


12-15-1985

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### Recommended Citation

John W. Wade *The Restatement (Second): A Tribute to its Increasingly Advantageous Quality, and an Encouragement to Continue the Trend*, 13 Pepp. L. Rev. 1 (1986)

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# The Restatement (Second): A Tribute to its Increasingly Advantageous Quality, and an Encouragement to Continue the Trend

JOHN W. WADE\*

## I. INTRODUCTION

Professor Keyes has drawn up a strong and challenging indictment against the American Law Institute and its product, the second *Restatement of the Law*. The charges are hypercritical and severe.

The central theme of these charges amounts essentially to this: the second *Restatement* is not an update of the first *Restatement*. Instead, the Institute has abandoned its first *Restatement* goal of stating, with clarity, precision, and certainty, the common law of the United States as it is, so that those who seek to learn the law on a topic covered by one of the *Restatements* can find it set forth in an authoritative and accurate form, entitled to implicit reliance. On the contrary, the drafters are now engaged in stating their own subjective views on what the law ought to be, rather than what it is. Worse yet, they have not disclosed that they are doing this, and are therefore misleading the persons who unknowingly rely on the provisions of the *Restatement*. This practice cannot be condoned, and the Institute must revert to the purpose and method that it followed in producing the first *Restatement*. If it declines, pressure must be brought to bear upon it by other elements of the legal profession to require it to return to its original plan.

My intention is to examine this indictment and its several charges as objectively as I can and to set forth my conclusions. Fairness requires me to indicate that my connections with the Institute may

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have created a bias that I cannot fully discard despite my best efforts at objectivity.<sup>1</sup>

## II. CHANGES BETWEEN THE FIRST AND SECOND RESTATEMENTS

### A. *Method of Preparation*

The method of preparing the *Restatement*, starting with the first one,<sup>2</sup> has been for the Institute to appoint a Reporter who, in collaboration with the Institute's Director, selects an advisory committee composed of judges, attorneys, and professors. The Reporter for each subject prepares a Preliminary Draft of a selected portion of the project, including notes for the Advisors referring to relevant cases. These drafts are studied carefully by the Advisors, and the whole Committee meets for a period of several days to discuss the material submitted. Discussion is vigorous and quite uninhibited, often resulting in substantial alterations or a remand to the Reporter to rewrite in the light of the discussion. Reworked and rewritten, it is then prepared as a Council Draft, submitted to the A.L.I. Council (a group of around fifty leaders of the legal profession) for its criticisms and suggestions. Once again there is vigorous discussion. The Reporter then reworks it again and prepares a Tentative Draft (including Reporter's Notes with citations) for submission to each member of the Institute for comments. These Tentative Drafts are available to the public and may be found in law libraries.

A substantial percentage of the members are present at the annual meeting of the Institute and participate in the active debates on the individual sections. Votes of the members are often taken. In the light of decisions reached, the Reporter reworks the draft again. If a complete reworking is involved, the draft may go through the whole process again, but this is not ordinarily required.

This is the process followed with little change for both the first and second *Restatements*. It is quite time-consuming, and means that a *Restatement* on a particular subject is years in the making. The pur-

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1. I have been involved with the Institute in the following capacities: member of the American Law Institute since 1952; member of the Advisory Committee for the second *Restatement of Torts*, 1965-1970; Reporter for the second *Restatement of Torts*, Volumes 3 and 4, 1970-1982; member of the American Law Institute Council, 1959-1970 and since 1982; member of the Advisory Committee for the second *Restatement of Restitution* since 1982.

Mr. Keyes had completed a first draft of his article when I came to Pepperdine Law School as a visiting professor for the 1984-85 academic year. He gave me a copy to read and he and I engaged in extended and vigorous discussion, coming to the mutual conclusion that neither of us could persuade the other. Then we amicably agreed that it might be useful to present both points of view in a pair of articles published together.

2. See Lewis, "How We Did It", in *RESTATEMENT IN THE COURTS* 1, 5-6 (1945); H. GOODRICH & P. WOLKIN, *THE STORY OF THE AMERICAN LAW INSTITUTE*, 1923-1961 (1961); Darrell & Wolkin, *American Law Institute*, 52 N.Y. ST. B.J. 99 (1980).

pose of this process is to insure that all of the significant elements of the legal profession, in all parts of the country, are given a full opportunity to participate in presenting their points of view and determining what the *Restatements* have to say.

Although the process has been refined over the years, there has been no substantial change in it since the beginning.

### *B. Format*

The format adopted in the first *Restatement* was to divide each chapter into sections headed by a Blackletter statement of a precise, unequivocal rule of law. To this there were usually added a few crisp paragraphs of Comments, containing a sentence or so explaining or interpreting the Blackletter. Sometimes short factual illustrations were given to make the meaning clear. But there was no general discussion or exposition of the rationale behind the rule or citation, or discussion of case authority. The authority of the Institute was regarded as a sufficient authentication of the Blackletter. The initial plan was for the Reporter to supply the discussion and citations by preparing a treatise covering the subject as a supplement to the *Restatement*. But this part of the program fell through because of the Institute's inability to produce a group version of the treatise, as had been done for the *Restatement* itself.

The *Restatement* sections themselves were regarded as providing their own authority. Later volumes of the first *Restatement* gradually came to have more extensive discussion, but the essential format was not changed.

Case citations were later included by preparing small volumes of annotations for individual states for the various *Restatements*, but this part of the program did not appear to develop much enthusiasm, and has gradually fallen into disuse.

The basic system of Blackletter, Comments, and Illustrations has been retained in the second *Restatement*. The Comments are much more discursive, treating the rationale and application of the rule in considerable detail. Often the Blackletter is written in more general, more flexible language, and it now serves primarily as an introduction to the Comments, which provide the essence of the treatment. Illustrations have not been greatly changed. But citation of authorities is now an integral part of the format. A Reporter's Note is attached to the published section — sometimes in the same volume at the end of each section, sometimes in separate appendix volumes.

This Note explains the relationship of each section to the similar section in the first *Restatement*, indicates the extent to which the rule of each section is generally followed, and gives citations to pertinent cases. Case citations accompanying some subjects in the *Restatement* are quite copious; in other subjects they are limited to a few carefully chosen cases.

### C. *Substantive Content*

The stated goal of the first *Restatement* was to set forth the general law (or the common law) of the United States with clarity and certainty.<sup>3</sup> The Institute did not undertake to spell out clearly what test was to be used for ascertaining what the general common law actually was. As a result, many users of the *Restatement* seemed to have assumed that the test would normally be the position taken by a majority of the states passing on the issue. It is hard to believe that the Reporters and their Advisors, even in the first *Restatement*, made a point of compiling the number of states lined up on each side of an issue and mechanically adopted the side with the most votes. Many court decisions are very difficult to interpret and thus very difficult to "line up." Some opinions are much more cogently reasoned and persuasive than others. Some courts and judges are generally regarded as distinctly more able than others. Some rules are more logically consistent with the principles underlying the particular area of the law; some rules balance the conflicting interests of the parties more fairly.

The leaders in the Institute sometimes spoke of the general principles underlying the decisions. This provided substantial leeway. In a few instances in the first *Restatement*, the drafters adopted a rule that persons already acquainted with the law would immediately recognize as following a distinctly minority position.<sup>4</sup>

Those primarily responsible for the second *Restatement* did not attempt to develop a firmly established test for determining the present state of the general common law. They instead came to utilize a growing amount of leeway in making this determination and in choosing the language for stating the rule or principle. Minority positions were somewhat more frequently adopted, and broader or more generalized language was often used in the Blackletter.

It is this difference (of degree and not of kind) that Professor Keyes deprecates and condemns as expressing the subjective view-

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3. "The function of the Institute is to state clearly and precisely in the light of the decisions the principles and rules of the common law." *Introduction to RESTATEMENT OF CONTRACTS* at ix (1932).

4. See, e.g., *RESTATEMENT OF CONTRACTS* § 90 (1932) (action in reliance on promise as making it enforceable); *RESTATEMENT OF TORTS* § 60 (1934) (mutual affray and consent to battery).

point of the drafters rather than the true state of the law as it existed at the time of the preparation of the particular *Restatement*.

### III. THE "COMMON LAW OF THE UNITED STATES"

#### A. *The Appellate Courts and the Common Law*

*First Stage.* There was a notion widely believed at one time that the common law was an integral system existing independently of the actions of the courts. The function of the courts was not to create the law but to discover it and declare it in their decisions. For them to create or change the law or declare it contrary to its true form was regarded as a violation of the constitutional principle of separation of powers and a usurpation of power.<sup>5</sup> According to this view, the task of the Restater, like that of the appellate courts, was to "divine" the true law and set it forth with clarity.

*Second Stage.* This "true law" came to be regarded as not entirely and irrevocably changeless. A series of decisions stating various exceptions to a legal rule falling out of accord with modern conditions might be judicially analyzed as having eroded the rule so far that the correct rule was now appropriately stated the other way, with possible exceptions applying the old rule only to special circumstances.<sup>6</sup> This technique, used charily in the beginning, has come to be utilized more frequently and more extensively over the years.

*Third Stage.* In more recent years a growing number of appellate courts have substantially changed the nature of their approach. They are no longer discovering the "true law" but are instead in the process of managing the developing evolution of the common law in order to point it in the right direction. These courts no longer hesitate to change a rule of law when they decide that it is unjust and out of accord with current ideals and mores and does not properly meet present social and economic needs. Openly and frankly declaring that they are changing the law, they are ready to regard this action as part of the judicial function. As appellate judges were the original creators of the common law, they are now assuming the function of keeping it up-to-date. More and more, courts are dropping the cir-

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5. See, e.g., Carter, *Provinces of the Written and Unwritten Law*, 2 VA. ST. B.A. REP. 95 (1889). See generally R. POUND, *LAW FINDING THROUGH EXPERIENCE AND REASON* (1960).

6. The classic example is *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916), where Judge Cardozo relaxed the requirement of privity of contract in a negligence action by an injured party against the product's manufacturer.

cumlocutions of an earlier day and accepting responsibility for the present state of the common law. This concept, or technique, is now becoming part of the common law system itself.

As they proceed to assume this responsibility, judges must recognize that it is a very heavy and significant one, not to be exercised lightly. No longer can they rely on such subterfuges as the one that courts are not really making the law but merely discovering it; the one that the law has itself changed and they are merely declaring it; or the one that there exists an "implied" provision, covenant, or warranty in the transaction of the parties.

This process has been more extensively developed in certain areas of the law than in others. The field of torts is one in which the judicial changes have been most frequent and extensive. In tort cases the rules of law are relied on not so much for determining what kind of conduct can be engaged in without subjecting oneself to liability, but for the purpose of attaining a just result after one party has been injured.<sup>7</sup> In property and commercial law, on the other hand, the prime function of the rules of law is to enable parties to attain the binding result that they desire. To make a judicial change in the law that produces a different result after the transaction has taken place is not defensible.<sup>8</sup> Yet the courts have found a way to meet this problem. The technique of "sunbursting" — directing that the judicial change will take effect only prospectively, under such conditions as the court may lay down<sup>9</sup> — means that transactions entered into prior to the judicial decision are not affected by the decision and thus eliminates the unfairness that would otherwise result.<sup>10</sup>

#### IV. THE RESTATEMENTS AND THE COMMON LAW

The task of the persons preparing the *Restatement* may differ in several respects from that of an appellate court making a decision for a particular state. Yet you will surely agree that my overly brief tracing of the development of judicial participation in the evolution

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7. The technique of frankly admitting that the court was changing a rule of law began around 1960 in the law of torts. See Wade, *The Most Important Tort Change in the Third Quarter of the Twentieth Century*, 20 AM. TRIAL LAW. A.L. REP. 413 (1977); Wade, *Recent Developments in Tort Law and the Federal Courts*, 72 KY. L.J. 1 (1983). An earlier recognition of this is found in R. KEETON, *VENTURING TO DO JUSTICE: REFORMING PRIVATE LAW* 169 (1969). See generally Peck, *Comments on Judicial Creativity*, 69 IOWA L. REV. 1 (1983).

8. For a discussion on the difference between tort law and commercial or property law, see Seavey, *The Restatement, Second, and Stare Decisis*, 48 A.B.A. J. 317, 318 (1962).

9. The name "sunbursting" comes from *Great N. Ry. Co. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358 (1932). See Schaefer, *The Control of "Sunbursts": Techniques of Prospective Overruling*, 42 N.Y.U. L. REV. 631, 634 (1967).

10. For application to the law of property, see Casner, *Restatement (Second) of Property as an Instrument of Law Reform*, 67 IOWA L. REV. 87, 91-96 (1981).

of the common law is quite relevant to an understanding of the task of the Restaters. Suppose there are several different positions taken on a particular issue in the various states. Should the Restaters rely on a simple compilation of the number of states supporting each position and then automatically pick the majority position? If the position in a particular state is unclear, do they use their own interpretation of it? Should they give greater weight to the opinions of those courts generally recognized as possessing superior talent, or to particular opinions that are unusually well-reasoned and therefore more persuasive?

Should they instead look to the broad principles underlying the rules governing particular issues and determine what rule is most consistent with the general principle? Does this mean, if the rule seems to fit in well with the general principles but the legal analysis generally given in support of the rule seems logically unsound, that they should make use of the more logical analysis while retaining the rule? Should they give any consideration to their own viewpoint regarding logical consistency and the desirability of the ultimate results of particular rules?<sup>11</sup>

The answer to these questions is that the Restaters normally look first to see if there is a clear majority rule. In many situations, however, the elements raised in each of the above questions may perforce play a significant part in reaching conclusions as to what the *Restatement* should say; the result may be an amalgam of these various considerations. Does this mean that the individual sections are a result of subjective determinations? Yes, it does. But I again call attention to the nature of the drafting procedures and the stages involved in reaching the final draft: preliminary draft by the Reporter after intensive study; debates with the Advisory Committee; presentation before the Council; and presentation to the Institute floor. There is vigorous and uninhibited debate at all levels, with changes often being made and the whole topic not infrequently being referred back to the Reporter for complete reworking in the light of the discussion. Many points of view and varying types of experience with the prob-

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11. In 1948, then Director Herbert Goodrich remarked in his annual report that in "cases of division of opinion a choice had to be made and naturally we chose the one we thought was right." Goodrich, *Report of the Director*, 25 A.L.I. PROC. 18, 18 (1948). See also Goodrich, *Restatement and Codification*, in DAVID DUDLEY FIELD CENTENARY ESSAYS 242 (1949). Cf. Fleming, *The Restatement and Codification*, 2 JEWISH L. ANN. 108, 116 (1979) ("Hence numerous conflicts had to be resolved in favor of 'the better rule,' i.e., the more principled solution; besides the manner of formulation often betrays, if discreetly, the individual biases of the Reporter or his Advisors.")



lem are involved in the procedure. A composite determination based on this process certainly acquires an objective character.

The goal of the first *Restatement* was "to state clearly and precisely in the light of the decisions the principles and rules of the common law."<sup>12</sup> The common law at any particular point of time was regarded as ascertainable from the decisions and opinions that had been rendered as of that time. Some of these decisions may have been rendered many years ago, with no more recent decisions arising in the jurisdiction. With a static law, unchangeable except for legislative action, the age of a decision would make no difference in its authority. With the modified attitude concerning the responsibility of the appellate courts in regard to the state of the common law, however, the issue to be decided in determining the common law rule in a particular state is not necessarily what was the rule applied in its last judicial holding, but what the Institute believes the state's highest court would now decide if the case were before it at this time.<sup>13</sup>

This is not just a creation of the imagination of an impractical academic. It occurs frequently in actual practice in the application of the rule of *Erie Railroad v. Tompkins*.<sup>14</sup> A federal district court must apply state law in a diversity case, and often finds itself confronted with the problem of deciding how the state court would now decide the issue. When there is a developing trend in the law — for example, judicial abolition or modification of interspousal tort immunity — a Reporter who is well-acquainted with the law of his subject, particularly recent decisions, can more accurately predict that a number of undesignated state courts will lay down changes in the law when the issue next comes before them than a federal district court can predict what the state court in a particular state would do. Under the newly-assumed responsibility for the status of the common law, as many courts now regard it, trends necessarily become quite important for the Restaters.

I conclude this necessarily brief treatment of the appellate courts and the common law by quoting some remarks of Professor Herbert Wechsler. In his capacity as Director of the Institute, he has had occasion to discuss this matter with some frequency. These remarks were part of a speech at the annual Institute banquet held in May, 1984, upon his retirement from the position of Director.

Half a century ago, the bench, the bar and a good portion of the legal professoriat were sharply divided in their conception of case law, a division be-

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12. *Introduction to RESTATEMENT OF CONTRACTS* at ix (1932).

13. *Cf. Lewis, supra* note 2, at 19: "The Restatement of each subject expresses as nearly as may be the rules which our courts will today apply."

14. 304 U.S. 64 (1938). *Cf. Curtis, A Better Theory of Legal Interpretation*, 5 VAND. L. REV. 407, 416 (1938) (lower federal courts trying to predict what the U.S. Supreme Court will do).

tween the adherents of an older school of thought and those who called for a revision of the gospel.

The traditionalists held to the conception of the common law as a closed system, yielding answers to all questions that arose in litigation by conformity to earlier decisions or deduction from the principles that they declared. It is difficult to realize today the strength of the allegiance to that view, not only on the bench and at the bar but generally in the culture. Partisans of this point of view obviously were confounded by the conflicts and the variations in approach and in decisions that were so pronounced a feature of the product of the courts. They welcomed an organ that would clarify and simplify by articulating the "right" principles and deducing their "correct" application, an organ for pronouncing what was orthodox in areas of common law.

The opposing school . . . granted, of course, that precedent must play an important rule in any structure of case law. Their assertion was that the techniques of distinction and the multiplicity of inconsistent precedents and doctrine left great room in the process of decision for considered choice by courts, room that courts as they grew older had increasingly perceived. Moreover, they insisted, it is itself a tenet of the common law that courts have a responsibility to reconsider and rework decisions of the past to serve new values and to meet emerging needs. Within the area where courts are left free to choose, choice must be justified, it was submitted, upon grounds largely extrinsic to the system, calling for attention to the ends that law should serve in our polity and the effects of a particular decision in promoting or retarding policies that should prevail . . . .

The crucial point has always seemed to me to be that a decision when it breaks new ground — or, indeed, when it refuses so to do — initiates a dialogue by its supporting reasons, reasons whose persuasiveness to others will largely be the measure of its ultimate success . . . .

Needless to say, many supporters of the [second position] also welcomed in the Institute a new organ that would undertake to work with the decisions — not to promote the orthodoxy the traditionalists were so eager to propound but rather to endorse and validate important new departures in the process of rethinking and revision taking hold at that time in some of our highest courts.<sup>15</sup>

## V. THE RESTATEMENTS AND LAW REFORM

Persons who are engaged in stating — or restating — the law for the courts and other persons to rely on, will find themselves in a difficult position when they are convinced that the legal rule involved is a "bad" rule, unjust in its effects and illogical in its relationship with other rules. Laying down the bad rule may have the effect of reinforcing it and prolonging its lifespan. Stating a better rule may lead one who relies upon it into unfortunate consequences when the court does not follow it. Are the Restaters impaled on the horns of a dilemma?<sup>16</sup>

15. *Address by Professor Herbert Wechsler, Director of the American Law Institute*, 61 A.L.I. PROC. 408, 410-11 (1984).

16. See Leach, *The Restatements as They Were in the Beginning, Are Now, and Perhaps Henceforth Shall Be*, 23 A.B.A. J. 517 (1937). A bylaw

Anyone who thinks about the problem for a moment will come to realize that this is not a true dilemma. A Restater can select either horn without fully committing himself if he explains the situation and indicates why the choice was made.<sup>17</sup> A person who reads the explanation carefully is not misled.

As the first *Restatement* was getting underway, however, the Institute was not ready to adopt this option. It expected its Blackletter sections to be accepted on the basis of the magisterial authority of the Institute, rather than the persuasive nature of an explanation of the rule. Only occasionally did it adopt a rule that was followed by only a small minority of the courts. When it did so, it ordinarily gave an indication that this was so. When the Restaters laid down a minority rule that they thought to be much better, they did not always call attention to it.<sup>18</sup>

In later work on some parts of the first *Restatement* this position appears to have been somewhat relaxed. As the second *Restatement* got underway some two decades later, the Restaters assigned to the work felt more free to adopt a minority rule if a clear trend existed in that direction, and this was normally done with a candid explanation of the matter.<sup>19</sup>

It is normal practice to state the majority rule in the Blackletter. Sometimes, however, a minority rule is stated in the same Blackletter as if it were the majority rule; it is this practice that Professor Keyes focuses on and emphatically condemns. To prove that the purpose of the Institute, as conceived by its founders, was to bring certainty and order from the mixture of precedents in this country, he

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that we can never adversely criticize a rule which we find we have to state . . . presents a very unpleasant dilemma to a Reporter. He must either state a good rule which he knows perfectly well is not the law; or he must state a bad rule and by his very statement entrench it further.

*Id.* at 519.

17. Professor Leach opted for stating the rule and indicating that it is bad and why. *Id.* at 520. He concluded his talk by saying: "To me the essential aspect of the present situation is that we are well on the road to recovery from a pretty serious institutional Jehovah complex; and the important thing for us to do is to admit it, nay proclaim it, to ourselves and the world." *Id.* at 521. It may be important to note that he was speaking about the *Restatement of Property*, which was one of the last of the first *Restatements* to be completed, and came at a time when *ex cathedra* pronouncements were being softened.

18. "The accuracy of the statements of law made rests on the authority of the Institute. They may be regarded both as the product of expert opinion and as the expression of the law by the legal profession." *Introduction to RESTATEMENT OF CONTRACTS* at xi-xiii (1932).

19. *Ex cathedra* statements are no longer the rule. Significant authorities are now cited where their citation is called for as an aid to the user. All this is helpful in setting forth the reasons the Restatement adopts one view or another in instances of difficult questions and a division of authority.

H. GOODRICH & P. WOLKIN, *supra* note 2, at 12-13; *cf.* Leach, *supra* note 16, at 521. At that time, work on the second *Restatement* had already started; Agency and Trusts had been completed.

quotes from a set of lectures by one of the leading founders of the Institute, Judge Benjamin N. Cardozo. Given in 1923, these lectures were published a year later as a little book entitled *The Growth of the Law*. The quoted selection reads:

The law of our day faces a twofold need. The first is the need of some restatement that will bring certainty and order out of the wilderness of precedent . . . . The second is the need of a philosophy that will mediate between the conflicting claims of stability and progress and supply a principle of growth. The first need is deeply felt and widely acknowledged. The American Law Institute, recently organized, is an attempt to meet it.<sup>20</sup>

This quotation, and the idea that it expresses, are both fully accurate, but they are incomplete. The quotation begins the opening lecture in the series, and the initial paragraph continues:

The second [need], though less generally appreciated, is emerging year by year to fuller recognition. My purpose in these lectures is to say something to you about both, but most of all about the second.

'Law must be stable, and yet it cannot stand still.' Here is the great antinomy confronting us at every turn. Rest and motion, unrelieved and unchecked, are equally destructive. The law, like human kind, if life is to continue, must find some path of compromise. Two distinct tendencies, pulling in different directions, must be harnessed together and made to work in unison. All depends on the wisdom with which the joinder is effected.<sup>21</sup>

The remainder of the lecture dwells on this subject; all of it is well worth careful study and thought. I am impelled to quote a few sentences from the last two paragraphs of that lecture:

The law's uncertainties are to be corrected, but so also are its deformities. Often they go together, and the remedy that cures the one will be found to cure the other. Restatement must include revision when the vestiges of organs, atrophied by disuse, will become centers of infection if left within the social body.

. . . Over-emphasis of certainty may carry us to the worship of an intolerable rigidity. If we were to state the law today as well as human minds can state it, new problems, arising almost overnight, would encumber the ground again. . . . Restatement will clear the ground of debris. . . . Existing rules and principles can give us our present location, our bearings, our latitude and longitude. The inn that shelters for the night is not the journey's end. The law, like the traveler, must be ready for the morrow. It must have a principle of growth.<sup>22</sup>

This elegant prose expresses the idea far more clearly and effectively than my pedestrian efforts can. I think you will agree that while Judge Cardozo believed that the initial function of the first *Restatement* was to bring order out of the welter of decisions and to portray the common law as an organized set of rules and principles,

20. B. CARDOZO, *THE GROWTH OF THE LAW* 1 (1924), reprinted in M. HALL, *SELECTED WRITINGS OF BENJAMIN NATHAN CARDOZO* 185 (1947).

21. B. CARDOZO, *supra* note 20, at 1-2 (citations omitted).

22. *Id.* at 18-20.

he would have regarded the function of the second *Restatement* as not only to update the first one by modifying the provisions that had been fully changed by a majority of the courts, but also to work toward finding some path of compromise between the need for stability and the principle of growth. Those who have labored on the preparation of the second *Restatement* have sought to use wisdom in determining that path of compromise.

Chronologically, it was at a time about halfway through the preparation of the second *Restatement* that many appellate courts began to adopt the practice of frankly declaring that they were changing a common law rule. As I suggested earlier, this practice now amounts to assuming responsibility for the current condition of the common law. As this trend continues to develop, it will certainly have a significant effect on future work in preparing the *Restatements*. Just as the judges, in undertaking their new responsibility, must be careful to exercise their power with wise restraint, so too must the Restaters use caution in making recommendations to judges for appropriate changes.

The Institute has not fully succeeded in establishing and communicating to the profession in general a clear policy regarding the relation of the *Restatements* to law reform and efforts to attain uniformity in the law.<sup>23</sup> In the years 1946 and 1947, however, during the interim period between work on the first and second *Restatements*, a "Special Committee" was appointed "to report on recommendations for a future program for the American Law Institute."<sup>24</sup>

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23. In his report to the Institute in 1967, Director Herbert Wechsler raised the question whether "we should feel obliged in our deliberations to give weight to all of the considerations that the courts, under a proper view of the judicial function, deem it right to weigh in theirs." Wechsler, *Report of the Director*, 44 A.L.I. PROC. 483 (1967). See also Wechsler, *Restatements and Legal Change: Problems of Policy in the Restatement Work of the American Law Institute*, 13 ST. LOUIS U.L.J. 185, 190 (1968) [hereinafter cited as Wechsler, *Restatements and Legal Change*]. Without formal action, this "working formula" was accepted by the Council in 1968. *Id.* at 191.

Certainly, the Restaters should give consideration to the same circumstances that the courts consider in reaching their decisions, but they may feel a little more limited in adopting an entirely new rule than a court would be. There are a fair number of instances in which a venturesome appellate court has reversed its rule of law and laid down a rule that no other court has previously adopted. See, e.g., *President & Directors of Georgetown College v. Hughes*, 130 F.2d 810 (D.C. Cir. 1942) (charitable immunity abolished); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973) (comparative negligence substituted for contributory negligence); *Dole v. Dow Chemical Co.*, 30 N.Y.2d 143, 282 N.E.2d 288, 331 N.Y.S.2d 382 (1972) (invention of "equitable indemnity" to allow apportionment of liability according to fault); *Goller v. White*, 20 Wis. 2d 402, 122 N.W.2d 193 (1963) (parent-child immunity abolished). A *Restatement Reporter* would surely hesitate to try to do that. The major problem lies in finding a way merely to recommend a change, rather than laying down a Blackletter rule to that effect. See *infra* notes 63-65 and accompanying text.

24. Report of the Special Committee on Future Program, Learned Hand, Chairman, submitted to Council of the American Law Institute (Mar. 18, 1947).

Its report covered a number of separate topics, one of which was entitled "A Critique of Legal Rules." After giving hearty approval to the accomplishments of the *Restatements*, the Committee continued its comments:

There are plenty of illustrations in the various subjects of the Restatement where the Institute stated the law as it found it even though had it felt free to choose, a different rule would have been adopted. . . .

We think that the time has come to study critically these rules which we have so clearly stated. Such a study should indicate (1) what rules are founded on historical accident, misconception of other cases and the like; (2) what rules are unjustified by any principles of justice, but are unimportant or harmless and may be left as they are because of the desirability of certainty; (3) what rules are unsupportable in principle and evil in action; (4) what rules are functionally or otherwise desirable, but have been established upon grounds that are unsound or inapplicable and which may lead in later cases to erroneous or unjust applications of the rule.

In the conduct of such studies we should not only examine material in law books to find the development of rules in legal history, but we should look to nonlegal sources to find that state of things on which these legal rules are called to operate. Such studies would, in effect, be critical appraisal of the common law. . . .

So here, we think, is an inviting field for legal scholarship of a type for which the Institute is particularly competent. There are many forms it might take. It could begin, for example, with a critical examination of the contents of some one portion of the Restatement, chapter by chapter or section by section. Such studies may lead to a demonstration of desirability of legislation in possible further cooperative work with the Commissioners [on Uniform State Laws]. Or they may lead to such a pronounced adverse criticism in narrow situations that courts would feel free to change previous rules without waiting for legislative authority.

The type of study and technique which would be involved is one with which both the Institute and legal scholarship outside of the Institute are already familiar. In other words we should know pretty well where to start and what to do. We have responsibility in the matter since the Institute's authority behind the Restatement may conceivably grow so great as to prevent or retard changes in adaptation of the common law which would otherwise occur through natural growth. We are in a position where we can effectively and hopefully promote that growth, not retard it . . . .<sup>25</sup>

I have quoted from the report at some length because it was apparently not printed in any publication, available in law libraries, or otherwise subject to citation. The quoted selection applied to the work of the Institute in general and was not confined to the *Restatements*. But it would obviously apply primarily to work on the *Restatements*. Although the report does not appear to have been formally adopted, it must still have had some effect. It should have, I strongly believe, much more effect, and should also be given careful attention as plans come to be considered for the next round of *Re-*

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25. *Id.*

statements. Even before that time arrives, thought may appropriately be given to other ways of implementing the Institute's responsibility for law reform.<sup>26</sup>

In one respect — the method of preparation — the *Restatement* program is very suitable for promoting law reform. The Reporter of a particular *Restatement* and his Advisory Committee are selected both for their scholarship and learning in the field and for their objectivity in treating controversial issues; the Council and the Institute members serve as an excellent balancing factor, assuring due consideration for all points of view. The format of the *Restatements* themselves, however, is not now adequately suitable for this purpose. There needs to be developed an established means for supplementing traditional Blackletter and Comment with formal recommendations for improving the restated law as it is expressed in a particular *Restatement*.

I am not now referring to a case in which a choice has been made between two recognized lines of authority and the minority position is selected for the Blackletter rule. That practice was followed in a good number of cases, even in the first *Restatement*, and it is fully in accord with statements in the original Report of the Committee on Establishment.<sup>27</sup> I am talking about expressing disapproval of the Blackletter even though there is little or no authority the other way.

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26. In 1968, A.L.I. Director Herbert Wechsler quoted the statement of the Special Committee on Future Program given in the text above in an address to the Conference of Chief Justices. He added as his concluding remarks:

Such an enterprise seemed to some members of the A.L.I. Council to be too large a task to undertake; possibly it was and is. But if the Institute cannot work back through the *Restatements*, with a view to finding where the law that it has stated is in need of renovation, should it not make clear as it proceeds the areas in which it thinks renovation is in order either by adjudication or by legislative change, indicating which is deemed appropriate?

I do not hesitate to state my own opinion that it should. Until it does, re-statement work will make a smaller contribution than it can to the great task that lies before us: the continual refreshment of the legal system we have had the fortune to inherit and have the duty to maintain and improve.

Wechsler, *The Course of the Restatements*, 55 A.B.A. J. 147, 151 (1969); see also Wechsler, *Restatements and Legal Change*, *supra* note 23, at 194.

For my part, I do not hesitate to indicate my full endorsement of this thought.

27. Again, where the law is uncertain or where differences in the law of different jurisdictions exist not due to differences in economic or social conditions, the restatement, while setting forth the existing uncertainty, should make clear what is believed to be the proper rule of law. The degree of existing uncertainty in the law would not necessarily be reduced by a mere explanation of rival legal theories. Indeed, a restatement which confined itself to such an explanation would reduce the degree of existing uncertainty only in those instances where but one line of decision was supported by reasons worthy of consideration. Where the uncertainty is due, as it often is, to the existence of situations presenting legal problems on the proper solution of which trained lawyers may differ, the court can best be helped by support given to one definite answer to the problem.

Report of the Committee on the Establishment of a Permanent Organization for Improvement of the Law Proposing the Establishment of an American Law Institute

The Blackletter would reflect the actual state of the law, but the discussion would suggest the desirability of changing it for a better rule. This would mean completely eradicating what was regarded in the early days of *Restatement* history as a taboo against criticism of the stated Blackletter rule.

The criticism might be placed in the Comments with a heading such as "Criticism of the Rule." Of course, it could be in the Reporter's Note, but this would state it as only a personal criticism of the Reporter, while the approbation of the Institute would give it added weight. A different method would be to compile a list of suggested improvements in the law for a completed chapter or volume of the *Restatement*. This list could be published separately or in the *Restatement* itself. In any event, if legislation should be regarded as the appropriate way to make the change, it would be desirable to draft and offer a suggested act. More frequently, I think, the change would be one that the courts, in their newly-found responsibility for keeping the common law up-to-date, would regard themselves as capable of accomplishing. Perhaps an outline of the proposed reasoning in the court's opinion could also be suggested.<sup>28</sup>

The *Restatements* are also helpful in promoting uniformity of the law. Appropriate attention given to this in the Comments can serve a very useful purpose.

It is appropriate to refer here to a current project of the Institute that is trying a new approach — *Principles of Corporate Governance and Structure: Restatement and Recommendations*. As this project is presently developing, it adopts a format very similar to the *Restate-*

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(Feb. 1923), reprinted in THE AMERICAN LAW INSTITUTE 50TH ANNIVERSARY 11, 22-23 (2d ed. 1973) [hereinafter cited as *Report of the 1923 Committee*].

The *Report of the 1923 Committee* likewise declares that "[t]he character of the restatement which we have in mind can best be described by saying that it should be at once analytical, critical and constructive." *Id.* at 22. It also speaks of the "province of the restatement to suggest" changes in the law, *id.* at 23, subject to stated limitations and asserts that the

restatement here described, if adequately done, will do more to improve the law than any other thing the legal profession can undertake . . . [and] will also effect changes in the law, which it is proper for an organization of lawyers to promote and which will make the law better adapted to the needs of life.

*Id.* at 25.

Does all of this, in the original document proposing the Institute, seem inconsistent with what Professor Keyes has criticized in the second *Restatement*?

28. Legislation might more appropriately be suggested when the change would be more extensive and have complicating ramifications. Judicial action would be suggested when the change involves the simple overruling of an existing decision.



ments — Blackletter, Comments, and Reporter's Notes. But the Blackletter is not always posed in terms of what the law is now; instead, it is posed in terms of what the law should be. Often the two are in accord. If not, changes in the law are required, sometimes by judicial action, sometimes by statute. As this project is developing, it is being refined and improved. The final result, with a clear practice of indicating what is now law and what is not, requiring legislative or judicial action, may well turn out to be an excellent model for the form of the third *Restatement*.

## VI. SOME RECURRING DRAFTING PROBLEMS AND PRACTICES

### A. *Improving the Statement of the Rule and the Explanation of the Basis For It.*

Sometimes courts develop a legal rule through a rather lengthy and involved process that may have involved the use of fictions. The result is that the rule may be stated in an awkward fashion likely to affect adversely its future development and its application to particular fact situations. The *Restatement* can cut through this verbiage and determine the essence of the rule. One of the original concepts of the Institute was to find and express the principles underlying the rules. Enlightened courts will recognize the value of the new statement, and the future of the rule is thus assured.

The classic example of this is section 339 of the first *Restatement of Torts*, covering the liability of a landowner to trespassing children for injuries from a dangerous condition on the landowner's premises. Bound by the traditional rule that a landowner owes no duty of care to a trespasser, the courts invented the "attractive nuisance doctrine." The children were not trespassers but were instead invitees, courts said, because they were attracted to the dangerous condition, lured onto the premises "like dogs to a piece of stinking meat."<sup>29</sup> This altered the categorical rule, but the fiction created undue restrictions and sometimes imposed a duty that was too broad. Section 339 in the second *Restatement* eliminated this fiction and laid down in a logical fashion the conditions necessary for recovery. Courts quickly recognized the validity of the change in language, and the section has been widely adopted, with only one or two courts getting into difficulty by holding onto the original approach.

Section 402A of the first *Restatement of Torts*, involving strict tort liability for products, may also come within this category. Courts had long been holding liability for personal injuries and property damage on the basis of implied warranty. This was actually strict liability,

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29. See PROSSER AND KEETON ON THE LAW OF TORTS 400 (W. Keeton 5th ed. 1984).

there being no need to show fault. The only problem was the requirement of privity of contract, and courts had been assiduously working on various fictional devices to circumvent the privity requirement. Once section 402A, in conjunction with the Traynor opinion in *Greenman v. Yuba Power Products, Inc.*,<sup>30</sup> made it clear that the action really sounds in tort (liability being imposed by the law for physical injury rather than for loss of bargain), the courts seized the explanation and strict product liability swept the country.<sup>31</sup>

*B. Finding the Proper Mean Between Too Much Rigidity and Too Much Flexibility.*

Human beings have an innate desire for the kind of certainty that will make a decision automatic and not require the exercise of a discriminating judgment. Primitive law was very rigid, treating everybody the same way. But differences of facts and circumstances might make it unfair to treat two cases the same way. One way of handling this is to draft a very detailed list of exceptions or qualifications to the rule. This raises two problems: the sub-rule may itself be too rigid; and discretion may be needed to determine which sub-rule to apply. The common law came up with another device—the use of standards. A “standard” is an expression that requires the exercise of discretion in its application, such as standards for due process or negligence (what a reasonable prudent person would do or not do under similar circumstances). Dean Pound declared that the use of standards is a development of modern law.<sup>32</sup> They supplement rules and permit the production of a decision tailor-made for each individual case, in the light of its particular circumstances.

Restaters need to determine in each instance whether to “restate” a broad general principle, a more specific rule with or without more specific exceptions and qualifications, or a rule containing standards. In the first *Restatement*, the Blackletter stood almost by itself, at least in the beginning. In the second *Restatement*, the Blackletter loses some of its dominance and serves more as an introduction to the Comments.

Sometimes a *Restatement* uses a very indefinite phrase. This started with section 90 of the first *Restatement of Contracts*, which

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30. 59 Cal. 2d 57, 377 P.2d 897, 27 Cal. Rptr. 697 (1963).

31. See Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960); Prosser, *The Fall of the Citadel*, 50 MINN. L. REV. 791 (1966).

32. Pound, *The Administrative Application of Legal Standards*, 44 REP. A.B.A. 445, 456-59 (1919).

provided that a promise reasonably inducing definite and substantial action "is binding if injustice can be avoided only by enforcement. . . ."33 Phrases of this type are normally used only in determining what relief should be available, rather than in laying down a rule for conduct. But compare the definition of conversion in the second *Restatement of Torts*: "(1) Conversion is an intentional exercise of dominion or control over a chattel which so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel."34 This definition is supplemented by a subsection 2, which gives a list of six factors for determining when there is conversion. The Advisory Committee spent an afternoon trying to work out a more precise rule, but the factors varied so much in significance under particular circumstances and in combination with each other that greater precision could not be attained.

On a few other occasions the drafters found they could do no better than to state a list of factors. This usually occurs when the law is still in an inchoate shape, not yet having attained crystallization.<sup>35</sup> Remember, however, that Comments supplementing the Blackletter serve to describe and indicate the relative significance of the several factors.

#### *C. No Decisions or Other Established Law on the Topic.*

If the topic has not been important enough to become the subject of litigation, it may perhaps be ignored. It may, however, be sufficiently important and likely enough to arise that something should be said about it. The statement would then be likely to be in the Comments rather than the Blackletter, and it would probably be reasoned out by deduction from the logical implications rather than from the rules that are expressed.

If the problem is quite important and there is no logically impelling basis for reaching a decision, it may be handled by use of a caveat, which would say that the Institute takes no position on the issue. This would usually be accompanied by a Comment describing the possibilities for resolving it.

#### *D. Two Separate Lines of Authority.*

When the lines of authority are not in agreement, it normally be-

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33. RESTATEMENT OF CONTRACTS § 90 (1932).

34. RESTATEMENT (SECOND) OF TORTS § 222A (1965).

35. See, e.g., *id.* § 520 (factors to determine strict liability for abnormally dangerous conduct); *id.* § 767 (factors for determining whether an interference with contractual relations is "improper"); *id.* § 895D (factors for determining whether public officer is immune).

comes necessary to choose between them. The decision is not only influenced by the number of states espousing each, but also by the convincing quality of the several court opinions and the viewpoint of the Restaters as to which is the better rule — the more principled one. Sometimes, however, it is possible to produce a compromise between the two positions — to take the more desirable elements of each position and merge them into a single rule. This felicitous result can aid not only in reforming the law but also in promoting uniformity.<sup>36</sup>

*E. Effect to Be Given to Statutes as the Basis for a Change in the Law.*

Should statutes modifying the common law be counted in determining whether to adopt the position that they take? It could be argued that since the *Restatement* is stating the common law, statutes should not be counted. But a statutory change expresses the policy of the state as effectively as a judicial change, and the practice has been to consider both of them in drafting a section. I can think of three such examples in the second *Restatement of Torts* — contribution between joint tortfeasors,<sup>37</sup> the single publication rule in defamation,<sup>38</sup> and abrogation or modification of tort immunity for municipalities and states.<sup>39</sup>

*F. A Decision in a Single Case Alters the Law in All of the States.*

It has not been the practice of the Institute to undertake a restatement of subjects involving federal constitutional law. But defamation is a matter of tort law, and the first *Restatement of Torts* covered defamation without any questions and without problems in this respect. When work on the second *Restatement* reached the chapter on defa-

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36. A striking example occurred regarding the dispute between Dean Prosser, the Torts Reporter, and Professor Eldredge, a member of the Advisory Committee, on the need to prove special damages in a libel action where the defamatory character of the communication is not apparent on its face. They had fought in the law reviews and were fighting on the floor of the Institute on this issue. A suggestion from the floor that proof of damages be required when the defendant neither knew nor should have known that the communication was defamatory was adopted as a suitable compromise. This solution was adopted in *Reed v. Melnick*, 81 N.M. 608, 471 P.2d 178 (1970). But before it was incorporated into the published volume, it was rendered unnecessary by the Supreme Court's decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), requiring fault in all cases. See *infra* note 55 and accompanying text.

37. RESTATEMENT (SECOND) OF TORTS § 886A (1979).

38. *Id.* § 577A.

39. *Id.* §§ 895B, 895C.

mation, the decisions in *New York Times Co. v. Sullivan*<sup>40</sup> and several of its progeny cases had already been rendered. The Institute decided that they must be taken into consideration because a chapter on defamation would be not only useless, but actively misleading, if it failed to indicate the effect of the newly-announced constitutional principles. The drafting work was undertaken and discussed vigorously at all levels of the editorial process. The refined copy was ultimately adopted by the Institute, subject to some reworking by the Reporter, particularly regarding the meaning of the opinions in the plurality holding in *Rosenbloom v. Metromedia, Inc.*<sup>41</sup>

Later that year came the holding in *Gertz v. Robert Welch, Inc.*,<sup>42</sup> disapproving *Rosenbloom* and setting up entirely new standards for defamation actions by a private plaintiff. Obviously, it was back to the drawing board for a completely fresh start. Interpretation problems were rife, and there were numerous implications for other parts of defamation law that very probably did not occur to any of the justices when *Gertz* was decided.

Here are some of the problems considered and the decisions reached:

(1) Is *Gertz* likely to be stable in view of (1) its 5-4 holding, with one of the five concurring justices dubious about the holding but joining in anyway to attain a "definitive ruling," and (2) the fluidity of the line-up of the justices in previous cases? Should its effect instead be regarded as so uncertain that as little change as possible should be made in the *Restatement*, pending clarification by the courts? Decision: regard it as stable because the four dissenting justices had split in opposite directions, and decide what to do about each of its implications. This decision has been vindicated by later developments.

(2) Do the new requirements of proving fault regarding truth or falsity and proof of actual injury apply to non-media defendants? The *Gertz* opinion gave no indication. Decision: discuss in the Comments; urge that they not be confined to media defendants.<sup>43</sup> Lower court decisions have been divided on this issue, but it now seems clear that this will be the result.<sup>44</sup>

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40. 376 U.S. 254 (1964).

41. 403 U.S. 29 (1971).

42. 418 U.S. 323 (1974).

43. See RESTATEMENT (SECOND) OF TORTS § 580B comment e (1977).

44. The most recent consideration of the problem by the Supreme Court does not provide an official answer, but seems to settle the matter. In *Greenmoss Builders, Inc. v. Dun & Bradstreet, Inc.*, 143 Vt. 66, 461 A.2d 414 (1983), *aff'd*, 105 S. Ct. 2939 (1985), the Vermont Supreme Court held that the media protections outlined in *Gertz* are inapplicable in non-media defamation actions and allowed damages for "presumed damages" and punitive damages. The Supreme Court granted certiorari, "[r]ecognizing disagreement among the lower courts about when the protections of *Gertz* apply." 105 S. Ct. at 2942. It affirmed "for reasons different from those relied upon by the Vermont Supreme Court." *Id.* The lower court's distinction between media and non-media

(3) Does the requirement of proving fault apply not only to issue of truth or falsity, but also to such issues as whether there was fault regarding the content of the communication, the defamatory nature of the communication, its reference to the plaintiff, and its publication to third persons? Decision: discuss in the Comments without taking any formal position.<sup>45</sup>

(4) Do the *Gertz* constitutional limitations regarding actual damages and liability without fault apply to all defamatory publications not covered by the *New York Times* standard, or will the application be limited to publications of the type involved in *Gertz*? Decision: discuss in the Comments, indicating the possibility that application of the *Gertz* requirements might be restricted to matters of public or general interest or be held to exclude other matters such as private gossip or commercial speech, but do not alter the language of the Blackletter to provide for this possibility.<sup>46</sup> The validity of this decision has now been impaired by the very recent holding in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,<sup>47</sup> which, like *Gertz*, has

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defendants was not specifically ruled on by the Court, but it was repudiated in two opinions. See *id.* at 2953 (White, J., concurring with the plurality opinion); *id.* at 2959 (Brennan, J., dissenting). Justice Brennan counted six justices who disapproved the distinction.

45. See RESTATEMENT (SECOND) OF TORTS § 580B comments b-f (1977).

46. See *id.* § 580B comment f (fault), § 621 comment b (damages).

47. 105 S. Ct. 2939 (1985). *Greenmoss* held that the constitutional requirement of "actual damages" does not apply to a defamatory publication that does not involve a "matter of public concern," so that a state may award both presumed damages and punitive damages without any showing of "actual malice" (knowledge or reckless disregard regarding the truth or falsity of the communication).

This holding is quite surprising because *Gertz* itself had repudiated the previous holding in *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), in which the plurality opinion had extended the knowledge-and-reckless-disregard rule beyond suits by public officials and public figures to any suit involving a matter that is a "subject of public or general interest." In *Gertz*, the Court discussed the balance to be drawn in the two situations but made the principal basis for its decision and based its holding primarily on the difficulties in defining the term, "subject of public or general interest." Note the language:

"Theoretically, of course, the balance . . . might be struck on a case-by-case basis. . . . But this approach would lead to unpredictable results and uncertain expectations, and it would render our duty to supervise the lower courts unmanageable. Because an *ad hoc* resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application." 418 U.S. at 343-44. "The extension of the *New York Times* test proposed by the *Rosenbloom* plurality would abridge this legitimate state interest to a degree that we find unacceptable. And it would occasion the additional difficulty of forcing state and federal judges to decide on an *ad hoc* basis which publications address issues of 'general or public interest' and which do not . . . . We doubt the wisdom of committing this task to the conscience of judges. . . ." *Id.* at 346.

And yet in *Greenmoss*, the Court is creating a third, new class of actions applying

raised more serious problems of interpretation. For example, will the *Greenmoss* rule apply to the *Gertz* prohibition against strict liability and permit states to impose liability for a reasonable mistake? Will a state have authority to award punitive damages for mere negligence or even in the absence of negligence?

(5) Should the *Gertz* developments on fault have the effect of shifting the burden of proof as to truth or falsity from the defendant to the plaintiff? There are good arguments both ways. Decision: use a caveat.<sup>48</sup> One or two courts have held that the burden is shifted to the plaintiff, but the Supreme Court has not formally committed itself.<sup>49</sup>

(6) What is the effect of the *Gertz* fault requirement on the whole system of qualified privileges for defamation? The first *Restatement* followed the rule of a substantial majority of the courts that publishing the statement without reasonable basis for believing it to be true was equivalent to an abuse of the privilege and meant that it was lost. But *Gertz* requires a showing of negligence in order to have a cause of action at all. Thus meeting the *Gertz* requirement would mean that the privilege was automatically lost. What to do? Decision: adopt a minority rule stating that the qualified privilege is lost only if the defendant acted with knowledge of the statement's falsity or reckless disregard of its truth.<sup>50</sup> Several cases have subsequently adopted this solution, but the Supreme Court has not passed on it and it may decide to leave the matter to the states.<sup>51</sup>

(7) What significance should be attached to Justice Powell's statement in the majority opinion that "there is no such thing as a false idea" or opinion?<sup>52</sup> Decision: combine it with the holdings in two

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"when the defamatory statements involve no issue of public concern." 105 S. Ct. at 2944.

48. See RESTATEMENT (SECOND) OF TORTS § 613 caveat, comment j (1977).

49. For the proposition that the burden is now on the plaintiff, see *Wilson v. Scripps-Howard Broadcasting Co.*, 642 F.2d 371 (6th Cir.), cert. granted, 454 U.S. 962 (1981). The Supreme Court granted certiorari, but the case was settled before the Court could decide it.

50. See RESTATEMENT (SECOND) OF TORTS § 580B comment l, § 599 comment d, § 600 (1977). See also *id.* chapter 25, topic 3, special note on conditional privileges at 259.

51. See, e.g., *British Am. & E. Co. v. Wirth, Ltd.*, 592 F.2d 75 (2d Cir. 1979); *Jacron Sales Co. v. Sindorf*, 276 Md. 580, 350 A.2d 688 (1976); *Moore v. Smith*, 89 Wash. 2d 932, 578 P.2d 26 (1978).

If the *Greenmoss* rule eliminating the constitutional requirement of proof of actual damages in an action by a private plaintiff involving the publication of a matter not of public concern is held to apply to the constitutional requirement of fault, it will apparently require three different rules as to the effect of a qualified privilege — one for suits by public officials or public persons, one for suits involving a matter of public concern, and a third for suits by a private person not involving a matter of public concern. See *supra* notes 44 and 47.

52. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the

other Supreme Court cases and on this basis change section 566 to provide that there can be no recovery for a mere expression of opinion as long as it does not imply the existence of unstated defamatory facts that justify the opinion.<sup>53</sup> There have been a number of subsequent cases on this subject, most of which are in accord with the general conclusion that a mere opinion is not actionable.<sup>54</sup> But there is considerable disagreement on how to define a nonactionable opinion.

(8) What is the effect of the fault requirement on the compromise solution previously adopted regarding the rules on libel per se and libel per quod? Decision: the general *Gertz* requirement of fault covers the specific requirement imposed by the compromise in the case of libel per se and so allows libel per se to be the rule without particular reference to fault.<sup>55</sup>

(9) Will the fault requirements of *Gertz* and *New York Times* apply to torts other than defamation, such as invasion of privacy and injurious falsehood? Decision: use caveats, with explanations, in the chapters on these torts.<sup>56</sup> The Supreme Court has since held that the standards apply to both an invasion of privacy<sup>57</sup> and an injurious falsehood,<sup>58</sup> but in somewhat different fashions.

The *Gertz* case is by no means typical, but it does indicate the kinds of problems that can arise for the first time and the ad hoc solutions necessary to respond to them when there is no authority in point.

conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.

*Gertz*, 418 U.S. at 339-40.

53. The other two cases are *Old Dominion Branch No. 496 v. Austin*, 418 U.S. 264 (1974), and *Greenbelt Coop. Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970). Section 566 now reads: "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." RESTATEMENT (SECOND) OF TORTS § 566 (1977).

54. See also *Cianci v. New Times Publishing Co.*, 639 F.2d 54 (2d Cir. 1980); *Gregory v. McDonnell Douglas Corp.*, 17 Cal. 3d 596, 552 P.2d 425, 131 Cal. Rptr. 641 (1976); *Rinaldi v. Holt, Rinehart & Winston, Inc.*, 42 N.Y.2d 369, 366 N.E.2d 1299, 397 N.Y.S.2d 943, cert. denied, 434 U.S. 969 (1977). The leading case is *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984) (en banc) (laying down a test based on four factors), cert. denied, 105 S. Ct. 2662 (1985). This problem will eventually require a definitive decision by the Supreme Court.

55. RESTATEMENT (SECOND) OF TORTS § 569 (1977).

56. See *id.* § 652E caveat, comment d (false light privacy); *id.* § 623A caveat, comments c-g (injurious falsehood).

57. See *Cox Broadcasting Co. v. Cohn*, 420 U.S. 469 (1975); RESTATEMENT (SECOND) OF TORTS § 652D (1977).

58. See *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984).



## VII. CONCLUSION: THE RESTATEMENTS AND THE FUTURE

The *Restatements* were the product of a novel and original concept of a few public-spirited leaders of the legal profession, who created in 1923 the American Law Institute and set it to work analyzing, organizing, and expressing ("re-stating") the underlying principles in certain important fields of the law. This product was not intended to be like an encyclopedia of the law or most of the legal treatises of that time, which merely collected and compiled the holdings of the courts, indicating differences of position, without much more. Nor was it to be like the European civil codes derived from the Roman law, which were legislative in origin and the authoritative starting point of any judicial determination.<sup>59</sup>

Instead, the *Restatements* relied for their influence upon their inherent validity and worth in expressing the underlying principles as Blackletter "rules" of law. The endeavor was successful. Few students of the law would deny that the state of the common law was in a much better condition as a result of the first *Restatement*. The law became better organized, better expressed, and more nearly uniform.

The first *Restatement* weathered the arrows of criticism from various points of view — traditionalists,<sup>60</sup> American legal realists with their disdain for "rules,"<sup>61</sup> and civilians urging that the *Restatements* be enacted as a code.<sup>62</sup> Use of the *Restatement* by lawyers, judges, and law schools constantly grew, and one measure of its success was the enthusiasm with which the Institute's decision to undertake a second *Restatement* was received.

The second *Restatement* has been, in my opinion, a distinct improvement over the first *Restatement*. The process of evaluation, with the Institute profiting from the experiences incurred in working on the first series and exploiting the ideas that appear to have worked best, has caused the second series to become less imperious in

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59. See *Report of the 1923 Committee*, *supra* note 27, at 27-30.

60. Professor Keyes' article may be classified as espousing the traditionalist view. One of the greatest controversies involving the traditionalist view was over section 402A of the *Restatement (Second) of Torts*. See Helms, *The Restatement: Existing Law or Prophecy*, 56 A.B.A. J. 152 (1970); *Memorandum of the Defense Research Institute's American Law Institute Committee Regarding the Restatement of the Law*, 9 FOR THE DEFENSE, May 1968, no. 5. Director Wechsler's response to the memorandum is in Wechsler, *The Course of the Restatements*, 55 A.B.A. J. 147 (1969).

61. See, e.g., Arnold, *The Restatement of the Law of Trusts*, 31 COLUM. L. REV. 800 (1931); Clark, *The Restatement of the Law of Contracts*, 42 YALE L.J. 643 (1933); Milner, *Restatement, The Failure of a Legal Experiment*, 20 U. PITT. L. REV. 795 (1959). Cf. Yntema, *What Should the American Law Institute Do?*, 34 MICH. L. REV. 461 (1936).

62. See Franklin, *The Historic Function of the American Law Institute: Restatement as Transitional to Codification*, 47 HARV. L. REV. 1367 (1934). Cf. Fleming, *supra* note 11, at 108-16; Gordley, *European Codes and American Restatements: Some Difficulties*, 81 COLUM. L. REV. 140 (1981).

its pronouncements and more judicious and adaptable. I think it has also proved to be more beneficial to the users, and I believe that the great majority of persons who have had occasion to deal with both series would agree with this assessment.

The charge that the second *Restatement* is misleading, because it is ready to adopt a minority position and lay it down as a rule purporting to state the law as it exists, cannot be sustained as an intentional attempt to misstate the law. The first *Restatement* occasionally adopted a minority position, sometimes without indicating this fact. The second *Restatement* has followed a practice of stating expressly in the Comments or in the Reporter's Notes when this has been done. There may have been occasions when, through inadvertence, this did not occur, and more care in this regard should be exercised in the future.

Nor is there any basis for asserting that the use of the name "Restatement" carries an implied representation that is not true. The dictionary defines "restate" as meaning "to state again or in another way,"<sup>63</sup> and a leading law dictionary defines "Restatement of Law" by stating that its purpose is to "tell what the law in a general area is, how it is changing, and what direction the authors think this change should take . . . ."<sup>64</sup>

But it does appear that somewhat different approaches on the subject of law reform may have developed in some *Restatements*. In their enthusiasm for straightening out some egregious "errors" in the law, where there existed a much better minority position to adopt, some Restaters may have glided into the position of creating their own solutions to problems arising from undesirable rules and placing those solutions in the Blackletter, with or without a full explanation in the Reporter's Notes.<sup>65</sup> A clearer and somewhat more consistent practice would be helpful.

One of the strongest reasons for the success of the Restatement has been the way in which the Institute has been able to enlist and harness the enthusiasm, energy, abilities, and best efforts of leading scholars, practitioners, and judges. If all of the hours spent by all of the persons connected with the Institute for a particular *Restatement*

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63. WEBSTER'S THIRD INTERNATIONAL DICTIONARY 1936 (1966).

64. BLACK'S LAW DICTIONARY 1180 (5th ed. 1979).

65. Professor Keyes lists some such instances in his article. Many of these instances can be fully explained, some on the basis that the writers he quoted were unhappy that their individual solutions were not adopted. It would prolong this article too much to try to refer to each of them.

were cumulated and charged at the rate those persons could command for legal work of the same nature, the figure would be astronomical. Yet the only person receiving compensation is the Reporter, who takes on the work as a second career and whose pay was declared by one Reporter to be at a rate much lower than that for any other legal work he ever did. The meetings of the Committee of Advisors are eagerly anticipated by all participants and are exhilarating while they last.<sup>66</sup> There is the good feeling of being engaged in pro bono work for the benefit of the legal system as a whole, and of the country, too. This has the added effect of producing an impartial objective attitude, even in lawyers whose attitude is normally that of an advocate.

The *Restatement* has been a very valuable invention whose usefulness has been clearly demonstrated.<sup>67</sup> The time will soon come when the Institute will need to decide whether to begin work on a third *Restatement*. It will probably appoint a special committee to study the matter and present recommendations for the action of the Council.

Because of appellate courts' currently developing practice of accepting the responsibility for adapting and changing the common law to keep it in accord with present needs and ideals, the answer seems clear that some updating of the second *Restatement* will be needed, whether it is in the form of a supplement or a new third *Restatement*. In the second *Restatement of Torts*, for example, the chapters on contributory negligence and assumption of risk must be completely reworked.<sup>68</sup> All but six of the states have substituted comparative negligence for contributory negligence.<sup>69</sup> The subjects of professional negligence and strict products liability are now covered by only a single section each.<sup>70</sup> More elaborate treatment is needed to cover their recent development. Still other outdated provisions need updating and revising, especially in the first two volumes. The other *Restatements* present similar problems.

The committee should consider what is the most desirable way to keep the *Restatements* functioning effectively in the future. Indeed, the committee might well be appointed as a standing committee on *Restatements*. It would then be in a position to consider criticisms

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66. I have tried to express my feelings about the work on the Advisory Committee in Wade, *William L. Prosser: Some Impressions and Recollections*, 60 CALIF. L. REV. 1255, 1257-60 (1972).

67. Cf. the careful evaluation in Fleming, *supra* note 11, at 108-16.

68. See RESTATEMENT (SECOND) OF TORTS chapters 17 (contributory negligence), 17A (assumption of risk) (1965).

69. The six states are Alabama, Maryland, North Carolina, South Carolina, Tennessee, and Virginia.

70. See RESTATEMENT (SECOND) OF TORTS §§ 299A (professional negligence), 402A (strict tort liability for products) (1965).

and suggestions as they arise.<sup>71</sup> It could reassess the format of the *Restatements* and determine what improvements could be implemented in the light of experience. It could also bring the differences in style of the individual *Restatements* more into uniformity. It should confront the problem of how recommendations for law reform can be made without necessarily stating the recommendation as Blackletter law, and find a reasonable solution that can be consistently followed. Greater uniformity in the form, location, and content of the Reporter's Notes is desirable. Some persons have urged that the *Restatements* should be updated annually; the committee can consider whether this is a good idea.

The committee can also consider what lessons should be derived from the current project on Corporate Governance.<sup>72</sup> Its format initially states the law as it should be, and then explains in the Notes to what extent and in what form that ideal statement is in accord with the present state of the law. The committee should decide whether this format is an appropriate one for the *Restatements* to adopt in general.

The committee would probably find it desirable to prepare an appropriate *vade mecum*, in the form of a manual suitable for ready reference, to aid in obtaining greater uniformity in the individual *Restatements*. This product might advert to such diverse matters as the relative significance of certain listed factors used in determining what rule to adopt and the scope of its coverage, the order of arrangement and titles for Comment paragraphs, the handling of cross-references, and the location and form of Reporter's Notes. A style-book, like that used by law reviews, might provide guidance regarding capitalization, type of print (e.g., blackletter or italics), citation forms, abbreviations, and similar matters.

A standing committee might decide that it is desirable to establish a legal periodical called, perhaps, the *Restatement Law Review* or the *ALI Law Journal*. This journal could publish, reprint, or digest items discussing *Restatement* matters — full-length articles, suggestions for improvement, criticisms, responses, reports of committees, treat-

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71. Complaints have recently been made about the open-ended character of some Restatement sections. Those sections specifically referred to are RESTATEMENT (SECOND) OF TORTS § 402A (1965) (strict tort liability for products); and RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6 (1971) (choice-of-law principles used in determining what state has the "most significant relationship" with the transaction).

72. See generally THE AMERICAN LAW INSTITUTE, PRINCIPLES OF CORPORATE GOVERNANCE AND STRUCTURE: RESTATEMENT AND RECOMMENDATIONS (Tent. Draft No. 1, 1982). The project is nearing completion.

ments of particularly important cases and their relation to *Restatement* provisions, and annual lists of important cases, perhaps accompanied by analytical comments on their significance. Such a law journal could be a very stimulating and useful periodical.<sup>73</sup>

The following are some other matters that a standing committee might consider:

(1) Closer cooperation once again with the National Conference of Commissioners on Uniform State Laws. Recommendations for law reform may involve statutory recommendations, and the two bodies have cooperated splendidly on such items as the Uniform Commercial Code.

(2) Establishment of a Research Staff. This was proposed in the original 1923 Report that led to the establishment of the American Law Institute and the *Restatements*.<sup>74</sup> Many useful projects for a staff of this nature can be envisioned if it can be financed.

(3) Determination whether there are new subjects suitable for *Restatement* treatment.

(4) Consideration whether it would be desirable for the Institute to undertake projects similar to the *Restatements* but covering topics much more limited in scope.<sup>75</sup>

For the sake of unity, I have confined my discussion here largely to the American Law Institute's work on the *Restatements*. The Institute has engaged in many other activities that have been beneficial in various ways to the status of American law and the legal profession. The Institute has clearly proved its worth, and its prospects for the future are bright if its current leaders are as forward-looking, public-spirited, and ingenious as were its founders. I believe that they are, and that the Institute will continue to serve ably and effectively in aiding the legal profession, the judicial system and the country as a whole by improving the state of the law and its administration.

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73. *The Symposium on the Restatement (Second) of Contracts*, 81 COLUM. L. REV. 1 (1981) provides a fine example of what the periodical might carry. The Keyes and Wade articles published herein would perhaps also be suitable.

74. *Report of the 1923 Committee*, *supra* note 27, at 54-56.

75. Since writing this, I have learned that a Special Committee on Institute Program has been appointed and that it is well advanced in considering the feasibility and usefulness of a number of projects of this nature.