DAMNED FOR THEIR JUDGMENT: THE TORT LIABILITY OF STANDARDS DEVELOPMENT ORGANIZATIONS

*Robert H. Heidt**

INTRODUCTION

The National Spa and Pool Institute ("NSPI") was a private, nonprofit trade association and standards development organization for, among others, builders of swimming pools. Although NSPI primarily provided a forum and information clearinghouse, it also strove, through consensus surveys of its members and through other methods, to develop suggested minimum standards for pools.[1] Beyond ensuring that the standards were developed following the procedures of the "Canvass Method" of the American National Standards Institute ("ANSI"), NSPI did not follow with any effort to check on compliance with the standards nor to sanction noncompliance.[2]

In order to suggest a standard, the NSPI members inevitably confronted trade-offs between desirable but conflicting features of pools.[3] Consider, for instance, the trade-offs inherent in the NSPI-suggested standards for the depth and transition slope of what were known in the industry as Type II pools.[4] These were commonplace

* B.A., University of Wisconsin-Madison; J.D., University of Wisconsin Law School.

1. NSPI assigned the initial draft of its standards to the relevant subcommittee, here the Aboveground/Onground Residential Pool Subcommittee, which it thereafter referred to as the "Writing Committee." That committee then used the American National Standards Institute ("ANSI") Canvass Method to develop consensus on an ultimate draft. The ANSI Canvass Method is described *infra* in text accompanying notes 139–45.

2. The pools are typically built and installed on site by local construction companies, many of which specialize in pools and spas. When injuries occur in the pools, these local builders and sellers, along with other product suppliers, face potential products liability. But the liability insurance policies of these local businesses may offer plaintiffs only modest liability limits.

3. *See* Robert W. Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 TEX. L. REV. 1329, 1378 (1978) ("Decisions affecting health and safety require tradeoffs between increased safety or health considerations on the one hand and increased costs and inconvenience on the other . . . .").

4. *See* AM. NAT'L STANDARDS INST., AMERICAN NATIONAL STANDARD FOR RESIDENTIAL INGROUND SWIMMING POOLS ANSI/NSPI-5, at para. 5.10.1 (2003), *available at* http://divingboardsafety.net/Standard-inground-pools.pdf.

residential pools that typically included a one-meter diving board at the deep end. To suggest a standard for the depth and transition slope of such pools, NSPI needed to balance such features as durability, maintenance, cost, and the appeal to, and safety of, pool users. Optimum safety itself required further trade-offs. Too little depth and too abrupt a transition slope increased the collision risk to those using the diving board. Too much depth and too gradual a transition slope increased the drowning risk to all pool users.

The NSPI members derived no direct financial benefit from confronting these inevitable trade-offs.[5] NSPI dues were not fees creating a contract that called for NSPI to suggest standards.[6] Although their participation in NSPI no doubt furthered the business interests of their employers, the NSPI members were volunteers, ostensibly serving out of a sense of responsibility rather than financial gain. Yet the standards that emerged from NSPI's judgment represented the distillation and encapsulation of invaluable engineering, technological, and scientific learning gained from the members' collective experience.[7] Like those of other standards development organizations ("standard developers"), the NSPI standards lowered the search costs and assisted the entry of aspiring builders of pools into the industry, thereby reducing information asymmetries and fostering desirable competition, as well as greatly improving the odds that the occasional "do-it-yourselfer" would construct a pool that was reasonably safe. The development of product standards also typically allows the interchangeability of parts (especially replacement parts), increases industrial innovation, identifies possible goals the products can serve, avoids the burdens of government regulation, supports common industry values, and facilitates benchmarking.[8]

5. *See* Meyers v. Donnatacci, 531 A.2d 398, 405–06 (N.J. Super. Ct. Law Div. 1987); James A. Filkins, Snyder v. American Association of Blood Banks: *Balancing Duties and Immunities in Assessing the Third Party Liability of Non-Profit Medical Associations*, 3 DEPAUL J. HEALTH CARE L. 243, 254 (2000).

6. *See Meyers*, 531 A.2d at 405–06.

7. *See id.* at 406. *See* FTC Standards and Certification, 43 Fed. Reg. 57,269, 57,269 (proposed Dec. 7, 1978) (describing the many benefits of private standards development); GEORGE P. LAMB & CARRINGTON SHIELDS, TRADE ASSOCIATION LAW AND PRACTICE §§ 5.1–.5 (rev. ed. 1971) (same); G. WEBSTER, THE LAW OF ASSOCIATIONS §§ 19.01, 19-2 to -3 (rev. ed. 1981) (same); Hamilton, *supra* note 3, at 1377–79 (same). Congress most recently recognized the social value of standards development in 2004 when it passed the Standards Development Organization Advancement Act of 2004, 15 U.S.C. §§ 4301–4306 (2006). Nevertheless, U.S. courts have been willing to impute socially undesirable motives to standards development organizations. *See infra* text accompanying note 128.

8. *See* Standards and Certification, 43 Fed. Reg. at 57,269 (listing some of the benefits of standard development). Benchmarking is a process in which a company learns the practices and mimics the techniques of its superior-performing peers in order to enhance its own efficiency. *See* David J. Teece, *Information Sharing, Innovation, and Antitrust*, 62 ANTITRUST L.J. 465, 477–78

Particularly in the fields of communications and information technology, which rely heavily on networking and interoperability, technical compatibility standards play a vital role in allowing innovators to commercialize new products.[9] The information encapsulated in a standard is a public good; unless the legal environment provides appropriate incentives for private standard developers to produce that information, not enough will be produced.[10]

The government also sets standards when it regulates products. And unlike the suggested standards of private standard developers, government standards are often mandatory.[11] In setting their

(1994).

Because the advantages of complying with a suggested standard are often significant, a business may not experience compliance as voluntary. A business may feel especially coerced to comply when noncompliance threatens some form of accreditation. *Id.* at 475–77. But coercion that is driven by the wish to take advantage of economies—which may be available either at the firm or industry level—cannot be equated with the coercion of government regulation without robbing the term "coercion" of too much of its value. In any event, the less compliance appears to be voluntary, the more quasi-governmental the standard developer becomes, the better it can wrap itself in the government's immunity, and the stronger the case becomes for according it the qualified privilege from tort liability for which this Article contends.

9. *Id.* at 477–78. For a perspective on the role that standard development plays in these markets, where it also helps new entrants "hack [their] way through [the patent thicket]," see Jonathan L. Rubin, *Patents, Antitrust, and Rivalry in Standard-Setting*, 38 RUTGERS L.J. 509, 509 (2007) (quoting Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard Setting*, *in* 1 INNOVATION POLICY AND THE ECONOMY 119, 120 (Adam B. Jaffe et al. eds., 2001)).

10. As Professor Daniel Farber writes, "[T]he presumption should be that the free dissemination of information generally makes individuals more knowledgeable and improves their welfare." Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 560 (1991). "Requiring producers [of information] to internalize costs fully . . . will not lead to a socially optimal level of information production because producers cannot also internalize all the benefits of their enterprise. Hence, information activities should not be subject to full tort liability." *Id.* at 559 n.22.

11. Because the NSPI membership included competing builders, these members and the NSPI would face antitrust exposure were they to reach agreement on the actual characteristics of the products each member would offer. *See, e.g.*, Nat'l Macaroni Mfrs. Ass'n. v. FTC, 345 F.2d 421, 427 (7th Cir. 1965) (holding that an agreement on product content violates § 5 of the Federal Trade Commission Act). The 2004 Act did not immunize from antitrust exposure standard developers who participate in such agreements. *See* 15 U.S.C. § 4301(c)(3) (2006).

This Article does not address the antitrust concerns that would arise from such agreements. Nor does it address the antitrust concerns that would arise if a standard developer attempted to sanction noncompliance with its standards. The Article further assumes that the standard developer's agreement on suggested standards does not disguise a coordinated effort to reduce output. This last assumption can be indulged confidently because coordinated efforts to

standards, government regulators confront the same trade-offs of conflicting considerations that private standard developers confront. The Consumer Product Safety Commission ("CPSC"), for example, adopts standards for products after much investigation of the costs and benefits of proposed precautions and in so doing must confront such trade-offs as follows: "how much certain risks should be tolerated to reduce others"; "how much should other interests, such as the range of consumer choice, be sacrificed in the interest of safety"; "how much weight should be given to the possibility that drunks and children may use the product for other than its intended purposes"; and ultimately "how much safety is enough."[12] Like the decision of when to evacuate a city as a storm approaches, such policy-bound trade-offs undertaken by the government represent an exercise of discretionary judgment, universally deemed inappropriate for independent judicial review.[13] When the CPSC uses its best judgment to undertake these trade-offs and thereby set a product standard, it need not fear that a judge and jury will second-guess its judgment, deem it negligent for adopting its standard, pronounce that negligence to be a cause of injuries suffered by those using a complying product, and hold it liable in tort for those injuries.

Despite their standards being only suggestive,[14] NSPI and other

reduce output require agreement by senior management on variables not normally part of standards development.

The antitrust implications of standards development were exhaustively examined by the Federal Trade Commission from 1974 through 1985. *See, e.g.*, Standards and Certification, 43 Fed. Reg. at 57,269, 57,269 (proposed Dec. 7, 1978) (stating that one of the FTC's concerns was the "denial to consumers of the benefits of superior or lower cost"); U.S. FTC, 1985 ANNUAL REPORT 15–16 (1985), *available at* http://ftc.gov/os/annualreports/ar1985.pdf. The FTC considered a wide range of concerns about standard development, not merely a concern about reduced output. *See* Standards and Certification, 43 Fed. Reg. at 57,269–84. One concern was that the developer's wish to further the business interests of its most influential members would lead to standards that were not congruent with consumer interests, either being too low out of a wish to reduce the member's costs, or too high out of a wish to disadvantage lower-cost rivals or entrants whose products did not comply. *See id.* at 57,270–71. Other concerns included the lack of public accountability of standard developers and the possibility that small or innovative firms would lack sufficient input in the standard-development process. *See id.* at 57,269–71. Various proposed rules were considered but none were adopted. *See id.* at 57,271; U.S. FTC, 1985 ANNUAL REPORT 16, *supra* (terminating the investigation in 1985 without any action having been taken).

12. *See* 15 U.S.C. § 2053 (2006) (establishing the CPSC).

13. *See* 28 U.S.C. § 2680(a) (2006) (defining the discretionary-function exception to the Federal Tort Claims Act); Freeman v. United States, 556 F.3d 326, 340–41 (5th Cir. 2009) (barring suits against the government based on its allegedly negligent response to Hurricane Katrina based on the discretionary function of the Robert T. Stafford Disaster Relief and Emergency Assistance Act).

14. This Article does not deal with standards that are backed by the force of

private standard developers enjoy no such luxury. Pool users who collide with the bottoms of pools meeting NSPI suggested standards have successfully obtained tort awards against NSPI in excess of seven figures.[15] The basis for these awards is simply that NSPI negligently undertook the trade-offs it faced. For example, juries have found NSPI negligent on the ground that its suggested standards for a Type II pool allowed too little depth and too abrupt a transition slope.[16] The courts in these cases simply invited the juries to second-guess the NSPI trade-offs that were incorporated in the suggested standards.[17] Having deemed negligent NSPI's

government, even though the standards may have emerged from a private standard developer. Nor does it deal with standards that yield "audited self-regulation." Audited self-regulation occurs when the government delegates the power to enforce and create standards to a nongovernmental body but retains the power to review those standards through a federal agency. *See* Douglas C. Michael, *Federal Agency Use of Audited Self-Regulation as a Regulatory Technique*, 47 ADMIN. L. REV. 171, 174–77 (1995).

15. *E.g.*, Meneely v. S.R. Smith, Inc., 5 P.3d 49, 53, 60 (Wash. Ct. App. 2000) (affirming a jury verdict against NSPI for negligence in suggesting standards and upholding a total damages award of $11 million against multiple defendants, $6.6 million of which was assessed against NSPI). After the *Meneely* judgment, NSPI filed for bankruptcy. *See In re* Nat'l Spa & Pool Inst., 257 B.R. 784 (Bankr. E.D. Va. 2001). After briefly emerging from bankruptcy in March of 2000, NSPI filed again for bankruptcy in that summer. Kenneth Bredemeier, *Rules or Advice?; Pool-Safety Cases Target Trade Group*, WASH. POST, Nov. 11, 2002, at E1. By the fall of 2002, NSPI faced more than $50 million in tort damages. Jerald A. Jacobs, *Dodging the Liability Bullet: Preventing Tort Claims Resulting from Association Policies and Programs*, PILLSBURY LAW: PUBLICATIONS AND PRESENTATIONS (Sept. 2003), http://www.pillsburylaw.com/index.cfm?pageid=34&itemid=37386. NSPI emerged from bankruptcy in 2004, reorganized as the Association of Pool and Spa Professionals ("APSP"). *See APSP Profile*, ASS'N POOL & SPA PROFS., http://www.apsp.org/Public/AboutUs/APSPProfile/index.cfm (last visited Nov. 4, 2010). It then created a new organization, the International Aquatics Foundation ("IAF"), specifically for standards development. Bob Dumas, *NSPI Emerges from Bankruptcy*, SPA & POOL NEWS, Nov. 19, 2004, http://poolspanews.com/2004/112/112topnews.html. NSPI's need to file bankruptcy suggests the difficulty that standard developers face in purchasing adequate liability insurance. Association liability insurance policies ("ALIPs"), sometimes called Association Professional Liability Insurance policies ("APLIs"), do not cover claims for "bodily injury or property damage."

16. *Meneely*, 5 P.3d at 59–60. The court in *Meneely* acknowledged that expert testimony indicated a Type II pool would need to be over twenty-two feet deep in order to eliminate completely the risk that a person using a one-meter diving board would collide with the pool's bottom. *Id.* at 59. Such depth would significantly increase the risk to all pool users of drowning and would also increase the cost of construction and maintenance. Moreover, the overwhelming majority of pool users do not need nearly that depth to slow their descent after diving, or to otherwise protect themselves against contacting the pool's bottom. *See id.*

17. *See, e.g.*, *id.* at 60 (holding that "the evidence and the reasonable inferences [drawn] therefrom support the jury's findings that NSPI negligently caused [plaintiff's] injuries").

judgment about these trade-offs, these juries went on to find that negligence was a cause-in-fact and proximate cause of the collision injury of the plaintiff pool users.[18] Naturally, these juries, and the courts upholding their decisions, were never required to confront nor defend the increased drowning risk that would accompany the greater depth or more gradual transition slope they implicitly required. Indeed, a future jury in the case of a plaintiff who drowned would be free to deem NSPI negligent because its standards suggested a depth that was too great or a transition slope that was too gradual. To add insult to injury, the Final Draft of the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* repeatedly cites with approval one of the appellate court opinions that subjects NSPI to a significant risk of tort liability whenever a person is injured in a pool that complies with NSPI standards.[19]

Granted, U.S. product liability law for at least the past five decades has asked juries to second-guess similar trade-offs made by companies that design products. When a jury applies the risk-utility test to the claim that a manufacturer's conscious choice of design was defective, for example, the jury is asked whether the plaintiff's proposed alternative design, which typically reduces the risk that caused plaintiff's injury while increasing either costs or other risks, renders the defendant's actual design not reasonably safe and hence defective.[20] In effect, then, the jury is asked whether the defendant's trade-off unduly tolerated the risk that materialized in the plaintiff's injury in order to serve other interests or to reduce other risks. *Dawson v. Chrysler Corp.* is a classic example.[21] The jury deemed the car that General Motors manufactured defective in its design because General Motors opted for a relatively light side bar that did not extend all the way through the front door panel.[22] The jury found that the plaintiff-driver's alternative design, which included a larger and longer side bar, rendered defendant's design defective.[23] The jury also found that this alternative design would have probably reduced the injury to the plaintiff-driver when his car skidded sideways and wrapped around a telephone pole.[24] But although the larger and longer side bar would have reduced injuries in side collisions, the evidence showed that the side bar called for by the jury would have added rigidity to the car and therefore would

18. *Id.* at 58–59.

19. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 43 cmts. c, e (Proposed Final Draft 2005) (citing with approval *King v. National Spa & Pool Institute*, 570 So. 2d 612 (Ala. 1990)).

20. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 (1998).

21. Dawson v. Chrysler Corp., 630 F.2d 950 (3d Cir. 1980).

22. *Id.* at 958–59.

23. *Id.* at 954–55.

24. *Id.*

have increased injuries in a frontal collision.[25] Hence a later jury in a frontal-collision case could deem a car's design defective precisely because it included the larger and longer side bar. In designing its car, General Motors simply could not avoid trading off these risks and also trading off other pros and cons of the larger and longer sidebar, which included on the con side all the disadvantages of the added weight and added costs. The Third Circuit Court of Appeals upheld the verdict for the plaintiff-driver but expressed severe misgivings about asking juries to second-guess the trade-offs that underlay a manufacturer's conscious design decisions.[26]

Many commentators, as well as an occasional court, have denounced this feature of our products liability law.[27] These critics point out that juries undertake these trade-offs with much less information than the product manufacturers (or than the government regulators), including, in particular, information about the wishes of consumers.[28] Juries also undertake the trade-offs with much less time to reflect.[29] In addition, juries undertake these trade-offs with the often tragically injured plaintiff before them and in the conspicuous absence of the consumers whom defendant's design saved. This setting invites the jury, erroneously, to view the product and its risks ex post (i.e., with the benefit of hindsight) and to assign undue weight to the risk that materialized in the plaintiff's injury compared to the risks that the defendant's design reduced.[30] The contradictory mandates that are invited—whereby the defendant's trade-off is condemned by some juries for overweighting a certain risk and by other juries for underweighting that same risk—disgrace our jurisprudence much more than would mere conflicting verdicts. Telling a manufacturer that it is negligent if it adopts a certain design and also negligent if it rejects that design sends a more perverse signal than merely having juries disagree

25. *Id.* at 958–59.

26. *Id.* at 962–63.

27. *See, e.g.*, Carroll v. Otis Elevator Co., 896 F.2d 210, 215–17 (7th Cir. 1990) (Easterbrook, J., concurring); Richard C. Ausness, *Retribution and Deterrence: The Role of Punitive Damages in Products Liability Litigation*, 74 KY. L.J. 1, 89 (1986); James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531, 1531 (1973); Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. CAL. L. REV. 133, 152–53 (1982); W. Kip Viscusi, *Jurors, Judges, and the Mistreatment of Risk by the Courts*, 30 J. LEGAL STUD. 107, 116 (2001).

28. Viscusi, *supra* note 27, at 116–17.

29. *See, e.g.*, *Carroll*, 896 F.2d at 216 (Easterbrook, J., concurring) ("The costs of adequate data often exceed the stakes of the case. Worse, many cases go to judgment before the data can be gathered and analyzed.").

30. For a discussion of a recent opinion from the Supreme Court of the United States acknowledging the inferiority of the jury, compared to legislators or administrators, in undertaking the balancing of necessary trade-offs, see *infra* notes 163–65 and accompanying text.

about whether a manufacturer's design is defective. Two juries disagreeing on the *Dawson* facts about whether General Motors' design was defective merely shows that our decision-making system is not fully predictable. Two juries both condemning General Motors' design—one for overweighting a certain risk and the other for underweighting that same risk—shows that our decision-making system, although predictable, is an intellectual disgrace. The shortcomings of asking juries to second-guess the conscious trade-offs of product designers argue against extending this aspect of our products liability law to standard developers.

Asking the jury to second-guess the far more informed and carefully arrived-at judgment of the standard developer is not the only disturbing feature of imposing liability on "negligent" standard developers whenever a person is injured by a product conforming to the developer's standards. The intervening behavior of the product's builder will often be more culpable than that of the standard developer, raising the fear that the suit against the standard developer represents the plaintiff's opportunistic pursuit of a marginal contributor.[31] While tort law has been notoriously willing to countenance the pursuit of marginal contributors,[32] doing so risks creating an undesirable distance between tort law and popular views of moral culpability.

Moreover, even when the product conforms to the standards of the standard developer, the testimony of the builder that he relied on those standards (rather than on his own judgment) in constructing the product is unreliable. Blaming the standard developer is a costless option for the builder. Deflecting blame to the standard developer mitigates the builder's culpability. The plaintiff's family or attorney may have urged the builder to point his finger at the standard developer. Nor is the testimony of the builder that he relied on the standards in constructing the product the kind of evidence whose dependability can be adequately checked through cross-examination. Yet this undependable testimony will often

31. A plaintiff's option to sue the builder or seller of the product, service, or activity that conformed to the standard also gives the injured plaintiff an alternative to suing the standard developer. These products liability suits against the builder or seller give the court and jury a more concrete product, service, or activity to evaluate than does the relatively abstract standard. Thanks to the rule of *The T.J. Hooper*, the builder's or seller's compliance with the industry standard gives it no defense in these suits. *See* New Eng. Coal & Coke Co. v. N. Barge Corp. (*The T.J. Hooper*), 60 F.2d 737, 740 (2d Cir. 1932). A pattern of successful suits against these industry members should provide at least some deterrence against an industry standard developer acting irresponsibly. Further deterrence is provided by the FTC's ability to attack standards it deems "deceptive." *See* 15 U.S.C. § 45(a)(2) (2006).

32. *See* George Scott Christian & Dale Craymer, *Texas Asbestos Litigation Reform: A Model for the States*, 44 S. TEX. L. REV. 981, 997 (2003) (discussing joint and several liability for asbestos distributors that are only marginally culpable for asbestos-related injuries).

provide the only evidence establishing not one, but two elements of the prima facie case against the standard developer. This testimony will establish the reliance on which many courts will base the standard developer's tort duty.[33] And this same testimony will supply the cause-in-fact connection between the standard and the plaintiff's injury. Showing the cause-in-fact connection, after all, requires showing that but for the standard, the builder would have made the product differently, and the plaintiff's injury would probably have been avoided.[34] Hence two of the three major issues—the other being the negligence ("breach") issue—turn on little more than speculation by a biased party.

Still more disturbing is the high percentage of cases against standard developers like NSPI in which the plaintiff's injuries, being horrific, call for damages of seven or more figures. This is no coincidence, because plaintiffs with lesser injuries will likely find the builder's or seller's liability insurance limits adequate for their purposes and feel less need to chase the national or international standard developer.[35] Consequently, the severity of the plaintiff's injuries combined with the status of the national or international standard developer exacerbates the usual threat that jury sympathy for the plaintiff will overthrow the requirement of causal negligence as the foundation for liability. In deciding the breach issue, for example, the jury will need to balance the brutally tangible tragedy the plaintiff has suffered against the more abstract benefits of the

33. The duty of the standard developer to the injured plaintiff is typically imposed by invoking section 324A of the *Restatement (Second) of Torts* or the voluntary rescue doctrine. *See* RESTATEMENT (SECOND) OF TORTS § 324A(c) (1965). *See*, *e.g.*, King v. Nat'l Spa & Pool Inst., Inc., 570 So. 2d 612, 614 (Ala. 1990) (noting that NSPI had a duty to plaintiff based on the voluntary rescue doctrine and section 324A of the *Restatement (Second) of Torts*); French v. Chase, 297 P.2d 235, 238 (Wash. 1956) (explaining that while an actor may not have an affirmative duty to rescue, if he undertakes a rescue effort, he must use a reasonable degree of care in carrying out that rescue). Both of these grounds for imposing a duty require reliance by a third party—here, the builder or seller—on the standard to the detriment of the plaintiff who used the product. *See id.*

34. The difficult problems of proof in determining cause-in-fact are themselves a recognized reason for dismissing the cases that present these proof problems on the ground of "no duty." The *Restatement (Third) of Torts: Liability for Physical and Emotional Harm* provides this example:

> In the educational-malpractice area, courts have concluded that educators have no duty of care to their students, often because of the administrative difficulties of adjudicating such claims. Problems exist both in sorting out conduct that is innovative or nontraditional as opposed to negligent and in determining the factual cause of a student's educational deficiency.

RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 cmt. f (2010).

35. Ignoring globalization and the international character of modern standard development, this Article restricts itself to the liability of standard developers under the tort law of the various jurisdictions of the United States.

standard.

Another disturbing feature is that the standard that the defendant organization suggests—while appearing to be a simple statement of how a product should be made or designed (in the case of prescriptive or design standards) or how a product should perform (in the case of performance standards)—may not only convey information. Some standards also constitute an opinion that a product so made or so performing is reasonably safe and represents an effective net of all trade-offs. Seeing suggested standards as opinions carries two implications. First, it brings into relief the extent to which standards represent an exercise in discretionary judgment. Hence some of the same concerns that warrant a complete privilege from tort liability for discretionary judgments of other decision makers call for at least a qualified privilege for those who develop standards. Otherwise liability for negligence will continue to threaten to distort the judgment of standard developers, just as such liability would threaten to distort the discretionary judgment of now-privileged decision makers.[36] Second, insofar as standards represent opinions, they are best forged through fearless and robust discussion among the members of the standard developer, unhampered by concerns of tort exposure. Liability then, perhaps to a surprising extent, also implicates First Amendment values.[37] Finally, imposing liability on standard developers whenever a person is injured by a product conforming to their standards and a jury deems the standard developer negligent exposes these organizations to an amount of liability that is unduly open-ended, insufficiently limited,[38] and disproportionate to the

36. For amplification of this point, see *infra* Part V.

37. Citing First Amendment values, courts have refused to impose a tort duty of care on the authors and sellers of "how to" books. *See, e.g.*, Cardozo v. True, 342 So. 2d 1053, 1056–57 (Fla. Dist. Ct. App. 1977) (holding that a book retailer was not liable to a customer on the basis of a recipe in a cookbook that led to plaintiff's poisoning, and observing that "ideas hold a privileged position in our society"); Alm v. Van Nostrand Reinhold Co., 480 N.E.2d 1263, 1267 (Ill. App. Ct. 1985) (holding that there could be no cause of action for negligence against the publisher of a "how to" book on making tools and observing that "[a]ny action which limits free expression must be scrutinized for potential infringement of the public right of free access to ideas"); Walter v. Bauer, 439 N.Y.S.2d 821, 822–23 (Sup. Ct. 1981) (holding that the publisher of a science book was not liable to a plaintiff who was injured while conducting an experiment described in the book and concluding that "the danger of plaintiff's proposed theory is the chilling effect it would have on the First Amendment"). Yet many standards also describe "how to" produce a product or perform a service or activity, and hence equally implicate First Amendment values.

38. More precisely, the judicial concern is with insufficiently limited liability for a single tortious act. This differs from "mass tort liability" situations, which raise different problems. For discussion of the many areas of tort law affected expressly or implicitly by the judicial concern with insufficiently limited liability, see generally Robert L. Rabin, *Tort Recovery for Negligently Inflicted Economic Loss: A Reassessment*, 37 STAN. L. REV. 1513

modest benefits the organization receives.

The number and variety of standards development organizations underscore the social importance of this Article. The ANSI reports that as of 1996, about 700 organizations were promulgating more than 93,000 standards.[39] Juries have been allowed to second-guess suggested standards ranging from the American Association of Blood Banks' protocols for screening blood donors[40] to the Oregon School Activity Association's schedules for starting football practice.[41] Practice parameters[42] routinely and laboriously issued for nearly every medical treatment threaten to expose the medical associations that issue them to significant tort liability.[43] When this liability drives small standard developers like

(1985). If negligent standard development were to lead to class actions against the standard developers, the insufficient limit on liability would present itself even more forcefully.

39. *See Domestic Programs (American National Standards) Overview*, AM. NAT'L STANDARDS INST., http://www.ansi.org/standards_activities/domestic_programs/overview.aspx?menuid=3 (last visited Nov. 4, 2010). In 1985, the Department of Defense mentioned around 3300 private standards in its procurement documents. James C. Miller, *The FTC and Voluntary Standards: Maximizing the Net Benefits of Self-Regulation*, 4 CATO J. 897, 899 (1985). The Internal Revenue Service reported in 2002 that over 71,000 organizations were registered under § 501(c)(6) of the tax code as nonprofit business leagues, the category in which standard developers typically fall. JOHN FRANCIS REILLY ET AL., IRS, IRC 501(c)(6) ORGANIZATIONS, at K-1, *available at* http://www.irs.gov/pub/irs-tege/eotopick03.pdf (last visited Nov. 4, 2010).

40. Snyder v. Am. Ass'n of Blood Banks (*Snyder II*), 676 A.2d 1036, 1038, 1055 (N.J. 1996) (upholding a jury verdict for a plaintiff who received HIV-infected blood against a standard developer for blood banks).

41. Peterson v. Multnomah Cnty. Sch. Dist. No. 1, 668 P.2d 385, 388, 393 (Or. Ct. App. 1983) (finding an association to be liable to a paralyzed plaintiff because its standards for preseason football allowed live tackling at early practices); *see also* Prudential Prop. & Cas. Ins. Co. v. Am. Plywood Ass'n, No. 932026, 1994 WL 463527, at *3–4 (S.D. Fla. Aug. 3, 1994) (holding that, by developing standards for the use of plywood, the American Plywood Association subjected itself to liability to homeowners whose property was damaged by a hurricane).

42. Practice parameters, or practice guidelines, are defined by the Institute of Medicine as "systematically developed statements to assist practitioner and patient decisions about appropriate health care for specific clinical circumstances." Arnold J. Rosoff, *The Role of Clinical Practice Guidelines in Health Care Reform*, 5 HEALTH MATRIX 369, 370 (1995) (quoting INST. OF MED., CLINICAL PRACTICE GUIDELINES: DIRECTIONS FOR A NEW PROGRAM 8 (Marilyn J. Field & Kathleen N. Lohr eds., 1990)). *See generally* Alice Nobel et al., Snyder v. American Association of Blood Banks*: A Re-examination of Liability for Medical Practice Guideline Promulgators*, 4 J. EVALUATION CLINICAL PRAC. 49 (1998); Megan L. Sheetz, Note, *Toward Controlled Clinical Care Through Clinical Practice Guidelines: The Legal Liability for Developers and Issuers of Clinical Pathways*, 63 BROOK. L. REV. 1341 (1997).

43. In transplantation medicine, the physicians responsible for the standards by which organs may be harvested could ultimately be held liable if a donated organ has been inadequately screened or a potential recipient has been denied an organ. *See* S. Sandy Sanbar, *Organ Donation and Transplantation*,

NSPI into bankruptcy, the liability generates little public outcry. That may not be true when the same legal principles endanger more prominent organizations, like the Joint Commission on Accreditation of Healthcare Organizations ("JCAHO").[44]

At least one possible effect of imposing liability on standard developers has apparently not yet materialized—an attempt by a successful plaintiff to collect a judgment against a standard developer from its individual or corporate members who participated in developing the standard. Principles of agency law arising from other contexts would offer disturbingly strong support to such an attempt.[45] Yet such liability might well discourage individuals and corporations from volunteering to develop standards.

This Article contends that when those injured by products, services, or activities that conform with the standards of a private standards development organization sue the organization for negligence in suggesting its standards, a court should dismiss the case on the ground of "no duty" [46] or should grant the organization a

in LEGAL MEDICINE 209, 218 (7th ed. 2007). In reproduction medicine, the Council on Scientific Affairs of the American Medical Association has set standards for referring a patient to a specialist in genetic counseling and may face liability whenever doctors following their standards fail to refer a patient. *See* Michael S. Cardwell & Thomas G. Kirkhope, *Reproduction Patients*, *in* AM. COLL. OF LEGAL MED., LEGAL MEDICINE 380, 380 (Susie Baxter ed., 4th ed. 1998).

44. The JCAHO was formerly known as the Joint Commission on Accreditation of Hospitals. *See* Kimberly J. Todd, Note, Snyder v. American Association of Blood Banks*: Expansion of Trade Association Liability—Does It Reach Medical Societies?*, 29 U. TOL. L. REV. 149, 173 n.172 (1997) (discussing the substantial exposure facing the JCAHO); Jack Bierig et al., *Tort Liability Considerations for Medical Societies*, *in* LEGAL IMPLICATIONS OF PRACTICE PARAMETERS 43, 43–54 (1990) (same).

45. *See, e.g.*, Vandervelde v. Put & Call Brokers & Dealers Ass'n, 344 F. Supp. 118, 155 (S.D.N.Y. 1972) ("[W]here a member knows or should know that the [trade association] to which he belongs is engaged in an unlawful enterprise and he continues his membership without protest, he may be found to have ratified the organization's action and become unable subsequently to disassociate himself from responsibility for its results.").

46. Whether a tort duty of care exists is a question of law. DAN B. DOBBS, THE LAW OF TORTS § 149, at 355 (2000). The various tests for duty acknowledge that resolving the duty issue requires balancing policy reasons for limiting the responsibility of defendants who have committed a tortious act against policy reasons for entitling a plaintiff to redress for injury caused by defendants' tortious acts. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 53, at 359 (W. Page Keeton ed., 4th ed. 1984) (noting various policy factors used in determining the scope of duty, "including convenience of administration, capacity of the parties to bear the loss, a policy of preventing future injuries, [and] the moral blame attached to the wrongdoer"). Tests for duty also acknowledge the wide latitude afforded to courts and cite as factors in determining duty the relationship of the parties and the wish to avoid potentially unlimited liability. The New York statement of the test for duty is typical: "[I]t is . . . the responsibility of courts, in fixing the orbit of duty, 'to limit the legal consequences of wrongs to a controllable degree'. . . and to protect against crushing exposure to liability . . . ." Strauss v. Belle Realty Co., 482

qualified privilege.[47] A qualified privilege would enable a standards development organization to prevail on a pre-answer motion to dismiss absent allegations in the injured plaintiff's complaint that the organization suggested its standards in bad faith. Likewise, if bad faith is alleged, a standards development organization should prevail on summary judgment when the paper record fails to show that the organization's good faith in suggesting its standards is genuinely disputed. Whichever ground is chosen, a standard developer should not be pushed to trial merely on a showing that the plaintiff was injured by a product, service, or activity that conformed to the standards combined with allegations that the standard developer's suggestion of those standards was negligent.[48]

I. THE CURRENT LAW ON THE DUTY ISSUE

Two cases presenting similar facts illustrate the tort exposure facing standard developers. In *King v. National Spa and Pool Institute, Inc.*, the plaintiff's decedent broke his neck when he dove off his diving board into his Type II pool.[49] Besides suing the local company that built the pool, the plaintiff also sued NSPI, despite the absence of any dealings between NSPI and the decedent, or even any dealings between NSPI and the pool's builder, apart from the pool builder's learning of the NSPI standards.[50] The plaintiff's sole theory of liability against NSPI was, in the words of the Alabama Supreme Court, "that the standards that allowed the placement of a diving board in this particular size pool created an unreasonable risk of harm."[51] That is, plaintiff's sole theory was that NSPI was negligent for developing the particular standards that permitted a diving board in plaintiff's type of pool. In reversing a grant of summary judgment for NSPI, the court held that the plaintiff should

N.E.2d 34, 36 (N.Y. 1985) (citations omitted) (quoting Tobin v. Grossman, 249 N.E.2d 419, 424 (N.Y. 1969)).

In every case discussed here, this Article assumes that the elements other than duty have been resolved in the plaintiff's favor. In particular, the Article refrains from discussing the merits of the particular standards suggested, for the merits of those standards constitute the heart of the breach issue. This Article abides by the sharp separation between the issues of duty and of breach that the *Restatement (Third): Liability for Physical and Emotional Injury* recommends. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 7 cmt. i (2010). For a discussion of proximate cause in these cases, see *infra* note 52.

47. To assure that a plaintiff must produce evidence of bad faith to survive a summary judgment motion, recognition of a qualified privilege should probably be seen to establish "bad faith" as an additional element of plaintiff's prima facie case rather than to establish "good faith" as a defense.

48. Nothing proposed here would affect the liability of the builders or sellers of the injurious product, service, or activity.

49. King v. Nat'l Spa & Pool Inst., Inc., 570 So. 2d 612, 613, 615 (Ala. 1990).

50. *Id.* at 614.

51. *Id.* at 613.

reach the jury and prevail if it could show that NSPI was negligent "in promulgating the standards in question."[52]

To impose on NSPI the legal duty of ordinary care, the court likened NSPI to a stranger who passes by another in distress. The court acknowledged that NSPI "had no statutorily or judicially imposed duty to formulate standards."[53] But having suggested standards, NSPI took on a legal duty to use ordinary care in doing so.[54] The court seized on the *Restatement (Second) of Torts* section 324A.[55] That section creates one of a number of exceptions to the usual rule (often called the "no duty to rescue rule") that a stranger passing by another owes the other no legal duty to act, carefully or

52. *Id.* at 616. The opinion clarified that NSPI's negligence arose from the deficiencies in the particular standard it suggested rather than merely from NSPI's decision to suggest standards in the first place. *Id.* at 618.

Of course the plaintiff must still show that NSPI's negligence in suggesting its standards was a cause-in-fact and a proximate or a legal cause of his injury. To show cause-in-fact, the plaintiff must show that "but for" the NSPI's negligent suggestion of standards, the injury to the plaintiff would have probably been avoided. DOBBS, *supra* note 46, § 168, at 409. The showing needed to establish proximate or legal cause, or what the *Restatement (Third)* refers to as the "scope of liability," is less clear. *See* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. b (2010). But as long as the defendant's standards are deemed negligent for ignoring or underestimating the same risk that materialized in the plaintiff's injury, proximate cause should exist. According to the *Restatement (Third)*, "An actor's liability is limited to those harms that result from the risks that made the actor's conduct tortious." *Id.* § 29. This risk test, as the *Restatement (Third)* reporters explain, is congruent with the foreseeability test when the foreseeability test is "properly understood and framed." *Id.* § 29 cmt. e.

The overlap between the duty issue and the proximate or legal cause issue is well known, and the policy reasons for holding "no duty" will constitute the ground for some courts holding "no proximate or legal cause." *Id.* § 29 cmt. f. For a case holding that a standard was not a proximate cause of the plaintiff-user's injury, see *Sizemore v. Georgia-Pacific Corp.*, Nos. 6:94-2894-3, 6:94-2895-3, 6:94-2896-3, 1996 WL 498410, at *12 (D.S.C. Mar. 8, 1996), *aff'd*, 114 F.3d 1177 (4th Cir. 1997). In calling for a holding of "no duty" and in ignoring the issue of proximate or legal cause, this Article follows the approach of the *Restatement (Third): Liability for Physical or Emotional Harm*. Comment f to section 29 of the *Restatement (Third)* states:

> [D]uty is a preferable means for addressing limits on liability when those limitations are clear, when they are based on relatively bright lines, when they are of general application, when they do not usually require resort to disputed facts in a case, when they implicate policy concerns that apply to a class of cases that may not be fully appreciated by a jury deciding a specific case, and when they are employed in cases in which early resolution of liability is particularly desirable.

RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL & EMOTIONAL HARM § 29 cmt. f (2010). Suits against standard developers by those claiming injury from complying products or activities fit this criteria.

53. *King*, 570 So. 2d at 614.

54. *Id.*

55. *Id.*

otherwise, to aid him.[56] In general, section 324A imposes a duty of care on a defendant toward a plaintiff when a defendant undertakes to perform services for another that defendant should recognize are necessary for the protection not of the other, but of a third party who is the plaintiff. One of the most famous illustrations of section 324A is *Marsalis v. LaSalle*, in which liability was imposed upon a defendant-volunteer who promised a husband whose wife was bitten by a cat to keep control of the cat until the passage of time would reveal whether or not the cat was rabid.[57] Were the cat to escape before that time lapsed, the risk that the cat was rabid would cause the plaintiff-wife to undergo painful medical treatment.[58] When the cat escaped due to the volunteer's negligence in confining it, and the plaintiff underwent the medical treatment as a result, the principle underlying section 324A enabled the plaintiff to recover from the volunteer for the damages resulting from the wife's medical treatment.[59] Without this principle, the defendant-volunteer would have been able to avoid liability by invoking the usual "no duty to rescue rule," which is perhaps more precisely stated as the rule that one has no duty to act affirmatively to aid another. *Restatement (Second)* section 324A states:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to protecting his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.[60]

As the court saw the facts of *King*, NSPI, by suggesting standards for pool construction, became the counterpart of the volunteer in *Marsalis*. Suggesting its standards constituted an undertaking by NSPI to render services to the pool builder, the counterpart of the husband in *Marsalis*. In rendering those services to the builder, NSPI should have recognized that the standards were necessary for the protection of all users of pools that conformed to NSPI standards, all such pool users—including the decedent, being

56. RESTATEMENT (SECOND) OF TORTS § 324A (1965).
57. Marsalis v. LaSalle, 94 So. 2d 120, 122, 126 (La. Ct. App. 1957).
58. *Id.* at 122–23.
59. *Id.* at 126.
60. RESTATEMENT (SECOND) OF TORTS § 324A (1965).

the counterpart of the plaintiff-wife in *Marsalis*. Hence, when NSPI suggested standards to the pool builder, NSPI undertook to perform the duty to use care, which the pool builder plainly owed to his customer and to future users of that pool. On this reasoning, 324A(b) would apply and would impose a tort duty on NSPI to the decedent and to any such pool user without the need for any further evidence from plaintiff on remand. In addition, the harm to the pool user was allegedly suffered because of the reliance of the pool builder on NSPI's standards in building the pool. Therefore, section 324A(c) would also apply and would alternatively impose a tort duty on NSPI to the decedent and to all pool users, at least once the plaintiff on remand adduced some evidence that the builder relied on NSPI standards.[61] And for this purpose, the testimony of the builder that he relied on NSPI standards in building the pool would presumably suffice.[62]

61. *Id.* at 614.

62. Some courts granting summary judgment to defendant standard developers or defendant inspectors of products or activities that prove injurious have made much of the reliance requirement, finding no reliance when the pool builder or his counterpart continued its own safety efforts, or was insufficiently under the control of the defendant. *E.g.*, Blessing v. United States, 447 F. Supp. 1160, 1196 (E.D. Pa. 1978) (holding that the Occupational Safety and Health Administration ("OSHA") had no duty to employees injured at work by equipment that had been allegedly inspected in a negligent fashion by OSHA because the employers were primarily responsible for maintaining the equipment); Bailey v. Edward Hines Lumber Co., 719 N.E.2d 178, 185 (Ill. App. Ct. 1999) (finding that a trade association that published recommendations for the construction of trusses owed no duty to construction workers who were injured when a truss collapsed because the recommendations were only advisory and the association had no power to enforce compliance); Meyers v. Donnatacci, 531 A.2d 398, 403–04 (N.J. Super. Ct. Law Div. 1987) (refusing to impose a duty on NSPI to a pool user because NSPI did not control the seller of pool); Beasock v. Dioguardi Enters., Inc., 494 N.Y.S.2d 974, 979 (Sup. Ct. 1985) (finding no duty by an association that developed standards for tire manufacturers to the plaintiff's decedent after a tire explosion because the standard developer did not control the manufacturer that negligently installed the tire).

These courts are certainly correct in pointing out the standard developer's lack of control. Suggested standards are often used merely as minimum guidelines that third-party builders or sellers may or may not choose to adopt, modify, or reject. Nevertheless, the approach recommended here concedes that the developer's standard has invariably influenced the injurious product or activity. The approach recommended concedes further that such influence, while falling far short of control over the third-party builder or seller, has been held sufficient to trigger the imposition of a tort duty of care on the defendant exerting the influence, at least in other contexts. *See, e.g.*, Weirum v. RKO Gen., Inc., 539 P.2d 36, 40–41 (Cal. 1975) (finding that a radio station had a duty to strangers on a highway when the station's disc jockey merely encouraged listeners who it did not control to arrive quickly at a particular location and one of those listeners caused an accident); Hyde v. City of Columbia, 637 S.W.2d 251 (Mo. Ct. App. 1982) (holding that a newspaper was liable to an assault victim for negligence for publishing the victim's identity and

There is no analytical difficulty in applying section 324A to the promulgation of standards. Section 324A provides a legal niche into which the promulgation of standards conveniently fits. The court in *King* reasoned that promulgating standards likely satisfied parts (b) and (c) of 324A,[63] but it could also have invoked part (a) on the ground that NSPI's standard, by suggesting that a one-meter diving board could be used in a Type II pool, increased the risk of this collision injury. The purpose of part (a), like that of section 324A generally, is to identify when a defendant's behavior takes that defendant out of the safe harbor of nonfeasance and precludes it from invoking the "no duty to rescue rule." Behavior that cannot be said to leave unaffected the level of risk facing plaintiff but rather increases that risk is an example of such duty-triggering behavior.[64] Arguably, as long as the standard was in place before the building of the pool and influenced the builder to construct a pool presenting this collision risk, rather than a pool presenting less collision risk, the standard could be said to increase the risk of a collision injury like the plaintiff's. Again, the builder's testimony that he was influenced by the suggested standard should suffice for this purpose.

But is section 324A of the *Restatement (Second)* an apt vehicle for carrying such baggage? Do the policies underlying section 324A call for imposing on standard developers a tort duty of ordinary care to all users of products or activities that conform to their standards? As the reporters of the *Restatement (Third)* emphasize, policy concerns may call for a holding of "no duty" no matter how tight the analytical fit between the facts and the language of section 324A.[65] Past cases invoking 324A seem to envision a relationship between the defendant and the plaintiff that is much more specific and more limiting. The volunteer-defendant in *Marsalis*, for example, knew the plaintiff personally. The volunteer personally met and promised the plaintiff-husband to contain the cat and knew the one specific individual who might be endangered by any negligence in her

address and thus assisting an assailant in assaulting the victim). Hence, the grounds advanced here for finding "no duty" differ.

63. King v. Nat'l Spa & Pool Inst., Inc., 570 So. 2d 612, 614 (Ala. 1990).

64. For a case in which section 324A(a) could not be invoked, see *Patentas v. United States*, 687 F.2d 707 (3d Cir. 1982). There, because the Coast Guard merely came upon the scene of a tanker explosion and was negligent in providing aid, the Coast Guard did not increase the risk to the victims of the explosion, and hence had no tort duty to them. *Id.* at 717.

65. In Comment b to section 43 of the *Restatement (Third)*, the counterpart to section 324A, the reporters state:

> *Court determinations of no duty based on special problems of principle or policy.* Even though an affirmative duty might exist pursuant to this Section, a court may decide, based on special problems of principle or policy, that no duty or a duty other than reasonable care exists.

RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 43 cmt. b (Proposed Final Draft No. 1, 2005).

promised undertaking.[66] Applying 324A to the volunteer in *Marsalis* imposed a duty on the volunteer to one person—the plaintiff. Moreover, the duty to that plaintiff would not last beyond a fortnight.[67] And because the situations to which 324A apply usually involve some exigency, the brief duration of the duty is another factor that limits its application.

When courts refuse to impose a tort duty, they often stress the fear of open-ended or insufficiently limited liability.[68] Applying 324A to impose a duty on standard developers whenever users of complying products are injured brings that fear into play. While knowing its standards would primarily be used by builders of pools, NSPI, like other standard developers, offered its standards generally to the world at large. The number of persons who might read and rely on its standards was unlimited. By suggesting its standards, NSPI did not develop a deeper, closer, or more specific relationship with any one of those persons than with any other. Unlike certifiers of previously produced products or models of products, NSPI did not express a judgment about the particular specimen of the product that proved injurious. Compared to the standards of those who certify particular finished products, NSPI's standards were general and forward-looking. When any organization suggests standards for products or models of products that are dangerous and widely used, the number of injuries resulting from the use of products that comply with the standards is potentially unlimited. Allowing all those injured to state a cause of action against the standard developer merely by alleging that it was negligent in not opting for a different standard threatens to yield much more liability for ordinary negligence than courts should be willing to tolerate. At least one court has recognized the insufficiently limited liability now facing standard developers:

> Here policy considerations weigh against holding the [National Fire Protection Association], a voluntary membership association, liable . . . . Promoting public safety by developing safety standards is an important, imperfect, and evolving process. The imposition of liability on a nonprofit, standards developer who exercises no control over the voluntary implementation of its standards . . . could expose the

66. Marsalis v. LaSalle, 94 So. 2d 120, 122 (La. Ct. App. 1957).

67. *Id.*

68. Classic decisions illustrating the judicial concern for insufficiently limited liability include *Ultramares Corp. v. Touche*, 174 N.E. 441, 444 (N.Y. 1931) and *H.R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896 (N.Y. 1928). *See also In re* N.Y. State Silicone Breast Implant Litig., 632 N.Y.S.2d 953, 957 (Sup. Ct. 1995) (refusing to impose a duty of care on Dow Chemical to all potential users of silicone products because such a duty "would be indeterminate"); John A. Siliciano, *Negligent Accounting and the Limits of Instrumental Tort Reform*, 86 MICH. L. REV. 1929, 1930, 1966 (1988).

> association to overwhelming tort liability to parties with whom its relationship is nonexistent and could hinder the advancement of public safety.[69]

In treating the duty issue, the *Restatement (Third)* endorsed this wish to avoid inviting unlimited liability.[70] Yet when the *Restatement (Third)* reporters created section 43 to update and replace section 324(a), they cited *King* favorably in the Reporters' Note to three separate comments.[71] First, they cited *King* in the

69. Commerce & Indus. Ins. Co. v. Grinnell Corp., Nos. Civ.A 97-803, Civ.A 97-775, 1999 WL 508357, at *3 (E.D. La. July 15, 1999). In refusing to impose a tort duty on the standard developer for accountants for the benefit of investors, the Connecticut Supreme Court also cited the fear of insufficiently limited liability:

> It is not difficult to envisage the consequences that would ensue if the voluntary promulgation of professional accounting standards were held to impose on the [American Institute of Certified Public Accountant ("AICPA")] a duty of care to a third party who neither is specifically identifiable nor has any relationship with the AICPA aside from reliance on the professional opinion of a certified public accountant who allegedly relied on published AICPA standards. In effect, the AICPA would be at risk of being called upon to defend its standards in any dispute challenging the propriety of the professional services of an AICPA member. In the face of such broad exposure, at least to the costs of litigation and possibly to liability for damages, the AICPA and other similarly situated professional organizations might well curtail their laudable and salutary efforts to broaden and strengthen professional standards. We are persuaded that this chilling effect would benefit no one—not the members of professional organizations, not their clients and not the public at large.

Waters v. Autuori, 676 A.2d 357, 364 (Conn. 1996).

70. RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 37, reporters' note to cmt. c (Proposed Final Draft No. 1, 2005) ("Thus, *Moch* was decided not on the ground of no duty to rescue but on no duty so as to avoid excessive liability being imposed. In that respect, *Moch* is of a piece with other no-duty decisions . . . .") (discussing H.R. Moch Co. v. Rensselaer Water Co., 159 N.E. 896 (N.Y. 1926)).

71. Section 43 of the *Restatement (Third): Liability for Physical and Emotional Harm*, titled "Duty to Third Persons Based on Undertaking to Another," largely duplicates Section 324A of the *Restatement (Second)* and provides:

> An actor who undertakes to render services to another that the actor knows or should know reduce the risk of physical harm to which a third person is exposed has a duty of reasonable care to the third person in conducting the undertaking if:
>
> (a) the failure to exercise reasonable care increases the risk of harm beyond that which existed without the undertaking,
>
> (b) the actor has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the person to whom the services are rendered, the third party, or another relies on the actor's exercising reasonable care in the undertaking.

RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 43 (Proposed Final Draft No. 1, 2005).

Reporters' Note to comment c to illustrate Alabama's acceptance of *Restatement (Second)* section 324A.[72] Second, they cited *King* in the Reporters' Note to comment e to illustrate that in a suit by a pool user, the reliance by the pool builder on NSPI's standards was the type of reliance that would satisfy the reliance requirement in section 43's counterpart to section 324A(c).[73] Third, they cited *King* in the Reporters' Note to comment h to illustrate that section 43 would impose a duty of care toward third parties like pool users on a defendant like NSPI simply because of NSPI's undertaking to promulgate safety standards for pool builders, and even though no contract existed between NSPI and any pool builder.[74] Necessarily then, a third party pool user like the plaintiff's decedent in *King* need not show he was a third party beneficiary of a possible NSPI contract with a builder or installer. These three favorable references to *King* suggest the *Restatement (Third)* reporters view the promulgation of standards by a standard developer as a quintessential example of an undertaking that ought to trigger a duty of care under section 43 to those injured by complying products. To be sure, the reporters' favorable citations of an opinion does not necessarily express approval of the opinion's ultimate ruling. The reporters may use the citation merely to explain or to illustrate a principle they are embracing. Nevertheless, the reporters' treatment of *King* should suppress any impulse to dismiss *King*, and its threat to standard developers, as an aberration.

In one incidental respect, the *Restatement (Third)* limits the liability of standard developers. For the *Restatement* reporters made clear that any tort duty imposed on a standard developer must arise under the "affirmative duties" laid out in sections 38 to 44, rather than under the general duty provision in *Restatement (Third)* section 7.[75] This means the *Restatement* reporters do not view the promulgation of standards as itself posing a risk of physical harm to those injured by complying products. Apparently, they view other forces, such as the product, service, or activity itself, as putting the injured plaintiff at risk. Hence the reporters believe that one of the exceptions to the usual "no duty to rescue rule" must apply before the development of standards will give rise to a tort duty. Section 37, entitled *No Duty of Care with Respect to Risks Not Created by Actor*, establishes the usual "no duty to rescue rule," and sections 38 through 44 lay out the exceptions to that rule.[76] The result is that—

72. *See id.* reporters' note to cmt. c.
73. *See id.* reporters' note to cmt. e.
74. *See id.* reporters' note to cmt. h.
75. *Id.* § 37.
76. *Id.* The exceptions are often collectively referred to as the "Good Samaritan Rule" because they recognize a duty of care once an actor, like the Good Samaritan, attempts to provide aid. *See, e.g.*, Williams v. State, 664 P.2d 137, 139 (Cal. 1983) ("Also pertinent to our discussion is the role of the volunteer who, having no initial duty to do so, undertakes to come to the aid of

at least in the eyes of the *Restatement* reporters—a standard developer, in order to persuade the court to dismiss the suit on the ground of "no duty," need only satisfy the court that none of exceptions found in sections 38 through 44 apply.

Meneely v. S.R. Smith, Inc. is the second case illustrating the tort exposure of standard developers like NSPI.[77] There, the Washington Court of Appeals upheld a judgment entered on a jury verdict for an injured pool user who also claimed NSPI was negligent in promulgating its standards for Type II pools—that is, residential pools with a one-meter diving board.[78] As in *King*, the pool user struck the bottom of the pool in the transition slope after diving from the diving board.[79] The jury set the plaintiff pool user's damages at $11 million, and that determination of damages was also upheld on appeal.[80]

The trial court relied on two alternative grounds for holding that NSPI owed the plaintiff a tort duty despite the absence of any contact between NSPI and either the plaintiff, the builder, or the owner of the pool.[81] Indeed, the only contact between NSPI and the pool in question was that the use of the particular type of diving board in this type of pool conformed to NSPI standards.[82] The trial court's first ground was *Restatement (Second)* section 324A—the ground relied on in *King*—and the second ground was Washington's voluntary rescue doctrine.[83] The appellate court agreed with the trial court that a duty should be imposed on NSPI under Washington's voluntary rescue doctrine and therefore upheld the trial court's judgment for the plaintiff without discussing whether *Restatement (Second)* section 324A also called for imposing a duty.[84]

Washington's voluntary rescue doctrine did not differ from that

another—the 'good Samaritan.' He is under a duty to exercise due care . . . .").

77. Meneely v. S.R. Smith, Inc., 5 P.3d 49 (Wash. Ct. App. 2000). The more specific theory of breach in *Meneely* seemed to be that the NSPI standards negligently allowed the use of this particular type of diving board in a Type II pool. *See id.* at 51, 58–59 (describing an NSPI-commissioned study that made NSPI aware that the standards set for minimum dimensions were insufficient to keep certain divers from impacting the bottom of a Type II pool).

78. *Id.* at 60.

79. *Id.* at 51.

80. *Id.* at 53, 60.

81. The contractor who installed the pool and excavated the land for the pool was not sued. Defendant S.R. Smith, Inc., apparently a member of NSPI, manufactured the allegedly inappropriate diving board and another defendant, Pool and Patio Supply, sold the board to the defendant pool owner. *Id.* at 51. The plaintiff stipulated before trial to the dismissal of all defendants other than NSPI. *Id.* at 52.

82. In *Meneely*, the court admitted that the pool in question failed to conform to NSPI standards in many respects, but held that it sufficed that the transition slope where plaintiff's collision occurred conformed to the NSPI standards. *Id.* at 59–60.

83. *Id.* at 57, 58 & n.4.

84. *Id.*

which exists throughout the country and which is reflected in *Restatement (Second)* section 323 and in *Restatement (Third): Liability for Physical and Emotional Harm* section 42. Qualifications aside, the doctrine imposes a tort duty of due care on an actor who undertakes, even gratuitously, to render services to another which the actor should recognize are necessary for the protection of the other.[85] The *Meneely* court deemed NSPI promulgation of suggested standards as a sufficient undertaking to trigger Washington's voluntary rescue doctrine and to impose a duty of care on NSPI toward all users of pools that conform to NSPI standards.[86]

The *Meneely* court reasoned that two cases applying Washington's voluntary rescue doctrine called for imposing a duty on NSPI. In *Brown v. MacPherson's, Inc.*,[87] a duty was imposed on the Washington Department of Motor Vehicles because its employee conferred with and then negligently misled the plaintiff's real estate broker into believing some cabins that the plaintiff later purchased

85. *Id.* at 55.

86. The *Meneely* court also made much of the NSPI continuing to use its standard after a study it commissioned reported that indeed pool users in complying pools were colliding with the bottom of pools. *Id.* at 53. While this study confirmed the foreseeability to NSPI of such a type of injury, that was never in dispute to begin with. *Id.* at 57. Ignoring the trade-offs of different risks that the NSPI needed to face in deciding on standards, the court's approach implied that a standard developer should not develop a standard unless the standard guarantees that a complying product or activity will be absolutely safe. One might think that half a century of risk-management professionals, not to mention legal scholars, discrediting the quest for absolute safety would have precluded the court's approach. *See* GUIDO CALABRESI, THE COST OF ACCIDENTS 3–5 (1970) (indicating the inevitable need to trade off other values against safety); Henderson, *supra* note 27, at 1540 ("[A]bsolute safety is not attainable and—in any event—is not the sole desirable objective . . . . Intelligent answers to the question of 'How much product safety is enough?' . . . can only be provided by a process that considers such factors as market price, functional utility, and aesthetics, as well as safety, and achieves the proper balance among them."); Viscusi, *supra* note 27, at 566 ("Tradeoffs will and must be made."). *See generally* DANIEL GARDNER, THE SCIENCE OF FEAR (2009) (reviewing authorities on risk management). Any standard developer for knives or guns knows that complying products can lead to injuries to users. Even a seemingly innocuous product like a toothpick poses a risk of harm: "Over the next 13 years, we can expect more than a dozen deaths from ingested *toothpicks* . . . ." Corrosion Proof Fittings v. EPA, 947 F.2d 1201, 1223 n.23 (5th Cir. 1991). Apart from requiring the impossible, then, a legal approach imposing a tort duty whenever the standard developer knows that a complying product, service, or activity presents the possibility of an injury sends an undesirable message to product users. That approach tells users that because injury should be impossible as long as the standard developers acted with care and the builders or sellers complied with the standards, the product user need not use his own judgment to avoid injury. Against many injuries, however, the judgment of the product user is the best precaution.

87. 545 P.2d 13 (Wash. 1975).

were not subject to an avalanche risk.[88] Quoting from that decision, the *Meneely* court fit those facts to the voluntary rescue doctrine: "the State's agents undertook to prevent the avalanche damage by conferring with [the real estate broker], in effect to rescue [the plaintiffs] from their danger, but in the process . . . negligently misled [the broker] and thus made [the plaintiff's] situation worse."[89] In the other application of the voluntary rescue doctrine, *Sheridan v. Aetna Casualty & Surety Co.*,[90] the Supreme Court of Washington imposed a tort duty on the insurance company of the Stirrat building in Seattle toward an injured employee of one of the tenants in that building.[91] The defendant insurance company had promised its insured, the owner of the building, to inspect the building's elevators and to file with the city a copy of the report about the elevator, as required by a city ordinance.[92] This "voluntary assumption, as the owner's agent, of the duty of proper inspection and reporting"[93] subjected the insurance company to a tort duty toward the tenant and its employee. The insurance company breached that duty and contributed to the elevator's malfunction by failing to inspect and report.[94]

Neither *Brown* nor *Sheridan* involved standards. Moreover, in each of those cases, as in most voluntary rescue cases in other jurisdictions, the defendant "rescuer" had interacted specifically with the plaintiff, the plaintiff's agents, or the owner of property on which the plaintiff was injured. Neither of these two cases required the courts deciding them to confront the concern about open-ended or insufficiently limited liability that would arise from imposing a duty on NSPI for promulgating its standards. The Department of Motor Vehicles employee in *Brown* met face-to-face with the plaintiff's broker, knew the broker was the agent of the plaintiff, and knew the plaintiff was inquiring about a specific property with a view toward purchasing it. Any possible liability was closely cabined. To impose a duty of care on the State based on the employee's representations about the property, sound or not, created no concern of unlimited liability. Likewise, the defendant insurance company in *Sheridan* issued its promise to inspect identifiable, specific elevators to an identifiable, specific landlord. True, the duty imposed on the insurance company in *Sheridan* subjected the insurer to liability to anyone using one of the elevators in the building, rather than, as in *Brown*, to the one potential plaintiff and

88. *Id.* at 17–19.

89. *Meneely*, 5 P.3d at 55 (alterations in original) (quoting *MacPherson's*, 545 P.2d at 17).

90. 100 P.2d 1024 (Wash. 1940).

91. *Id.* at 1029–31.

92. *Id.* at 1027–28.

93. *Id.* at 1031.

94. *Id.*

his associates who hoped to build in the avalanche area. Still, the defendant insurer's liability was limited to injuries caused by less than half a dozen elevators. The small number of product specimens[95] to which defendant's duty extended provided a natural limit on liability. Contrast the insurer's potential exposure with that of a standard developer whose standards fly around the country, often around the globe, offering themselves for use by anyone making a specimen or variation of the type of product to which the standards apply.

Although generalizations across the wide array of products affected by standards are treacherous, the potentially huge number of products that a standard might affect bears on the duty issue for two related reasons as well. In contrast to a standard developer, a certifier who inspects, certifies, endorses, accredits, recommends, or otherwise publicly approves a number of finished, particular products or models of products will appear to have taken more responsibility for the product and will more likely lead builders of those particular products to forego their own efforts and judgment regarding the products' safety. The builders know that the defendant certifier has looked at and approved the specimen of the product at which they are looking. However, when NSPI merely suggests standards for all Type II pools, builders of the pools realize that NSPI experts will never come by to confirm the compliance of their particular pools to NSPI standards, or to confirm whether the many variations the builders adopted for a particular pool have compromised product safety. When suggested standards apply so generally, builders of a particular specimen of the product seem more likely to view the standards merely as helpful guidance rather than as a reason for abandoning their own safety concerns about the particular specimen of the product they are building.[96]

The potentially huge number of products that a standard might

95. The reference to "product specimens" rather than "products" aims to remind the reader that the defendant insurer in *Sheridan* did not promise to inspect all elevators of the type of those in the building in question, but only the specific, physical, individual elevators in that building. Standard developers, in contrast, typically concern themselves with a more general category of product, rather than with a single specimen of the product, and hence the number of specimens to which their duty might extend, and their corresponding liability, could be greater by several orders of magnitude.

96. Because the builders may attach the labels of the standard developer to finished products, which incorrectly suggest to a buyer or user that the standard developer has indeed looked at and approved that specific specimen or type or model, the safety efforts of buyers and users may well be as negatively affected by the labels of the standard developer as by the labels of the product certifier. But the builder or seller, in contrast to the buyer or user, will nevertheless know that the standard developer has not looked at the particular specimen, type, or model of the finished product. Thus the safety efforts of the builder or seller should be more negatively affected by the product certifier than by the standard developer.

affect bears on the duty issue for another reason as well. It suggests that the likely relationship between the standard developer and the injured plaintiff will not be close.[97] Granted, basing "duty" on the closeness of the relationship between the parties invites vague and unverifiable assertions about that relationship that rarely amount to more than conclusions. Moreover, a judicial finding of a "close relationship" may serve merely as a proxy for a finding that no concerns about unlimited liability arise. But if the closeness of the relationship matters in itself, the relationship between NSPI and the plaintiff in *Meneely*, for example, seems less close than the relationship between the defendant and plaintiff in *Brown* or between a product seller and its buyer or user. In one of the NSPI cases in which NSPI prevailed, the court, in addressing the lack of a relationship between NSPI and the plaintiff diver, described the plaintiff "[a]s a faceless member of an unresolved class of persons not marked by any definable limits."[98] Had NSPI inspected the specific pool involved in *Meneely*, it would have more actively participated in the sale and arguably would have developed a closer relationship with any pool user. But an organization that simply promulgates standards for products to be used by any builder or seller bears an undifferentiated relationship to each product user. In this respect, the relationship between the standard developer and the product user resembles the undifferentiated relationship between a police force and a random crime victim who sues the police for negligently protecting him. While other policy concerns arise when government employees are sued, courts unanimously refuse to impose a tort duty on the police unless prior police behavior toward the individual plaintiff sufficiently differentiates the plaintiff from the mass of others who might expect police protection.[99]

These three policy reasons distinguish suits against standard developers from the ever-lengthening line of successful suits against those who have certified or otherwise inspected and approved the very specimen or model of the injurious product.[100] Rightly or

97. One could term the concern about the closeness of the relationship between the standard developer and the injured plaintiff as a concern for sufficient "nexus." One former, but now defunct, requirement for duty—privity—played a similar role. *See* 63A AM. JUR. 2D *Products Liability* § 832 (2010).

98. Howard v. Poseidon Pools, Inc., 506 N.Y.S.2d 523, 526 (Sup. Ct. 1986).

99. *See* Riss v. City of N.Y., 240 N.E.2d 860, 861 (N.Y. 1968) (declining to impose a tort duty on the police to protect individuals from criminals, but observing that "[q]uite distinguishable . . . is the situation where the police authorities undertake responsibilities to particular members of the public"); *cf.* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 201–03 (1989) (holding that state social service agency has no duty as a matter of constitutional law to protect specific children from third parties).

100. Some clarification is needed because occasionally the certifier will approve not the particular specimen of the injurious product but instead the

wrongly, courts have usually imposed a duty on such product certifiers. This line of authority extends back at least to *Hanberry v. Hearst Corp.*, a case in which a tort duty was imposed on *Good Housekeeping Magazine* and a jury verdict for misrepresentation was upheld because the magazine placed its "Consumers' Guaranty Seal" on shoes the plaintiff bought, thereby, according to the court, warranting that the shoes were "safe."[101] More recently, courts have

particular type, model, or sample of that product. However, the difference between standard development and such certification of a specified product (or type, model, or sample of that product) remains salient. Certification involves passing judgment on a specific design, model, or product that is already finished. On the other hand, standard development establishes goals for production (especially true for performance standards) and aims to assist those who are planning to produce or are in the process of producing a product (especially true for design or prescriptive standards). While the builder or seller may decide on its own to attach the standard developer's label to the product, that is often a matter of indifference to the standard developer. In contrast, labeling and listing by the certifier constitute the heart of the certification enterprise. There is also a conceptual difference between standard development and certification. Standards typically describe desired designs, materials, methods of productions, or performance characteristics of products. Standard developers, as it were, resemble legislators who write the "statutes." Certification typically calls for the application of those or other standards to particular products, models, or designs. Certifiers thus resemble courts in that they apply standards to particular cases. *See generally* Charles F. Rechlin, Note, *Liability of Certifiers of Products for Personal Injuries to the User or Consumer*, 56 CORNELL L. REV. 132, 133 n.8 (1970); *Introduction to ANSI*, AM. NAT'L STANDARDS INST., http://www.ansi.org/about_ansi/introduction/introduction.aspx?menuid=1 (last visited Nov. 4, 2010).

101. Hanberry v. Hearst Corp., 81 Cal. Rptr. 519, 521, 523–24 (Ct. App. 1969); *see also* Canipe v. Nat'l Loss Control Serv. Corp., 736 F.2d 1055, 1057, 1061–62 (5th Cir. 1984) (holding that summary judgment in favor of an inspection corporation was inappropriate when that corporation contracted to provide inspection services and the injured plaintiff produced evidence that a negligent inspection had caused his injuries); Toman v. Underwriters Labs., Inc., 707 F.2d 620, 620–21 (1st Cir. 1983) (discussing the liability of Underwriters Laboratories when it certified the particular product injuring the plaintiff); Hempstead v. Gen. Fire Extinguisher Corp., 269 F. Supp. 109, 117–18 (D. Del. 1967) (imposing liability on a testing company that approved a particular model of fire extinguisher that exploded and injured the plaintiff); Martinez v. Perlite Inst., Inc., 120 Cal. Rptr. 120 (Ct. App. 1975) (finding sufficient "minimum contacts" between trade association and the state of California to bring the association within a California court's jurisdiction when association disseminated information about a harmful product to several of the association's members located in California); Michael P. Diepenbrock, Annotation, *Liability of Product Indorser or Certifier for Product-Caused Injury*, 39 A.L.R. 3D 181, § 3 (1971) (collecting cases). Although the usual claim is negligence in certification or testing, negligent misrepresentation is sometimes alleged. *See* RESTATEMENT (SECOND) OF TORTS § 311 cmt. d, illus. 8 (1965); *id.* § 311 cmt. e, illus. 9. Even a claim for breach of express warranty has been advanced. *See* Christopher J. Clark, Comment, *Potential Liability of Non-Manufacturer Certifiers of Quality*, 10 VILL. L. REV. 708 (1965) (discussing liability of certifiers under negligent misrepresentation and express warranty theories); Rechlin, *supra* note 92, at 145–47; Note, *Tort Liability of Independent*

imposed a duty on the International Association of Plumbing Mechanical Officials ("IAPMO") because IAPMO certified that certain piping, which injured plaintiffs, complied with the IAPMO Uniform Piping Code.[102] The courts in these cases typically grounded the duty they imposed on section 324A of the *Restatement (Second)*.[103] Certification certainly resembles standards development in many respects, but the certifier's approval of the particular completed specimen of the injurious product, or at least the completed model of that product, distinguishes standards development for the reasons stated above. That is, the certifier's approval of an existing product specimen may reduce, at least somewhat,[104] the fear of unlimited liability, more likely halts the builder's own safety efforts, and establishes a closer relationship between the certifier and the product user. These three policy concerns blunt the precedential force of the many decisions that impose a duty on product certifiers and justify a court faced with a case against a standard developer in refusing to impose a similar duty.

Having distinguished the cases against certifiers, a court wishing to adopt the approach recommended here must still confront the current law, exemplified by *King* and *Meneely*. Those cases expressly impose a duty of care toward all users of complying products onto private standard developers who do not attempt any certification or approval of the specific injurious product. And questioning the underpinnings of *King* and *Meneely* in no way diminishes their threat to standard developers. There is little

Testing Agencies, 22 RUTGERS L. REV. 299 (1968) (discussing both theories). *But see* Benco Plastics, Inc. v. Westinghouse Elec. Corp., 387 F. Supp. 722, 786 (E.D. Tenn. 1974) (holding that certification was not enough to trigger a tort duty to product users).

102. *See, e.g.*, FNS Mortg. Serv. Corp. v. Pac. Gen. Grp., Inc., 29 Cal. Rptr. 2d 916, 921–24 (Ct. App. 1994).

103. *See id.* at 918; *cf.* Dekens v. Underwriters Labs. Inc., 132 Cal. Rptr. 2d 699, 702–03 (2003) (applying the same rule in the context of occupational asbestos exposure where the defendant had allegedly "undertaken to guarantee [decedent's] safety from illness resulting from his exposure to asbestos").

104. While less open-ended than that of standard developers, the potential liability of certifiers is still substantial. For example, in 1970, the National Commission on Product Safety reported that the seal of Underwriters' Laboratories, Inc. appeared on 800,000 models manufactured by 15,000 companies. NAT'L COMM'N ON PRODUCT SAFETY, FINAL REPORT PRESENTED TO THE PRESIDENT AND CONGRESS 55–57 (1970). Other certifiers include Good Housekeeping Institute, *Parents' Magazine*, Consumer Service Bureau, Consumers' Research, Inc. (publisher of *Consumer Bulletin*), and Consumers Union (publisher of *Consumer Reports* magazine). *Id.* at 66; Rechlin, *supra* note 100, at 144 n.45. Some certifiers, like Good Housekeeping, Inc., accept money in the form of advertising revenue from businesses whose products they certify; others, like Consumer's Union, do not. Rechlin, *supra* note 100, at 144 n.45. Some are more likely to have 501(c)(3) status under the IRS Code than 501 (c)(6) status, the typical status of standards development organizations.

reason to believe that future courts will dismiss *King* and *Meneely* as deviant applications of *Restatement (Second)* section 324A, of *Restatement (Third)* section 43, or of a state's voluntary rescue doctrine.[105] At best, predictability is nil. Indeed, the favorable reaction of the *Restatement (Third)* reporters to *King* suggests that these cases herald an era of increasing liability.[106]

Further support for this prediction comes from the mixed results of suits against a much more quasi-governmental standard developer than the purely private NSPI—the American Association of Blood Banks ("AABB"). The more closely a standard developer is associated with the government—that is, the more quasi-governmental it is—the better it can wrap itself in the government's privilege, and the stronger the case is for according it the same qualified privilege that a government agency suggesting standards would enjoy. Accordingly, a court that refuses to accord a qualified privilege to a quasi-governmental standard developer would, *a fortiori*, refuse to accord such a privilege to a purely private standard developer.

In these highly publicized suits, the plaintiffs received blood transfusions of HIV-contaminated blood. They then sued the AABB, claiming that it was negligent in setting standards for screening blood donors and was thus liable to the plaintiffs for their HIV infections.[107] Unable to point to any affirmative misfeasance by the AABB, the plaintiffs claimed its negligence lay in failing to adopt a standard calling on blood banks to surrogate test blood donors.[108] Surrogate testing would have identified donors who were infected with hepatitis B or with other conditions that put them at high risk of having HIV-infected blood; those so identified would then be barred from donating blood.[109] The plaintiffs were able to show that

105. Cases in which courts have refused to impose a tort duty on standard developers for the policy reasons given here include *Commerce and Industry Insurance Co. v. Grinnell Corp.*, Nos. 97-803, 97-775, 1999 WL 508357, at *4 (E.D. La. July 15, 1999) (holding that the National Fire Protection Association, which promulgates standards for construction companies, has no duty to a building owner) and *Friedman v. F.E. Myers Co.*, 706 F. Supp. 376, 383 (E.D. Pa. 1989) (holding that a standard developer for water pump manufacturers has no duty to homeowners).

106. *See supra* notes 71–74 and accompanying text.

107. *See* Robert Hanley, *Blood Bank Is Held Liable in AIDS Case*, N.Y. TIMES, June 5, 1996, at B2.

108. *See, e.g.*, Snyder v. Am. Ass'n of Blood Banks (*Snyder II*), 676 A.2d 1036, 1038 (N.J. 1996). Some of the cases against AABB advanced other theories of negligence based on its standards development, such as negligence for failing to impose a standard that would call on blood banks to offer directed donations to transfusion patients or negligence for failing to impose a standard that would call on blood banks to undertake direct questioning of donors. *E.g.*, N.N.V. v. Am. Ass'n of Blood Banks, 89 Cal. Rptr. 2d 885, 889, 893 (Ct. App. 2000).

109. The surrogate test for hepatitis B was known as the "core test." The AIDS Task Force of the Center for Disease Control viewed the core test as the

they would not have been infected had the blood banks that were responsible for the blood transfused into them engaged in surrogate testing. For if the blood banks had engaged in surrogate testing, they would have refused to take the blood of the particular high-risk donors whose blood plaintiffs received.

On appeal, the elements of breach, cause-in-fact, and proximate cause were assumed to be resolved in a plaintiff's favor, and the primary issues became whether the court should impose a tort duty on the AABB toward a plaintiff, and if so, whether the court should accord AABB a qualified privilege that would save it from liability as long as it promulgated its standards in good faith.[110] In most of these cases, the courts imposed a duty on the AABB, rejected any claim of qualified privilege, and affirmed the judgments against the AABB.[111]

Unlike the certification or inspection cases, the negligence theory against the AABB—that their standards for blood banks should have called for surrogate testing—raised the specter of unlimited liability once a duty was imposed. AABB faced the prospect of liability to every person throughout the nation and beyond who acquired HIV from being transfused with HIV-contaminated blood supplied by a blood bank that did not surrogate test during the time period that the AABB standard (or lack of

most promising surrogate test, and the suits against the AABB focused on the failure of AABB standards to call for this test. *Snyder II*, 676 A.2d at 1045. Other surrogate tests that AABB standards might have called for were the T-cell ratio test and the absolute-lymphocyte test. *Id.* at 1044.

110. *See Id.* at 1058–62 (Garibaldi, J., dissenting).

111. *See, e.g.*, Douglass v. Alton Ochsner Med. Found., 696 So. 2d 136, 140 (La. Ct. App. 1997) (reversing summary judgment in favor of AABB); *Snyder II*, 676 A.2d at 1055 (affirming a jury verdict against AABB for a plaintiff transfused with HIV-infected blood); Weigand v. Univ. Hosp. of N.Y. Univ. Med. Ctr., 659 N.Y.S.2d 395, 400 (Sup. Ct. 1997) (imposing a duty on the AABB to a plaintiff transfused with HIV-infected blood); *cf.* Doe v. Am. Nat'l Red Cross, 848 F. Supp. 1228, 1234 (S.D. W. Va. 1994) (finding that a reasonable jury could find the American Red Cross dilatory in its standards relating to blood transfusions); United Blood Servs., Div. of Blood Sys., Inc., v. Quintana, 827 P.2d 509, 525 (Colo. 1992) (en banc) (observing that blood-banking standards were insufficient and that blood center's compliance was "not conclusive proof" of reasonable care); Gilmore v. Mem'l Sloan Kettering Cancer Ctr., 607 N.Y.S.2d 546, 550 (Sup. Ct. 1993) (same); Doe v. Univ. Hosp. of the N.Y. Univ. Med. Ctr., 561 N.Y.S.2d 326, 328 (Sup. Ct. 1990) (imposing a duty on a hospital to a plaintiff transfused with HIV-infected blood). *But see* Hoemke v. N.Y. Blood Ctr., 912 F.2d 550, 551 (2d Cir. 1990) (affirming summary judgment for a hospital in a suit by a plaintiff transfused with HIV-infected blood); N.N.V. v. Am. Ass'n of Blood Banks, 89 Cal. Rptr. 2d 885, 889 (Ct. App. 1999) (finding no duty imposed on AABB to a plaintiff transfused with HIV-infected blood); Osborn v. Irwin Mem'l Blood Bank, 7 Cal. Rptr. 2d 101, 104 (Ct. App. 1992) (finding a blood bank not negligent for failing to screen blood donors adequately when the court observed that the blood bank was "doing as much if not more in the areas of testing and screening than any other blood bank in the country").

standard) about surrogate testing operated.[112] That time period itself provided a de facto limit on the number of suits because AABB's negligent failure to call for surrogate testing lasted only from January 1983 until March 1985, when the Food and Drug Administration approved a blood test for AIDS now known as ELISA.[113] Another de facto limit arose from the transmission rate for HIV, which at the time was estimated to be between 1 in 1000 and 1 in 20,000 transfusions.[114] Nevertheless, these suits imposed a tort duty on the AABB to all those affected by a product, service, or activity for doing no more than what every standard developer does: promulgating standards that may influence the supplier of a product, service, or activity and that therefore may affect the product, service, or activity offered. The courts' rulings for the plaintiffs in these cases imposed a duty on the AABB despite the absence of any relation between the AABB and the blood that was injurious to the plaintiffs—other than the fact that the AABB's standards influenced the particular blood bank's decision not to engage in surrogate testing of donors.

In *Snyder II*, the leading decision for the plaintiffs, the New Jersey Supreme Court imposed a duty on the AABB by relying heavily on factors increasingly deemed relevant not to the issue of duty, but to the issue of breach. For instance, the court relied heavily on the obvious foreseeability of injury to blood recipients from the AABB's decision against a standard calling for surrogate testing.[115] At the time of that decision, the AABB knew of the evidence showing that HIV-infected blood could transmit the virus.[116] Indeed, the issue then under discussion at the AABB was what to recommend in light of this knowledge.[117] But the court found that this knowledge of the evidence about how HIV might be transmitted sufficed to render the plaintiff's infection a foreseeable result of the AABB's standard development, and to satisfy fully whatever importance the factor of foreseeability played in determining duty.[118] That the evidence of transmission-related HIV was inconclusive at the time was irrelevant; as the court held, "The

112. The AABB inspected and accredited blood banks, including the specific bank that supplied the blood to each plaintiff, and on that ground could be deemed a certifier or inspector, even though it never approved the particular blood that injured the plaintiffs. *Snyder II*, 676 A.2d at 1048. But the opinions imposing a duty on AABB make clear that its standard development alone triggered a tort duty of care, regardless of any inspection, accreditation, or follow-up. *See id.* at 1048–54; *Weigand*, 659 N.Y.S.2d at 401.

113. ELISA is an acronym for the "enzyme-linked immunosorbent assay" screening test. *See* Kirkendall v. Harbor Ins. Co., 887 F.2d 857, 860 (8th Cir. 1989).

114. *N.N.V.*, 89 Cal. Rptr. 2d at 894.

115. *Snyder II*, 676 A.2d at 1048–49.

116. *Id.* at 1049.

117. *Id.* at 1044–48.

118. *Id.* at 1048–49.

foreseeability, not the conclusiveness, of harm suffices to give rise to a duty of care."[119]

However important a role foreseeability has played in shaping the duty issue as a historical matter, some courts and the *Restatement (Third)* now reject foreseeability as a factor in determining duty.[120] Because foreseeability often determines whether a defendant acted reasonably under the circumstances, it bears on the issue of breach. And yet the issue of breach is reserved for the jury and necessarily involves an inquiry into the specific facts of an individual case.[121] The jury's role is undermined if courts assess foreseeability in determining the existence of duty as a threshold issue.[122] Reliance by courts on notions of foreseeability may also obscure the factors that actually guide—or, in the *Restatement's* view, should guide—courts in imposing tort duties. Rejecting foreseeability as a factor then better respects the jury's role and compels courts to articulate more clearly the policy factors that support their duty or no-duty determinations.

The New Jersey Supreme Court also based its imposition of a duty on the unquestioned severity of becoming infected with HIV. As with foreseeability, courts have historically found the severity of the injury risked by a defendant's negligence to be a factor in assessing duty.[123] But again, the *Restatement (Third)* conspicuously omits the severity of injury as an appropriate factor in deciding duty and strongly suggests that the severity of injury is better treated as

119. *Id.* at 1049. Insofar as "foreseeability" is a factor, the court was surely correct in finding that the AABB could foresee plaintiff's harm in deciding not to recommend surrogate testing.

120. *E.g.*, Gipson v. Kasey, 150 P.3d 228, 231 (Ariz. 2007) (en banc); *see also* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL HARM § 7 cmt. j (Proposed Final Draft No. 1, 2005) (rejecting foreseeability as a factor in determining duty). *See generally* W. Jonathan Cardi, *Purging Foreseeability: The New Version of Duty and Judicial Power in the Proposed* Restatement (Third) of Torts, 58 VAND. L. REV. 739 (2005).

121. *See, e.g.*, Derdiarian v. Felix Contracting Corp., 414 N.E.2d 666, 670 (N.Y. 1980) ("Because questions concerning what is foreseeable and what is normal may be the subject of varying inferences, as is the question of negligence itself, these issues generally are for the fact finder to resolve."). Foreseeability, of course, also plays a role in determining proximate or legal cause. *See* Cardi, *supra* note 120, at 758 (noting that in the past foreseeability has made a dual appearance on duty and proximate cause). Because the standard developer certainly foresees that a builder or equipment-supplier might comply with its standard, and because the standard developer has typically considered the risk that materialized in the plaintiff's injury when it developed the standard, the plaintiff should have no difficulty showing foreseeability.

122. W. Jonathan Cardi & Michael D. Green, *Duty Wars*, 81 S. CAL. L. REV. 671, 729 (2008).

123. *See, e.g.*, Harrison v. United States, 284 F.3d 293, 299 (1st Cir. 2002) (applying the "severity of the risk" analysis to the context of a physician's duty to disclose treatment risks).

part of the breach issue.[124] Doing so effects no change in the law pertaining to breach, as the Learned Hand calculus for breach has long incorporated the severity of the injury as the *L* in its calculus. That well-known calculus calls for finding breach when *B* (the burden of precautions) is less than *P* (the chance of injury) multiplied by *L* (the severity of the injury).[125]

The final factor the New Jersey Supreme Court emphasized in imposing a duty was the great influence of AABB standards on the behavior of the member blood banks.[126] About that influence, and the influence of standard developers generally, there is again no doubt.[127] This Article concedes that plaintiffs can invariably show the product, service, or activity in question was influenced by a defendant standard developer's standards. What the New Jersey court failed to appreciate was that such influence is entirely appropriate, considering AABB's ex ante perspective, its experience, information, expertise, collective judgment, and reputation for possessing these attributes among others in the industry. Indeed, the wealth of know-how that lies behind the standard developer's judgment is the very reason the government often incorporates a developer's standards wholesale into regulations. Yes, standards development organizations sometimes develop standards in an environment of high stakes. The question that remains is whether they should be exposed to tort liability when the fact-finder deems them guilty of ordinary negligence in doing so.

124. The *Restatement (Third)* asserts that the duty issue should turn on such policy factors—applicable to categories of actors or patterns of conduct—as the overall social impact of finding a duty, social norms about responsibility, relational limitations, proof problems (especially in ascertaining cause-in-fact), concerns of institutional competence, the need to defer to the discretion of other branches of government, and concerns with unduly open-ended and insufficiently limited liability. *See generally* RESTATEMENT (THIRD) OF TORTS: LIAB. FOR PHYSICAL AND EMOTIONAL HARM § 7 cmts. a–o (2010).

125. United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947).

126. Snyder v. Am. Ass'n of Blood Banks (*Snyder II*), 676 A.2d 1036, 1050 (N.J. 1996).

127. An inevitable result of standards being influential is that those who do not comply with the standard suffer some stigma, loss of trust, or other competitive disadvantage. For many decades U.S. courts in antitrust cases made much of the competitive disadvantage that noncompliers suffer. *See, e.g.*, Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 658–60 (1961) (holding that a standard developer, gas utility companies, and rival burner manufacturers could potentially be liable for treble damages for adopting a standard that put the plaintiff's burner at a significant competitive disadvantage). Recent antitrust cases, as well as the Standards Development Organization Advancement Act of 2004, focus more on the harm to output and to consumers generally than on the disadvantage to noncompliers. *See* Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 293–95 (1985); Robert Heidt, *Industry Self-Regulation and the Useless Concept: "Group Boycott*,*"* 39 VAND. L. REV. 1507 (1986) (reviewing the pre-1985 law).

II. THE SOCIAL VALUE OF STANDARDS

Compared to the courts of other common-law countries, U.S. courts view private standard developers inhospitably.[128] In general, U.S. courts react more unfavorably to private organizations engaged in what is loosely called industry self-regulation, using the term "regulation" not in the narrow sense of regulation backed by the force of law, but in the broader sense, which includes suggestions and other informal attempts to influence the behavior of the organization's members. When the standards of those organizations directly or indirectly disadvantage or injure others, U.S. courts are far more likely than English courts, for example, to come to the aid of the disadvantaged and impose liability on the organization, whether on the ground of tort or antitrust.[129] The English courts, in contrast, label such purely private organizations "domestic tribunals" or "semi-public tribunals" and respond to them with deference, tolerance, and gratitude for the important and necessary work these organizations perform.[130] In general, the English courts

128. *See* Robert Heidt, *Populist and Economic v. Feudal: Approaches to Industry Self-Regulation in the United States and England*, 34 MCGILL L.J. 39, 48–57 (1989) (comparing the American and English approaches). A number of Supreme Court opinions illustrate the tendency of U.S. courts to look on standard development with a jaundiced eye. *See, e.g.*, Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500 (1988) ("Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products. Accordingly, private standard-setting associations have traditionally been objects of antitrust scrutiny."); Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 571 (1982) (observing that a standards development organization "can be rife with opportunities for anticompetitive activity" and that its agents had "an opportunity to harm . . . competitors through manipulation of [association] codes"); Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 464 (1941) (expressing concern that all industry self-regulation intrudes on the domain of courts).

129. One tort-related concern is that the standard, by being set unduly low, will help complying industry members defend against negligence and product liability suits. Compliance with standards, like compliance with industry custom, may provide evidence helpful to defendants in such suits, but it is never a defense. New Eng. Coal & Coke Co. v. N. Barge Corp. (*The TJ Hooper*), 60 F.2d 737, 740 (2d Cir. 1932) (allowing the jury to find negligent a defendant who complied with industry custom). U.S. courts thus deem industry standards unworthy to set the test for negligence and yet important enough, when they create an unreasonable risk of harm, to warrant liability.

In its decade-long investigation of standard development, the FTC voiced a concern that courts have yet to appreciate—the potential delay in updating standards with a resulting freeze in innovation. *See* FTC, STANDARDS AND CERTIFICATION, PROPOSED RULE AND STAFF REPORT 54–63 (1978). Subjecting standard developers to tort liability should a fact-finder deem its standards negligent is likely to increase this delay.

130. *E.g.*, Nagle v. Feilden, [1966] 2 Q.B. 633 at 645; Russell v. Duke of Norfolk, [1949] 1 All E.R. 109 (Civ) 118. The rationale for the more hostile treatment of standard development at the hands of U.S. courts remains uncertain. Among the reasons suggested is the long tradition of judicial deference to guild rule in England compared to the judicial determination to

distinguish less sharply, and much less passionately, between mandatory regulation duly authorized by statute and performed by a public body, on the one hand, and regulation by a purely private organization acting merely under industry custom, on the other.[131] Of course, if U.S. courts accorded private standard developers the same treatment they accord government regulators, private standard developers would enjoy an unqualified privilege against tort suits by persons injured by complying products or activities. In refusing to review a private sporting association's adverse action against the plaintiff member, an English court's language reveals the deference shown such private organizations there:

> There are many bodies which, though not established or operating under the authority of statute, exercise control, often on a national scale, over many activities which are important to many people, both as providing a means of livelihood and for other reasons.
>
> . . . .
>
> I think that the courts must be slow to allow any implied obligation to be fair to be used as a means of bringing before the courts for review honest decisions of bodies exercising jurisdiction over . . . activities which those bodies are far better fitted to judge than the courts. . . . Bodies such as the [defendant] which promote a public interest by seeking to maintain high standards . . . ought not be hampered in their work without good cause.[132]

Congress too tends to appreciate standard developers more than do the U.S. courts. Congress most recently recognized the social value of standard development when it passed the Standards Development Organization Advancement Act of 2004 ("SDOAA").[133]

---

suppress vigilante rule—especially as represented by the Ku Klux Klan—in the United States. *See* Heidt, *supra* note 128, at 48–54.

131. Although this usually means less liability for a private organization in England, occasionally this equivalent treatment means more liability. For example, a private trade association whose treatment of a plaintiff member arguably offends the plaintiff's "right to work" is as likely as a public agency to be told by an English court that it must provide the plaintiff a hearing. Regina v. Gaming Bd. for Gr. Brit., [1970] 2 Q.B. 417 at 429–32 (observing that an association action that threatens the "right to work" triggers a right to a fair hearing); Faramus v. Film Artistes' Ass'n, [1963] 2 Q.B. 527 at 540, 546–48.

132. McInnes v. Onslow-Fane, [1978] 1 W.L.R. 1520 (Ch) 1527, 1533.

133. 15 U.S.C. §§ 4301–4306 (2006). For the legislative history, see H.R. REP. NO. 108-125 (2003), *reprinted in* 2004 U.S.C.C.A.N. 609, 609–18. Other statutory provisions acknowledging the value of private standard development include 15 U.S.C. §§ 271–272 (2006), which established the National Institute of Standards and Technology ("NIST") and charged the NIST with creating an "implementation plan" for the coordination of public and private standards; and 15 U.S.C. § 278g-3 (2006), which established a computer standards program to be implemented by the NIST. The National Cooperative Production

Although the Act addressed the standard developer's antitrust rather than tort exposure, the legislative history demonstrates that the Act sought to "encourage the development and promulgation of voluntary consensus standards by providing relief under the antitrust laws to standards development organizations with respect to conduct engaged in for the purpose of developing voluntary consensus standards . . . ."[134] The Report of the House Judiciary Committee provided the relevant background:

> Standard development organizations play a pivotal role in promoting free market competition.
>
> . . . .
>
> Beginning in the 1990's, Congress concluded that government could no longer keep pace with rapid technological and market change, and that government-directed standard-setting activity was often cumbersome, duplicative, and inefficient. To address this concern, Congress passed the National Technology Transfer and Advancement Act of 1995 ("NTTAA"). NTTAA's express goal was to . . . assist in the development of voluntary consensus standards and to adopt such standards in favor of often outmoded government standards whenever possible. While the NTTAA succeeded by almost every measure, [standard development organizations] continue to be vulnerable to litigation even after its passage.[135]

When the possible tort liability of standard developers has been

Amendments of 1993, Pub. L. No. 103-42, 107 Stat.117, amended the National Cooperative Research Act of 1984, Pub. L. No. 98-462, 98 Stat. 1815, by renaming it the National Cooperative Research and Production Act of 1993 ("NCRPA") and extending its provisions to cover joint product ventures, including informal standard developers or consortia. The SDOAA extended the provisions of the NCRPA to formal standard developers. *See* 15 U.S.C. §§ 4301–4302.

134. H.R. REP. NO. 108-125, at 1 (2003). The SDOAA required that standards development organizations be accorded rule-of-reason analysis under the antitrust laws, rather than the more severe per se analysis. 15 U.S.C. § 4302. It also eliminated the threat of treble damages for specified standard development activity and provided for the recovery of attorney fees by defendant standard developers when they prevail. 15 U.S.C. §§ 4303–4304. The Act also encouraged disclosure and discussion of intellectual property rights and licensing terms during standard development proceedings. *See* H.R. REP. NO. 108-125, pt. 2 (2003). Despite the SDOAA, the mere possibility of an antitrust challenge, even under the rule of reason, inhibits many standard developers from allowing pre-adoption discussions among rivals about license terms or royalty rates. Yet these discussions would serve the salutary purpose of avoiding later strategic claims of infringement from patentees whose patents are incorporated in the standards. *See generally* Patrick D. Curran, Comment, *Standard-Setting Organizations: Patents, Price Fixing, and Per Se Legality*, 70 U. CHI. L. REV. 983 (2003).

135. H.R. REP. NO. 108-125, at 3–4 (citations omitted). The NTTAA was passed as Pub. L. No. 104-113, 110 Stat. 775 (1995).

brought to Congress's attention, Congress has invariably opted against liability and provided the standard developers some privilege. The treatment recently accorded the facility-security standards of ASIS International, a standard developer for security professionals, offers an example. In the SAFETY Act of 2002,[136] Congress authorized the Department of Homeland Security to "designate" the standards, including those of ASIS International.[137] That designation:

> (2) . . . limits ASIS' liability for acts arising out of the use of the [ASIS] standards and guidelines in connection with an act of terrorism, and
>
> (3) . . . precludes claims of third party damages against organizations using the standards and guidelines as a means to prevent or limit the scope of terrorist acts.[138]

Congress has also acknowledged the elaborate procedures through which private standard developers normally produce their standards. The model set of procedures was first adopted by the private ANSI,[139] and is referred to either as the ANSI Canvass Method or as the ANSI Research Protocol.[140] The goal of these

136. Support Anti-Terrorism by Fostering Effective Technology Act of 2002, 6 U.S.C. §§ 441–444 (2006).

137. *See id.* §§ 441(b), 443.

138. ASIS INT'L, FACILITIES PHYSICAL SECURITY MEASURES ASIS GDL FPSM-2009 GUIDELINE, at i (2009), *available at* http://www.peaceatwork.org/resources/ASIS_Facility_Security_Guidelines_2009.pdf.

139. The ANSI is the central, private body responsible for the identification of a single, consistent set of voluntary standards in the United States. It aims to identify the need for standards and to then provide a set of standards that are without conflict or unnecessary duplication in their requirements. ANSI is the U.S. member of nontreaty international standards organizations such as the International Organization for Standardization. As such, ANSI coordinates the activities involved in U.S. participation in these groups. *See Introduction to ANSI*, AM. NAT'L STANDARDS INST., http://ansi.org/about_ansi/introduction/introduction.aspx?menuid=1 (last visited Nov. 4, 2010). Most, but not all, standards development organizations support ANSI and seek ANSI approval of their standards. Among those seeking and obtaining ANSI approval was the NSPI. In following the ANSI Canvass Method to develop the standards condemned in *King* and *Meneely*, the NSPI called for public review and comment on successive drafts by a wide variety of interest groups including the American Red Cross, the National Safety Council, the American Public Health Association, the U.S. Consumer Product Safety Commission, plaintiffs' lawyers, and experts active in swimming pool litigation. *See Standards News: APSP Standards Consensus Committee Convened*, ASS'N OF POOL & SPA PROF'LS, http://www.apsp.org/Public/GovernmentRelations/Technical-Standards/index.cfm (last visited Nov. 4, 2010) (noting that the APSP has "reaccredited its procedures with American National Standards Institute").

140. *See* AM. NAT'L STANDARDS INST., ANSI PROCEDURES FOR THE DEVELOPMENT AND COORDINATION OF AMERICAN NATIONAL STANDARDS, at iv, 1 (2001), *available at* http://www.aiim.org/documents/standards/ansprolive401.pdf; *see also* AM. NAT'L STANDARDS INST., ANSI ESSENTIAL

procedures is to assure that the process of developing standards adheres to principles of openness, voluntariness, balance, cooperation, transparency, and lack of dominance.[141] The goal of "lack of dominance," for example, is described as follows: "The standards development process shall not be dominated by any single interest category, individual or organization. Dominance means a position or exercise of dominant authority, leadership, or influence by reason of superior leverage, strength, or representation to the exclusion of fair and equitable consideration of other viewpoints."[142]

In the 2004 SDOAA, Congress required that in order to enjoy the protections of the Act, standard developers must follow procedures that closely track the ANSI Canvass Method.[143] These elaborate procedures contradict the populist image of industry leaders manipulating the standard developer into suggesting standards that will entrench the leaders at the expense of more efficient innovators and of the public.

The ANSI procedures call for eliciting the views of all interested parties before any standard is proposed, forbid any single interest group from constituting a majority of any body dealing with standards, require wide distribution of a proposed standard followed by a lengthy period for public comment, insist that a record be made of any objections, and further insist that a single such objection automatically reach the eyes of the ANSI Board of Standards Review.[144] All standards development organizations who wish their standards to be acknowledged as ANSI standards must follow these procedures.[145] To be sure, saying the standards are arrived at by "consensus" may mislead. Consensus does not mean that everyone agrees on the standard. It merely means that the standard was agreed upon by something more than a simple majority of the voting

REQUIREMENTS: DUE PROCESS REQUIREMENTS FOR AMERICAN NATIONAL STANDARDS (2010) [hereinafter ANSI ESSENTIAL REQUIREMENTS], *available at* http://publicaa.ansi.org/sites/apdl/Documents/Standards%20Activities/American%20National%20Standards/Procedures,%20Guides,%20and%20Forms/2010%20ANSI%20Essential%20Requirements%20and%20Related/2010%20ANSI%20Essential%20Requirements.pdf (outlining various ANSI procedures).

141. *See* ANSI ESSENTIAL REQUIREMENTS, *supra* note 140, paras. 1.0–.10.

142. *Id.* at para. 1.2.

143. *See* 15 U.S.C. § 4305(a)(2), (b), (c) (2006). Enforcement of these procedural requirements was assigned to the Office of Management and Budget ("OMB"). *See* OMB Circular A-119: Federal Participation in the Development and Use of Voluntary Consensus Standards and in Conformity Assessment Activities, 63 Fed. Reg. 8546, 8546 (Feb. 19, 1998). On its own accord, the OMB has shown the executive branch's appreciation of private standard development by directing agencies to adopt private standards into law "whenever practicable and appropriate," in order to "eliminate[] the costs to the Government of developing its own standards." Revision of OMB Circular No. A-119, Notice of Implementation, 58 Fed. Reg. 57,643, 57,644–45 (Oct. 26, 1993).

144. AM. NAT'L STANDARDS INST., *supra* note 1, at paras. 1.2, 1.2.7, 1.3.1.

145. *Id.* at para. 1.1

group, whose members were selected by the standard developer itself. Moreover, while outside entities are encouraged to comment on proposed standards, they are only allowed to vote if the standard developer appoints them to the voting group.[146]

Of all the types of industry self-regulation, standard development may provide the greatest social value. Standards supply the technical foundation for transactions involving complex goods, services, and activities. Standards facilitate communication between sellers and buyers; transfer technology; achieve efficiencies in design, production, and inventory; and promote interchangeability of products and components. Standards usually represent the distillation of a large body of technical facts as well as a collective judgment about the pertinent goods, services, and activities. They tell what is important about them, how they must be produced or carried on, how to test them, and how to evaluate the test results. The particular utility of a standard arises from providing this complex information in a form useful to those who are not experts on the goods, services, or activities.[147]

To illustrate the information efficiencies of standards, a buyer who is not informed about a product's safety or performance characteristics, and who cannot evaluate them by casual inspection, may be helped to make a satisfactory choice by referring to a product standard. Consumers buy motor oil simply by asking for their "standard" grade. A manufacturer using standards could produce a quality product without being an expert regarding the underlying chemical, metallurgical, or other properties of the materials used. This is possible because the technology or activity in question has already been evaluated by persons who participated in development of the standard. The standard codifies their judgments as to "acceptable" attributes of the good, service, or activity. Builders, buyers, and others who use the standard to evaluate product acceptability are able to adopt these judgments without repeating the evaluation process. Standards are especially valuable as the level of technology rises and government entities become less able to keep up with industry change: "For a mass society in an era of accelerating scientific and technical change, standards are the stabilizing, the protective factor. Without standards there would be technological chaos; without standards the user would be unprotected."[148]

146. *See id.* at Annex A, paras. A.5.3–.4.

147. Leaving each individual business to devise standards on its own would not serve consumers. With unpooled resources, the individual business would often be unable to devote the resources necessary to investigate health and safety issues. *See* Clamp-All Corp. v. Cast Iron Soil Pipe Inst., 851 F.2d 478, 487 (1st Cir. 1988).

148. LAMB & SHIELDS, *supra* note 7, § 5.1, at 75 (quoting John F. Kincaid, former Assistant Sec'y of Commerce for Sci. & Tech., Address Before the National Electrical Manufactures Association (Nov. 14, 1967)).

As the social value of information flow within an industry is generally better appreciated, the social value of standards as facilitators of that information flow should become better appreciated as well.[149] Michael Porter, in *The Competitive Advantage of Nations*, suggests how standards may contribute to innovation. He emphasizes the importance of "industry clusters" in which groups of domestic rivals are integral to the rapid interfirm diffusion of product and process innovations.[150] In discussing Porter's work, Professor David Teece identifies professional and trade associations as key facilitators of this information flow partly because of their provision of complementary standards:

> [These] standards are essential if products and their complements are to be used in a system. Computers need software, compact disc players need compact discs, televisions need programs, and bolts need nuts. Compatibility standards define the format for the interface between the core and complementary goods, so that, for example, compact disc players from any manufacturer may use compact discs from any music company.[151]

Teece proceeds to identify a closely related advantage of standards:

> The advantage of a standard is that the greater the installed base of the core product, the more complementary goods are likely to be produced by independent vendors, in turn increasing demand for the core good. In the compact disc example, the more households that have disc players, the more titles record companies are likely to publish on compact disc. The same mechanism applies when the complement is a service, such as a maintenance network for aircraft, or when the complement is other users of the same product, as with a telephone network.
>
> . . . .
>
> In each case the demand for the core product increases the larger the base of products using the same standard. The standard increases the total market for the product because it enables network externalities to be enjoyed.
>
> . . . .

149. *See* MICHAEL E. PORTER, THE COMPETITIVE ADVANTAGE OF NATIONS 143–44 (1990). *See generally* Teece, *supra* note 8.

150. PORTER, *supra* note 149, at 152, 283, 665. The information exchange need not dull competition. As Porter writes, "[when] the exchange and flow of information about needs, techniques, and technology among buyers, suppliers, and related industries . . . occurs *at the same time that active rivalry is maintained in each separate industry*, the conditions for [national] competitive advantage are the most fertile." *Id.* at 152.

151. Teece, *supra* note 8, at 473–74.

> The advantages to society associated with the widespread adoption of common standards can be very large, as network externalities are often considerable.[152]

Establishing common standards requires a great deal of communication and coordination.[153] Private standards development organizations serve as forums for providers and users to educate each other and to discuss and plan the creation of systems of compatible components. The standards that emerge can also serve as a focal point for designers who must choose among many technical solutions when embedding a standard in a component design.[154]

---

152. *Id.* at 474–75.

153. While suggesting standards provides more benefits than merely serving as a clearinghouse of information, the value of rivals sharing information about their products or services should not be ignored. For a discussion of the benefits of sharing information, see generally John Han, Comment, *Antitrust and Sharing Information About Product Quality*, 73 U. CHI. L. REV. 995 (2006). The author of that article contends that such sharing may minimize over- and under-investment and better tune operations to supply and demand than might otherwise be the case. The author offers this example:

> Suppose a firm has the task of estimating some parameter of great importance, such as future demand [or] the weather . . . . The statistic of interest is quite uncertain. Each firm in the industry has some separate foundation for estimating its value. By sharing such imperfect knowledge, firms in an industry are likely to increase the accuracy of their judgments. . . . With better estimates of uncertain common values, operations and investments can be scheduled more confidently and efficiently, thereby lowering long-term costs.

Id. at 1009–10 (quoting Teece, *supra* note 8, at 479).

154. The effect of standards development organizations on output is of course an antitrust concern, not a tort concern. But that effect is ambiguous even when actual standardization occurs. Teece, *supra* note 8, at 479. After all, product standardization facilitates achieving economies of scale in production. Whether standardization increases or decreases output depends on whether competition is primarily quality-based to begin with. That is, whether standardization on balance increases output depends on a trade-off between economies of scale in production (or the cost of producing design variants) and the level of market demand for improvements (or the benefit of producing design variants). As Professor Kevin Lancaster has stated:

> If there are no economies of scale associated with individual product variants . . . then it is optimal to custom produce to everyone's chosen specification. If there is no gain from variety and there are scale economies, then it is clearly optimal to produce only a single variant if those economies are unlimited, or only such variety as uses scale economies to the limit . . . . Most cases involve a balance of some variety against some scale economies . . . .

Kevin Lancaster, *The Economics of Product Variety: A Survey*, 9 MARKETING SCI. 189, 192 (2000); *see also* E.H. Chamberlin, *Product Heterogeneity and Public Policy*, AM. ECON. REV., May 1950, at 85, 89 ("[U]nless it can be shown that the loss of satisfaction from a more standardized product . . . is less than the gain through producing more units, there is no "waste" at all, even though

Because a standard can provide a benchmark, standards also facilitate and support the benefits of benchmarking. Benchmarking is the process in which a company learns and then mimics the techniques of its superior-performing peers to enhance its own efficiency.[155] Benchmarking galvanizes companies to compete once they recognize what rivals are doing, how far behind they are, and what they can do to improve. It helps underperforming peers to catch up. And realizing that the promulgation of the standard will now tend to close the gap with its inferior rivals, the superior firm gains more incentive to refine its processes further, whether in management, manufacturing, research, or development. This will affect the next round of standard development and then the process begins again.

The social value of developing standards far exceeds the social value of merely providing a forum for discussion for experts in a standard developer's field.[156] The need to decide on a standard

every firm is producing to the left of its minimum point.").

Markets for physical products with dominant designs by definition possess high-scale economies and low market demand for improvements. With such products, standardization is typically procompetitive. Taking advantage of scale economies increases output by lowering the cost of production. At the same time, standardization does not reduce output because the market does not demand much "improvement." Standardization in these markets increases price competition without reducing quality competition. *See* JEAN TIROLE, THE THEORY OF INDUSTRIAL ORGANIZATION 286 (1988) (stating that the optimal degree of product design variety is low for markets in which there are economies of scale in production and a dominant design); *see also* Tag Mfrs. Inst. v. FTC, 174 F.2d 452, 463, 465 (1st Cir. 1949) (finding procompetitive the standardization of tag manufacturing). Standardization can also make previously differentiated products more comparable, thereby reducing buyer search costs.

In addition, standardization can take advantage of a dominant design that accounts for most of a market's demand and of positive externalities between firms. Information advertising and public research conducted by one firm benefits other firms that produce according to the same standard. But advertising has an ambiguous effect on competition. It can either increase demand elasticity by showing similarities between products or decrease demand elasticity by particularizing buyer preferences. *See* E. Thomas Sullivan, *On Nonprice Competition: An Economic and Marketing Analysis*, 45 U. PITT L. REV. 771, 798–800 (1984).

155. *See* Teece, *supra* note 8, at 477.

156. As the National Marrow Donor Program explained in its amicus brief opposing the imposition of tort liability on the American Association of Blood Banks:

> A standard setting body, such as the AABB, provides an arena in which researchers can and do come together to focus on the state of scientific knowledge. The standard setting process thus imposes a certain discipline and coordination to what would otherwise be independent research going on in many places at the same time. Without this arena or this discipline, there are only scholarly articles going back and forth in various journals that are then individually analyzed and responded to months later by other researchers.

forces the members of the standards development organization, each of whom may have relevant information about some aspect of the matter at hand, to focus on the implications of their learning instead of merely sharing their learning.[157] The standard development process coordinates the learning of the members and pushes that learning to resolution, if only in the form of suggestions. In a sense, the standard development process provides for the industry what the *Restatement* process provides for the common law. It represents an attempt to summarize, translate, and resolve different points of information that develop over time, like different case outcomes, into the directions and generalizations that will be most helpful to experts and nonexperts alike. Subjecting trade associations to potential liability when they go beyond information-sharing and attempt to develop a standard would deprive members, consumers, and the community-at-large of a valuable resource.

Part of the social value of standard development lies in the standards development organization's ex ante perspective. That is, the standard developer, much like the product designer in selecting between alternative designs, is in a position to take into account all of the reasonably foreseeable pros and cons of alternative standards.[158] Compared to other decision makers, the standard developer sits on higher ground and enjoys better vision. In regard to risks, for example, the standard developer, at least when free from the threat of liability, can accord appropriate weight to the entire panoply of risks presented by the product or activity, measuring those risks by their relative probability and severity. Unlike a judge or jury, the standard developer is not tempted to put undue weight on the risks that materialized in the injury to the particular plaintiff before the court.[159] Assuming the standard developer possesses at least as much information as a subsequent court, the standards emerging from the standards development process are hence more likely to reflect an accurate assessment of all the risks, and an informed trade-off between them, than would any standards suggested by a decision maker deprived of the benefits of an ex ante perspective. Insofar as the threat of liability leads the standard developer to place undue weight on some risks, namely, the risks most likely to result in liability, that threat may destroy society's best chance of obtaining its most informed assessment of

Brief of Amicus Curiae National Marrow Donor Program in Support of Respondent at 8, N.N.V. v. Am. Ass'n of Blood Banks, 89 Cal. Rptr. 2d 885 (Ct. App. 1999) (No. D026690), 1998 WL 34113746, at *8.

157. *See id.*

158. *See* Indian Head, Inc. v. Allied Tube & Conduit Corp., 817 F.2d 938, 946–47 (2d Cir. 1987) (noting that courts have "little expertise" in the standard developer's trade and it is thus infeasible to substantively review every developer decision (citing Kletschka v. Driver, 411 F.2d 436, 443 (2d Cir. 1969))).

159. *See, e.g.*, Meneely v. S.R. Smith, Inc., 5 P.3d 49 (Wash. Ct. App. 2000).

the costs and benefits of alternative standards.[160]

Compare the standard developer's ex ante perspective in developing a standard with the ex post perspective of a jury that is asked whether the suggestion of that standard constitutes negligence. Calling the jury's perspective "ex post" means the jury knows what has happened—that is, it knows the plaintiff has been injured and it knows the role the product, service, or activity that complied with the standard played in that injury. That perspective subjects the jury to what one judge called the "hydraulic force" of the hindsight bias.[161] For instance, the jury knows that only one of the several risks the standard developer took into account has materialized in the gruesome injury to the plaintiff before them. Does such knowledge affect the jury's evaluation of the magnitude and severity of that risk compared to that of the risks that did not materialize? Of course, the members of the jury are told that their knowledge of that risk materializing, like their knowledge of what happened generally, should not affect their evaluation of the standard developer's judgment. They are told to adopt the ex ante perspective and impartially assess the magnitude and severity of all risks. But an ample body of literature establishes that most people succumb to the hindsight bias. Knowledge of the outcome significantly increases the jury's perception of the foreseeability and the probability of that outcome, regardless of how carefully they are instructed to ignore that knowledge.[162] In cases against standard developers, as in cases against product designers, this bias likely manifests in jurors overestimating the risk that materialized in plaintiff's injury compared to other, equal risks. The jurors then tend to condemn as negligent the standard developer's more accurate estimate of that risk, an estimate that is implicit in its standard.

While juries retain a hallowed place in tort law, even the United States Supreme Court has recently acknowledged that juries, as a practical matter and however instructed to the contrary, do not conduct the careful cost-benefit calculus called for by the risk-utility test for design defect claims and by the Learned Hand test for

160. For discussion of the extent to which tort liability distorts standard development, see *infra* Part IV and text accompanying notes 196–99.

161. Carroll v. Otis Elevator Co., 896 F.2d 210, 215 (7th Cir. 1990) (Easterbrook, J., concurring).

162. For further elaboration on this point, see Baruch Fischhoff's experiments in the 1970s, described in *The Science of Fear*. GARDNER, *supra* note 86, at 298 (2008). In those experiments, potential outcomes given a probability of 33.8% before subjects knew the outcome were given a 57.2% probability by subjects who knew the outcome had in fact materialized. And after events occurred, subjects remembered assigning a higher probability to that event occurring than they actually had assigned to it. When events did not occur, subjects remembered assigning a lower probability to that event occurring than they actually had. *Id.*

negligence. In comparing the assessments of juries to the assessments of state legislatures or regulators, the Court deemed juries' judgments "less deserving" and recognized that the jury is likely to accord the risk that materialized in plaintiff's injury disproportionate weight:

> A state statute, or a regulation adopted by a state agency, could at least be expected to apply cost-benefit analysis similar to that applied by the experts at the FDA: How many more lives will be saved by a device which, along with its greater effectiveness, brings a greater risk of harm? A jury, on the other hand, sees only the cost of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not represented in court.[163]

The Court's candor is as refreshing as its implications are dramatic. For if the Court correctly depicts the jury's perspective when presented with a design defect claim, then the Court has taken the side of the severest critics of asking the jury to second-guess a manufacturer's design decisions.[164] The Court's frank admission that juries do not apply the risk-utility test for design defects or the Learned Hand test for negligence mocks the formal law that supposedly governs and accuses that law of allowing virtually untrammeled scope for jury sympathy. In effect, the Supreme Court is saying that, however well-defined our law may be up to that point, once negligence and design-defect claims reach the jury, lawlessness reigns. Lower courts that are too willing to defer crucial elements to the jury's judgment, therefore, threaten due process norms.[165] Such constitutional issues need not be reached if a court—citing the standard developer's ex ante perspective and the jury's shortcomings—refuses, under the rubric of "no duty," to let the jury condemn as negligent the standard developer's judgment.

The customary practice rule applied in malpractice actions

163. Riegel v. Medtronic, Inc., 552 U.S. 312, 325 (2008) (holding that federal approval of a Class II medical device that had undergone premarket approval by the FDA preempted state tort claims). Professor Francis Bohlen cited a similar shortcoming of the jury nearly a century ago. *See* Francis A. Bohlen, *Mixed Questions of Law and Fact*, 72 U. PA. L. REV. 111, 118 (1924) ("The concept universal among primitive men, that an injury should be paid for by him who causes it . . . still dominates the opinion of the sort of men who form the average jury.").

164. *See, e.g.*, William A. Niskanen, *Keynote Address: Freedom of Contract as Tort Reform*, 1 MICH. L. & POL'Y REV. 1, 7 (1996) (noting that the extension of strict liability to the field of design defects has "require[d] courts and juries to second guess the product designers, the engineers and the marketing people" and that "[s]uch second guessing is difficult or impossible").

165. For a discussion of the scope of jury discretion allowed by the Due Process Clause, see *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 568, 575 (1996) and *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 456–58 (1993).

against professionals may reflect a similar distrust of the jury properly determining the breach issue. This rule requires the plaintiff to produce expert evidence and requires the jury to find that the allegedly negligent medical professional failed to comply with the standard of care of the profession.[166] Hence the jury is not free to deem the defendant negligent merely on finding that in its collective opinion the defendant failed to exercise ordinary care. This customary practice rule stems in part from the same concern voiced throughout this Article—the reluctance to let the jury second-guess the judgment of the more informed.

Less obviously, the customary practice rule also stems in part, some have suggested, from fear that the jury will infer negligence merely from the defendant making what has turned out in hindsight to be a mistake.[167] In many malpractice actions, naturally, it is clear that the defendant in some respect turned out to be mistaken. The customary practice rule comes to the aid of the mistaken, but nonnegligent, defendant by protecting him from the jury as long as he has complied with the standard of care of the profession.[168]

The fear that the jury will infer negligence merely from finding a mistake presents itself just as forcefully in actions against standard developers as in malpractice actions against professionals. In the blood transfusion cases against the AABB, one court based its refusal to impose a duty, in part, on its conviction that the jury would find AABB negligent simply because AABB's failure to call for surrogate testing turned out in hindsight to be tragically mistaken.[169] Yet the current law provides "mistaken" standard developers no counterpart to the protection from a wrongful finding of negligence that is provided to mistaken individual professionals by the customary practice rule.

This Part has emphasized the benefit to society of the information that standards provide. The benefit to society from standard development resembles the benefit to shareholders of the entrepreneurial and managerial efforts of their company's executives. Just as the shareholders' benefit helps to justify the "business judgment" rule, which protects the executive from liability for shareholder losses caused by the executive's ordinary negligence,[170] the benefit to society from standard development argues for the equally hospitable treatment of standard developers. Courts that appreciate the informational benefit of standards and

166. *See* Crowe v. Marchand, 506 F.3d 13, 17–18 (1st Cir. 2007); Allan H. McCoid, *The Care Required of Medical Practitioners*, 12 VAND. L. REV. 549, 605–08 (1959).

167. *See, e.g.*, McCoid, *supra* note 166, at 607–08.

168. *Id.* at 605–07.

169. Doe v. Am. Nat'l Red Cross, 866 F. Supp. 242, 247–48 (D. Md. 1994).

170. *See* Nursing Home Bldg. Corp. v. DeHart, 535 P.2d 137, 143 (Wash. Ct. App. 1975).

that realize how ill-positioned the jury is to evaluate standards should also question the current exposure of standard developers on those grounds alone. But the realization that standards are often opinions, albeit highly informed opinions, about best practices or optimal trade-offs brings into play First Amendment values and strengthens further the case against imposing liability for negligent standard development.

III. LIABILITY'S THREAT TO FIRST AMENDMENT VALUES

Even the most devoted First Amendment fan may question the sincerity of a standard developer who claims that imposing a tort duty of care upon it when its standards cause physical injury would pose a significant threat to First Amendment values. Whether they are suggesting standards for rating the prurient content of motion pictures, suggesting procedures for blood banks, or suggesting practice parameters for brain surgery, standard developers deal primarily with information, not expression, with know-how, not ideas. Their suggestions are more akin to commercial speech[171] and hardly seem to implicate core First Amendment values. If anything, resolving on a suggested standard tends to overrule more than it tends to support deviant voices. And, of course, tort liability neither imposes a prior restraint nor "abridges" First Amendment rights through fines or imprisonment.[172] All the same, those who would dismiss First Amendment concerns out of hand in deciding whether to impose a duty on standard developers should rebuke themselves. Courts have often found that imposing a tort duty on communicators

171. Commercial speech receives less protection than do other types of speech under the First Amendment. *See* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456 (1978) (observing that commercial speech receives "a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values"); Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761, 770 (1976). *But see* Daniel A. Farber, *Commercial Speech and First Amendment Theory*, 74 NW. U. L. REV. 372, 385–86 (1979) (questioning the distinction between commercial and political speech); Alex Kozinski & Stuart Banner, *Who's Afraid of Commercial Speech?*, 76 VA. L. REV. 627, 634–52 (1990) (disputing the grounds for distinguishing commercial speech).

172. Modern cases, however, have expanded the notion of abridgment. *See, e.g.*, Cohen v. Cowles Media Co., 501 U.S. 663, 668 (1991) ("Our cases teach that the application of state rules of law in state courts in a manner alleged to restrict First Amendment freedoms constitutes 'state action' under the Fourteenth Amendment."); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 265, 276–77(1964); *cf.* Bd. of Cnty. Comm'rs v. Umbehr, 518 U.S. 668, 674 (1996) ("'[C]onstitutional violations may arise from the deterrent, or 'chilling,' effect of governmental [efforts] that fall short of a direct prohibition against the exercise of First Amendment rights.'" (quoting Laird v. Tatum, 408 U.S. 1, 11 (1972))). *See generally* Susan Elizabeth Grant Hamilton, Comment, *The First Amendment as a Trade Association Shield from Negligence Liability and Strategies for Plaintiffs Seeking to Penetrate that Shield*, 2 U. PA. J. CONST. L. 466 (2000).

to those physically injured by their communication implicates First Amendment values.[173] Indeed the range of tort cases arising from communications in which First Amendment concerns can be dismissed is surprisingly narrow. Professor Frederick Schauer has attempted to describe that narrow range of cases:

> [W]hen an act of communication is directed at a private transaction and not at social change, when it is delivered face to face or individually rather than to the world at large, when it seeks to convey information and not argument, *and* when it pertains only to topics well beyond the range of topics perceived to involve the values of the First Amendment, then with the convergence of all four of these factors there does not seem to be any reason to convert what would otherwise be a pure tort action into anything else.[174]

If nothing else, Schauer's requirement that the communication be face-to-face excludes cases related to suggesting standards from this narrow range of cases in which First Amendment concerns can be dismissed. Hence the extent to which imposing a tort duty on standard developers sacrifices First Amendment values warrants examination.

Such an examination quickly reveals that, while many standards merely convey information, many others represent a greater-than-majority opinion among experts about the optimum trade-off between several conflicting goals. A standard may announce, for instance, "Here is our opinion about the best way of making a product or performing an activity, net of all trade-offs between conflicting goals." Overall safety is typically one of these goals but hardly the only one. However impressive the body of data about risks and benefits from which the experts draw, these

173. *E.g.*, Ginsburg v. Agora, Inc., 915 F. Supp. 733, 739–40 (D. Md. 1995) (refusing to impose tort liability on defendants for alleged negligent misstatements contained in an investment letter, in part based on First Amendment concerns); Daniel v. Dow Jones & Co., Inc., 520 N.Y.S.2d 334, 339–40 (Civ. Ct. 1987) (holding that the First Amendment, among other factors, counseled against giving a subscriber a negligence action against an online financial service for alleged misstatements); Gutter v. Dow Jones, Inc., 490 N.E.2d 898, 899–900 (Ohio 1986). Even some courts that allow plaintiffs' tort actions to proceed in this context acknowledge that First Amendment values support defendants. Those courts typically balance First Amendment values against the plaintiffs' interests, and only allow the action to continue upon finding that the plaintiffs' interests deserve greater weight. *See, e.g.*, *In re* Factor VIII or IX Concentrate Blood Prods. Litig., 25 F. Supp. 2d 837, 842–43 (N.D. Ill. 1998) (citing *N.Y. Times Co.*, 376 U.S. 254; *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342–43 (1974); and *Curtis Publishing Co. v. Butts*, 388 U.S. 130, 152 (1967) in analyzing a negligence claim implicating First Amendment values).

174. Frederick Schauer, *Mrs. Palsgraf and the First Amendment*, 47 WASH. & LEE L. REV. 161, 169 (1990).

standards turn ultimately on value judgments. These standards then amount to informed and agreed-upon judgment calls. Like other opinions, but unlike, say, the price of cucumbers, these standards are not susceptible to verification.[175] Of course, one can disagree with the standard developer's opinion. One can think his or her standard should have called for more precautions or placed less weight on the cost of precautions. Just so, one can disagree with the laws that emerge from the legislative process, or from the provisions of the *Restatement of Torts*. One may likewise condemn the actual effects of those standards, laws, or provisions. But allowing the jury to characterize the standards, laws, or provisions themselves, or their actual effects, as "negligent" is something else again.

Imposing tort liability whenever a jury deems the standard developer's opinion negligent collides head-on with the protection against tort liability that courts accord to statements of opinion generally. When those stating an opinion are sued for defamation, for example, courts accord the statement of opinion virtually absolute protection, citing both the impairment of First Amendment values if voicing an opinion triggered tort liability and the difficulty of judging an opinion as true or false.[176] Yet judging a suggested standard negligent or non-negligent, at least when the standards are developed through compliance with the normal ANSI procedures,[177] seems equally difficult.[178]

Of all the types of speech, "how to" books most closely resemble the suggestion of standards, at least in their usual goals. When authors are sued for the physical injuries caused by the faulty instructions in such books, courts have refused to impose a tort duty.[179] As one court explained, "Were we tempted to create this

175. If some standards amounted to a guarantee against being injured while using a complying product, perhaps those standards could be judged to be true or false. But virtually no standards purport to give such a guarantee.

176. *See Gertz*, 418 U.S. at 339–40 ("Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact." (footnote omitted)). *But see* Milkovich v. Lorain Journal Co., 497 U.S. 1, 19–21 (1990) (cautioning against "the creation of an artificial dichotomy between 'opinion' and fact," but using verifiability as the touchstone for distinguishing opinions and ideas from facts). While the fact/opinion distinction may break down under scrutiny, it has afforded substantial protection for literary and political criticism.

177. *See supra* notes 140–42 and accompanying text.

178. Admittedly, certifiers likewise offer opinions. Yet doing so has not prevented courts from deeming them negligent and imposing liability.

179. *E.g.*, Alm v. Van Nostrand Reinhold Co., Inc., 480 N.E.2d 1263, 1267 (Ill. App. Ct. 1985) (holding that the publisher of a "how to" book on making tools had no duty of care to prevent injuries caused by a tool that shattered when a reader was following the book's instructions); *cf.* Cardozo v. True, 342 So. 2d 1053, 1057 (Fla. Dist. Ct. App. 1977) (holding that, "absent allegations

duty, the gentle tug of the First Amendment and the values embodied therein would remind us of the social costs."[180]

Perhaps the best illustration of how standard development may benefit from a wide open, fearless, and vigorous discussion was the supposedly negligent standard development by the AABB that led to liability in *Snyder II*. There, the trial court sent to the jury the claim of the plaintiff, a recipient of HIV-infected blood, that the AABB was negligent because its standards for blood banks, adopted in July of 1984, did not call for surrogate testing of blood donors for hepatitis B.[181] And the Supreme Court of New Jersey upheld on appeal the jury's finding of negligence and liability.[182]

Implicitly then, the jury found that the AABB was unduly and unjustifiably influenced at that time by the considerations, introduced through the testimony of the AABB's experts, that argued against surrogate testing. Yet a brief review of those considerations suggests their obvious relevance and the social value of a wide-open discussion that will put such considerations before the standard developers. In deciding whether to adopt a standard that called for surrogate testing of blood donors for hepatitis B, and the consequent exclusion of those donors, the AABB needed to consider the effect of such testing on the supply of blood. Many individuals need blood regularly and others require it as a life-saving measure in emergency situations. Instituting surrogate

that a [recipe] book seller knew that there was reason to warn the public as to contents of a book," the retailer did not impliedly warrant the safety of the recipes in the cookbook); MacKown v. Ill. Publ'g & Printing Co., 6 N.E.2d 526, 529–30 (Ill. App. Ct. 1937) (finding that a newspaper that published a reader-submitted recommendation for reducing dandruff lacked any tort duty to another reader who was injured after trying the remedy, primarily on the basis of lack of privity or direct communication); Walter v. Bauer, 439 N.Y.S.2d 821, 822–23 (Sup. Ct. 1981) (finding no cause of action could exist under a strict liability theory for the publisher of a science book after the plaintiff was injured attempting to conduct an experiment). Publishing a "do-it-yourself" installation guide for above-ground swimming pools resembles closely the behavior of the NSPI in suggesting standards for pools. Yet when sued by an injured pool user, the publisher of the guide prevailed on the ground of "no duty," with the court insisting that a duty of care should only be imposed on the seller of the pool. *See* Spaulding v. Lesco Int'l Corp., 451 N.W.2d 603, 606 (Mich. Ct. App. 1990) (holding that the defendant, the publisher of a manual, "had no duty to warn of the alleged dangers of another's product"), *aff'd sub nom*. Glittenberg v. Doughboy Recreational Indus., 491 N.W.2d 208 (Mich. 1992). Travel guides also resemble standards, and courts have not hesitated to dismiss legal claims based on these guides on the ground of "no duty." *See, e.g.*, Birmingham v. Fodor's Travel Publ'ns, Inc., 833 P.2d 70, 76–77 (Haw. 1992) (holding that the publisher of a travel guide had no duty to warn readers of dangerous conditions on a specific beach when readers relied on the travel guide in deciding to visit the beach).

180. Winter v. G.P. Putnam's Sons, 938 F.2d 1033, 1037 (9th Cir. 1991).

181. Snyder v. Am. Ass'n of Blood Banks (*Snyder II*), 676 A.2d 1036, 1038 (N.J. 1996).

182. *Id.* at 1055.

testing would produce false positives in five percent of the normal population who were not HIV infected and would thereby wrongly exclude a half-million blood donors.[183] Being told they were rejected lest they contaminate the blood supply with HIV might inflict emotional distress, and even panic, on these false positives, at the fear that they had contracted HIV. Members of high-risk groups might be drawn to blood banks under the impression that they could then find out whether they were infected with HIV. Since the test for hepatitis B was not completely reliable—only eighty percent of male homosexuals with HIV would test positive[184]—the net effect might be to contaminate more blood. Moreover, there was only one manufacturer of commercial kits to test for hepatitis B, that test had not yet been approved by the Food and Drug Administration, and it was unclear whether this test, even if approved, could be made available quickly and efficiently.[185] Also arguing against surrogate testing was a study that showed a high rate of hepatitis B in areas with a high proportion of Chinese residents even though the incidence of HIV in this Chinese population was low.[186] Surrogate testing was also costly in part because it would have required notifying people who had tested positive and doing repeated testing. Estimates of the probability of acquiring HIV through blood transfusions at that time ranged from 1 in 1000 to 1 in 20,000.[187] By the late 1990s, evidence had been developed to suggest that surrogate testing would have avoided twenty-one percent of the blood-transmitted HIV cases.[188] But up to the relevant time period, medical studies on the efficacy of surrogate testing had yielded conflicting results. Other organizations studying the evidence such as the Food and Drug Administration, the American Red Cross, and the National Institutes of Health and the Public Health Service adopted the same position as the AABB in not recommending the surrogate testing of blood donors until December 1984.[189] Rather, all these organizations, from December 1982—when evidence first arose that HIV could be transmitted through the transfusion of blood—through March 1985—when the ELISA test for HIV became available—called for further study, and instituted measures to protect patients from AIDS, including recommendations about AIDS education, self-deferral, directed donations, and screening through medical history.[190] As the *Snyder II* dissent noted, and the majority

183. N.N.V. v. Am. Ass'n of Blood Banks, 89 Cal. Rptr. 2d 885, 890–891 (Ct. App. 1999).

184. *Snyder II*, 676 A.2d at 1045; *see also* Todd, *supra* note 44, at 155.

185. *N.N.V.*, 89 Cal. Rptr. 2d at 890.

186. *Id.* at 892.

187. *Id.* at 894.

188. *Id.*

189. *See, e.g.*, INST. OF MED., HIV AND THE BLOOD SUPPLY 77–79 (1995) (describing the development of a screening process by the FDA).

190. Snyder v. Am. Ass'n of Blood Banks (*Snyder II*), 676 A.2d 1036, 1045,

could hardly dispute, the AABB's decision to adopt educational efforts and indirect donor screening instead of surrogate testing was "the exercise of judgment or discretion in making basic policy."[191]

This background is recited not to defend the AABB's decision, but to illustrate the many matters that standard developers may legitimately consider. To provide that consideration, a wide open discussion untrammeled by the fear of tort liability is as appropriate for standard developers, as it is, say, for the voting public during an election campaign.[192] There is a First Amendment interest in affording the standard developer and its members who participate in that discussion—and in the ultimate vote on a proposed standard—the "breathing space" that protection against tort liability for ordinary negligence would provide.[193] Here again the great number of possible claimants against standard developers should a duty be imposed heightens the likely chilling effect from liability on the developer's deliberations[194] The harm to First Amendment values must therefore be added to the other concerns that argue against imposing a duty, and the sum of those concerns then laid against the gain from liability, primarily the deterrence of negligent standard development.

1047 (N.J. 1996).

191. *Id.* at 1056 (Garibaldi, J., dissenting) (quoting Costa v. Josey, 415 A.2d 337, 342 (N.J. 1980) (interpreting New Jersey's statute that supplied absolute immunity for discretionary public functions and granting defendant a privilege under the statute)).

192. The New Jersey Supreme Court, in contrast, suggested that the AABB had considered too many concerns. After reviewing the concerns that argued against surrogate testing, the court held: "These concerns . . . should not have diverted the AABB from its paramount responsibility to protect the safety of the blood supply. Recognition of that responsibility should have led the AABB to consider more carefully the risks to recipients from the transfusion of infected blood." *Id.* at 1050. In the court's view, apparently, a court and jury should determine the scope of relevant concerns that the standard developer may properly consider. Being "diverted" by other concerns is apparently evidence of negligence. Under this framework, a member who diverts the standard developer's attention by raising previously unconsidered concerns may thereby increase the standard developer's tort exposure.

193. Labeling standards themselves, and the discussion leading to them, as commercial speech does not eliminate First Amendment concerns. *See, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563 (1980); Bates v. State Bar of Ariz., 433 U.S. 350, 363–64 (1977); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 761–62 (1976).

194. The Supreme Court has recognized that imposing tort liability may distort discussion. In *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), the Court held that the common law of defamation, if left unqualified, could so distort discussion about public figures as to be unconstitutional. *Id.* at 279. Such liability would deter uttering a certain assertion "even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so." *Id.*

IV. LIABILITY'S THREAT TO THE INTEGRITY OF STANDARDS

Imposing liability on standard developers to those injured by products or activities complying with the standard not only inhibits the discussion of possible standards, it also tends to distort the standards themselves by putting disproportionate pressure on the standard developers to sacrifice other interests in striving to avoid tort liability. That is, interests that for whatever reason the standard developer can sacrifice without fear of triggering tort liability will tend to be sacrificed far too readily. These include, for example, diffuse or abstract interests. In contrast, interests that if sacrificed threaten to trigger a viable tort suit will receive disproportionate weight and deference.[195] For example, standard developers will unduly avoid standards that might inflict a well-defined and substantial injury on an identifiable person or group. The more well-defined and substantial the injury and the more identifiable the victims, the more easily the injured can prove cause-in-fact and attract an attorney who will work on a contingency fee. For example, the AABB in the future will more readily sacrifice interests such as its interest in maintaining the supply of blood. However harmful it may be, an insufficient supply of blood is not likely to produce an identifiable person or group who will sue. Instead, the AABB will feel undue pressure to opt for a standard such as requiring surrogate testing, albeit foolish on balance, because failure to adopt that standard will inflict a substantial injury—in this case HIV infection—on identifiable persons for whom a tort suit may be a viable and practical undertaking. Indeed a tort duty pressures the AABB to rush to adopt whatever standards will best avoid liability lest they be deemed negligent for failure to respond quickly enough to new information.[196]

In this respect the effect of liability on standard developers resembles the effect of tort liability on members of medical peer review groups. Medical peer review groups are typically charged with deciding whether the performance of the doctor being reviewed warrants the continuation of the doctor's staff privileges at a hospital.[197] Continuing the doctor's privileges, however poor the

195. Courts have recognized that liability for negligence can distort decision making by leading to the undue sacrifice of abstract or diffuse interests. *E.g.*, Smith v. Day, 538 A.2d 157, 159 (Vt. 1987) (observing that imposing a duty of care on a university to control the activities of its students to the extent necessary to protect students from dangers such as shootings "would inevitably lead to repressive regulations and a loss of student freedoms, thus contravening a goal of higher education: 'the maturation of the students'" (quoting Baldwin v. Zoradi, 176 Cal. Rptr. 809, 818 (Ct. App. 1981))).

196. Imposing a tort duty will also hinder the adoption of a new standard because plaintiffs can then argue that the adoption admits that the prior standard was inadequate.

197. *See* Kwoun v. Se. Mo. Prof'l Standards Review Org., 811 F.2d 401, 408 (8th Cir. 1987) (discussing the purpose of medical peer review groups); Clark C.

doctor's record and however many patients may suffer from his future performance, did not create a significant risk of suit against the members. Only denying privileges created such a risk. Such a denial, after all, inflicted a well-defined and substantial injury on an identifiable doctor with enough at stake to sue. Congress decided this undesirable imbalance of pressures resulting from the threat of liability called for granting the members of such peer review groups a privilege against suit. The result was the Health Care Quality Improvement Act of 1986.[198]

Congress and the courts have recognized tort liability's tendency to distort the judgment of decision makers by distorting the incentives the decision makers face. This imbalance lies behind the well-known privilege public employees enjoy when they are engaged in discretionary functions. Professor Richard Epstein describes the policy underpinnings of that privilege as follows:

> The nub of the issue lies in the implicit imbalance in the incentives imposed on public officials if left wholly unprotected by any immunity doctrine. Let them make an incorrect decision and they will have to shoulder the enormous costs of liability. Let their decisions be correct and there will be enormous gains, which will be captured not by them, but by the public at large. Why, therefore, should a public official take all the risks for none of the gain? . . . One way to restore the [proper] balance would be to pay public officials enormous sums to compensate them for the great liability risks. . . . The other way to restore the needed symmetry between official rewards and official burdens is to release the public official from liability, in whole or in part. In this way the system is brought into balance, since the official in question escapes capturing the full gain or bearing the full loss, albeit at the cost of individual redress for government wrongs.[199]

By threatening to distort standard development, a tort duty puts in jeopardy the many goals, health and safety among them, that standard development seeks to serve.

Havighurst, *Professional Peer Review and the Antitrust Laws*, 36 CASE W. RES. L. REV. 1117, 1123–29 (1986) (describing peer review organizations).

198. 42 U.S.C. §§ 11101–11152 (2006) (conferring tort immunity on members of medical peer review committees). The California Legislature has also provided immunity for members of peer review committees as long as the members act in good faith. *See* CAL. CIV. CODE § 43.7(b) (Deering 2005); *see also Kwoun*, 811 F.2d at 407–09 (conferring tort and § 1983 immunity on private medical peer review group that conducted a quasi-prosecutorial medical performance review).

199. Snyder v. Am. Ass'n of Blood Banks (*Snyder II*), 676 A.2d 1036, 1057 (N.J. 1996) (Garibaldi, J., dissenting) (alterations in original) (quoting RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 878–79 (5th ed. 1990)).

V. THE ALTERNATIVE TO "NO DUTY"—A QUALIFIED PRIVILEGE

Unlike public employees, however, standard developers face no government oversight, nor risk of electoral removal, nor do they operate under a formal commitment to serve the public interest. Moreover, despite following ANSI protocols and procedures, standard developers face an abiding incentive to let business considerations and cost considerations influence unduly the standards they suggest. Most standard developers also act as lobbyists for their industry[200]—further indication that they may be motivated by their industry's interests as well as by the public good, and that unlike government employees, they may enjoy some private benefit from their suggested standards. And no doubt exists about the great influence of standard developers generally over the products, services, and activities they address. Eliminating tort liability altogether, then, may strike some as too sweeping an abdication of traditional judicial oversight over influential private behavior.

These concerns of selfish incentives, power, and lack of oversight may call for a less sweeping approach than a rule of "no duty" or a grant of an unqualified privilege. An alternative approach—judicial recognition of a qualified privilege for suggesting standards—may strike a better balance between the contending concerns. This approach would retain a role for the jury and provide some check against wholly abusive standard development. It would require those injured by a product, service, or activity that conformed to a standard to show that the standard developer acted in bad faith in developing its standard. Courts would identify the contours of bad faith and the evidence needed to reach the jury on the issue on a case by case basis. While attempts to identify "bad faith" behavior would be premature, a standard developer's unexplained failure to follow the well-accepted ANSI procedures in adopting a standard would certainly provide evidence against it.[201]

200. *See* Wilk v. Am. Med. Ass'n, 719 F.2d 207, 212 (7th Cir. 1983) (observing that the American Medical Association "publishes numerous professional journals, receives and responds to questions from the public on medical subjects, and engages in legislative lobbying"); Lynn v. Amoco Oil Co., 459 F. Supp. 2d 1175, 1189–90 (M.D. Ala. 2006) (discussing oil industry groups that both lobby and develop standards).

201. In her dissent in *Snyder II*, Judge Garibaldi also called for a qualified privilege for standard developers that would free them from liability for ordinary negligence but impose liability when the standards were promulgated in bad faith. *See Snyder II*, 676 A.2d at 1062 (Garibaldi, J., dissenting). Judge Garibaldi proposed a test for bad faith that by focusing on the standard developer's motive may be too open-ended and difficult to apply: "[A] qualified [privilege] . . . imposes a sufficient check against decisions [by standard developers] that are clearly wrong and motivated by profit." *Id.*

The *Restatement (Second) of Torts* offers similar guidance about what "bad faith" might entail when it identifies how a person who enjoys a qualified

Evidence of good faith, on the other hand, would include a standard developer establishing that, when "faced with alternative approaches, [it] weighed the competing policy considerations and made a conscious choice."[202]

While no statutes provide a qualified privilege to private standard developers generally, the "partial statutory immunities are reflective of public policy and may serve as a guide to the evolution of related common law immunities."[203] The beneficiaries of these statutory privileges are not merely judges and prosecutors, but many wholly private actors who can point to some government authorization for their decision making.[204] Many courts have acknowledged that recognition of the privilege does not depend on the source of the decision-making power but rather on the nature of the decision-making process.[205] The decision to grant a privilege is

privilege to publish defamatory matter about another may "abuse" and thus lose that qualified privilege. Such a person "abuses the privilege if he does not act for the purpose of protecting the interest for the protection of which the privilege is given." RESTATEMENT (SECOND) OF TORTS § 603 (1977). For example, a qualified privilege regarding defamation may be created because "an interest of the public is actually or apparently involved, and the knowledge . . . of the defamatory matter, if it is true, is likely to be of service in the protection of that interest." *Id.* cmt. a. The interests of the public that warrant giving a qualified privilege to defamers closely resemble the interest that would be served by extending a similar privilege to standard developers.

202. Costa v. Josey, 415 A.2d 337, 342 (N.J. 1980); *see also* Bombace v. City of Newark, 593 A.2d 335, 341 (N.J. 1991) (per curiam) (defining good-faith immunity as protecting a defendant from liability when, objectively or subjectively, the defendant acted in good faith); Bedrock Founds., Inc. v. Geo. H. Brewster & Son, Inc., 155 A.2d 536, 545–46 (N.J. 1959); RESTATEMENT (SECOND) OF TORTS § 895D cmt. e (1977) (discussing categories of immunity and privilege).

203. Crawn v. Campo, 643 A.2d 600, 605 (N.J. 1994). When the attention of Congress has been drawn to the possible tort liability of standard developers, Congress has tended to provide a privilege. *See supra* note 136 and accompanying text (discussing the Support Anti-Terrorism by Fostering Effective Technology Act of 2002, 6 U.S.C. §§ 441–444 (2006)).

204. *See, e.g.*, Kwoun v. Se. Mo. Prof'l Standards Review Org., 811 F.2d 401, 407–09 (8th Cir. 1987) (conferring tort and § 1983 privileges on a private medical peer review group that conducted a quasi-prosecutorial medical performance review); Wasyl, Inc. v. First Bos. Corp., 813 F.2d 1579, 1582 (9th Cir. 1987) (granting privilege to arbitrators who performed quasi-judicial acts); Bushman v. Seiler, 755 F.2d 653, 655–56 (8th Cir. 1985) (conferring tort privilege on employee of Medicare carrier); City of Durham v. Reidsville Eng'g Co., Inc., 255 N.C. 98, 102–03, 120 S.E.2d 564, 567 (1961) (conferring privilege on an engineer who approved payments during construction because the engineer was acting in a quasi-judicial capacity); Berends v. City of Atl. City, 621 A.2d 972, 981–82 (N.J. Super. Ct. App. Div. 1993) (providing an airline with a qualified privilege that protected its decision to close a particular runway, which allegedly caused the crash of a small plane).

205. *See, e.g.*, Corey v. N.Y. Stock Exch., 691 F.2d. 1205, 1211 (6th Cir. 1982); Citrano v. Allen Corr. Ctr., 891 F. Supp. 312, 318 (W.D. La. 1995). Similarly, the Supreme Court's concern that liability would inhibit vigorous and appropriate decision-making processes does not depend on the existence of a grant of governmental authority. *See* Barr v. Matteo, 360 U.S. 564, 572–74

based on a desire to protect and to encourage certain types of decision making.[206] That is, the recognition of a common law privilege should depend on the functional comparability[207] of the standard developer's behavior to the behavior of those to whom the federal and state governments have granted a statutory privilege. Consistent with Supreme Court guidance, a court rightly "examine[s] the nature of the functions . . . entrusted, and . . . evaluate[s] the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions."[208] This view mirrors the functional approach embraced by the Supreme Court in looking both to the defendant's act as well as the capacity in which that act was performed.

The privilege mentioned above, that provided to public officials by the Federal Tort Claims Act ("FTCA") and its state equivalents, is the most prominent statutory privilege. The FTCA and its state equivalents prohibit state tort suits against the government and its officials based on "the exercise or performance or the failure to exercise or perform a discretionary function."[209] This discretionary-function exception prohibits predicating tort liability on policy-bound decisions that require the exercise of judgment or discretion. Standard development entails the same "type of policy-bound decision" that the discretionary-function exception insulates from judicial scrutiny.[210] As it does for public officials, a privilege would allow the members of standard developers to avoid the fear and expense of litigation and its diversion of personal energy from their standard development responsibilities.[211]

Admittedly, when private standard developers are not acting

(1959).

206. *Barr*, 360 U.S. at 571; *Costa*, 415 A.2d at 343.

207. The term "functional comparability" was first used in *Imbler v. Pachtman*, 424 U.S. 409, 423 n.20 (1976). The term was affirmed and expanded upon a year later in *Butz v. Economou*, 438 U.S. 478, 511–14 (1978).

208. Forrester v. White, 484 U.S. 219, 224 (1988).

209. 28 U.S.C. § 2680(a) (2006). Other examples are the many statutes referencing "good faith" that provide a qualified privilege for employers responding to requests for information from potential employers about current or past employees. At least twenty-nine states have adopted such statutes, and other states recognize a similar qualified privilege by common law. This privilege has protected employers who respond to these requests in good faith from suits based on defamation, intentional misrepresentation, negligent misrepresentation, and retaliation in violation of Title VII. *See* Susan Oliver, Note, *Opening the Channels of Communication Among Employers: Can Employers Discard Their "No Comment" and Neutral Job Reference Policies*, 33 VAL. U. L. REV. 687, 692–94, 714–18 (1999).

210. C.R.S. v. United States, 11 F.3d 791, 797 (8th Cir. 1993).

211. *See* Corey v. N.Y. Stock Exch., 691 F.2d 1205, 1211 (6th Cir. 1982) (suggesting that liability for arbitrators would discourage individuals from serving in this capacity); *cf.* Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982) (noting the social costs of suits against both innocent and guilty public officials, namely the deterrence of able citizens from acceptance of public office).

pursuant to any express or implied grant of government authority, there is little precedent for recognizing a common law privilege analogous to that created by the discretionary-function exception. Courts have, however, invoked the discretionary-function exception by analogy in recognizing a common law privilege for the good faith performance of the discretionary tasks of wholly private arbitrators. In stressing the similarity between the function of arbitrators and judges, and the need of both for some privilege in their decision making, courts have overlooked the absence of governmental authorization for arbitrators.[212] These courts have acknowledged that judicial review is inappropriate for some policy-bound decisions, however private the decision makers.[213] As the function of arbitrators resembles the function of judges, the function of standard developers resembles the function of legislators and administrators, both of whom, no less than judges, enjoy at least a qualified privilege for their decision making under the discretionary-function exception.

Of course, courts need not base recognition of a qualified privilege for standard development upon an analogy to the discretionary-function exception and its state equivalents. When private behavior—however injurious to particular plaintiffs—benefits the public, courts have felt free to grant that behavior a qualified privilege under the common law. An example is the qualified privilege for those who publish false and defamatory matter in the public interest.[214] The *Restatement (Second)* reporters explain the balancing of interests that warrants this privilege, and the qualification to that privilege, in language that also seems apt for standard developers sued for personal injury:

212. *See, e.g.*, Austern v. Chi. Bd. Options Exch., Inc., 898 F.2d 882, 886 (2d Cir. 1990) (granting an absolute privilege for all quasi-judicial actions to arbitrators who heard case pursuant to contractual arbitration clause); *Corey*, 691 F.2d at 1208–11 (conferring a privilege on private arbitrators performing quasi-judicial duties); Lundgren v. Freeman, 307 F.2d 104, 118 (9th Cir. 1962) (conferring a privilege on an architect acting as arbitrator pursuant to contract because the policy of judicial immunity "extends to private persons acting [as arbitrators] in a quasi-judicial capacity within jurisdiction established by private agreement"); Craviolini v. Scholer & Fuller Associated Architects, 357 P.2d 611, 613 (Ariz. 1960) (recognizing a tort privilege for private arbitrators); Rubenstein v. Otterbourg, 357 N.Y.S.2d 62, 63–64 (Civ. Ct. 1973) (conferring a privilege for an arbitrator association because its members "perform with respect to arbitrator's functions similar to those performed by the Judicial Conference, the Administrative Boards and the Appellate Division with respect to judges").

213. *Craviolini*, 357 P.2d at 613–14.

214. RESTATEMENT (SECOND) OF TORTS § 598 (1977). As comment d to section 598 explains, "The rule stated in this Section is applicable when any recognized interest of the public is in danger . . . ." *Id.* cmt. d. For a discussion of the public interest in standard development, see *supra* notes 147–78 and accompanying text.

> A conditional privilege is one of the methods utilized by the common law for balancing the interest of the defamed person in the protection of his reputation against the interests of the publisher . . . and of the public in having the publication take place. The latter interests are not strong enough under the circumstances to create an absolute privilege but they are of sufficient significance to relax the usual standard for liability.[215]

Similarly, the effect of granting this qualified privilege in modern defamation law—requiring the plaintiff to show the defendant's "malice"—closely resembles the proposed effect of granting standard developers a qualified privilege in personal injury suits—requiring plaintiff to show the defendant's bad faith:

> One consequence . . . is that mere negligence as to falsity, being required for all actions of defamation, is no longer treated as sufficient to constitute abuse of conditional privilege. Instead, knowledge or reckless disregard as to falsity is necessary for this purpose.[216]

Granting standard developers a qualified privilege under the common law, while certainly not compelled by precedent, would then fall well within the traditional bounds of judicial authority.

CONCLUSION

Standards development organizations seem unlikely candidates for the sympathy of any readers, legal scholars and judges included. The industry leaders, scholars, and scientists who develop standards often glory in being invited to such prestigious duty. Regardless of liability, they will likely carry on, continuing to use their know-how and judgment to develop standards that guide others and that lubricate the engines of production and service. Inevitably their judgment, no less than that of the courts, lies exposed to the unpredictability of human experience. But this Article has argued against exposing their judgment further to a jury's condemnation as negligent, with all that condemnation entails.

This second-guessing of a standard developer's judgment by a jury is particularly inappropriate in the context of a personal injury suit brought by a person injured by a product, service, or activity that complied with a standard. In that context, not only the standard developer but the legal process and society as a whole lose out when juries force standard developers, deemed guilty of no more

215. RESTATEMENT (SECOND) OF TORTS § 599 cmt. d (1977).

216. *Id.* By modern defamation law, I mean the defamation law that has developed in the wake of the holding in the *Gertz* case in 1974. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974) (limiting the privilege of immunity to defamation of public figures, defined by fame or voluntary involvement in public controversy).

than ordinary negligence, to pay tort damages to the injured plaintiff. The legal process loses out because asking a fact-finder whether the promulgation of a standard was negligent—in light of the many trade-offs inherent in opting for a standard—asks for more than traditional adjudication can sensibly deliver. Society loses out because even when standard development continues, liability distorts that ex ante assessment of all benefits and costs, and the wide open discussion of them, that ought to guide the process of standard development. Sheltering from tort liability the good-faith development of industry standards will help to ensure that, undaunted by the prospect of litigation expense and potential damage awards, private, nonprofit standard developers continue the essential service that they are best positioned to perform.