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When the Restatement Is Not a Restatement: The Curious Case of the "Flagrant Trespasser"^{OSQ}

David A. Logan

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**WHEN THE RESTATEMENT IS NOT A RESTATEMENT:
THE CURIOUS CASE OF THE “FLAGRANT
TRESPASSER”**

David A. Logan[†]

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Restatement: /rɪ st'eɪtmənt: An iteration that repeats a prior statement, usually in a slightly different form. Synonym: reiteration¹

The American Law Institute (ALI), in existence since 1923, has a distinguished reputation for its law reform projects, typically “restatements” of areas of domestic common law.² The most

[†] David A. Logan, Dean and Professor of Law, Roger Williams University. Dean Logan is an adviser for the Third Restatement. He would like to thank David DiSegna for his excellent research assistance and Tracy Sartrys for her continuing professional support. Thanks also to Mike Green and Wayne Logan for their helpful comments on an earlier draft.

1. ROGET'S II THE NEW THESAURUS 832–33 (Kaethe Ellis et al. eds., 3d ed. 1995).

2. In recent years, the ALI has branched out to projects concerned with international law (e.g., Transnational Insolvency) and domestic topics typically

successful of these projects involves the law of torts. There were more than 160,000 judicial citations to restatements by 2004, with the largest single number, by a considerable margin, involving torts.³ Additionally, positions promulgated by the ALI, though not binding on any court, often loom large in doctrinal debates.⁴

This essay will first discuss the ALI and the role it has played in law reform, especially when it navigates the tension between simply adopting a well-developed majority position and the desire to “get it right” (by selecting a distinctly minority position). I will then turn to one of the rare occasions in which the ALI in the Restatement (Third) of Torts: Liability for Physical and Emotional Harm (2010) (Third Restatement) opted for a position that is not even a minority rule, but rather is a novel formulation—the “flagrant trespasser” in premises liability cases—that is, when the restatement does not “restate” the law. I will conclude with some reflections on the wisdom of such a bold step.

I. THE ALI AND LAW REFORM

A. *When Giants Walked the Earth: The ALI and the First and Second Restatements of Torts*

In the early decades of the twentieth century, a project to “restate the law” was attractive to both the formalists then reigning in the bench and bar, as well as the legal realists, who were gaining influence, especially in law schools.⁵ To the old guard,

controlled by statutes (e.g., Professional Responsibility). *Projects, Overview*, AMERICAN LAW INSTITUTE, <http://www.ali.org/index.cfm?fuseaction=projects.main> (last visited Apr. 9, 2011).

3. During this time there were more than 67,000 citations to the torts restatements, with the contracts restatements a distant second with slightly less than 29,000 citations. AMERICAN LAW INSTITUTE, PUBLISHED CASE CITATIONS TO RESTATEMENTS OF THE LAW AS OF MARCH 1, 2004 (2004), *available at* http://www.ali.org/_news/annualreports/2004/AM04_07-RestatementCitations04.pdf.

4. See Gregory C. Keating, *Is Negligent Infliction of Emotional Distress a Freestanding Tort?*, 44 WAKE FOREST L. REV. 1131, 1134–35 (2009) (recognizing the “Restatement impulse to elicit taxonomical order” but arguing that the Restatement does not accurately reflect the order immanent in the law); Christopher J. Robinette, *The Prosser Notebook: Classroom as Biography and Intellectual History*, 2010 U. ILL. L. REV. 577, 579 (2010) (describing the broad influence of the Restatement (Second) of Torts (1965)).

5. See GRANT GILMORE, *THE AGES OF AMERICAN LAW* 77–78 (1977); see also John P. Frank, *The American Law Institute, 1923–1998*, 26 HOFSTRA L. REV. 615, 617 (1998) (noting that the thirty-five member committee, including Benjamin Cardozo, Learned Hand, and Roscoe Pound, reported that uncertainty and

traditionalists who considered the common law “a closed system that yielded answers to all issues that arise,”⁶ this presented an opportunity to bolster their view of law as science and to lock in contemporary principles and practices, an aspect of a broader effort to rebuff the mongrelization of the profession via the proliferation of night law schools that primarily served immigrant strivers.⁷ The President of the Association of American Law Schools (AALS) was blunt: “As long as our doors were entered chiefly by immigrants of cognate blood, the common law as it was studied by Story and Langdell might safely be left to develop and adapt itself to each changed condition. But within the last twenty years a horde of alien races from Eastern Europe and from Asia has been pouring in on us”⁸

Xenophobia and a deep-seated fear of change were not, however, the only motivations of the traditionalists. Formalists also, more palatably, saw a need for “definite standards by which the activities of business, industry and commerce are conducted.”⁹

The countervailing jurisprudence of legal realism can be traced, in part, to the provocative ideas of Roscoe Pound who, as dean at the University of Nebraska College of Law, and later a faculty member and dean at Harvard Law School, focused on the imprecise nature of the law.¹⁰ Pound argued for legal principles

complexity caused by badly written statutes and unnecessary administrative provisions required a “Restatement of the Law”).

6. Frank, *supra* note 5, at 624 (quoting ALI Director Herbert Wechsler).

7. The “conventional wisdom [was] that the ALI was created by a band of legal formalists working hand in hand with the legal moguls of New York and Philadelphia corporate finance to save the common law from statutory liberalization and other un-American pollutants.” N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, in *THE AMERICAN LAW INSTITUTE: SEVENTY-FIFTH ANNIVERSARY, 1923–1998*, 49, 52 (1998); see also G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 *LAW & HIST. REV.* 1, 3 (1997) (describing the “conservatives,” who swore fealty to nineteenth-century conceptions of law as a branch of science, “logically self-contained and self-referential, like geometry, or taxonomic, like the natural sciences”).

8. Hull, *supra* note 7, at 60–61. Another AALS leader observed:

[I]f you examine the class rolls of the night schools in our great cities, you will encounter a very large proportion of foreign names. . . . The result is a host of shrewd young men, imperfectly educated, crammed so they can pass bar examinations . . . but viewing the Code of Ethics with uncomprehending eyes.

Id. at 61.

9. Frank, *supra* note 5, at 621 (quoting ALI President George W. Wickersham).

10. See Larry A. DiMatteo & Samuel Flaks, *Beyond Rules*, 47 *HOUS. L. REV.* 297,

based on the world as it was, rather than law plucked from the ether.¹¹ These critics accepted, and in some cases embraced, the notion that legal rules were inherently impermanent, and that there needed to be adjustments based upon “evolving empirical data.”¹²

Despite the tug of the two schools of jurisprudence, on balance, the founders of the ALI were primarily “reformist progressive-pragmatists who viewed the law as the means to achieving social ends, believers in the power of the legal profession to bring about positive change.”¹³

Many legal luminaries gathered in 1923 to consider creating what was to become the American Law Institute. In attendance were three justices of the Supreme Court of the United States, five federal court of appeals judges, twenty-eight representatives from state supreme courts, representatives from the American Bar Association and the National Conference of Commissioners on Uniform Laws, plus stars from legal education, including twenty-three law school deans.¹⁴ They met to consider the report of a committee of thirty-five, which included Associate Justice Harlan F. Stone, Judges Benjamin Cardozo and Learned Hand, top appellate advocate John W. Davis, Dean Roscoe Pound, and Professor John Wigmore.¹⁵

326 (2010) (exploring the two lines of legal thought comprising the legal realist movement).

11. See Hull, *supra* note 7, at 53.

12. White, *supra* note 7, at 3. White argues that the view that the ALI pitted two different schools of jurisprudence is overstated and that the progressives differed from conservatives in points of emphasis, but not with the basic idea that “restating the law” would yield more predictable judicial decisions. *Id.* at 9–10. It remained for the proponents of critical legal studies to take the perspective that law is personal and indeterminate to its logical conclusion. See Darren Lenard Hutchinson, *Factless Jurisprudence*, 34 COLUM. HUM. RTS. L. REV. 615, 617 n.9 (2003) (citing John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, 45 DUKE L.J. 84, 89 (1995)).

13. Hull, *supra* note 7, at 86. *But see* GILMORE, *supra* note 5, at 73 (“No doubt most of the people who were caught up in the Restatement project shared the Institute’s official position” that there were fundamental principles of the common law, which did not change.).

14. The *New York Times* described the meeting as “probably the most distinguished gathering of the legal profession in the history of this country.” Hull, *supra* note 7, at 89.

15. See JOHN P. FRANK, *THE AMERICAN LAW INSTITUTE: SEVENTY-FIFTH ANNIVERSARY, 1923–98*, 9 (1998). Support for the ALI was not, however, uniform—Associate Justice Oliver Wendell Holmes, Jr. quoted Justice Louis Brandeis as quipping, “Why, I am restating the law every day.” *THE AMERICAN LAW INSTITUTE*,

The report concluded that there was a pressing need for an institute that would create a “Restatement of the Law” to deal with the deplorable state of the common law.¹⁶ First, there was the “great volume of the annual increase to the already overwhelming mass of reported cases,” which “cannot be directly checked by any action which may be taken by the profession.”¹⁷ This, in turn, resulted in a “lack of agreement among [the members of the legal profession on] the fundamental principles of the common law’ and the ‘lack of precision in the use of legal terms.’”¹⁸ “The committee concluded that these ‘two causes of uncertainty and complexity are precisely those over which the legal profession has the greatest control.’”¹⁹ The report concluded:

We speak of the work which the organization should undertake as a restatement; its object should not only be to help make certain much that is now uncertain and to simplify unnecessary complexities, but also to promote those changes which will tend better to adapt the laws to the needs of life. The character of the restatement which we have in mind can be best described by saying that it should be at once analytical, critical and constructive.²⁰

Despite these grounds for agreement, the participants recognized from the outset the inherent tension at the core of their mission: should the goal be to simply count citations (“the law as it is”) or to articulate what the law should be. As the report observed, “the law is not always well adapted to promote what the preponderating thought of the community regards as the needs of life.”²¹ However, the changes should be restricted to those that are “generally accepted as desirable.”²²

THE AMERICAN LAW INSTITUTE 50TH ANNIVERSARY 276 (2d ed. 1973) (quoting a letter written by Justice Holmes).

16. Frank, *supra* note 5, at 617 (quoting the ALI’s first committee report in 1923); *see infra* note 20, at 173–223.

17. Frank, *supra* note 5, at 617 (quoting the ALI’s first committee report in 1923); *see infra* note 20, at 187.

18. Frank, *supra* note 5, at 617 (quoting the ALI’s first committee report in 1923); *see infra* note 20, at 186.

19. Frank, *supra* note 5, at 617 (quoting the ALI’s first committee report in 1923); *see infra* note 20, at 188.

20. REPORT OF THE COMMITTEE ON THE ESTABLISHMENT OF A PERMANENT ORGANIZATION FOR THE IMPROVEMENT OF THE LAW PROPOSING THE ESTABLISHMENT OF AN AMERICAN LAW INSTITUTE, *in* AMERICAN LAW INSTITUTE, THE AMERICAN LAW INSTITUTE SEVENTY-FIFTH ANNIVERSARY 1923–1998, 190 (1998).

21. *Id.* at 192.

22. *Id.*; Frank, *supra* note 5, at 618 (quoting the institute’s report).

The group approved the establishment of the ALI and, after securing funding from the Carnegie Foundation, set about to study core topics that became the first restatements in contracts, agency, conflicts, and torts.²³ These reports, in the distinctive black letter/comment format, were drafted in the first instance by a “reporter,” who recruited a group of experts to serve as “advisers,” who helped the reporter prepare a subject-specific document that would be considered by a “council,” and finally approved by the full membership of the ALI²⁴

The ALI was organized in a way that enhanced its influence in the coming decades. By giving the critical role of reporter to academic lawyers, the ALI made it likely that its proposals would be well-grounded in the current law and mindful of doctrinal critiques and suggestions for reform. The flip-side risk of turning out proposals that were excessively academic was checked by the presence in the membership, and on the council, of significant numbers of practicing lawyers and judges. Quality control also was enhanced by the requirement that all voters—whether in the rank-and-file membership, the drafting committee of the advisers, or the council—were to be elected on a meritocratic basis. Finally, the requirement that any final draft had to be approved by both the council and the entire membership minimized the risk that the final product would be dominated by an idiosyncratic interest group.²⁵

23. Frank, *supra* note 5, at 619.

24. For a thorough survey of the restatement process, see Kristen David Adams, *Blaming the Mirror: The Restatements and the Common Law*, 40 IND. L. REV. 205 (2007).

25. RICHARD A. POSNER, *THE PROBLEMATICS OF MORAL AND LEGAL THEORY*, 303–04 (1999); *see also id.* at 309 (“The Institute’s unusual balance of practical lawyerly judgment, legislative-type consensus-generating machinery, and scholarly expertise equips it to provide leadership in [law reform].”); Herbert Wechsler, *Foreward*, *THE AMERICAN LAW INSTITUTE 50TH ANNIVERSARY*, vii–viii (2d ed. 1973) (noting that one of the greatest strengths of the ALI is the “triple challenge” of consecutive review of the reporter’s draft by the project’s advisers, the council, and the membership of the ALI). There is also a less flattering motive for the ALI’s organization: status. White, *supra* note 7, at 3 (“The composition of the Institute, the selection process for its members, the self-conscious links forged in that process between elite law faculties, elite practitioners, and judges . . . were efforts to clarify and reinforce status criteria and status distinctions within the legal profession.”).

B. The First and Second Torts Restatements

The reporter for the Restatement (First) of Torts (1934) (First Restatement) was Francis Bohlen from the University of Pennsylvania, “the outstanding and nationally known expert in [the] field.”²⁶ He recruited an all-star team of advisers that included leading federal judges (Learned Hand), state judges (Connecticut Chief Justice George Wheeler), and top academics from Yale Law School (Leon Green and Edward Thurston) and University of Chicago Law School (Dean James Hall), with perhaps the greatest common law judge, New York’s Benjamin Cardozo, attending a number of meetings in an unofficial capacity.²⁷

From the outset, all members of the ALI agreed that the common law needed to be “tidied up,”²⁸ but there was disagreement as to whether the restatements should be descriptive or prescriptive. As a long-time member of the ALI Council, Shirley Abrahamson, chief justice of the Wisconsin Supreme Court, observed: There is always the struggle between the law “that is” and the law as it “ought to be.”²⁹

26. William Draper Lewis, *Francis Hermann Bohlen*, 91 U. PA. L. REV. & AM. L. REG. 377, 381 (1943).

27. An academic kerfuffle arose when the leading torts scholar of the mid-century era, William L. Prosser, attacked Cardozo’s behavior in conjunction with the first restatement. Prosser alleged that Cardozo attended a meeting of the advisers (he was not technically an adviser, but his standing as a top thinker about torts issues explained his presence) while knowing that he would soon be considering the appeal of a case involving a bizarre chain of events that led to a woman’s injury while she stood on the defendant’s railroad platform. William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1 (1953). Prosser asserted that Cardozo attended the meeting but did not participate in the discussion or vote on the “hypothetical”. *Id.* at 4. In Prosser’s account, Cardozo returned to Albany and soon ruled in the railroad’s favor by adopting the majority view of the advisers. *Id.* at 5. The ALI adopted the view expressed by Cardozo in *Palsgraf*, and even used the facts of *Palsgraf* for one of its illustrations. RESTATEMENT (FIRST) OF TORTS § 281 cmt. g, illus. 3 (1934). To Prosser, “[i]t is not likely that any other case in all history ever elevated itself by its own bootstraps in so remarkable a manner.” Prosser, *supra* note 27, at 8. More recent scholarship acknowledges that Cardozo heard ALI discussions about the border between duty and proximate cause raised by *Palsgraf* but disputes whether Cardozo actually attended a meeting that discussed the facts of *Palsgraf* before he heard the appeal. ANDREW L. KAUFMAN, *CARDOZO*, 286–95 (1998).

28. Posner, *supra* note 25, at 304 (arguing that the ALI is less well-adapted today than it was in the 1920s because doctrinal law has been tidied up by now).

29. Shirley S. Abrahamson, *Refreshing Institutional Memories: Wisconsin and the American Law Institute the Fairchild Lecture*, 1995 WIS. L. REV. 1, 17 (1995).

By general consensus, the first restatements, which consisted of nineteen volumes,³⁰ broke little new ground, pursuing what one scholar termed the “mild reform” strategy suggested in the ALI’s founding document: when the laws in the states differ in ways “not due to differences in economic and social conditions . . . the restatement should make clear what is believed to be the proper rule of law.”³¹

Work on a second series of restatements began at the end of World War II, and the tension between restating and reforming the law was raised explicitly by Judge Learned Hand.³² A committee he headed concluded that the organization should identify which provisions were “‘founded on historical facts,’ which were ‘unjustified by any principles of justice, but are unimportant or harmless and may be left as they are because of the desirability of certainty,’ and ‘what rules are insupportable in principle and evil in action.’”³³ Henry Hart and Albert Sacks criticized the preference for conservatism: “[T]he Institute limited itself to the role only of a follower in the statement of the law and of a follower, moreover, willing to join the parade only after it was well under way.”³⁴ This preference for *de jure condendum*—the law as it should be—would prove to be an even stronger force for the Restatement (Second) of Torts (1965) (Second Restatement).³⁵

30. 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, 185–86 (1968) (on the topics of contracts, agency, conflict of laws, trusts, restitution, torts, security, judgments, and property).

31. Patrick J. Kelley, *The First Restatement of Torts: Reform by Descriptive Theory*, 32 S. ILL. U. L.J. 93, 106 (2007). Kelley believes that the only significant reform came via the adoption of reporter Bohlen’s innovative positions on liability for children and the insane. *Id.* at 107; *see also* Frank, *supra* note 5, at 624 (the only case where the ALI adopted a distinctly minority principle was section 90 of the contracts restatement, which involved promissory estoppel); Benjamin Kaplan, *Encounters with O.W. Holmes, Jr.*, 96 HARV. L. REV. 1828, 1835 (1983) (the first restatements of contracts and torts were “relatively conservative works”); Warren A. Seavey, *The Restatement, Second, and Stare Decisis*, 48 A.B.A. J. 317, 318 (1962) (“[T]he statements were usually in agreement with the rules in a very large percentage of the states, a survey showing something like ninety per cent [sic] agreement with decided cases on contested points . . .”).

32. *See generally* Frank, *supra* note 5, at 622–23 (“[C]onclud[ing] that the first Restatement had been overly static”).

33. Frank, *supra* note 5, at 623.

34. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF THE LAW* 740 (William N. Eskridge, Jr. & Philip P. Frickey eds., 1994).

35. A willingness to adopt minority positions, and thus become more prescriptive, was consistent with the gradual change in outlook of the ALI

The ALI once again assembled a supremely talented team for the Second Restatement project: Berkeley Dean William Prosser—whose treatise had already become a fixture for practitioners and academics³⁶—was named reporter, and he was assisted by a roster of advisers that included academic luminaries John Wade (Vanderbilt University Law School), Fleming James, Jr. (Yale Law School), Warren Seavey and Robert Keeton (Harvard Law School), Page Keeton (University of Texas School of Law), Clarence Morris (University of Pennsylvania School of Law), and Roger Traynor, chief justice of the California Supreme Court.³⁷ The introduction to the publications acknowledged “there has been enormous change in torts” since the First Restatement; indeed, “the scope of change wrought by the courts may . . . have transcended that in any other field.”³⁸ The project was massive: it involved twenty-two preliminary drafts, forty-one council drafts, and twenty-three tentative drafts produced over a period of twenty-two years.³⁹

The most significant, and controversial, change wrought by Dean Prosser et al. was a new section covering injuries caused by defective products.⁴⁰ Courts had been gradually extending the scope of contract (warranty) law (which required no proof of fault) to an array of consumer injuries from food products, and, in a few scattered cases, to injuries caused by products “intended for bodily use” (such as cosmetics). However, there was only scholarly authority for a global theory of strict liability for products injuries

directors over the years. See Abrahamson, *supra* note 29 at 19–21.

36. Christopher J. Robinette, *The Prosser Notebook: Classroom as Biography and Intellectual History*, 2010 U. ILL. L. REV. 577, 579 (2010).

37. RESTATEMENT (SECOND) OF TORTS, iii–iv (1965). Justice Traynor was perhaps the best-known state court judge of his era. Stewart Macaulay, *Justice Traynor and the Law of Contracts*, 13 STAN. L. REV. 812, 812 (1961) (“In his twenty years on the Supreme Court of California Justice Roger J. Traynor has become one of the country’s best known state judges.”).

38. RESTATEMENT (SECOND) OF TORTS, Introduction, at ix (1965).

39. Michael Greenwald, *American Law Institute*, 79 LAW LIBR. J. 297, 302 (1987).

40. DAVID G. OWEN, *PRODUCTS LIABILITY LAW* 265 (2d ed. 2008). The Second Restatement also made significant changes to the narrow pocket of cases that were deemed appropriate for strict liability, i.e., those activities deemed “ultrahazardous.” This section was satisfied when the activity was both especially dangerous and not a “matter of common usage.” Further, the Second Restatement changed terminology to “abnormally dangerous activities,” and adopted a multi-factor approach, of which common usage was only a factor (as is whether the locale was appropriate for the activity). This approach was harshly criticized, inter alia, as a “poorly disguised negligence regime.” DAN B. DOBBS, *THE LAW OF TORTS* 953 (2000).

generally⁴¹ until the California Supreme Court handed down *Greenman v. Yuba Power Products, Inc.*,⁴² in 1963. Building on this single decision, the Second Restatement announced a new doctrine of strict products liability in tort.⁴³

At the same time, Dean Prosser was reworking the sections from the First Restatement that covered injuries from products. In rapid succession he proposed drafts that moved from a beachhead of strict liability in tort for injuries caused by food (1958), expanding to “products intended for intimate bodily use, including products intended for external application or contact” (1962)⁴⁴ and, finally, to all products (1964).⁴⁵ Despite sharp criticism of the new provision,⁴⁶ the resulting section 402A was adopted by the ALI in 1964.⁴⁷

Section 402A was built on scant doctrinal foundation, as Dean Prosser could point to virtually no case authority and relatively little scholarship to tease out the application of the core concept of strict liability in tort to the variety of contexts in which products could harm consumers, let alone bystanders. In essence, the ALI, quite uncharacteristically, boldly painted on what amounted to a blank canvas. As one early critic put it, the ALI was guilty of “ignoring the traditional role of the Institute: to restate only rules of law embraced by a majority of the courts.”⁴⁸ Many courts fell in line

41. See, e.g., William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

42. 377 P.2d 897 (Cal. 1963). There were cases that imposed strict liability via application of the implied warranty of merchantability, but such cases, as a technical matter, were not considered to reflect tort law and, more significantly, provided defendants with an array of defenses (like the ability to disclaim a warranty or requiring notice before filing suit) that were anti-consumer and not applicable to claims sounding in tort. See, e.g., *Goldberg v. Kollsman Instrument Corp.*, 191 N.E.2d 81, 83 (N.Y. 1963) (applauding *Greenman* for recognizing “strict tort liability” (surely a more accurate phrase) rather than breach of warranty).

43. OWEN, *supra* note 40, at 257.

44. OWEN, *supra* note 40, at 265 (quoting RESTATEMENT (SECOND) OF TORTS § 402A (Tentative Draft No. 7, 1961)).

45. OWEN, *supra* note 40, at 265.

46. The Defense Research Institute widely circulated a brief arguing that the ALI should return to its traditional policy of “restating established law as it is.” Fred B. Helms, *The Restatements: Existing Law or Prophecy*, 56 A.B.A. J. 152, 154 (1970); see also Jay M. Smyser, *Products Liability and the American Law Institute: A Petition for Rehearing*, 42 U. DETROIT L.J. 343 (1965) (arguing section 402A was unjustified in either decisional law or sound public policy).

47. OWEN, *supra* note 40, at 281; see Wechsler, *supra* note 31, at 187–92 (detailing the deliberations by the ALI Council that led to the approval of section 402A).

48. Herbert W. Titus, *Restatement (Second) of Torts Section 402A and the Uniform*

soon thereafter,⁴⁹ besting Dean Prosser's prediction that it would take at least five decades for the new principle to become dominant.⁵⁰ The remarkable speed with which section 402A was adopted by courts presented its own problems. While consistent with the explosion of progressive reforms across common law, legislative, and constitutional law,⁵¹ the result was that judges who considered product liability claims could not evaluate the wisdom of 402A against the backdrop of the careful accretion of precedent characteristic of the common law.⁵²

Over time, courts and scholars came to recognize that there was a range of possible product claims, and they increasingly questioned whether a strict liability regime made sense in all contexts.⁵³ This critique was especially powerful when challenging

Commercial Code, 22 STAN. L. REV. 713, 715 (1970). Professor Titus also expressed dismay that a major change in the law came via the restatement, rather than through legislative changes to state versions of the Uniform Commercial Code. *Id.* at 755 ("If legislative supremacy means anything, it must mean that the courts cannot create a new rule of strict tort liability that will displace the products-liability scheme of the Uniform Commercial Code.")

49. OWEN, *supra* note 40, at 255 ("[S]trict manufacturer liability for defective products swept into the American law of torts during the 1960s") (citations omitted).

50. Prosser, *supra* note 41, at 1120 ("[Strict liability] may very possibly be the law of fifty years ahead.")

51. See ROBERT KEETON, *VENTURING TO DO JUSTICE* 3 (1969) (describing the outpouring of torts opinions across the nation between 1958 and 1968 as one of "candid, openly acknowledged, abrupt change"); see also Civil Rights Act of 1964 § 201(a), 42 U.S.C. 2000a (2006) ("All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation . . . without discrimination or segregation on the ground of race, color, religion, or national origin."); *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 258–59 (1964) (holding that sections 201–07 of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a–2000a-6 (1964) were constitutional and that a public hotel "has no 'right' to select its guests as it sees fit, free from governmental regulation"); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954) (holding state sponsored segregation unconstitutional and overruling *Plessy v. Ferguson*, 163 U.S. 537 (1896)).

52. Titus, *supra* note 48, at 716 ("Even so, one might have hoped for some judicial restraint so that issues posed by the strict tort rule might have been refined and shaped by the facts in actual cases. . . ."); see also Suzanna Sherry, *Politics and Judgment*, 70 MO. L. REV. 973, 982 (2005) ("In both common law and constitutional adjudication, incrementalism and adherence to precedent work hand-in-hand to ensure that the law will change slowly, through accretion and subtle revision rather than through sudden or fundamental shifts in policy."); Clyde W. Summers, *American Labor Law Scholarship—Some Comments*, 23 COMP. LAB. L. & POL'Y J. 801, 801 (2002) ("The law is built on countless court decisions; if it grows at all, it is not so much by design, but by accretion.")

53. See, e.g., William Powers, Jr., *A Modest Proposal to Abandon Strict Products*

the design of a product, which often involved complex, polycentric choices made by technically trained experts, a task for which 402A's "ordinary consumer expectation" test seemed ill-suited.⁵⁴ Interestingly, and reflecting the gravitational pull of the restatement and the earliest post-Second Restatement judicial decisions,⁵⁵ courts would often hew to the rhetoric of strict liability, while actually applying a negligence-like analysis in design defect cases.⁵⁶ Similarly, many courts and commentators came to reject true strict liability for products claimed to have informational flaws.⁵⁷ That is, where a plaintiff claimed that the injury occurred because of insufficient warnings or instructions.⁵⁸ The notable failure at bold law reform that section 402A represented was a key aspect of the intellectual environment that faced the ALI as it prepared for a third torts restatement.

C. *The Third Restatement*

As the ALI leadership considered a third restatement of (the first topic to be treated with a third project), they addressed two important changes: one doctrinal and the other logistical. First, there were areas of tort law that had undergone especially rapid change since the Second Restatement.⁵⁹ As mentioned above, there had been significant judicial, scholarly, and legislative

Liability, 1991 U. ILL. L. REV. 639, 639 (1991) ("[P]roduct cases differ more among themselves than they differ from other personal injury cases.").

54. *Id.* at 652–55.

55. See, e.g., *Phipps v. Gen. Motors Corp.*, 363 A.2d 955 (Md. 1976); *Thibault v. Sears, Roebuck & Co.*, 395 A.2d 843 (N.H. 1978); *Voss v. Black & Decker Mfg. Co.*, 450 N.E.2d 204 (N.Y. 1983); *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033 (Or. 1974) (en banc); *Turner v. Gen. Motors Corp.*, 584 S.W.2d 844 (Tex. 1979).

56. See OWEN, *supra* note 40, at 255 ("While the courts continued to claim that they were applying liability that was 'strict,' it became increasingly clear that the standards normally applied were truly based on fault.").

57. See, e.g., Steven P. Coley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683, 716–17 (1993); Richard A. Epstein, *The Unintended Revolution in Products Liability Law*, 10 CARDOZO L. REV. 2193, 2204–06 (1980); Alan Schwartz & Louis L. Wilde, *Imperfect Information in Markets for Contract Terms: The Examples of Warranties and Security Interests*, 69 VA. L. REV. 1387, 1416–19 (1983); Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 374–84 (1988).

58. See *supra* note 57 and accompanying text.

59. See Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 VAND. L. REV. 631 (1995) (discussing the evolution of products liability law); Aaron D. Twerski, *One Size Does Not Fit All: The Third Multi-Track Restatement of Conflict of Laws*, 75 IND. L.J. 667 (2000) (discussing the evolution of the concept of "apportionment").

movement away from strict liability for injuries caused by products.⁶⁰ There also had been many changes to what came to be termed “apportionment,” caused by the rise of comparative fault and the demise of joint and several liability.⁶¹ Second, the ALI recognized that torts had become so complex that it was unreasonable to assign the entire new torts restatement to a single reporter, no matter how talented.⁶² As a result, the Third Restatement came to be made up of chunks (or “projects”), now termed, Products Liability, Apportionment, Liability for Physical and Emotional Harm, and Economic Harm, handled by different sets of reporters.⁶³

The first, and most controversial, project concerned Products Liability and the appointment of Professors James Henderson, Jr. and Aaron Twerski as co-reporters.⁶⁴ Henderson and Twerski were marked men from the beginning, as their published scholarship reflected considerable skepticism about the wisdom of strict liability for many, if not most, products-related injuries.⁶⁵ Henderson was candid on this point, observing, “When I was first appointed [co-reporter with Twerski] the Plaintiff’s Bar had, collectively, what might pass for an aneurism,”⁶⁶ and that “we plead guilty to the charge that we did not restate existing case law. One could hardly be expected to restate gibberish.”⁶⁷

The jurisprudential philosophy of the reporters was not the only flashpoint. There was also concern about the none-too-subtle efforts to hijack the process on the part of ALI members, who in

60. See *supra* notes 53–58 and accompanying text.

61. Twerski, *supra* note 59, at 671–72.

62. Stephen D. Sugarman, *Rethinking Tort Doctrine: Visions of a Restatement (Fourth) of Torts*, 50 UCLA L. REV. 585, 587 (2002); see also Richard A. Posner, *Thursday Evening Session*, 72 A.L.I. PROC. 321, 323 (1995) (describing how the pool of candidates for reporter had moved from the “generally acknowledged leading law schools” because of the “democratization of the law school world, which has dramatically narrowed the quality differences among the different tiers of law schools”).

63. See Ellen Pryor, *Restatement (Third) of Torts: Coordination and Continuation*, 44 WAKE FOREST L. REV. 1383, 1384 (2009) (describing the various projects, including the one covering economic harm, which is now in its early stages).

64. Richard L. Cupp, Jr., *Believing in Products Liability: Reflections on Daubert, Doctrinal Evolution, and David Owen’s Products Liability Law*, 40 U.C. DAVIS L. REV. 511, 517–18 (2006).

65. *Id.* at 518–19.

66. James A. Henderson, Jr., *Revising Section 402A: The Limits of Tort as Social Insurance*, 10 TOURO L. REV. 107, 111 (1993).

67. See, e.g., James A. Henderson, Jr. & Aaron D. Twerski, *Drug Designs Are Different*, 111 YALE L.J. 151, 180 (2001).

their private practices regularly represented either plaintiffs or defendants.⁶⁸

Born in controversy and at odds with the original rationales for and concepts of strict liability, the core provisions of the products liability project were perceived as anti-consumer.⁶⁹ And, as critics predicted, in the ensuing years, key new provisions have been rejected by some courts because the rules go “beyond the law,” set the bar for recovery too high, and amount to a “regression in the law.”⁷⁰

Professor Frank Vandall was convinced that the Third Restatement’s handling of products represented “radical restructuring” of existing products liability theory,⁷¹ and that it violated the ALI’s mission to “restate the law,”⁷² while Professor Ellen Wertheimer took the ALI to task because the restatement “does not in fact restate the law,” but rather, “changes the law, invariably in ways unfavorable to plaintiffs and faithless to the

68. Alex Elson, *The Case for an In-Depth Study of the American Law Institute*, 23 LAW & SOC. INQUIRY 625, 636 (1998) (describing ALI response to “a number of gross incidents of special interest lobbying . . . in connection with the . . . product liability [restatement]”). See, e.g., Kristen David Adams, *The Folly of Uniformity? Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423, 440–42 (2004); see also Shirley S. Abrahamson, *Refreshing Institutional Memories: Wisconsin and the American Law Institute*, 1995 WISC. L. REV. 1, 31 (describing how corporate clients were said to have pressured practitioners who were ALI members to oppose progressive proposals in violation of the ALI’s “check your client at the door” rules); Frank, *supra* note 5, at 628–31 (describing efforts of “pressure groups” to influence ALI projects). See generally Alan Schwartz & Robert E. Scott, *The Political Economy of Private Legislatures*, 143 U. PA. L. REV. 595, 597 (stating that public choice theory explains why ALI projects may reflect the “preferences of legislators”).

69. Larry S. Stewart, *Strict Liability for Defective Product Design: The Quest for a Well-Ordered Regime*, 74 BROOK. L. REV. 1039, 1040 (2009).

70. *Id.*; see also David W. Lannetti, *Toward a Revised Definition of “Product” Under the Restatement (Third) of Torts: Products Liability*, 35 TORT & INS. L.J. 845, 851 n.30 (2000) (describing the conflicting views of leading scholars on the credibility of the process and final product); John F. Vargo, *The Emperor’s New Clothes: The American Law Institute Adorns a “New Cloth” for Section 402A Products Liability Design Defects—A Survey of the States Reveals a Different Weave*, 26 U. MEM. L. REV. 493, 501–02 (1996) (arguing that reporters’ claim that requirement that plaintiffs introduce evidence of a “reasonable alternative design” reflected a consensus of authority was inaccurate).

71. See Frank J. Vandall, *The Restatement (Third) of Torts: Products Liability Section 2(b): The Reasonable Alternative Design Requirement*, 61 TENN. L. REV. 1407, 1407, 1423–24 (1994).

72. Frank J. Vandall, *Constructing a Roof Before the Foundation is Prepared: The Restatement (Third) of Torts: Products Liability Section 2(b) Design Defect*, 30 U. MICH. J.L. REFORM 261, 279 (1997).

original goals of section 402A.”⁷³

The second project was called “Apportionment,” and it tackled an area in which there had been significant change over the decades—virtually all states had replaced the mechanical (and draconian) affirmative defense of contributory negligence with one of several strains of comparative fault.⁷⁴ Concurrently, there was also the erosion of the automatic imposition of joint and several liability among multiple tortfeasors.⁷⁵ While debate was spirited in the ALI and in scholarly journals, the Apportionment project was a relatively congenial process compared to the war that had erupted over the law of products liability.⁷⁶

The most wide-ranging of the Third Restatement efforts has undergone changes in both nomenclature and scope; the current title is “Liability for Physical and Emotional Harm,” but it is still often referred to as the “General Principles Project.”⁷⁷ It has generated significant controversy on several fronts, most notably involving the adoption of a general rule of duty tied to risk-creation.⁷⁸ As one of the reporters, Michael Green, admitted, this provision has received “stinging criticism.”⁷⁹ While most of the intellectual combat on whether to impose a general duty of reasonable care took place in scholarly journals, the causation rules, which were perceived by some to tilt in favor of plaintiffs, especially in complex areas like toxic torts, reprised some of the ideological battle played out earlier in the ALI debates about products liability.⁸⁰ When the decision was made to extend the

73. Ellen Wertheimer, *The Third Restatement of Torts: An Unreasonably Dangerous Doctrine*, 28 SUFFOLK U. L. REV. 1235, 1255 (1994).

74. OWEN, *supra* note 40, at 852.

75. See generally John W. Wade, *Should Joint and Several Liability of Multiple Tortfeasors be Abolished?*, 10 AM. J. TRIAL ADVOC. 193 (1986) (discussing the campaign for “tort law reform” and its concentrated attack on the rule of joint and several liability).

76. But see Frank J. Vandall, *Constricting Products Liability: Reforms in Theory and Procedure*, 48 VILL. L. REV. 843, 859 (2003) (“The theme of the Restatement (Third): Apportionment is that joint and several liability is flawed, and that any approach is better than joint and several liability.”).

77. See W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671, 679 (2008) (stating that “[t]he portion of the Third Restatement that addresses tort duty generally was begun in the latter half of the 1990s, entitled at the time ‘General Principles’”).

78. See generally Vandall, *supra* note 76; see also Cardi & Green, *supra* note 77, at 680–81.

79. Cardi & Green, *supra* note 77, at 671.

80. The author, David A. Logan, is an ALI adviser for the Third Restatement. In his capacity as adviser to the Third Restatement, Mr. Logan attended many

General Principles Project to include premises liability, the stage was set for an effort to, in at least one circumstance, not restate the law, but remake it.

II. HOW WE GOT HERE: THE PREMISES MESS

It is a tale oft-told, so it will be only briefly summarized here. The American law of premises liability was based upon the feudal notion that a man's worth, both reputational and financial, was tied to the ownership of land, which meant that the safety of entrants on that land was of scant importance.⁸¹ One American court described the roots of our common law:

Traced to its source, the rule exempting a landowner from liability to a trespasser injured through the condition of the premises is found to have originated in an overzealous desire to safeguard the right of ownership as it was regarded under a system of landed estates, long since abandoned, under which the law ascribed a peculiar sanctity to rights therein. Under the feudal system as it existed in western Europe during the Middle Ages, the act of breaking a man's close was an invasion of exaggerated importance and gravity. It was promptly resented.⁸²

Dean Prosser observed: "He has a privilege to make use of the land for his own benefit, and according to his own desires, which is an integral part of our whole system of private property."⁸³

To implement this preference for safeguarding the rights of landowners, the common law established a three-tiered regime that tied the level of duty owed to an entrant to the reason he was on the land.⁸⁴ In its earliest form, a "full duty of reasonable care"⁸⁵ was

meetings in which these provisions were debated.

81. See *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630 (1959).

82. *Humphrey v. Twin State Gas & Elec. Co.*, 139 A. 440, 442 (Vt. 1927).

83. WILLIAM L. PROSSER, *THE LAW OF TORTS* 358 (3d ed. 1964).

84. See generally DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, *TORTS AND COMPENSATION*, 317–30 (6th ed. 2009). This approach was consistent with the general approach of courts to physical injuries, which tied what duties were owed to the status/relationship of the injured and the injurer. See *RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM* § 40 (Proposed Final Draft No. 1, 2007).

85. A "full duty of reasonable care" includes both a duty to use reasonable care to rectify known dangers and a duty to inspect for the same; other entrants are owed a "limited" duty of reasonable care, with no duty to inspect. 5 *FOWLER V. HARPER ET AL., HARPER, JAMES AND GRAY ON TORTS* § 27.1, 142–46 (3d ed. 2008).

owed only to entrants on the premises for a specific business purpose, such as performing a contract for the owner, a person termed “an invitee.”⁸⁶

Other entrants, even those with permission to enter (termed “licensees”), were owed a minimal duty—merely to refrain from intentionally injuring the entrant, or, in later years, refraining from non-intentional, but nevertheless “willful” and “wanton” negligence.⁸⁷ And, if the common law gave little regard for the safety of people on the premises with permission but with a non-business purpose, then it is not surprising that for those on the premises without permission (trespassers) property owners only owed them the minimal duty to refrain from inflicting injury through highly culpable misconduct.⁸⁸

By the mid-twentieth century, in both the United States and Great Britain, courts had carved out exceptions to what had come to be perceived as the unduly harsh results associated with application of the three-tiered, or status, approach.⁸⁹ The first route to reform was extending the full duty of reasonable care to certain non-business entrants who were on the premises with permission. For example, the courts recognized a new kind of invitee, one who lacked a business purpose but was injured while on land held open to the public generally.⁹⁰ Such a “public invitee” was owed a full duty of reasonable care even when window shopping on private premises or while on public premises, such as in a post office or public park.⁹¹

The Second Restatement also recognized the need for change to the rules applicable to some trespassers, propounding a cluster of ameliorative exceptions to the harsh common law rules: for

86. *Id.*

87. WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 60, 377–79 (4th ed. 1971); *see also* Keith N. Hylton, *Tort Duties of Landowners: A Positive Theory*, 44 WAKE FOREST L. REV. 1049, 1050 (2009) (explaining the “incentive-based function of the classical landowner duties”).

88. PROSSER, *supra* note 83, at 365 (“When they enter where they have no right or privilege, the responsibility is theirs, and they must assume the risk of what they may encounter, and are expected to look out for themselves.”). There is also an instrumental/economic argument for the minimal duty owed a trespasser. *See* Keith N. Hylton, *Tort Duties of Landowners: A Positive Theory*, 44 WAKE FOREST L. REV. 1049, 1066 (2009) (stating that a rule of limited duty to trespassers is justified because the trespasser is often the “cheapest-cost-avoider,” and the law should protect the “subjective valuations that landowners attach to property”).

89. DOBBS, *supra*, note 40, at 615–20.

90. RESTATEMENT (SECOND) OF TORTS § 332(2) cmt. a (1965).

91. *Id.*

example, a duty of reasonable care could be owed if the trespasser was a child, was confronting a danger known only to the owner, was a frequent trespasser on a limited area, or when the trespasser was helpless to protect himself from a danger.⁹²

As has been the case over the generations of the common law, these reforms were the result of multiple forces. Society had become increasingly complex and urbanized, making the frequency of large, difficult-to-oversee tracts of property far less common. At the same time there was the increased value of safety (the recognition that we can all be plaintiffs at some point), reflected, for example, in the demise of the “fellow servant rule” and the concomitant rise of workers’ compensation. Similarly, policy justifications reflected a mix of normative preferences (for example, it seems unfair to allow the owners of public land, supported by taxes, to avoid providing entrants a duty of reasonable care) and utilitarian principles (the burden to take reasonable precautions is less when the duty only attaches to a small part of the premises or when the social welfare is maximized when the owner can easily save a helpless trespasser from serious injury).

A half-century ago, the myriad rules, based upon what seemed to be almost meaninglessly thin distinctions, had become so baroque that they seemed ripe for fundamental rethinking.⁹³ The vehicle for this change was a decision of the California Supreme Court, *Rowland v. Christian*.⁹⁴ Consistent with the reformist zeitgeist of the times, *Rowland* attacked the three-tiered duty regime, and its myriad exceptions, head-on.⁹⁵ The facts were simple, and involved a pocket of law that California had not reformed: when a social guest encounters a latent danger known to the owner or discoverable through the use of reasonable care. In such cases, at that time, the law in many jurisdictions often imposed no duty to warn.⁹⁶ This crabbed doctrine violated instrumentalist goals (the cost of providing a warning was minimal, and the benefit of avoiding the risk of a sliced hand significant), as well as normative

92. *Id.* §§ 334–39.

93. DOBBS, *supra* note 40, at 615–16.

94. 443 P.2d 561 (Cal. 1968), *superseded by statute*, CAL. (PROPERTY) CODE § 847 (West 2007), *as recognized in* Calvillo-Silva v. Home Grocery, 968 P.2d 65, 71–72 (Cal. 1998).

95. *See* Cardi & Green, *supra* note 77, at 672 (discussing how the California Supreme Court took a leading role in changing tort law in the 1980s and 1990s).

96. *See, e.g.*, HARPER ET AL., *supra* note 85, at 223–25.

goals (it is unfair to make a person on the premises with permission face a latent danger known to the owner). Courts inclined to reform could change the law incrementally by imposing a duty to warn in such circumstances (but not any duty to inspect), thereby changing only one aspect of the centuries-old, tiered regime.

The California Supreme Court, under the leadership of the widely respected Chief Justice William Traynor, chose a bolder approach. Fundamental change was necessary because the common law had become so riddled with exceptions that the tiered system no longer provided reliable guidance; it was, in the court's language, a "semantic morass."⁹⁷ This confusion is "due to the attempts to apply just rules in our modern society within the ancient terminology."⁹⁸ Rather, the negligence system "often do[es] not reflect the major factors which should determine whether immunity should be conferred upon the possessor of land."⁹⁹ The court further noted:

Some of those factors, including the closeness of the connection between the injury and the defendant's conduct, the moral blame attached to the defendant's conduct, the policy of preventing future harm, and the prevalence and availability of insurance, bear little, if any, relationship to the classifications of trespasser, licensee and invitee and the existing rules conferring immunity.¹⁰⁰

The court chose to apply "ordinary principles of negligence," holding that an owner of property owed all entrants a duty of reasonable care, regardless of their purpose for being on the land or whether the visit was with permission.¹⁰¹ By imposing a "unitary" standard and a duty of reasonable care in all circumstances, *Rowland* had the practical consequence of narrowing the range of cases in which a trial judge could dispose of a premises liability

97. *Rowland*, 443 P.2d at 566 ("In an effort to do justice in an industrialized urban society, with its complex economic and individual relationships, modern common-law courts have found it necessary to formulate increasingly subtle verbal refinements, to create subclassifications among traditional common-law categories, and to delineate fine gradations in the standards of care which the landowner owes to each. Yet even within a single jurisdiction, the classifications and subclassifications bred by the common law have produced confusion and conflict. As new distinctions have been spawned, older ones have become obscured.").

98. *Id.* at 567.

99. *Id.*

100. *Id.*

101. *Id.* at 568.

claim before trial. But while doing away with the tiered approach, the court provided a Delphic, and potentially significant, qualification: while status was no longer “determinative” of whether a duty of reasonable care was owed, it may “have some bearing on the question of liability.”¹⁰²

Despite this last limit on the boldness and scope of the decision, *Rowland* triggered much interest on the part of other courts and scholars, with many predictions that the unitary approach was destined to replace status-based rules.¹⁰³ As it turned out, there was no flood of fundamental reform to the status-based regime over the next forty years: only a few jurisdictions followed California and completely eliminated status as the basis for differing duties, while a much larger group melded the invitee and licensee category, recognizing a duty of reasonable care to everyone on land with permission, but continuing to impose a far more limited duty when the entrant was a trespasser.¹⁰⁴ The remaining states, a strong minority, retained all three statuses but continued the time-honored approach of making modest adjustments to the common law, generally in the direction of greater landowner liability.¹⁰⁵ It was the variegated collection of approaches that faced the reporters of the Third Restatement (Tentative Draft No. 6, 2009) as they set out to “restate” the law of premises liability.

III. THE ALI LABORATORY CREATES THE “FLAGRANT TRESPASSER”

The reporters were faced with an interesting situation when considering the law of premises liability. By their count, the states were basically split down the middle, with about half retaining the three-tiered/status approach; the rest either collapsed invitees and licensees into a single category and imposed the garden-variety duty of reasonable care (but continued to recognize a circumscribed duty to trespassers), or followed California and

102. *Id.*

103. See James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467, 512 n.163 (1976) (citations omitted).

104. *Id.* at 513–14.

105. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 51 cmt. a reporters’ note & table (Tentative Draft No. 6, 2009); see also Ann Fievet, Comment, *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 (2009) (summarizing the common law).

adopted a unitary approach.¹⁰⁶

As an initial matter, the ALI decided to meld the categories of invitees and licensees, so that both classes of entrants on land were owed a duty of reasonable care.¹⁰⁷ This move was eminently sensible—after all, both groups are on the premises with the owner’s permission and thus impose no “taking” or infringement on the right of quiet use and enjoyment nor upon the related right to exclude unwanted visitors from the premises.¹⁰⁸ It is also the case that there is often no greater burden imposed on the property owner for social, as opposed to business, guests. And, as mentioned previously, this position is consistent with the law in about half of the states since the Second Restatement.¹⁰⁹

The new provisions also went a step further, tacking in the direction of a minority of states led by California in *Rowland* that extend the duty of reasonable care even to trespassers.¹¹⁰ In so doing, the ALI adopted a unitary standard, but added an important and quite new concept, reflecting the broad array of motives that may explain a trespasser’s presence on the premises—the duty of reasonable care did *not* extend to “flagrant trespassers.” Such miscreants were owed only the traditional minimal duty of care owed to persons on the land without permission, i.e., the duty to merely refrain from inflicting “willful and wanton injury.”¹¹¹ The motivation of the reporters was clear: the “trespasser” category contains actors who enter the premises with a broad range of motivations and who engaged in a variety of conduct—some as

106. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 51 cmt. a reporters’ note & table (Tentative Draft No. 6, 2009).

107. See *id.* at cmt. a.

108. See *id.* at cmt. c (listing justifications for moving toward a unitary standard).

109. See RESTATEMENT (SECOND) OF TORTS § 339 cmts. b, c (1965).

110. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 51 cmt. a reporters’ note & table (Tentative Draft No. 6, 2009) (listing states that extend a full duty of reasonable care to trespassers: Alaska, California, Colorado, Hawaii, Louisiana, Montana, Nevada, New Hampshire, New York).

111. *Id.* § 52(a). Additionally, section 51, comment j describes the circumstances in which even states adopting a unitary standard are reluctant to extend the duty of reasonable care to all trespassers, i.e., to trespassers who enter the property to commit a crime or act in some other way repugnant to the possessor’s right of exclusive control. Section 52, comment a, defined the category undeserving of a duty of reasonable care as when the trespass is “egregious or atrocious,” or “sufficiently offensive to the property rights of the land possessor it is unfair to subject the possessor to liability for mere negligence.” An earlier draft used the terminology “culpable” trespassers. See *infra* note 115 and accompanying text.

benign as the child who cuts across another's yard on the way to school, some as malign as a burglar imbued with felonious intent. The response of the Second Restatement to this array of circumstances was to carve out a few context-specific exceptions (the child trespasser doctrine being the best-known).¹¹² The focus in the Third Restatement (Tentative Draft No. 6, 2009) became whether the infringement of the owner's property was "highly culpable or entitlement destructive."¹¹³

The reporters tried to capture the distinction by identifying in the comments to section 52 those trespassers whose presence on the property was "egregious or atrocious" (or elsewhere "particularly egregious") and thus "so antithetical to the rights of the land possessor to exclusive use and possession" that it is "unfair" to impose anything more than the most minimal duty of care.¹¹⁴ The reporters then made a most unusual move, eschewing the step that most lawyers follow instinctively when a term of art is employed, that is, providing a definition. Instead, the reporters "[left] each jurisdiction employing the concept to determine the point along the spectrum of trespassory conduct at which a trespasser is a 'flagrant' rather than an ordinary trespasser."¹¹⁵

In an effort to provide at least some guidance, the reporters identified two examples that "are sufficiently extreme as to be applicable regardless of where a jurisdiction chooses to draw the [flagrant/ordinary] line."¹¹⁶ The first case involves a person walking in a city park after the posted hours it was open to the public, an act that was trespassory but not highly inconsistent with the rights of the city, while the second—the flagrant trespasser— involves a burglar who is injured while trying to flee the

112. See *supra* note 111.

113. Ellen M. Bublick, *A Restatement (Third) of Torts: Liability for Intentional Harm to Persons—Thoughts*, 44 WAKE FOREST L. REV. 1335, 1346 (2009).

114. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 52 cmt. a (Tentative Draft No. 6, 2009) (Tentative Draft No. 6, 2009); see also *id.* at cmt. b (noting that the presence of flagrant trespassers is "so inconsistent with and offensive to the rights of the land possessor").

115. *Id.* at cmt. a. It is interesting to note that the reporters say "no single word can capture the concept," but then provide what amounts to a single appellation: "flagrant." *Id.*; see also James A. Henderson, Jr., *The Status of Trespassers on Land*, 44 WAKE FOREST L. REV. 1071, 1077, n.35 (2009) (criticizing the use of the term "flagrant" and noting that a previous draft used, and actually defined, the term "culpable").

116. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 52 cmt. a reporters' note (Tentative Draft No. 6, 2009).

defendant's premises.¹¹⁷ Other illustrations are offered to show "factors that might be relevant to a determination whether a trespass was flagrant," including a pair of examples in which the injured person was engaged in highly culpable behavior but in one instance did not also implicate the right of the possessor "to use that property as the possessor sees fit,"¹¹⁸ and another pair which are distinguished by repeated warnings and damage to property.¹¹⁹

The reporters then set out to justify why they took the highly unusual step of recognizing a new legal concept but not defining it. First, different jurisdictions might set the balance between safety concerns and the rights of property owners differently, giving more (or less) weight to the balance between communitarian and libertarian values.¹²⁰ Second, some jurisdictions might prefer "bright-line rules" to a more flexible standard that allows for case-by-case development.¹²¹ Third, and closely related to the second point, the reporters pay homage to the "common law process [that] depends on accumulated learning from individual cases" to help gradually define a concept that is "new to the Restatement."¹²²

The Reporters' Note identifies support for their choice, though none of it terribly convincing: extrapolation from a handful of criminal statutes, drawing negative inferences from a group of about ten state court decisions, and dicta from a single decision of

117. *Id.* at cmt. a, illus. 1, 2.

118. *Id.* at cmt. a. The reporters distinguish an injury occurring on property in conjunction with a crime on the property (flagrant trespass) and an injury that occurs after a crime was committed off the premises but where the injury occurs on the premises (ordinary trespass). *Id.* at cmt. a, illus. 3, 4.

119. *See id.* at cmt. a, illus. 5, 6. In illustration five, the landowner "erected large signs warning trespassers to keep off and employed a private security firm to patrol the area." *Id.* at cmt. a, illus. 5. In illustration 6, the trespassers repeatedly returned to the landowner's property to destroy it despite verbal warnings. *Id.* at cmt. a, illus. 6.

120. *See id.* at cmt. a ("[D]ifferent jurisdictions . . . will have different values about the relative importance of protecting the safety of entrants on land and protecting the rights of land possessors . . .").

121. *Id.* On the other hand, "[o]thers may prefer to adopt more general standards that allow the factfinder to take into account all of the facts and circumstances of the case." *Id.*

122. *Id.* This, as will be seen, is an understatement: the concept is new not just to the Third Restatement but to the law more broadly. *See, e.g.,* Bublick, *supra* note 113, at 1346 ("Introducing the new category 'flagrant trespasser' into the law was a subject of concern precisely because the category created a division where none had previously been, requiring new common-law development of the concept by judges.").

the Alabama Supreme Court.¹²³

The first authority cited is the legislative push-back from the unitary standard of care recognized in *Rowland v. Christian* in the form of a California statute that stripped a person injured on the land from a claim based upon mere negligence if they were in the process of committing one of a list of twenty-five felonies, and similar legislation in five other states and British Columbia.¹²⁴

Next, the reporters point to the post-*Rowland* decisions that refused to adopt a unitary standard that encompassed trespassers because “a criminal intruder who is injured should not be able to sue the negligent land possessor.”¹²⁵ They summarized these cases, observing that “no source has been found expressing any dissent to the proposition that land possessors should not be liable for negligently injuring a criminal trespasser.”¹²⁶

Their most direct case authority is a decision of the Alabama Supreme Court, which distinguishes “mere’ trespassers” from trespassers who are on the premises with the intent to commit a crime.¹²⁷ According to the reporters, *Ryals v. U.S. Steel Corp.*¹²⁸ “employs different duties for each class of trespasser.”¹²⁹ A closer look at the opinion, however, weakens the precedential value, as the case turned on whether the plaintiff adduced sufficient evidence of wanton misconduct, with the recognition of two classes of trespassers appearing in dicta.¹³⁰

These and the other cited sources do support the view that all trespassers should not be treated the same,¹³¹ as the common law

123. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 52 cmt. a reporters’ note (Tentative Draft No. 6, 2009).

124. *Id.* The five additional states are Alaska, Arizona, Colorado, Louisiana, and Washington.

125. *Id.*

126. *Id.*

127. *Id.*

128. 562 So. 2d 192 (Ala. 1990).

129. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 52 cmt. a reporters’ note (Tentative Draft No. 6, 2009).

130. *Ryals*, 562 So. 2d at 193–95 (issue presented was whether plaintiff adduced sufficient of wrongdoing to withstand summary judgment).

131. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 52 cmt. a reporters’ note (Tentative Draft No. 6, 2009); see also, e.g., *Ryals*, 562 So.2d at 193 (noting that “trespassers who enter upon the land of another with the manifest intent to commit a criminal act” are trespassers “to whom the landowner owes only the duty not to intentionally injure them” while “mere trespassers” are trespassers “to whom the landowner owes the duty not to wantonly injure them”).

has done for years by recognizing exceptions for children, known trespassers, and so forth,¹³² and given the intuition (or in their language “widespread sentiment”) that someone who enters another’s land without permission intending to commit a serious wrong is undeserving of a duty of reasonable care from the putative victim.¹³³ And the statutory provisions referred to, along with the scattered language in the cited opinions, do support a minority view that *criminals* are undeserving of a duty of due care.¹³⁴ What is lacking is any support for creating an entirely new category: the “flagrant trespasser.” This, the reporters recognize, albeit delicately: “The synthesis of land-possessor duties provided in this Chapter and Section employs different terminology than that used in the Second Restatement or in the reforms to that law that have emerged since.”¹³⁵

132. *E.g.*, Robert S. Driscoll, Note, *The Law of Premises Liability in America: Its Past, Present, and Some Considerations for its Future*, 82 NOTRE DAME L. REV. 881, 885 (2006) (discussing common-law liability for trespassers and noting that exceptions exist where “the landowner knows or has reason to know that members of the public constantly trespass, knows or has reason to know of a specific trespasser on the land, or with trespassers who are children.”).

133. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 52 cmt. a reporters’ note (Tentative Draft No. 6, 2009); *see also, e.g.*, Peterson v. Balach, 294 Minn. 161, 165, 199 N.W.2d 639, 642 (1972) (“Burglars are trespassers; vandals are trespassers. We have criminal statutes governing trespassers. Sweeping away all distinction between trespassers and social guests and business invitees is a drastic step to take because there may be, and often is, good reason to distinguish between a trespasser and a social guest.” (internal citation omitted)).

134. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 52 cmt. a reporters’ note (Tentative Draft No. 6, 2009) (noting that “[a] handful of states have statutes that limit the ability of plaintiffs to recover for injuries suffered in the course of committing (or fleeing the commission of) certain crimes.”); *see, e.g.*, COLO. REV. STAT. ANN. § 13-80-119 (2005) (“No person . . . shall have a right to recover damages sustained during the commission of or during immediate flight from an act that is defined by any law of this state or the United States to be a felony, if the conditions stipulated in this section apply.”); *Ryals*, 562 So. 2d at 193 (noting that “trespassers who enter upon the land of another with the manifest intent to commit a criminal act” are trespassers “to whom the landowner owes only the duty not to intentionally injure them”).

135. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 52 cmt. a reporters’ note (Tentative Draft No. 6, 2009). The new rules include an exception that protects even some “flagrant trespassers” because they are “unforeseeable or more difficult to protect.” *Id.* at § 52(b).

IV. THE THIRD RESTATEMENT AND THE ROAD NEVER BEFORE TAKEN

As was the case when the ALI adopted the principle of strict liability in tort for product-related injuries, the ALI set sail in uncharted waters when it recognized a new premises liability category, the “flagrant trespasser.” As the reporters admit, “[i]n all candor, the place where we have carved at the joint of this conflict between tort and property concerns does not reflect anything that might be described as a majority or even plurality rule.”¹³⁶ There are a number of criticisms that can be leveled at the ALI for adopting this approach. First, the rules covering injuries to such miscreants are internally inconsistent. Second, the term used to describe the category of undeserving plaintiffs is inartful. Third, it is unwise to announce but refuse to define it. Fourth, the creation of a new legal concept represents an illegitimate exercise of power.

A. *The Inconsistency Critique*

Section 52 is flawed because it reflects inconsistent rationales: nodding toward normative concerns, it rejects an obligation of due care for really bad (“flagrant”) trespassers, while at the same time nodding toward instrumental/efficiency concerns by recognizing exceptions that impose due care when a flagrant trespasser is helpless and unable to protect himself—recognizing that, in such a setting, the landowner is in the best position to ameliorate danger.¹³⁷

This critique, propounded by James Henderson,¹³⁸ is weak. It is unsurprising that a restatement provision fails the test of intellectual consistency: the common law of torts reflects a blend of policies, primarily corrective justice and instrumentalism and wealth-maximization, and just as we should expect the output from the legislative process to reflect compromise and trade-off, we should be tolerant of such “impure” doctrines in the common law.¹³⁹ As Ellen Bublick observed:

136. *Id.* at Reporters’ Memorandum.

137. Henderson, *supra* note 115, at 1076–77.

138. *Id.*

139. Jane Stapleton, *Controlling the Future of the Common Law by Restatement*, in *EXPLORING TORT LAW* 262, 266–67 (M. Stuart Madden ed., 2005). Another critique of the new premises liability provisions focuses on the “packaging,” that is that premises principles should not have been covered in a separate chapter at all, but rather were better located in the general discussion of duty in section 7. See Stephen D. Sugarman, *Land-Possessor Liability in the Restatement (Third) of Torts: Too*

Of course, a Restatement cannot create a grand scheme that unites all disparate tort doctrines into a single uniform framework. Nor can the drafting process unearth an essential taxonomy of the subject. Yet 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.¹⁴⁰

B. *The Terminology Critique*

The narrowest concern raised by how the Third Restatement handles injuries to trespassers is the choice of the word “flagrant” to describe the category of injured entrants who are undeserving of a duty of due care. The reporters state that the term “flagrant” is used “in the sense of egregious or atrocious rather than its alternative meaning of conspicuous.”¹⁴¹ This was a change from earlier drafts, which used the term “culpable.”¹⁴²

Professor Henderson takes issue with the terminology, preferring either the initial term used (“culpable”), or replacing it with a word such as “undeserving,” or “reprehensible.”¹⁴³ To Henderson, the ALI’s final formulation fails to capture the lack of moral standing of a particular trespasser (rather than merely the wrongfulness associated by an “entry without permission, as such”).¹⁴⁴

The reporters acknowledge the problem by trying to take one possible meaning of flagrant off of the table: the sense that it could mean “conspicuous” (for example, a noisy entrance intended to call attention to the intrusion on to defendant’s property).¹⁴⁵ And they admit that “no single word can capture the concept,” although

Much and Too Little, 44 WAKE FOREST L. REV. 1079 (2009).

140. Bublick, *supra* note 113, at 1335–36 (2009); *see also* GILMORE, *supra* note 5, at 108–09 (“[T]he components of the formalistic approach have included the search for the theoretical formulas assumed to be of universal validity and the insistence that all particular instances should be analyzed and dealt with in the light of the overall theoretical structure. . . . [W]e will do well to be on our guard against all-purpose theoretical solutions to our problems.”).

141. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM, § 52 cmt. a (Tentative Draft No. 6, 2009).

142. *Id.* § 52(a).

143. Henderson, *supra* note 115, at 1077. Other meanings that are implicitly excluded include “blatant,” “glaring,” and “obvious.” MERRIAM WEBSTER ONLINE, <http://www.merriam-webster.com/> (last visited Mar. 16, 2011).

144. Henderson, *supra* note 115, at 1077.

145. RESTATEMENT (THIRD) OF TORTS: LIAB FOR PHYSICAL & EMOTIONAL HARM, § 52 cmt. a (Tentative Draft No. 6 2009).

that, of course, is not responsive to whether “flagrant” comes closest to capturing both the factual settings and the policies implicated.¹⁴⁶ The reporters also try to make clear the focus is not solely upon the intent of the entrant, as when a bank robber’s escape leads to a private yard where an injury occurs.¹⁴⁷ In such a circumstance the felon would not, despite being a bad person, be considered a “flagrant” trespasser because the entrance did not strip the owner of her “rights to personal security,” as compared to a thief injured on the premises in the process of an effort to burglarize the premises.¹⁴⁸

Such outcomes are, admittedly, “counter to some intuitions” but reflect the singular focus on the extent to which the wrong is “antithetical to the rights of the land possessor to exclusive possession and use of the land.”¹⁴⁹ While Professor Henderson’s critique has merit, his preferred locutions add little that is not available to a person trying to capture the gist of the section from a close reading of the black-letter law and comments.

C. *The Lawmaking Critique*

The reporters are candid. They recognize that they have created a legal category where one never existed before: “The synthesis of land-possessor duties provided in this Chapter and Section employs different terminology than that used in the Second Restatement or in the reforms to that law that have emerged since.”¹⁵⁰ The ALI has in the past only occasionally undertaken to identify an important new principle, justified not by a synthesis of court decisions but rather on a belief that existing law was flawed, with the best example in the torts context the recognition of “strict liability in tort” in section 402A of the Second Restatement.¹⁵¹

Reluctance to remake the law makes sense on a number of grounds. First, it is consistent with the common law method, which relies upon many judges deciding many cases involving many variations in the facts over time. The intrinsic conservatism of the common law approach was reflected in the observation of Arthur

146. *Id.*

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.*

151. *See supra* notes 40–58 and accompanying text.

Corbin, who urged the ALI of the 1930s to proceed cautiously in its law reform efforts: “[T]he best way to turn mores into law is to do it piecemeal by the ‘molecular motion’ of the courts.”¹⁵² This general preference for incrementalism over bold strokes was well described by Cass Sunstein:

“Anglo-American courts often take small rather than large steps, bracketing the hardest and most divisive issues.

....

... It is alert to the existence of reasonable disagreement in a heterogeneous society. It knows that there is much that it does not know; it is intensely aware of its own limitations. . . . It avoids clear rules and final resolutions. Alert to the problem of unanticipated consequences, it sees itself as part of a system of democratic deliberation; it attempts to promote the democratic ideals of participation, deliberation, and responsiveness. It allows continued space for democratic reflection”¹⁵³

Guido Calabresi described how the “slow, unsystematic, and organic quality of common law” meant that “no single judge could ultimately change the law, and a series of judges could only do so over time and in response to changed events or to changed attitudes in the people.”¹⁵⁴

One can extract from such classic discussions of the common law method the following characteristics:

- *Modesty.* Judges working in the common law system must be aware of the inability of humans to solve complex problems. They should proceed with humility and a recognition of the risk of causing unintended consequences through the exercise of judicial power. Even the wisest judge should display a Burkean reluctance to attack—let alone try to solve—grand problems.¹⁵⁵ As Benjamin Cardozo observed, “The common law does not work from pre-established truths of universal and inflexible

152. Arthur L. Corbin, *The Restatement of the Common Law by the American Law Institute*, 15 IOWA L. REV. 19, 28 (1930).

153. CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT ix–x (1999).

154. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUES 4, 5 (1982).

155. David A. Strauss, *The Common Law Genius of the Warren Court*, 49 WM. & MARY L. REV. 845, 857–60 (2007) (“It is unwise to try to resolve a problem without deferring to some degree to the collected wisdom reflected in what others have done when faced with a similar problem in the past.”); see also GRANT GILMORE, THE AGES OF AMERICAN LAW 99–100 (1977) (“Man’s fate will forever elude the attempts of his intellect to understand it.”).

validity to conclusions derived from them deductively. Its method is inductive”¹⁵⁶

• *A preference for precedent.* Common law judges do not generally work on a blank canvas, and this is not just due to a generalized preference for relying upon judicial precedents. Rather, it reflects a healthy respect for a “rough empiricism” and an inclination toward concrete solutions to specific problems, rather than the tackling of what are invariably complex issues via abstract notions of how the world should be.¹⁵⁷ The result is doctrine “forged from . . . the hammer and anvil of litigation” and a system built by the “gradual accretion of special instances,”¹⁵⁸ i.e., a system characterized by “[e]volution, not revolution [and] slow and unconscious adaptation”¹⁵⁹

• *Dialogue.* Common law judges can be seen as pursuing a version of the scientific method. They welcome the opportunity to test possible outcomes and reasoning by considering the decisions of other judges facing similar problems.¹⁶⁰ In turn, the common law judge’s decision becomes a data point for the next judge who faces an identical, or even related, fact situation, who then asks whether the earlier decision appears to have been a wise resolution. In this sense, the common law judge launches a “trial balloon,” whose virtue is then measured by the judges that later come to face a similar question.¹⁶¹ As a venerable

156. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 22–23 (1921).

157. Strauss, *supra* note 155, at 858; *see also* BENJAMIN N. CARDOZO, *THE GROWTH OF THE LAW* 55 (1924) (“[The common law] process of trial and error determines [judgments’] right to reproduce their kind.”); O. W. HOLMES, *THE COMMON LAW* xix (Mark D. Howe ed., Harv. Univ. Press 1963) (1881) (“[T]he common law is . . . a lesson in the tentative and experimental character of judgment.”).

158. Harlan F. Stone, *The Common Law in the United States*, 50 HARV. L. REV. 4, 6, 7 (1937). For a considerably less sanguine view of the value of precedent, *see* FRANK ZAPPA WITH PETER OCCHIOGROSSO, *THE REAL FRANK ZAPPA BOOK* 327–28 (1989) (“**Case law** is what happens when a stupid judicial decision from one place gets cited as a ‘legal precedent,’ forming the basis for another stupid judicial decision somewhere else—like a computer virus.”) (emphasis in original).

159. Bruce Ackerman, *The Common Law Constitution of John Marshall Harlan*, 36 N.Y.L. SCH. L. REV. 5, 6 (1991) (noting also the cultural impact of intellectual Darwinism).

160. MUNROE SMITH, *JURISPRUDENCE* 21 (1908).

161. *See* Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 WM. & MARY L. REV. 1575, 1837 n.1043 (2001) (citing and quoting ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 176 (1962)); *see*

proponent of the common law method put it, common law rules are laid “down *provisionally* only.”¹⁶²

It is interesting to consider how the Third Restatement fares on these counts. The most obvious question is the wisdom of announcing a legal category where none existed before. Introducing the “flagrant trespasser” will require judges to consider, and construct, a new legal principle.¹⁶³ But “[t]he need for the division stemmed from issues of principle or policy—the need for a no-duty rule in some trespasser cases but not others—not from a need to update a Restatement project to match new doctrines that had been developed by common-law courts.”¹⁶⁴

However, the reporters did pursue a “rough empiricism” (what they call a “synthesis”),¹⁶⁵ albeit not by counting cases (the typical approach) but instead by teasing out of the judicial decisions that have rejected a unitary regime a perceived need to protect premises owners from entrants with a purpose fundamentally at odds with the rights of the owner.¹⁶⁶ In addition, and consistent with past practice, the reporters could point to the legislative reactions post-*Rowland* that have rejected extending a duty of due care to this sort of trespasser.¹⁶⁷

And how about dialogue? In a most unusual move, the reporters eschewed defining the “flagrant trespasser” category, while providing six examples of where the line might be drawn between flagrant and non-flagrant trespassers. This is a highly unusual maneuver, at least in the Third Restatement. In only one other place in the project did the reporters reflect uncertainty regarding the adopted position. In the discussion of “factual cause” (section 26), the reporters added a comment “n” that

also David R. Barnhizer, *Prophets, Priests, and Power Blockers: Three Fundamental Roles of Judges and Legal Scholars in America*, 50 U. PITT. L. REV. 127, 141–42 (1988) (arguing that the “real role of the Common Law judge” involves the ability to “release . . . hypothetical ‘trial balloons’”).

162. JAMES C. CARTER, *THE PROPOSED CODIFICATION OF OUR COMMON LAW 25* (1884) *microformed on Nineteenth-Century Legal Treatises* No. 1183 (Research Publications).

163. Bublick, *supra* note 113, at 1346.

164. *Id.*

165. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 52 cmt. a (Tentative Draft No. 6, 2009).

166. *Id.*

167. See Greenwald, *supra* note 39, at 301 (“The second series of Restatements . . . [has] come increasingly to draw upon statutes as sources of future common-law developments.”).

discusses “lost opportunity or lost chance as harm.” After describing the circumstances in which the doctrine has been recognized (characterized as “halting”) the reporters declined to endorse the concept.¹⁶⁸

Interestingly, the Second Restatement made far greater use of a similar deferential device, the “caveat.” Caveats were appropriate because “the function of the reporter was to state the law as it is rather than to speculate as to what the law should be in cases where there is substantially no authority.”¹⁶⁹

There were numerous caveats in previous restatements of torts. For example, in the discussion of strict liability for “ultrahazardous activities,” section 520 added: “*Caveat*: The Institute expresses no opinion as to whether the construction and use of a large tank or artificial reservoir in which a large body of water or other fluid is collected is or is not an ultrahazardous activity.”¹⁷⁰ More broadly, the first section of the Second Restatement announced that subsequent sections will contain many caveats reflecting the generative nature of tort law.¹⁷¹

The failure of the Third Restatement to define “flagrant trespasser” can then be seen as consistent with examples from past restatements as well as the “dialogic” ideal of the common law. The tactic allows for, indeed invites, the full and rounded consideration

168. The reporters identified two reasons for this position: the fact that the doctrine “reconceptualizes the harm” means that the concept is not simply a matter of factual causation, and because courts have so far confined the concept to medical malpractice contexts, it was part of “a specialized area of negligence liability outside the scope of this Restatement.” RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 26 cmt. n (2005).

169. See Patrick J. Kelley, *The First Restatement of Torts: Reform by Descriptive Theory*, 32 S. ILL. U. L.J. 93, 105 (2007) (quoting Francis H. Bohlen, reporter for the Restatement (First) of Torts (1934)).

170. RESTATEMENT (FIRST) OF TORTS § 520 cmt. c (1938). This limitation seems surprising given that the seminal case applying strict liability for harmful uses of land, *Rylands v. Fletcher*, [1868] UKHL 1, (1868) LR 3 HL 330, has been discussed in many American cases and was well known and the subject of significant commentary, including an extended discussion in the reporter’s treatise. See WILLIAM L. PROSSER, LAW OF TORTS § 77 (3d ed. 1964).

171. RESTATEMENT (SECOND) OF TORTS § 1 cmt. e (1965) (“Because of the probability that the tendency to give legal protection to interests now unprotected and to increase the protection given to those now imperfectly protected will continue, the Restatement of this Subject contains numerous ‘Caveats.’ These call attention to the fact that the Institute takes no position as to whether the protection given to a particular interest by the rule stated in the Section to which the Caveat applies should or should not be extended to other analogous situations which have not been the subject of judicial consideration.”).

of the issues raised (like whether a state would prefer a bright-line rule that applies to all felons injured on the premises), while providing examples that can be used to guide, if not direct, the analysis by courts.

The “flagrant trespasser” is not a “bright-line concept but one that is left to develop in future cases. But it does have the advantage of a reasoned, progressive approach that avoids the confusing array of classes of trespassers that are sprinkled throughout decisions,”¹⁷² while at the same time recognizing the appealing notion that not all trespassers are alike. And, the very restatement process itself, with all of its layers of review, involving hundreds of specialists in the field, provides some assurance that the position adopted will not be wildly off the mark.¹⁷³

In summary, the Third Restatement reporters can cleave themselves to the words of one of the greatest twentieth-century thinkers (and one-time ALI director) Herbert Wechsler: “The crucial point has always seemed to me to be that a decision when it breaks new ground . . . initiates a dialogue by its supporting reasons, reasons whose persuasiveness to others will largely be the measure of its ultimate success.”¹⁷⁴

D. *The Legitimacy Critique*

By any measure, the ALI and its restatements play an important role in debates about legal rules, especially in torts. Regularly cited by courts, and undoubtedly relied upon by

172. Michael D. Green & Larry S. Stewart, *The New Restatement's Top 10 Torts Tools*, TRIAL, Apr. 2010, at 47.

173. See Doug Rendelman, *Restating Restitution: The Restatement and Its Critics*, 65 WASH. & LEE L. REV. 933, 943 (2008) (“The restatement process does not specifically follow a common law court’s adversary technique, with the reporter acting as judge, receiving adversaries’ briefs, and drafting an opinion for a collegial court. But the ALI’s formal process resembles the best features of a common law decision-making process: ‘[t]he combination of explicitly normative reasoning with a reliance on the lessons of the past, along with a recognition that both are indispensable.’ . . . Related areas are examined. Majority and minority rules are consulted. The reporter’s research, ideas, and articulation are tested against others’. The reporter’s drafts are exposed to the curiosity and candor of the members’ consultive group, the advisers, the council, and the members. Each phase is a potential intellectual crucible, although the testing may occur off the public stage. Although its membership could be more diverse, the ALI internal process is rigorous and intellectually heterogeneous within the intellectual community of doctrinal legal analysis.”).

174. Herbert Wechsler, *Address at the Annual Dinner of the American Law Institute* (May 17, 1984), 61 A.L.I. PROC. 408, 411 (1985) (on file with author).

practitioners even more often, restatements help shape the law in an increasingly broad array of fields.¹⁷⁵ This great influence is in large measure due to the level of talent arrayed for projects, especially the reporters and, to a lesser extent, the advisers, who have deep and broad involvement in the subject areas covered. These drafters, though as a group highly regarded in their particular areas of expertise, are then necessarily unrepresentative of the legal profession, let alone the citizenry generally.¹⁷⁶

The selection process for key roles within the ALI is even less democratic: the council is selected from the membership (typically about 3,000 academic and practicing lawyers and judges, but with little actual competition for leadership positions, as is the case with the governance of many non-profits).¹⁷⁷ The council has the sole power to appoint the director.¹⁷⁸ The director, then, has broad authority to both identify the topics appropriate for “restating” as well as to appoint the reporters and advisers, although the practice is for the director to consult members of the council before making these important decisions.¹⁷⁹ And while reporters typically bring knowledge and expertise to deliberations, their degree of influence is uneven. As one reporter wrote, “The text of a restatement . . . is largely the product of the reporter. The reporter must answer, of course, to a group of advisers, but their oversight is incomplete” due to “[l]imitations of time and expertise.”¹⁸⁰

Once the advisers sign off, the reporters seek approval from the council (a group of approximately fifty-five), but the level of understanding and preparation in this group may not be the match for a strong-willed reporter.¹⁸¹ The final step is approval by the entire membership, but in practice many issues are resolved by a relatively small group who prepare for the annual meeting (by reading the voluminous materials beforehand) and who are willing,

175. See *supra* notes 4–5 and accompanying text. The ALI has also been influential in non-restatement projects, such as the Model Penal Code. AMERICAN LAW INSTITUTE, PAST AND PRESENT ALI PROJECTS 4 (2010), available at http://www.ali.org/doc/past_present_ALIprojects.pdf.

176. See Adams, *supra* note 24, at 239; Posner, *supra* note 62, at 323.

177. AM. LAW INST., RULES OF THE COUNCIL, 1–4 (2007), available at http://www.ali.org/doc/rules_council.pdf.

178. *Id.* at 8.

179. E-mail from Lance Liebman, ALI Director, to author (Oct. 26, 2010) (on file with author).

180. Charles W. Wolfram, *Bismarck's Sausages and the ALI's Restatements*, 26 HOFSTRA L. REV. 817, 830 (1998).

181. *Id.* at 831–32.

despite their busy schedules, to sit through hours of debate.¹⁸² Indeed, on occasion, a provision is considered and passed by fewer than one hundred members.¹⁸³

Such a closed loop of a system would be unacceptable if the end result of ALI projects were binding on courts, which, of course, they are not. Nevertheless, this is an area of concern because of this combination of high influence and low representation.¹⁸⁴ This critique is especially persuasive in the context of the exercise of judicial power, because federal judges, and many state judges, constitute the least democratic branch of government, largely immune from the discipline provided by the need to regularly stand for general election (often termed “the countermajoritarian difficulty”).¹⁸⁵

And, just as no ALI pronouncement binds any judge (let alone legislator), the legislature and executive branches have the power (within constitutional limits) to overrule a court’s decision to adopt a restatement rule. However, “Restatements can have the same dire consequence [as a statute]—relied upon by a tribunal for a proposition that burdens a litigant in a proceeding no matter how strenuous the litigant’s argument that the restatement provision in question has it wrong.”¹⁸⁶

Although ALI positions are not the result of anything close to a democratic process,¹⁸⁷ the institute’s handiwork is intended to, and often does, impact society. And having a meritocratic rather than democratic process yields not only decision makers who are knowledgeable, but also the virtue of members less likely to be swayed by the passions of the street. Ultimately, the level of influence accorded a restatement rule is determined in the rough and tumble of litigation in coming years. In this sense, the ALI’s work, though antidemocratic in origin, will be tested and will stand or fall in the marketplace of ideas.

182. *Id.* at 832.

183. *Id.*

184. *See id.*; *see* Elson, *supra* note 68.

185. *See* JAMES W. CAESAR, AMERICAN GOVERNMENT, ORIGINS, INSTITUTIONS, AND PUBLIC POLICY 410 (2002).

186. Wolfram, *supra* note 180, at 817. Professor Wolfram notes the “strange exceptions . . . [involving] the United States Northern Mariana and Virgin Islands where local statutes make a Restatement position binding . . . in the absence of contrary local authority.” *Id.* at 819 n.8.

187. *Id.* at 829 (“[T]he ALI process of generating a Restatement is hardly artful or even inartfully democratic.”).

V. CONCLUSION

The Third Restatement made welcome changes to premises liability law, especially the merging of invitee and licensee categories, a move that reflects modern, rather than feudal concepts about the relative value of safety versus the prerogatives of landowners. The proposals will also hopefully bring order where there is now a morass of rules and exceptions and exceptions to exceptions, not just differing among jurisdictions, but even within a single jurisdiction. There is also much positive about heightened concern with safety in the many contexts when trespassers are injured on the premises. And, as a measure of progress, the restatement treatment of trespassers has been reduced from seven to two sections, a positive step in the direction of a core ALI goal of simplifying the law.

What is not so clear is whether the new category of flagrant trespasser is the right approach. As a creature of normative policy, it reflects the common sense notion that wrongdoers are generally disfavored in the law: the equitable doctrine of “unclean hands” or the common law rule that a plaintiff’s gross negligence precludes recovery from a defendant whose conduct was merely negligent are but two examples. It also has support in scattered positive law, like the state statutes that preclude liability when a trespasser is injured while committing a felony.¹⁸⁸ The rub is the absence of judicial decisions, with the ALI proceeding in largely uncharted territory, not restating the law but rather making it up. This is inconsistent with the most recently articulated ALI position: “[The restatement aims] at clear formulations of common law and its statutory elements or variations and reflect the law as it presently stands or might plausibly be stated by a court. Restatement black-letter formulations assume the stance of describing the law as it is.”¹⁸⁹

The handling of flagrant trespassers thus lays bare the core tension that exists in the very DNA of the elite and undemocratic ALI: whether it should be a force for bold law reform or a merely a tidier of messy common law doctrine, whether it should stake out “what law should be” rather than merely stating “what the law is.”¹⁹⁰

188. See RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 52 reporters’ note (Tentative Draft No. 6, 2009).

189. *Projects, Overview*, AMERICAN LAW INSTITUTE, <http://ali.org/index.cfm?fuseaction=projects.main> (last visited Mar. 17, 2011).

190. HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS* 743–44 (William N. Eskridge, Jr., & Philip P. Frickey eds., 1994); see also Roberta Cooper

The decision to create the flagrant trespasser category was made without grounding in the product of many judges working on a problem on a case-by-case basis, the core strength of the common law process. The bold move is ameliorated somewhat by the “punt,” reflected in the comments, in which the ALI expressly eschews providing a core definition for the “flagrant trespasser” concept, expressly leaving that task to judges in future cases. Whether this compromise was wise will face the drafters of the Fourth Restatement.

Ramo, *The President's Letter: On Compromise and Civility: American and American Law Institute Values*, 32 A.L.I. REP. 3 (2010) (“Reaching an ALI-authorized position that achieves a fair view of the current state of law or an equally fair position of what the law should be requires good representation from all points of view, a respect for the majority view in the law across the country, and significant agreement on the part of advisers, Members Consultative Groups, the Council, and ultimately the entire membership.”), available at http://www.ali.org/_news/reporter/spring2010/2_Presidents_Letter.htm.