

THE ROLE OF TORT THEORY IN THE THIRD RESTATEMENT OF TORTS: AN EXPLANATION AND DEFENSE

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ABSTRACT

In a recent article, Professors and Restatement Reporters Nora Freeman Engstrom and Michael D. Green strongly deny that tort theory is useful in the crafting of Restatements. They also deny that tort theory has had much useful to offer to judges who formulate and revise tort doctrine. Although some of their criticisms have merit with respect to some types of tort theory, their central argument is unpersuasive. One pervasive kind of tort theory is indeed extremely valuable—namely, a theory that identifies the normative principles that justify tort doctrine. To be plausible, that normative theory must be pluralistic and must encompass a range of distinct rights, principles, and values. But it should also acknowledge the law’s institutional and pragmatic constraints. And, if it is to be useful in a Restatement, the theory needs to be relatively noncontroversial and largely consistent with past legal practice. However, these qualifications do not undermine the point that tort doctrine is supported by a coherent and plausible set of normative principles.

OUTLINE

- Part I. Introduction: The anti-theory argument offered by Nora Engstrom and Michael Green
- Part II. Partial agreement with the authors’ argument
 - A. Common law judges are justifiably cautious
 - B. Some tort doctrines are vacuous or unprincipled

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- C. Some legal theories are too abstract to provide doctrinal guidance
- Part III. How theory is relevant to judicial opinions
 - A. Principles often play an explicit role
 - B. Reliance on multiple principles is justifiable
 - C. Principles often play a historical or background role
- Part IV. How theory is relevant to Restatements
 - A. Restatements frequently invoke normative principles
 - B. Judges often rely on black letter provisions without discussing justifying principles
 - C. Restatements have a distinctive role and influence
- Part V. Conclusion

I. INTRODUCTION: THE ANTI-THEORY ARGUMENT OFFERED BY
ENGSTROM AND GREEN

In a recent article, Nora Engstrom and Mike Green relentlessly attack tort theory, concluding that it is almost entirely useless to courts and to Reporters who draft Restatements.¹ Consider the following excerpts: “[T]ort law—as it exists and has existed—is not scripted or planned. There is no coherent theory at tort law’s core Tort law is haphazard and eclectic.”² “There is no God or Master Imminence who *designed* tort law, and there is no meta-theory that explains it.”³ Indeed, the authors mock tort law itself, claiming that tort law is “far too messy to be the product of intelligent design.”⁴ They also characterize tort theorists as believing that there is “one glorious foundational principle that knits all of tort law together.”⁵

As a scholar who greatly values tort theory, and as a Reporter for the *Restatement Third, Torts: Intentional Torts to Persons*, I beg to differ.

First, there is no reason why those of us who find tort theory useful must insist that only *one* principle underlies all of tort law. Perhaps *multiple* rights, principles, and values are needed to justify tort law, a point that I will return to below.

1. See generally Nora Freeman Engstrom & Michael D. Green, *Tort Theory and Restatements: Of Immanence and Lizard Lips*, 14 J. TORT L. 333 (2021).

2. *Id.* at 336.

3. *Id.* at 343.

4. *Id.* at 333.

5. *Id.* at 336.

Second, is it really true that one can only endorse underlying principles if those principles are “glorious”? Or is there some *other* role that principles can play in justifying doctrine?

Consider some antonyms of the adjective “glorious.” One set of antonyms is “mediocre” or “unimpressive.”⁶ That is not very promising. But a second set is “modest” or “humble.”⁷

Let me humbly suggest that judges should employ, and actually do employ, a more modest account of how theory justifies judicial decisions than the account proposed by the authors. And similarly, Reporters should and actually do employ a modest account of how theory helps us to draft Restatements.

But before I turn to those accounts, an important definitional question must be addressed. What is tort “theory”? This could mean many things.⁸ A legal theory might be a description of doctrine or practice. It could be an interpretation. Or it could be a purported justification. The authors focus on the last idea, tort theory as justification, and so will I.

Accordingly, this paper will characterize legal theory as those normative principles that might justify the results in legal cases and, at a slightly higher level of abstraction, might justify the content and scope of legal doctrines. Theory in this sense very often does matter to tort law, as I hope to show.

II. PARTIAL AGREEMENT WITH THE AUTHORS’ ARGUMENT

I begin with some important points on which I agree with the authors.

A. *Common Law Judges Are Justifiably Cautious*

When judges write tort decisions, they usually do not see their task as creating the most normatively attractive doctrine. They are not painting on a blank canvas. Most of the time, they proceed incrementally: they apply current doctrine, or they modestly expand or contract it. Tort law is common law, and courts are justifiably hesitant to reject existing rules or to radically remake those rules.

But this hesitancy is not unprincipled. Rather, it reflects a meta principle, a secondary legal rule. Because judges are empowered to create,

6. MERIAM-WEBSTER DICTIONARY, <https://www.merriam-webster.com/thesaurus/glorious> [<https://perma.cc/5VPW-LQMU>].

7. *Id.*

8. An excellent recent account is Tarunabh Khaitan & Sandy Steel, *Theorizing Areas of Law: A Taxonomy of Special Jurisprudence*, 28 LEGAL THEORY 325 (2022) (analyzing normative and nonnormative accounts of areas of law and distinguishing subcategories within each).

expand, or restrict common law doctrine, they are usually cautious about using that power too aggressively. That caution is justifiable; courts are cognizant of their institutional role relative to the legislative branch and of the need to exercise their power in a way that is, and is seen to be, legitimate.

Moreover, the doctrinal rules that judges create or recognize are legal rules, not moral rules. That is, judges do not see their role as first identifying the rules and norms that should govern people in their interpersonal relations, and then simply incorporating those rules within legal doctrine. As the authors properly emphasize, legal rules must satisfy requirements of publicity, clarity, consistency in application, and legitimacy, and must respect the appropriate scope and limits of the state's coercive authority. These desiderata do not apply, or do not apply in the same way, to nonlegal moral standards. For example, as a matter of ordinary morality, perhaps I owe a duty to rescue a stranger from serious harm when I can do so without suffering a significant hardship, but the common law does not recognize such a legal duty. And ordinary morality might demand that I apologize for, and take modest steps to compensate for, the harm that I faultlessly cause to another, but the law has good reason not to require full tort compensation whenever I harm another.

The result, as the authors note, is that history plays a powerful role in shaping current common law doctrines. The content of those doctrines is strongly path dependent. Some features of doctrine are therefore arbitrary and difficult to justify.

Consider an interesting and little-noted example from the field of intentional torts.⁹ For some intentional torts, the victim must prove that they were contemporaneously aware of the defendant's tortious act, but for other intentional torts, this is not required.

Thus, for assault liability, courts require the victim to be contemporaneously aware of a threatened touching. If X throws a stone at B that misses B, and B is too distracted to notice the throw until after the stone sails past B's head, X is not liable for assault.¹⁰

9. See generally Kenneth W. Simons, *Is Tort Law Hopelessly Fragmented?*, JOTWELL (July 27, 2020), <https://torts.jotwell.com/is-tort-law-hopelessly-fragmented/> [<https://perma.cc/MZ8H-HM73>] (reviewing Kenneth S. Abraham & G. Edward White, *Conceptualizing Tort Law: The Continuous (and Continuing) Struggle*, 80 MD. L. REV. 293 (2021)).

10. For a similar example, see RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 5 illus. 2 (AM. L. INST., Tentative Draft No. 1, 2015) [hereinafter TD 1] (providing the example where "A, standing behind B, wants to frighten B. A throws a knife to the left of B's head, and the knife sails past B. B has a serious impairment of peripheral vision and does not see the knife. A is not liable to B for assault").

Similarly, for false imprisonment liability, courts usually require the victim to be contemporaneously aware of the confinement. Suppose manager Y calls employee C into her office for a lengthy discussion of C's possible responsibility for a theft. C is unaware that Y has locked the door. After the discussion, Y unlocks and opens the door. Y is not liable for false imprisonment.¹¹

However, for offensive battery liability, courts do not require contemporaneous awareness of the offensive contact. Consider this example from the *Restatement Third, Torts: Intentional Torts to Persons*: "While Pam is riding the subway, fast asleep, a man fondles her breast. When Pam awakens, a friend tells her about the incident. The man, a stranger to Pam, is subject to liability for an offensive battery."¹²

If courts were writing on a clean slate, it is most doubtful that they would endorse this hodgepodge of results for different intentional torts.

At the same time, courts and Restatement drafters are also quite capable of revising doctrine to achieve greater consistency with more fundamental normative and legal principles. In the Intentional Torts project, for example, earlier drafts identified a species of intentional conduct causing physical harm that is not covered by the traditional intentional torts—namely, cases in which the actor had the purpose to inflict bodily harm on someone but did not inflict that harm by way of physical contact. For example, imagine that a prison guard deliberately turns down the heat in an inmate's cell to cause physical illness to the inmate. The guard has not committed a battery because he did not cause physical contact with the inmate, even indirectly. Traditional tort doctrine would treat this case as an instance of negligence, not as an intentional tort. But the culpability of such an actor is at least as great as the culpability of most actors who commit battery, assault, or false imprisonment. It is thus appropriate to impose liability on the actor for an intentional tort. Accordingly, section 4 of the Intentional Torts to Persons project recognizes tort liability for the tort of "purposeful infliction of bodily harm."¹³

11. See RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 7 illus. 12 (AM. L. INST., Tentative Draft No. 3, 2018). Contemporaneous awareness is usually required for false imprisonment, but it might not be required if the plaintiff, although unaware of the confinement, suffers bodily harm because of it. See *id.* § 7(c).

12. TD 1, *supra* note 10, § 1 illus. 6 (originally numbered § 101).

13. *Id.* § 6 (originally numbered § 106).

B. *Some Tort Doctrines Are Vacuous or Unprincipled*

The authors identify several examples of tort doctrines that “catch on” for arbitrary or unpersuasive reasons. One example is the substantial factor test of causation, which employs a vague and indeterminate criterion in place of more specific factual cause criteria—such as the but-for test and the rule treating multiple sufficient concurrent tortious causes as factual causes.¹⁴ Another example is the use of catchy phrases, such as “danger invites rescue,” as a substitute for careful analysis.¹⁵

I agree that many judicial decisions, and even some Restatement provisions, exhibit a distressing tendency to use vague or indeterminate terms. For example, reasonableness criteria are very frequently employed when it would be feasible to articulate more precise standards.¹⁶ Vague or ambiguous concepts often obscure difficult questions of policy and principle by invoking a phrase or criterion that has a reassuring tone but ultimately evades the challenging questions.

But the existence of such examples is not seriously problematic. Among the most helpful functions of a Restatement are to clarify legal concepts and to develop more precise and determinate legal criteria.

Consider an issue that arose in the drafting of the *Intentional Torts Restatement*. Courts have struggled to explain the different types of consent that preclude liability for an intentional tort. They often invoke the concept of “implied” consent to characterize any instance of consent other than “express” consent, with the latter embracing only the very limited category of cases in which plaintiff’s explicit language demonstrates actual willingness to permit the defendant’s otherwise tortious conduct.¹⁷ But this extremely broad understanding of “implied” consent conflates a number of quite distinct categories: actual consent that is inferred from the plaintiff’s conduct; apparent consent, under which defendant reasonably (but perhaps mistakenly) believes that plaintiff has actually consented; the emergency doctrine, under which defendant is justified in giving emergency treatment to the plaintiff despite the absence of actual consent (so long as defendant

14. See Engstrom & Green, *supra* note 1, at 363. The term is persuasively rejected in RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 26 (AM. L. INST. 2010).

15. Engstrom & Green, *supra* note 1, at 359-60.

16. See Kenneth W. Simons, *The Hegemony of the Reasonable Person in Anglo-American Tort Law*, in 1 OXFORD STUDIES IN PRIVATE LAW THEORY 45–79 (Paul B. Miller & John Oberdiek eds., 2d ed. 2021); see also Kenneth W. Simons, *Justifying and Categorizing Tort Doctrines: What is the Optimal Level of Generality?*, 14 J. OF TORT L. 551, 555–56 (2022).

17. RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS § 13(a) cmt. c (AM. L. INST., Tentative Draft No. 4, 2019).

has no reason to know that plaintiff does not actually consent); presumed consent, which is a generalization of the principles underlying the emergency doctrine; and implied-in-law consent, under which courts deem that a plaintiff has consented for public policy reasons not based on consent at all.¹⁸

C. *Some Legal Theories Are Too Abstract to Provide Doctrinal Guidance*

The authors raise the valid point that many tort theorists have had disappointingly little to say about doctrinal issues. This is true of some of the most important corrective justice theorists of the last fifty years, including Jules Coleman and Ernest Weinrib. Their theories are not pointless or useless, but what they explain or justify is the overall structure of tort liability relative to other bodies of law. They do not purport to specify the content of specific tort rules.

On the other hand, many other tort theorists articulate general principles but also spell out their doctrinal implications. For example, Gregory Keating and Benjamin Zipursky critique the cost-benefit interpretation of the Learned Hand test of negligence,¹⁹ and John Goldberg and Zipursky draw several doctrinal conclusions from their civil recourse theory of tort.²⁰ Law and economics scholars have developed efficiency or wealth-maximization models that entail modification of specific doctrines. For example, some scholars broadly favor strict liability over negligence²¹ or endorse punitive damages whenever the defendant's negligent conduct is difficult to detect.²² Some of these theorists, especially advocates of law and economics, would drastically change existing tort rules, but the point remains that their theories have substantial, real-world implications.

18. *Id.* §§ 12-17; *see also* RESTATEMENT (THIRD) OF TORTS: INTENTIONAL TORTS TO PERSONS (AM. L. INST., Tentative Draft No. 6, 2021).

19. *See* GREGORY KEATING, REASONABLENESS AND RISK: RIGHT AND RESPONSIBILITY IN THE LAW OF TORTS 123-84 (2022); Benjamin Zipursky, *Sleight of Hand*, 48 WM. & MARY L. REV. 1999 (2007). I have offered my own criticisms of the economic interpretation of the Hand test. *See generally* Simons, *Tort Negligence, Cost-Benefit Analysis, and Tradeoffs: A Closer Look at the Controversy*, 41 LOY. L. REV. 1171 (2008).

20. *See* JOHN GOLDBERG & BENJAMIN ZIPURSKY, RECOGNIZING WRONGS 263-340 (2020) (discussing wrongs and recourse). Similarly, Arthur Ripstein has endorsed a general Kantian theory, but he also discusses concrete implications of his general approach for such torts as battery, conversion, defamation, false imprisonment, negligence, nuisance, strict liability for animals and ultrahazardous activities, and trespass. *See generally* ARTHUR RIPSTEIN, PRIVATE WRONGS (2016).

21. *See* Steven Shavell, *The Mistaken Restriction of Strict Liability to Uncommon Activities*, 10 J. LEGAL ANALYSIS 1, 2-4 (2018).

22. *See* A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 886 (1998).

III. HOW THEORY IS RELEVANT TO JUDICIAL OPINIONS

I now turn to several problems with the authors' argument that tort theory is largely useless to judges. The subsequent section challenges their argument that tort theory is of little value to Restatement drafters.

A. *Principles Often Play an Explicit Role*

Principles often play an explicit role in justifying both common law judicial decisions and the black letter rules in Restatements. In tort law, examples are plentiful, especially when courts self-consciously modify past doctrine. Thus, comparative fault rules have been widely adopted to replace the traditional all-or-nothing contributory negligence rules. Although many states adopted this change through legislation, many effectuated the change through judicial decisions. And those decisions often emphasized fairness. They viewed the traditional rules as unduly harsh because they completely ignored the defendant's fault and thus failed to give proportionate weight to the fault of both plaintiff and defendant.²³

Products liability is another obvious example of dramatic yet principled doctrinal change. Moreover, in this instance, a critical factor explaining the speed and breadth of the change was a newly popular type of justification: the policy of loss-spreading. To be sure, the meaning and deeper justification for this policy is ambiguous:

[I]t can be justified by the foundational principle of distributive justice but also by the foundational principle of promoting aggregate welfare. Loss-spreading satisfies distributive justice if this is understood as requiring all who benefit from an activity to pay for its costs, including the accidents that the activity predictably causes. And it arguably satisfies a welfarist utilitarian principle because, if a concentrated loss to the victim is not compensated, the victim suffers a loss of welfare that exceeds the aggregate cost to the beneficiaries of the activity, each of whom suffers an insignificant loss of welfare.²⁴

23. See *Li v. Yellow Cab Co.*, 532 P. 2d 1226, 1229 (Cal. 1975) (concluding that “[t]he doctrine of comparative negligence is preferable to the ‘all-or-nothing’ doctrine of contributory negligence from the point of view of logic, practical experience, and fundamental justice”); *id.* at 1231 (“The basic objection to the [contributory negligence] doctrine—grounded in the primal concept that in a system in which liability is based on fault, the extent of fault should govern the extent of liability—remains irresistible to reason and all intelligent notions of fairness.”). Compare the authors’ surprising characterization of the shift from contributory to comparative negligence as unprincipled or mysterious: “[W]e cannot understand how some immanent tort glue can explain the change from a rule that barred a negligent plaintiff from recovery to one that apportioned liability among all who acted negligently.” Engstrom & Green, *supra* note 1, at 364.

24. Simons, *Justifying and Categorizing Tort Doctrines*, *supra* note 16, at 557.

But on either view, loss-spreading is a distinctive rationale for the strict liability aspects of products liability doctrine, especially liability for manufacturing flaws, food impurities, and vicarious liability of commercial sellers and distributors for defects existing when that distributor was in possession of the product.

In their article, Engstrom and Green do admit that courts rely on a range of factors to explain their decisions, but they characterize the factors as a messy mishmash, too indeterminate and unpredictable to guide the direction of the law. Despite their pervasive skepticism, however, they acknowledge that one of tort's "main ingredients" is "the promotion of sound public policy."²⁵ They define "sound public policy" as "a policy position a judge or lawyer would consider appropriate . . . to justify a particular legal ruling."²⁶

The authors then concede that "[t]he line between 'policy' and 'theory,' may sometimes blur, particularly when one discusses the straddler concepts of fairness, loss spreading, and optimal deterrence as these ideas feature prominently in public policy arguments and *also* prevailing tort theories"²⁷

This is quite a concession. It seems we are now jousting over terminology, not substance. In their view, if a theory is specific enough to justify a particular legal ruling, it is not really a theory, it is a sound public policy. And such policies are a perfectly good type of justification. As the song goes: "You like potato, I like potahto."²⁸ They like "sound public policy," I like "justifying principle."

In the end, Professors Engstrom and Green are more normative than they claim to be. They do want to bring some intelligent design to tort doctrine. They are tort theorists (in the relevant sense) after all!

Why, then, do the authors resist characterizing public policy and other normative factors as instances of "tort theory"? One reason might be their assumption that a justifying theory must be *monistic*—or in their words, "one glorious foundational principle."²⁹

So let us turn to, and question, that assumption.

25. Engstrom & Green, *supra* note 1, at 344.

26. *Id.* at 341–42.

27. *Id.* at 336 (emphasis in original).

28. From the song "Let's Call the Whole Thing Off," written by George and Ira Gershwin.

29. Engstrom & Green, *supra* note 1, at 366.

B. Reliance on Multiple Principles Is Justifiable

Theories or principles that justify specific doctrines can be pluralistic.³⁰ This does make the analysis more complex. But “mixed” theories of tort law are very plausible. Compare the most famous “mixed” theory of principles justifying an area of law—H.L.A. Hart’s view that the justifying aim of criminal law is the utilitarian goal of reducing crime, but that that goal is limited by a retributive principle of just deserts.³¹ And similarly, torts scholar Gary Schwartz invoked Hart and proposed a mixed theory of tort law that values both deterrence and corrective justice.³²

In my view, a mixed theory of tort law is highly attractive. For example, the Learned Hand test of negligence is best approached this way.³³ On any plausible moral or legal theory, reasonable care often requires tradeoffs, a feature that consequentialist and economic theories focus upon. But the law also should place limits on a simple cost/benefit analysis of tradeoffs—for example, it should exclude certain preferences as illegitimate,³⁴ and it should more readily conclude that the actor was negligent if the potential victims of the actor’s risky conduct did not benefit from the activity in question.³⁵

C. Principles Often Play a Historical or Background Role

One explanation for the authors’ skepticism about the value of tort theory is their subjective day-to-day experience as Reporters. As a fellow Reporter, I share their feeling that we often seem to be merely tinkering at the margins of existing doctrine, rather than making “glorious” and earth-shattering pronouncements. And judges deciding tort cases probably feel the same way most of the time.

30. For the application of this idea to intentional torts, see Kenneth W. Simons & W. Jonathan Cardi, *Restating the Intentional Torts to Persons: Seeing the Forest and the Trees*, 10 J. TORT LAW 343, 344 (2017) (“[T]he intentional torts express a pluralistic set of values and principles. No single principle (such as welfare, autonomy, or freedom) fully explains all of these torts.”)

31. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 1–12 (2d ed. 2008).

32. Gary Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1813–28 (1997).

33. See generally Simons, *Tort Negligence*, *supra* note 19.

34. See RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM § 3 cmt. h (AM. L. INST. 2005) (“[C]ertain motorists . . . may find it exciting to race a railroad train toward a highway crossing. Yet because society may not recognize that excitement as appropriate, it may be ignored by the jury in considering whether the motorist should have driven more conservatively.”).

35. See Simons, *Tort Negligence*, *supra* note 19, at 1202–21.

But it does not follow that the existing doctrine that we are tinkering with is itself unprincipled, for a straightforward reason. On many issues, the largest and most controversial questions have already been settled. For example, the following propositions are now undisputed:

1. People have a legally protected interest in avoiding emotional distress.
2. A patient has an autonomy right to decide on medical treatment even if medical practitioners consider the decision unwise.
3. Tort law does not impose an affirmative duty to rescue a stranger.

The settled status of many important tort issues is one reason why it might seem that Restatements are not at all influenced by fundamental principles or theories. However, if courts are self-consciously changing or reforming the law in a significant way, they *will* provide justifying reasons for the change—as they should.

IV. HOW THEORY IS RELEVANT TO RESTATEMENTS

We have been analyzing the ways in which theory, in the sense of normative principles, is relevant to judicial decisions and legal doctrines. But it is a separate question whether Restatements depend on theory in this sense. The answer is a qualified “yes.” Restatements do depend on principles, but in a somewhat different way.

A. Restatements Frequently Invoke Normative Principles

There is a mountain of evidence that Restatements regularly invoke normative principles. This is especially true of the more recent Restatements, such as the various projects of the *Third Restatement of Torts*. If one compares the official comments to the black letter sections of the *First*, *Second*, and *Third Restatements of Torts*, it is evident that principled justifications for the black letter rules are somewhat more common in the Second Restatement than in the First, and *much* more common in the Third Restatement than in the Second. The comments of the *First Restatement of Torts* very rarely discuss arguments of policy and principle. Indeed, this reticence appears to have been a deliberate choice by the Reporters and ALI members at that time.³⁶ But by the time of the Restatement Third projects, the comments frequently rely on fairness, incentives, culpability, autonomy, loss-spreading, and other normative

36. See Patrick Kelley, *The First Restatement of Torts: Reform by Descriptive Theory*, 32 S. ILL. U. L.J. 93, 131–33 (2007) (noting that the Reporters and members of the American Law Institute made a conscious decision in the first Restatement of Torts *not* to include commentaries or explanatory notes that provided reasons or legal theories justifying the black letter provisions).

justifications. Indeed, it is now quite routine for Reporters to include, for most black letter sections, an official comment that explicitly sets forth the “rationale” or “rationales” for the black letter rule.

B. Judges Often Rely on Black Letter Provisions Without Discussing Justifying Principles

One important difference between how justifications are treated in Restatements and in judicial opinions is the special deference that judges often afford to the work of the American Law Institute. Judges frequently start with a presumption that the Reporters and other ALI members, through the very lengthy process of creating and revising Restatement drafts, have carefully and thoroughly explored the relevant alternatives and the arguments supporting or undermining them.

Thus, it is very common that judges cite a Restatement’s black letter provision but do not cite the specific justifying rationales contained in the comments to that provision. In discussing the relevant legal rule, the judge might not fully explore its potential justifications or indeed might not discuss them at all.

But this practice certainly does not prove that the judge doesn’t care about whether the relevant legal rule has a principled justification. It merely underscores some obvious realities. Judges who decide civil cases have substantial dockets and must resolve a wide range of legal issues, yet as generalists, they cannot easily familiarize themselves with all the relevant principles and policies that might justify specific doctrines. It is understandable, then, that judges rely on the expertise of the ALI. And that trust, in my experience, is warranted, because of the professionalism and enormous care with which Reporters and ALI members undertake their responsibilities.

C. Restatements Have a Distinctive Role and Influence

Reporters and ALI members must be conscious of the special influence of ALI projects, especially Restatements, and especially the Restatements of Torts, which are cited more than any other Restatements.³⁷ A Restatement’s black letter rules can be predicted to carry significant or even

37. See Richard L. Revesz, *Completing the Restatement Third of Torts*, 41(2) ALI REPORTER 1 (Spring 2019) (“The ALI’s work on torts arguably has been the most influential of our efforts to restate the common law. Courts have cited to our Torts Restatements more than 80,000 times. No other ALI publication comes close to this mark; Contracts Restatements, the runner-up, have somewhat less than 40,000 citations.”).

decisive weight in most of the states and territories of the United States and in federal common law.

Accordingly, the ALI needs to be somewhat cautious in recommending a rule that is controversial. Different states have different legal traditions and different modes of selecting judges. Restatements are recommendations of a private organization, not rules with the force of law. Reporters and ALI members must therefore be careful to invoke the most appealing and the most widely shared possible justifications for the Restatement rules that the ALI adopts.³⁸ They should not unduly favor any particular normative perspective to the exclusion of others.

Reporters who are revising previously adopted Restatements face some additional challenges. The first version of a Restatement is inevitably a novel distillation of existing legal doctrine. Its categories and black letter provisions often significantly modify or transcend the doctrinal criteria that courts are then explicitly employing. As a practical matter, this type of creative transformation is unavoidable, because courts rarely have both the expertise and time to devote to a systemic formulation of an entire field of law. The *First Restatement of Torts*, for example, produced an impressive set of doctrinal rules that did not, and could not, precisely reflect the rules of any specific jurisdiction at that time. After a First Restatement on any topic is approved by the ALI, courts frequently respond by adopting its provisions as helpful and appropriate statements of the governing law (albeit with some modifications).

But when the time arises for revision of the First Restatement, the new Reporters confront a new difficulty. If courts have widely adopted the previous Restatement's black letter rules, then the Reporters might conclude that those rules should not be revised, except for modest stylistic or clarificatory changes. Yet if Reporters take that tack, Restatements would be frozen in time. Alternatively, Reporters might attempt to anticipate the future development of the law and reform the previous Restatement to that end. This is a preferable option, recognizing the value of the common law evolving, but it carries a complication. If, as in the case of the Torts Restatements, the Restatement strongly influences the direction of legal doctrine, any reforms that the new Restatement adopts are likely to become the law. As a result, the new Restatement might fail to anticipate how the common law will naturally evolve, and instead might artificially divert the course of legal change.³⁹ And, of course, these challenges persist as successive Restatements are adopted.

38. See Simons, *Justifying and Categorizing Tort Doctrines*, *supra* note 16, at 559–60.

39. As John Goldberg perceptively notes about section 402A and other provisions of the Restatement Second of Torts, these sections “involved reasonable efforts by Prosser and the ALI

These challenges are real, but they are not insurmountable. Although many courts are highly deferential to Restatements, others are less so. And all courts would be willing to rethink existing doctrine or the most recent Restatement positions in sufficiently compelling circumstances. Restatements have a lengthy shelf life of many decades. Reporters and engaged ALI members are human; they cannot perfectly foresee changes in technology, in social conditions and practices, and in community values that affect legal doctrine. Thus, case law and doctrine will inevitably evolve somewhat independently of the content of Restatements. This process is both inevitable and desirable. Restatements should not be self-fulfilling prophecies.

One recent example is the loss of a chance doctrine, under which many courts permit the award of partial damages against a doctor whose negligence increased the chance of a patient's death or other injury, even if it cannot be proven by a preponderance of the evidence that the doctor's negligence caused the injury.⁴⁰ Courts developed this doctrine independently of the *Restatement Second of Torts*, but early drafts of the *Restatement Third of Torts* approve of the doctrine.⁴¹

Another example is the definition of intent for purposes of the tort of battery. The *Restatement Second of Torts* contains definitions that are ambiguous about the requisite intent. Thus, section 13(a) provides in part that the actor must "act[] intending to cause a harmful or offensive contact with the person of the other."⁴² But does this require only the (single) intent to cause a contact, a contact that turns out to be harmful or offensive? Or does it instead require the (dual) intent both to cause a contact and to cause harm or offense to the plaintiff? In recent years, many courts have addressed how the intent for battery should be defined, with a majority

to gauge where the law was and where it was heading, no doubt mindful that their efforts would, in Heisenberg-like fashion, affect the very developments they sought to predict." John C. P. Goldberg, *Torts in the American Law Institute*, in *THE AMERICAN LAW INSTITUTE: A CENTENNIAL HISTORY* 12 (Andrew S. Gold & Robert W. Gordon eds., Oxford U. 2023).

40. See, e.g., *Matsuyama v. Birnbaum*, 890 N.E.2d 819 (Mass. 2008); *Dickhoff v. Green*, 836 N.W.2d 321 (Minn. 2013).

41. See *RESTATEMENT (THIRD) OF TORTS: MEDICAL MALPRACTICE PROVISIONS* § 8 (AM. L. INST., Council Draft No. 1, 2023); *RESTATEMENT (THIRD) OF TORTS: REMEDIES* § 11 (AM. L. INST., Tentative Draft No. 2, 2023). A similar example is the market-share liability rule endorsed by some courts. In this case, however, the subsequent *RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL & EMOTIONAL HARM* § 28 cmt. p (AM. L. INST. 2010) threw cold water on this innovative judicial departure from the usual factual cause requirement, emphasizing the difficulties with the approach and concluding that the most attractive version of the approach "has an exceedingly limited reach."

42. *RESTATEMENT (SECOND) OF TORTS* § 13(a) (AM. L. INST. 1965).

endorsing the single intent view.⁴³ This is an example of courts attempting to follow the *Restatement Second of Torts* yet disagreeing about the meaning of one of its essential definitions. The example offers multiple lessons. Reporters should make every effort to avoid ambiguity in drafting Restatements. Nevertheless, judges will, on important issues such as the required intent for battery, explicitly address the alternatives and develop principled arguments favoring one alternative over another. Restatements should highlight these arguments.

A final example is medical monitoring. *The Restatement Third of Torts: Miscellaneous Provisions* proposes a provision, not contained in previous Restatements, endorsing liability for medical monitoring if an actor has tortiously exposed others to a significantly increased risk of serious future bodily harm.⁴⁴ Courts are split on the desirability of any such liability; and even those courts that endorse liability disagree about its proper scope. The latest draft of the Restatement takes a middle position, endorsing liability but recognizing several limiting principles.⁴⁵ This is an excellent example of a Restatement responding to a substantial innovation in judicial doctrine by clarifying the issues at stake and responding with a measured and principled version of the new doctrine.⁴⁶

V. CONCLUSION

What is the proper role of theory in drafting a Restatement? Consider the following excerpt from an earlier article, co-written with my co-Reporter Jonathan Cardi:

We see our task, not as creating a grand theory from which all of intentional tort doctrine can be deduced, but as a bottom-up endeavor, accurately characterizing developments in the case law and then providing the most sensible and persuasive justifications for extant doctrine. We

43. TD 1, *supra* note 10, § 2 (originally numbered § 102).

44. RESTATEMENT (THIRD) OF TORTS: MISCELLANEOUS PROVISIONS, at 30–42 (AM. L. INST., Tentative Draft No. 2, 2023) (unnumbered section).

45. *Id.* at 31 cmt b.

46. The authors mention medical monitoring as an example of the deficiencies of tort theory because, in their view, that theory is too abstract to provide guidance about doctrine, especially about line-drawing problems, such as the exact threshold of increased risk that warrants liability for the costs of medical monitoring. *See* Engstrom & Green, *supra* note 1, at 367–68. But the challenge of identifying a precise threshold for a moral or legal duty is a very widespread problem. That problem should not be treated as dooming the entire project of justifying such a duty. *See, e.g.*, Larry Alexander & Michael Moore, *Deontological Ethics*, STANFORD ENCYCLOPEDIA OF PHIL. ARCHIVE (Oct. 30, 2020), <https://plato.stanford.edu/archives/win2021/entries/ethics-deontological/> [<https://perma.cc/F9WK-B54S>] (discussing fixed as opposed to sliding-scale thresholds in deontological norms).

look closely at what judges are doing, and what they say about what they are doing. At the same time, however, we strive to provide intellectual coherence to this body of law. Thus, we examine not only the holdings in narrow doctrinal categories, but also the consistency of those holdings with more general tort law principles.⁴⁷

Professors Engstrom and Green properly object to “grand theories” that purport to deduce all of tort doctrine from a single, highly general principle, such as utilitarianism or Aristotelian corrective justice. But justifications can be more modest and nuanced. They can be inductive as well as deductive. Indeed, the most persuasive justifications in morality and law contain elements of both methods of reasoning, toggling between plausible general principles and plausible judgments about outcomes in specific cases.⁴⁸ In this essay, I hope to have shown that a plurality of principles can and indeed must be invoked to justify the outcomes and doctrines of common law tort cases.

47. Simons & Cardi, *supra* note 30, at 345.

48. I refer here to the famous methodology of reflective equilibrium espoused by political philosopher John Rawls. See Norman Daniels, *Reflective Equilibrium*, STANFORD ENCYCLOPEDIA OF PHIL. ARCHIVE (Oct. 14, 2016), <https://plato.stanford.edu/archives/sum2020/entries/reflective-equilibrium/> [<https://perma.cc/Q2GU-QDHA>].