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An Analysis of Applications of the Restatement (Second) of Contracts in Connecticut and the Restatement (Second) and (Third) of Torts in Washington: Realizing the Restatements' Objectives in Practice

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With gratitude and honor this twenty-third day of April, two thousand and twenty-one:

Brendan W. Clark '21
At Hartford, Connecticut

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Introduction. The Restatements and Why They Matter—An Issue of Policy and Uniformity in the Law

Restatements of the Law—the most significant project of the American Legal Institute (ALI)—have long been a mark of America's shift toward uniformity in the law during the twentieth century. However, of principal concern, specifically, is the place of the Restatements in developing and shaping our modern conception of American legal practice. Studying the Restatements can help us to understand how the law is shaped and developed by a variety of different parties and interest groups, and the issues that arise from there.

In the case of the Restatement, our focus must begin with the legal academy: an elite group of educated counsel and academicians, practicing and advancing specific legal ideals and positions. Thus, our study will address the Restatement (Second) of Contracts and the Restatement (Second) and (Third) of Torts. These Restatements address different legal practice areas but share a common interest in being adopted at the state level. Restatements, by virtue of their development, are not controlling law. Instead, in order to become operative and enforceable, they must be adopted by judges in state and federal courts. Their influence is driven by the fact that they were created and developed by our nation's leading jurists and attorneys. Still, their existence and adoption raise a key question: how do we accept an expansive and uniform legal code that has been created outside of the democratic process?

As a policy concern, adoption of Restatement provisions can have a myriad of effects on legal outcomes in court cases. Each time that the law is changed through adoption and judicial remedy, the opportunities and remedies available to litigants change, and their interactions with the legal system are realized differently. The common law, then, has a crucial impact on how citizens interact with and seek recovery within our legal system. In the case of the Restatements, their adoption in many cases exits with the common law. However, on certain occasions, the

Restatements conflict with and overrule the common law. The policy implications when those moments arise are crucial to how we understand the development and change that occurs within our legal system, and how the legal system responds to the constraints and demands of cultural touchstones in the law. Likewise, the Restatements can afford us a valuable window into how the law does not merely reflect the will of the people generally. Instead, they both reflect the law and also suggest how the law might develop and force us to consider what the existence of our specific legal processes mean in terms of equity and justice.

The Restatements can thus be understood as a powerful tool in the arsenal of sources and materials which contribute to the judicial decision-making process. They are not the sole impetus for legal change, but they are a critical one that is persuasive to the judges and the counsel who construct arguments and make legal change. To truly understand American law, one might undertake a thorough and considered study of the sources that lead to development and change. In the case of the Contracts and Torts Restatements considered here, they represent two major areas of legal development that both concern recovery: contract recovery for damages in notions such as business and profit, and torts in issues of harm and emotional distress. Both areas of the law have the ability to inflict serious harm on individual interest and, further, share a common interest in providing meaningful restitution that can confer justice. The courts here rely on the Restatement in order to define ambiguous and uncertain areas of the law and, in the case of damages, seek to explain how the legal community balances its interest in justice with specific policy positions.

Our study here will aim to consider the interactions and experiences of the Restatement at the state level. This is where, specifically in the area of the common law, uniformity becomes a central issue that can carry significant weight in advancing changes in the law. For contracts,

adjustments in the common law—and the potential for uniformity across state borders—raises contentious issues of reciprocity and insight into how business and corporate interests operate in the fragmentary legal system established by our Constitution. This study will begin with a survey of the Restatement's history and development—and the varied and often contentious relationship that different sects of the legal academy have with its provisions. Even so, they share a common faith in uniformity and the increased efficiency in the administration of justice that model codes and Restatements can offer.

Our study then turns to the Restatement (Second) of Contracts in Connecticut and will consider the nexus of business interests with contract principles in a state known for significant operations in the insurance industry, which regularly operate across state borders and carry wide implications for reciprocity in the law. The Restatement of Contracts also presents a key implication: how does the legal system respond to the needs of corporate interests and how does the academy, in their Restatement project, balance competing interests across a variety of contract issues. What recovery is available to the contractor and contractee, the lessee and lessor, the lienor and lienee? The resolution of each of these questions is predicated on an understanding of the thought that goes into judicial decisions. In our case, Connecticut's treatment and adoption of Restatement provisions reflects a careful balance but also an understanding of the law's place in the development of uniformity. Considering closely the impact and interaction of the Restatement on Connecticut's common law tradition helps us to realize both the power of influence in the development of the law and how we interact with our legal system. Further, from a policy perspective, the adoption of provisions of the Restatement of Contracts in Connecticut offers insight into how deliberate judicial decisions direct significant changes in the law. Each case, each decision, each set of facts presents a different legal issue that can be altered.

Our study next turns to an assessment of the Restatement (Second) and (Third) of Torts and its influence on recovery by litigants in the state of Washington. Again, the focus here turns on how the law is shaped and developed by competing interests and policy concerns. Torts, in particular, is an area of the law that addresses how the courts respond to human injury and suffering. In this context, the damage to interests is not merely pecuniary—as in contracts—but instead turns on damages to emotional distress and suffering. Studying the Restatement in Washington allows us to examine progressive jurisprudence at work, in the case of certain provisions, and is emblematic of the interaction between the law and policy interests. In the majority of cases considered in the Restatement of Torts, the specific efforts at legal uniformity do not reflect the reality of the common law but instead reflect well the efforts of law aimed at progress.

Our study of the Restatement of Torts in Washington also speaks to the influence of the legal academy on our conceptions of recovery and what constitutes sufficient justice. If the Restatement sets the terms and boundaries of claims for emotional distress and the liability for defective products, our own democratic interests and concerns are, in many respects, severely curtailed. Understanding the Restatements, then, is key to realizing again how judicial decisions are often shaped by and responsive to the beliefs and concerns of selected individuals. The challenge then of the Restatement in Washington is rectifying our conception of an egalitarian legal system with the narrow confines and prescriptions of a uniform code. In the case of tort and tort reform, the Restatement has at varying points in time privileged particular interests. With that said, those interests often do attempt to capture or state what may be considered the policy position that affords some measure of justice in accordance with the degree of harm.

This study of the Restatements will conclude in many ways where we began: with an assessment of the reception of the Restatements, but with a particular focus on what this means for recovery. Recovery is often front of mind for litigants and is, above all else, a statement by the courts on what the law considers sufficient for justice to have been served. The influence of the Restatements on conceptions of justice thus turns on a key question: whether we should accept a Restatement that emphatically does more than state what the law is, but also—at times—takes the liberty to adopt a minority viewpoint and state what the law should be. Ultimately, though it offers clarity in certain provisions of the law and may advance a policy position, the Restatement has become a policy necessity in clarifying the law for the judicial record.

It is this sense of the Restatement' indispensability among certain circles of judicial policy makers that demonstrate its necessary role in legal development. In reality, while there are certainly flaws in the Restatement process, a solution exists in a greater focus in the drafting process in assessing the realities and impact of litigant recovery. In their abstract form, developed with input from the legal academy and jurists, their impact is often left unaddressed. As a policy instrument, the Restatements would benefit from prior review and a considered reflection on what happens when they supplant existing state law. While each of these scenarios will invariably be presented as conflicting and different, the Restatements applications in Connecticut and Washington, as we shall consider, demonstrate a need to more acutely assess how the Restatements are applied in practice. This thesis will conclude with some suggestions for reform, particularly in light of balancing the Restatements' value as a tool of uniformity with the need to preserve and leave to the states themselves the ability to develop and advance the common law on issues of policy and recovery.

Chapter I. Restatements of the Law, the American Legal Institute, and Critics and Supporters of the Aspirational Restatement

Restatements of the Law, a series of treatises on the common law in the American judicial system, have long served as the principal achievement and product of the American Law Institute (ALI), a research association of academics and jurists who began with the intent of simplifying and distilling principles of the United States common law. The ALI's work—and its application in state courts—has been met with persuasive acceptance, especially by some liberal jurists in recent years, but also with condemnation from some conservative jurists who critique its alleged aspirational objectives and construction as a judicial treatise that lacks the input of the elected legislature.[1]

Black's has defined the Restatement as a treatise that focuses on "describing the law in a given area and guiding its development."[2] The Restatements distinctive format—of "black-letter rules, official comments, illustrations, and reporter's notes"—are frequently cited in judicial cases and used to adjust and supplement the common law systems found in United States jurisdictions.[3] Important to bear in mind, however, are the limitations of a Restatements influence: in legal argument and judicial decisions, it is merely persuasive (often utilized by litigants to fill gaps in a state's common law tradition) and its rules and comments are not binding on a Court unless it has been adopted within the jurisdiction by the highest court of an

[1] This critique, however, has its limits and the delineation of particular camps of judicial philosophy on the issue is offered here with some trepidation. For instance, the late Associate Justice Antonin Scalia assailed the Restatement (Third) of Restitution and Unjust Enrichment as "of questionable value" and suggested that the ALI had "abandoned the mission of describing the law and have chosen instead to set forth their aspirations for what the law ought to be." *Kansas v. Nebraska*, 574 U.S. 445, 475, 135 S. Ct. 1042, 1064, 191 L. Ed. 2d 1 (2015). However, Scalia's opinions within the same term and the term prior cited with approval earlier versions of the Restatements seven times across five cases. Director's Letter from Richard L. Revesz, American Law Institute (Winter 2016) (on file with the American Law Institute Archives).

[2] *Restatement*, Black's Law Dictionary (10th ed. 2014).

[3] *Id.*

individual state.[4] Still, it is the individual state courts that hold the singular power to rely on or accept Restatement principles in their decisions and enforce those principles on litigants.[5] Since their inception in 1923, there have been three versions of Restatements compiled at various periods, though not all categories of the law have seen subsequent revisions: the Restatements (First) refers to works completed between 1923-1944, the Restatements (Second) are those between 1952 and 1986, and the Restatements (Third) are those from 1987 to the present.[6]

A Restatement entry or "chapter" is encyclopedic and also practical in its format. Those Restatement entries typically appear as follows, first stating the principle itself (distilled from the common law tradition in various U.S. jurisdictions) followed by commentary on interpretation and application developed by the ALI. An illustration (described in abstract, algebraic terms) and a Reporter's Note of citations may also be appended. The example below, from the Restatement (Second) of Contracts, concerns the ALI's analysis of a particular aspect of the common law Statute of Frauds:[7]

> **§ 111 Contract of Executor or Administrator:**
>
> A contract of an executor or administrator to answer personally for a duty of his decedent is within the Statute of Frauds if a similar contract to answer for the duty of a living person would be within the Statute as a contract to answer for the duty of another.
>
> **Comment:**
>
> *a*. *Analogy to suretyship.* The first clause of § 4 of the English Statute of Frauds is treated as a special application of the suretyship provision of the second clause. Where the principal obligor dies before the promise in question is made, the case may not fall

[4] Black's, *supra* note 2.
[5] The decisions and adoption of specific Restatement principles in courts in the U.S. states of Connecticut and Washington will be examined in Chapter II and Chapter III, respectively.
[6] AMERICAN LAW INSTITUTE, https://www.ali.org/about-ali/story-line/ (last visited Nov. 21, 2020); For instance, this thesis concerns the Restatement (Second) of Contracts, released in 1981, and the Restatement (Second) and (Third) of Torts. The Restatement (Third) considers language from the 1960s and updates on product liability provisions that were circulated in the early 2000s.
[7] Statute of Frauds: "A statute (based on the English Statute of Frauds) designed to prevent fraud and perjury by requiring certain contracts to be in writing and signed by the party to be charged." *Statute of Frauds*, Black's Law Dictionary (10th ed. 2014).

> precisely within the usual definition of suretyship. See Restatement of Security § 82. But the situation is similar, and similar rules are applied. If there was no obligation before the death of the decedent, the promise is not within this clause. Where the executor or administrator makes a contract on behalf of the estate, the creditor's right against the estate ordinarily depends on the right of the executor or administrator to exoneration. Compare Restatement, Second, Trusts §§ 266-71A.
>
> *b. Exceptions.* The executor provision is subject to the same exceptions as the suretyship provision. See Topic 2, §§ 112- 23; Restatement of Security §§ 89-100. Thus the rule relating to novations stated in § 115 and the "main purpose" rule stated in § 116 are similarly applied to promises of executors or administrators.[8]

Restatements address a wide array of practice areas: specifically, the ALI has released Restatements in the fields of Contracts, Torts, Employment Law, Property, Restitution and Unjust Enrichment, Trusts, Judgments, *inter alia*.[9] The development of the Restatements is an extensive process, undertaken over the course of a decade, if not longer, and the reports are regularly revised (hence, Restatements are issued and referred to by their editions as the "Restatement (Second) of Contracts" or the "Restatement (Third) of Torts").

Generally, the Restatement process entails reporters who are selected and tasked with working to "structure the project, prepare drafts, and present drafts."[10] These reporters are frequently drawn from the legal academy (most are professors), and are often not practitioners.[11] The reporters then receive feedback on their work from appointed advisers as part of the ALI's Council, as well as volunteer ALI members—which include practitioners—who serve as part of the Members Consultative Group (MCG).[12] The Restatement itself goes through four formations prior to issuance: a preliminary draft (a substantial segment of the project completed) is circulated, followed by a Council draft (a working draft circulated to participants), a tentative

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[8] Restatement (Second) of Contracts § 111 (Am. Law. Inst. 1981).
[9] AMERICAN LAW INSTITUTE, https://www.ali.org/publications/#publication-type-restatements (last visited Nov. 23, 2020).
[10] AMERICAN LAW INSTITUTE, https://www.ali.org/about-ali/how-institute-works/ (last visited Nov. 23, 2020).
[11] AMERICAN LAW INSTITUTE, https://thealiadviser.org/inside-the-ali-posts/the-restatements-first-second-third/ (last visited Nov. 23, 2020).
[12] *Id.*

draft (that incorporates revisions received from the Council), and a discussion draft (which may include comments and feedback from ALI members at their annual meeting). A proposed final draft may be released if there exist extensive changes, and then the official text is released by the Institute and becomes the model text cited by courts, legislatures, and the academy, superseding previous versions.[13] Importantly, however, because the Restatements do not by themselves carry the force of law and lack the force of statutes, which can be replaced by successive amendments from the legislature, a court must adopt the new provisions or changes to Restatements each time they are issued in order for any portion to be binding on litigants. In this sense, the adoption of Restatements in courts is something of a patchwork, where an outdated Restatement of Contracts may still govern even if the ALI has formally announced a change in the language.

Together, the Restatement is the ALI's primary project that helps it aspire to its mission: to alleviate the "uncertainty" and "complexity" in the American legal system, which "cause useless litigation, often make it difficult to advise persons of their rights, and create delay and expense after litigation begins."[14] In definition, the Restatement's objective was understood as one that acts to limit and explain: in an early release of the plan establishing the ALI, William Draper Lewis—the Institute's inaugural director—argued that the "Restatement should express the principle which those responsible for its production regard as sound, and that, furthermore, where the present law though certain is not well adapted to promote the ends generally regarded as desirable."[15] Still, the ALI's founders envisioned practical limitations of the work: while the Restatement retained the latitude to express and suggest a change in the law, they must have care taken "to avoid proposing changes of a political or social character which would promote

[13] AMERICAN LAW INSTITUTE, *supra* note 10.
[14] AMERICAN LAW INSTITUTE, https://www.ali.org/about-ali/faq/, (last visited Nov. 24, 2020).
[15] William Draper Lewis, *Plan to Establish the American Law Institute*, 9 AM. BAR ASS'N J. 77, 77-79 (1923).

controversy."[16] This historical development and balancing of aspirations became a central aspect that governed the development and release of the ALI's Restatements.

Classical and Progressive Legal Thought: American Law at the Century's Turn and The ALI's Quest for Judicial Clarity

Lewis, a former dean at the University of Pennsylvania Law School, began his directorship of the American Law Institute shortly after its incorporation in 1923. Lewis, together with other notable early twentieth century jurists and lawyers such as Elihu Root,[17] George W. Wickersham,[18] former President and Chief Justice of the Supreme Court William Howard Taft, Second Circuit Court of Appeals Judge Learned Hand,[19] and then-Associate Judge of the New York Court of Appeals Benjamin Cardozo,[20] convened the ALI with both practical and aspirational aims in mind. As Root suggested in an early report, the objective of the Institute in pursuing the Restatements was "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."[21]

That original mission concerned achieving some measure of conformity across America's judicial system, especially at the federal level where interventions into state actions were becoming increasingly prevalent. The development of an increasingly significant federal forum, where rights and pleading practice became beset with rules and the minutiae of civil procedure,

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[16] Lewis, *supra* note 15, at 77.
[17] Root was Secretary of War under President William McKinley and was also Secretary of State under President Theodore Roosevelt.
[18] Wickersham, the first President of the ALI, was Attorney General under President William Howard Taft and later oversaw the Council on Foreign Relations.
[19] Hand was especially revered and recognized as laying the foundation for much of modern torts jurisprudence from his seat on the Second Circuit and is also known for his antitrust decisions in the Southern District. By some estimations, Hand is the most cited lower-court judge in opinions by the Supreme Court. GREAT AMERICAN JUDGES: AN ENCYCLOPEDIA 471 (John R. Vile, ed., 2nd ed., 2003).
[20] Cardozo would later be elevated as an Associate Justice of the Supreme Court by Herbert Hoover, though he is perhaps best remembered for his decisions on the New York Court of Appeals and his influence on the American common law tradition.
[21] Elihu Root, *Report Proposing the Establishment of an American Law Institute*, 1 ALI Proc. 14 (1923).

reflected a broader social trend as America and its courts become more connected. As Lawrence Friedman has suggested, the development of technology and new means of communication meant that the nation now "spoke, as it were, a common language; and shared a common culture."[22] Friedman applies this social theory to the legal world, suggesting that this development, in part, contributes to the legal expansion in power of the federal bench and also the need in the 1920s—at the time the ALI was constituted—to form a uniform judicial system as a bulwark that could protect the rights and interests of litigants and permit them to petition for relief within the federal system.

Such an expansion required as a predicate that effective, organized judiciary in order to restrain and shepherd this unprecedented advance. The outcome and direction of the federal judiciary of the early twentieth century relied on charting the contentious path between two camps of legal thought: the so-called "Classical Legal Thought" of the nineteenth century and the "Progressive Legal Thought" of the early twentieth which would come to prevail. The latter's elevation, particularly under the Warren Court in post-war America, was in part led by the ALI's efforts at modernizing for the sake of judicial economy. The former's downfall may have been the result of shifting conceptions of judicial and philosophical morality. Morton Horwitz has suggested that the Classical model—particularly in the common law—fell victim to "struggles over the meaning of social justice and challenges to the moral foundations of individualism that had emerged by the turn of the century."[23] Horwitz recognizes that it was precisely this newfound judicial antipathy toward the "traditional legitimating ideal of equality of opportunity as practiced within a market system that was thought to distribute rewards more or less fairly

[22] LAWRENCE MEIR FRIEDMAN, AMERICAN LAW IN THE TWENTIETH CENTURY 5 (1st ed., Yale Univ. Press, 2004).
[23] MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960 4 (1st ed., Oxford Univ. Press, 1992).

according to the value of one's economic contribution"[24] that heralded the change in justice. In short, the new judicial system had a new focus: equality, at least in the classical sense,[25] of access to relief at the federal bench.

G. Edward White, in his multi-volume work on the presence of law in the shaping of American history, recognizes that the Supreme Court—and federal judiciary—had largely come to view themselves as acting in the capacity of "guardian review," where the primary responsibilities of the federal courts entailed recognizing access to procedural safeguards and protections while preserving the integrity of the court system. White notes that the court of the late nineteenth and early twentieth centuries found itself adopting new notions of due process and applying these principles to questions of police power and civil liberties.[26] So, too, were areas of contract and industry swept up in the same due process implications, especially with respect to workers' rights.[27] In this sense, White identifies judges as applying new law and expanding latitude while concurrently presenting themselves as guardians, as "enforcing the foundational principles on which the Constitution rested."[28]

The nexus, as it were, of progressive jurisprudence, state influence, and corporate regulation within the "guardian review" era was the Supreme Court's address of questions of labor law in the landmark *Lochner v. New York*, 198 U.S. 45 (1905). *Lochner* represented a departure from that final vestige, to many critics of the time, of a lassiez-faire judicial attitude

[24] HORWITZ, *supra* note 23, at 4-7.
[25] It seems unlikely that the ALI and its fellow progenitors of "Progressive Legal Thought" considered equality in the racialized and gendered senses we envision today. Rather, it was a question of "equality of access" in the economic sense (or, occasionally, the religious), with a direct repudiation to the 19th century notion of the dispensable industrial worker, suited to his occupation and restricted in judicial relief as a result of his fixed social station.
[26] G. EDWARD WHITE, LAW IN AMERICAN HISTORY, VOLUME 2: FROM RECONSTRUCTION THROUGH THE 1920s 354-356, (1st ed., Oxford Univ. Press, 2016).
[27] *Id.* at 355.
[28] *Id.*

and, many feared, would herald a new activism that would corrupt and expand federal influence. Paul Kens has gone further, suggesting that "[t]he most vehement among them [the *Lochner* critics] viewed the decision as a coup d'état. They charged that the Court had usurped power that properly rested with the legislature, and ultimately in the people, in order to turn a controversial political philosophy into fundamental law of the land. Thus, *Lochner* became the ultimate symbol of judicial overreaching."[29] These fears of *Lochner* were not borne out in the long term[30] and, as Ellen Frankel Paul has argued, were largely exaggerated. The Court did not, as New Dealers would come to argue, overturn "hundreds of laws regulating economic relations" under the aegis of the Fifth and Fourteenth Amendment Due Process protections.[31] Rather, the Court and the federal bench seemed to acknowledge—*Lochner* notwithstanding—that the pace of judicial progress necessitated some government intervention and also a clear, consistent application of common law principles of equity to the conditions of the working class. White, too, recognizes *Lochner*'s infamy in a different sense: as a catalyst for the type of uniformity and clarity that the ALI would strive for in the Restatement's construction and development. *Lochner*, for White, was not merely inconsistent with the Court's jurisprudence in our historical review: rather, it was a debate over the selective and minute interpretations of terminology. The Court was concerned with defining whether the purpose of judicial intervention was "to determine whether that intervention was an *undue* one, constituting an invasion of protected rights, or a due one, a permissible exercise of governmental powers (emphasis in original)."[32] *Lochner* is thus both a judicial anomaly and a catalyst for the ALI's early objectives.

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[29] Paul Kens, *Lochner v. New York: Tradition or Change in Constitutional Law?*, 1 NYU J.L. & Liberty 404 (2005).
[30] The end of the *Lochner* era is largely recognized as concluding with the passage of the landmark *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), in which the Court upheld the constitutionality of a state minimum wage, rejecting and effectively stymieing the "freedom of contract" Locherian ideal.
[31] Ellen Frankel Paul, *Freedom of Contract and the Political Economy of Lochner v. New York*, 1 N.Y.U. J.L. & Liberty 515 (2005).
[32] White, *supra* note 26, at 403.

It was in this legal world beset by both a clinging, rigid traditionalism and an unprecedented pace of economic development that the ALI set about with its Restatement work. The first set of Restatements—which would take from 1923-1944 to realize—covered a wide corpus of the law: Agency, Business Associations, Conflict of Laws, Contracts, Judgments, Property, Restitution, Sales of Land, Security, Torts, and Trusts.[33] This early focus, Judge Cardozo recognized, would come to redefine how the law is applied and how the law is taught. He argued that the Restatement "will be invested with unique authority, not to command, but to persuade. It will embody a composite thought and speak a composite voice. Universities and bench and bar will have had a part in its creation. I have great faith in the power of such a restatement to unify our law."[34] Cardozo's faith in the vision outlined by Lewis and the other founding ALI members would be borne out in perhaps two of its most cited and adopted treatises, the Restatement (Second) of Contracts and the Restatement (Second) and (Third) of Torts. These publications, covering an area of the law subject to great change as the century progressed, would contribute to the conversation and scholarship that came to surround major judicial policy and the outcome of contract and tort actions nationwide.

The ALI's Early Restatements: Critics and Supporters of the Restatements and the Ideal of the Restatements as Policy Instruments

The release of the early Restatements (nine were completed by 1947, the Restatement of Contracts was the first to be released in 1932) was met with support and ambivalence by a burgeoning legal academy. Charles Clark,[35] writing in the *Yale Law Journal* shortly after the

[33] Jordan Steele, Leslie O'Neill, Emily Johns, *First Restatement of the Law Records Finding Aid*, Univ. of Penn. Biddle Law Libr. (2008), http://dla.library.upenn.edu/dla/pacscl/ead.pdf?id=PACSCL_UPENN_BIDDLE_USPULPULALI04001.
[34] BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 9, (2nd ed., Yale Univ. Press, 2009).
[35] Clark was Dean of Yale Law School, President of the Association of American Law Schools, and worked with the ALI as an adviser on property and the later Restatement of Property.

release of the original Restatement of the Law of Contracts, suggested that the ALI was "outstandingly important in its ambitious objective, in its personnel and in the resources which it has secured for research in law."[36] Still, Clark expressed early concerns both in the practicality of the ALI's methodology and with the possibility of in fact achieving simplification: while "simplification as a clarification and orderly statement of intellectual processes and conclusions is desirable," Clark contends that the notion that the "resulting statement is the law nowhere and in its unreality only deludes and misleads."[37] For Clark, the other concern with the Restatement of Contracts—one which remains perennial—was the ideal of "securing of authority…to back up statements."[38] The fact that the Restatement is in essence "a statute without statutory enactment" makes the Restatements' attempt to reform procedure nearly impossible. Clark seems ambivalent about abandoning the project entirely, though remained pessimistic that they will influence and achieve the conformity that the Institute seeks: with "no sovereign power behind them to compel the courts to breathe meaning into them," if the courts determine they lack meaning, the "courts should turn to something else and are doing so."[39] Still, the Restatement sparked academic discourse around the distillation of time-honored and well-regarded legal theorems. Clark identifies that Section 90 of the Restatement of Contracts,[40] dealing with the legal concept of consideration," seems to be "deserving of praise for [its] forward-looking point of view" but also subject to ire for its "vagueness covering the inevitable compromise."[41] In this sense, Clark's incisive criticism reveals another early critique of the Restatements: the effort to distill

[36] Charles E. Clark, *The Restatement of the Law of Contracts*, 42 YALE L. J. 643, 644 (1933).
[37] *Id.* at 654.
[38] *Id.*
[39] *Id.*
[40] Section 90 reads, in pertinent part, as follows: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only be enforcement of the promise." Restatement of Contracts § 90 (Am. Law. Inst. 1932).
[41] Clark, *supra* note 36, at 656-657.

principles, especially those that were customary, ran a perilous line of increasing efficiency for the sake of judicial economy at the expense of compromise. If the Restatements' black letter principles were adopted and adhered to without limitation, Clark feared, litigants and their interests could suffer an inflexible judiciary that would rather apply direct statutory principle rather than seek resolution.

Clark's former concern around force and the notion that the Restatements would hold minimal influence in judicial proceedings appears in the absence of statutory force appears to have been proven false. The Restatements gained increasing traction in the early years of the Warren Court, where a progressive federal judiciary looked to the Restatements applications as an opportunity to find support for aspirational policy objectives. Herbert Wechsler[42]—revisiting the topic of the Restatements—addressed their role in policymaking in a review during the late 1960s. Wechsler found that the Restatements and the nation as a whole had recognized the increasing value of the legislature and the need for legislative adoption of model codes, but still held that the Restatements had value in advancing a particular legal philosophy. Indeed, Wechsler argued that "what our law requires most and will increasingly require in the future is that systematic reexamination and re-thinking at the legislative level that is not within the competence of courts."[43]

Wechsler wrote specifically on a particular decision by the ALI Council relative to § 402A of the Restatement (Second) of Torts.[44] That section was originally limited to regulating a

[42] Wechsler was a distinguished professor at Columbia Law School, where he focused primarily on Constitutional law, and has written an influential and oft-cited treatise on federal practice (*The Federal Courts and the Federal System*) with Henry M. Hart, Jr. Wechsler also served as the Director of the ALI and was critical in the development of the Model Penal Code. Tamar Lewin, *Herbert Wechsler, Legal Giant, Is Dead At 90*, N.Y. Times, Apr. 28, 2000, at C21.

[43] 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, 187 (1968).

[44] This particular section, which drew ire from some courts and practitioners, affirmed "the strict liability of the vendor of 'any product that is in a defective condition unreasonably dangerous to the user or consumer or his

particular industry (cosmetics) in a preliminary draft but came to be widely applied to any product marketed in a retail setting. In this sense, § 402A made all vendors liable for defective products and, thus, exposed numerous industries to the implications of potential legal and financial liability for faulty products were the courts to adopt § 402A. It is precisely in this policy area, Wechsler noted, that the ALI's aspirational objective in § 402A was realized. The "action of the highest courts upon the issue in the intervening years"[45] affirmed that the aspirational was in fact practical. Still, the adoption of this provision demonstrated a central issue that barred the ALI from achieving its objective of uniformity: it had, perhaps, expanded beyond the bounds of its traditional limitation and fallen victim to engaging in a policy discussion.

Wechsler, for his part, proffers a solution to the issue. The ALI engaging in the advancement of a particular legal philosophy comports with its mission, he argues, citing to William Lewis' admonition that the Restatements should express "as nearly as may be the rules which our courts will today apply."[46] Importantly, Wechsler adds in response to critics of the Restatements, the courts themselves are empowered to adopt individual provisions of their own accord. The common law "calls on the courts to show a due regard for precedent but also calls on them to choose between conflicting lines of doctrine."[47] Wechsler is thus forward-thinking, petitioning for an optimism and the belief that the ALI should "liberate the process of

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property' for 'physical harm thereby caused to the ultimate user or consumer, or to his property,' if 'the seller is engaged in the business of selling such a product' and 'it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.'" Restatement (Second) of Torts § 402A (Am. Law. Inst. 1965).

[45] For instance, California's Supreme Court adopted Section 402A in *Greenman v. Yuba Power Products, Inc*., 22. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1962), and the New Jersey Supreme Court relied on Section 402A in apportioning strict liability for an asbestos producer, *Beshada v. Johns-Manville Prods. Corp.*, 90 N.J. 191, 209, 447 A.2d 539, 546 (1982)). The Pennsylvania Supreme Court had previously adopted the "unreasonable danger" standard in Section 402A in *Azzarello v. Black Brothers Company*, 480 Pa. 547, 391 A.2d 1020 (1978), though this decision was overturned and the scope of 402A significantly limited in *Tincher v. Omega Flex, Inc*., 628 Pa. 296, 104 A.3d 328 (2014).

[46] 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 (1968). 189.

[47] *Id.* at 189-191.

restatement from any surviving rigid limitations."[48] Further, Wechsler identifies his position that the Restatements should not only be liberated, but should explicitly identify "where the law that it has stated is in need of renovation."[49] It was in this period, particularly during the waning years of the Warren Court in the late 1960s, that the ALI began to focus on identifying and promoting areas of the law that required review and revision. In short, the ALI entered a period of increasingly aspirational Restatements.

Restatements Today: Contemporary Criticism and Outlooks on Judicial Adoption In State Courts and Restatement Treatment At The Federal Level

In more contemporary reviews, Restatements—especially those of contracts—have become mired in controversy over questions of philosophy: are they really the most economical means to condense the law and see their results realized? Doug Rendleman, writing on the Restatement's approach to restitution policy[50] in contracts cases, stresses that the Restatement and its laborious editing process often results in a description of the law that fails to represent the most recent developments of the common law. The Restatements, for Rendleman, look "to reprise a method of legal scholarship that has been out of fashion for nearly one hundred years,"[51] yet requires careful navigation as restitution at its heart requires a Restatement that "articulates and publicizes these unjust enrichment principles and makes the law of restitution available and more accessible to the legal profession."[52] Despite these concerns, Rendleman's consideration of restitution, specifically, evinces a need for the clarity that a Restatement can

[48] Wechsler, *supra* note 46, at 192.
[49] *Id.*
[50] Restitution: "A body of substantive law in which liability is based not on tort or contract but on the defendant's unjust enrichment. See UNJUST ENRICHMENT. **2.** The set of remedies associated with that body of law, in which the measure of recovery is usu. based not on the plaintiff's loss, but on the defendant's gain. Cf. COMPENSATION; DAMAGES." *Restitution*, Black's Law Dictionary (10th ed. 2014).
[51] Doug Rendleman, *Restating Restitution: The Restatement Process and Its Critics*, 65 WASH. & LEE. L. REV. 934-944 (2008).
[52] *Id.* at 943.

offer: as it is an "essential and nuanced common law area" and "many smaller American states lack a decision on particular restitution points," the Restatement can serve its purpose of clarifying and resolving areas of legal ambiguity.[53] Still, it is precisely because restitution is undeveloped that the Restatement holds value. More developed and divergent areas of the law—such as contracts and torts—often differ from state to state and have developed practice areas.

That there is value to a Restatement seems apparent, too, in convoluted areas such as the conflict of laws.[54] As Kermit Roosevelt and Bethan Jones note in a *Yale Law Journal* forum, the Restatement (First) had "bad rules…[which were] self-contained and derived from a territorialist [sic] premise." Moreover, these rules, they write, were often "insensitive to the content of state laws"[55] and neglected to consider the value and import of decisions by an individual judge at the state level. Still, Roosevelt and Jones believe that many of these problems have been resolved in subsequent iterations of Restatements. Importantly, the sense of territorialism that existed initially became difficult to sustain, they argue, and forced the Restatements—especially in the realm of conflicts—to focus on identifying when the law and "practice converges sufficiently to allow the formulation of appropriately narrow and policy-sensitive rules."[56] Thus, the Restatements seem to have particular application and value in clarifying the law in areas with significant overlap and ambiguity. They can act, as in conflicts, as a vehicle for judicial economy in supporting the clarification of complex legal concepts.

However, contracts and torts do not reflect this lack of clarity. While many of their rules are common across jurisdictions, the corpus of law in contracts and torts—especially on the

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[53] Rendleman, *supra* note 50, at 936.
[54] Conflict of Laws: "A difference between the laws of different states or countries in a case in which a transaction or occurrence central to the case has a connection to two or more jurisdictions. — Often shortened to *conflict. Cf.* "CHOICE OF LAW." *Conflict of Laws*, Black's Law Dictionary (10th ed. 2014).
[55] Kermit Roosevelt III and Bethan Jones, *The Draft Restatement (Third) of Conflict of Laws: A Response to Brilmayer & Listwa*, 128 YALE L. J. 293-314 (2018).
[56] *Id.* at 302.

question of commercial transactions in contracts—differs markedly between states. Gregory Maggs has recently characterized the ALI's ambitions in contracts as electing to "state the best rules, not necessarily the rules that most courts have followed."[57] In this sense, the Restatement of Contracts has been particularly aspirational in its application and has often resulted in tension with longstanding, affirmed principles of state law. This, Maggs argues, reveals the resulting hazards of relying on the Restatements to guide judicial reasoning: it is difficult to "critically think about the legal system" if judges, as well as practitioners, remain uncertain when the Restatement (Second) "reflects actual contract law and when it merely states a proposal that has not yet gone into practice."[58] Maggs, here, argues for accountability by the ALI in identifying explicitly when their writings are a codification of existing common law principles and when their principles reflect an objective or goal of the Institute itself. The Restatement (Second) of Contracts, too, has been beset with criticism over matters of interpretation. Writing in the *Columbia Law Review*, Robert Braucher has suggested that the Second Restatement gets at the central question of intention and attempts to codify this section. The Second Restatement includes this emphasis "on the context in which a contract is made and on the meanings attached by the parties to their words and conduct."[59] For Braucher, the Restatement's focus on interpretation is worthwhile, but there remains some trepidation around when the Restatement should move its interpretations and definitive statements of the law from the "comment" section to the "black letter" statement itself.[60]

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[57] Gregory Maggs, *Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law,* 66 GEO. WASH. L. REV. 508, 510 (1998).
[58] *Id.* at 511.
[59] Robert Braucher, *Interpretation and Legal Effect in the Second Restatement of Contracts*, 81 Colum. L. Rev. 13, 14 (1981).
[60] *Id.*

Despite this criticism and concern around interpretation and intent, the Restatements and the ALI have remained stalwart and respected institutions within the legal community, particularly in the last several decades. The last twenty years have also demonstrated a policy shift toward achieving uniformity of statutes and codes in many jurisdictions in certain practice areas, especially trusts and torts.[61] Michael Traynor has identified and lauded the Restatement as the solution to the modern "complex and challenging panorama of statutory as well as common law" and noted the Restatement's value in navigating the "sophisticated concepts of post-*Erie* federalism.[62] *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)—which negated federal courts rights to create general common law in diversity cases—eroded, in many respects, the uniformity of a federal common law that the Restatement had first sought to introduce. For Traynor, the development of the Restatements have proven their efficacy in aiding judicial proceedings, though Traynor urges the ALI to consider expanding the scope of its coverage areas: in his view, the ALI should aim to "explore other areas that might either evoke, given the present day challenges and circumstances, or go well beyond the vision of the founders."[63] Accordingly, Traynor argues for a more expansive vision of the Restatements development and value in expanding the scope of the recorded common law tradition.

Minimal scholarly attention, however, has been afforded to the adoption of the Restatement at the state level, a jurisdictional policy phenomenon that has become apparent in state court decisions over the last twenty years. In a 2011 white paper to state jurists, Victor Schwartz and Cary Silverman warned of the Restatements' deleterious impacts in tort law and

[61] These efforts are reflected in publications that have been promulgated as policy solutions, such as the Uniform Commercial Code (UCC), the Uniform Probate Code (UPC), and the Uniform Apportionment of Tort Responsibility Act (UATRA).
[62] Michael Traynor, *The First Restatements and the Vision of the American Law Institute, Then and Now*, 32 S. Ill. U. L.J. 145, 146 (2007).
[63] *Id.* at 165.

cautioned of a threat to litigants' rights at the state level, bemoaning the "chaos in the law" for commerce and industry prompted by the Restatement's embrace of concepts of strict product liability. Schwartz and Silverman argue that the Restatements greatest concern at the state level is judges who embrace their doctrines "without reasoning about where and when strict liability should apply."[64] Silverman, too, has noted that the ambiguity of the tort Restatement's § 402A, dealing with non-manufacturer liability, has created a situation where state courts that have adopted the Restatements have "no clear position" on major aspects of modern liability practice.[65] While not writing in direct response to Wechsler's position on § 402A, the concerns of Schwartz and Silverman come from the perspective of counselors within the commerce industry who view—to an extent, rightfully so—§ 402A as acting to limit consumer choice and restricting the ability of industry producers to retail products.[66]

Symeon Symeonides, meanwhile, reexamines the issue of state adoption by considering the first Restatement of Conflicts of 1934 and the interests of its reporter, University of Chicago Law Professor Joseph H. Beale.[67] Symeonides attacks the notion that the Conflicts Restatement is "the punching bag of any Conflicts class" while expressing concern that Beale is "a target of ridicule" as a reporter. In construction and application, Symeonides also examines Beale's critics, who express concern over the limitations of the Restatements generally. Importantly, the question of state application arises in Symeonides' discussion of the Conflicts Restatement itself: for many critics, he argues, the Restatement "retarded the development of American conflicts law by placing it into the straightjacket of rigid, mechanical rules."[68]

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[64] VICTOR E. SCHWARTZ & CARY SILVERMAN, THE NEW RESTATEMENT: BLUNTING 4 (U.S. Chamber Institute for Legal Reform, 2011).
[65] *Id.* at 11.
[66] *Id.* at 12; For a more exhaustive study of the Restatement of Torts (Second) and § 402A, *see*: George W. Conk, *Is There A Design Defect in the Restatement (Third) of Torts: Products Liability?*, 109 Yale L. J. 1087 (2000).
[67] Symeon C. Symeonides, *The First Conflicts Restatements Through The Eyes of Old*, 32 S. Ill. U. L. J. 31 (2010).
[68] *Id.* at 40, 41.

State outlooks on the Restatements are difficult to discern, though we can look to the federal circuit to get a sense of how they should be received. In *Beau Townshend Ford Lincoln, Inc. v. Don Hinds Ford, Inc.*, 759 F. App'x 348 (6th Cir. 2018), the 6th Circuit placed the spirit of the Restatement in directing state and federal decisions thusly: we "may look to an applicable Restatement for guidance 'when there is no controlling state law on point when the state has indicated…that it considers the Restatements to be persuasive authority."[69] Indeed, the decision to adopt Restatements *in toto* or in part at the state level is often apparent when Restatement principles can act to fill gaps in state legal policy. For instance, in a recent Arizona trust case, *Owner-Operator Indep. Drivers Ass'n v. Pac. Fin. Ass'n, Inc.*, 241 Ariz. 406 (2017), the court relied on the Restatement to reach a determination that a valid trust existed. That state level decision, distinct from the federal practice, resulted in a new, controlling understanding of what constitutes a trust across Arizona courts.[70] In another case, *Tractebel Energy Mktg., Inc. v. E.I. Du Pont De Nemours & Co.*, 118 S.W.3d 60, 65 (Tex. App. 2003), the Texas Court of Appeals—drawing on a state Supreme Court decision—recognized §§ 261-264 of the Restatement (Second) of Contracts as establishing impracticability as a defense to contract performance in Texas.[71] These cases may appear, admittedly, anecdotal. However, our study herein, which addresses the Restatement (Second) of Contracts in Connecticut and the Restatement (Second) and (Third) of Torts in Washington, affirm this anecdotal principle that the Restatements do exert significant policy-making authority even at the state level. As is readily apparent in the

[69] *Beau Townsend Ford Lincoln, Inc. v. Don Hinds Ford, Inc.*, 759 F. App'x 348, 353 (6th Cir. 2018) (quoting *Garrison v. Jervis B. Webb Co.*, 583 F.2d 258, 262 n.6 (6th Cir. 1978)).
[70] *Owner-Operator Indep. Drivers Ass'n v. Pac. Fin. Ass'n, Inc.*, 241 Ariz. 406, 414, 388 P.3d 556, 564 (Ct. App. 2017).
[71] *Tractebel Energy Mktg., Inc. v. E.I. Du Pont De Nemours & Co*., 118 S.W.3d 60, 65 (Tex. App.), opinion supplemented on overruling of reh'g, 118 S.W.3d 929 (Tex. App. 2003).

Texas case, litigants' rights and outcomes can be significantly impacted by Restatement adoption, as a wholesale adoption of a contract defense was recognized at the state level.

William Richman and David Riley, in a study of the Restatement of Conflicts in 1997, identify eleven states who rely on the Restatement as their "predominant choice-of-law methodology," with as many as 29 explicitly adopting and citing certain provisions of the Restatements as a matter of course.[72] In this sense, Richman and Riley suggest—numerically—that the Restatements and their provisions offer something to state judiciaries eager to clarify the scope of their own common law tradition or substitute Restatement policy for legislative enactments. Numerical references of adoption offer compelling questions of the scope of Restatement authority by indicating, in many respects, how often a particular point of law is addressed. The reason for their popularity and reception is simple, especially in those undeveloped areas of the law at the state level. Anita Bernstein, writing on the question of product liability in the Restatements, notes simply that their popularity stems from their ability to

> streamline entire areas of the law. They make research easier. Their division of content into black letter and comments saves time for the harried lawyer who must read quickly. Their neglect of a topic may well be salutary. Restatement, in short, yields practical, doctrinal, and epistemological benefits.[73]

Connecticut and Washington, meanwhile, have adopted particular provisions of the Restatement of Contracts (Second) and the Restatement of Torts (Second) and (Third), respectively, that address gaps in their own prior state common law jurisprudence. These Restatement provisions also act, at times, to extend and restrict litigants' opportunities to argue and raise defenses in the course of their cases. For example, in Connecticut—examined in greater detail *infra* in Chapter II—the state Supreme Court has recognized the impracticability doctrine

[72] William M. Richman and David Riley, *The First Restatement of Conflict of Laws on the Twenty-Fifth Anniversary of Its Successor: Contemporary Practice in Traditional Courts*, 56 MD. L. REV. 1196, 1200 (1997).
[73] Anita Bernstein, *Restatement Redux*, 48 VAND. L. REV. 1663, 1677 (1995).

as a valid defense, citing affirmatively to the Restatement (Second) in *O'Hara v. State of Connecticut*, 218 Conn. 628 (1991), thereby adjusting the availability of contract defenses to litigants.[74] Conversely, Connecticut has affirmatively declined to adopt the Restatement (Second) of Torts and its guidance, noting that it is not binding if in conflict with state precedent. *Snell v. Norwalk Yellow Cab, Inc*., 158 A.3d 787, 805 (Conn. Ct. App. 2017). Washington, meanwhile, looked favorably to § 402A of the Restatement (Second) of Torts, adopting and citing its principles, especially around the question of "unreasonably dangerous products" and stressed that the focus in evaluating a claim is "upon the product, rather than upon the conduct of the supplier of the product." *Little v. PPG Indus., Inc.*, 92 Wash. 2d 118, 120, 594 P.2d 911, 913 (1979). Thus, Washington demonstrated its adoption of § 402A, despite the concerns and claims raised by those in commerce practice over the danger of the strict product liability doctrines in practice. In both Connecticut and Washington, it is evident that their state courts turn, at times, to the Restatement for direction in their rulings.

Together, these cases and others considered in Chapters II and III illumine the role and place of the Restatements in the construction of state common law jurisprudence. With the adoption of a Restatement and its specific provisions, especially in developed realms of the law, state courts have the power to alter existing common law jurisprudence and to, in effect, make policy. What remains outstanding is how cases, from the commencement of an action, are influenced by Restatement principles and what impact these policies and judicial philosophies have on future actions. Reviewing the role and impact of those judicial decisions reveals just how the ALI's balance between aspiration and limitation plays out in the world of practice.

[74] *O'Hara v. State of Connecticut*, 218 Conn. 628, 637, 590 A.2d 948, 953 (1991).

Chapter II. Case Study—Applications of the Restatement of Contracts (Second) In Connecticut At The Appellate and Supreme Court Level

The courts of the State of Connecticut has adopted several provisions of the Restatement (Second) of Contracts, which will form the focus of this portion of the study. In Connecticut, the Restatement's provisions serve two critical functions: they act to supplement existing common law principles of contract drafting, defense, and enforcement in Connecticut and, second, they act to supplant precedent and replace with the Restatement's provisions. These two functions have varying impacts: they serve to protect foundational elements of contractual interpretation while also acting to limit the extent of litigants' rights and, in some cases, they can act to constrain opportunities for legal argument under Connecticut theories.

With respect to the first function—of supplementing existing common law principles—the Connecticut Supreme Court has issued a myriad of opinions that seek to affirm basic tenets of contracts under the common law. In those cases, the Court has often turned to the Restatement to authoritatively and concisely outline a legal principle. For instance, in *Hopkins v. Titan Value Equities Group, Inc.*, the Supreme Court explicitly adopted the Restatement's provisions around one of the most foundational elements of contract formation: the covenant of good faith and fair dealing. In *Hopkins*, the Court relied on the Restatement's interpretation to outline the limits and application of this covenant, contending that it is "axiomatic that the implied duty of good faith and fair dealing is a covenant implied into a contract or a contractual relationship."[75] The Court explicitly adopted the Restatement provision—that "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement"[76]—in reaching its

[75] *Hoskins v. Titan Value Equities Grp., Inc.*, 252 Conn. 789, 793, 749 A.2d 1144, 1146 (2000).
[76] Restatement (Second), Contracts § 205 (1979).

determination that "the existence of a contract between the parties is a necessary antecedent to any claim of breach of the duty of good faith and fair dealing."[77]

Thus, in operation here, the Restatement of Contracts in Connecticut is used not to supplant or subvert a common law principle but to supplement it. The reference to § 205 is applied by the Court in an affirmative sense, seeking to find support for the covenant's existence within Connecticut's common law tradition while also acknowledging that it is an accepted tenet of contract formation within the legal community. The Court is careful to note that the Restatement alone does not inform the decision, noting that the covenant is made in "accordance with *these* authorities" (emphasis added), not merely the singular authority of the Restatement but the Restatement together with the full corpus of Connecticut's common law of contracts.

The Supreme Court again turned to the Restatement with a similar affirming purpose in determining that party must adhere to the plain terms of a contract and satisfy contractual promises, even if doing so might impose undue financial hardship. In *Gibson v. Capano*, the Court adopted the Restatement's §§ 154 and 159 in determining that "in private disputes, a court must enforce the contract as drafted by the parties and may not relieve a contracting party from anticipated or actual difficulties undertaken pursuant to the contract, unless the contract is voidable on grounds such as mistake, fraud or unconscionability."[78] The Restatement, again, merely acts here to supplement Connecticut's existing common law precedent codified in *Holly Hill Holdings v. Lowman*, where the Supreme Court recognized that the freedom to contract includes the "right to contract for the assumption of known or unknown hazards and risks that may arise as a consequence of the execution of the contract."[79] In *Holly Hill Holdings*, the Court

[77] See note 75, *supra*, at 793.
[78] *Gibson v. Capano*, 241 Conn. 725, 730–31, 699 A.2d 68, 71 (1997).
[79] *Holly Hill Holdings v. Lowman*, 226 Conn. 748, 755–56, 628 A.2d 1298, 1302 (1993).

recognized this high bar when analyzing that a purchaser's assertion of a property's "as-is" condition failed to provide grounds for voiding a contract. It would be several years later that the Court recognized the Restatement as a corollary to this inquiry in *Gibson*. In both cases, the principle is the same—but in *Gibson*, the Court found support in the pithy language of the Restatement and made the inquiry more precise. The adoption of §§ 154 and 159 demonstrate the Court's receptiveness to engaging with Restatement principles that act to state what the law is and make a declaration of extant principles clear to lower courts within the jurisdiction.

Between this measure of complete adoption in *Hoskins* and *Gibson* and the substantive reform of the common law, the Court has also elected to apply portions of the Restatements in an effort to clarify its methods of legal inquiry. In *Shah v. Cover-It, Inc.*, the Appellate Court declined to adopt the Restatement's black letter definition of a contract breach and its attendant obligations, instead relying on the Supreme Court's approach of a multifactor test to determine the existence of a breach. In its analysis, the Court first maintained Connecticut's common law tradition, averring that it is a "*general rule of contract law that a total breach of the contract by one party relieves the injured party of any further duty to perform further obligations under the contract.*"[80] The Court—relying on its decision in *Rokalor, Inc. v. Connecticut Eating Enterprises, Inc.,* 18 Conn.App. 384, 391, 558 A.2d 265 (1989)—held in an examination of an employment dispute that a material breach bars continued duty by the non-breaching party without relying on a Restatement interpretation.[81]

However, when it came to the more focused question of determining whether or not a breach had in fact occurred, the Court did elect to apply the multifactor test outlined in the

[80] *Shah v. Cover-It, Inc.*, 86 Conn. App. 71, 75, 859 A.2d 959, 963 (2004) (emphasis added).
[81] *See also*: *State v. Lex Associates,* 248 Conn. 612, 624, 730 A.2d 38 (1999); *669 Atlantic Street Associates v. Atlantic–Rockland Stamford Associates,* 43 Conn.App. 113, 125–26, 682 A.2d 572, cert. denied, 239 Conn. 949, 950, 686 A.2d 126 (1996).

Restatement (Second) of Contract's § 241. Citing the Connecticut Supreme Court's endorsement of the multifactor Restatement test in *Bernstein v. Nemeyer*,[82] the Appellate Court specifically quoted and adopted the Restatement's test in full:

> In determining whether a failure to render or to offer performance is material, the following circumstances are significant: (a) the extent to which the injured party will be deprived of the benefit which he reasonably expected; (b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived; (c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture; (d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances; [and] (e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.[83]

Thus, while the common law continues to govern the obligations of parties in the event that one party breaches a contract, the Restatement has come to supplant the dictates of the common law inquiry and sees as a substitute its own multifactor test in court determinations of the existence of material breaches. The Restatement therefore functions in *Bernstein* as a modifier, adding to the existing law and focusing the legal arguments that must be presented when seeking to prove the existence and operation of material breaches of contract terms. The Appellate Court thus sought out a balance here between the Restatement and the extent of its influence: rather than adopting the provision *en masse* or replacing the common law in its entirety, the Court adopted its relevant portions for a limited purpose.

Conversely, in an earlier case, *West Haven Sound Development Corp. v. West Haven*,[84] the Court turned to the question of practicability of a contract's terms and had found the Restatement's guidance compelling in a focused and particular application. In *West Haven Sound Development Corp.*, the Court dealt with whether the plaintiff could bring a cause of action for

[82] *Bernstein v. Nemeyer,* 213 Conn. 665, 672, 570 A.2d 164 (1990).
[83] Restatement (Second) of Contracts § 241 (1981).
[84] *W. Haven Sound Dev. Corp. v. W. Haven*, 201 Conn. 305, 514 A.2d 734 (1986).

breach of contract[85] and whether a referendum and order of the trial court constituted an "event" which rendered satisfaction of the contract otherwise impossible.[86] The Court cited affirmatively to the Restatement's §§ 261-272, finding agreement with the basic tenet that the "[W]here, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary."[87] While conceding that a governmental order—such as a referendum—would constitute "an event" under § 264, a second part of the inquiry—*viz.*, the determination of the breaching event and the extent of a party's control over a breaching event—was novel and utilized, again, the Restatement's guidance to afford clarity in the absence of direction from the common law.

Ultimately, the Court concluded that the Restatement's analysis required a consideration of who was at fault: though the confounding action—the referendum—was brought by the citizens of West Haven, the Court held that the citizenry and its administration were inseparable and that the referendum "can only be viewed as the action of the city of West Haven, the same entity which, through its elected and appointed representatives, had entered into the contract with the plaintiff."[88] Applying the Restatement's guidance, the Court found that the question turned whether West Haven and its administrators could be viewed as separate. Thus, under the

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[85] *See also*: *West Haven v. Impact,* 174 Conn. 160, 384 A.2d 353 (1978) and *New Haven Savings Bank v. West Haven Sound Development,* 190 Conn. 60, 459 A.2d 999 (1983).
[86] The facts of the case—which had been in litigation for about a decade by the time of the instant decision—are in essence that the Plaintiff, West Haven Sound Development Corp., contracted with the City of West Haven in the Savin Rock area to develop a restaurant. The contract indicated that a substantial part of the adjoining land would be developed by West Haven and other developers for "commercial, recreational and apartment use." Ultimately, a referendum and subsequent court order resulted in the adjoining property being converted to a public park and the restaurant closed and later brought an action for breach of contract against the City.
[87] *Id.* at 313; Restatement (Second) of Contracts § 264 (1981).
[88] See note 84, *supra*, at 315.

Restatement's analysis, West Haven failed to meet the burden of proving that they were "without fault" because they had expressly allowed the referendum to proceed and the two groups—citizens and administrators—were one in the same. Here, the Restatement resulted in an adverse municipal outcome and also raises important questions. Did the Restatement, because of its broad and general objective of clarifying the law, fail to take into account the unique bargaining position, functions and, nature of a municipality that present it with a different set of possible factors that can interfere with the performance of a contract?[89] The Appellate Court, perhaps sensing some of the particular and acute circumstances facing municipalities in contract actions, appended a specificity requirement and analyzed under the same Restatement framework in a subsequent case—*Bridgeport Harbour Place I, LLC v. Ganim*[90]—which dealt with a similar agreement between a developer that relied on future promises of investment in a particular area.

In certain applications of contract law, the Restatement is at odds with existing Connecticut jurisprudence. The Court has shown a willingness to discriminate and apply those provisions it feels are especially relevant or clarifying. For example, during the early years of the Restatement's existence, the Court showed antipathy toward adopting its dictates when they conflicted with established jurisprudence. In *Colonial Disc. Co. v. Avon Motors*,[91] the Court considered the proper role of intentionality in interpreting the terms of a contract. Drawing on the Court's common law precedent in *Byram Lumber & Supply Co. v. Page*,[92] the Court found that in making an intent inquiry in third party actions, "all of the circumstances surrounding the

[89] Maine has dealt with a case on similar terms and developed the question of a municipality's liability for its own frustrating actions. *Elsemore v. Hancock,* 137 Me. 243, 18 A.2d 692 (1941).
[90] *Bridgeport Harbour Place I, LLC v. Ganim*, 131 Conn. App. 99, 30 A.3d 703 (2011). Here, the Plaintiff—Bridgeport Harbour Place I, LLC—was unable to recover under the more specific damages requirement and under an analysis of the scope of the Defendant's control over the frustrating action.
[91] *Colonial Disc. Co. v. Avon Motors*, 137 Conn. 196, 200–01, 75 A.2d 507, 509–10 (Conn. 1950).
[92] *Byram Lumber & Supply Co. v. Page*, 109 Conn. 256, 146 A. 293 (Conn. 1929).

making of the contract must be taken into consideration."[93] In defining the law of the jurisdiction, the Court found that the "ultimate test to be applied is whether the intent of the parties to the contract was that the promisor should assume a direct obligation to the third party and that that intent is to be determined from the terms of the contract read in the light of the circumstances attending its making, including the motives and purposes of the parties."[94]

The Restatement principle on the same subject, however, is at odds with the Court's judicial principle: in the Restatement, the "final test is whether the third party is a donee or a creditor beneficiary." The final test in Connecticut seeks merely to answer whether or not the "promisor should assume a direct obligation to the third party"[95]—and does not require the Court to look to whether or not the third party is a donee or a creditor. The Court in *Colonial Disc. Co.* elected not to follow the Restatement and stressed that there were practical limitations on determining the status of a third-party contractual party that made the Restatement's principle impossible to enforce and difficult to discern. Thus, in this context, the Court recognized that the Restatement's ideals were limited by practical constraints and rejected them. This interplay of determining when the Restatement serves a practical purpose is critical to judicial access, but also represents one of the key perils in Restatement applications at the state level: if the provision is impractical, then why include it in the first place?[96]

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[93] See note 91, *supra*, at 200.
[94] *Id.* at 200; The Court ultimately recognized that "[T]he law in this jurisdiction is, therefore, that the ultimate test to be applied is whether the intent of the parties to the contract was that the promisor should assume a direct obligation to the third party and that that intent is to be determined from the terms of the contract read in the light of the circumstances attending its making, including the motives and purposes of the parties."
[95] *Id.* at 202.
[96] The ALI can, of course, address issues of application and the unpopularity of particular provisions in the context of subsequent Restatements. The desire for clarification and additional guidance, for instance, has long been demanded over the contentious addition of the Restatement (Second) of Torts § 402A, which governs strict liability for sellers. For a further discussion of the conflicts over § 402A in the context of Washington courts, see Chapter III, *infra*, at 50 to 55.

In certain cases—specifically those that constrain litigants' rights and opportunities for legal argument—the Restatement can adjust the availability of legal remedies and affect the scope of recovery. In *Weiss v. Smulders*,[97] the Court found that in addition to the multifactor materiality test adopted by the Court in *Bernstein*, an inquiry into the scope of materiality extends further under the Restatement: "[T]he reasonableness of the injured party's conduct in communicating his grievances and in seeking satisfaction is a factor to be considered in this connection."[98] In this context, then, the subjective factor of "reasonableness" is introduced to the Court's analysis. Importantly, that "reasonableness" assessment was not a component of the Restatement's black letter principle. Instead, it was drawn from the comment section—added by the Reporter, a member of the academic and legal community—and reviewed separately by the panel of judges and practitioners that often review black letter Restatement language as part of the ALI's process.[99] The Reporter's comments in the Restatement process permit more independence and allow for the Reporter's opinion to be expressed in the final text of the Restatement. Thus, academic influence becomes manifest in legal ideas at the state level, as exhibited in the adoption of the "reasonableness" standard in the *Weiss* decision.

The Restatement's impact on contract cases also extends to opportunities for recovery of damages, especially in the realm of the type of damages afforded and the availability of contract remedies such as specific performance.[100] In *Gianetti v. Norwalk Hosp*.,[101] the Appellate Court

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[97] *Weiss v. Smulders*, 313 Conn. 227, 96 A.3d 1175 (2014).
[98] *Id.* at 264; Restatement (Second) of Contracts § 242, Comment (b) (1981).
[99] See Chapter I, *supra*, at 3-4 for a discussion of the Restatement's Reporter and the involvement of various constituencies and members of the legal community in the Restatement drafting process.
[100] Specific Performance: "The rendering, as nearly as practicable, of a promised performance through a judgment or decree; specif., a court-ordered remedy that requires precise fulfillment of a legal or contractual obligation when monetary damages are inappropriate or inadequate, as when the sale of real estate or a rare article is involved. *Specific Performance*, Black's Law Dictionary (10th ed. 2014).
[101] *Gianetti v. Norwalk Hosp.*, 64 Conn. App. 218, 779 A.2d 847 (2001), *aff'd in part, rev'd in part*, 266 Conn. 544, 833 A.2d 891 (2003). *See also*: *Snyder v. Herbert Greenbaum & Associates, Inc.,* 38 Md.App. 144, 154 & n. 3, 380 A.2d 618 (1977).

recognized that recovery by the plaintiff—a hospital patient—could only be offered if he qualified as a "lost volume seller"[102] under the common law standard set forth in Connecticut under *McMahon v. Bryant Electric Co*.[103] In its decision, the Appellate Court focused its analysis, contending that the Superior Court failed to conduct an analysis of whether the "lost volume" doctrine applied under the Restatement's definition. Indeed, the Court concluded that the "measure of damages in such ["lost volume"] cases is the lost volume of business that the nonbreaching seller in a contract for the sale of goods or services incurs because of the buyer's breach, undiminished by the profits from the sale of similar goods *or services* during the term of the breached contract."[104] The Restatement and a confluence of common law precedent is thus applied again in the context of determining the circumstances and the standing required to bring a claim. Here, then, the Court again relied on a comment from the Restatement in order to make the case that the "lost volume" rule cannot apply to the litigant at bar. Citing to the Restatement § 347, the Court found that "lost volume" status can only apply if the injured party meets the following prerequisite:

> If the injured party could and would have entered into the subsequent contract, even if the [original] contract had not been broken, and could have had the benefit of both, he can be said to have 'lost volume' and the subsequent transaction is not a substitute for the broken contract.[105]

The adoption of this provision sets two crucial restrictions on litigants' opportunities to bring legal action in Connecticut and argue under theories of contract recovery: first, the Restatement now determines the methods of analysis by which the Court determines if a party

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[102] Lost Volume Seller: "A seller of goods who, after a buyer has breached a sales contract, resells the goods to a different buyer who would have bought identical goods from the seller's inventory even if the original buyer had not breached. Such a seller is entitled to lost profits, rather than contract price less market price, as damages from the original buyer's breach." *Lost Volume Seller*, Black's Law Dictionary (10th ed. 2014).
[103] *McMahon v. Bryant Electric Co.,* 121 Conn. 397, 185 A. 181 (1936).
[104] See note 101, *supra*, at 223-24.
[105] Restatement (Second) of Contracts § 347, Comment (f) (1981).

qualifies to have "lost volume." That analysis requires the Court to determine whether or not the party had the capacity to enter into an additional contract—a factual inquiry—and also sets a bar that a litigant must overcome in order to present themselves as a "lost volume" seller. Second, the Court—in adopting the advice of the Restatement's comment—also limits litigant opportunities to quash an action via a preliminary motion. The comment the Court adopts in full indicates that it is a "question of fact whether the injured party would have chosen to enter the second transaction if there had been no breach of the first contract."[106] In effect, this adoption suggests that a cause of action relying on an underlying "lost volume" claim could survive or entirely avoid a dispositive motion—such as a motion for summary judgment[107]—because such motions rely on the notion that there are no "material facts" in order to permit judicial relief.[108]

Further, in *Gianetti*, the Appellate Court concluded that the Restatement should apply, acting to extinguish the common law standard of *McMahon* that was previously applied in determining a litigants' "lost volume" status: "the doctrine of mitigation of damages is not applied in such cases, and the measure of damages is the amount the plaintiff would have earned from the performance of the breached contract were it not for the breach, less any costs attributable to its performance."[109] In the absence of the doctrine of mitigation of damages, the Court thus privileged a Restatement principle and effectively amended the possible outcomes available to litigants. This additional standard, in "lost volume" contract actions, reflects directly

[106] See note 105, *supra*, at § 347.
[107] Summary Judgment: "A judgment granted on a claim or defense about which there is no genuine issue of material fact and on which the movant is entitled to prevail as a matter of law. The court considers the contents of the pleadings, the motions, and additional evidence adduced by the parties to determine whether there is a genuine issue of material fact rather than one of law." *Summary Judgment*, Black's Law Dictionary (10th ed. 2014).
[108] Judicial relief, in this case, constituting a dismissal of the action or a portion of the action that fails for want of a factual dispute.
[109] See note 101, *supra*, at 228.

how the Restatement acts to adjust judicial outcomes and recovery opportunities in Connecticut litigation and suggests that its impacts can be keenly felt at various points in litigation.

In other areas of contract recovery, the Supreme Court has found that the plaintiff is barred from recovery for contract actions on issues of pain and suffering by applying the Restatement's provisions. In *Gazo v. City of Stamford*,[110] the Court concluded that the Plaintiff was not entitled to recovery under contract theories based on the Restatement's evaluation. In a dispute over medical services afforded under a municipal insurance contract, the Plaintiff sought recovery of certain intangible damages such as pain and suffering, which the Restatement (Second) of Contract's § 347 (b) expressly bars.[111] § 347(b) acknowledges the impracticality of determining intangible recovery, especially on issues of emotional distress: "Where the injured party's expected advantage consists largely or exclusively of the realization of profit, it may be possible to express this loss in value in terms of money with some assurance. In other situations, however, this is not possible and compensation for lost value may be precluded by the limitation of certainty."[112] The Restatement thus takes the practical approach by recognizing that inquiries into the extent of emotional damage are inherently fraught with issues of objectivity.

The Court noted that the record did not reflect attempts by the Plaintiff to "seek the contract price paid by Chase Bank for the work done by Pierni [the Defendant] or any lost profits. Instead, the plaintiff seeks recovery [solely] for his physical and mental pain and suffering, lost wages and medical bills resulting from Pierni's negligence."[113] Despite the fact

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[110] *Gazo v. City of Stamford*, 255 Conn. 245, 765 A.2d 505 (2001).
[111] Restatement (Second) of Contracts § 347 (b) (1981). § 347 reads, in pertinent part, as follows: "Subject to the limitations stated in §§ 350- 53, the injured party has a right to damages based on his expectation interest as measured by: (a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus; (b) any other loss, including incidental or consequential loss, caused by the breach, less; (c) any cost or other loss that he has avoided by not having to perform."
[112] *Id.*
[113] See note 110, *supra*, at 265-266.

that the Plaintiff "cast this claim in contractual language," he "in essence he seeks a tort recovery," the Court held. The Court recognized that this could not be countenanced as the Restatement "ordinarily do[es] not encompass such losses as pain and suffering."[114] The *Gazo* decision, as in analogous cases that consider the role of the Restatement and theories of recovery, also runs contrary to existing Connecticut common law. In *Tolland Enterprises v. Scan-Code, Inc.*, the Court recognized the opposite: that a contract breach can provide for recovery of consequential damages, including those concerned with the emotional category such as pain and suffering.[115] *Gazo* offers two points for reflection: first, it acts to bar competing or dual recovery theories of contract (thus, a litigant cannot not bring a pain and suffering cause of action twice and attempt to recover in the context of both a contract claim and a tort claim). Further, in going against the Court's prior decision in *Tolland Enterprises* and adopting the Restatement's bar to recovery under contract actions, the Court constrains how litigants can plead their case and requires that a cause of action sound in tort. Second, the *Gazo* Court turned again to the Restatement to outline how the Court views recovery generally: by asserting that recovery for emotional damages fails to manifest in contract cases, the Court has adopted the Restatement's broader approach to the policy question of *what* and *when* damages are appropriate. In other words, the Restatement sets the tenor of the appropriateness of damages under particular actions. This is as much a legal decision as a policy one: with *Gazo*, the Supreme Court has made clear that recovery for "pain and suffering" requires a tort claim and not a contract claim. They must be pled separately to prevail.

[114] See note 110, *supra*, at 265-266.
[115] *Tolland Enterprises v. Scan–Code, Inc.,* 239 Conn. 326, 332, 684 A.2d 1150 (1996) ("a breach of the accord by the plaintiff entitled the defendant to specific performance of the accord and any consequential damages").

The Court has also turned to the Restatement when weighing questions of contract validity in the mortgage context. Here, the Court considered both substantive common law in competing jurisdictions and the Restatement, uniting those sources to reach the determination that certain types of contract provisions must be excluded in Connecticut for as a result of compelling public policy interests. In *Brown v. Soh*,[116] the Court—citing positively to the Restatement's § 195—found that "exculpatory agreements[117] in the employment context violate Connecticut public policy."[118] § 195 states that exculpatory agreements are void on grounds of public policy because they allow parties to escape the consequences prompted by intentional or negligent harm:

> (1) A term exempting a party from tort liability for harm caused intentionally or recklessly is unenforceable on grounds of public policy.
> (2) A term exempting a party from tort liability for harm caused negligently is unenforceable on grounds of public policy if
>
> (a) the term exempts an employer from liability to an employee for injury in the course of his employment;
>
> (b) the term exempts one charged with a duty of public service from liability to one to whom that duty is owed for compensation for breach of that duty, or
>
> (c) the other party is similarly a member of a class protected against the class to which the first party belongs.
>
> (3) A term exempting a seller of a product from his special tort liability for physical harm to a user or consumer is unenforceable on grounds of public policy unless the term is fairly bargained for and is consistent with the policy underlying that liability.[119]

The Court in *Brown* considered exculpatory contracts in the employment context,

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[116] *Brown v. Soh*, 280 Conn. 494, 909 A.2d 43 (2006).
[117] Exculpatory Clause: "A contractual provision relieving a party from liability resulting from a negligent or wrongful act." *Exculpatory Clause*, Black's Law Dictionary (10th ed. 2014). *Cf.* Limitation of Liability Clause.
[118] See note 116, *supra*, at 503.
[119] Restatement (Second) of Contracts § 195 (1981).

specifically, a provision in an employment contract with a racing car company that barred recovery of damages and limited liability prematurely for physical injury. In *Brown*, the Restatement's application was used—similar to cases examined *supra* such as *Shah*—to supplement existing Connecticut precedent and narrow the focus of the Court's inquiry. The Court previously ruled in *Hanks v. Powder Ridge Rest. Corp.*[120] that "[t]he ultimate determination of what constitutes the public interest must be made considering the totality of the circumstances of any given case against the backdrop of current societal expectations."[121] While that common law principle was preserved in *Brown*, the Restatement was used to clarify its application in the context of an employer-employee relationship, where the bargaining power between the parties is inherently different and the employer, presumably, holds the stronger bargaining position.

The decision in *Brown* relied on the Restatement's § 147 to establish wholesale that exculpatory contracts that attempt to exclude intentional or negligent harm must be void as contrary to public policy in the employment context. To buttress this sweeping argument, which effectively acts to limit contract defenses and expands the potential scope of employer liability, the Court relied on common law principles from other jurisdictions which were in comity with § 147.[122] *Brown*, then, sees the Restatement play out in the context of Connecticut caselaw with striking clarity around a policy issue: what is equitable in an employment context? When do liability provisions become unwieldy and, in effect, unethical? The Restatement's drafters thus see here their position of "what the law is" realized in the context of a particular field, such as

[120] *Hanks v. Powder Ridge Rest. Corp.*, 276 Conn. 314, 885 A.2d 734 (2005).
[121] See note 120, *supra*, at 330.
[122] *See also*: *Bunia v. Knight Ridder,* 544 N.W.2d 60,63 (Minn.App.1996) (newspaper's exculpatory agreement with newspaper carrier violated public policy given parties' disparity in bargaining power), review denied (Minn. May 9, 1996), *Pittsburgh,* [*Cincinnati, Chicago & St. Louis Railway] Co. v. Kinney,* 95 Ohio St. 64, 72, 115 N.E. 505 (1916); *Pugmire v. Oregon Short Line R.R. Co.,* 33 Utah 27, 92 P. 762 (Utah 1907).

employment litigation. *Brown*, too, carries considerable precedential consequence for employment litigation and employment defense in Connecticut practice. Employers—cognizant of the *Brown* ruling—would have to construct their contracts accounting for the likelihood that broad, all-encompassing exculpatory clauses could be easily voidable on public interest grounds. Thus, contract terms in Connecticut reflect marked influence from the clarifying nature of the Restatement's § 147 and the attendant limitations the Restatement imposes on exculpatory clauses in employment contracts.[123]

In Connecticut, however, the Restatement (Second) of Contract's application seems most consequential in an assessment of how the Court moves from the proposed, abstract ALI Restatement rule to a practical application of these principles in Connecticut legal theory. In cases where the Restatement has wholly supplanted existing Connecticut common law, the inquiry must then turn to how litigant strategies become altered and what that means from a policy perspective. This is especially apparent in the nexus between the Restatement and the Connecticut Unfair Trade Practices Act (CUTPA)[124] on the question of mortgage obligations, which has marked impacts with respect to theories of contract recovery and also public policy interests that seek to make mortgage terms comprehensible and fair to consumers.

CUTPA has a corollary statute at the federal level—the Federal Trade Commission Act (FTCA)—and is modeled in many respects on the federal system outlined in the FTCA.[125] In essence, CUTPA protects consumer interests at the state level in Connecticut by prohibiting "unfair competition and unfair and deceptive acts" in the context of business or consumer

[123] The legal principle established with the adoption of § 147 was applied in three recent cases: *Kleen Energy Sys., LLC v. Comm'r of Energy & Envtl. Prot.*, 319 Conn. 367, 125 A.3d 905 (2015); *Lavin v. Absolute Tank Removal, LLC*, No. CV044003218, 2007 WL 448030, (Conn. Super. Ct. Jan. 29, 2007); and *Lewis v. Habitat for Humanity of Greater New Haven, Inc.*, No. CV095030268S, 2012 WL 386391, (Conn. Super. Ct. Jan. 9, 2012).
[124] CONN. GEN. STAT. § 42-110a *et seq*. (2011).
[125] Federal Trade Commission Act (FTCA) of 1914, 18 U.S.C. § 41-58 *et seq*.

relationships. Specifically, CUTPA provides a private right of action for those who suffer "a measurable loss of money or property as a result of an unfair or deceptive act."[126] The specific deceptive acts are not clearly defined by statute and the determination that an unfair or deceptive business practice occurred is a question—under the ambit of the courts—that is ascertained by conducting an evaluation under the Federal Trade Commission's "cigarette rule,"[127] which Connecticut adopted in *Votto v. American Car Rental, Inc*.[128]

The Restatement came into play in evaluating a CUTPA action in the Appellate Court's landmark ruling in *Gebbie v. Cadle Co*.[129] In *Gebbie*, the Restatement (Second) of Contracts acted to bar the Defendant's arguments on appeal that the contractual terms of a mortgage restructuring agreement were fraudulent or the result of a mistaken interpretation. Specifically, the *Gebbie* Court cited positively to the Restatement's § 153,[130] holding that the Defendant could not recover because a "party seeking to avoid a contract on the basis of a unilateral mistake must be the party that was mistaken." The Defendant in the instant matter failed—under the Restatement's standard—to prove that he was the mistaken party. Instead, his argument relied on the notion that it was the Plaintiff, not the Defendant, who was confused about the contract

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[126] The Connecticut Unfair Trade Practices Act, CONN. DEPT. OF CONSUMER PROTECTION, https://portal.ct.gov/DCP (last visited Dec. 29, 2020). CUTPA allows for private citizens to act as their own "attorney general" and gain recovery—and judgment—in the interests of themselves and other consumers.

[127] The FTCA "cigarette rule" is as follows: "It is well settled that in determining whether a practice violates CUTPA we have adopted the criteria set out in the cigarette rule by the [F]ederal [T]rade [C]ommission for determining when a practice is unfair: (1) [W]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some common law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers, [competitors or other businesspersons].... All three criteria do not need to be satisfied to support a finding of unfairness. A practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three." *Naples v. Keystone Bldg. & Dev. Corp.*, 295 Conn. 214, 227–28, 990 A.2d 326, 336–37 (2010) quoting *Votto v. American Car Rental, Inc.,* 273 Conn. 478, 484, 871 A.2d 981 (2005) (internal quotation marks omitted).

[128] *Votto v. American Car Rental, Inc.*, 273 Conn. 478, 971 A.2d 981 (2005).

[129] *Gebbie v. Cadle Co.*, 49 Conn.App. 265, 714 A.2d 678 (1998).

[130] Restatement (Second) of Contracts § 153 (1981).

terms. Thus, the Court found that the Defendant was making an argument that it lacked standing to bring: it sought to void the contract based on the alleged misinterpretation of the other party. The Court continued, observing that the Defendant also failed to make a viable fraud claim under the Restatement's § 152 and 153: "[A]ccording to general principles of contract law, rescission based on a mistaken understanding of the terms of an agreement is available only where the mistake is mutual, or where one party's mistake has been caused by the other party's fraud."[131] The Defendant plainly failed to allege how fraud entered into the renegotiation of terms. In fact, the Court observed that the Defendant has admitted to an extent the validity of the contract, as the Defendant "openly acknowledges the existence of an agreement by which it is bound yet refuses to honor."[132] Under an evaluation of the Restatement, then, the Defendant's legal argument have failed to

In the context of CUTPA, the Court found that the Defendant was liable because he could not abrogate the contract's validity by alleging a defense such as mistake or fraud that met the expectations of the Restatement. In affirming the CUTPA violation, the Court noted that the Defendant's "actions forced the plaintiff to seek redress in the courts to have the agreement enforced. This is the type of behavior that CUTPA seeks to discourage."[133] In further outlining its affirmation of the CUTPA allegation, the Court observed that absent any ruling that the contract was void, the actions of the Defendant constituted precisely those that would be contrary to the dictates of public policy. The Appellate Court embraced Connecticut's common law in

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[131] See note 129, *supra*, at 276-77. The full text of the Restatement's § 153 provides as follows: **"**Where a mistake of one party at the time a contract was made as to a basic assumption on which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and (a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or (b) the other party had reason to know of the mistake or his fault caused the mistake." Restatement (Second) of Contracts § 153 (1981).

[132] *Id*. at 279.

[133] *Id. See also*: *Murphy v. McNamara,* 36 Conn.Supp. 183, 416 A.2d 170 (1979) and *Bailey Employment System, Inc. v. Hahn,* 545 F.Supp. 62 (D.Conn.1982), aff'd, 723 F.2d 895 (2d Cir.1983).

reaching the public policy determination, citing to *Cheshire Mortgage Service, Inc. v. Montes*[134] in concluding that "a practice may be unfair because of the degree to which it meets one of the criteria or because to a lesser extent it meets all three.... Thus a violation of CUTPA may be established by showing either an actual deceptive practice ... or a practice amounting to a violation of public policy.... Furthermore, a party need not prove an intent to deceive to prevail under CUTPA."[135] A CUTPA violation was thus found by relying on the Restatement and, importantly, establishing a category of business practices within the mortgage industry that Connecticut courts consider to be contrary to public policy. The *Gebbie* ruling—using the Restatement as a base—allows for a whole class of mortgage actions and contract terms to become subject to the expectations of § 152 and 153. In other words, *Gebbie* utilized the Restatement with a degree of activism to accomplish a public policy initiative: mortgage agreements and renegotiations—if executed in accordance with the law—have a high value worth upholding to preserve the public trust in the mortgage system.

Further, in *Gebbie*, the Restatement can thus be observed in practical application as something more than a mere abstract principle. Here, the Restatement worked to defeat the Defendant's claims and rendered the Defendant liable for damages for a CUTPA violation that ran contrary to the Court's beliefs on what constitutes sound public policy. The Restatement in the context of CUTPA has also seen a concerted effort from Connecticut practitioners themselves to move toward and adopt the Restatement's values for the sake of clarity. In an evaluation of CUTPA's application to particular areas of the law—such as cases for breach of contract—*Connecticut Practice* observed that certain sources of policy "would seem appropriate

[134] *Cheshire Mortgage Service, Inc. v. Montes,* 223 Conn. 80, 105–06, 612 A.2d 1130 (1992).
[135] See note 129, *supra*, at 279.

in developing law under CUTPA,"[136] especially given that the statute as amended fails to prescribe the particular definitions of "deceptive acts" and leaves that determination largely to the courts. Specifically, *Practice* presents as an example "a possible claim of unconscionability in a contractual relationship. How might a court consider when actions that might be characterized as being unconscionable are a violation of CUTPA? A determination that there is unconscionability in a contractual relationship is a basis for providing relief under the Uniform Commercial Code and also is applicable to contractual relationships not covered by the UCC provision, according to the *Restatement Second, Contracts*."[137] The Restatement, then, receives some support for its suggestions in the context of Connecticut attorneys as well as the bench. *Practice*—as a measure of the outlook of Connecticut practitioners—reveals areas of the law that could stand to benefit from the Restatement's clarity. Here, in the CUTPA context, the Restatement can provide some clarity to an otherwise ambiguous area of the law and can serve to contribute to the resolution of critical legal questions in Connecticut.

Together, these Connecticut cases suggest that the application of the Restatement (Second) of Contracts is varied in the state. In many instances, the Court turns toward the Restatement to affirm foundational tenets of contract law. In others, the Court adopts the Restatement principle and develops a novel legal principle in Connecticut practice. What is critical in both substantive changes and the Restatement's affirmative guidance is that the Restatement guides the inquiry and is often given the same value as the common law. In this sense, present adoption of the Restatement in Connecticut seems to run contrary to what Yale Law Dean Charles Clark observed in his early review of the Restatement's adoption nationwide.

[136] Robert M. Langer, John T. Morgan, and David L. Belt, 12 Conn. Prac. § 2.5, Policy in Construing Act, Unfair Trade Practices (2020).
[137] See note 136, *supra*, at § 2.5.

Writing shortly after the Restatement of Contracts was first released in 1932, Clark notes that the "restatements *are furnishing the impeccable judicial citation* (emphasis added) with which to garnish an opinion and that they are not affecting the course of decision in any material way, nor in a way comparable to texts and articles of law professors."[138] Connecticut cases reflect a different vision: while they may lend some credence to the Restatement for the purpose of "judicial citation" à la Clark, judges at the Supreme and Appellate level seem to indicate a willingness to engage with the Restatement as a serious intellectual text that offers plausible and well-researched interpretations and guidance for courts to adopt. The Restatement in Connecticut, then, seems widely accepted and, in general, a valuable tool in outlining the law.

Connecticut cases, however, seem to fall in line with a vision of the Restatement that is broad and encompassing and approaches its inclusion from a myriad of perspectives. Indeed, as ALI Director Richard Revesz has noted, the Restatement can serve many purposes: it often "distills a rule that is latent in a body of case law, but which never has been expressly announced by a court."[139] In others, it can act to offer "new terminology to describe what courts are doing" and, in certain instances, anticipate "issues that have not yet arisen in decided cases and offer a view on how the law should be extended to decide those issues."[140] All of these various outcomes seem manifest in Connecticut jurisprudence and all embrace the same requirement, that there be some degree of judgment.

While the scope of the Restatement (Second) of Contracts influence is apparent, its outcomes are not: the decisions examined suggest several possible outcomes that alter the extent of recovery and have a real impact on litigants and judicial outcomes. In striking cases such as

[138] See note 36, *supra*, at 661.
[139] Richard L. Revesz, *The Debate Over the Role of Restatements*, 41 THE ALI REPORTER 1, 1-4 (2019).
[140] *Id.* at 4.

Gebbie and *Brown*, the fate of an appeal or the very construction of contracts and their provisions in Connecticut are governed by the Restatement's positions. These outcomes have a discernible impact on recovery and on rights and, in this sense, the Restatement plays a crucial role as a secondary source and as a bellwether when the common law cannot, or fails to, meet the expectations of the Court.

Chapter III. Case Study—Applications of the Restatement (Second) and (Third) of Torts In Washington At The Court of Appeals and Supreme Court Level

In the State of Washington, the second case study considered here, there is a different set of relationships at play. Whereas Connecticut caselaw on the Restatements often concerns contracts in the context of business—and attendant financial harm to business operations—Washington's adoption of certain provisions of the Restatement (Second) and (Third) of Torts directly addresses the impact on litigant rights and, particularly, avenues toward the recovery of damages that the Restatement can dictate. Indeed, relative to legal duties and liability specifically, the Washington Supreme Court has embraced and balanced common law duties with the Restatement (Second) of Tort's broader and all-encompassing approach that—in general—recognizes a right of recovery for the injured, but also recognizes the scope of issues presented by tort liability against manufacturers and their operations.[141]

In *Robb v. City of Seattle*, the Court considered the apportioning of third-party liability against several police officers in an action where the officers negligently left a firearm at the scene of a crime during a *Terry* stop[142] and the weapons were subsequently retrieved and used to effectuate a murder.[143] In *Robb*, the Court found that the scope of the action did not fall under the auspices of the Restatement (Second) of Tort's § 302B after conducting a thorough examination of the Restatement principle and the common law doctrines in Washington which both supported and rejected Restatement doctrine. § 302B, in pertinent part as follows, indicates that **"**[a]n act or

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[141] For a discussion of the Restatement (Second) and (Third) of Torts and their outlook toward litigants specifically between the author and ALI Director Richard Revesz, see Chapter IV, *infra*, at ___ to ___.

[142] Terry Stop (cf. stop-and-frisk): "A police officer's brief detention, questioning, and search of a person for a concealed weapon when the officer reasonably suspects that the person has committed or is about to commit a crime." *Terry Stop*, Black's Law Dictionary (10th ed. 2014). *See also*: *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968).

[143] *Robb v. City of Seattle*, 176 Wash. 2d 427, 433–35, 295 P.3d 212, 216–17 (2013).

an omission may be negligent if the actor realizes or should realize that it involves an unreasonable risk of harm to another through the conduct of the other or a third person which is intended to cause harm, even though such conduct is criminal."[144] In considering the applicability of § 302B's definition of "realize" to determine the extent of a party's potential liability, the Court began first with an analysis of the general common law rule, which holds that "in the absence of a *special relationship* between the parties, there is no duty to control the conduct of a third person so as to prevent him from causing harm to another'" (emphasis added).[145]

Further, in this context, the Court determined that § 302B cannot be considered independently or exclusively of the underlying relationship required for duty to attach. Indeed, the Court in *Robb* identified two types of common law relationships that might serve as premises to liability: a "special relationship with the victim" or "a special relationship with the criminal."[146] Here, however, there existed neither: the novel question before the Court was thus whether § 302B could abrogate the common law reliance on a "special relationship"[147] in the determination of third-party liability and instead find fault (and, consequently, award damages) on some other, independent basis such as "realization" that the Restatement favored.

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[144] Restatement (Second) of Torts § 302B (1965). With respect to recovery, the Court has noted that § 302B alone does not prescribe the full panoply of possibilities or account for all limiting factors. For instance, "[w]here the intentional misconduct is that of the person who suffers the harm, his recovery ordinarily is barred by his own assumption of the risk (see Chapter 17A) or his contributory negligence (see Chapter 17). This does not mean, however, that the original actor is not negligent, but merely that the injured plaintiff is precluded from recovery by his own misconduct. There may still be situations in which, because of his immaturity or ignorance, the plaintiff is not subject to either defense; and in such cases the actor's negligence may subject him to liability." Restatement (Second) of Torts § 302B cmt. c (1965).

[145] *Kim v. Budget Rent A Car Sys., Inc.,* 143 Wash.2d 190, 195, 15 P.3d 1283 (2001) (quoting *Richards v. Stanley,* 43 Cal.2d 60, 65, 271 P.2d 23 (1954)).

[146] See note 2, *supra*, at 434.

[147] The Court also noted that certain third-party liability existed in other sorts of special relationships, such as "between a business and a business invitee, an innkeeper and a guest, state and a probationer, and a psychotherapist and a patient." *Id*. at 434.

The Court concluded that § 302B did not apply, though it did acknowledge that in other contexts, such as those seeking recovery under torts such as negligent infliction or intentional infliction of emotional distress, a duty could materialize outside of the context of special relationships. What is critical in *Robb* is also the identification by the Court of a distinct and discrete "common law of Restatements" in Washington jurisprudence when attempting to parse the existence of a duty of care and the extent of liability, especially for third-party defendants. In the development of tort actions, Washington elected to use and rely on past interpretations to shift in favor of the common law rule for special relationships, citing favorably to *Hutchins v. 1001 Fourth Ave. Assocs.,* 116 Wash.2d 217, 802 P.2d 1360 (1991) (finding no duty under the Restatement's principles to a passerby assaulted while traversing the land of another) and *Kim v. Budget Rent A Car Sys., Inc.*, 143 Wash. 2d 190, 15 P.3d 1283 (2001), *as amended* (Jan. 31, 2001) (finding no duty of care under the Restatement against a rental car company after a vehicle was stolen and used in a vehicular assault). In developing and relying on past Restatement interpretations—themselves a part of the common law—order to reject the applicability of an existing provision such as § 302B, Washington courts appear to attempt to approach the question of Restatement applicability holistically.

However, the Court also acknowledged in *Robb* its own inherent inconsistency of apportioning duty. In its previous jurisprudence, *viz. Parrilla v. King Cty.*,[148] the Court of Appeals found that liability attached to a bus driver who exited his bus while leaving it running with a visibly erratic man on board. In *Parilla*, the Court applied an analogous "foreseeability" standard to find liability which is almost parallel § 302B's "realize" standard.[149] However, while there existed no "special relationship" in *Parrilla*, the Court still applied and found liability

[148] *Parrilla v. King Cty.*, 138 Wash. App. 427, 157 P.3d 879 (2007).
[149] *Id.* at 430.

under a separate, independent basis. In this sense, *Robb* is contradictory: the Washington Court rejected the Restatement's attempt at making the question of duty uniform even when the existing common law jurisprudence remains inconsistent itself. To relieve itself of this potential contradiction, the Court concentrated on the existence of an "affirmative act"[150] as central to the liability question: in *Parilla*, the leaving of the keys in the ignition was affirmative, in *Robb*, there was no such affirmative action.[151] There is, perhaps, an antipathy toward adopting Restatement provisions in their entirety that contribute to this sense of judicial inconsistency. The Restatement is often helpful in explaining and considering the scope of liability in a particular case, but when its principles—because they are inherently aspirational—are inconsistent with the common law, the Court will often attempt to balance the two, perhaps in an effort to maintain its own independence.[152] This balancing results in what appears initially to be an inconsistency in judicial reasoning.

However, while the determination and conformity of duty in Washington jurisprudence under the Restatement is less certain, its application to strict product liability within torts has been relatively consistent among decisions. The Restatement (Second) of Tort's § 402A—which has long been considered a contentious provision[153]—became "approved as the law in this [Washington] jurisdiction with respect to defective products" in *Little v. PPG Indus., Inc.*[154]

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[150] See note 147, *supra*, at 440-41.
[151] Though even this proposition seems dubious and a matter of parsing hairs: could it not be argued that the decision of the investigators to leave the firearms on the scene not an "affirmative act" similar to the bus driver's decision to leave the keys in the ignition?
[152] The notion that Courts often seek to balance their independence against the principles of the Restatement is a frequent subject of scholarly debate. For a negative treatment of the Restatement's impact and the dangers of American judicial positivism, *see* Alan Milner, *Restatement: The Failure of a Legal Experiment*, 20 U. PITT. L. REV. 795 (1958). For a positive view on the uniformity the Restatement can instill in judicial decision making vis-à-vis torts, see Arthur L. Goodhart, *Restatement of the Law of Torts*, 83 PENN. L. REV. 4 (1935).
[153] For a full treatment of § 402A's history and impact on the development of product liability, see Chapter I, *supra*, at 11-12, 17.
[154] *Little v. PPG Indus., Inc*., 92 Wash. 2d 118, 594 P.2d 911 (1979).

However, although the general contours of strict product liability in § 402A have been accepted, the Court still took issue with the Restatement's Comment H and found that "this statement is open to question."[155]

The black letter Restatement rule for § 402A reads as follows:

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.[156]

Comment H defines the limitations of "defective condition," which is the basis for imputing liability under the Restatement. If the product is not in a "defective condition," liability cannot attach under § 402A. However, the Restatement adopted a broad understanding of "defective" and predicated such a determination on the presence of a "reason to anticipate" as a component of manufacturer's liability. This doctrine has been subject to criticism, particularly with respect to the use of the word "defective" itself. Some have argued that the absence of a warning is better termed "unreasonably dangerous," and that this ambiguity leads to the ineffective application and of § 402A in judicial decisions.[157] The difficulty of applying the rule and its potential for judicial misuse becomes particularly acute in judicial attempts to interpret Comment H's expectation of an "adequate warning" and the manifestation of a "reason to anticipate" among manufacturers. Indeed, Comment H, in pertinent part, clarifies the scope of

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[155] See note 153, *supra*, at 120.
[156] Restatement (Second) of Torts § 402A (1965).
[157] John E. Montgomery & David Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C.L.Rev. 803, 819 *et seq.* (1976).

defection and provides model situations in which liability for defective condition could be introduced:

> [A] product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal handling, as where a bottled beverage is knocked against a radiator to remove the cap, or from abnormal preparation for use, as where too much salt is added to food, or from abnormal consumption, as where a child eats too much candy and is made ill, the seller is not liable. Where, however, he has reason to anticipate that danger may result from a particular use, as where a drug is sold which is safe only in limited doses, he may be required to give adequate warning of the danger (see Comment *j*), and a product sold without such warning is in a defective condition.[158]

The Washington Supreme Court in *Little* was thus faced with the question of applying Comment H's interpretation of "defective" against a manufacturer of cleaning solvent in the delivery of jury instructions. In *Little*, the plaintiff's husband died as a result of using cleaning solvent that lacked certain warning labels and plaintiff brought suit for wrongful death under theories of strict liability and negligence. Central to the Court's application and restricting of § 402A was negligence and the lack of guidance on how to present negligence claims in jury instructions in a strict product liability action. In particular, the Court framed the issue of reasonableness around one of the sufficiency of the warning rather than the intent of the manufacturer, adding that while the Court agrees "with the defendant's contention that the rule of reasonableness has a role to play in products liability cases, it is a role which concerns itself with the sufficiency of the warning and the expectations of the user. The question is, was the warning sufficient to catch the attention of persons who could be expected to use the product; to apprise them of its dangers and to advise them of the measures to take to avoid those dangers?"[159] While the plaintiff in *Little* sought additional damages under broad theories of negligence,[160] the Court

[158] Restatement (Second) of Torts § 402A cmt. h (1965).
[159] See note 153, *supra*, at 122.
[160] The award of punitive damages (which may be more lucrative and significant than compensatory damages) for strict product liability, alone, is generally barred in Washington absent express legislative authorization. *See Dailey*

found that they could not comport with an application of strict liability and that the two must be treated as independent: "the objective of the rule of strict liability with respect to dangerous products is defeated if a plaintiff is required to prove that the defendant was negligent, or the latter is allowed to defend upon the ground that he was free of negligence. It is the adequacy of the warning which is given, or the necessity of such a warning, which must command the jury's attention, not the defendant's conduct."[161]

The Court reached this determination in *Little* for two reasons: first, it sought to limit the scope of recovery under § 402A because of the potential dangers for "limitless liability" and their attendant financial consequences against manufacturers posed by a subjective judicial determination of negligence. The Court sought to be cautious knowing that in the purchase and use of any product, specifically those with varying costs and degrees of quality, it "must be borne in mind that we are dealing with a relative, not an absolute concept."[162] In other words, the consumer of a product has differing expectations for quality and use depending on the nature of the product and its cost, and the manufacturer alone cannot bear the burden of ensuring that all products are in operable condition when cost is an inherent factor. Second, and critical to the influence of the Restatement on litigant rights, the Court found that § 402A—in establishing a uniform basis for apportioning strict products liability—already afforded litigants an adequate opportunity for recovery. If compensatory damages can be awarded with a § 402A finding of

v. North Coast Life Ins. Co., 129 Wash. 2d 572, 575, 919 P.2d 589, 590, 71 Fair Empl. Prac. Cas. (BNA) 718 (1996). However, with the introduction of a theory of negligence, the potential for recovery of punitive damages could be made easier, particularly given the location of the manufacturer. Imprimis: "If the injury occurred outside of Washington, or if the manufacturer is located outside of Washington, and there appears to be a basis for an award of punitive damages, consideration should be given to whether the action should be filed in a jurisdiction that would permit the award of punitive damages. Alternatively, application of the Restatement rule regarding choice of law rule may favor the law of a jurisdiction that permits punitive damages." § 26:5. Remedies—Punitive damages, 29 Wash. Prac., Wash. Elements of an Action (2020-2021 ed.).

[161] See note 153, *supra*, at 120.

[162] *Id.* at 122.

strict liability, there was simply no need to expand the scope of recovery: the Court found that that award was sufficient to meet the standard of making the plaintiff whole. The sole question was, then, the nature of the question posed to a jury: whether a product is safe or "unsafe to an extent beyond that which would be reasonably contemplated by the ordinary consumer?"[163]

The Court later addressed § 402A in other contexts, upholding the *Little* decision but recognizing certain exceptions. For instance, litigant rights to recovery were again restricted as Washington courts recognized that suppliers of component parts could not be held liable for other defective or unsafe components in the manufacture of a single product. In *Simonetta v. Viad Corp.*,[164] the Court considered whether a manufacturer of an evaporator (a device which desalinizes sea water) was liable under § 388 and § 402A for insulation, produced by a different company, that included asbestos. Recognizing that the Restatement's § 388 defines a supplier as "any person, who for any purpose or in any manner gives possession of a chattel for another's use…without disclosing his knowledge that the chattel is dangerous for the use for which it is supplied or for which it is permitted to be used."[165] In applying § 388 and holding that a component manufacturer is not liable under § 388 and § 402A, the Court again returned to the question of the scope of the "reason to anticipate" that accompanies a particular duty to warn in the manufacturing process. Indeed, citing to a prior Appeals Court decision in *Sepulveda–Esquivel v. Central Machine Works, Inc.*[166] (finding no liability under § 388 against a hook manufacturer when the hook itself did not contribute to the deficiency in a loading crane), the Court plainly determined that there must be a demonstration of actual knowledge of the manufacturer of a component before liability can attach under § 388. In this way, the Court

[163] See note 153, *supra*, at 122.
[164] *Simonetta v. Viad Corp.*, 165 Wash. 2d 341, 197 P.3d 127 (2008).
[165] Restatement (Second) of Torts § 388 cmt. c (1965).
[166] *Sepulveda–Esquivel v. Central Machine Works, Inc.,* 120 Wash.App. 12, 84 P.3d 895 (2004).

adopted a comparatively narrow approach to the apportioning of liability toward manufacturers, one which comports with case law in other jurisdictions which "similarly limits the duty to warn in negligence cases to those in the chain of distribution of the hazardous product."[167] In the process of advancing particular legal aims, the Court here found that the scope of recovery against manufacturers must be based on knowledge, in effect applying § 402A's general rule of reasonableness requirement to a different subset of parties in a strict liability action. Here, then, the Restatement's lack of clarity around who precisely holds a duty to warn played a role in the ruling of the Court that ultimately acts to limit the parties that a litigant can recover against.

Escaping liability under § 388 as a component developer raises questions about the Restatement's effectiveness and the Restatement's construction: in excluding any discussion of precise liability determinations for the manufacturers and developers of a particular product, the ALI has effectively left it to the common law to discern when liability can attach to these component manufacturers. In this way, despite warnings against § 402A that often castigate it as applying beyond the scope of its authority, § 402A is also underdeveloped in ways that permit judicial imagination to define its limits. Consider, for instance, the denial of § 402A recoveries here for cases of component liability against, as Charles Cantu notes, the application of § 402A to cases that go beyond the sale of products and apply to "lease agreements" and the development of strict liability for leased products.[168] In this respect, the common law and the Restatement again seem to work together in a tête-à-tête between the courts and the ALI around the scope of effective limits. Still, what is particularly notable about § 402A applications and adoptions at all is that they represent an area of the law with no basis in common law majority

[167] See note 163, *supra*, at 353.
[168] Charles E. Cantu, *Reflections on Section 402a of the Restatement (Second) of Torts: A Mirror Crack'd*, 25 Gonz. L. Rev. 205 (1990).

rulings prior to their inclusion in the Restatement. As Cantu argues, court rulings nationwide prior to 1965 had found that "the basis of liability in defective products cases had been either negligence, or express or implied warranty."[169] Only a scattered few "concurring and dissenting opinions called for the application of strict liability to manufacturers and/or sellers of defective products."[170] § 402A then can be perhaps best understood in the genre of the aspirational Restatement, as moving the law in a particular direction even absent a common law basis. That impact on recovery, particularly in Washington where the provision has been adopted, reflects the influence that Restatement ideology can have on the courts themselves.

However, Washington has also turned more recently to the Restatement (Third) of Torts to guide its determinations in other areas at the nexus of multiple legal practice areas, specifically in determining liability for physical and emotional harms at the nexus of contract law and real property questions of land ownership. In *Adamson v. Port of Bellingham*,[171] a worker injured by a defective passenger ramp at a port, brought an action seeking compensatory damages, pain and suffering, and lost consortium. Seeking to recover damages, the Court had to determine whether the port itself had possession—an essential component of liability—as a preemptive question before finding liability. The Court found that a possessor of land under the Restatement (Third) of Torts is "a person who occupies the land and controls it,"[172] with the additional caveat in the comments as guidance that "[a] person is in control of the land if that person has the authority and ability to take precautions to reduce the risk of harm to entrants on the land."[173] In *Adamson*,

[169] See note 167, *supra*, at 207-208.
[170] *Id.* at 207.
[171] *Adamson v. Port of Bellingham*, 193 Wash. 2d 178, 438 P.3d 522 (2019).
[172] Restatement (Third) of Torts § 49 (2012).
[173] Restatement (Third) of Torts § 49 cmt. c (2012). The Court also loked to Comment D, which found considerable support for the notion that even a "possessor who cedes temporary control of property to another may be responsible as a possessor for conditions on the land that are not in the effective control of the other because of the temporal and practical limits of the other's possession."

the Court also turned to the Restatement (Second) of Torts and its own "common law of Restatements" to inform the standard that a possessor owes for potential hazards, citing to *Tincani v. Inland Empire Zoological Society*[174] in support of the proposition that § 343 is *"*the appropriate standard for duties to invitees for known or obvious dangers."[175]

The Restatement (Second) of Torts § 343, in pertinent part, indicates that a possessor of land is subject to liability for physical harm, even if the property is leased to another, if he:

> (a) knows or by the exercise of reasonable care would discover the condition, and should realize that it involves an unreasonable risk of harm to such invitees, and
> (b) should expect that they will not discover or realize the danger, or will fail to protect themselves against it, and
> (c) fails to exercise reasonable care to protect them against the danger.[176]

In *Adamson*, the Court—relying on § 49 of the Restatement (Third) and § 343 of the Restatement (Second)—found that the port could be held liable because it was a possessor and it had failed to exercise the prerequisite of reasonable care in maintaining the passenger ramp. Thus, the Restatement here finds itself applied with deft attention to the expectations of liability therein and also the terms of the lease itself. Because the Court found that "the Port had access to the property to conduct maintenance; had the authority to unilaterally make changes to the property, while the lessee needed written permission; and the Port affirmatively contracted to repair and maintain with no provision requiring the lessee to repair and maintain," it was liable to ensure the adequacy and structural integrity of the ramp.[177] *Adamson* speaks to another aspect of Restatement application that has a direct and measurable impact on litigant recovery, *viz.* the interaction of Restatement principles with existing statutes and the common law. Contrary to the

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[174] *Tincani v. Inland Empire Zoological Society,* 124 Wash.2d 121, 875 P.2d 621 (1994). *See also*: *Ford v. Red Lion Inns,* 67 Wash.App. 766, 840 P.2d 198 (1992), *review denied,* 120 Wash.2d 1029, 847 P.2d 481 (1993); *Jarr v. Seeco Constr. Co.,* 35 Wash.App. 324, 666 P.2d 392 (1983); *Swanson v. McKain,* 59 Wash.App. 303, 796 P.2d 1291 (1990).
[175] *Id.* at 139.
[176] Restatement (Second) of Torts § 343 (1965).
[177] See note 170, *supra*, at 188.

Connecticut approach considered in Chapter II on contracts, Washington courts on questions of tort liability tend to address both their own common law adoptions and concurrently apply the black letter Restatement in order to buttress the rulings. In this respect, *Adamson* and its progeny reflect the fact that the Restatement cannot be studied in a void or be viewed as exclusively applied to particular areas of the law to satisfactorily resolve their disagreements. Instead, Restatement provisions such as § 402A function here as one resource to resolve and negotiate the complexities that often occur in apportioning liability in tort cases.

For instance, one of the leading cases before the Court of Appeals subsequent to *Adamson*—*Fowler v. Swift*[178]—considered a premises liability action over a slip and fall injury caused by a staircase. In assessing whether liability and a duty of care could attach to the two second floor tenants of the building, rather than merely the building owner, the Court again turned to the same Restatement analysis adopted in *Adamson*. Here, however, there was a clear caution that the "threshold determination of whether a duty exists is a question of law" for the Court to decide independently, not merely one to be resolved under the auspices of the Restatement. Further, the Court reasoned that the Restatement's expectations for possessors alone were insufficient to establish liability. Indeed, the additional step of the established common law doctrine was a prerequisite to finding liability. In *Fowler*, the Court found persuasive not merely the Restatement's definition of possessor, but also the principle the Court had itself established in *Minahan v. W. Wash. Fair Ass'n.*[179] There, on a question of premises liability against a high school by a teacher who suffered injuries at an event on a fairground, the Court found that "[w]here an owner divides their premises and rents certain parts to various

[178] *Fowler v. Swift*, 10 Wash. App. 2d 1038, *amended and superseded on reconsideration*, No. 51366-8-II, 2019 WL 6881332 (Wash. Ct. App. Oct. 8, 2019). *See also*: *Coleman v. Hoffman*, 115 Wn. App. 853, 64 P.3d 65 (2003).
[179] *Minahan v. W. Wash. Fair Ass'n*, 117 Wn. App. 881, 73 P.3d 1019 (2003).

tenants, while reserving other parts such as entrances and walkways for the common use of all tenants, it is the landlord's duty to exercise reasonable care and maintain those common areas in a safe condition unless otherwise specified in the lease."[180] The Court relied in *Fowler* on *Minahan*'s reasoning to potentially support two particular outcomes that contribute to an understanding of the Restatement's function and application in Washington jurisprudence. First, the election of including *Minahan* reinforces and identifies that premises liability may be too complicated for a black letter Restatement to adequately state. There is a degree to which the common law, with its ability to subjectively assess notions such as reasonable care and impose long-presumed intentions of property maintenance (*e.g.*, maintaining common areas) is the superior vehicle for ascertaining liability. Separately, the Court in *Fowler* speaks to the practical limitations of Restatement over possession that often seek to favor the injured litigant at the expense of the alleged tortfeasor. For example, on the black letter Restatement alone, a tenant would be expected to exercise a duty of care event absent possession by virtue of § 343a correlated with the plaintiff's poor condition and health difficulties. What saves the defendants here is the presence of the common law as a remedy to a presumption of reasonable care in premises that are not their own. This finds accord with foundational tenants of real property for "most courts hold that the landlord has a common-law duty to exercise reasonable care to maintain common areas in a reasonably safe condition for the use of the tenant…*and persons using the areas in right of the tenant*" (emphasis mine).[181] Interestingly, this same principle is embraced by the Restatement (Second) of Property (Landlord and Tenant), which holds that there exists a duty of "reasonable care" imposed on the landlord to disclose any "latent" defects

[180] See note 178, *supra*, at 891; see also *Fowler*, *supra* note 177, at 1038.
[181] SHELDON F. KURTZ, MOYNIHAN'S INTRODUCTION TO THE LAW OF REAL PROPERTY 108 (6th ed. West Academic Pub., 2015).

in the premises and, to the extent known, the common areas and spaces also enjoyed by the tenant under the terms of the lease.[182]

In this respect, *Fowler* demonstrates a potential inconsistency in the application of the Restatement itself, particularly when one principle (§ 343) might come into conflict with the common law tradition embraced by another Restatement in a separate subject area. Thus, here the value of the Restatement as a guide and not as a dictum is readily apparent: while it can serve to clarify and advance the interests of the law, it can also obfuscate the common law and bar courts from effectively applying the law by effectively considering the impact of prior decisions. Washington's engagement with the Restatement (Second) and Restatement (Third) of Torts extends into another realm that has a considerable impact on actions by applying the Restatement to questions of statutory construction and statutory remedies broadly in Washington courts. In *Mathis v. Ammons*,[183] on an action for negligence against a tractor operator who had failed to adhere to a statutory requirement to display flashing lights on his vehicle. In *Mathis*, the Court outlined that aside from a general common law duty of ordinary care, a defendant can be subject to an additional duty that is distinct from ordinary care and may carry more significant expectations. To meet this standard, however, the Court in Mathis indicated that it will look to whether the statute meets a "four-part test drawn from the Restatement (Second) of Torts: The statute's purposes, exclusively or in part, must be (1) to protect a class of persons that includes the person whose interest is invaded; (2) to protect the particular interest invaded; (3) to protect that interest against the kind of harm that resulted; and (4) to protect that interest against the particular hazard from which the harm resulted."[184] Further, the Court observes, when a statute

[182] Restatement (Second) of Property (Landlord and Tenant) § 17.1 (1977).
[183] *Mathis v. Ammons*, 84 Wash. App. 411, 928 P.2d 431 (1996), *as amended on denial of reconsideration* (Jan. 21, 1997); *see also*: Restatement (Second) of Torts § 286 (1965).
[184] *Id.* at 416.

meets the expectations of the four-part test, a generic negligence action "will involve not just a common law duty to exercise ordinary care, but also a statutory duty to comply with whatever the pertinent statute says."[185] However, critical to this inquiry is still that the Restatement can effectively decide when duties concomitant to a negligence action can expand to include other types of duties in tort actions. The notion that a Court would defer to the Restatement to determine the situations in which a statute—an affirmative act by the legislature—is applicable offers one of the more significant demonstrations in the practical application of the law of the Restatement's persuasive authority in judicial settings.

The Court found in *Mathis* that although the statute must pass muster under this test, the judge still retains some ability to apportion negligence: "If all reasonable minds would conclude that the defendant failed to exercise ordinary care, the judge can find negligence as a matter of law. If no reasonable mind could find that the defendant failed to exercise ordinary care, the judge can find the absence of negligence as a matter of law. In any other case, negligence is an issue for the trier of fact, even when the defendant breached a duty imposed by statute."[186] Therefore, the judge still retains the authority and the ability—even if a statutory expectation was breached—to apply the law and determine whether a negligence action can attach. Further, *Mathis* and the analysis of § 286 applicability is further confounded by the introduction of the Restatement's position that

> The fact that a legislative enactment requires a particular act to be done for the protection of the interests of a particular class of individuals does not preclude the possibility that the failure to do such an act may be negligence at common law toward other classes of persons. It also does not preclude the possibility that, in a proper case, the requirements of the statute may be considered as evidence bearing on the reasonableness of the actor's conduct.[187]

[185] See note 182, *supra*, at 416-17.
[186] *Id.* at 418-19.
[187] Restatement (Second) of Torts § 286 cmt. g (1965).

In this respect, the Restatement takes a cautionary approach: it specifies a test for courts to adopt to determine the extent of negligence in relation to a statute, but it also acknowledges that common law negligence can still apply even absent the broader protection hat could be afforded by a statute. Here, though the Court of Appeals endorses § 286, the Supreme Court has yet to rule directly on the issue. Even so—again—the Washington courts seem to find persuasive the existence of a so-called "common law of Restatements" consisting of decisions which have turned favorably toward applying provisions such as § 286. In *Mathis*, the Court determined that this test could apply by reviewing decisions of the Supreme Court and lower courts which have applied the test in fragmentary components rather than as a united statement of the law, including *Est. of Kelly By & Through Kelly v. Falin*[188] (applying the Restatement's § 286 "class of persons" prong to the duty of care for a commercial vendor who sold liquor in contravention of a statute); *Hansen v. Friend*[189] (applying Restatement's § 286 "class of persons" prong in a wrongful death action against adults who had served a minor alcohol); and *Schneider v. Strifert*[190] (applying the Restatement's § 286 "particular interest" prong against a dog owner whose loose dog prompted a collision with a bicyclist), *inter alia*. The *Mathis* principle thus exhibits another aspect of Restatement adoption by the Courts in Washington: it is not always an affirmative adoption by the Supreme Court or the highest equivalent court of a state that is required for an effective declaration of the principle. Rather, the Restatement is often considered "adopted" not by explicit, wholesale declaration but through frequent citation and prevalence in the decisions of the court. This approach reflects both the Restatement's guiding potential and its frequent reliance by judges across the spectrum of decisions.

[188] *Est. of Kelly By & Through Kelly v. Falin*, 127 Wash. 2d 31, 896 P.2d 1245 (1995).
[189] *Hansen v. Friend*, 118 Wash. 2d 476, 824 P.2d 483 (1992).
[190] *Schneider v. Strifert*, 77 Wash. App. 58, 888 P.2d 1244 (1995).

The last major appearance of the Restatement (Second) of Torts in Washington jurisprudence which merits consideration is the application again of § 343 and § 343A to questions of duty. Here, of interest to our study, is the decision to discard the common law "Massachusetts" rule regarding natural accumulations of snow and ice and attendant duties imposed by the injuries they may cause. In *Iwai v. State, Emp. Sec. Dep't*,[191] the Court considered a claim for injuries against sustained during a slip and fall on a patch of ice in a state parking lot. Prior to *Iwai*, the state had adopted the natural accumulation or so-called "Massachusetts Rule" that "landowners had no duty to protect invitees from conditions caused by natural accumulations of snow or ice."[192] In this context, however, the Court—rather than disturbing *stare decisis*—used the Restatement to force a reconsideration of a question that had divided appeals courts in Washington.

The Restatement's § 343 and § 343A thus became in *Iwai* the "appropriate tests for determining landowner liability to invitees"[193] and abrogated a recent Appeals Court decision, *Schaeffer v. Woodhead,*[194] that had affirmed a case on summary judgment in favor of a defendant who had slipped in a store's parking lot. Here, again, the Restatement comes into play in making whole avenues of recovery available to litigants: at common law, there was no recovery for "natural accumulations." *Iwai* and its adoption of strict liability under § 343A changed that principle and reimagined opportunities for finding fault. Indeed, even when developing and promoting new theories of recovery, the Washington Court is careful to present the decision not as the creation and abrogation of existing law, but consistent with a line of previous decisions

[191] *Iwai v. State, Emp. Sec. Dep't*, 129 Wash. 2d 84, 915 P.2d 1089 (1996).
[192] *Id.* at 91.
[193] *Id*. at 93.
[194] *Schaeffer v. Woodhead,* 63 Wash.App. 627, 821 P.2d 75 (1991).

that had moved in favor of the broad approach to duties and liability that § 343 and § 343A countenance, including *Ford v. Red Lion Inns*[195] (rejecting accumulation rule and promoting § 343 in a slip and fall by a hotel guest in a parking lot) and *Geise v. Lee*[196] (imposing duty on mobile home owners under § 343 to keep the causeways between the homes clear of snow and ice), among others. These decisions, the Court reasoned, "taken together…reject the natural accumulation rule and impose Restatement (Second) of Torts §§ 343 and 343A as the appropriate standards for determining landowner liability to invitees."[197] Thus, with these cases in support, the Court reasons that it is safe to rely on the Restatement. Washington jurisprudence, then, reflects not only a willingness to adopt the Restatement in the area of tortious liability, but also a particular focus on ensuring that the Restatement is applied and tested in a myriad of decisions before being considered "adopted" at the state level.

Further, the Court in *Iwai* also recognized and imposed a greater duty on government and state agencies to maintain reasonable care on their properties. The Restatement's Comment G was relied on by the Court to establish that it is particularly important for duty when the land in question is "land upon which the public are invited and entitled to enter as a matter of public right."[198] Indeed, the Court found that the expectation of duty is even greater when the interests of a public utility or agency are incorporated and members of the public can expect to "encounter some known or obvious dangers which are not unduly extreme, rather than to forego the right."[199] Here the Court permitted the Restatement to direct and applied greater expectations of

[195] *Ford v. Red Lion Inns,* 67 Wash.App. 766, 840 P.2d 198 (1992).
[196] *Geise v. Lee*, 84 Wash.2d 866, 529 P.2d 1054 (1975).
[197] See note 190, *supra*, at 95.
[198] Restatement (Second) of Torts § 343A(2) cmt. g (1965).
[199] *Id.* § 353A(2) cmt. g reads, in pertinent part, as follows: "The same is true of the government, or a government agency, which maintains land upon which the public are invited and entitled to enter as a matter of public right. Such defendants may reasonably expect the public, in the course of the entry and use to which they are entitled, to proceed to encounter some known or obvious dangers which are not unduly extreme, rather than to forego the right.

reasonable care to the position that government defendants will be held to a higher expectation of compliance because of the particular nature of their services and their position.

Also, unique to Washington's adoption of the provision in natural accumulation cases was the caveat that "[t]he standards imposed by these sections do not distinguish between artificial and natural conditions—the duty to protect invitees from harm is the same in both situations."[200] This, too, reflects another aspect of Restatement adoption at the state level: the *sua sponte* expansion of the principle even absent direct guidance from the Restatement by the Court. In this sense, there is an underlying current of judicial activism: nowhere does the Restatement differentiate between artificial and natural conditions, and nowhere in their briefs did the plaintiff or defendant address this difference. The Restatement, then, becomes an adaptable and fluid vehicle for the formation of the state's common law and frequently becomes attenuated, as here, with additional requirements or impositions that can expand their scope and adjust their influence. This same principle is exhibited again in Iwai and analogous cases as the Court does not merely allow liability to attach and duty to form under § 343. Instead, a plaintiff must also prove in a premises liability action that the "landowner had actual or constructive notice of the unsafe condition"[201] or, alternatively, that the condition had existed for enough time "as would have afforded [the defendant] sufficient opportunity, in the exercise of ordinary care, to have made a proper inspection of the premises and to have removed the danger."[202] Again, this additional burden imposed on the plaintiff in a premises action is absent from the Restatement. It

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Even such defendants, however, may reasonably assume that members of the public will not be harmed by known or obvious dangers which are not extreme, and which any reasonable person exercising ordinary attention, perception, and intelligence could be expected to avoid. This is true particularly where a reasonable alternative way is open to the visitor, known or obvious to him, and safe." See note 197, *supra*.

[200] See note 190, *supra*, at 95.

[201] *Id.* at 96. *See also: Ingersoll v. DeBartolo, Inc.,* 123 Wash.2d 649, 869 P.2d 1014 (1994).

[202] *Pimentel v. Roundup Co.,* 100 Wash.2d 39, 666 P.2d 888 (1983) (quoting *Smith v. Manning's, Inc.,* 13 Wash.2d 573, 126 P.2d 44 (1942)).

reflects, perhaps, an effort by the Court to balance the increased scope of liability imposed on landowners under § 343 against their interests in operating and existing free from vexatious and constant fear of litigation.

Washington's adoption, here, of provisions of the Restatement (Second) and Restatement (Third) of Torts addresses the full breadth of aspiration and activism that the Restatements can introduce into the judicial realm. As Arthur Goodhart observes in his early review of the Restatement, there is present in American tort law a distinct sense of the "punitive or moral element that seems to be stronger in American law than it is in the English. Throughout the Restatement the rule seems to be that if the actor does an act which is wrongful as to A then B can recover if he is incidentally injured by it, even though as to him the actor has acted neither intentionally nor negligently."[203] In its own adoption of Restatement provisions, Washington has demonstrated an acute aversion in many cases to leaving litigants without opportunities or theories of recovery. Though certain decisions such as *Little* may limit the scope of recovery, all judicial decisions and limitations seem employed with an eye toward the impact on both parties to an action.

Washington thus provides, along with Connecticut, two separate approaches to Restatement application that help in a broad consideration of Restatement policy implications. In the case of the former, Washington, the focus is often on balancing interests and providing opportunities for recovery when the common law is at conflict with the pace of Restatement advancement. In the case of the latter, Connecticut, the focus in contract actions is often the promotion and protection of business interests. This result, considered further in Chapter IV, *infra*, may well be the result of the nature of the law and the states' historical judicial interests.

[203] Arthur L. Goodhart, *Restatement of the Law of Torts*, 83 PENN. L. REV. 4, 416 (1935).

Chapter IV. The Restatements and Litigant Rights—Understanding and Assessing the Impact of Decisions and Recovery

Assessing and interpreting the results of the Restatements as a judicial instrument is a difficult task. Decisions are issued and applied, but each affords relief to individual litigants and is not generally viewed as part of some great judicial philosophy or dictum that is reviewed and studied. Rarely—outside the line of Constitutional interpretation over specific issues—are cases considered as instructive and consistent on areas of the law such as relief. Moreover, there is no comprehensive study of the Restatements' application in particular areas that the author is aware of, aside from a scattering of critical interpretations in law journals, and these do not directly address the question of how judicial adoption of the Restatements directly impacts litigation outcomes and the results realized by participants in the judicial process. Further, studies of the Restatements are not often considered in assessments of decisions at the state level and their role in interpreting and overruling state common law principles: in other words, to state jurists, they are applied but often invisible in contemporary bar discussion, which tends to focus on the applications of the Restatements nationally.

In this case, our review of the Restatement (Second) of Contracts in Connecticut and the Restatement (Second) and (Third) of Torts in Washington afford a first step in considering the realities of the Restatement's influence and their place in shaping judicial decision making among state litigants and, specifically, how state participants see their outcomes directed. Ultimately, we can use the Restatements' applications here to understand what the consolidation of the common law and, in other cases, erosion of its principles mean for the awards of damages and recovery and for judgments and results, which constitute the principal concerns for litigants. Further, the state of the Restatement and its applications at the state level suggest that there is a real opportunity for further study on how litigants have seen their opportunities expand and

retract since the Restatements introduction, particular when we consider their persuasiveness and presence in judicial circles. In an interview for this disquisition, American Law Institute Director Richard Revesz has observed that the Restatements as a whole underwent a major shift during the administration of ALI Director Herbert Wechsler in the 1960s that adjusted their focus and sought to concentrate on consistency issues. Revesz noted that Wechsler's principal contributions were to recognize "that the ALI needed to consider statutory law passed by legislatures as well as common law developed by courts."[204]How much has this notion been realized? How much has this notion been realized? In the case of Connecticut, for instance, the Restatement (Second) of Contracts does not seem to have been concerned with statutory interpretations. Indeed, the legislature in the context of contracts has largely deferred from interacting with and directly addressing contract issues. In this absence, can the Restatement's aim in fact be realized? Perhaps only in certain areas of the law, such as Washington, where courts have sought to address the development of torts and evaluating the viability of certain statutes under a four-part test articulated in the Restatement.[205] For instance, Revesz in some respects predicts the reality in Washington, noting that certain states have "enacted statutes addressing issues that previously were controlled by judge-made rules, such as the choice among contributory and comparative liability regimes in torts."[206] This development in the Restatement speaks to the contemporary impact that they can have: they can direct the consolidation of the common law and also act responsively (and in relation to) legislative statutes.

Ian MacNeil has observed that the development of the Restatement (Second) of Contracts was guided by resolving an essential need for clarity. MacNeil argues that "the question raised is

[204] Interview with Richard Revesz, Director, American Law Institute, in New York, NY. (Jan. 4, 2021).
[205] See Chapter III, *supra*, at 55-56 for a discussion of the nexus between statutes and the Restatement in the context of *Mathis*.
[206] See note 204, *supra*.

a more basic one concerning the wisdom of attempting to restate anew the law of transactional contracts at a time when so much contract law concerns relations which much of the transactional doctrine is so ill-fitted to serve."[207] MacNeil addresses two central aspects of the Restatement of Contracts that are embodied in the Connecticut jurisprudence: the need for uniformity, specifically in the context of commercial transactions, and the need for a Restatement that effectively allows for more efficient commercial transactions between states. Thus, MacNeil asserts, the Restatement of Contracts and its development had to be cautionary to the extent that it did not take on the task "of developing new doctrines to link and describe the principles underling the similarities in behavior."[208] Indeed, by taking this course of action, the reporters of the Restatement of Contracts understood that their primary objective was to capitalize on a "body of doctrine already considerably developed not only by the formal lawmakers such as courts, administrative agencies and legislatures, but also developed in the scholarly sense and, above all in the customs and manners of the society."[209] The focus here is placed on the Restatement's ability to unify a disparate and existing body of law from a myriad of sources. Even so, MacNeil's optimistic projection is not always borne out in practice but rather realized only in certain situations where the law and the precise interests of the Restatement align.

As exhibited in the Connecticut caselaw, there is a clear distinction placed between the Restatement acting to supplement the common law and to replace it. In *Gibson*, considered *supra*, the Court supplemented the principles and interpretations of the foundational concept of the freedom to contract.[210] The purpose of supplementing and clarifying existing law was

[207] Ian R. MacNeil, *Restatement (Second) of Contracts and Presentiation*, 60 VIRGINIA L. REV. 609 (1974).
[208] See note 207, *supra*.
[209] See note 207, *supra*, at 609.
[210] For the full analysis of *Gibson*, see the discussion in Chapter II, *supra*, at 22-23.

recognized as a central principle by Revesz, who observed that among their primary goals is "to aid not just judges but also strive to advance the understanding of the law more generally."[211] Particularly with respect to contract formation, then, one aim of the Restatement of Contracts was to make the principles and norms of commercial transactions commonly known by the contracting parties. Even so, Connecticut cases did foreclose some of these opportunities for balance, opting instead—especially in common law "lost volume" cases such as *Gianetti*.[212] It is thus difficult to assess whether the Restatements in fact achieve their objective of balance: the official position may reflect that the Restatements seek to state the law as it is, but the reality is often muddled in particular practice areas. All of this, of course, results in an acute impact on the litigation strategies and the types of claims that can be brought by litigants.

Central to assessing whether or not the Restatement is in fact effective is not only a study of the extant case law, but also a recognition of why the Restatement's reporters may depart from the majority position. Revesz has indicated that, as with judicial decisions, "determining when to follow a minority rule requires judgment." Ultimately, Revesz contends, "a Restatement might find that a majority approach to a question creates unintended consequences in another area of the law," but indicates that the ALI "relies on its lengthy and transparent drafting process to ensure we get these determinations right."[213] This effort of engaging in that transparent process and departing from the majority rule was at play in Washington's consideration of strict product liability in § 402A of the Restatement (Second) of Torts, examined in Chapter III. Here, the Restatement adopted the minority approach for reasons that have been the subject of

[211] See note 204, *supra*.
[212] For the full analysis of *Gianetti*, see the discussion in Chapter II, *supra*, at 29-31.
[213] See note 204, *supra*.

considerable debate and disagreement and elected to depart from the previously accepted common law tradition in favor of this novel approach.

In making these departures from the accepted dictates of the common law, Fred Helms has observed that the Restatements, particularly in advancing their view on tort liability, have "forced the courts to look at law review articles to determine the present majority rule on strict liability."[214] Indeed, "instead of giving the courts an authoritative, determinative source with which at least to begin the decision-making process, the *Restatements* are in danger of being treated as merely worthwhile treatises."[215] Helms' contention is clear: the Restatements must avoid playing an activist role precisely because such activism would merely make them another treatise with suggestions or thoughts on the law could be improved. Further, it would erode their purpose as the standard bearer and expositor of the common law tradition in particular subject areas. Helms' point, however, appears to have fallen on deaf ears in our evaluation of the Restatements. While many provisions do turn on the question of what was intended by the common law tradition, others turn to focus on aspirational goals. The apportioning of liability and ability to recover damages, particularly in Washington, is at odds with existing jurisprudence. All of this suggests that, in some respect, the Restatements have expanded beyond their intentions and aims and turned their focus to advancing particular legal aims.

Revesz, in his interview, noted that the "Restatements do not purport to be controlling law" and "serve as useful secondary sources to aid judicial interpretation and advance understanding more generally."[216] This, however, is not necessarily the reality of how the Restatements are applied in practice. Indeed, while they are not controlling in the sense of the

[214] Fred Helms, *The Restatements: Existing Law or Prophecy*, 56 A.B.A. Journal 153 (1970).
[215] See note 214, *supra*.
[216] See note 204, *supra*.

common law, courts have adopted when convenient—as evidenced by the case studies—the Restatements as sufficient authority to justify a change in existing practice. Helms, too, seems to recognize that though the Restatements may not purport to be controlling, they still have as their aim a future outcome. Specifically, Helms notes, the Restatement process has come to fear that it will have been "on the edge of becoming dated before it is published," specifically with respect to issues such as strict liability. In this sense, then, Helms suggests that the Restatements, in developing legal disciplines such as torts, sacrificed the common law interest in order to remain relevant. This same sense of relevancy seems apparent in the Washington courts, particularly as strict liability regimes are considered and assigned. Helms, meanwhile, insists that we recognize that it "will always be possible for the men responsible for restating the law to envision changes, but no combination of experts can predict accurately and no reference point is as understandable and as useful as the present. The best tool for re-evaluation is a restatement of how things are now."[217] The Restatements, then, have long proven contentious for the careful balance that they strike as aspects of legal practice: a citable reference for judicial actors, but also a policy apparatus that helps to advance specific, identifiable aims from within the legal community.

§ 402A's adoption in Washington, for instance, provides one example of a Restatement provision which fundamentally afforded a new scheme under which litigants could seek recovery. For example, notes Herbert Titus in an early response, just five years after its adoption by the ALI in 1964, state courts "in at least 15 jurisdictions have embraced the strict tort liability rule" in § 402A and "other courts have commented favorably…and have used it as a helpful guide in resolving cases involving traditional warranty liability."[218] Thus, the Restatement—

[217] See note 214, *supra*, at 154.
[218] Herbert W. Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 714 (1970).

though not controlling—is regularly persuasive in directing judicial outcomes at the state level. Titus also notes that "none of these courts had questioned the accuracy of the case law cited by the American Law Institute…and none has given serious consideration to the question [of] whether a jurisdiction's enactment of the Uniform Commercial Code precludes judicial adoption of the strict liability rule."[219] The danger, then, in a Restatement is not necessarily its content but that an errant court may rely without understanding the scope of the supporting comment or the authorities it relies upon. The adherence and trust of the courts in the Restatements, even without conducting additional research, speaks to both their weight and their importance within the legal community. If they are accepted at face value, as was the case with § 402A in certain jurisdictions, the ALI is thus invested with considerable power to state more than what the law is and turn its attention to what the law ought to be. Likewise, it becomes easier to see how quickly the Restatements' principles can find themselves judicially adopted. This degree of power, and the attendant results it can have on judicial outcomes, suggests that the Restatements may be more persuasive than at first glance. It is this concern that is frequently raised by critics, especially when the matter before the court can directly adjust the expectations of litigants.

As Titus asserts, § 402A and the adoption of widespread strict liability systems was enabled and accelerated by the introduction of the Restatement (Second) of Torts. For instance, he adds, courts "that have adopted the strict tort liability rules of section 402A have ignored these critics" and, more distressing than this, there is an "apparent 'overanxiousness' [sic] of courts to take part in the 'dramatic fall of the citadel'" that was previously the bedrock of limited liability schemes.[220] Here, then, is another principal concern of the Restatements with respect to their practical application in the courts: even if the ALI itself does not consider itself to be

[219] See note 218, *supra*.
[220] See note 218, *supra*.

controlling, the courts do in many areas of the law and fall back on the extant Restatements as persuasive when it is judicially efficient to do so. This "judicial boldness," suggests Titus, revolves around the view that the Restatement "presume[s] to be good law" when, in reality, the entire enterprise often relies on minority rules that may help to subjectively move the law forward.[221]

This judicial boldness extends, too, beyond the scope of state actions. As Revesz added, at the federal level and in federal process and procedure, the ALI Has "expressly taken up these questions."[222] ALI initiatives have included a Study of the Business of the Federal Courts[223] in the 1930s and a Study of the Division of Jurisdiction Between State and Federal Courts[224] in the 1950s and 1960s. In both cases, the ALI appears to function as a policy advocate on issues of uniformity and efficiency. Similar to the Restatements, it is this difficulty in balancing and competing objectives that confound what otherwise may be noble aims: the Restatements cannot be both aspirational and objective in their observations on law, at least not if they wish to be presented as impartial and well-sourced treatises. Further, Revesz observed, the Supreme Court has more recently turned to the Restatement to clarify an issue on which state and federal authorities were divided. In *McDonough v. Smith*,[225] the Court found that the Restatement (Second) of Tort's proposition of fabricated evidence was sufficient to dictate the federal standard. Even here, however, we are left with the question of how much the Court relied on their trust in the Restatement process when rendering a decision: how can we be certain of the caselaw that is selected and how can a court be confident that the rule or rules they select in fact

[221] See note 218, *supra*.
[222] See note 204, *supra*.
[223] A STUDY OF THE BUSINESS OF THE FEDERAL COURTS, (A.L.I., 1st ed. 1934).
[224] A STUDY OF THE DIVISION OF JURISIDCTION BETWEEN STATE AND FEDERAL COURTS, (A.L.I., 1st ed. 1968).
[225] *McDonough v. Smith*, 588 U.S. ____, 139 S.Ct. 2149 (2019).

speak to the majority opinion? These issues appear to, in some degree, beset the effectiveness of the Restatements and leave an uncertain field for those who approach the courts seeking judicial relief. Is the relief they seek a majority view or are the principles the court has adopted consistent with the common law tradition it has indicated it prefers to uphold?

Again, this trepidation toward the Restatements' construction and outlook is not a new phenomenon. However, as James Henderson and Aaron Twerski have observed, whether the Restatement may be understood as the result of "political" interactions responding to different constituencies ultimately depends on how you define and understand the term "politics" itself. Henderson and Twerski, who analyze the revisions to the products liability portion of the Restatement (Third) of Torts and were in fact instrumental in its drafting,[226] have posited that "if the term 'political' is defined as used in common parlance, then we categorically assert that external political pressures played no role in influencing our participation in the Products Restatement. At no time did any individual or group threaten to withhold support or approval unless we succumbed to making a change with which we disagreed as to the substantive merits."[227] However, Henderson and Twerski contend, if the term "political" is broadened to include the "art of opening up the process to persons with varying views of public policy, engaging them in dialogue, and responding on the merits to their criticisms and suggestions regarding what the law is and should be," then we "plead guilty to having 'played politics' in the first degree."[228] This distinction is important for two reasons. First, there is something of a legal fiction created by suggesting that policy interests and influences do not direct the real outcomes

[226] Both Henderson and Twerski served as co-reporters for the Restatement (Third) of Torts Products Liability provisions.
[227] James A. Henderson, Jr. and Aaron D. Twerski, *The Politics of the Products Liability* Restatement, 26 HOFSTRA L. REV. 667-668 (1998).
[228] See note 227, *supra*, at 668.

embodied in the Restatements, and second, this admission affirms one of the most compelling critiques of Restatement adoption: even if they are constructed with an aim toward uniformity, they still admit to an inherent susceptibility (and willingness to engage) policy interests.

In some cases, one might view this engagement of policy interests as a good thing: if we reach a compromise and consensus on issues such as, say, the proper apportionment of damages in particular actions, could we not offer more uniformity in results to litigants? Would it not be a better judicial outcome if those who suffered similar injuries were entitled to equal relief on similar triable issues? Perhaps—but as David Owen has argued—this is fundamentally at odds with the disparate impact that particular injuries suffered can have depending on a variety of social and economic factors. The Restatement (Third)'s approach to "rejecting section 402A's approach of defining defectiveness…obviated the need for a global test of liability based on some traditional liability touchstone such as consumer expectations or negligence."[229] Rather, suggests Owen, the Restatement (Second) of Torts introduced a new test that was not burdened with the traditional common law views of negligence that made effective remedies for litigants possible. Even so, Owen cautions, a concern of the Restatements is also their limiting and, one might even suggest, chilling effect on tort claims based on emotional appeals: the approach taken by the Restatement (Second) (and adopted in some form in Washington courts) is "devoid of the lively clash of claims of right and wrong that marked the early years" of tort development, but results in some increase in uniformity in judicial decisions. Still, each case which comes before a court must, in theory, be measured on its own merits, the need for relief can often correspond to the harm caused: an automobile accident, with respect to the measure of compensatory damages

[229] David G. Owen, *The Graying of Products Liability Law: Paths Taken and Undertaken in the New Restatement*, 61 TENN. L. REV. 1246 (1994).

(and antecedent claims such as lost wages or loss of consortium), would certainly have a different impact on the quality of life for a single mother with few assets compared to a banker.

While at some level this comparison may appear simplistic, one of the drawbacks of wholesale Restatement adoption may be their ability to curb judicial discretion on equity issues such as damage apportionment and assessments. Though the Restatement on its own is not controlling or binding, when a state Supreme Court—be it Connecticut, Washington, or some other jurisdiction—adopts it as persuasive, it does become binding under *stare decisis* on courts within the same jurisdiction. Because tort actions generally begin their judicial life in superior courts (or courts of similar jurisdiction), the adoption of the Restatement can have significant impacts on the tort claims brought by litigants from the inception of litigation. Further, by setting the scope and limitations of claims in a manner contrary to the common law at the outset, litigants are left with an unsatisfying paradox: our courts have historically ruled allowable certain actions and premises but have now overridden them through recent adoption of a foreign, in the jurisdictional sense, Restatement.

Doubtless, there is a need for consistency in certain decisions. However, as Mark Geistfeld has argued, decisions in tort claims, especially around liability and distress, cannot be reduced to objective principles and maintain their coherence. Indeed, Geistfeld contends, the "problem of coherence arises because a rationale for negligence liability applies to other tort doctrines. The justification for negligence liability in the Restatement (Third) proceeds from the compelling premise that one ought not engage in wrongful behavior and should be obligated to compensate others for the harmful consequences of such behavior. This justification *depends on a conception of* wrongful behavior."[230] In other words, because tort liability is premised on a

[230] Mark Geistfeld, *Negligence, Compensation, and the Coherence of Tort* Law, 91 GEO. L.J. 586 (2003); emphasis mine.

subjective notion of wrongful behavior, there are always going to be aberrations in the case law that are inconsistent with what we might consider appropriate remedies for the harms inflicted. Because of this, the Restatement's efforts to unify and effectively state compensatory schemes or measures of damages may take away an important contribution that the common law provides: an ability to focus on the merits of the case and not become tethered to a rigid scheme or existing structure that ensures that a complaint is determined and disposed without regard to its particular accusations and merits.

This also speaks to Owen's contentions, particularly that the Restatement does not always follow the prevailing sentiment and may act to in fact work against the interest of litigants seeking recovery or the interests of defendants in maintaining that uniformity. Specifically, Owen observes that "while plaintiffs may decry the abandonment of consumer expectations as the explicit test of liability in the new Restatement, defendants surely would have wished for a more complete return to negligence as the explicit test of products liability."[231] In this sense, the Restatement does not always satisfy either party nor does it reflect a prioritization of interests. Even with this factor introduced, the Restatement still at times evidently favors particular interests: strict liability provisions certainly do not defer to business interests and privilege the recovery interests of the injured.

The abandonment of negligence and the introduction of strict liability as evidenced by the Washington line of cases epitomizes the role of the Restatement as a policy instrument. For example, strict liability, which lacks a basis in the traditional notions of negligence upon which the common law is predicated, represents the implementation of a key policy objective for those engaged in the representation of plaintiffs in tort practice. Owen argues that "the very definition

[231] See note 229, *supra*, at 1250.

of defectiveness in section 402A was explicitly rooted in consumer expectations…[t]he fundamental exceptional value rests on the central importance of truth to individuals attempting to make intelligent choices in exercising their free wills."[232] There is, thus, the presence in the Restatement of Torts of a responsiveness to the judicial demands and interests of individuals. Still, it seems difficult to comport the privileging of individual interests here with the realities of an ALI process which is presented as inclusive of many of the parties that § 402A in its final form works against.

Instead, we might understand the Restatement's as imperfect representations of various policy interests at a given moment. Certainly, the notion of strict liability—at odds with the common law tradition—was a key departure in the Restatement (Second). Perhaps in response to this, the ALI adjusted strict liability for products with the Restatement (Third) but—critically—many states, including Washington, have continued to operate under the extant principles. This demonstrates the dangers that Restatement adoption can have. Because they are not controlling and require adoption, there is no default adjustment to the law as there might be for a statutory scheme that succeeds a previous one. In this respect, the Restatements can prove difficult to correct if prevailing sentiment forces an adjustment. The marked shift between the Restatement (Second) and the Restatement (Third) on the matter of strict liability means that judicial outcomes differ significantly by state: Washington adheres by the old system under the Restatement (Second), whereas other states may elect to follow the advisories of the Restatement (Third). If the object of the Restatement is to introduce judicial uniformity and aid in decision-making, having different, operative forms of the Restatements that are at odds with each other

[232] See note 229, *supra*, at 1247.

permits a dangerous step in the judicial process. Judges could, in theory, apply the Restatement of their preference.

Thus, the question becomes: can the Restatement's issues be remedied, and can it still prove an effective judicial instrument? Despite these issues, George Conk has argued that there is an unavoidable reality of the Restatement: that there is real power in the "black letter rule of law and the tendency of the *Restatement*'s explanatory comments to become authoritative texts that set the terms of debate for many years."[233] Indeed, the Restatement remains effective, particularly in aiming to state what the law is, with an addendum of what the law may be. Conk also identifies a second aspect that makes the Restatements a powerful instrument for judicial reformation and development: their imprimatur carries considerable weight in making policy changes accepted, particularly among the legal community. Conk notes that the adoption of § 402A, which came after previous efforts to implement strict liability schemes in New Jersey and California, "imparted credibility to this effort because of the prestige of the ALI and the strong consensus among its leading voices that strict liability was the proper rule…with the issuance [of the Restatement], the concept of strict liability for defective products became institutionalized."[234] Therefore, the Restatements serve the purpose of imparting judicial and institutional legitimacy to the legal theories and proposals that are first tested in jurisdictions. Even with this in mind, however, the Restatement (Second) of Torts continues to present a challenge, *viz*. the uncertainty to litigants that comes with the inconsistent judicial applications of the Restatement principles.

[233] George W. Conk, *Is There a Design Defect in the Restatement (Third) of Torts: Product Liability*, 109 YALE L. J. 1091 (2000).
[234] See note 233, *supra*, at 1092.

While the Restatement (Second) of Torts is among the treatises that has generated the most animated opposition from varied sects of academia and from the legal community broadly, our study of contracts also suggests that corporate interests and priorities can be considerably impacted by the introduction of Restatement principles that are at odds with the common law. For instance, Connecticut's adoption of § 264, examined *supra*, and its reliance on Restatement definitions in reviewing litigation around a West Haven referendum and its influence on a property development project. This had a material outcome on a contract interest and resulted in a tangible adjustment of the expectations that the parties had when entering into a contract and taking subsequent action. As Joseph Perillo has observed, the Restatement (Second) of Contracts is particularly interested in the awarding of damages and restitution: characterizing these provisions as combining "outworn dogma with audacious innovation," Perillo argues that the Restatement (Second) of Contracts has expanded "to encompass also restitution following avoidance of contract on grounds of fraud, duress, mistake, and the like, and following discharge because of impracticability, frustration of purpose, and similar circumstances."[235] Again, however, what is interesting is that the Restatement's inquiry and inclusion of awards of damages in some form—in this case those that are restitutionary—adjusts the calculus from merely stating the existing law in rendering judicial decisions. Instead, the Restatement now affords important guidance on the outcomes that litigants can expect in contract actions and the opportunities for recovery that are imposed by the treatise.

In this respect, the Restatement (Second) of Contracts acts similar to Torts in that both offer codifications of accepted principles (such as the elements of contract formation), but also seek to advance new agendas and interests that permit the court to take specific policy

[235] Joseph M. Perillo, *Restitution in the Second Restatement of Contracts*, 81 COLUM. L. REV. 37 (1981).

provisions. For instance, in the realm of contracts, allowing for specific forms of restitution demonstrates the impact that a contracts Restatement can have on litigant recovery. Further, as Perillo contends, the inclusion of restitution provisions in the Restatement (Second) speaks not to capturing the existing law, but to harkening back to earlier legal provisions and theories. Indeed, Perillo notes, the restitution provisions are "reminiscent of the first two decades of the twentieth century" and, speaking on reliance, rebuff "the authorities that protect the reliance interest in actions for restitution."[236] The Restatement, then, is not always concerned with the existing state of the law and can at times identify different sources on which to base its authority. In the case of contracts, restitution principles markedly diverge from their standards at the start of the twentieth century and again reflects a preference for privileging particular legal interests over others.

Perillo also notes that among the chief contributions of the Restatement (Second) of Contracts is its understanding that "justice does not require that the same measure of recovery always be used" and, in fact, restitution and recovery should be viewed as "either the market value of the plaintiff's performance or the 'extent to which the other party's property has been increased in value or his other interests advanced.'"[237] Again, the focus here is not on affording discretion, but on providing concrete guidance to judicial decision makers who may have to consider the scope of recovery allowable and the premises on which that recovery should be based. The Restatement (Second) of Contracts thus introduces another element to the recovery options for litigants and relies on authorities to reach its conclusions which may not *per se* be the majority. For Perillo, the Restatement's restitution provisions serve justice well. This may not be the case, however, for corporate defendants faced with significant restitution dues under a

[236] See note 235, *supra*, at 40.
[237] See note 235, *supra*, at 43.

Restatement scheme that diverges from the model that was previously considered established law. It is unlikely that their policy interests of indemnity are served in the restitution provisions.

What these case studies demonstrate is that a considered review of the Restatements offers insight into how judicial decisions are made and what factors influence their outcome. In the case of the Restatement (Second) of Contracts and the Restatement (Second) and (Third) of Torts, the impacts on litigant interests and awards are apparent. What is difficult to rectify, however, is that the law of the Restatements is not always consistent with the common law approach or with the statutory direction. Though they are not controlling, as Revesz has indicated, to do their job well "it is important that judges and other readers be able to turn to a Restatement for an accurate description of the state of existing law and for a reasoned explanation of why the ALI has adopted one approach to a legal question rather than another."[238] Implicit in that response is a sense of the Restatement as both a codification of what the existing law is but also an aspirational document which, on particular policy issues, adopts a minority or dissenting view over the existing majority position.

Although the law cannot be understood in a vacuum divorced from policy interests, the objectives of the ALI inherently constitute a different focus than those that may occupy a judge making a decision on the merits of a case before him. Advancing a particular policy persuasion supported by the academy (or supported by a Reporter and ALI members), may serve a discreet judicial purpose or satisfy a long-standing interest. An emphasis on increased uniformity in judicial decision making may not always have the positive outcome for the adequate representation of interests precisely because the law must have some measure of malleability when it comes to making awards for damages or deciding particularly contentious issues.

[238] See note 204, *supra*.

The case studies here demonstrate that the Restatements, particularly in the areas of contracts and torts, can have a positive impact through their adoption of tests and measures for particular claims. Even so, the Restatements are also a policy instrument that can prompt change in judicial practice and also serve (as was the case with the more contentious § 402A) as a catalyst that affirms and provides legitimacy to more radical judicial developments introduced in state courts. As Revesz noted in his interview, it is clear that the usefulness of the Restatements is in part the fact that they serve the purpose of "clarifying, modernizing, and otherwise improving the law across a range of contexts."[239] The Restatement, then, states the law as it is but also acts to modernize it. Implicit in the ALI's understanding of its own mission is a sense that the law can be consistently improved, and that the Restatement is a vehicle that can be used to advance the policy and judicial aims of uniformity and, in some cases, subjective views of equity.

In considering the development of the Restatements and their use as policy tools, it becomes evident that they serve an important purpose. Nevertheless, they still remain a legal project without the oversight of the full judicial process itself and one that is developed independent of the common law tradition on which our judicial system is predicated. The privileging of these minority interests at times appears contradictory with the stated aims of the Restatement process but remains available as a critical policy apparatus that can pursue and advance specific aims. The Restatements are a valuable resource for judicial uniformity and improvement—but their influence, insofar as pursuing the aim of ensuring that policies last in perpetuity—might be best served by amending the process and ensuring that it recognizes the implicit interests that are realized in the Restatements themselves.

[239] See note 204, *supra*.

Conclusion. The Restatements as a Policy Issue: Practical Solutions and Changes for the Advancement of the Law

As we have considered, the Restatements are an important policy device that are regularly relied on in making judicial decisions and determinations, and they can have a considerable impact in the development of new legal traditions, *viz*. by providing a foundation for minority positions and ideals to take hold in the courts. The courts of Connecticut and Washington have come to rely on the Restatements to clarify the law but also to advance discreet policy objectives while also turning to them for clear statements of the law. Charting a path forward for the Restatements requires a deliberate exercise in restraint and also a recognition that decisions which contradict the common law will inherently result in potential opposition from certain sects of the judiciary. With this concern in mind, adjustments to the Restatement process, especially around contentious provisions, would permit for a wider acceptance of Restatement principles and the more efficient operation of the law.

In our study here, the Restatements' potential challenges have been demonstrated in an assessment of their practical applications at the state level. Conflict with the Restatement and the common law has resulted in mixed outcomes and, in some cases, has come to result in the replacement of state decisions with the uniform Restatement. This outcome, however, regularly works against the clarity that the ALI seeks. Litigants are left with uncertainty about the sources of law and the rules enforced against them and find themselves discontented with a court system that emphasizes uniformity at the expense of situations that may be particular to certain states and certain state legal systems in our federal system. This is not to suggest that the existing Restatement process is inconsequential in remedying some of these concerns, but there exists real opportunity to reform the process in a way that focuses on how the ALI can effectively

balance the competing sets of interests that arise to advocate for the adoption of a particular policy provision.

Further, the Restatements are in need of reformation, particularly relative to those provisions which seek to supplant the common law and advance a specific group's legal aims. While many of the Restatements' principles are noble and aim to make substantive progress in particular areas of the law, their application and development via the avenue of the Restatements can lead to contradictions with existing state jurisprudence, often at the expense of the interests of litigants. These Restatement provisions also stand to place limitations on the effective development of the law and toward adequately reflecting the desires and beliefs of litigants. An effective remedy to these concerns would take into account the fact that the Restatements are not controlling but acknowledge that their basis in common law traditions (and embrace, on occasion, of minority opinions) provide for a wide array of cases on which to properly assess and measure the legal realities that develop as a result of their release.

Thus, the ALI should strongly consider developing and publishing with the issuance of the Restatements impact assessments which take into account the particular realities of certain jurisdictions, especially on those Restatement provisions which markedly diverge from the existing common law of jurisdictions. While this aim may not be practicable to compile for all states, the ALI could certainly propose a system that would track implementation in certain jurisdictions around controversial or novel provisions and could release timely reports to advise judges on the potential impacts to litigant interests that could develop as a result of adoption. The purpose of these reports would be two-fold: first, the release of candid assessments of the impact of certain Restatement principles on existing state law would better permit judges to assess and make decisions based not only on a particular minority interest, but with the full scope of the

possible implications considered. Second, judicial decision makers would also be able to better balance interests by being apprised to the potential conflicts that the ALI and others within the legal academy foresee and counter those conflicts in the strategic issuance and drafting of their rulings.

The effective implementation of these reports would require an independent set of decision makers and reporters at the ALI but would also provide a valuable opportunity as well to state for the record the full scope of potential disagreement and dissent from among the members of the ALI. In this sense, these reports may in fact afford an opportunity for those members of the ALI who disagree with the adoption of a minority rule to consider and examine the implications of the Restatement. The development of these non-partisan reports would also provide the Restatement reporters with an opportunity to consider the practicality of implementing what are originally abstract legal concepts. In this sense, the Restatements themselves could be made stronger by effectively examining the common law and then following up with a report on the actual judicial impacts of Restatement provisions.

With these reports, too, the ALI could also work to remedy issues of consistency and preference for certain Restatement provisions on a more frequent schedule than the issuance of an entire Restatement. For instance, our case study of Washington and § 402A on strict liability has revealed adoption, but we have also considered here the wide disagreement and concern within policy circles for strict liability regimes. In some cases, the Restatement of Torts (Third) responded to and attempted to clarify the strict liability laid out in the Restatement (Second). Likewise, in Connecticut, changing conditions and expectations in the formation of contracts, such as the Appellate Court's adoption of a multifactor test in the determination of contract performance examined *supra*, speak to the challenges presented by the adoption of Restatement

provisions. How can business be effectively conducted if there is a lack of clarity and a conflict between the common law conditions which have endured and the novel theories of the Restatement? Clarity cannot be afforded by merely issuing the Restatement. Rather, it must be issued with an understanding that new developments and legal ideas in the Restatement must be communicated and clarified to the decision makers in state courts, especially when such adjustments presage a change in the majority position.

Thus, having reports that regularly assess judicial preference for, and agreement with, Restatement principles, even when such principles have their genesis in a minority rule, would assist the ALI with its own mission and would also ensure that litigants have an opportunity to see change at the Restatement level sooner than over a period of decades. Accordingly, with this improvement in mind, it may be best to view possible adjustments to the Restatement process in a less stringent and arranged form: typically, new Restatements are issued after an adoption period of thirty or forty years to respond to adjustments in law and practice. Having provisional reports that measure the actual impact, from the perspective of litigants, on issues such as recovery would allow the Restatements' minority provisions to be more responsive to judicial needs. Further, this would comport with the ALI's emphasis on stating what the law is at a given time. While it may be impractical to completely revise and issue new Restatements on an annual basis, a regular assessment and amendment to more controversial opinions—informed by their adoption at the state level—would do much to serve judicial clarity and ensure that the law is responsive to legal developments at the state level.

These two remedies, though by no means conclusive, could serve within the scope of the ALI's mission to ensure that the law is stated and developed with an understanding of the inherent need by judicial actors for clarity and transparency in their decisions. Likewise, when

the ALI considers the adoption of legal principles drawn from minority rules or dissenting opinions, the normal review process should be supplemented by a mechanism that can serve to adequately redress the disruption that such adoptions can prompt. In other words, if the common law is to be upended, any revision should be subject to additional review, perhaps by the formation of a standing committee within the ALI that can report before the release of the Restatement on the potential impact of rule changes that would supplant the existing common law. Adopting a measure with this focus would allow the ALI to retain control over the process while improving and furthering the transparency of the drafting process. This committee could also require a Restatement reporter who proposed the change from existing legal practice to actively defend and advocate his position before the committee, putting further scrutiny on the issue of revision and requiring greater consideration and care in the drafting process before advancing minority rule positions. This committee could also consider in the scope of its review unconventional sources, such as testimony and written memoranda from litigants' themselves. This could be especially germane in cases that rely on the Restatements in assessing and determining an award of damages.

All of these recommendations would broadly operate within the scope of the ALI's mission without eliminating its purpose of promoting greater judicial uniformity. Indeed, revisions to the Restatement process should not be viewed with trepidation. Instead, the ALI can best serve the legal community when it is responsive to the needs of its primary audience: judges and other judicial actors at the state level who rely on the Restatements to clarify the law and, in some cases, provide uniformity to its decisions. Likewise, a revision to the Restatement policy and process with targeted action around the adoption of minority rules and dissenting opinions would ameliorate the concerns of litigants, especially when those provisions have a direct impact

on their recovery options. In all respects, these suggestions for policy change are uniform in their support for a Restatement that is as inclusive as possible in its construction and focus on an outcome that demonstrates that the ALI can effectively achieve its policy aims. They are likewise guided by the fact that the Restatement cannot be understood as the process of one individual or even one interest group. Rather, as we have demonstrated, the Restatement process relies on incorporating a variety of interests and concerns. These measures could provide the balance necessary in order to ensure that different interests are represented and that particular interests are not prioritized over another.

In some respects, it may seem easier to suggest that the Restatements adhere to the limited purpose of stating the law as it is. There are, however, compelling arguments, given the ALI's diverse membership, for on occasion adopting minority rules and advancing certain legal concerns with an eye toward equity and efficiency. However, any steps that would tend to limit or otherwise supplant the existing common law practice or majority preference in judicial decisions should be accompanied by a strong, deliberative process that focuses on the meaning imparted by a minority rule adoption: that the law needs to be changed for the better, and that existing dissenting opinions afford strong justification to suggest that the prevailing view is incorrect. A transparent revision that explains this reasoning cannot be achieved by a Restatement reporter alone, nor can it be adequately resolved effectively within the current ALI structure for drafting Restatements. Instead, to remedy these concerns and increase transparency, the ALI should consider revisions to the drafting process that acknowledge the contention around the adoption of minority rules. Doing so would, truly, afford the clarity around advancements in

legal uniformity that are critical to the fostering of public trust and faith in the Restatements as treatises and guides in the complex and fragmented world of the American common law.[240]

[240] Despite these concerns, the author does feel that the ALI has the capacity and ability to proceed forward with reformation. Historically, it has undertaken such efforts before (with Herbert Wechsler) and it shall undoubtedly happen again.

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A Note on Typefaces:

The chapters of this thesis are set in Times New Roman, a standard serif typeface in the Roman family designed for the *Times* of London newspaper in 1929 by Stanley Morison. Today the gold standard for academic writing, it has been at times called ubiquitous and bland. In his memoir on typography, *A Tally of Types*, Morison observed that in considering its design, he wondered what William Morris (the designer of the ITC Golden Type font) would think of Times New Roman, remarking that "as a new face it should, by the grace of God and the art of man, have been broad and open, generous and ample; instead, by the vice of Mammon and the misery of the machine, it is bigoted and narrow, mean and puritan." The font remains particularly popular with newspapers in a nod to its origins.

The title page and headings of this thesis are set in Goudy Old Style, with chapter headings underlined and set *in Goudy Old Style Italic*. Goudy (or GOS) is an old-style serif font designed by American type designer Frederic W. Goudy for American Type Founders in 1915. Inspired by the Italian Renaissance, the font is also individualistic, with its eccentric upward facing "g" and diamond dots above the "i" and "j" and clever, gentle swells at the base of "E" and "L." The italic form was completed by Goudy in 1918. Today, the font is especially popular in luxury magazines, and has been the font of choice in distinguished publications such as *Harper's* (formerly *Harper's New Monthly Magazine*) in the twentieth century. The font also finds regular use among those remaining bastions of American correspondence manufacture (such as Crane) It might best be termed "graceful" or, as Goudy himself described the font, it is "book letter with strong serifs, firm hairlines, and makes a solid, compact page." Truly though, the use of the font here is perhaps a coy nod to the future publishing ambitions of the author and his recent predilection with typographic history.