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Torts 2.0: The Restatement 3rd and the Architecture of Participation in American Tort Law

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TORTS 2.0: THE RESTATEMENT 3RD AND THE ARCHITECTURE OF PARTICIPATION IN AMERICAN TORT LAW

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The intellectual history of the American Law Institute's (ALI) restatement of torts project tells a tale of great ambition, imagination, success, and failure. Unlike in other areas of the law, where parallel work by the Uniform Law Commission has led to the widespread adoption of uniform statutes across American states, in the law of tort, American courts generally continue to develop the law according to common law traditions on a case-by-case basis.[1] The tort restatements have played a critical role in shaping the debate on common law principles by American lawyers and jurists.[2] The latest iteration of the restatement, released in part in 2010,[3]

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1. *See* Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 ARIZ. L. REV. 917, 927 (1996).

2. *See* Kristen David Adams, *The Folly of Uniformity? Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423, 436–37 (2004); *see also* Charles W. Wolfram, *Bismarck's Sausages and the ALI's Restatements*, 26 HOFSTRA L. REV. 817, 820 (1998) (describing the Restatement (Second) of Torts (1965) as having essentially "launch[ed] . . . the products liability field of litigation.").

3. The first portion of the Restatement (Third) of Torts: Liability for Physical and Emotional Harm was released in 2010 (covering basic topics in the law of torts), while a follow-on portion, covering landowner liability, affirmative

will no doubt have a similar influence.

The ambitions of the Restatement (Second) of Torts (1965) (Second Restatement)[4] were far more sweeping than those of the Restatement (First) of Torts (1934) (First Restatement).[5] The First Restatement seems almost quaint and unimaginative compared to the Second Restatement.[6] This is perhaps not surprising, given that it was the ALI's first attempt to "restate" the law[7]—perhaps scholars, commentators, and readers should praise the imaginative nature of the project itself, without nitpicking the authors' substantive formulations of the law. The First Restatement's goals, however, were largely functional and positivist;[8] it sought to provide certainty at the end of an era of perceived legal change by providing a "prima facie . . . correct statement of the general law of the United States."[9]

The First Restatement, prepared between 1923 and 1934,[10] preceded sweeping technological change that drastically altered the nature and economic impact of accidents—most notably the widespread adoption of that unparalleled instrument of death, destruction, and mayhem—the motorized carriage.[11] The authors

duties, and other topics, will be released in 2011. *See Current Projects*, AMERICAN LAW INSTITUTE, http://www.ali.org/index.cfm?fuseaction=projects.proj_ip&projectid=16 (last visited Feb. 16, 2011).

4. RESTATEMENT (SECOND) OF TORTS (1965).

5. *See* Stephen D. Sugarman, *Rethinking Tort Doctrine: Visions of a Restatement (Fourth) of Torts*, 50 UCLA L. REV. 585, 586–87 (2002) (describing the Restatement (Second) of Torts as a "monumental undertaking[]" that took more than two decades to complete). *Compare* RESTATEMENT (SECOND) OF TORTS, Introduction, at ix (1965) (explaining that the Institute will articulate more comprehensively "the reasons for positions, taken," as well as reporter's notes and references to court opinions), *with* RESTATEMENT (FIRST) OF TORTS, Introduction, at ix (1934) (noting that the Institute aims to have "the legal profession accept[] the Restatement as . . . a correct statement.").

6. Victor E. Schwartz, *The Restatement (Third) of Torts: Products Liability—The American Law Institute's Process of Democracy and Deliberation*, 26 HOFSTRA L. REV. 743, 744 (1998) ("The diverse views of different state courts were slowly and carefully evaluated. In general, when the Restatement (First) of Torts derived a rule, the majority rule was chosen.").

7. *Id.* at 743.

8. Jordan K. Kolar, Note, *Is This Really the End of Duty?: The Evolution of the Third Restatement of Torts*, 87 MINN. L. REV. 233, 242 (2002).

9. *Id.* (quoting WILLIAM DRAPER LEWIS, RESTATEMENT (FIRST) OF TORTS, Introduction, at ix (1939)).

10. *See* Schwartz, *supra* note 6, at 744.

11. LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 519–20 (3d ed. 2005) ("By the 1920s . . . this was fast on the way to becoming a society of people with cars. . . . [T]he automobile accident replaced the train accident as the staple

of the Second Restatement had the opportunity to reflect both on the nature of technological change[12] and a window into emerging developments in insurance law and coverage that would come to change the on-the-ground realities of accident liability.[13]

The authors of the Second Restatement had grand ambitions—hoping to move American tort law into a new age, and to leave behind many of the seemingly anachronistic limitations inherited from English tort jurisprudence.[14] In areas from the law of causation in negligence, to the availability of damages in cases of mental distress, to the liability of the manufacturers of products, the authors of the Second Restatement's various components proposed radical change in a document that, in many respects, reads like an academic's polemic.[15] In some areas, the Second Restatement succeeded wildly;[16] in others, it was a failure of singular magnitude in the history of American law reform.[17]

As the Restatement (Third) of Torts (Third Restatement) project nears completion, signs of its authors' guiding principles emerge, both from their comments and writings, and from the nature of the document they have produced. Unlike with the Second Restatement, the ALI structured work on the Third Restatement into a series of discrete projects.[18] The Products Liability[19] portions were published in 1998, the Apportionment of Liability[20] provisions two years later, and the third piece, Liability

of personal injury law . . . .").

12. Schwartz, *supra* note 6, at 745.

13. Friedman, *supra* note 11, at 520 (suggesting insurance companies, reacting to widespread use of the automobile, became "[t]he real parties in interest" throughout the expansion of tort law).

14. Schwartz, *supra* note 6, at 745 ("Most importantly, the Restatement (Second) of Torts differed from the Restatement (First) of Torts in that its content was shaped more by the Reporters' and advisory committee's evaluation of the wisdom of competing case law than a presumption to follow 'clear majority' rules.").

15. In the Second Restatement, for the first time the ALI seems to have turned its attention to academic criticism of tort rules, and this may explain its new purpose: "normative prescription." Kolar, *supra* note 8, at 243.

16. For instance, the Second Restatement's embrace of strict liability for defective product cases became widely adopted.

17. For instance, to the extent that its authors intended the "substantial factor" test to replace the traditional legal tests for cause-in-fact and proximate cause, the Second Restatement failed.

18. Michael D. Green & Larry S. Stewart, *The New Restatement's Top 10 Tort Tools*, 46 TRIAL 44 (Apr. 2010).

19. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. (1998).

20. RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIAB. (2000).

for Physical and Emotional Harm,[21] entered its final stages in the last few years.[22]

The story of the Third Restatement and its progenitors bears a remarkable resemblance to the great technological revolution of the century's end: the World Wide Web.[23] Observers of the internet have recently coined the phrase "Web 2.0" to describe the emergence of a second generation of internet offerings.[24]

Under this formulation, the first generation of internet activity, "Web 1.0," is recognized for its broad, sweeping ambitions, and for both spectacular successes and failures.[25] First-generation web activity treated users as passive—presenting them with information or choices, but involving them in web content on only a limited basis.[26] Many Web 1.0 sites, such as the online grocer Webvan, were spectacular failures.[27] Spending on such sites matched their ambitions—Webvan, for instance, committed one billion dollars to build new warehouses soon before collapsing in

21. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM (BASIC PRINCIPLES) (Tentative Draft No. 1, 2001); RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM (Tentative Draft No. 6, 2009).

22. Green & Stewart, *supra* note 18, at 44.

23. Michael W. Loudenslager, *Allowing Another Policeman on the Information Superhighway: State Interests and Federalism on the Internet in the Face of the Dormant Commerce Clause*, 17 BYU J. PUB. L. 191, 261 (2003) (explaining that the invention and development of the World Wide Web in the early 1990s allowed for the beginnings of widespread use of the internet by the general public).

24. Dale Dougherty reportedly coined the term to "describe technologies that turn the Internet into an active blend of mashed-together information." Elizabeth Corcoran, *Hacking a Trend*, FORBES MAG., Sept. 1, 2008, http://www.forbes.com/forbes/2008/0901/080.html. Others cite O'Reilly Media, Dougherty's employer, as the origin of the term. Brian Deagon, *However It's Defined, Web 2.0 Means Money; Tech Firms Scrambling to Cash in on New Wave of Internet Innovation*, INVESTOR'S BUS. DAILY, Dec. 4, 2006, at A08; Dan Fost, *What Exactly Does Web 2.0 Mean? Well…*, SAN FRANCISCO CHRON., Nov. 5, 2006, at F5, *available at* http://articles.sfgate.com/2006-11-05/business/17320641_1_world-wide-web-windows-platform-live-web/2; *Web 2.0 Defines Next Generation*, BUFFALO NEWS, Apr. 30, 2007, at C2. Perhaps fittingly, the term "Web 2.0" was selected to be the one millionth word in the English language. *Newest Word: Web 2.0*, GRAND RAPIDS PRESS, June 11, 2009, at A2.

25. *See* Steven Hetcher, *User-Generated Content and the Future of Copyright: Part One—Investiture of Ownership*, 10 VAND. J. ENT. & TECH. L. 863, 880–81 (2008) (discussing the opportunities and shortfalls associated with Web 1.0).

26. *See generally* Mary Madden & Susannah Fox, *Riding the Waves of "Web 2.0": More Than a Buzzword, But Still Not Easily Defined*, PEW INTERNET PROJECT (Oct. 5, 2006), http://www.culturadigitale.it/Schede/PIP_Web_2.0.pdf (discussing the differences between user activity on Web 1.0 and Web 2.0).

27. Christopher Steiner, *Bot-in-Time Delivery*, FORBES MAG., Mar. 16, 2009, at 40, *available at* http://www.forbes.com/forbes/2009/0316/040_bot_time_saves_nine.html.

2001 in a "spectacular disaster."[28]

The great revolution of Web 1.0 was the democratization of access to information. So long as a person had access to the internet, she "had access to the same information as everyone else," whether sitting in a "Harvard law library or a row house in Dublin or a grass hut in Africa."[29] "Web 1.0 users' characteristic activity was surfing static Internet pages."[30]

Web 2.0, by contrast, is based upon the "architecture of participation."[31] Content in Web 2.0 is not locked onto pages, but broken up into "nuggets" that can be deployed wherever users want.[32] Web 2.0 offerings are organic, rather than pre-planned, developing according to the preferences and drives of users rather than the visions of site planners and developers.[33] The signal achievement of Web 2.0 is the internet encyclopedia "Wikipedia,"[34] in which users freely update encyclopedia entries. The theory behind the site is that "if millions of eyes monitor encyclopedia entries that anyone can write and rewrite . . . the result will take on Britannica."[35]

28. *Id.*

29. Justin Ewers, *On the Record: Dan Nova*, U.S. NEWS & WORLD REP., Aug. 28, 2006, *available at* http://www.usnews.com/usnews/biztech/articles/060820/28record.htm.

30. Peter Lunenfeld, *Welcome to Web 2.0*, L.A. TIMES, June 24, 2007, at 11.

31. Steven Levy, *Farewell, Web 1.0! We Hardly Knew Ye.*, NEWSWEEK, Oct. 18, 2004, at 20, *available at* http://www.newsweek.com/2004/10/17/farewell-web-1-0-we-hardly-knew-ye.html.

32. *Id.*

33. According to advocates of the Web 2.0 concept, examples of the distinction include:

> Netscape the browser was the "standard bearer" for "Web 1.0"; Google the search engine is the new standard bearer. In Web 1.0, Britannica Online became a popular reference; in Web 2.0, we have Wikipedia, which allows user input. Rather than "publishing" content as we did in Web 1.0, we're now "participating" in the dissemination of information.

Daniel E. Harmon, *The "New" Web: Getting a Grip on the Slippery Concept of Web 1.0*, LAW. PC (West, Eagan, Minn.), Jan. 1, 2006, at 1.

34. David Wallace-Wells, *Rage Against the Machine*, NEWSWEEK, Jan. 18, 2010, at 63, *available at* http://www.newsweek.com/2010/01/06/rage-against-the-machine.html.

35. Steven Levy, *The New Wisdom of the Web: Why Is Everyone so Happy in Silicon Valley Again? A New Wave of Start-ups Are Cashing in on the Next Stage of the Internet. And This time, It's All About . . . You,* NEWSWEEK, Apr. 3, 2006, at 47, *available at* http://www.newsweek.com/2006/04/02/the-new-wisdom-of-the-web.html.

Under Web 2.0, the view of content-creators as "authoritarian figure[s] gives way to a . . . wisdom-of-the-crowds process."[36] The "great lesson of the Web 2.0 era is that to control quality, you don't lock things down; you open them up."[37] Under Web 2.0, "everyone has a voice."[38] Web 2.0 moves from the notion, "if you build it, they will come," to the notion, "if *they* build it, *they* will come."[39] Web 2.0 transforms the internet experience from a lecture to a discussion.[40] User interface in Web 2.0 "yields a result that no amount of hands-on filtering could have managed."[41] The key components of Web 2.0 include "using the Web as a platform," "harnessing collective intelligence," and "enriching data for a deeper online experience."[42]

In spite of its apparent commercial power, Web 2.0 is not without its critics. Michael Gorman foresees "a world in which everyone is an expert in a world devoid of expertise."[43] Still, the success of early Web 2.0 offerings provides strong support for the notion that internet users have long craved a more participatory role and that the days of "top down" internet development may have drawn to an end.

Read by comparison to the Second Restatement, the new Third Restatement shares many of Web 2.0's characteristics. Unlike the top-down approach chosen by the authors of the Second Restatement, in which sweeping reforms were "stated" to American courts, the authors of the Third Restatement have developed a more general, organic approach to the law of torts. This approach is participatory in the sense that it leaves state common-law courts the task of wrestling with the nuance of tort doctrine and filling the gaps in stated rules according to their own

36. Steven Levy, *The Future of Reading: Amazon's Jeff Bezos Already Built a Better Bookstore. Now He Believes He Can Improve Upon One of Humankind's Most Divine Creations: The Book Itself*, NEWSWEEK, Nov. 26, 2007, at 54, *available at* http://www.newsweek.com/2007/11/17/the-future-of-reading.html.

37. Jimmy Wales, *Open-Door Policy*, FORBES MAG., May 7, 2007, at 190, *available at* http://www.forbes.com/free_forbes/2007/0507/190.html.

38. Ewers, *supra* note 29.

39. *Id.* (second emphasis added).

40. Colin Stewart, *Whither Web 2.0?*, ORANGE COUNTY REG., Oct. 24, 2006, *available at* http://www.ocregister.com/articles/web-41589-company-venture.html.

41. Levy, *supra* note 35, at 47.

42. Fost, *supra* note 24, at F5.

43. Michael Gorman, *Web 2.0: The Sleep of Reason, Part II*, ENCYCLOPEDIA BRITANNICA BLOG (June 12, 2007), http://www.britannica.com/blogs/2007/06/web-20-the-sleep-of-reason-part-ii/.

wisdom and experience.

I. THE SECOND RESTATEMENT AS WEB 1.0

A. *Ambitions*

The Second Restatement was remarkable as a law reform document, if not quite the "statement" of the common law it was supposed to be.[44] Its authors seemed to focus on the "re" rather than the "statement," suggesting sweeping "re"-forms in a variety of areas of tort law.[45] In that sense, for better at times and worse at others, the Second Restatement was inconsistent with the organic and evolutionary traditions of the Anglo-American common law.[46] Rather than wait for rules to crystallize across courts and across time, the authors of the Second Restatement sought to impose certain reforms on American tort law, in some cases, before the time for such reforms seemed to have come.[47] As Victor Schwartz observed, the

> Restatement (Second) of Torts Differed from the Restatement (First) of Torts in that its content was shaped more by the Reporters' and advisory committee's evaluation of the wisdom of competing case law than a presumption to follow "clear majority" rules. The so-called "minority rule" frequently made its way into the "black letter."[48]

44. *See* Schwartz, *supra* note 6, at 745.

45. *See id.* (stating that many minority rules made their way into the "black letter" rules contemplated throughout the entire restatement).

46. *See, e.g.*, Wolfram, *supra* note 2, at 817–19.

47. The appropriate role for the authors of a restatement is a subject of some contention. David Robertson argues that "a 'restatement' of a body of court decisions should capture, explain, and enhance the best available judicial views, but . . . should not offer up as something visible or immanent in existing law any proposition or approach that is in realty brand-new, wholly lacking any trace of judicial acceptance." David W. Robertson, *Causation in the Restatement (Third) of Torts: Three Arguable Mistakes*, 44 WAKE FOREST L. REV. 1007, 1008 (2009). On the other hand, Ellen Bublick suggests that "when designing a system of liability, a Restatement need not be sanguine about adopting a patchwork of liability rules that cannot be reconciled on any principled basis." Ellen M. Bublick, *A Restatement (Third) of Torts: Liability for Intentional Harm to Persons—Thoughts*, 44 WAKE FOREST L. REV. 1335, 1336 (2009).

48. Schwartz, *supra* note 6, at 745.

Indeed, the Second Restatement likely represents the beginning of the ALI's shift from simply stating the law to *prescribing* what the law should be.[49]

The Second Restatement was a "compendious depiction of tort doctrines" that "functioned to provide courts and litigants with definitive fixed answers to tort questions."[50] It "emphasize[d] detailed treatment at the occasional expense of a general articulation of principles," at times sacrificing "the opportunity that generalization presents to explore underlying rationales more fully."[51]

One of the great ambitions of the Second Restatement concerned liability for injuries caused by products. Section 402A, promulgated in 1964, imposed liability for the sellers of products regardless of whether a seller "exercised all possible care."[52] This sweeping reform was embraced by courts "[w]ith a gusto unmatched in the annals of the Restatements of the Law."[53] David Owen observes,

> Tort law has probably never witnessed such a rapid, widespread, and altogether explosive change in the rules and theory of legal responsibility. If ever a Restatement reformulation of the law were accepted uncritically as divine, surely it was section 402A of the Restatement (Second) of Torts.[54]

To those who view the purpose of a restatement project as "restat[ing] the current law, not creat[ing] new law," Section 402A represents "an anomaly."[55] The section "did not restate the law," instead, it "created or molded products liability law for decades and has been referred to as the 'bible' or 'holy grail' of products liability law."[56]

49. John H. Marks, *The Limit to Premises Liability for Harms Caused by "Known of Obvious" Dangers: Will It Trip and Fall Over the Duty-Breach Framework Emerging in the Restatement (Third) of Torts?*, 38 TEX. TECH. L. REV. 1, 2 n.2 (2005).

50. Bublick, *supra* note 47, at 1340.

51. Deborah A. DeMott, *A Revised Prospectus for a Third Restatement of Agency*, 31 U.C. DAVIS L. REV. 1035, 1041 (1998).

52. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

53. David G. Owen, *Design Defect Ghosts*, 74 BROOK. L. REV. 927, 935 (2009).

54. *Id.*

55. Vicki Lawrence MacDougall, *The Impact of the Restatement (Third), Torts: Products Liability (1998) on Product Liability Law*, 62 CONSUMER FIN. L.Q. REP. 105, 105 (2008).

56. *Id. But see* George W. Conk, *Is There a Design Defect in the Restatement (Third) of Torts: Products Liability?* 109 YALE L.J. 1087, 1091 (2000) ("Section 402A ratified a body of product-defect case law emerging from the state courts in the 1960s.").

B. Spectacular Failures

Like many websites and businesses launched in the era of Web 1.0, some of the Second Restatement's reform efforts were spectacular failures. Some of these failures became clear within the first years if not months of the promulgation of relevant restatement provisions, while others became cumbersome and unworkable over a longer period of time.[57]

Perhaps the most ambitious doctrinal change in the Second Restatement concerned its treatment of causation in the law of negligence. Traditional causation analysis required two steps. First, defendant's conduct must have been a "cause-in-fact" of plaintiff's injury, most commonly demonstrated by showing that, "but for" the defendant's conduct, the plaintiff would have been free of the injury.[58] Second, the defendant's breach must have been a "proximate cause" of plaintiff's harm—specifically, a cause *near enough* to the harm that it is appropriate to assign liability to the defendant.[59]

Both traditional tests for the common law doctrine of causation are linguistically complex and difficult for both students of the law and courts to understand and apply. The formulation of "but-for-cause" requires an awkward double-negative [60] in that one asks whether, *without* the breach, the plaintiff would be *without* damages,[61] and challenges courts and juries to engage in counter-

57. *See, e.g.*, Schwartz, *supra* note 1, at 747–48 (noting that thirty years of litigation resulted when the restatement's black letter formula substituted words from its authors in place of the exact language used in a pivotal case).

58. *See* John D. Rue, *Returning to the Roots of the Bramble Bush: The "But For" Test Regains Primacy in Causal Analysis in the American Law Institute's Proposed Restatement (Third) of Torts*, 71 FORDHAM L. REV. 2679, 2681 (2003).

59. W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 41, at 263 (5th ed. 1984) (stating that "proximate cause" is also frequently termed the "legal cause").

60. In explaining how to formulate "but for" cause statements for analytical purposes, the author suggests students envision the test as their friend—indeed, their best friend—in most negligence problems. So close a friend that it could be called a *best friend forever*, or a "BFF" in the common vernacular. The mnemonic device "BFF" helps frame the but-for-cause inquiry as "But-For . . . Free": *but for* the breach, would the plaintiff have been *free* of injury? If this "BFF" question is answered in the affirmative, the breach IS a but-for-cause of plaintiff's damages, and thus a cause-in-fact. If answered in the negative, the breach is NOT a but-for-cause of plaintiff's damages, and thus not a cause-in-fact unless one of the special solutions available in cases such as concert-of-action, multiple sufficient causes, or alternative liability applies.

61. The "but-for" inquiry "is a significantly complex mental operation." David

factual reasoning (what would have happened had X *not* occurred?) that arguably boils down to simple speculation.[62] And the terms "proximate cause" are "weasel words,"[63] which justify particular policy conclusions, but in and of themselves, appear to provide little analytical value.

With that in mind, the authors of the Second Restatement, following the path of the First Restatement,[64] jettisoned the traditional bipartite approach to causation in favor a single "legal cause" concept.[65] In order to be liable in negligence, the defendant's breach needed to be the "legal cause" of the plaintiff's damages.[66] "Legal cause" would be established only by a showing that the breach was a "substantial factor" in producing the harm.[67]

In proposing this alternative formulation, the authors of the Second Restatement "walked off a cliff."[68] The test, according to the authors of the Third Restatement, has been a "major source of confusion and misunderstanding"[69] and has not "withstood the test of time."[70] Notably, it has since been withdrawn from the torts treatise of Dean Prosser, its early champion.[71] The failure of the

W. Robertson, *The Common Sense of Cause in Fact*, 75 TEX. L. REV. 1765, 1770 (1997).

62. Leon Green, *Are There Dependable Rules of Causation?*, 77 U. PA. L. REV. 601, 605 (1929); Leon Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 556 (1962); Barbara A. Spellman & Alexandra Kincannon, *The Relation Between Counterfactual "But For" and Causal Reasoning: Experimental Findings and Implications for Jurors' Decisions*, 64 LAW & CONTEMP. PROBS. 241, 250 (2001); E. Wayne Thode, *The Indefensible Use of the Hypothetical Case to Determine Cause In Fact*, 46 TEX. L. REV. 423, 431–33 (1968).

63. GUIDO CALABRESI, THE COST OF ACCIDENTS 6 n.8 (1970) ("I do not propose to consider the question of what, if anything, we mean when we say that specific activities 'cause,' in some metaphysical sense, a given accident; in fact, when we identify an act or activity as a 'cause,' we may be expressing any of a number of ideas.").

64. *See* Rue, *supra* note 58, at 2681.

65. RESTATEMENT (SECOND) OF TORTS § 430 (2010).

66. *Id.*

67. *Id.* §431 ("The actor's negligent conduct is a legal cause of harm to another if (a) his conduct is a substantial factor in bringing about the harm.").

68. Joseph Lavitt, *The Doctrine of Efficient Proximate Cause, the Katrina Disaster, Prosser's Folly, and the Third Restatement of Torts: Cracking the Conundrum,* 54 LOY. L. REV. 1, 37 (2008).

69. *Id.*

70. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 cmt. j (2010).

71. Lavitt, *supra* note 68, at 37 n.161 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 41, 43–45 (5th ed. Supp. 1988) ("Even if 'substantial factor' seemed sufficiently intelligible as a guide in time past . . . the development of several quite distinct and conflicting meanings for the term . . . has created a risk of confusion and misunderstanding, especially when a court . . . uses the

Second Restatement's causation provisions was quickly apparent. Barely a decade after the provisions were published, the ALI issued a new version under a new reporter, which attempted to characterize the earlier efforts as simply being statements about cause-in-fact—an effort which led to "further anomalies within the Restatement (Second) when read as a whole."[72] In sum, "substantial factor" was "mistakenly adopted."[73]

Certain aspects of the Second Restatement's work on products liability can also be described as abject failures. Even though the Second Restatement's core notion that products liability claims should sound in strict liability—as well as via traditional negligence, warranty, and other actions—was widely followed,[74] the actual doctrines released by the ALI for defining the scope of the products liability claim were difficult for courts to apply.

In large part, this may be because the drafters of the Second Restatement presented a sweeping rule of strict liability for product injury claims based on a thorough understanding of only one type of product defect: mismanufacture.[75] The second form of product defect, defective design, as it turned out, came to dominate the products liability caseload of courts in the latter part of the twentieth century.[76] The rules articulated in the Second Restatement were so broad that they applied to all kinds of claims,[77] even though they turned out to be a poor fit in the design defect context.[78] Courts have "struggled" since the Second Restatement's

phrase without indication of which of its conflicting meanings is intended.").

72. Jane Stapelton, *Legal Cause: Cause-in-Fact and the Scope of Liability for Consequences*, 54 VAND. L. REV. 941, 971 (2001).

73. Lavitt, *supra* note 68, at 39.

74. Some have called Section 402A the "most successful section of the Restatement." Frank J. Vandall & Joshua F. Vandall, *A Call for an Accurate Restatement (Third) of Torts: Design Defect*, 33 U. MEM. L. REV. 909, 918 (2003) (noting 3,000 citations of the section).

75. *See* Victor E. Schwartz, *The Restatement, Third, Torts: Products Liability: A Model of Fairness and Balance*, 10 KAN. J.L. & PUB. POL'Y 41, 42 (2000) (stating that the *Second Restatement* "shed no light on what should be the legal standard for defect of design").

76. James A. Henderson, Jr., *Why Negligence Dominates Tort*, 50 UCLA L. REV. 377, 384 (2002) (stating that development of products liability has been and continues to be in the area of product design and marketing).

77. Larry S. Stewart, *Strict Liability for Defective Product Design: The Quest for Well-Ordered Regime*, 74 BROOK. L. REV. 1039, 1041 (2009) ("Under 402A there was no distinction between manufacturing and design defect . . . .").

78. *Id.* at 1043 ("Much confusion resulted in the ensuing arguments over the proper rule for design defect claims. . . . Resulting decisions were a hodge-podge of rule . . . .").

products liability provisions were released regarding how to apply strict liability "beyond manufacturing defects . . . to the then-emerging context of design safety, where section 402A's consumer expectations test proved increasingly inadequate."[79] In time, courts began to understand that "principles of reasonableness were necessary to resolve the difficult issues of balance between product usefulness, safety, cost, practicality, and information dissemination inherent in such cases."[80] The difficulties in the standards established by Section 402A are well-documented.[81] They arose because courts looked to the language of a broad rule for guidance in a new category of cases but "were searching for an answer that was not there."[82]

C. Content Control and "Over-Doctrinalization"

The Second Restatement resembled Web 1.0 in that both represented top-down efforts to control content. The products liability provisions of Section 402A of the Second Restatement, for instance, were "top down law reform[s] motivated . . . by the enthusiasm of a small group of Legal Realists that saw the opportunity to make what they saw as a small win-win change to legal entitlements."[83]

Although laid out in what appeared to be a "neat" fashion, many of the Second Restatement's rules left important considerations unclear.[84] Moreover, many of the Second Restatement's rules proved cumbersome when actually taken up by common-law courts.[85] Drafters of restatement language must strive to render statements of the common law that are correct in all cases. Two approaches are available. One, selected by the authors of the Third Restatement, is to describe rules in highly general

79. Owen, *supra* note 53, at 927.

80. *Id.* at 935.

81. Michael D. Green, *The Unappreciated Congruity of the Second and Third Torts Restatements on Design Defects*, 74 BROOK. L. REV. 807, 832 (2009).

82. Schwartz, *supra* note 75, at 42.

83. Jane Stapelton, *Bugs in Anglo-American Products Liability*, 53 S.C. L. REV. 1225, 1229 (2002).

84. *Id.* ("The apparent neatness, low impact, and intellectual glamour of this move led its promoters to overlook major gaps in the theoretical foundations of the rule in the new § 402A.").

85. For instance, the doctrinal formulation of recklessness is virtually incomprehensible. *See infra* nn.89–99 and accompanying text.

terms.[86] The other, at times selected by the authors of the Second Restatement, is to describe rules with painstaking clarity, including caveats, exceptions and the like in the formal statement of the rules.[87] Unfortunately, the latter approach often produces language that says too much—that "overdoctrinalizes" the rules in question.

Consider, for instance, the Second Restatement's articulation of the important concept of reckless misconduct in tort law, described in section 500.[88] Recklessness is an important concept in tort law because it provides an escape valve for traditional limitations on liability arising from a plaintiff's contributory negligence or primary assumption of risk.[89] In a range of contexts, plaintiffs must demonstrate recklessness on the part of a defendant responsible for an injury in order to meet the threshold for recovery.[90] Moreover, recklessness has been established as a necessary threshold for the imposition of punitive damages.[91]

The authors of the Second Restatement defined this concept in one of the longest, most awkward compound sentences in the history of American tort law:

> §500. Reckless Disregard of Safety Defined
>
> The actor's conduct is in reckless disregard of the safety of another if he does an act or intentionally fails to do an act which it is his duty to the other to do, knowing or having reason to know of facts which would lead a reasonable man to realize, not only that his conduct creates an unreasonable risk of physical harm to another, but also that such risk is substantially greater than that which is necessary to make his conduct negligent.[92]

86. *See* Sugarman, *supra* note 5, at 587, 590.

87. *See id.* (referring to Professor Schwartz's project in coming up with "fewer and better-presented basic principles that could come to replace a great number of the sections scattered throughout the four volumes of the Restatement (Second)").

88. RESTATEMENT (SECOND) OF TORTS § 500 (1965).

89. Geoffrey Christopher Rapp, *The Wreckage of Recklessness*, 86 WASH. U. L. REV. 111, 134 (2008).

90. *Id.* at 115–16.

91. *Id.*

92. RESTATEMENT (SECOND) OF TORTS § 500 (1965).

The comments that followed this section only amplified the confusion this language caused in the courts,[93] as they made "little or no sense."[94] The rule itself was over-doctrinalized, establishing a test involving so many elements that the possibility of consistent jurisprudence was eliminated from the outset.[95]

By contrast, the authors of the Third Restatement have defined the concept in a more organic fashion:

> §2. Recklessness
>
> A person acts recklessly in engaging in conduct if:
>
> (a) the person knows of the risk of harm created by the conduct or knows facts that make the risk obvious to another in the person's situation, and
>
> (b) the precaution that would eliminate or reduce the risk involves burdens that are so slight relative to the magnitude of the risk as to render the person's failure to adopt the precaution a demonstration of the person's indifference to risk.[96]

Notably, this section has moved to the beginning of the new Third Restatement, a recognition of its importance to courts developing tort doctrine.[97] It also compacts the concept of recklessness into two central inquiries: (1) what was the defendant's knowledge of the risk or facts suggesting risk?; and (2) does the defendant's conduct constitute "aggravated negligence" under the traditional "Hand Formula" so as to demonstrate indifference?[98] Gone is the confusing language regarding intent. Also gone is the implicit requirement that the risk-taker *know* that his conduct exceeds the legal threshold for negligence. Section two of the new Third Restatement shows more faith in common law courts to develop, from the bottom-up, a set of rules to guide determinations of when wrongful conduct rises to the level of recklessness.

93. Rapp, *supra* note 89, at 133–52.

94. Anthony J. Sebok, *Purpose, Belief, and Recklessness: Pruning the Restatement (Third)'s Definition of Intent*, 54 VAND. L. REV. 1165, 1186 n.29 (2001).

95. Rapp, *supra* note 89, at 135 ("With the doctrine itself hopelessly ill-defined, courts have not produced systematically coherent jurisprudence in the area.").

96. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 2 (2010).

97. Authors moved the definition of "recklessness" to Chapter 1, Section 2 in the Third Restatement.

98. James A. Henderson, Jr., et al., *Intent and Recklessness in Tort: The Practical Craft of Restating Law*, 54 VAND. L. REV. 1133, 1155–56 (2001).

II. THE THIRD RESTATEMENT AS WEB 2.0

A. Organic

Unlike earlier versions of the torts restatement, the Third Restatement is decidedly organic. The bright-line rules and sweeping reforms of the Second Restatement have given way to law formulations structured in more flexible, open-ended terms.[99] The Third Restatement is "conceptual" in nature—"focused on exposing principles and creating processes to guide the development of judicial responses to policy-oriented questions."[100]

Perhaps the best example of this concerns the Third Restatement's treatment of toxic exposure, an issue that courts have struggled with since the 1980s.[101] The ALI addresses this issue in section twenty-eight. The section and its comments eschewed "bright-line rules," instead recognizing that "whether an inference of causation is appropriate is a matter of informed judgment . . . ."[102]

B. The Architecture of Participation

The Third Restatement, from its early days, embraced the kind of bottom-up participation that is the cornerstone of Web 2.0. For instance, the authors of the products liability sections of the Third Restatement were "centrally concerned with perceived bottom-up pressure on the U.S. products regime from 'classic design cases.'"[103] In its "functional, negligence-based definition of design defect," the Third Restatement "reflected how courts and lawyers around the nation increasingly were framing and litigating this central issue of products liability law."[104]

99. Bublick, *supra* note 47, at 1340.
100. *Id.*
101. Green & Stewart, *supra* note 18, at 46.
102. *Id.*
103. Stapelton, *supra* note 83, at 1229.
104. Owen, *supra* note 53, at 927. *But see* Vandall & Vandall, *supra* note 74, at 922 ("[T]he Restatement (Third) . . . delivers a radical concept of negligence and therefore misrepresents the law."); Robert L. Habush, 10-Fall KAN. J. L. & PUB. POL'Y 49, 53 (2000) ("[T]he Reporters . . . miscounted the judicial support for the reasonable alternative device requirement . . . .").

In "deposing"[105] the Second Restatement's ambitious "substantial factor" and "legal cause" approach to causation in favor of linguistically simplified versions of the traditional "but-for" and "proximate cause" notions, the authors of the Third Restatement also embraced a participatory role, in this case for juries. The "but-for" causation inquiry chosen by the Third Restatement "is . . . more finely adjusted to reliably strengthen the core fact-finding of juries, and less likely to produce peculiar results."[106]

Moreover, the manner in which the test is framed suggests it represents an invitation for participation on the causation inquiry by courts and juries. The Third Restatement is "articulate in silence as in enunciation," allowing the "'but for' test to stand on its own for the first time . . . ."[107]

C. Caveats

Of course, there are exceptions. With respect to owners and occupiers of land, the Third Restatement has embraced the controversial modern trend of a universal reasonable care standard, even though half of American jurisdictions continue to adhere to the traditional approach[108] that imposes only limited duties on owners and occupiers of land, based on the category of injured entrant and the nature of the condition causing harm.[109] While there may be strong academic support for the universal reasonableness approach, even its supporters have criticized the manner in which the Third Restatement's authors are attempting to promulgate the change.[110] The Third Restatement aims to

105. Lavitt, *supra* note 68, at 39.

106. *Id.*

107. Rue, *supra* note 58, at 2716.

108. *See* Ann Fievet, *Breaking the Law and Getting Paid for It: How the Third Restatement of Torts Synthesizes Two Distinct Standards of Care Owed to Trespassers*, 44 WAKE FOREST L. REV. 239, 246 (2009) (stating that "twenty-six states have chosen to retain the traditional categories").

109. *See* Green & Stewart, *supra* note 18, at 47.

110. *See, e.g.*, Stephen D. Sugarman, *Land-Possessor Liability in* Restatement (Third) of Torts: *Too Much and Too Little*, 44 WAKE FOREST L. REV. 1079, 1079 (2009) ("I think that it is a mistake to have a separate chapter on land possessors. . . . [I]ntegrating the topic of land possessors into earlier sections would help us to make progress on two important substantive themes that, I believe, are not very helpfully addressed by the Reporters: (1) What are the reasons that justify any no-duty rule in tort? (2) In deciding what due care requires, when is a fair warning sufficient and when must the defendant eliminate . . . the danger by taking additional precautions?").

"purg[e] . . . a tradition of no-duty rulings based on case-specific unforeseeability . . . ."[111]

III. CONCLUSION

Ultimately, the success of the Third Restatement will only become clear as courts wrestle with its provisions.[112] Similarly, the success of Web 2.0 ventures will be decided over time by the preferences of users and the commercial applications of such sites. However, both the Third Restatement and Web 2.0 seem positioned to succeed in a broader fashion than their predecessors, thanks to their organic, participatory, and bottom-up approaches.

111. Marks, *supra* note 49, at 4.

112. *See* MacDougall, *supra* note 55, at 116 (discussing the effect the Third Restatement may have on courts).