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Defectiveness Restated: Exploding the "Strict" Products Liability Myth

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DEFECTIVENESS RESTATEd:
EXPLoRING THE "STRICT"
PRODUCTS LIABILITY MYTH

David G. Owen*

Strict liability in tort has occupied the core of modern products liability doctrine ever since Dean Prosser first penned the most often cited Restatement section in history—section 402A of the Second Restatement of Torts. In the Third Restatement, the ALI has completely restructured the definition of product defectiveness. The inscrutable phrase that has confounded courts and commentators for so many years—"defective condition unreasonably dangerous"—is now trifurcated according to the separate types of product defects: manufacturing defects, design defects, and warnings defects.

In this important article, Professor Owen explores the conceptual developments that led to the restated liability formulations and provides much needed clarification of the "defectiveness" concept for courts and practitioners alike. The Third Restatement's redefinition of liability for manufacturing defects in terms of departure from intended design restates the law in a manner that faithfully reflects how courts have handled cases of this type. Yet the new Restatement's definitions of defectiveness in design and warnings cases are structurally awkward and unduly complex, a condition which promises to continue the kind of confusion that has plagued the application of section 402A in the courts. In order to clarify the fundamental tests for design and warnings defects, the complicated definitions of the Third Restatement are first decoded, in order to reveal their essential concepts, and they are then reformulated into simple and straightforward liability tests that courts and juries can comprehend. In this manner, the Third Restatement's standards

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This article is dedicated to Dean W. Page Keeton of Texas, whose teaching and scholarship for many decades have helped unravel the perplexities of torts and products liability law, and whose example has inspired subsequent generations of laborers in these fields of law.
are translated into a useful form for resolving the central liability issues in modern products liability litigation.

A reworking of the definitions of product defect requires an exploration into the nature of "strict" liability in the various products liability contexts. While true strict liability has been adopted for manufacturing defects, a reasonableness standard, which includes the notions of optimality and balance, in fact prevails in the design and warning contexts. Professor Owen argues persuasively that the reasonableness standard properly applied by courts in design and warnings cases is simply negligence, wrapped in a strict liability shroud, and that courts might profitably dispense with the myth that responsibility in these contexts is strict and embrace instead both the language and doctrine of the negligence standard they truly use.

It was 1964 when the American Law Institute propelled products liability law into the modern age with the adoption of section 402A of the Restatement (Second) of the Law of Torts. With a gusto unmatched in the annals of the Restatements of the Law, courts and legislatures across the land embraced section 402A and the bold new doctrine that it proclaimed—"strict" liability in tort for harm caused by defective products. Tort law has probably never witnessed such a rapid, widespread, and altogether explosive change in the rules and theory of legal responsibility. If ever a Restatement reformulation of the law were accepted uncritically as divine, surely it is section 402A of the Second Restatement of Torts.
Even from the start, of course, there were some heathens. A few early commentators questioned the desirability and legitimacy of this major change in tort law doctrine, and five states never did succumb to the new religion. As time marched on into the 1970s and early 1980s, academic apostates grew in number, and courts increasingly questioned whether and how products liability law really should or could be "strict." Then, beginning about the mid-1980s, the foundations of the "strict" products liability cathedral began to fracture, revealing large cracks in the doctrine's underlying theoretical structure. Today, while most courts still purport to apply a general rule of "strict" liability in tort for defective products, and while some academics still proclaim the virtues of such a rule, courts continue to struggle to make sense out of section 402A in application and commentators continue to expose its practical and theoretical problems.


7. Jurisdictions that never adopted § 402A (or some other version of strict products liability in tort) either judicially or legislatively include Delaware, Massachusetts, Michigan, North Carolina, and Virginia. The North Carolina General Assembly recently rejected the doctrine legislatively. N.C. GEN. STAT. § 99B-1.1 (1995) ("There shall be no strict liability in tort in product liability actions.").

8. See The Fault Pit, supra note 5, at 709 n.21 (collecting the articles).


10. See generally Principles of Justice, supra note 5; The Fault Pit, supra note 5; Moral Foundations, supra note 5.


In 1991, the American Law Institute determined that the time had come for the products liability edifice to be reconstructed, and in 1992 it appointed Professors James Henderson and Aaron Twerski as Reporters to perform the task. Although some work remains to be done in reformulating the secondary doctrine, the Products Liability Restatement’s most important portion—defining product “defect”—has now been tentatively approved by the ALI. The Gospel According to Prosser, as it were, has been rewritten.

How the basis of responsibility for product accidents is defined at bottom is the most fundamental aspect of all of products liability law, and the Third Restatement’s definitional approach is problematical and highly controversial. This article critically examines the basic definitions of defect in sections 1 and 2 of the Products Liability Restatement. Together, these first two sections comprise the heart and soul of the Third Restatement, and both are examined here against the backdrop of the comments. Courts, practitioners, and commen-


15. Still to be tentatively approved, as this article goes to press in April 1996, are sections on used products, causation, comparative fault, disclaimers, and post-sale duties to warn or recall. See Restatement (Third) of Torts: Products Liability (Tentative Draft No. 3, Apr. 5, 1996).

16. Among other sections, Restatement (Third) of Torts: Products Liability §§ 1-3 (Tentative Draft No. 2, Mar. 13, 1995) were tentatively approved by the Institute at the annual meeting of the ALI on May 18, 1995. As this article goes to press, Tentative Draft No. 3 has just been issued. Restatement (Third) of Torts: Products Liability (Tentative Draft No. 3, Apr. 5, 1996).

17. On the development of § 402A, for which Dean William Prosser was the Reporter, see sources cited supra note 5.


20. Restatement (Third) of Torts: Products Liability § 3 (Tentative Draft No. 2, Mar. 13, 1995), entitled “Circumstantial Evidence Supporting Inference of Product Defect,” serves a limited but important default role for certain cases that fall between the defect definitional cracks of § 2. See Owen, supra note 19, at 1248-50.

21. The Reporters’ Notes, which provide a rich source of authority and analysis, are also referred to infra as appropriate. Some commentators have challenged the reliability of certain aspects of the Reporters’ cited authority. See, e.g., Roland F. Banks & Margaret O’Connor, Restating the Restatement (Second), Section 402A—Design Defect, 72 OR. L. REV. 411, 415-20 (1993); Howard F. Klemme, Comments to the Reporters and Selected Members of the Consulta-
tators all will surely struggle to understand the new definitions of product defect for many years to come, and the purpose of this article is to facilitate that process. By exploring the tensions that lie beneath the restated liability formulations, it seeks to clarify the central notion of responsibility for product defects.

The analysis proceeds in several stages. First examined is the Third Restatement's trifurcation of defectiveness into manufacturing defects, design defects, and instruction and warning defects. Responsibility for each is separately explored, and the newly formulated standards of liability for each is scrutinized. The Third Restatement's definitions of defectiveness are then linguistically decoded to uncover their core concepts. Standards of responsibility for design and warnings defects are then reconstructed to clarify the central principles. These reformulations are intended to provide courts and lawyers with alternative approaches to defining design and warnings defects consistent with the Restatement, yet in a manner which more clearly isolates the issues that need to be decided. Finally examined is the Third Restatement's treatment of the most important secondary aspects of defectiveness—obviousness, misuse, and state of the art—and how they relate to the underlying concepts of product safety responsibility. As one achieves a deeper, clearer vision of responsibility for product defects, the myth of "strict" products liability explodes.

I. SETTING THE DEFINITIONAL STRUCTURE: TRIFURCATING DEFECTIVENESS AND THE STANDARDS OF LIABILITY

Topic 1 of chapter 1 of the new Products Liability Restatement, entitled "Product Defectiveness," describes the basic principles of products liability in general and product defectiveness in particular. Sections 1 and 2 set forth, in general terms, the standard of liability for the sale of defective products and the separate formulations of the "defect" concept. Section 3, adapted from the basic res ipsa loquitur section of the Restatement (Second) of Torts, prescribes a rule of circumstantial evidence for proof of defect in certain limited situations.22 The great bulk of fundamental products liability doctrine lies within sections 1 and 2, which are the subjects of this article.

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22. RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 3 & cmt. a (Tentative Draft No. 2, Mar. 13, 1995), entitled "Circumstantial Evidence Supporting Inference of Product Defect" (drawing from RESTATEMENT (SECOND) OF TORTS § 328D (1964)), articulates a doctrine that might be coined defect ipsa loquitur. This principle of products liability law, generally applied only in manufacturing defect cases, often is referred to as the "malfunction doctrine." See generally KEETON, OWEN, MONTGOMERY, & GREEN, supra note 5, at 53-57.
Section 1 of the Third Restatement sets the basic liability standard:

§ 1. Liability of Commercial Seller or Distributor for Harm Caused by Defective Products

(a) One engaged in the business of selling or otherwise distributing products who sells or distributes a defective product is subject to liability for harm to persons or property caused by the product defect.

(b) A product is defective if, at the time of sale or distribution, it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings.23

In its very inception the Third Restatement bases all of products liability law on the concept of product "defect." Yet, rather than treating the defect concept as a single notion, as did the Second Restatement in section 402A, the Third Restatement in section 1(b) instead divides the concept into the three conventional categories of defectiveness: (1) manufacturing defects, (2) defects in design, and (3) defects in instructions and warnings. In an effort to focus on the separate issues pertinent to these quite different forms of product danger, courts have uniformly employed this type of tripartite division of the concept of product defect.24 In this structural respect, therefore, section 1 fairly restates the broad categories of products liability law accepted by the courts.

The significance of section 1, however, lies not in the fact of trifurcating defectiveness, but in what it does with the trifurcation. By splintering the defect notion from a unitary concept into three, section 1 provides a mechanism for stripping away the great bulk of strict liability from products liability law and returning it to negligence, more or less. More specifically, by pulling design and warnings cases away from those involving manufacturing defects, section 1 permits the retention of strict liability in the latter context, where almost all agree that it belongs,25 while abandoning the strict liability concept for negligence principles in design and warning cases26 which comprise the bulk of products liability law and litigation.27


24. On the conventional nature of this classification, see id. § 1 cmt. a, reporters' note.

25. Even George Priest, long a vocal opponent to the principles of § 402A, has come around to this position. See George L. Priest, Strict Products Liability: The Original Intent, 10 Cardozo L. Rev. 2301, 2316-17 (1989); Schwartz, supra note 5, at 624 (making this observation).

26. Section 1 cmt. a states: [T]he [strict liability] rule developed for manufacturing defects is inappropriate for [design and warnings cases]. The latter categories of cases require determinations that the product could have reasonably been made safer by a better design or instruction or warning. . . . [The definitions of defect in these cases] rely on a reasonableness test traditionally used in determining whether an actor has been negligent.

Restatement (Third) of Torts: Products Liability § 1 cmt. a (Tentative Draft No. 2, Mar. 13, 1995).

27. Design and warnings claims together were found to comprise 60% of all claims in one study, and 71% in another. In a study of large claims (in excess of $100,000) in which strict
Shifting from strict liability to negligence principles in the new Restatement does in a broad way "restate" what courts have long been doing if rarely saying. It has been an open secret for many years that courts have been purporting to apply "strict" liability doctrine to design and warnings cases while in fact applying principles that look remarkably like negligence.28 Quite simply, most courts have been saying one thing while doing quite another—calling a pig a mule.29 The courts may be excused for this blatant mislabeling because they were misguided on this point by section 402A, which has been justifiably criticized for "restating" the law of 1964 as the Reporter (Dean William Prosser) then surmised it might evolve by the year 2010—as "strict."30 Indeed, it was section 402A's premature definition of product defectiveness as a unitary concept, subject to a single principle of strict liability, that has led in large part to the current "law" that calls a pig a mule.

The Reporters and the ALI fairly might be faulted for not righting the "wrong" of section 402A—for failing to restate in black letter the basis of liability for design and warnings errors explicitly as "negligence."31 Indeed, shortly before the Third Restatement project, the Reporters themselves forthrightly proclaimed that this type of terminological confusion "inevitably [breeds] bad law."32 Moreover, their explanation in the comments for applying negligence principles to de-
sign and warnings cases\textsuperscript{33} is far more powerful than their unpersuasive apology for the "rhetorical preference" of many courts for calling design and warnings liability standards "strict."\textsuperscript{34}

Several arguments may be marshalled to support the hybrid approach chosen by the Reporters and approved by the Institute. First, because many courts now do in fact call a pig a mule, that incongruity may be viewed as "law," and so it arguably may be so restated.\textsuperscript{35} Second, the definition is improved somewhat, in that a pig is defined no longer merely as a "mule," but now is defined instead as a "pig-like mule." That is, while liability is "strictly" defined in design and warnings "defect" terms, the defect concept is itself explained (albeit in the comments) in terms of "a reasonableness test traditionally used in determining whether an actor has been negligent."\textsuperscript{36} Third, the Reporters are now essentially correct in asserting that "products liability is a discrete area of tort law which borrows piecemeal from negligence and warranty [and which] is not fully congruent with classical tort or contract law."\textsuperscript{37} It arguably follows, therefore, that liability may rationally be defined, as the Reporters have done, as a combination of the strict liability terms of contract law and the reasonableness-balancing principles of the law of negligence. Lost in the process, however, is the long-established divide between tort and contract. Also lost is the vital commonsense distinction between negligence, based on fault, and no-fault liability that is "strict."

As do the courts (in both word and deed), the new Restatement defines the standard of liability for manufacturing defects in the strict liability terms of the law of contract.\textsuperscript{38} Because of the special significance in the manufacturing flaw context of the user's expectation interests,\textsuperscript{39} contract law's strict liability principle here is plainly proper. By contrast, the new Restatement, like most courts in fact (but not in word), explains liability for design\textsuperscript{40} and warnings\textsuperscript{41} defects in the reasonableness-balancing-negligence terms of the law of tort. Consumer expectations remain entitled to important respect in this context, too, but they are demoted as a strict test of liability and relegated in the

\textsuperscript{33} Restatement (Third) of Torts: Products Liability § 2 cmt. a (Tentative Draft No. 2, Mar. 13, 1995).

\textsuperscript{34} Id. § 1 cmt. a.

\textsuperscript{35} Arguably it should not. See infra notes 68, 92-104 and accompanying text.

\textsuperscript{36} Restatement (Third) of Torts: Products Liability § 1 cmt. a (Tentative Draft No. 2, Mar. 13, 1995); see also id. § 2 cmts. a, c, d & f. Section 8, concerning the liability of sellers of prescription drugs and medical devices, similarly applies negligence principles to design and warnings liability by rules tailored to that specific context. Id. § 8.

\textsuperscript{37} Id. § 1 cmt. a.

\textsuperscript{38} See infra notes 44-51 and accompanying text.

\textsuperscript{39} See generally Owen, supra note 19, at 1245; Moral Foundations, supra note 5, at 467-68 ("[T]he expectations of the parties, and ultimately the truth, support the maker's responsibility for harm from latent manufacturing defects.").

\textsuperscript{40} See infra notes 53-89 and accompanying text.

\textsuperscript{41} See infra notes 90-110 and accompanying text.
new Restatement to the balancing calculus.\textsuperscript{42} In sum, by grounding liability generally in strict terms of "defect," and by explaining design and warnings defects in hybrid form, section 1 places products liability law squarely in the borderland between tort and contract, between negligence and strict liability, where it straddles both domains.

Section 2 of the Third Products Liability Restatement particularizes the defectiveness liability standard as follows:

§ 2. Categories of Product Defect
For purposes of determining liability under § 1:

(a) a product contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product;

(b) a product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe;

(c) a product is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the instructions or warnings renders the product not reasonably safe.\textsuperscript{43}

Erected upon the structure and premises of section 1, section 2 provides a separate definition of liability for each of the three traditional types of product defectiveness—manufacturing flaws, excessive design dangers, and informational inadequacies in warnings and instructions. In a nutshell, a strict liability test for manufacturing defects is established in section 2(a), and tests for design and warnings defects that are strictly framed but really based on principles of negligence are established in sections 2(b) and (c). This is only the basic shell of section 2, however, and the specific contours of each of the three standards are now examined separately in turn.

II. PRODUCTION FLAWS: DEFECTS IN MANUFACTURE

In no uncertain terms, section 2(a) proclaims liability for manufacturing defects to be strict—based on a test of "departure from intended design." If there were otherwise any doubt as to the strictness of this liability test,\textsuperscript{44} it is altogether put to rest by the standard’s final qualifier, which emphasizes that liability will attach "even though all..."
possible care was exercised" by the seller. The notion of deviation from design specifications (variation from blueprints) has long been widely accepted as the proper standard of responsibility for product accidents attributable to manufacturing flaws. Even when the basis of liability is negligence rather than strict liability, courts for many years have allowed recovery in manufacturing defect cases without requiring specific proof as to how the manufacturing error occurred, and even lacking specific evidence on how the accident occurred. While proof-problem cases of this type are now specifically addressed under the separate "malfunction" umbrella of section 3 of the Third Restatement, the long-standing willingness of courts liberally to allow an inference of negligence upon a simple finding of manufacturing defect demonstrates the established judicial view that liability for such defects should indeed be strict.

There are many good reasons why the courts have been so ready to allow liability once a manufacturing defect is found to have caused an accident. First, in practical terms, such errors in production are apt to be few and far between, so that liability in such cases is unlikely to threaten a manufacturer with financial ruin. Moreover, the availability of blueprints to use as a standard of quality usually provides a clear touchstone of responsibility: the manufacturer will seek to conform (within allowable tolerances) all units of its product to the standards specified by its engineers or scientists, and the particular accident-producing unit can be measured against those standards. Indeed, manufacturers ordinarily do not even try to deny that deviations from their own design specifications (in excess of accepted tolerances) are in fact usually attributable to some form of negligent mistake. At a more fundamental level, consumer expectations are likely to be severely and unfairly fractured by violent product failures caused by manufacturing defects, and principles of truth and equality demand that sellers be strictly accountable to consumers injured by such defects.

Section 2(a), therefore, is consistent with how courts treat manufacturing cases and with moral theory. While most courts have gen-

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45. The "even though all possible care" qualifier is borrowed from Restatement (Second) of Torts § 402A (2) (1964) ("although . . . the seller has exercised all possible care").
46. During the many heated congressional committee debates of the 1980s over bills that broadly recodified products liability law, formulations of the liability standard for manufacturing defects along these lines were generally accepted uncritically and noncontroversially.
47. See, e.g., Jenkins v. General Motors Corp., 446 F.2d 377 (5th Cir. 1971), cert. denied, 405 U.S. 922 (1972).
48. See supra notes 20, 22 and accompanying text.
49. See Restatement (Third) of Torts: Products Liability § 2 cmt. a (Tentative Draft No. 2, Mar. 13, 1995); Schwartz, supra note 5, at 624.
52. See, e.g., Rix v. General Motors Corp., 723 P.2d 195, 204 (Mont. 1986) (approving definition of manufacturing defect as nonconformance with design).
erally assumed the "departure from intended design" standard without explicitly articulating it, there is little doubt that it well describes what courts in such cases have been thinking and what they properly have been doing. Accordingly, courts should be expected to endorse quite willingly the strict liability test for manufacturing defects in section 2(a) of the Third Restatement.

III. Conceptual Misjudgments: Defects in Design

Determining the proper basis of liability for dangers in design has proven to be the most vexing problem in the entire field of products liability law. Apart from the fundamentally perplexing issue of whether "strict" liability makes sense at all for dangers in design, courts and practitioners have been confounded by a bewildering array of conceptual problems from the time design defect litigation first charged boldly onto the judicial scene in the 1960s. For thirty years, debate has raged over such important issues as the proper "tests" of liability, including the problem of finding a proper role for consumer expectations, and the definition of proper limits for the outer boundaries of responsibility based on such factors as the obviousness of the danger, the misuse of a product by the victim or another, and the significance of the state of the technological art. Thus, any effort to restate or redesign the law of liability for product design was destined to be the most daunting task in the entire Products Liability Restatement project.

The quite transparent objective of section 2(b) is to adopt a negligence standard of liability clothed in the "defect" language of strict liability—to dress a pig in mule's clothing, as mentioned earlier. Putting aside for now the desirability of such an approach, it should be helpful to look at how section 2(b) might look if instead it were drafted explicitly in negligence terms. Such a forthright liability definition might look something like the following:

A manufacturer is subject to liability for harm caused by a product if a reasonable manufacturer would have designed the product more safely, that is, if the manufacturer was negligent in failing to adopt a safer design.

Understanding why a general negligence approach to liability for design danger (in either a pure pig-is-a-pig form or the Restatement's pig-is-a-mule formulation) is preferable to strict liability requires examining the distinction between optimal and absolute safety that lies at the heart of the concept of reasonable behavior.

53. For a persuasive argument that it does not, see, for example, Moral Foundations, supra note 5, at 466-84; Powers, supra note 12, at 640.
54. To say nothing of the commentators; the articles are too numerous to cite.
A. Optimal vs. Absolute Safety

Consumer advocates, plaintiffs’ lawyers, and persons untutored in law, economics, or utility theory often argue that products should be "safe." Alluring at first glance, such a statement of the goal contains a deceptive defect: it assumes that the "safety" concept is absolute, that a product is either "safe" or "unsafe," and that absolute or perfect safety is both technologically feasible and normatively desirable. As general propositions, such premises are seriously misguided, and they produce much mischief and confusion.\footnote{See generally Peter Huber, Safety and the Second Best: The Hazards of Public Risk Management in the Courts, 85 COLUM. L. REV. 277, 278 (1985); David G. Owen, Philosophical Foundations of Fault in Tort Law, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW (David G. Owen ed., Oxford Univ. Press 1995); Stephen R. Perry, The Impossibility of General Strict Liability, 1 CAN. J.L. & JURISPRUDENCE 147 (1988); Christopher H. Schroeder, Rights Against Risks, 86 COLUM. L. REV. 495 (1985).}

When safety is properly conceived of in \textit{a priori} terms, as a prediction of the avoidance of future injury from some condition, it is necessarily a matter of probability and, hence, degree.\footnote{Safety is usually absolute, of course, as to a particular person’s experience on a particular, past occasion: a person either will have experienced the occasion safely (without injury) or not.} As is undeniably true of all predictions of how the future will unfold, the very notion of the "safety" of a particular product design is inherently uncertain and contingent, highly dependent upon the degree to which the product is used for the purposes and in the manner planned for and reasonably expectable by the design engineers. Safety is the opposite side of risk (or danger), which is also an \textit{a priori} concept that is probabilistically contingent rather than absolute.

Because "strict" liability implies that any degree of risk is simply wrong, it is intrinsically deficient as a true standard for design liability.\footnote{As it is for liability more generally. See, e.g., The Fault Pit, supra note 5, at 705 (opining that tort law is properly returning to a fault-based ethic from strict liability); Perry, supra note 55 (arguing that there is no "plausible justification . . . for a general standard of strict liability in tort.").} Instead, since the degree of risk or safety in every product design is counterbalanced by considerations such as cost, utility, and aesthetics, the basis of responsibility for design choices logically should be based on the principle of \textit{optimality} inherent in the philosophical notion of utility and in the economic concept of efficiency. That is, the goal of both design engineers and the law should be to promote in products an ideal \textit{balance} of product usefulness, cost, and safety.\footnote{Cf. Davis, supra note 28, at 1248-50 (noting that courts “recognize the true nature of the design defect inquiry: Did the manufacturer exercise the required care in its design decisions to prevent foreseeable risks of unreasonable harm to the plaintiff?” and proposing to heighten the standard of care to reflect the manufacturer’s position of trust).}

This is why negligence is the ideal standard for product design responsibility.\footnote{From the start, the concept of negligence has been}
based on the notion of "reasonableness," predicated on the idea that proper decisions involve selecting the proper balance of expected advantages and disadvantages, of expected benefits and costs. Learned Hand, of course, memorialized the essence of this concept in his celebrated \( B < PL \rightarrow N \) negligence formula in *United States v. Carroll Towing Co.* This type of "cost-benefit" or "risk-utility" analysis may be problematic if relied upon excessively as a mechanical device for producing automatic "right" answers, but it nicely describes the decisional calculus that lies at the heart of products liability law in particular and accident law in general.

In sum, the interrelated concepts of reasonableness, optimality, and balance on which design decisions necessarily rest are captured flawlessly by the flexible negligence concept. By contrast, "strict" liability is a rigid absolutist concept premised on an inherent priority of right—a concept which is entirely misplaced in evaluating the propriety of design judgments that necessarily involve tradeoffs among conflicting interests of different groups of persons. Thus, the Third Restatement correctly endorses the widespread judicial practice of applying negligence principles (albeit in "strict" liability clothing) as the basis of liability for dangers in product design.

**B. The Design of Section 2(b)—Reasonable or Defective?**

Section 2(b), of course, is defined in terms of "defectiveness" rather than explicitly in the language of negligence. The first issue here, then, concerns the section's *rationale* for employing a standard of liability that purports to be "strict" but which is based on the negligence principles of reasonableness, optimality, and balance. The second, more technical, issue concerns the *effectiveness* of the section's structure and language in achieving this objective.

The definition in this subsection provides that a design is "defective" if the "foreseeable risks" of the product "could have been reduced or avoided by . . . a reasonable alternative design . . . and the omission of the alternative design renders the product not reasonably safe." If the purpose of this language were to adopt the doctrine of negligence, then it would indeed be a poor substitute for a standard

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60. *See generally Oliver Wendell Holmes, Jr., The Common Law 88-103 (1881); Henry T. Terry, Negligence, 29 Harv. L. Rev. 40-42 (1915).*

61. 159 F.2d 169, 173 (2d Cir. 1947) (expressing the concept in algebraic terms, as negligence being implied if \( B < PL \), where \( B \) is the burden or cost of avoiding accidental loss, \( P \) is the increase in probability of loss if \( B \) is not undertaken, and \( L \) is the probable magnitude or cost of such loss).

62. *Keeton, Owen, Montgomery & Green, supra note 5, at 59-60.* The Hand formula is supported in moral theory by the principle of equality. *See The Fault Pit, supra note 5, at 722.*

63. On the judicial practice in this respect, see, for example, Birnbaum, *supra* note 28, at 600-10; Davis, *supra* note 28, at 1248-71.

64. *Restatement (Third) of Torts: Products Liability § 2(b) (Tentative Draft No. 2, Mar. 13, 1995).*
that based liability simply upon whether the seller was negligent in failing to adopt a safer design—the pig-is-a-pig definition of negligent design set forth above. Yet the Reporters chose to adopt not the doctrine but the utilitarian *principles* of negligence—reasonableness, optimality, and balance—within a broader framework that is "strict." That is, section 2(b) quite plainly attempts to straddle products liability doctrine between the traditional doctrines of both negligence *and* strict liability.

This type of structural straddling between conventional common-law doctrines is problematic, but it does reflect the dual origin and nature of products liability law. Tort law is centrally implicated since the domain involves responsibility for creating risks of injury to other persons; yet contract law principles may help define the allocation of risks arising out of sales transactions in which monetary value is voluntarily exchanged for property containing both utility and risk.\(^6\) As products liability law has evolved, it truly is neither exclusively tort nor contract, but a discrete area of law in between, as the Reporters correctly note,\(^6\) that lies within the borderland of "tortracts."\(^7\) Dean Prosser's immortal words, penned prior to the birth of section 402A, reemerge from the mists of time: "When the ghosts of case and assumpsit walk hand in hand at midnight, it is sometimes a convenient and comforting thing to have a borderland in which they may lose themselves."\(^8\)

Thus, in section 2(b), the utilitarian, fault-based negligence principles of tort law and the expectational, strict liability principles of the law of contracts are conjoined.\(^9\) Whether this conjunction is proper may well be doubted, for the separate spheres of tort and contract law serve distinct functions and derive from disparate policies and ethics.\(^10\) But the theoretical propriety of joining tort and contract principles in the borderland realm of products liability law involves a morass of deep and complex issues that exceed the boundaries of this article. It is sufficient here to understand the rationale for section 2(b)'s blended

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\(^6\) The typical products liability paradigm thus is far more complex than the ordinary tort paradigm of *A* hits *B*. See Moral Foundations, *supra* note 5, at 461-62.

\(^6\) *See* Restatement (Third) of Torts: Products Liability § 1 cmt. a (Tentative Draft No. 2, Mar. 13, 1995).

\(^7\) For more than one sufficient reason, "tortracts" is a better term than "contorts" to describe the general borderland between the law of torts and the law of contracts. First, the "tortracts" term avoids the ambiguity of appearing to describe the area of constitutional torts, as "contorts" appears to do. Second, it gives primacy to the dominant and more valuable field of law. Finally, "tortracts" is simply the more elegant word. In the particular case of products liability law, there is an additional reason for preferring "tortracts," to wit, the accepted fact that tort law principles properly dominate the analysis of the great majority of products liability issues. See id. § 1 cmt. a.


\(^9\) Although strict liability may be the prevailing rule of contract law, it is hardly a stranger to the law of torts.

\(^10\) See authorities cited *supra* note 6.
The structure and language of the section may be examined next to see if the goal—of infusing negligence principles into a strictly stated liability rule—is essentially achieved. The first question here is whether the design liability rule stated in section 2(b) is indeed facially strict. The answer must be that it largely is. If strict liability is properly defined as "liability without fault," then section 2(b) on its face adopts a strict liability rule. Liability rests upon the notion of "defectiveness," which describes the condition of the product, not the conduct of the seller. An accident product is deemed defective in design if it was more dangerous than it reasonably needed to be, as demonstrated by the existence at the time of a reasonable safer design, which renders the accident product by comparison "not reasonably safe." At the surface, liability is predicated entirely on the product—not the seller—being bad. Thus, on the face of the black letter, liability for defective design is "strict."

If liability accordingly is strict, how then can it be based on the fault-based principles of negligence? For an answer to this apparent paradox, one must examine the comments to sections 1 and 2, as well as the black letter, which together make it abundantly clear that the notions of "defective design" and "not reasonably safe" rest almost entirely, perhaps completely, on principles of negligence. On closer analysis of the black letter rule itself, the defect-based "strict" liability of section 2(b) appears to be altogether congruent with liability in negligence. By hypothesis, a manufacturer would be blameworthy for choosing to sell a defectively designed, not reasonably safe product containing foreseeable risks that reasonably could have (and hence "should have") been avoided had the manufacturer adopted a reasonable alternative design. Such a manufacturer thus would necessarily appear to be negligent for making and selling a product that it should have known to be excessively dangerous—more dangerous than a prudent manufacturer should have known it reasonably needed to be.

As noted earlier, negligence law is predicated on certain fundamental principles rooted in utilitarian theory—reasonableness, optimality, and balance—each of which in fact implies the others. Design liability, as defined in section 2(b), is constructed squarely on these three principles. The black letter language of the section itself is structured around the principle of reasonableness: to be defective, the product must be "not reasonably safe"; for a product to be characterized as "not reasonably safe," the manufacturer must have failed to

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71. I put aside for now the linguistic problems of interpretation that are examined infra part V.
adopt a "reasonable alternative design."  

Comment c notes that this standard for judging defectiveness of design is "a reasonableness ('risk-utility' balancing) test" viewed from the perspective of "a reasonable person . . . used in administering the traditional reasonableness standard in negligence." Thus, the negligence principle of reasonableness lies at the heart of the design defect standard of liability.

By equating reasonableness with the second principle, " 'risk-utility' balancing," comment c taps into the analytical process Learned Hand explicitly applied in Carroll Towing to judge the reasonableness of behavior under negligence law, as noted earlier.  

In determining whether the safety of a product's design should be increased further, in searching for the point of optimality, a reasonable design engineer must balance the costs and benefits (the risks and utility) of adding increased safety. Balancing assessments are necessary because manufacturers are forced to shoulder a legislative-type responsibility in accommodating the often-conflicting interests of three quite different constituencies: (1) consumers generally, who desire an optimal balance between usefulness, cost, and safety; (2) future injury victims, who retrospectively desire absolute safety; and (3) shareholders, who desire safety levels that will generate the highest profit. A reasonable manufacturer must accord equal respect to all such persons by

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72. For a consideration of this interpretation of § 2(b), see infra notes 124-25 and accompanying text.

73. See supra notes 60-61 and accompanying text. More fully, cmt. c provides in pertinent part as follows:

Subsection (b) adopts a reasonableness ("risk-utility" balancing) test as the standard for judging the defectiveness of product designs. More specifically, the test is whether a reasonable alternative design would, at reasonable cost, have reduced the foreseeable risks of harm posed by the product and, if so, whether the omission of the alternative design rendered the product not reasonably safe.

RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. c (Tentative Draft No. 2, Mar. 13, 1995). Comment c also explains the connection between balancing and reasonableness:

Assessment of a product design requires a comparison between an alternative design and the product design that caused the injury, undertaken from the viewpoint of a reasonable person. That standard is also used in administering the traditional reasonableness standard in negligence. See Restatement, Second, of Torts, § 283, Comment c. The policy reasons that support use of a reasonable person perspective in connection with the general negligence standard also support its use in the products liability context.

Id.


75. The future injury victim group may be subdivided even further, according to types of product risk; reducing one type of risk for one class of person may increase a different type of risk for others. See Dawson v. Chrysler Corp., 630 F.2d 950 (3d Cir. 1980), cert. denied, 450 U.S. 959 (1981) (installing steel frame on side of car, safer in side-impact collisions, would render the car more dangerous in the more frequent type of front- and rear-impact collisions); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. d (Tentative Draft No. 2, Mar. 13, 1995).

76. Section 2 comment a explains why a reasonable manufacturer must make such balancing assessments:
"legislating" levels of safety (and utility and cost) that optimally balance the competing interests of all concerned.\textsuperscript{77}

In the quest for optimal safety,\textsuperscript{78} a manufacturer must appropriately consider the interests of each of its three constituencies by fairly balancing a large variety of design considerations that often conflict with one another: the foreseeable risks of harm, consumer expectations, usefulness, cost, longevity, responsibility for maintenance, aesthetics, marketability, and other advantages and disadvantages of the chosen and omitted safety features.\textsuperscript{79} After a product accident, the judge and jury must evaluate these same factors with respect to both the accident product as designed and the alternative put forward by the plaintiff. A product's design will be deemed "not reasonably safe" and hence "defective" if a comparison of the designs of the two products—the accident product and the alternative product proposed by

Some sort of independent assessment of relevant advantages and disadvantages, to which some attach the label "risk-utility balancing," is necessary. Products are not generically defective merely because they are dangerous. Many risks can be eliminated only by excessively sacrificing product features that make the products useful and desirable. For such risks, users and consumers are the best risk minimizers. Thus, trade-offs are necessary to determine which risks are more fairly and efficiently borne by the immediate user, on the one hand, and, on the other hand, by users and consumers generally, through the mechanism of holding product sellers liable and having product prices reflect the relevant costs. . . . [T]he advantages and disadvantages of existing designs and safer alternatives must be considered in determining whether a defendant's design is defective.


\textsuperscript{77} Moral Foundations, supra note 5, at 468-84.

\textsuperscript{78} The Reporters discuss the important optimality concept in § 2 cmt. a. See supra note 73.

\textsuperscript{79} The point is developed further in that comment:

Subsections (b) and (c) of § 2, which impose liability for products that are defectively designed or sold without adequate warnings or instructions and are thus not reasonably safe, achieve the same general objectives as does liability predicated on negligence. The emphasis is on creating incentives for manufacturers to achieve optimal levels of safety in designing and marketing products. Society does not benefit from products that are excessively safe—for example, automobiles designed with maximum speeds of 20 miles per hour—any more than it benefits from products that are too risky. Society benefits most when the right, or optimal, amount of product safety is achieved. From a fairness perspective, requiring individual users and consumers to bear appropriate responsibility for proper product use prevents careless users and consumers from being subsidized by more careful users and consumers, when the former are paid damages out of funds to which the latter are forced to contribute through higher product prices.


\textsuperscript{79} RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. e (Tentative Draft No. 2, Mar. 13, 1995). This subsection provides in pertinent part as follows:

\begin{itemize}
  \item \textbf{e. Design defects: factors relevant in determining whether the omission of a reasonable alternative renders a product not reasonably safe.} Subsection 2(b) states that a product is defective in design if the omission of a reasonable alternative design renders the product not reasonably safe. A broad range of factors may legitimately be considered in determining whether an alternative design is reasonable and whether its omission renders a product not reasonably safe. The factors include, among others, the magnitude of the foreseeable risks of harm, the instructions and warnings that accompanied the product, the nature and strength of consumer expectations regarding the product, the relative advantages and disadvantages of the product as designed and as it alternatively could have been designed, and the effects of the alternative design on production costs, product longevity, maintenance and repair, aesthetics, and marketability.
\end{itemize}

\textit{Id.}
the plaintiff—demonstrates that the alternative product's balance of cost and benefit factors was better than the accident product's balance of these same factors. And the converse is also true: if the balance of competing design considerations in the accident product was as good or better than the balance in the plaintiff's alternative design, then the accident product's design will be deemed "reasonably safe" and "nondefective." Section 2(b) rests on negligence principles by limiting the consideration of risks (and presumably benefits) to those that are foreseeable. The black letter rule itself speaks expressly in terms of "foreseeable risks of harm," and the comments note that "the balancing of risks and benefits in judging product design and marketing must be done in light of the knowledge of risks and risk-avoidance techniques reasonably attainable at the time of distribution." This restriction of consideration to risks that are foreseeable is ordinarily of greater importance in warning defect cases than in cases involving dangers in design, and it is fully considered in that context below. It is sufficient here to note that restricting a seller's design responsibilities to risks that are foreseeable precludes resort to the truly strict "Wade-Keeton test" of defectiveness employed in a number of jurisdictions, which leaves the consumer expectations liability test as the only way to define liability for design defectiveness in a manner that is strict.

80. The plaintiff, of course, must also prove causation—that the alternative product would have prevented or reduced his harm. See id. §§ 1(a), 2 cmts. d, m & p. Causation is treated generally in id. §§ 10 & 11. A "better balance" definition of defective design is proposed below, infra notes 138-44 and accompanying text.

81. Implicit in finding such a product "innocent" is the conclusion that its risks of injury fall fairly on users (potential victims) rather than on the manufacturer:

[Product makers [should] be legally responsible for the harmful consequences of their negligent mistakes, but not for "proper" legislative choices that the manufacturer could only do its best to make and price for the general benefit of the community as a whole. Principles of freedom, truth, equality, utility, and efficiency all support a principle that places on potential victims the risk of harmful consequences that inevitably flow from reasonable efforts of manufacturers to protect the public good.

Moral Foundations, supra note 5, at 504 (citations omitted).

82. Restatement (Third) of Torts: Products Liability § 2 cmt. a (Tentative Draft No. 2, Mar. 13, 1995). The soundness of this approach is explained in terms of moral theory in Moral Foundations, supra note 5, at 483-84.

83. See infra notes 93-100 and accompanying text.

84. The so-called Wade-Keeton test of strict products liability in tort imputes knowledge of all risks, knowable and unknowable alike, to the manufacturer and then bases liability on whether a manufacturer with such knowledge would be negligent in marketing the product in the condition in which it was sold. Because this test predicates liability on fictional "constructive" knowledge that may be impossible for the manufacturer to possess, liability is truly "strict." The Wade-Keeton test has now been repudiated by both Deans Wade and Keeton, and is rejected by the Reporters. Restatement (Third) of Torts: Products Liability § 2(b) & cmts. a & l (Tentative Draft No. 2, Mar. 13, 1995). For a good discussion of this matter, see id. § 2 cmt. l.
Yet the Third Restatement conclusively and controversially\textsuperscript{85} expels consumer expectations from the definitional contest\textsuperscript{86} as an independent test of defect in products liability cases. Instead, consumer expectations are relegated in the comments to mere factor status, for consideration among the various other factors that comprise the risk-utility calculus.\textsuperscript{87} The consumer expectations test derives from the law of contracts,\textsuperscript{88} and, like the great bulk of contract law principles, it operates in a manner that is truly "strict." Thus, this test often operates poorly in the design context where reasonableness, optimality, and balance are the proper benchmarks of responsibility. By banishing consumer expectations as a formal test of product defect, the Reporters\textsuperscript{89} exploded the final obstacle to the complete and final victory of negligence principles in shaping the defect concept in design and warnings cases.

In sum, while defining design danger liability in terms that appear "strict," section 2(b) is constructed upon principles of reasonableness, optimality, and balance that are the hallmarks of the law of negligence. The one workable way of viewing risk-benefit analysis as a form of strict liability, by expelling the foreseeability limitation from the calculus, is rejected in both the black letter and the comments. Finally, the comments explicitly reject the use of consumer expectations as a strict liability test for design liability, relegating such expectations to the balancing calculus for consideration among the other variables. What remains quite clearly is a design liability rule that may be strict in name, and is perhaps somewhat strict in superficial focus, but which is grounded in and determinable upon fault-based principles of negligence.

IV. INFORMATIONAL INADEQUACIES: DEFECTS IN WARNINGS AND INSTRUCTIONS

Warnings and instructions are complementary to a product's design, but they are otherwise quite different concepts. The design of a


\textsuperscript{86} For an overview of the consumer expectations v. risk-utility contest, see Keeton, Owen, Montgomery & Green, supra note 5, at 189-244.

\textsuperscript{87} See Restatement (Third) of Torts: Products Liability § 2 cmt. e (Tentative Draft No. 2, Mar. 13, 1995); supra note 79. The demotion of consumer expectations is proclaimed and explained in Restatement (Third) of Torts: Products Liability § 2 cmt. f (Tentative Draft No. 2, Mar. 13, 1995) ("Consumer expectations do not constitute an independent standard for judging the defectiveness of product designs."). Consumer expectations remain the test, as opposed to the earlier "foreign/natural" test, for use in food cases. Id. § 2 cmt. g.

\textsuperscript{88} 1 Arthur L. Corbin, Corbin on Contracts § 1, at 1-2 (2d ed. 1963).

\textsuperscript{89} Following a number of courts, and perhaps a trend. The actual count of precisely which jurisdictions employ precisely which liability test—consumer expectations or some version of risk-utility—is fraught with difficulty as well as controversy. See generally Klemme, supra note 21, at 1177-82; Shapo, supra note 11, at 666-67 n.177; Vargo, supra note 21.
product concerns the creation of a blueprint for the product concept, defining the engineering configuration of its physical components or its chemical (or biological) formulation. A product's design, in other words, is the conceptual formulation of its physical "hardware"—hardware which contains certain inherent risks when used by human beings. Warnings and instructions, on the other hand, provide information about those risks—what they are (warnings) and how to avoid them (instructions).

Warnings and instructions thus provide consumers with informational "software" that helps them better understand the true utility + cost + safety mix that constitutes each product. Providing safety information to consumers promotes two ideals: (1) individual autonomy, by helping consumers make informed choices in the selection and use of products that each consumer decides contain the mix of utility + cost + safety that best advances his or her personal goals; and (2) (optimal) safety, by providing consumers with information they may use to reduce (optimally) the risks inherent in the products they choose to purchase.90

A. Defining Liability for Defective Warnings and Instructions

Despite these fundamental differences between the concepts of product design on the one hand, and warnings and instructions on the other, they are treated virtually identically in the definitions of defectiveness in section 2 of the Products Liability Restatement. In fact, the standard of liability in section 2(c) for defective warnings and instructions mirrors the standard of liability in section 2(b) for design defectiveness almost word for word:

A "product is defective because of inadequate instructions or warnings" if the "foreseeable risks" of the product "could have been reduced or avoided by the provision of reasonable instructions or warnings . . . and the omission [thereof] renders the product not reasonably safe."91

Section 2(c) employs the same structural approach to defining liability as section 2(b): the black letter rule is stated in terms that appear strict, but the comments explain the rule in negligence terms.

The desirability of such a pig-is-a-mule definition was questioned above in the context of design defectiveness, and it is even more debatable for warning and instruction liability. In the former context, almost all courts at least pretend that liability under section 402A is somehow "strict." In warnings cases, on the other hand, many courts and commentators have long acknowledged that the relevant principles of so-called strict liability are largely, or entirely, based on negli-

90. See generally Keeton, Owen, Montgomery & Green, supra note 5, at 315-17.
And it was in the warnings context that the courts first broke back through the strict liability sound barrier, as it were, holding that there should be no duty to warn of unforeseeable risks, and that the duty to warn should lie in negligence. Thus, it was a warnings case, *Feldman v. Lederle Laboratories*, that provided the occasion for the New Jersey Supreme Court resoundingly to reject not only the Wade-Keeton test of strict liability, after explicitly having endorsed it in the *Beshada* case two years earlier, but also the very premises of strict products liability as well.

In warnings cases, therefore, the courts themselves in substantial numbers have expressed a distinct preference not only for the principles of negligence law but, increasingly, for negligence doctrine, too. In this context more than in design cases, most courts have seemed doctrinally stuck in "strict" liability against their will, remaining there perhaps because of the inertial power of section 402A of the Second Restatement. But this doctrinal prison is entirely unnecessary, for manufacturers are almost always liable under negligence doctrine on basic risk-utility reasoning for failing to warn consumers of material risks. And the Third Restatement agrees with the nearly universal view that manufacturers should not be obligated to warn of risks that cannot be foreseen. What is left of warning "defectiveness" is only negligence, nothing more.

Understanding why the Third Restatement formulates the black letter basis of liability for inadequate warnings in strict liability defect terms, rather than in pure negligence, is challenging to say the least.
Perhaps there is a modicum of merit in maintaining a superficially “strict” face on liability in warnings and instructions cases in order to maintain a uniformity at least of superficial doctrine with the other two forms of defectiveness. But the predicate to this explanation is the appropriateness of defining the design standard of liability itself in strict defect terms, a quite dubious proposition as discussed above. The Reporters argue that applying a strict facade to products liability generally will help avoid certain problematic applications of the conventional negligence defenses of contributory negligence and assumption of risk. This argument collapses when one recognizes that the doctrine of comparative fault has well harnessed both defenses across the nation. Perhaps, since many courts continue to speak of warnings liability as “strict” under section 402A, one might make the argument here as well that the law should be restated as most courts are stating it. But this should take on a look of bootstrap reasoning when section 402A itself created this major doctrinal quandary. This leaves only an aspirational and symbolic argument for stating “strictly” the important rules of product safety responsibility, as discussed below.

One might well conclude that aspiration is too fragile by itself to bear the weight of pretending that pigs are mules.

In sum, the Third Restatement’s decision to wrap warnings and instructions liability in a defect shell that has a strict appearance is dubious at best. A more forthright black letter definition of warnings liability in conventional negligence terms would have been superior to the chosen path of slipping negligence in the back door by clever stealth. In its adoption of section 2(b), the ALI missed a major opportunity to restore common sense and credibility to the liability rules at work in warnings cases.

B. Reasonableness in the Warnings Context

“Reasonableness” fully captures the principles of negligence that underlie the new Restatement’s standard of liability for instruction and warning defects. A product is thus defective under section 2(c) if reasonable instructions and warnings of foreseeable risks are not provided by reasonable means to persons who reasonably and foreseeably need the information. Many courts use the word “adequacy” to ex-

101. For whatever aesthetic value may lie in this form of doctrinal symmetry.
102. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 cmt. a (Tentative Draft No. 2, Mar. 13, 1995).
103. The Reporters elsewhere acknowledge this point themselves, noting that “the majority of courts utilize comparative fault to reduce the recoveries of products liability plaintiffs.” Id. § 12 Reporters’ note to cmt. a. For a perceptive analysis of comparative fault at play in products liability cases, see Mary J. Davis, Individual and Institutional Responsibility: A Vision for Comparative Fault in Products Liability, 39 VILL. L. REV. 281 (1994).
104. See infra note 150 and accompanying text.
105. This is a rough summary of § 2(c). “Subsection (c) of § 2 adopts a reasonableness test for judging the adequacy of product instructions and warnings. It thus parallels § 2(b) which
press this reasonableness notion in the warnings and instructions context.\textsuperscript{106}

In informational adequacy cases of this type, the reasonableness requirement has two distinct components, one "substantive" and the other formal or "procedural."\textsuperscript{107} The first, or substantive, component requires that the informational content of warnings and instructions be sufficient for the context, that they contain adequate types and amounts of danger and safety information in view of the foreseeable types and amounts of risk. Such communications must thus convey, as far as reasonably practicable, accurate information on both the nature and degree of danger. If the product may cause severe injury or death, then warning of anything less will be inadequate, and therefore "unreasonable" under section 2(c).

The second, or procedural, component requires that the information be conveyed in a form and manner that is reasonably calculated to reach and catch the attention of persons who need it. Thus, written warnings and instructions must be presented in an appropriate size, color, and style of type, and sometimes should be preceded by a heading; pictures, bells, or buzzers will be necessary for certain types of products, and labels, plaques, or tags must sometimes be affixed directly to the face of the product hardware; odors or colors may need to be added to some dangerous gases and liquids that otherwise might be invisible or look like water. Moreover, the distribution system for safety information should reasonably assure that the information finds its way to those personally at risk, or to others likely to act on their behalf, and the risk information must be presented in language or schematic pictorial form likely to penetrate the mind of the type of persons likely to use the product. Thus, to serve their purposes and be legally adequate, warnings and instructions must be "reasonable" both in substance and in form.

The related principles of balance and optimality that dominate the reasonableness inquiry in design defectiveness cases also apply to warnings cases, but in a different way. In design cases, the goal is to achieve an optimal mix of utility + cost + safety within a calculus where both utility and cost often conflict with safety, where enhancing safety often reduces a product's usefulness and increases its cost.\textsuperscript{108} In warnings cases, this type of competition among consumer values usually is much weaker. Although the goal here also is for optimal rather than maximum safety, the provision of \textit{too much} safety information does not involve so clear a sacrifice of other interests as does the pro-

\textsuperscript{106} See id. See generally Keeton, Owen, Montgomery & Green, \textit{supra} note 5, at 315-60.

\textsuperscript{107} See generally Keeton, Owen, Montgomery & Green, \textit{supra} note 5, at 326-27 n.8.

\textsuperscript{108} See Moral Foundations, \textit{supra} note 5, at 477-84.
vision of excessive safety in design; safety information usually may be added with negligible loss of utility and at minimal direct expense.\(^{109}\) In this context, it is safety itself that may suffer when product risks are exaggerated and when important safety information is drowned in a sea of trivia. This is the problem of information overload, sometimes called "warnings pollution," that results from promoting maximum in lieu of optimal safety and danger information.\(^{110}\)

As with the definition of design defects in section 2(b), warning and instruction defects are defined in section 2(c) and its comments in terms of foreseeable risk, reasonableness, optimality, and balance. These important underlying principles are the concepts that the courts and commentators have found proper for resolving warning and instruction defect cases, and the new Products Liability Restatement captures them in section 2(c). Yet, the Third Restatement fails to take the proper final step of grounding them as well in negligence law doctrine. Instead, it stretches logic, common sense, and the English language beyond good sense in order to force the liability standard based on such principles into a strictly framed defect mold.

V. THE MAGIC LANGUAGE: “DEFECTIVE . . . NOT REASONABLY SAFE”

The magic language has been changed. Section 402A of the Second Restatement imposed strict liability for the sale of products in a "defective condition unreasonably dangerous" to persons or property. The phrases "defective condition" and "unreasonably dangerous" were separately defined in separate comments, both in nearly identical consumer contemplation terms.\(^{111}\) From the very start, and for many years, courts and commentators struggled valiantly with the meaning of this magic language.\(^{112}\)

Dean Prosser’s early drafts of section 402A, in 1958 and 1960, defined the liability standard in terms of “a condition dangerous to the consumer,” but members of the ALI Council complained that it was

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109. See supra note 99.
110. The point is nicely captured in § 2 comment h:
[The reasonableness test] is more difficult to apply in the warnings context. Warnings that are too numerous or detailed may be ignored and thus ineffective. It is also difficult to determine the appropriate degree of intensity with which warnings should be transmitted. Useful instructions and warnings call the user’s attention to dangers that can be avoided by careful product use, but [they] can be debased if attention must also be directed to trivial or far-fetched risks.

Restatement (Third) of Torts: Products Liability § 2 cmt. h (Tentative Draft No. 2, Mar. 13, 1995). Sources on this issue are collected in id. § 2 Reporters’ note to cmt. h. Information overload is a small piece of the much larger puzzle of why warnings are often ineffective. See generally Howard Latin, “Good” Warnings, Bad Products, and Cognitive Limitations, 41 UCLA L. Rev. 1193 (1994).

111. "Defective condition" is defined in Restatement (Second) of Torts § 402A cmt. g (1964); “unreasonably dangerous” is defined id. § 402A cmt. i.
112. See generally Keeton, Owen, Montgomery & Green, supra note 5, at 223-44.
overbroad. In response, he overreacted, modifying "dangerous" with
"unreasonably" and "condition" with "defective," thus putting the op-
erative language of section 402A into its final form, "defective condi-
tion unreasonably dangerous." When section 402A was first
debated on the floor of the American Law Institute in 1961, the
double-headed definition of the black letter liability standard was uni-
formly criticized as confusing, "gilding the lily," and promoting of mis-
chief, which criticisms have all proved true. The great
definitional debate came to a head in Cronin v. J.B.E. Olson Corp.,
which quixotically purged the much more meaningful "unreasonably
dangerous" portion of the phrase because it "rings of negligence." Yet truly it rings of negligence, and proudly so, because it is centered
in the important concept of "reasonableness" (and the connected no-
tions of optimality and balance) from whence it draws its power. In
time, of course, most courts eventually came to understand the full
phrase as signifying a unitary concept, captured ordinarily in the single
word of "defect" (or "defectiveness"). Understandably, however,
some courts still are led by the double-headed language in the stan-
dard to the confusing conclusion that the phrase must mean two
things.

A. The Interpretive Confusion in the Design and Warnings Defect
Tests: Decoding Subsections 2(b) and (c)

Whether the new Restatement's similar use in sections 2(b) and
c (c) of multiple definitional terms—"defective," "reasonable alterna-
tive design," and "not reasonably safe"—will generate another decade
or two of definitional confusion is an open question. Unfortunately,
the problem is compounded by the use in both subsections of extrane-
ous doctrine and confusing syntax that requires several readings
and heavy reliance on the comments to begin to understand. This
type of linguistic confusion in the basic liability standards can cause
much mischief for it provides lawyers with grist for argument on alter-
native meanings that surely will confound busy judges with little time

113. See id. at 223.
114. Id. at 223-25.
115. See generally id. at 225-44 (chronicling the courts' struggle to understand the meaning
of "defective condition unreasonably dangerous").
117. Id. at 1162.
118. The trial court appears to have been so misled in Stinson v. E.I. DuPont de Nemours &
Co., 904 S.W.2d 428 (Mo. Ct. App. 1995) (semble). See Keeton, Owen, Montgomery &
Green, supra note 5, at 242 n.3.
119. Leon Green's criticism of the first Restatement of Torts comes to mind: "The most
striking feature of the black letter sections ... is their stiffness and pompousness of expres-
sion. ... smother[ing] ... [i]mportant ideas ... in a welter of insignificant ones raised by black
letter to the same level of importance." Leon Green, The Torts Restatement, 29 Ill. L. Rev. 582,
591-92 (1935).
120. Perhaps not unlike this article.
to divine the true meaning from the variety of different notions stitched together awkwardly in black letter over several Restatement drafts. Parsing the language of subsections 2(b) and (c) to determine the true meaning of these basic tests of liability is not an easy task.

The parsing task of both subsections is probably best begun by focusing on the single definition of design defectiveness in section 2(b). That section now provides:

\[ \text{[A] product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.} \]

In attempting to understand this language, it is helpful to begin by stripping away the secondary doctrine on retailer liability that has no business cluttering up the new Restatement's single most important section, one which is complex and confusing enough in any event. Once this stripping operation is accomplished, at least a basic idea of the section's meaning begins to peek through the mist:

A product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by a reasonable alternative design, and the omission of the alternative design renders the product not reasonably safe.

What does this decoded version of section 2(b) say to courts and lawyers? Even in its stripped down iteration, the meaning of this test of liability is not clear at all. A serial examination of the concepts appears to reveal two, or possibly three, independent normative poles lurking in the test:

A product is defective in design when:

1. the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design, and
2. the omission of the alternative design renders the product not reasonably safe.

121. The definition of design defect in § 2(c) is closely paralleled by the definition of warnings and instructions defects in § 2(c). See Restatement (Third) of Torts: Products Liability § 2(c) (Tentative Draft No. 2, Mar. 13, 1995). For a variety of reasons reflected in 30 years of judicial experience under § 402A, the liability test for design defectiveness promises to be at once far more significant and subject to substantially greater interpretive confusion than the test for defective warnings.

122. Id. § 2(b).

123. The retailer doctrine at issue is otherwise clearly and fully treated in the comments. The Reporters assert that the particular doctrinal question at issue here is whether a retailer or other downstream seller is strictly liable for defects (including design and warnings defects) attributable to the manufacturer. But the comments clearly, forcefully, and unequivocally provide that such downstream sellers are indeed strictly responsible for defects generated upstream. See id. §§ 1 cmts. a & e, 2 cmt. n (explaining why such a harsh and often unnecessarily stringent standard of responsibility is imposed on retailers). As for the general problem of placing secondary doctrine in black letter, see supra note 119.

124. And some other extraneous language is peeled away. Herbert Weschler, who served as the ALI Director for many years, pointed out the extraneousness of the "the adoption of" language during the floor debate on § 2 in 1994.
Reminiscent of the Cronin-type linguistic problem with section 402A, where "defective condition unreasonably dangerous" was understandably interpreted by many courts and lawyers to contain two separate normative prongs—"defective condition" + "unreasonably dangerous"—section 2(b) might be interpreted to have as many as three such prongs: (1) "defective" condition, (2) "reasonable alternative design," and (3) "not reasonably safe."

Perhaps the fairest interpretation of the language of section 2(b), consistent with the structural interrelationship between sections 1 and 2, is revealed by emphasizing the "when": A product is "defective" in design, making the seller subject to liability, when (1) a "reasonable alternative design" was available and (2) the actual design was "not reasonably safe." To borrow Learned Hand's formulaic approach to definition, design defectiveness under this interpretation of section 2(b) might be expressed as follows:

\[ D = RAD + NRS \]

where \( D \) means "defective," \( RAD \) means "reasonable alternative design," and \( NRS \) means "not reasonably safe."

Under this interpretation of section 2(b), it thus appears that a plaintiff must establish two principal elements: (1) the existence of an available alternative design that was reasonable (such that the manufacturer's failure to adopt it may have been unreasonable) and (2) that the actual design was not reasonably safe, that it was unreasonable (such that the manufacturer's adoption of it was in fact unreasonable). The problem of understanding here, then, resolves down to the apparent existence in the test of two apparently separate normative poles—one positive and one negative—both of which are based on similar, or identical, conceptions of reasonableness and either of which alone logically would appear sufficient for the liability test.

This is not a welcome conclusion, for it leaves the interpreter of section 2(b) in a conceptual muddle: either prongs (1) and (2) are merely opposite sides of the same conceptual coin and hence identical, \( RAD = NRS \), or they are somehow different from one another. Unlike the magic language in section 402A, neither of these two operative terms is specifically defined in the comments, which thus requires the interpreter to make a careful study of a good portion of the 127 pages covered in Tentative Draft No. 2 by sections 1 and 2 in an attempt to unearth their meanings. If the two terms are indeed synonymous, if a product is "not reasonably safe" because a "reasonable alternative design" was available but omitted by the manufacturer, then the concept of the test is comprehensible and may be applied with little trouble. This interpretation of the standard may be expressed symbolically as follows:

\[ D = RAD = NRS \]
On this interpretation of the standard, juries might be instructed that a manufacturer’s design is defective, subjecting the manufacturer to liability, if the manufacturer failed to adopt a reasonable available design. A careful trial court will be sorely tempted to stop the instruction on the liability test there, to avoid confusing the jury into thinking that the plaintiff must prove something additional to RAD for the manufacturer to be subject to liability.

Yet many courts may be expected to try to discern different meanings in RAD and NRS because the concepts on their face are obviously quite different: RAD applies a positive (“reasonable”) standard to a hypothetical alternative design, whereas NRS applies a negative (“not reasonably safe”) standard to the product’s actual design. If indeed the two terms mean something different from one another, then this is where the grand confusion will begin, for there is nothing in the comments that directly explains either the meaning of or the relationship between RAD and NRS, but the comments do provide a rich array of opportunities for guessing. And so most courts and lawyers are provided with little help in trying to understand the meaning of this central defect concept in the tests of liability as they are formulated in the Third Restatement.

But there is one final place to search for the meaning of section 2(b) which may hold a key to understanding its proper interpretation—in the prior drafts that document historically its journey from conception to its present form. In its early iterations, the Reporters had indeed initially defined “design defect” in terms of a single normative pole, based on RAD, by which a design was deemed defective “if the foreseeable risks of harm posed by the product could have been reduced by the adoption of a reasonable alternative design.”

A court or lawyer who proceeds this far in the deconstruction process may thus conclude with reasonable confidence that the two standards of defectiveness now appearing in sections 2(b) and (c) are really one. And if the interpreter searches even deeper in the “legislative history” of the section, the reason for this strange bipolar definition of a single concept will be revealed, for the Reporters note that the Council insisted that they infuse the seemingly sterile RAD standard with some substantive content. And so the confusing definitional

125. Perhaps the ripest possibility for such empty vessel guessing is the notion of consumer expectations. Although the concept is explicitly relegated to factor status in comments e and f, its substantial power under § 402A, which drew upon the conceptual underpinnings of both the law of contracts and the law of torts, may provide some courts with justification for pouring once again consumer expectations into the standard of liability via the vessel of “not reasonably safe.”

126. Restatement (Third) of Torts: Products Liability § 2(b) (Preliminary Draft No. 1, Apr. 20, 1993); Restatement (Third) of Torts: Products Liability § 2(b) (Council Draft No. 1, Sept. 17, 1993).

127. Yet there exists another quite plausible interpretation: that the addition of NRS to Council Draft 1A was intended for a purpose.

128. The Reporters noted in pertinent part that
DEFECTIVENESS RESTATED

The technique of using bipolar definitions to express perhaps a single liability concept is seen to have been forced upon the Reporters by the Council, just as happened to Dean Prosser in the development of section 402A thirty-three years earlier. In both cases, the definition of a (two-humped) camel comes uncomfortably to mind.

But this still leaves open the question of whether the Council was intending to add a second and different normative pole to the liability definitions in sections 2(b) and (c) instead conceived of RAD as involving the purely technical question of whether a feasible alternative design was available at the time. The latter interpretation is recommended by much of the case law which treats the availability of a feasible design alternative as a largely technical precondition to the normative question of whether the product's risks exceeded fair consumer expectations or the product's benefits. But the former interpretation is supported by the observations of one Reporter, Professor Aaron Twerski, who has explained that at least one purpose for adding the NRS prong was to dispel the notion that there can only be but one lawful design for any type of product. This is an important problem involving the common situation in which there are multiple product designs intended to serve the same function.

This problem may be illustrated by a power saw example. Power saws with reciprocating blades and chain saws both were invented and commercially developed to cut down trees and divide them into logs. One design or the other will turn out in the long run to be objectively more dangerous, yet perhaps no more useful or less expensive than the other. It may not be the place of products liability law to force juries to decide that only one type of power saw, necessarily dangerous to a large extent itself, is "lawful" in our society; both types may be reasonable approaches to relieving men and women of the burden of sawing manually. While a monopolar "reasonable alternative design" method of defining defectiveness would appear to require


129. See supra note 113 and accompanying text.
130. As a horse (defectively) designed by a committee.
131. As does the maxim, plus ça change.
132. See generally KEETON, OWEN, MONTGOMERY & GREEN, supra note 5, at 293-95 (examining importance of feasible design alternative to plaintiff's case).
133. See generally Hildy Bowbeer, The ALI's Restatement on Products Liability: Some Early Concerns and Suggested Revisions, 21 Prod. Safety & Liab. Rep. (BNA) 785 (July 23, 1993) (analyzing the Third Restatement's effect when more than one reasonable alternative design is available).
branding one such saw illegal, adding a second normative pole of “not reasonably safe” to the definition would allow a jury to find both types of saw socially acceptable. Interpreting NRS in this manner makes good sense in terms of policy and fairness and argues for a bipolar interpretation of sections 2(b) and (c) along these lines.

Regardless of whether one concludes that RAD and NRS are equivalent, that RAD = NRS, section 2 contains two additional, possibly normative terms—“defect” and “defective.” For many years now, courts and commentators have used these two words in a conclusory, nonsubstantive sense to mean nothing more than “subject to liability” under section 402A.\textsuperscript{134} In the Third Restatement, section 2 refers back to section 1, which establishes the primary definitional structure, so that sections 1 and 2 fairly must be read together. When this is done, the words “defect” and “defective” are seen in fact to be employed in the conclusory sense that they generally have acquired. Understood in this manner, “defectiveness” is substantively empty and merely descriptive of the single end-condition of liability—that the product is (on other, substantive grounds) “bad” in law. “Defect” and “defective” thus are seen as summary characterizations of the liability standards substantially defined in section 2 and its comments. In interpreting the liability standards of section 2, therefore, “defective” should be viewed merely as a hollow, conclusory term which serves only as a vehicle for interconnecting the substantive liability tests of section 2 with the result of passing (perhaps “failing” better describes the point) the test—("strict") liability—of section 1. As structurally complex and awkward as this definitional approach may appear, it does permit the basic “strict” liability rule to be stated simply and uniformly in section 1.

Thus, sections 2(b) and (c) may be decoded to reveal either a monopolar basis of liability or one that is bipolar, both of which are logical. Yet, either manner of decoding section 2 is at once complex and quite unsatisfactory in requiring detailed analysis of various Restatement drafts, possibly reliance on one Reporter’s recollections of a rationale, and in either case a convoluted twisting of the language of section 2. While the Twerski bipolar explanation of sections 2(b) and (c) makes good sense and appears to fit the language of the definitions, there appears to be no basis for it in the comments which if anything appear to point the other way. In sum, sections 2(b) and (c) remain inscrutable at various levels of logical and linguistic analysis, leaving the courts with the daunting task of reconstructing and explaining to juries the basic definition of defectiveness in design and warnings cases.

\textsuperscript{134} This proposition is axiomatic. For example, the chapter examining the basic tests, theories, and limits to liability in \textsc{Keeton, Owen, Montgomery & Green}, supra note 5, is entitled “The Concept of Defectiveness.”
B. Understanding the Tests for Design and Warnings Defects: Reconstructing Subsections 2(b) and (c)

The defectiveness notions in design (and warnings) cases may be reformulated in a variety of helpful ways consistent with the theory and basic approach of sections 1 and 2 of the Third Restatement. First, however, continuing the primary focus here on design liability, it is important to summarize the fundamental ideas that are properly captured within the liability concept. In basic terms, a manufacturer generally should be liable for harm attributable to a product design if the manufacturer reasonably should have designed the product in a different manner that would have prevented the harm. More specifically, a product fairly may be deemed defective in design if there was available at the time an alternative design that was (1) foreseeably safer, both overall and in respect to the risk that caused the plaintiff's harm, (2) technologically and practicably feasible, and (3) on balance materially better overall than the actual design with respect to the balance of (a) safety, (b) utility, and (c) cost.\(^1\) These are the key concepts or elements that are in fact included in section 2(b) but hidden by the syntax of the black letter or scattered in the comments.

The liability standard reformulation process may be begun with the decoded version of section 2(b) set forth above:

A product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by a reasonable alternative design and the omission of the alternative design renders the product not reasonably safe.

The standard can be stripped of the problematic conjunctive definition and otherwise clarified to read as follows:

A product is defective in design if its foreseeable risks of harm could have been reduced by a feasible alternative design the omission of which renders the product not reasonably safe.

By replacing "reasonable" with "feasible,"\(^2\) converting RAD to FAD, the standard in this form still contains two key elements, but only one of them is normatively significant; important as it is to liability, the feasible alternative design requirement (unlike RAD) is an element that involves issues of technological practicability which are capable of objective proof and determination. This important alteration of the definition properly isolates NRS as the sole normative pole, thereby curing much of the confusion generated by the final, apparently bipolar definition.\(^3\)

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1. See generally Moral Foundations, supra note 5, at 477-84.
2. During the 1994 ALI floor debate on § 2 of Tentative Draft No. 1, one Reporter agreed that "feasible" might be preferable to "reasonable" in the liability standard but concluded with the other Reporter that the definitional process had progressed too far to admit of change, that the "clay had hardened"—a notion promptly dubbed the "hard clay" theory of draft immutability.
3. It also conforms more closely to the language of judicial decisions.
The test for design defectiveness may be strengthened further by focusing closely on what should be balanced against what in determining the adequacy of a product's design. Courts and commentators have experienced enormous difficulty in deciding precisely what should be balanced in such cases, and the design defect test should be reformulated in a way that helps to clarify this issue. Generally, the proper focal point for the risk-utility balance is the particular safety feature of the alternative design proposed by the plaintiff that would have prevented or reduced the plaintiff's harm.

Ordinarily, therefore, what are relevant are the incremental ("marginal") risks and benefits of adopting the particular design safety feature proposed by the plaintiff—those that would have been incurred in moving from the manufacturer's actual design to the plaintiff's hypothetical alternative design. The results of this kind of incremental balance may be ascertained directly, by determining the foreseeable costs and benefits attributable solely to the particular design feature proposed by the plaintiff. For example, if the issue is the defectiveness of an outboard motor not equipped with a propeller guard, the proper inquiry concerns the balance of risks and benefits that would result from adding such a guard—not the risks and benefits of outboard motors generally, without such guards, and certainly not the broader risks and benefits of power boats propelled by such motors. See Fitzpatrick v. Madonna, 623 A.2d 322 (Pa. Super. Ct. 1993) (correctly balancing the incremental risks and benefits of adding such a guard). Similarly, a plaintiff's proposed design feature might involve removing some hazardous portion of the product, such as a dangerous hood ornament on a car. Cf. Hatch v. Ford Motor Co., 329 P.2d 605 (Cal. Ct. App. 1958). Here, the only pertinent risks and benefits would concern the removal of the hood ornament from the car—not the broader risks and benefits of cars that happen to sport sharp hood ornaments.

Many courts frame the question indirectly, however, in terms of the overall costs and benefits of the product design taken as a whole—the risks and benefits of "the product," presumably the accident product as actually designed by the manufacturer. See, e.g., Banks v. ICI Americas, Inc., 450 S.E.2d 671, 674 (Ga. 1994) (adopting "a test balancing the risks inherent in a product design against the utility of the product so designed"); Sperry-New Holland v. Prestage, 617 So. 2d 248, 254 (Miss. 1993) (adopting risk-utility analysis, defined as whether "the utility of the product is outweighed by the danger that the product creates"). This formulation of the risk-utility balance in macro-product terms seriously misstates the nature of the true issue and proper analytical process in most design defect cases, thus confusing the question of what properly should be balanced against what. Although the macro-balancing approach may be converted to a form that will yield correct results, it requires no less than three separate balances, the first two "internal" to the two competing designs on trial:

1. The balance of risks and benefits of the accident product's actual design—which generates a net value of the product overall as actually designed;
2. The balance of risks and benefits of a hypothetical alternative design that would have prevented or reduced the harm—which generates a net value of the product overall as it might alternatively have been designed; and
3. The net value of (1) balanced against the net value of (2)—the value of the product overall as actually designed balanced against the value of the product overall as alternatively designed.

Under this macro-balancing approach, the net value outcomes generated by the internal balances of (1) and (2) provide the values for the ultimate external balance described in (3); and the third, "external" balance determines which of the two competing designs—the actual or the alternative—is (on balance) "better" overall. Macro-product balancing along these lines should yield correct defectiveness determinations, but the process is far more complicated than that involved in micro-balancing the marginal risks and benefits of the particular safety feature proposed by plaintiff. The Third Restatement touches only indirectly upon the macro-micro balancing distinction, in comments c, d, and e to §2, in connection with the reasonable design alternative requirement. The comments suggest that the risk and benefit factors are applicable
Restatement test may be altered to sharpen this focus, by shifting attention away from the "not reasonably safe" pole, that concerns the actual design, toward the pole that involves the "reasonableness" of the alternative design. The standard may in this way be formulated as follows:

A product is defective in design if a feasible alternative design was foreseeably safer and reasonable.

So revised, the standard is now clear and reduced in large measure to its essentials. As so constructed, however, "reasonable" itself may well be unnecessarily vague, and the clarity of the liability test is measurably enhanced by setting forth explicitly the key subconcepts that lie within the general notion of "reasonable." In its clearest and fullest formulation, the liability test for design defectiveness thus may be defined something like the following:

A product is defective in design if a feasible alternative design was foreseeably safer and better overall in terms of its balance of safety, utility, and cost.

This key-element form of definition, or one along these lines, seems to reformulate comprehensibly the Third Restatement's definition of the standard of liability. It captures the most important aspects of design defectiveness, describing with particularity the ultimate balancing process for determining the "better" design, and it excludes extraneous secondary concepts from the principal definition. Finally, and importantly, it expresses at a glance—within the black letter and without the need for herculean decoding—the essential requirements for liability based on the concept of deviation from a proper safety norm.

to actual as well as alternative designs, and they fail to describe the proper relationship between the two. This important topic is largely beyond the scope of the present article but is explored more thoroughly elsewhere. See David G. Owen, The Risk-Utility Test for Design Defectiveness: Toward a Proper Balance, 30 U. Mich. J.L. Ref. (forthcoming 1997).

140. The focus sharpening is necessarily incomplete, since the objective here is to clarify the Third Restatement's defect tests with minimal conceptual and linguistic change.

141. Moreover, the "foreseeably safer" formulation appears to afford fair protection to manufacturers in the multiple-safe-product situation examined earlier.

142. A variety of similar approaches may work as well or better, for example:

1. A product is defective in design if it feasibly could have been designed more safely in a manner that was better overall in terms of its foreseeable risks, utility, and cost; or

2. A product is defective in design if a feasible alternative design was foreseeably safer and better overall in regard to its mix of safety, utility, and cost; or

3. A product is defective in design if a feasible alternative design contained a better overall balance of foreseeable risks, utility, and cost.

Each of these approaches more or less accomplishes the purpose of conceptual and linguistic clarity that is so essential in the test of liability, and certainly there are others that achieve the same result.

143. See supra note 80 and accompanying text.

144. The notion of a "proper safety norm" provides a powerful, unifying foundation for all three forms of defect. From this perspective, § 1 and § 2 may be decoded to look something like the following:

§ 1. Commercial Seller's Liability for Harm Caused by Defective Products
The advantages of redefining "defectiveness" along such clear and simple lines should be self-evident. Such straightforward and comprehensible definitions reveal for courts and lawyers (and juries) the true meaning of the liability standards, and there simply is no good reason for forcing those who need to know the law to struggle in every case to try to understand the confusing liability definitions of section 2. The interpretative problems surrounding the Products Liability Restatement's liability test formulations are profound and will no doubt provide much grist for many future essays as confusion unfolds with time in one court opinion after another. Yet, the courts themselves may make the fix judicially by redesigning the liability tests for design and warnings defectiveness clearly and comprehensibly along the lines discussed above.\textsuperscript{145}

C. Changing "Unreasonably Dangerous" to "Not Reasonably Safe"

The magic language in the Third Restatement has been changed in another way: the phrase "not reasonably safe" was substituted for the "unreasonably dangerous" language in section 402A. The important question here is whether the change from the "unreasonably dangerous" language of the Second Restatement was intended to alter the fundamental test of liability. It would seem that this linguistic change was somewhat more than stylistic, that the language was altered at least to alert the legal community that certain substantive changes were being made in the old liability standard of section 402A. The liability test under section 402A, it will be recalled, was explicitly defined in terms of consumer expectations,\textsuperscript{146} which the Third Restatement equally explicitly relegated to "factor" status.\textsuperscript{147} Further, the liability standards of the Third Restatement are enormously embellished by copious doctrinal and explanatory particularizations in the

\begin{itemize}
  \item[(a)] One engaged in the business of selling products who sells a defective product is subject to liability for harm to persons or property caused by the product defect.
  \item[(b)] A product is defective only if, at the time of sale, it departs from a proper safety norm in manufacture, design, or due to inadequate warnings or instructions, as defined in § 2.
\end{itemize}

\textbf{§ 2. Proper Safety Norms for Establishing Product Defect}

For purposes of determining defectiveness under Section 1, the proper safety norms are:

\begin{itemize}
  \item[(a)] With respect to manufacturing defects, the manufacturer's intended design.
  \item[(b)] With respect to design defects, an alternative design that was foreseeably safer, feasible, and better overall in terms of its balance of safety, utility, and cost.
  \item[(c)] With respect to warnings and instructions defects, an alternative warning or instruction that was foreseeably safer, feasible, and reasonable.
\end{itemize}

As in § 2(b), key elements might well be substituted for "reasonable" in § 2(c).

\textsuperscript{145} This assumes that courts will decide to retain a standard of liability for design defect cases that is strict in form. As in the warnings context, there is much to commend a simple return to negligence doctrine for determining liability in such cases. See, e.g., Powers, supra note 12.

\textsuperscript{146} See supra note 111 and accompanying text.

\textsuperscript{147} See supra note 87 and accompanying text.
comments reflecting decades of judicial (and legislative) construction of a major edifice around this mushrooming area of the law. Had the “unreasonably dangerous” phrase been retained, courts and commentators might have wondered how much precedential value to attach to “old” section 402A cases using the “unreasonably dangerous” language but employing now outdated doctrine. The Restatement slate, in other words, is now brushed clean.

Finally, the “not reasonably safe” standard adopts as the expected norm for products a positive standard—reasonable “safety”—replacing the old unreasonably “dangerous” negative formulation of the norm. It is true, of course, that danger inheres in every product, so that the central question of “How much safety is enough?” that arises in every design case in fact must turn on whether the amount of danger was excessive (“unreasonable”) in view of a broad-based calculus of costs and benefits. Yet it may just be that the Products Liability Restatement for the twenty-first century properly elevates the norm, aspirationally, to one of (reasonable) safety. The actual legal test of liability is not thereby raised in concrete terms, but the new safety standard serves symbolically to provide a signal that (reasonable) product safety—as a positive goal required by the law—must now be afforded a central place in the decisional calculus of manufacturers. And so, while certain changes to the magic language in the Third Restatement will undoubtedly generate serious confusion, other changes may make good sense.

VI. LIMITATIONS ON DEFECTIVENESS: OBVIOUS DANGERS, MISUSE, AND STATE OF THE ART

The question of defectiveness has so far focused on the elements of a plaintiff’s case, conditions that must be proven to establish a product “defect.” Liability standards, such as those in sections 1 and 2, are necessarily framed in terms of the elements that minimally com-

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148. The standards are also discussed in the Reporters’ notes. One might have wished that the most important rules of defectiveness poured into a single section, § 2, had been separately articulated and given separate black letter status each unto itself. Such a particularized division of the rules in black letter form would have focused analysis and debate more clearly and fully on each such rule, each of which would have had separate comments of its own. Yet such a detailed approach to the subject matter would have taken a good deal more work and time, and the ALI leadership in the early stages of the project appeared anxious to move the Third Restatement ahead with all due speed. By early 1995, the reporters themselves appeared to have run out of steam, as evidenced by their desire to restrict the scope of the remaining topics addressed in this Restatement. See Restatement (Third) of Torts: Products Liability introductory note (Preliminary Draft No. 3, May 18, 1995).

149. “Mushroomed” in some respects may be more accurate, for most products liability doctrine was substantially in place by the end of the 1970s. Yet there is no denying that the output of decisional and statutory law in this field continues rapidly to expand.

150. I am grateful to Aaron Twerski for explaining this rationale.

151. And, to a lesser extent, in warnings cases.

prise the legal wrong at its center. Important questions also lie on the outer edges of the defect concept, factors arguing against liability, that help define the outer boundaries of the liability standards. The three most fundamental liability-limiting issues of this type that courts have grappled with for many years concern (1) the obviousness of a product danger, (2) product misuse, and (3) the state of the art. Considerable doctrine has developed around each of these three issues, and the Third Restatement addresses each in the comments to sections 1 and 2.

A. Obvious Dangers

We hardly believe it is any more necessary to tell an experienced factory worker that he should not put his hand into a machine that is at that moment breaking glass than it would be necessary to tell a zookeeper to keep his head out of a hippopotamus' mouth.

The obviousness of a product danger has long played a significant role in the determination of defectiveness. The strongest cases of product defect have always involved a hidden or “latent” danger unsuspected by the victim who walks into a kind of trap. If, on the other hand, a product danger is open and obvious for all to see, the case for defectiveness weakens since the purchaser not only obtains the benefit of the bargain but also generally controls the risk and so bears responsibility for taking protective steps from harm.

In Campo v. Scofield, an early classic of products liability law, the New York Court of Appeals announced the “patent-danger doctrine,” holding that a manufacturer “is under no duty to guard against injury from a patent peril.” While the patent-danger rule was zealously adopted by most courts, its illogic and unfairness as an absolute bar to liability in design cases became increasingly obvious, especially in cases where a simple guard or other minimal design change would

153. The Reporters, in § 2 comments c and d, address an emerging limitation on defectiveness that involves such inherently dangerous product categories as alcoholic beverages, tobacco, firearms, above-ground swimming pools, toy guns that shoot hard rubber pellets, and exploding cigars, addressed above in the context of the formulation of a proper standard for design defectiveness. Id. § 2 cmts. c & d.

154. See generally Keeton, Owen, Montgomery & Green, supra note 5, at 360-463 (exploring limitations on defectiveness).

155. The issue is also addressed, to some extent, in Restatement (Third) of Torts: Products Liability §§ 4, 7 (Tentative Draft No. 2, Mar. 13, 1995).


157. See, e.g., Matthews v. Lawnlite Co., 88 So. 2d 299, 301 (Fla. 1956) (moving metal parts, hidden beneath armrest of outdoor lounge chair displayed in store, amputated plaintiff's finger “with the ease that one clips a choice flower with pruning shears,” causing finger to fall limply to the floor).

158. As explained in terms of moral theory in Moral Foundations, supra note 5, at 476-77.

159. 95 N.E.2d 802 (N.Y. 1950) (plaintiff's hand caught in onion-topping machine lacking guards or stopping device).

160. Id. at 804.
have cured the danger.\textsuperscript{161} The death knell for the rule was finally sounded when the New York high court itself repudiated the doctrine, holding that the obviousness of a danger logically weakens a plaintiff’s case of design defectiveness but should not destroy it altogether.\textsuperscript{162} The patent-danger doctrine has now been buried as an absolute no-duty rule for design cases in almost every state, and it is put to final rest by the Third Restatement. The comments officially declare that the obviousness of a product’s dangers in design is only one among the many factors (if sometimes an important one) to be considered in the calculus of design defectiveness.\textsuperscript{163}

In warnings cases, on the other hand, the obviousness of a product danger often properly continues to play a decisive no-duty role, as many courts have held.\textsuperscript{164} If a danger is truly obvious,\textsuperscript{165} then its very obviousness informs potential victims of the danger, so that the informational goals of warnings have been fulfilled. In such cases, there is no value in providing warnings of dangers that should be known already, and the (nonmonetary) costs may be substantial.\textsuperscript{166} The Third Restatement adopts this view,\textsuperscript{167} which makes good sense.

\subsection*{B. Product Misuse}

We cannot charge the manufacturer of a knife when it is used as a toothpick and the user complains because the sharp edge cuts.\textsuperscript{168}

\begin{itemize}
\item \textsuperscript{161} As was the case in Matthews v. Lawnlite Co., 88 So. 2d 299 (Fla. 1956). Perhaps the classic criticism of the rule, in terms of rhetoric if not logic, is in Palmer v. Massey-Ferguson, 476 P.2d 713, 719 (Wash. Ct. App. 1970) (“The manufacturer of the obviously dangerous product ought not to escape because the product was obviously a bad one. The law, we think, ought to discourage misdesign rather than encourage it in its obvious form.”).
\item \textsuperscript{162} Micallef v. Miehle Co., 348 N.E.2d 571 (N.Y. 1976).
\item \textsuperscript{163} The point is principally addressed in § 2 comment c:
\begin{quote}
Subsection (b) does not recognize the obviousness of a design-related risk as precluding a finding of defectiveness. The fact that a danger is open and obvious is relevant to the issue of defectiveness, but does not necessarily preclude a plaintiff from establishing that a reasonable alternative design should have been adopted that would have reduced or prevented harm to the plaintiff.
\end{quote}
\item \textsuperscript{164} For a selection of cases on the topic, see Keeton, Owen, Montgomery & Green, supra note 5, at 366-80.
\item \textsuperscript{165} Obviousness probably should be considered a factual issue reasonably subject to dispute. See, e.g., Laaperi v. Sears, Roebuck & Co., 787 F.2d 726, 731 (1st Cir. 1986). \textit{Contra} Smith v. Hub Mfg., 634 F. Supp. 1505, 1508 (N.D.N.Y. 1986) (stating that it is a question of law for the court).
\item \textsuperscript{166} Warnings in this situation generate “warnings pollution.” See \textit{supra} note 110 and accompanying text.
\item \textsuperscript{167} Section 2 cmt. i states: “In general, no duty exists to warn or instruct regarding risks and risk avoidance measures that should be obvious to, or generally known by, foreseeable product users.” \textit{Restatement (Third) of Torts: Products Liability} § 2 cmt. i (Tentative Draft No. 2, Mar. 13, 1995).
\item \textsuperscript{168} General Motors Corp. v. Hopkins, 548 S.W.2d 344, 349 (Tex. 1977).
\end{itemize}
An original premise of strict products liability was that the injury arose out of proper product use. In *Greenman v. Yuba Power Products, Inc.*, 169 the fountainhead of strict liability in tort for defective products, Judge Traynor carefully limited manufacturer responsibility to "intended" use. 170 Section 402A's predecessor and parallel theory of strict products liability based in contract, the implied warranty of merchantability, is quite similarly confined in scope to fitness for "ordinary" use. 171 Liability under section 402A itself is explicitly restricted in the comments to injuries arising out of "normal" use. 172 Finally, the various negligence theories of products liability, as traditionally defined, contain similar built-in limitations on liability for intended, "lawful," and "probable" use. 173

Limiting liability along some such lines appears to make good sense, for serious product abuse may be viewed as "use or handling so unusual that the average consumer could not reasonably expect the product to be designed and manufactured to withstand it—a use which the seller, therefore, need not anticipate and provide for." 174 As products liability law developed, however, it soon became apparent that the traditional doctrine's limitation to intended or ordinary use coped poorly with the realities of the world—where infants will sometimes drink bright cherry-red furniture polish, 175 nightgowns will sometimes brush momentarily against burners of electric stoves, 176 and cars will often crash. 177 Accordingly, the courts quite quickly expanded the scope of responsibility to include injuries from not only

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170. He stated:
Implicit in the machine's presence on the market . . . was a representation that it would safely do the jobs for which it was built . . . . To establish the manufacturer's liability it was sufficient that plaintiff proved that he was injured while using the Shopsmith in a way it was intended to be used as a result of the defect in design and manufacture of which plaintiff was not aware that made the Shopsmith unsafe for its intended use. *Id.* at 901 (emphasis added).
171. U.C.C. § 2-314 (2)(c) (1978); see also *id.* §§ 2-314 cmt. 13, 2-316(3)(b) & cmt. 8 & 2-715(2)(b) cmt. 5. For a good example, see Venezia v. Miller Brewing Co., 626 F.2d 188 (1st Cir. 1980) (throwing beer bottle against telephone pole is not an "ordinary" purpose).
172. The Second Restatement provides: "A product is not in a defective condition when it is safe for normal handling and consumption. If the injury results from abnormal [use], the seller is not liable." *Restatement (Second) of Torts* § 402A cmt. h (1964); see also *id.* § 402A cmt. g (defectiveness not established by harm from "mishandling"); *id.* § 402A cmt. i (no unreasonable danger if harm from "over-consumption"); *id.* § 402A cmt. j (no duty to warn of generally known risks of excessive use; seller may assume warnings will be read and heeded).
173. See *id.* § 388 (negligent warnings—liability for harm from "use of the chattel in the manner for which . . . it is supplied"); *id.* § 395 (negligent manufacture—liability for harm caused by chattel's "lawful use in a manner and for a purpose for which it is supplied"); *id.* § 398 (negligent design—liability for harm from "probable use," special application of § 395). In addition, it should be noted that a number of state legislatures have adopted misuse defenses as a form of products liability reform legislation. See Keeton, Owen, Montgomery & Green, *supra* note 5, at 396.
177. Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968).
intended (and ordinary) uses but also injuries from all uses and misuses that are foreseeable.\textsuperscript{178}

The Third Restatement limits responsibility in the black letter definitions of design and warnings defects to "the foreseeable risks of harm posed by the product." Arguably, at least, risks may generally be foreseeable only if they arise from foreseeable types of product use.\textsuperscript{179} Thus, the black letter definitions of design and warnings defec-
tiveness in section 2 appear to build in a limitation on responsibility to injuries arising out of foreseeable product use. Consistent with the developed doctrine of misuse discussed above, the comments powerfully explain the unfairness of holding manufacturers accountable for unforeseeable product abuse\textsuperscript{180} and now make clear\textsuperscript{181} that a product is not defective, and its seller is shielded altogether from lia-

ability, with respect to injuries caused by the product's unforeseeable misuse, modification, or alteration.\textsuperscript{182} Less clear is the Restatement's position on how the concepts of misuse, (proximate) causation, and damages apportionment fit together, which involves a host of complex problems that are mentioned but not examined in the comments.\textsuperscript{183} Nor do the comments resolve whether the burden of pleading and proof on the foreseeability of use rests upon the plaintiff or the defendant,\textsuperscript{184} an important issue on which jurisdictions differ. The con-

\textsuperscript{178} Many courts have helpfully framed the foreseeability notion here as elsewhere in terms of "reasonableness": "We conclude . . . that 'reasonable foreseeability' is the appropriate test, and thus [the product should not be] unreasonably dangerous when used for a purpose and in a manner that is reasonably foreseeable." \textit{Ellsworth}, 495 A.2d at 355.

\textsuperscript{179} The first sentence to cmt. \textit{l} interprets §§ 2(b)-(c). \textit{See infra} note 180.

\textsuperscript{180} \textit{See Restatement (Third) of Torts: Products Liability} § 2 cmts. \textit{l} (foreseeability of use and risks) \& \textit{o} (misuse, modification, and alteration) (Tentative Draft No. 2, Mar. 13, 1995). Comment \textit{l} provides in part:

\textit{l. Reasonably foreseeable uses and risks in design and warning claims.} Subsections (b) and (c) of § 2 impose liability only when the product is put to uses that it is reasonable to expect a seller or distributor to foresee. Product sellers and distributors are not required to foresee and take precautions against every conceivable mode of use and abuse to which their products might be put.

The requirement of reasonable foreseeability reflects concern for not only whether a reasonable actor would have anticipated particular modes of product use and consumption, but also whether such modes are unusually and unreasonably dangerous. Increasing the costs of designing and marketing products in order to avoid the consequences of unreasonable modes of use is not required. Reasonably careful product users should not be expected, through higher prices, to subsidize careless or reckless users. \textit{Id.} § 2 cmt. \textit{l}.

\textsuperscript{181} Treatment of this issue was muddled in \textit{Restatement (Third) of Torts: Products Liability} § 2 cmts. \textit{i}, \textit{l} (Tentative Draft No. 1, Apr. 12, 1994).


\textsuperscript{183} \textit{See id.} § 2 cmt. \textit{o}, § 10 cmt. \textit{b} (causation); \textit{id.} § 12 cmt. \textit{c} (damages apportionment for plaintiff misconduct); \textit{see also id.} § 10 cmt. \textit{b}, Reporters' note (misuse and causation); § 12 cmt. \textit{c}, Reporters' note (misuse and plaintiff misconduct).

\textsuperscript{184} The commentary on this point is confusing. Section 2 comment \textit{c} provides: "Once the plaintiff establishes that the product was put to a reasonably foreseeable use . . . ." but the final paragraph to cmt. \textit{o} notes the jurisdictional split and concludes as follows: "The allocation of burdens in this regard is not addressed in this Restatement and is left to local law." \textit{Id.} § 2 cmt. \textit{o}.
ventional and better rule at common law places the burden on the plaintiff as a part of the obligation to establish the defectiveness of the product.\textsuperscript{185}

\section*{C. State of the Art}

A consumer would not expect a Model T to have the safety features which are incorporated in automobiles made today.\textsuperscript{186}

Because knowledge in science and engineering is by nature incomplete, some product dangers are not discoverable, and some risk avoidance measures are not achievable, until after a product has been manufactured, sold, and caused an injury. The terms "undiscoverable," "unknowable," and "unavoidable" are often used (frequently interchangeably) by courts and commentators in describing dangers of this type. Another phrase often applied to this issue is "state of the art"—as in the "state of the art defense" or "state of the art evidence." Although the state of the art concept is variously defined in differing contexts by different courts,\textsuperscript{187} the basic idea is that a product risk was unknown, or the means of avoiding it unknown or unavailable, at the time the product was manufactured and sold.

The fundamental problem in this context concerns the inability of the manufacturer to control the risk. As easy as the problem is to state, however, the surrounding issues of legal doctrine and social policy have proved exceedingly complex. The state of the art issue goes to the very heart of the notions of strict liability, negligence, defectiveness, and foreseeable risk. Probably for this reason, the most spectacular battles in all of products liability law have been fought over the "state of the art" issue of who, as between the manufacturer and potential victims, should bear the burden of unforeseeable risks.\textsuperscript{188}

"State of the art" was the issue in the celebrated duo of New Jersey cases mentioned earlier, \textit{Beshada} and \textit{Feldman},\textsuperscript{189} which in combination vividly portrayed the conflicting tensions that lurk within it. Until \textit{Feldman} in 1984 joined issue with the \textit{Beshada} holding, on whether the knowability of a product danger at the time of sale should make a difference in rendering "strict" liability determinations, the cases on "state of the art" went every which way—not only in result, but also on the very meaning of the term, as mentioned earlier. To some, especially manufacturers, the phrase traditionally has meant lit-

\begin{itemize}
\item \textsuperscript{185} See generally \textit{Keeton, Owen, Montgomery & Green}, supra note 5, at 390 n.4.
\item \textsuperscript{186} Bruce v. Martin-Marietta Corp., 544 F.2d 442, 447 (10th Cir. 1976).
\item \textsuperscript{187} The same is true of legislatures, a number of which have enacted some form of state of the art defense. \textit{See infra} note 196.
\item \textsuperscript{188} See generally \textit{Keeton, Owen, Montgomery & Green}, supra note 5, at 409-63 (exploring the problem of unavoidable dangers). The state of the art issue, pitting strict against fault-based liability, is a weighty problem in moral theory. \textit{See Moral Foundations}, supra note 5, at 484 (concluding that "[u]tility theory, as truth and equality, thus suggests that manufacturers are not morally accountable for generic dangers that cannot reasonably be discovered").
\item \textsuperscript{189} See supra notes 93-97 and accompanying text.
\end{itemize}
tle more than the knowledge and techniques prevailing in (and hence the custom of) the industry at the time of manufacture; to others, especially plaintiffs, it has meant the ultimate in science or technology existing at the time anywhere in the world. 190 Most courts and legislatures, however, have sought to moderate the concept by defining it somewhere in between in terms such as "the best technology reasonably available at the time." 191 Tentative Draft No. 1 defined "state of the art" as "the safest technology developed and in commercial use at a given time," 192 a somewhat more specific definition that also properly stakes out a middle-ground position close to where the law is beginning rationally to settle. But the Reporters changed their minds. Bowing to the impracticality of formulating for all purposes a nebulous concept subject to such disparate definitions, they abandoned altogether in Tentative Draft No. 2 their earlier effort to institutionalize a single general definition. 193

The most salient issue under the state of the art umbrella concerns responsibility for risks that are unforeseeable at the time of sale. Here, as discussed earlier in connection with foreseeability of risk, 194 most cases and the Third Restatement come down quite squarely favoring a negligence-type, foreseeability-limiting approach to the problem. That is, a manufacturer is held responsible only for risks that are foreseeable and is obligated to apply only such risk reduction techniques as are reasonably knowable and otherwise commercially feasible at the time of sale. 195 Despite the highly controversial nature of this issue in recent years, the Third Restatement decisively limits...
the responsibility of manufacturers in this important respect. In so doing, the Third Restatement boldly stakes out a sound position on state of the art that is consistent with both developing law\(^{196}\) and moral theory\(^{197}\) and which should help to put to rest the central theoretical debate in modern products liability law.

VII. Conclusion

Even as the ALI presses were still churning out the new section 402A of the Second Restatement of Torts three decades back, both courts and commentators were drawn like moths inexorably to the central mysteries of product defectiveness, to the burning flame of the new doctrine proclaimed as "strict." Three decades since those heady days have now rolled by, and the ALI's products liability presses have cranked up once again. If there were a growth industry in Restatement doctrine, section 402A of the Second Torts Restatement should be there at the top, for "strict" products liability in tort has leapfrogged in thirty years from a single section\(^{198}\) to its own Restatement.

With the approval of sections 1-3 of Tentative Draft No. 2 by the ALI,\(^{199}\) the definitions of product defect which comprise the centerpiece of the new Products Liability Restatement are now in place. The topic which over the years has involved the greatest confusion and tumult in all of products liability law, and hence which is in greatest need of "restatement," is the meaning of defectiveness and how it

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For the liability system to be fair and efficient, most courts agree that the balancing of risks and benefits in judging product design and marketing must be done in light of the knowledge of risks and risk-avoidance techniques reasonably attainable at the time of distribution. To hold a manufacturer liable for a risk that was not foreseeable when the product was marketed might foster increased manufacturer investment in safety. But such investment by definition would be a matter of guesswork. To insure against future claims, the manufacturer would be required to estimate the risks upon which claims would be based. A commercial insurer would be in no better position to make such an estimate. Thus, with respect to unforeseeable or incalculable risks, manufacturers would find it inherently impossible adequately to protect themselves with insurance. Furthermore, manufacturers may persuasively ask to be judged by a normative behavior standard to which it is reasonably possible for manufacturers to conform. For these reasons, §§ 2(b) and (c) speak of products being defective only when risks were reasonably foreseeable.

Restatement (Third) of Torts: Products Liability § 2 cmt. a (Tentative Draft No. 2, Mar. 13, 1995); see also id. § 1 cmt. a (stating that "a defendant is held to the standard of knowledge available to the relevant manufacturing community at the time the product was manufactured"). These principles apply with special force in connection with toxic chemicals and prescription drugs. See id. §§ 2 cmt. 1, 8 cmt. g.

196. Both judicial and legislative, because state of the art defenses have been a popular reform measure in state legislatures. See Keeton, Owen, Montgomery & Green, supra note 5, at 462. The Third Restatement properly takes the view that the plaintiff should have the burden of proof on state of the art. "[P]laintiff should bear the burden of establishing that the risk in question was known or should have been known to the relevant manufacturing community." Restatement (Third) of Torts: Products Liability § 2 cmt. i (Tentative Draft No. 2, Mar. 13, 1995). The Third Restatement thus rejects the shift in the burden of proof on this issue adopted by the New Jersey court in Feldman v. Lederle Labs., 479 A.2d 374 (N.J. 1984).

197. See supra note 188.

198. Even designated (perhaps distinguished) as an afterthought by the letter "A."

199. "Tentative" in theory, but largely cast in stone.
relates to the law of negligence. At the very bottom of this most funda-
mental of all products liability issues is whether liability is truly
"strict" or whether it is really based on fault—whether it is pig or
mule.

The Third Restatement’s formulation of the standard of liability
for manufacturing defects is only of passing interest, for it employs a
conventional definition—departure from intended design. Liability in
such cases thus is truly strict, in both fact and name. Few peeps of
discontent will be heard from either courts or commentators in this
noncontroversial formulation of existing law consistent with good
policy.

Far more interesting are the new “functional” definitions of lia-


ability for design and warnings cases. The Third Restatement here too
defines liability in terms of product defect, and it acquiesces in denot-
ing such liability “strict.” Yet here there is a problem, for the rigidity
of the “strictness” concept is inconsistent with the considerations of
balance that lie at the heart of design and warning cases. This prob-


lem finds its source in the very origins of strict products liability in
tort, a doctrine that was cursed from its beginning by an inherent
schizophrenia arising out of its hybrid birth from separate tort and
contract law parents. As courts and commentators have come to
recognize the inherent unworkability, illogic, and even incomprehen-
sibility of such a doctrine in design and warnings cases, the very idea
that liability in these central contexts is “strict” has been viewed in-
creasingly as a myth.

The Third Restatement could have exploded this myth of strict
liability in design and warnings cases, fully and explicitly, and it should
have done so. Such decisive action would have enhanced the author-


ity of the ALI and restored credibility to liability doctrines called
“strict” in various other tort law contexts. Instead, the Institute chose
to follow a hybrid (one might say bastardized) path that for at least
another generation institutionalizes liability rules that straddle the law
of torts and contracts and which do violence to conventional catego-


ries of tort law doctrine. Following the tortured path of many courts
in design and warnings cases, the Third Restatement pretends in black
letter that liability is strict but explains by comment that it is really
not. Strict liability, the ALI proclaims, now means negligence.

So defining strict liability in terms of negligence has two major
implications: one good, one bad. The first implication, the good one,
is that it effectively explodes the doctrine of strict products liability in
tort at its very core, in design and warnings defect cases. While the


200. This is the Reporters’ characterization: “§§ 1 and 2 define the liability for each form of
defect in functional terms.” RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 1 cmt. a
(Tentative Draft No. 2, Mar. 13, 1995).

201. See Prosser, supra note 3, at 1126 (describing the birth of strict products liability in
warranty as “a freak hybrid born of the illicit intercourse of tort and contract”).
resulting demise of most "strict" products liability doctrine is somewhat muted, lying in the comments to the Third Restatement, its final death knell is sounded there quite clearly, albeit indirectly. The issuance of a formal death certificate for strict products liability has been long in coming, and the muffled nature of the explosion will likely restrain the jubilance or despair of those who care about such things. But the core of strict products liability has exploded nonetheless.

The second implication of calling negligence liability "strict" has a troubling side that tarnishes the result, for it locates at the core of the Products Liability Restatement a fundamental disingenuity. An important goal for any Restatement should be "to improve the law, [to] seek wisdom and excellence in [the] choice of legal rules."202 Defining strict liability as negligence—pigs as mules—hardly has the feel of "wisdom and excellence." Because many courts struggling to make sense of section 402A themselves have come to view the basis of liability in such cases as little more than negligence, one might argue that the law may "properly" be restated in this manner.203 But the jurisprudence of products liability developed this central contradiction largely because Dean Prosser overreached in formulating section 402A too broadly, defining the doctrine far beyond its proper borders. The Third Restatement provided the ALI with an opportunity to correct this fundamental error of the Second Restatement and to proclaim the law forthrightly—by declaring that the concept of "strict liability" applies properly only to manufacturing flaw cases, and that negligence principles and negligence doctrine govern liability in design and warnings cases. But it chose to tread a middle and muddled path, the one the Institute had unwittingly thrust upon the courts in section 402A now one-third of a century ago. As the twenty-first century approaches, the ALI in bootstrap fashion has now perpetuated, at least to some extent, the myth that products liability is strict. That pigs are mules is now officially the law.

How the courts will receive the Third Restatement is difficult to divine. For a variety of reasons, it takes little prescience or even ingenuity to predict that the Third Restatement will be unable to muster the kind of quasi-religious fervor that spawned the widespread and uncritical adoption of section 402A of the Second Restatement thirty years ago. The times and law both have changed in such fundamental

202. Shapo, supra note 11, at 634.
203. Tension between the "is" and the "ought" may be traced to the beginnings of the ALI's restatement enterprise. See Hon. Shirley S. Abrahamson, Refreshing Institutional Memories: Wisconsin and the American Law Institute, 1995 Wis. L. Rev. 1, 17 n.60 (citing N.E.H. Hull, Restatement and Reform: A New Perspective on the Origins of the American Law Institute, 8 LAW & HIST. REV. 55, 60-65 (1990)). Judge Abrahamson notes that the is/ought conflict is presently manifest in the revision of § 402A of the new Products Liability Restatement. Id. at 22.
ways\textsuperscript{204} that such a resounding judicial reception today seems entirely outside the realm of reasonable foreseeability.\textsuperscript{205}

Some courts may be expected to adopt the new liability definitions unskeptically and verbatim, while others no doubt will choose to define their own liability tests in ways they deem superior. Most courts, of course, will need to decode section 2 in various respects. Why the "defect" lily should be gilded linguistically with some other standard based on "reason," or vice versa, is a perplexing problem that the ALI inflicted years ago upon the legal community in section 402A's double-headed standard of "defective condition unreasonably dangerous." Perhaps concluding that lawyers and judges have suffered insufficiently, the ALI has done it once again—for now a product must be "not reasonably safe" in order to be (perhaps in addition to) "defective" in design or warnings. As a way around this problem, courts may well choose to strip the definitions of all Hydra heads save one. Probably many courts will decide to redefine the standards in section 2, perhaps along lines suggested above, while others likely will choose to return to accepted negligence doctrine in design and warnings cases.\textsuperscript{206}

If the purpose of the Third Restatement was to provide guidance to courts and lawyers by clarifying\textsuperscript{207} the confusing doctrine of product defect, the project may be viewed as having failed—only partially to be sure, but in a fundamental way. In view of the highly politicized\textsuperscript{208} and controversial nature of the enterprise,\textsuperscript{209} the likelihood of complete success of such an important and complex project may have been doomed from the start; perhaps achievement of such an ambitious goal was simply a political impossibility in an increasingly disparate and divisive world.\textsuperscript{210} The Reporters certainly cannot be faulted for lack of originality, for their "functional" manner of

\begin{itemize}
\item \textsuperscript{204} And there is no dark and menacing citadel to storm, towering in the mists, nor is Dean Prosser now available for muster to carry into battle a flag of destiny and virtue.
\item \textsuperscript{205} To coin a phrase.
\item \textsuperscript{206} As for the bulk of secondary defectiveness doctrine, the Third Restatement's Comments and Reporters' Notes contain a wealth of information to assist courts and lawyers seeking guidance on such issues.
\item \textsuperscript{207} See Herbert Wechsler, Restatements and Legal Change: Problems of Policy in the Restatement Work of the American Law Institute, 13 St. Louis L.J. 185, 192 (1968) (noting clarification as one achievement of restatements).
\item \textsuperscript{208} Compare Shapo, supra note 11, at 698 (noting that "politicization of the common law of torts is risky business, whether done by Congress or the American Law Institute") with Hans A. Linde, Courts and Torts: "Public Policy" Without Public Politics, 28 Val. U. L. Rev. 821, 840, 844 (1994) ("[T]he A.L.I. should not avoid controversial topics of legal policy, even if it could...[and] policymaking must be prepared to face politics.").
\item \textsuperscript{209} See, e.g., Attorneys Spar over Restatement (Third) of Torts; ATLA to Mobilize Opposition to ALI Project, 22 Prod. Safety & Liab. Rep. (BNA) 436 (Apr. 22, 1994); see also supra note 18 and accompanying text. But see Shapo, supra note 11, at 652 (theorizing that the controversial nature of products liability law was itself a principal "motivating force" in the ALI's decision to restate this part of tort law first).
\item \textsuperscript{210} It may even be that the very idea of attempting to "restate" the law of torts in any way was misguided from the start. See Green, supra note 119, at 584.
\end{itemize}
redefining product defect was a creative effort to quell the warring factions in the ongoing debate over the proper formulation of this area of the law. Yet, rather than clarifying the central defect notions, the new Products Liability Restatement defines them in a manner that is inscrutable, assuring years and maybe decades of continuing uncertainty and debate. The myth of strict products liability has been exploded, but its ghost lives on to haunt the halls of justice and academia for years to come.