cases turn on essentially risk-utility evaluations, see § 2, Comment c, the practical importance of whether something is, or is not, a product has diminished somewhat. Nevertheless, that issue remains important in the modern era to the extent that the concept of strict liability retains functional meaning").

95. *Id.* at 260.

properly be called Advanced Torts.⁹⁶ Yet although Henderson and Twerski have left little of "strict liability" standing, they have also insisted on the separate identity of products liability as distinguished from negligence. One Stapleton criticism of the European Union statute—"[u]nless we have an adequate rationale for how, where and why we have drawn boundaries around such a limited civil liability, we may be unable to hold those boundaries stable"⁹⁷—resonates here. Simultaneously reifying and denying products liability, the Third Restatement not only cannot answer the question of "What is the Problem?," but it underscores the importance of that question.

Henderson and Twerski allude frequently to lack of uniformity, the last refuge of a restater. At a forum on the Third Restatement, Twerski concluded his remarks by decrying uncertainty:

When you are dealing with terms that make sense only to the Oracle at Delphi, there is room for huge amounts of maneuvering. Lawyers are jealous of that maneuvering space and sometimes correctly so. We have not written and will not write a manifesto for "law reform." Although we have our own personal view about what the law of products liability should be, we have not imposed [it] on the Restatement. But we will impose some clarity, and there are costs to clarity. Thirty years into the product revolution, we think that the time has come to do that.⁹⁸

Elaborating at the same symposium, Henderson described the problem of uncertainty as a burden on insurance classification and a source of social cost.⁹⁹ Henderson, speaking more candidly than his co-reporter, acknowledged that the Third Restatement would probably not "meet the reception of the Restatement (Second) of Torts section 402A, which was an idea whose time had come."¹⁰⁰ One reason the time of the Third Restatement has not come is that its purpose is not yet clear.

96. See Henderson and Twerski, *Products Liability* at xxix (cited in note 93).

97. *Product Liability* at 7 (cited in note 3).

98. Aaron Twerski, *From a Reporter's Perspective: A Proposed Agenda*, 10 *Touro L. Rev.* 5, 19 (1993).

99. Henderson, 10 *Touro L. Rev.* at 117-20 (cited in note 92). Professor Henderson elaborates that if the scope of products liability faced by a particular industry is "per se, unpredictable," then the manufacturers in that industry will have an incredibly difficult time finding adequate insurance at a reasonable cost. "The actuaries would compute a sum of money that represented the basic risks presented based on the statistics they had. Whatever figure they came up with, they would multiply it by ten and maybe write some insurance. This would be very, very costly to the insured." *Id.* at 117.

100. *Id.* at 108.

B. To Whom is the Solution Addressed?

A restatement expresses commitment to the principle of segmentation. It does not purport to achieve synthesis of all common law or case law, but rather refines understandings about one doctrinal category. As political documents written and ratified by groups, restatements must offer service to a constituency, whereas treatises or other learned compilations do not address a segmented audience. Thus, just as “uncertainty” and “lack of uniformity” are poor answers to “What is the Problem?” the question “To Whom is the Solution Addressed?” should preferably not draw the answer “everybody.” By the definition used here, a restatement must affect a significant number of people in order to earn this label. Past that point, though, the more diverse the groups that a restatement tries to affect, the less likely it is to work.

The best illustration of the point is the Ur-restatement, the Uniform Commercial Code. The UCC derived its authority not only from the stature of its father, Karl Llewellyn, but also from the idea that merchants need a rulebook for the game they voluntarily play. Llewellyn’s code has provoked both hagiography and harsh criticism. Admiring accounts describe a brilliant restater alert to the commercial world around him, a scholar capable of both listening to businessmen’s anecdotes and building a great structure.¹⁰¹ Others have argued that the notion of an apolitical commercial law code that delivered rules based on what people need and do in business (with neither empirical evidence nor a clear economic theory of the market) is nonsense.¹⁰² A more moderate assessment may be derived from attention to the question “To Whom is the Solution Addressed?” The UCC is most useful where lawyers and their clients benefit from a rulebook—article 9, on secured transactions, has been roundly praised—but is less attractive to those who feel like outsiders. Literal foreigners occupy the latter category, and comparative lawyers have objected to the UCC because it separates domestic law from special

101. See Soia Mentschikoff, *The Uniform Commercial Code: An Experiment in Democracy in Drafting*, 36 A.B.A. J. 419, 419-20 (1950); William Twining, *Karl Llewellyn and the Realist Movement* 316 (Weidenfeld and Nicolson, 1973).

102. See, for example, Friedman, *A History of American Law* at 675 (cited in note 13); Richard Danzig, *A Comment on the Jurisprudence of the Uniform Commercial Code*, 27 Stan. L. Rev. 621 (1975). In a distracted moment, Karl Llewellyn alluded in a memo to “a very considerable body of commercial law which is very largely non-political in character, and which can be put into shape to be flexibly permanent.” Quoted in Kathleen Patchel, *Interest Group Politics, Federalism, and the Uniform Laws Process: Some Lessons From the Uniform Commercial Code*, 78 Minn. L. Rev. 83, 84 (1993).

rules about international transactions, causing "vexacious and essentially insol[uble] problems."¹⁰³ Figurative foreigners—such as those who speak for bank customers or consumers of delivered household goods, who could not have their interests represented adequately at the time of codification—also complain about the way they are treated in the UCC.¹⁰⁴

Lessons from the reception of the UCC pertain to the restatement of any type of accident law. Where doctrine is associated with a haves/have-nots dichotomy, as is the case in the United States with both accident law and commercial law involving consumers, a restatement will tend to favor the organized interests that can influence its writing. Accident law may not be inherently more "political" than other areas of law, but it functions in an overtly political way in the United States.

Implications follow for the Third Restatement. One may generalize that, unless a political shift occurs, the entire Third Restatement is likely to be weakened by plaintiff/defendant rifts, more so than its two predecessors, which functioned in a less overtly political liability system.¹⁰⁵ Within a torts restatement, certain sections will fare better than others. By hypothesis, a restatement will be most useful in describing those wrongs where individual consciousness, rather than political or economic position, is understood to divide agents from recipients of agency. Several intentional torts fit within this amenable-to-restatement category.¹⁰⁶ For negligence and many types of strict liability, including products liability, where an individual/firm (or haves/have nots) matrix serves as a divider, a torts restatement will be of less utility.

103. Rosett, 40 Am. J. Comp. L. at 687 (cited in note 68).

104. Professor Patchel describes problems of collective action and pre-drafting compromise to appease industry. See Patchel, 78 Minn. L. Rev. at 100-01 (cited in note 102). See also Beutel, 61 Yale L. J. at 335 (cited in note 52); Grant Gilmore, *The Uniform Commercial Code: A Reply to Professor Beutel*, 61 Yale L. J. 364 (1952).

105. On political rifts as tending to weaken the Third Restatement, see Shapo, 48 Vand. L. Rev. at 686 (cited in note 8) (recounting a colleague's remark that, after attempting to restate products liability, "next, the ALI will undertake a Restatement of Abortion").

106. Here I mean to classify intentional torts with other torts that do not fit squarely within an intentional/negligence/strict-liability triad, such as dignitary torts and nuisance. For this category, harm may be said not to be "accidental," and neither plaintiffs nor defendants occupy an obvious political or economic category. The Second Restatement made its best contribution in these areas. Its sections on the invasion of privacy are especially good. *Restatement (Second) of Torts* §§ 652A - 652I (1977). I lack data to support the point, but my impression is that Torts instructors—who read the Second Restatement looking for pedagogical merit—strongly prefer the sections on assault, battery, and intentional infliction of emotional distress to those on negligence and related questions of legal cause. Although § 402A may be the most famous section of the Second Restatement, it is famous for reasons other than its utility and clarity.

Over the last twenty years, working within this division of enterprise versus individuals, defense-based interests have fueled the tort reform engine. It is hard to overstate the division between the two classes. High-stakes crisis talk, dichotomizing plaintiffs and defendants, has accompanied products liability for decades. This energy seems to sustain itself as books, articles, statutes, conferences, speeches, and reforms all seem to produce more of the same, so much so that 1994, the year of urgent central planning in products liability, may not even mark the peak. In almost all of the tort reform debate, polarization is presumed.

Many writers have sought to position themselves in the center between these two poles, and the ALI and its co-reporters see this rift as an opportunity to mediate and "settle troubled waters." Yet the ALI has had little moderating influence. In the state houses, public opinion, and even Congress, defense interests have done so well that they would not wish to support any restatement except one too lopsided for a bench-bar-academy coalition to deliver. Consumer organizations and the plaintiffs' bar mistrust the ALI for its earlier *Enterprise Responsibility for Personal Injury*, its sources of funding, and its enthusiasm for the political center at a time when the center has been pulled to the right.¹⁰⁷ Plaintiffs' advocates appear more comfortable competing directly against their adversaries with judicial campaign contributions and state-level lobbying. The two camps agree on few matters, but probably would agree that the Third Restatement is not addressed to them.

C. Do Normative Principles Guide and Constrain the Solution?

Divisions between plaintiffs and defendants contribute to the third vulnerability of a products restatement: an absence of agreement about underlying principles. This problem, though related to political dichotomies, is independent of them as Richard Posner has demonstrated. Skeptical generally of attempts to codify the common law, Posner described in an early article the chaos that results when a

107. On hostility to the *Enterprise Responsibility* report, see Elizabeth C. Price, *Toward a Unified Theory of Products Liability: Reviving the Causative Concept of Legal Fault*, 61 *Tenn. L. Rev.* 1277, 1316-17 & n.281 (1994). See also Stephen D. Sugarman, *A Restatement of Torts*, 44 *Stan. L. Rev.* 1163, 1163 (1992) (describing political conflicts present in, and generated by, the ALI report); Bruce S. Kaufman, *Attorneys Spar Over Restatement (Third) of Torts: ATLA to Mobilize Opposition to ALI Project*, 22 *Prod. Safety & Liab. Rep.* (BNA) 436, 437 (1994).

restatement does not stay within coherent normative boundaries.¹⁰⁸ His examination of defense-of-property tort law considered a belief manifested in the First and Second Restatements: human life and limb are more important than property, except when they are less important.¹⁰⁹ Because the ALI could not declare a consistent normative principle informing spring-gun law, Posner wrote, it should have stayed out of the business of restating it.¹¹⁰ His suggested normative commitment—efficiency analysis, with all cant about “transcendent value” removed—though repugnant to many, would have taken a step toward coherence.

Stapleton makes a similar argument in the middle part of *Product Liability*, called simply “Theory.”¹¹¹ Products liability, she writes, has “a plethora of rationales, some of which are internally inconsistent,” and “a ragbag of reasons” but “no indication of the weight and priority to be given to each.”¹¹² Although Stapleton directly addresses the European Union products liability law, her complaint about theoretical “shallowness”¹¹³ also applies to section 402A and American products liability law.

Her major criticisms are numerous. First, as was mentioned, she questions the validity of a rule limited to products.¹¹⁴ Stapleton goes on to attack what she calls “liability as an economic strategy,” and although “market apologists” and the “crude use of the Coase Theorem to provide a rationale for laissez-faire ideology”¹¹⁵ absorb the brunt of her criticism, she is also dissatisfied with the liberal Calabresian version of an economics rationale. According to Stapleton, the concept of the cheapest cost avoider cannot work in any but the most simplified settings and is fraught with complications.¹¹⁶ Noneconomic theories of liability, such as Richard Epstein’s libertarianism¹¹⁷ and Ernest Weinrib’s formalism,¹¹⁸ receive more cursory treatment. Stapleton says that they rest on assertion and, like some

108. Richard A. Posner, *Killing or Wounding to Protect a Property Interest*, 14 J. L. & Econ. 201 (1971).

109. *Id.* at 205-06.

110. *Id.* at 208. Jonathan Macey makes a similar point in his attack on the ALI’s Corporate Governance Project, an attempt at restatement that failed, he argues, because it lacked a coherent normative or conceptual commitment. See Jonathan R. Macey, *The Transformation of the American Law Institute*, 61 Geo. Wash. L. Rev. 1212, 1215 (1993).

111. *Product Liability* at 89-230 (cited in note 3).

112. *Id.* at 91.

113. *Id.*

114. *Id.* at 96-97.

115. *Id.* at 118.

116. *Id.* at 103-05, 138-48.

117. See Richard A. Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151 (1973).

118. See Ernest J. Weinrib, *Understanding Tort Law*, 23 Valp. U. L. Rev. 485 (1989).

economic theories, on simplification as well.¹¹⁹ This section of *Product Liability* may not find a constituency of readers because most of Stapleton's arguments will be familiar to specialist scholars, yet they are presented in too much disorder to be especially accessible for newcomers to liability theory.¹²⁰

One might also carp a little at Stapleton's high standards. Not only products liability but all of civil liability would buckle a bit under her gaze were she to aim it more widely. Some of the criticisms she levels at the European directive, and the theorists whose work underlies some of the statute, can be pointed at her own affirmative writing in *Product Liability*.¹²¹ Nevertheless, Stapleton has written a powerful rebuttal to the prevalent enthusiasm for restatement of products liability, establishing the incoherence, instability, and arbitrariness of the subject. She argues persuasively that an orderly law of products liability cannot be achieved.

A short extension of Stapleton's argument indicates that attempts to reconcile products liability might be worse than inaction. To the extent that products liability law, or indeed accident law, shows any commitment to a principle, that principle is ad hoc determination of responsibility, or anti-formalism. This generalization is especially true of American law. Anti-formalism is most strikingly expressed in the peculiar American toleration of jury trials in accident cases. As the personal-injury lawyer Philip Corboy has argued, a connection may exist between the (formalist) products liability restatement and tort-reformist hostility to the civil jury in the United States.¹²² A formalist law of accidents is certainly imaginable, especially to Commonwealth scholars, as the works of Ernest Weinrib demonstrate.¹²³ Stapleton (an Australian working in Britain) also expresses some interest in formalism, although she avoids that word, favoring "boundaries"¹²⁴ or "clear rules" instead.¹²⁵ Academic and legislative efforts to increase the formalism of American tort law, however, have achieved scant results. Hostility to plaintiffs, personal-injury lawyers, and juries is not quite the same thing, even

119. *Product Liability* at 103-79 (cited in note 3).

120. Although Stapleton refers somewhat apologetically to the book's "unconventional" structure, *id.* at v, she neglects to apologize for the state of the Index.

121. See notes 128-43 and accompanying text.

122. See Corboy, 61 *Tenn. L. Rev.* at 1073-74 (cited in note 89).

123. See generally Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 *Yale L. J.* 949 (1988); Ernest J. Weinrib, *Law as a Kantian Idea of Reason*, 87 *Colum. L. Rev.* 472 (1987).

124. *Product Liability* at 275 (cited in note 3).

125. *Id.* at 302.

though the tort reform movement frequently veils its proposals in pro-doctrine rhetoric.¹²⁶ As long as the major normative principle of American accident law remains that of anti-formalism, a restatement of this subject is doubly infirm.¹²⁷

IV. REFORM WITHOUT RESTATEMENT

By avoiding the mistakes that have harmed several ALI work products—that is, inability to address one central problem, attempts to reconcile elements that will not mix, and moral or political confusion about goals—Stapleton leaves products liability doctrine in a better condition than where she found it. *Product Liability*, in other words, offers reform without restatement. Stapleton's reformist efforts may be described with reference to two categories. First, she works within the boundaries of a stated normative tenet. Second, she writes helpfully about sources of doctrinal error. These efforts parallel the ALI mission of improvement of the law on the one hand, and clarification and simplification on the other. Stapleton's reformist work, being that of an individual, does not have the legislative effect of a restatement, but it does render *Product Liability* among the most impressive reconceptions of products liability in the current marketplace of ideas on the subject.

A. *The Normative Tenet (or "Improvement" of the Law)*

Stapleton believes that the law should redress some accidents through negligence doctrine and others through strict liability, and further argues that "the profit motive coherently identifies many activities where liability ought to fall in the latter category."¹²⁸ It is the pursuit of financial profit rather than any characteristic identified with mass-marketed products (such as advertising, design coupled with manufacture, or readily apparent opportunities to internalize

126. See, for example, Victor E. Schwartz and Liberty Mahshigian, *A Permanent Solution for Products Liability Crises: Uniform Federal Tort Law Standards*, 64 *Denver U. L. Rev.* 685, 693-94 (1988) (expressing confidence in the ability of products liability law to stay within federalized rules); Law Firm of Sidley and Austin, *The Need for Legislative Reform of the Tort System: A Report on the Liability Crisis from Affected Organizations*, 10 *Hamline L. Rev.* 345, 352 (1987) (urging a return to "Fault As A Basis For Damages Under Tort Law").

127. This point is not an original one: the realist scholar Leon Green, who continually argued for flexibility and change in accident law, disapproved of the First Restatement, complaining about its "stiffness and pompousness." Leon Green, *The Torts Restatement*, 29 *Ill. L. Rev.* 582, 588 (1935).

128. *Product Liability* at 185-86 (cited in note 3).

costs or spread risks) that explains the rise of a stricter rule for product-occasioned harms.¹²⁹ Moreover, Stapleton continues, the profit motive as a source of distinction between negligence and strict liability fits with “ordinary people’s ascription of responsibility,”¹³⁰ the development of section 402A,¹³¹ nineteenth-century sales law,¹³² vicarious liability,¹³³ and workers’ compensation.¹³⁴

It is hard for a reader to tell how seriously Stapleton takes the pursuit of profit as a normative dividing line. She chooses to phrase her endorsement of the idea in it-could-be-argued lawyerspeak,¹³⁵ and adds a disclaimer: “I am not necessarily promoting it in preference to other rationales but using it to show that, by providing a basis for the limitation of product rules to activities ‘in the course of the defendant’s business’ it provides a considerably better fit with those rules than economic theories, although still not a completely satisfactory fit.”¹³⁶ As if to forestall red-baiters, Stapleton adds an FDRish remark about wanting to save capitalism from itself, suggesting that “long-term confidence in a profit-based economy” may depend on something like strict liability, whereby business pays its way.¹³⁷ Her caution notwithstanding, Stapleton contributes to an emerging dialogue about products liability as an event of significance in political history.¹³⁸

But, as Stapleton intimates, “the profit motive” as a unifying explanation of modern products liability or enterprise liability creates problems that are both tactical and theoretical. If Stapleton really does mean to propose that American and European doctrine jettison “products liability” in favor of “profit motive liability” (she prefers “strict moral enterprise liability,”¹³⁹ but the distinction would likely be lost) this candor could lead to costs of all kinds. Tactical prudence would suggest that an explicit linkage between liability doctrine and

129. *Id.*

130. *Id.* at 186.

131. *Id.* at 189.

132. *Id.* at 188.

133. *Id.* at 190-93.

134. *Id.* at 193-95.

135. *Id.* at 186, 188.

136. *Id.* at 186.

137. *Id.* at 188.

138. Compare by analogy Anita Bernstein, *A Products Liability Anthology* 177-257 (Anderson, 1995) (compiling different perspectives on products liability).

139. *Product Liability* at 185 (cited in note 3).

the profit motive may threaten the perceived authority and autonomy of positive law.¹⁴⁰

At the level of theory, using the profit motive as an explanatory device raises additional questions of descriptive accuracy and conceptual appeal. I agree with Stapleton that reference to profit explains vicarious liability, especially respondeat superior, more convincingly than most attempts at economic analysis. Prior to the profit-motive chapter of *Product Liability*, however, Stapleton uses defamation as the paradigmatic strict liability tort,¹⁴¹ even though the profit motive pertains only very slightly to defamation. Furthermore, Stapleton has not elaborated on her construct—does profit mean something like “large profit?” How does the profit motive differ from (anyone’s) rational choice, or the Freudian desire to maximize pleasure and minimize pain?—and so it is hard to measure this normative tenet. Countervailing indicators in products liability, such as plaintiff’s-conduct defenses and statutes of repose, suggest limitations of profit-motive theorizing. Readers need a fuller description of “the profit motive” in order to compare it with other efforts to explain anomalies of liability law, such as Saul Levmore’s concept of economics-tinged “immoderate group liability,”¹⁴² or my suggestion that manufactured products play unique sociological and political roles.¹⁴³

But even this fragmentary and controversial normative tenet helps make Stapleton’s products liability reform effort more valuable than current efforts at restatement. Regardless of their political stance, readers who know the purpose of Stapleton’s descriptive summary acquire a reference point by which to judge the efficacy of her book. As debates over whether the Third Restatement is centrist or pro-defendant reveal, quarrels about the purpose of descriptive writing get in the way of analyzing that writing. The frank cards-on-the-table courage of Stapleton’s talk about profit also underscores the appeal of a single, individual intelligence behind products liability reform.¹⁴⁴ Again a sharp contrast with the ALI project is evident:

140. Stapleton appreciates the symbolic import of liability law but has reservations about symbolism as a justification for an expensive and imprecise legal institution. Her preliminary ideas on the subject are thoughtfully presented. See *id.* at 347-48.

141. See *id.* at 177.

142. Saul Levmore, *Gomorrhah to Ybarra and More: Overextraction and the Puzzle of Immoderate Group Liability*, 81 Va. L. Rev. 1561 (1995).

143. Anita Bernstein, *How Can a Product Be Liable?*, 45 Duke L. J. 1 (1995).

144. The same appeal is present in products liability reform arguments that come from the right side of the political spectrum. See Peter W. Huber, *Liability: The Legal Revolution and its Consequences* (Basic Books, 1988) (providing an account of the history of products liability law as a means for developing future reforms); Richard A. Epstein, *The Risks of Risk/Utility*, 48

when Twerski says that a particular choice was foreclosed to the Third Restatement because only five states favor it, one wonders who among the population able to count to five needs a Third Restatement.¹⁴⁵ A vision of products liability-cum-enterprise liability-cum-welfare capitalism may offend a reader, but the normative tenet demands attention. Genuine reform can follow from this kind of engagement of one's audience.

B. Grappling With Doctrinal Anomalies (or "Clarification" and "Simplification" of the Law)

In addition to proposing a normative tenet that guides reform, Stapleton immerses herself in virtually every issue of Anglo-American products liability law. Though conversant and comfortable with the theories of Aristotle, Tony Honoré, and Ernest Weinrib, among many others, Stapleton never flinches from doctrine. For instance, she takes the trouble to make sharp points about the European directive's agricultural provisions.¹⁴⁶ Her efforts pay off. *Product Liability* reveals itself as a learned work in both familiar and unexpected ways.

Stapleton's central insight about products liability rules is that they tend to migrate. She begins with a close reading of the European products liability law.¹⁴⁷ Despite differences between the directive and American rules—for example, the European law attaches responsibility to "producers" while in the United States it is commercial suppliers who are strictly liable—the two are similar for purposes of the point she makes.¹⁴⁸ Stapleton divides the terms of products liability law into rules of "relatively stable boundaries"¹⁴⁹ and

Ohio St. L. J. 469, 474-77 (1987) (attacking open-ended balancing tests and endorsing bright line "rules of thumb" in the alternative).

145. See *Caveat Emptor: Will the A.L.I. Erode Strict Liability in the Restatement (Third) for Products Liability?*, 10 *Touro L. Rev.* 21, 53-54 (1993) (remarks of Prof. Twerski). In fairness to the co-reporters, these conclusions generally require more than the ability to count. For instance, in this "forty-five to five" example, Twerski was referring to the vitality of *Beshada v. Johns-Manville Products Corp.*, 90 N.J. 191, 447 A.2d 539 (1982), a precedent that has probably (but not certainly) been overruled in its home state and that might (or might not) be favored by the Federal Rules of Evidence. Yet Twerski spoke bluntly about counting to fifty as a high duty of any restater: "On any theory of a restatement of law, if you are working forty-five to five, that is irresponsible." 10 *Touro L. Rev.* at 53-54. But see notes 81-85 (describing the origins of § 402A, the "restatement" of a strict liability rule that had been accepted in only a handful of states).

146. *Product Liability* at 303-05 (cited in note 3).

147. *Id.* at 49-52.

148. *Id.* at 3-4.

149. *Id.* at 275.

rules that are "specific sources of instability."¹⁵⁰ She illustrates the division with definitions and examples. Rules with relatively stable boundaries, though vulnerable to change, evolve in a manner and at a pace resembling that of all liability law. Examples of this first category include principles of causation, rules about what constitutes a claim, and caps on damages.¹⁵¹ Rules that are specific sources of instability are inherently distorting, incentive-shifting, hard to explain, and contradictory in their application. Not surprisingly for one who has read this far, rules of the second category occupy the heart of products liability. Stapleton condemns, among other rules, the limiting of products liability law to product-caused injury, rules about who can be a products liability defendant, and the requirement that the defendant have put the product into commercial circulation.¹⁵²

Central rules of products liability doctrine are unstable primarily because they are not justified, nor even explained, by theory.¹⁵³ Failings at the level of theory render the rules arbitrary. As a result, ill-founded ideas about products liability within the population make the fragile rules topple in practice. For example, Stapleton writes, Americans injured by asbestos "blame the product" and often do not think to sue building occupiers or architects, even though these actors may have played important roles in causing harm.¹⁵⁴ Emphasis on a product shifts attention from careless plaintiffs, derelict parents, and irresponsible employers.

The belief that civil liability can increase safety, Stapleton elaborates, rests on a prior belief that human behavior responds to incentives;¹⁵⁵ but products liability rules obscure the goal of prevention by diverting attention to things and away from persons.

150. *Id.* at 303.

151. *See id.* at 275-90.

152. *See id.* at 303-40. My own discussion of these vexacious rules agrees that they are sources of instability, although I focus on their continued vitality; in other words, having endured so long, these rules are probably better-founded than Stapleton assumes. *See* Bernstein, 45 *Duke L. J.* at 1 (cited in note 143).

153. *See Product Liability* at 351 (cited in note 3) (using the exclusion of pure economic loss claims as an example).

154. *See id.* at 343. Stapleton elaborates:

A specific products rule tends to imply that other causally relevant factors are to be given less weight by the law, because the rule does not encompass claims against mere users and other non-suppliers of products. Whereas in the law of negligence consideration can be given to the role of intermediaries such as parents, occupiers or users, their role is peripheral under a products rule aimed only at product suppliers.

Id.

155. *See id.* at 331 (indicating that all human behavior resulting in a dangerous condition in a product should be the focus of liability).

Moreover, in both Europe and the United States products liability law coexists with—that is, does not preempt—older rules of negligence and contract, leading to instability rooted in confusion about which type of law should be used.¹⁵⁶ New law (such as the European directive, American attempts at federalization, and indeed the Third Restatement) compounds the problem, heaping more rules, more classes of affected persons, and more need for decisions onto products liability. In litigation, some of the fog can be cleared after each lawsuit is filed, especially if the rules of indemnity, impleader, and subrogation work well. It would be better, Stapleton argues, to keep alert for instability before litigants set it in motion.

In sum, Stapleton has claimed that the very category of products liability collides with the reform goal of clarification and simplification of the law. A reader need not necessarily agree with this conclusion—I have my own doubts—to appreciate the value of Stapleton's insight about doctrinal instability. Stapleton is not alone in her concern. The theme of instability surfaces in a contemporary article by Jerry Phillips, who argues that the anomalous treatment of manufacturing defects is an "Achilles' heel" in the Third Restatement, threatening its superficial cohesion and order.¹⁵⁷ Professor Phillips, a prolific author of several books about products liability, as well as a "provisional section 402A,"¹⁵⁸ presumably does not share Stapleton's dislike of the category. Yet, as both scholars point out, and as realists, practicing lawyers, and social scientists would agree, legal doctrines do not repose calmly in a restatement or any other pristine container, awaiting application by jurists.¹⁵⁹ They press human beings into behavior. When that behavior tends to undermine the structure of rules, inquiry into the theory behind these rules is demanded.

A lesson for those who would improve products liability law is implicit in *Product Liability*: doctrine must be studied seriously so that each rule's tendency toward stability or instability is revealed.

156. See *id.* at 356 (referring to "costly duplication").

157. See Phillips, 61 *Tenn. L. Rev.* at 1267-70 (cited in note 89).

158. See Jerry J. Phillips, Nicolas P. Terry and Frank J. Vandall, *Products Liability: Cases, Materials, Problems* 14-15 (Michie, 1994) (proposing a provisional § 402A concerning special liability for business suppliers of defective products).

159. See Friedman, *A History of American Law* (cited in note 13); Oliver Wendell Holmes, *The Common Law* 5 (Mark de Wolfe Howe, ed., 1963); Gilmore, *The Death of Contract* at 58 (cited in note 13); John Monahan and Laurens Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 *U. Pa. L. Rev.* 477, 477-78 (1986). For practicing lawyers' comments on the impossibility of understanding products liability as a collection of pristine rules, see Corboy, 61 *Tenn. L. Rev.* at 1043 (cited in note 89); Sara Deutch Schotland, *A Practitioner's Perspective on the Teaching of Product Liability Law*, 45 *J. Legal Educ.* 287 (1995).

Of course, no rule ever remains perfectly stable or unstable. As Calabresi and Melamed taught, the boundaries of all liability categories are permeable.¹⁶⁰ The stability criterion, however, goes a long way toward clarification and simplification of the law. Its most important function, Stapleton says, is to shed light on the principles behind doctrine. She concludes that “[j]udicial reasoning attracts respect where affected parties perceive a clear, agreed and consistent set of principles on which it operates. Where it does not—as here—doctrinal instability and political grievance may well result in the longer term.”¹⁶¹

V. CONCLUSION

Two scholars have remarked that the words “tort” and “crisis” are paired “so often in print that they have taken on the character of automatic association, like ‘bread and butter’ or ‘death and taxes.’”¹⁶² One might make the same observation about “products liability” and “reform.” The history of modern products liability is full of charismatics and visionaries, men who saw possibility in this narrow-sounding category of doctrine. Justice Roger Traynor proclaimed strict liability almost *ex nihilo* in a personal-injury opinion.¹⁶³ William Prosser accomplished a similar coup in the writing and adoption of section 402A.¹⁶⁴ And Friedrich Kessler and Fleming James, who added their dreams of a better future to the development of liability law,¹⁶⁵ are probably among the pantheon of what Peter Huber has called Founders.¹⁶⁶ The tort reform movement is a bit grayer, but it too has brought forth leaders who see products liability reform as tending to make a better world.¹⁶⁷

Product Liability and its contemporary, the *Restatement (Third) of Torts: Products Liability*, offer products liability reform of a

160. See Guido Calabresi and Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089 (1972).

161. *Product Liability* at 352 (cited in note 3).

162. Glen O. Robinson and Kenneth S. Abraham, *Collective Justice in Tort Law*, 78 Va. L. Rev. 1481, 1481 (1992).

163. See *Escola v. Coca Cola Bottling Co.*, 24 Cal.2d 453, 150 P.2d 436, 440 (1944) (Traynor, J., concurring).

164. See *Product Liability* at Part III.A.1 (cited in note 3).

165. George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. Legal Stud. 461, 465 (1985).

166. Huber, *Liability* at 6 (cited in note 144).

167. See note 144. See also Richard Neely, *The Product Liability Mess: How Business Can Be Rescued From the Politics of State Courts* (The Free Press, 1988).

more sober kind. Both Jane Stapleton and the American Law Institute seem to view their work as, at least in part, the cleaning up of a disarray made by earlier reformers who did not foresee all of the consequences of their ideas. Their separate approaches to order were contrasted in this Book Review. While the co-reporters of the Third Restatement, Professors Henderson and Twerski, view reconciliation as the fitting-together of products liability case law and statutes, Stapleton attempts to reconcile products liability with the wider subject of civil liability.

Both Stapleton and the co-reporters profess interest in improvement as well as reconciliation of products liability law; and both indicate, somewhat covertly, that the best improvement may lie in the elimination of this legal category. This suggestion is less explicit in the Third Restatement. Constrained by their official duties to restate something called Products Liability, the co-reporters cannot give full voice to their belief that the subject is merely a subcategory of negligence. And so their work product is at war with itself, evading the three questions that should be asked in the preparation of any restatement: "What is the Problem?"; "To Whom is the Solution Addressed?"; and "Do Normative Principles Guide and Constrain the Solution?" As a result, the Third Restatement can achieve neither reconciliation nor reform.

Stapleton, however, accomplishes reform as well as reconciliation. Her central theme—that boundaries in civil liability must be consonant with a sound theory of that liability—allows her to envision change. Although *Product Liability* challenges the existence of products liability, it also accepts the realities of contemporary law. Visionaries and practitioners alike need the insights of this book.

