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## The Beginning and End of the Rise of American Tort Law

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## ARTICLES

### THE BEGINNING AND THE POSSIBLE END OF THE RISE OF MODERN AMERICAN TORT LAW

*Gary T. Schwartz\**

#### I. INTRODUCTION

In 1981, as part of a torts symposium in this law review, I published an article that chronicled the rise of modern American tort law—the huge growth in tort liability that had occurred since about 1960.<sup>1</sup> That article characterized that rise as involving “the vitality of negligence”—that is, the expansion of a defendant’s liability for harm caused by negligent conduct. Yet that article, while setting forth the doctrinal framework within which the growth in liability occurred, made little effort to probe the purposes of the

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\* Professor, UCLA School of Law. The original version of this Article was presented as the Sibley Lecture at the University of Georgia, on November 11, 1991. Later versions were presented at USC and the University of Toronto. I am very grateful for the comments of faculty at these three law schools. Additional thanks to Robert Ellickson, Mark Grady, Jim Henderson, Dan Lowenstein, Jon Macey, David Owen, Ken Simons, and Michael Wells.

<sup>1</sup> Gary T. Schwartz, *The Vitality of Negligence and the Ethics of Strict Liability*, 15 GA. L. REV. 963 (1981) [hereinafter Schwartz, *Vitality*].

judges responsible for that growth. One goal of this Article, then, is to supplement my earlier effort by giving fuller consideration to the judicial understandings that motivated the rise in modern tort law. The Article will acknowledge the impact of the judicial activism of the Warren Court; it will suggest the relevance of the more general public-policy activism at all levels of government in the 1960s and 1970s; and it will emphasize the particular relevance of a new public-policy consensus that developed around the problem of product-related injuries.

While my previous characterization of the growth in liability as resting on negligence principles has been accepted as generally accurate by tort scholars such as Richard Epstein,<sup>2</sup> Robert Rabin,<sup>3</sup> and Michael Trebilcock,<sup>4</sup> it has perhaps been rejected by George Priest. In a leading article in 1985, Priest stated that the intellectual history of modern tort law hinges on a theory of "enterprise liability."<sup>5</sup> This theory, which Priest suggests was accepted by the courts beginning in 1960, has tended toward a practice of "absolute liability"—a practice that would hold product manufacturers liable for all injuries or harms that result from the use of their products.<sup>6</sup> Moreover, in follow-up articles Priest has claimed that the enterprise liability idea has spread beyond the products context so as to reach institutions and professionals that provide a variety of services. He therefore suggests—at least in some of his writings—that these defendants have been subjected to practices that move in the direction of absolute liability. The emphasis that Priest places on the law's approach to absolute liability certainly can seem at odds with my own emphasis on negligence as the criterion of liability. A second goal of this Article, then, is to defend my own position and to review and critique that advanced by Priest.

Ten years have now passed since my original *Georgia Law Review* article. Dean Ellington's invitation to deliver the Sibley Lec-

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<sup>2</sup> RICHARD A. EPSTEIN ET AL., *CASES AND MATERIALS ON TORTS* 88-89 (4th ed. 1984).

<sup>3</sup> Robert L. Rabin, *Tort Law in Transition: Tracing the Patterns of Sociolegal Change*, 23 VAL. L. REV. 1, 24 (1988).

<sup>4</sup> Michael J. Trebilcock, *The Social Insurance-Deterrence Dilemma of Modern North American Tort Law: A Canadian Perspective on the Liability Insurance Crisis*, 24 SAN DIEGO L. REV. 929, 948 (1987).

<sup>5</sup> George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 463 (1985) [hereinafter Priest, *Enterprise Liability*].

<sup>6</sup> *Id.*

ture at the University of Georgia encouraged me to consider more fully what has happened to tort doctrine in the course of the last decade. That consideration has led me to appreciate that during this interval the expansion of modern tort law has essentially ended. Between 1960 and the early 1980s, there had been continuous liability-rule innovations in almost all areas of tort law. Since then, however, the impetus for innovation has lost most of its power. To be sure, in only a limited number of instances have courts actually overruled liability-expanding doctrines developed between 1960 and the early 1980s; what I describe is *not* "the rise and fall of modern American tort law." Still, during the last decade courts have rejected invitations to endorse new innovations in liability;<sup>7</sup> moreover, they have placed a somewhat conservative gloss on innovations undertaken in previous years. What is here portrayed, then, is "the beginning and the end of the rise in modern tort law."

Admittedly, the tendency to expand liability has by no means dried up, and I will bring together a number of situations in which courts during the last decade have broadened liability standards. These innovations, however, have been clearly outnumbered by cases in which courts have rejected plaintiffs' liability-expanding proposals or have conservatively interpreted preexisting liability rules. Torts cases from the 1960s and 1970s that were included in early 1980s coursebooks were almost all triumphs for plaintiffs; the collection of these cases could be referred to as "plaintiffs' greatest hits." The torts opinions from the last decade that will be included in the next round of coursebooks will have a quite different character. They will commonly entail substantial defense victories. At the very least, they will involve a mix of results—a mix that stands in sharp contrast to the pattern of plaintiffs' victories afforded by the previous two decades.

My appraisal of the tendencies in recent tort decisions has been facilitated, I can say, by an article published two years ago by James Henderson and Theodore Eisenberg, describing a "quiet revolution in products liability" that they see as having taken

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<sup>7</sup> These "rejections" have taken two forms. In some instances courts have rejected novel arguments for expanding liability advanced by plaintiffs. In other instances courts in States A and B have rejected liability doctrines that previously had been accepted by the courts in States C and D.

place between 1983 and 1990.<sup>8</sup> The "revolution" they set forth has operated at several levels. One concerns the published products liability opinions of state and federal judges; another, the disposition of products liability cases in federal trial courts.<sup>9</sup> But Henderson and Eisenberg also discuss trends in appellate doctrine,<sup>10</sup> and this is the portion of their article that has encouraged my current study. As far as appellate doctrine is concerned, their use of the term "revolution" is perhaps unfortunate; what they primarily describe is not the overruling of precedents but rather the rejection by the judiciary of further expansions of products liability doctrine. They can call this a "revolution" because it stands in such contrast to the growth in doctrine that had occurred between 1960 and the early 1980s. In any event, as assessed by Henderson and Eisenberg, the "quiet revolution" has been limited to products liability. When, on occasion, their article considers other areas of tort law, they suggest that the products liability change-in-direction entails a departure of sorts from the trends operating elsewhere in tort law.<sup>11</sup> My own conclusion is that the stabilization in products liability doctrine that they assess has been an organic part of a larger process occurring through much of tort law.

Having described this general process of stabilization and mild retrenchment, I then attempt to explain it—to set forth the reasons that evidently have motivated the judiciary to alter its course. Certain of these reasons suggest that the recent years mark the actual termination of what had been a two-decade period of expanding liability. Other reasons, however, imply that these years may provide only a pause—a respite in what could turn out to be a continuing rise in liability. To acknowledge the uncertainty in the status of the recent experience, my title refers to "the *possible* end of the rise of modern tort law."

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<sup>8</sup> James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990) [hereinafter Henderson & Eisenberg, *The Quiet Revolution*]; see also Theodore Eisenberg & James A. Henderson, Jr., *Inside the Quiet Revolution in Products Liability*, 39 UCLA L. REV. 731 (1992); Teresa M. Schwartz, *Product Liability Reform by the Judiciary*, 27 GONZ. L. REV. 303 (1991/92).

<sup>9</sup> Henderson & Eisenberg, *The Quiet Revolution*, *supra* note 8, at 488-98.

<sup>10</sup> *Id.* at 488-98.

<sup>11</sup> *Id.* at 527-30, 535-36. To be sure, in dealing with these more general tort trends, Eisenberg & Henderson focus on filings and dispositions rather than on appellate rulings of law.

## II. EXPLANATIONS FOR THE RISE

Before undertaking to explain the liability-expanding changes in tort doctrine during the post-1960 era, let me recap what those changes have been—and let me furthermore locate those changes within the larger framework of American tort history. In the nineteenth century, American personal injury law was fashioned by state judges through a process that included some reliance on precedent and a considerable measure of creativity.<sup>12</sup> Early in the twentieth century, workers' injuries were removed from the tort system and reassigned to workers' compensation programs. Also, twentieth-century cases like *MacPherson v. Buick Motor Co.*<sup>13</sup> affirmed the negligence liability of manufacturers. Apart from such developments, however, between 1900 and the late 1950s American tort law remained generally stable. Twentieth-century opinions, for the most part, sharpened and clarified tort doctrines that had been presented somewhat more crudely in nineteenth-century cases.<sup>14</sup>

This early stability in twentieth-century tort law provides the backdrop for those tort changes after 1960 that demonstrate the vitality of negligence.<sup>15</sup> These changes included the abolition of im-

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<sup>12</sup> See Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. Rev. 641, 678-79 (1989) [hereinafter Schwartz, *Character*].

<sup>13</sup> 111 N.E. 1050 (N.Y. 1916). *MacPherson* involved a manufacturing flaw in an automobile. Later cases developed and supported the idea of manufacturers' liability for negligent designs and for negligent failures to warn. See Gary T. Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58 N.Y.U. L. Rev. 796, 799-80 (1983).

<sup>14</sup> To be sure, cases like *The T.J. Hooper*, 60 F.2d 737 (2d Cir. 1932), cert. denied, 287 U.S. 662 (1932), resolved the confusion in nineteenth-century law as to the effect of the defendant's compliance with custom. Also, twentieth-century courts relied on traditional rules of strict liability in order to construct a somewhat new concept of strict liability for ultrahazardous activities. Additionally, new doctrines were developed to protect plaintiffs against various forms of emotional distress.

<sup>15</sup> In emphasizing negligence, my earlier *Georgia Law Review* article entailed my reaction to the claims of other scholars that modern tort law had witnessed a move away from the negligence standard in the direction of strict liability. See, e.g., Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Tort*, 81 YALE L.J. 1055 (1972); see also John G. Fleming, *The Role of Negligence in Modern Tort Law*, 53 VA. L. Rev. 815 (1967) (contending that the negligence standard is obviously unsuitable for a modern industrial society).

Granted, my examples related to situations in which rules of negligence liability had come to replace previous rules that had set liability at levels below negligence. My article did not claim that negligence had replaced previous rules of outright strict liability. It did point out, however, that strict liability had not really expanded during this period. Schwartz, *Vitality*, *supra* note 1, at 970-77. The doctrine of strict liability for abnormally dangerous activities had largely been stagnant. Moreover, judges had ignored or neglected various proposals for

munities for charities, governments, and family members—abolitions that rendered such defendants liable under standards of negligence. Auto-guest statutes and guest doctrines were eliminated; thereby enlarging the liability of motorists for harms caused by their negligence. Many courts established a general negligence principle to cover the liability of landowners, thereby rejecting rules of limited liability that had been tied to the plaintiff's status as a land entrant. The locality doctrine in medical malpractice cases was withdrawn, thereby permitting a fuller consideration of the question of the doctor's malpractice. New affirmative duties were recognized, as in *Tarasoff v. Regents of University of California*<sup>16</sup>—duties which defendants violate if, but only if, they behave negligently. Also, new causes of action were created for the negligent infliction of economic loss and the negligent infliction of emotional distress. The traditional defense of contributory negligence was replaced by the doctrine of comparative negligence, which by apportioning liability in accordance with fault could be seen as an elaboration of the basic idea of fault liability. As well, many courts "merged" the defense of assumption of risk into the doctrine of comparative fault, thereby confirming that negligence is the only feature of the plaintiff's conduct that merits the law's attention. To be sure, the liability of manufacturers became governed by a strict liability doctrine; yet my article interpreted that doctrine in a way that emphasized its negligence components. In particular, the modern law of design defect is noteworthy for the way in which courts have aggressively applied the negligence-like risk-benefit standard to complex questions of product design. Also, in order to acknowledge instances of extreme manufacturer fault, punitive damage awards in products liability cases were judicially authorized.

While emphasizing the various ways in which liability had advanced, my earlier article gave only cursory attention to the reasons behind these advances. All it said was that "a preliminary assessment is that judges have been strongly impressed by the ideas favoring the negligence principle and have undergone a loss of belief in the host of reasons that have long been relied on to restrain

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new rules of strict liability. Also, the primacy of workers'-compensation strict liability had been eroded by the increasing intrusion of tort causes of action into the employment setting.

<sup>16</sup> 551 P.2d 334 (Cal. 1976) (affirming therapist's duty to warn patient's intended victim).

that liability."<sup>17</sup> Before turning to the "host of reasons" counseling restraint, let me begin by expanding on those "ideas favoring the negligence principle."

Negligence liability carries with it, first of all, the resonance of tradition. The negligence standard has deep roots in English tort law even prior to the nineteenth century,<sup>18</sup> and by 1960 negligence had been the primary (though not the exclusive) standard of tort liability in the United States for over a century.<sup>19</sup> Negligence liability, moreover, is associated with strong fairness values. "Ethically regarded, the idea of liability for harm caused by one's unexcused errors and mistakes is both straightforward and intuitive."<sup>20</sup> Yet negligence liability is also supported by a concern for safety. An obvious safety advantage of negligence liability is that it can discourage improper harmful conduct; indeed, a deterrence rationale has been influencing tort judges for over a century.<sup>21</sup> In light of all the tensions that are possible between ethical and economic approaches to tort law, what is distinctive about the negligence standard is that it achieves a certain synthesis of fairness and deterrence values. Furthermore, many modern judges have probably believed that loss distribution is an important tort objective.<sup>22</sup> Since there are ample numbers of victims whose injuries are at

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<sup>17</sup> Schwartz, *Vitality*, *supra* note 1, at 977 (footnote omitted).

<sup>18</sup> See Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 *YALE L.J.* 1717, 1722-27 (1981).

<sup>19</sup> Schwartz, *Character*, *supra* note 12, at 679.

<sup>20</sup> Schwartz, *Vitality*, *supra* note 1, at 1003. This intuition, moreover, can be expanded on by invoking formal concepts such as corrective justice and compensatory justice, which require the negligent party to afford reparation to his victim. See Ernest Weinrib, *Understanding Tort Law*, 23 *VAL. L. REV.* 485 (1989). Negligence liability can be understood as placing sanctions on defendants who egoistically give more weight to their own welfare than to the welfare of their possible victims. See Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 *YALE L.J.* 697, 701-02 (1978) [hereinafter Schwartz, *A Reappraisal*].

<sup>21</sup> See Schwartz, *Character*, *supra* note 12, at 665 & n.146.

To be sure, there can be quite significant ethical and economic arguments in favor of strict liability. Proposals for strict liability, however, do not *reject* liability for negligence; rather, they recommend that negligence liability be supplemented in various ways. Moreover, the arguments on behalf of strict liability tend to be contestable, or applicable only to a limited range of cases. By contrast, there is considerable support for the general idea of subjecting the negligent injurer to *prima facie* liability. To be sure, there are certain disadvantages of a broad practice of negligence liability. For discussion of these disadvantages, see *infra* notes 190-192 and accompanying text.

<sup>22</sup> See *infra* note 178 and accompanying text.



least arguably due to some defendant's negligence, these judges could support broadened rules of negligence liability on grounds of the ability of those rules to achieve a substantial measure of loss distribution.

A full regime of negligence liability should *not* be regarded as modest. To be sure, negligence liability is not "strict" liability, let alone "absolute" liability. Even so, as noted, plenty of harm in society is caused by conduct that is quite possibly negligent. Any legal system that tries to respond to all instances of negligence—or to deter all of those instances—is accepting a very large responsibility. Before 1960, American tort law had not yet taken on this task. Rather, the reach of the doctrine of negligence liability was then limited in any number of ways.

By 1960, several of these limitations seemed like historical anomalies—legal rules that had become "outmoded"<sup>23</sup> or obsolete. The doctrine of governmental immunity, for example, drew support from the notion that "the sovereign can do no wrong"—a notion that seemed fundamentally at odds with basic principles of democracy. This immunity doctrine had long been criticized by almost every American scholar who had considered it.<sup>24</sup> As of 1960, the American rule of contributory negligence as a full defense was out of line with the practice of comparative negligence, which had already been accepted by most other countries' tort systems;<sup>25</sup> among legal scholars, the American rule had almost no defenders.<sup>26</sup> The doctrines establishing the limited liability of landowners were understood by many as resulting from a feudal, pre-industrial con-

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<sup>23</sup> See Robert E. Keeton, *Comment, Comments on Maki v. Frelk—Comparative v. Contributory Negligence: Should the Court or Legislature Decide?*, 21 VAND. L. REV. 906, 915 (1968).

<sup>24</sup> *E.g.*, Edwin M. Borchard, *Government Liability in Tort* (pts. 1-3), 34 YALE L.J. 1, 129, 229 (1924-1925); Edgar Fuller & A. James Casner, *Municipal Tort Liability in Operation*, 54 HARV. L. REV. 437 (1941).

<sup>25</sup> See Harry Kalven, Jr., *Comment, Comments on Maki v. Frelk—Comparative v. Contributory Negligence: Should the Court or Legislature Decide?*, 21 VAND. L. REV. 897, 899 n.14 (1968), on the "apparent[] worldwide consensus" on behalf of comparative negligence.

<sup>26</sup> In the Vanderbilt symposium, Professor Kalven expressed some ambivalence about comparative negligence. *Id.* at 901. However, most of the other commentators were quite certain that comparative negligence is the better doctrine. *E.g.*, Keeton, *supra* note 23, at 912-13; Robert A. Leflar, *Comment, Comments on Maki v. Frelk—Comparative v. Contributory Negligence: Should the Court or Legislature Decide?*, 21 VAND. L. REV. 918, 928 (1968).

ception of the status of landowners.<sup>27</sup> In light of this understanding, those doctrines could have easily seemed ripe for reconsideration. The locality rule in the law of medical malpractice appeared to derive from a nineteenth-century conception of how the typical doctor works; given the increasing nationalization of the medical profession, that rule invited being evaluated as artificially restrictive.

However, even given such contemporary evaluations, one can appreciate why courts might have been reluctant to revise and modernize doctrine. One problem was *stare decisis*—the notion that courts should *not* feel free to overturn precedents that have come to seem unwise. A related problem concerned the idea that basic changes in the law should be implemented not by courts but rather by legislatures.<sup>28</sup> Courts could assume that legislatures can do a better job of gathering facts, rendering judgments that are validated by the political process, and adopting a full package that includes not only the primary new doctrine but also a host of subsidiary details.

If a narrow conception of the judicial role thus partly explains why certain restraints remained in American tort law as of 1960, then in assessing the relaxation of those restraints after 1960 we can recognize that tort judges were undoubtedly operating under the influence of the United States Supreme Court. In its constitutional rulings, the Warren Court was the paradigm of judicial activism. Its 1954 decision in *Brown v. Board of Education*,<sup>29</sup> for example, initiated the revolution in race relations in the United States; *Brown* was the first of what turned out to be dozens of decisions by the Court addressing questions of racial equality. In 1962, the Court in *Baker v. Carr*<sup>30</sup> set the stage for a revolution in legislative reapportionment; in later decisions, the Court committed this revolution to the drastic principle of "one person, one vote."<sup>31</sup> In *New York Times Co. v. Sullivan*<sup>32</sup> in 1964, the Court

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<sup>27</sup> *E.g.*, 2 FOWLER V. HARPER & FLEMING JAMES, JR., LAW OF TORTS 1432 (1956).

<sup>28</sup> This idea is expressed, for example, in *Campo v. Scofield*, 95 N.E.2d 802, 805 (N.Y. 1950).

<sup>29</sup> 347 U.S. 483 (1954) (holding school segregation unconstitutional).

<sup>30</sup> 369 U.S. 186 (1962) (holding reapportionment claims justiciable).

<sup>31</sup> See *Reynolds v. Sims*, 377 U.S. 533 (1964).

<sup>32</sup> 376 U.S. 254 (1964) (holding that absent actual malice defamation of public officials is protected speech).

initiated a thoroughgoing reconceptualization of the law of defamation in order to take First Amendment principles into account. *Sullivan* was only one portion of a larger transformation of the First Amendment that was effectuated during the Warren Court era. Indeed, during that era, one area after another of federal and constitutional law was subjected to renovation.

The Warren Court of course had its critics. Yet while some law professors complained about the Court's reasoning, few doubted the basic social wisdom of its results—the correctness of the Court's basic directions. Indeed, those directions were widely praised; in the minds of enlightened public and professional opinion, the Warren Court was certainly commendable and probably heroic. One can understand, then, the impact of the Warren Court's apparent success on the orientation of state court judges as they approached particular tort problems. If the Supreme Court could insist on dramatic societal reform, the least that state judges could do would be to clear away various encumbrances operating on tort law. Compared to the revolution in legislative reapportionment called for by the Supreme Court, the "*Rowland* revolution"<sup>33</sup> could seem like a very modest endeavor. The Warren Court, moreover, declared rights at the constitutional level; it invalidated federal and state statutes and effectively prohibited subsequent legislative review of the Court's results. Given the Warren Court's success, state court judges could easily conclude that they should not be inhibited in issuing rulings that somewhat broadened tort liability—rulings that state legislatures would then be free to review and if necessary reverse.

Yet there was more than the Warren Court exerting an influence on judges in the 1960s and later; for a norm of public policy activism was then being established at all levels of government. By the late 1950s the sense was growing that the Eisenhower era had been marked by a singular complacency. Public policy had been dormant, stagnant. On the economic side, domestic policy had been quite simply unenlightened, failing to acknowledge even the basic core of Keynesian ideas. On the social front, serious problems had been developing and accumulating that social policy was complacently ignoring. Liberals like Arthur M. Schlesinger, Jr. were able

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<sup>33</sup> See *Rowland v. Christian*, 443 P.2d 561 (Cal. 1968) (expanding landowner liability). See *infra* notes 302-307 and accompanying text for a discussion of *Rowland*.

to refer to the "trance" of the Eisenhower era.<sup>34</sup>

This trance was ended by the intense debate about public policy that characterized the 1960 Presidential campaign, which highlighted John Kennedy's promise to "get this country moving again."<sup>35</sup> The arrival of the Kennedy administration in 1961 marked the beginning of a ferment in the consideration of public policy. This ferment became more encompassing during the years of President Johnson's Great Society. Between 1964 and 1968, Congress produced new legislation at an historic rate. The Civil Rights Act was passed in 1964,<sup>36</sup> prohibiting discrimination in employment and public accommodations; it was followed by such measures as the Fair Housing Act of 1968.<sup>37</sup> Serious problems of poverty persisting in America were discovered, leading to the declaration of a war on poverty, a war that was implemented along several fronts. The deterioration of our cities was finally recognized; with high hopes, a new Department of Housing and Urban Development was created not only to coordinate existing federal programs but also to develop for the first time a federal urban policy. A Department of Transportation was also established and charged with the responsibility of thinking through a national transportation policy, one that could be "comprehensive" in that it would include all transportation modes and would take account of social and environmental perspectives that had previously been ignored by the technicians running such agencies as the Federal Aviation Administration and the Bureau of Public Roads.<sup>38</sup>

The establishment of new programs continued into the Nixon administration.<sup>39</sup> In 1970, it was President Nixon who, without evident discomfort, signed the Clean Air Act Amendments<sup>40</sup> and the

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<sup>34</sup> ARTHUR M. SCHLESINGER, JR., *KENNEDY OR NIXON?* 33 (1960).

<sup>35</sup> For consideration of the "grand theme" in the Kennedy campaign, see THEODORE H. WHITE, *THE MAKING OF THE PRESIDENT: 1960*, at 256-59 (1961).

<sup>36</sup> Pub. L. No. 88-352, 78 Stat. 241.

<sup>37</sup> Pub. L. No. 90-284, tit. VIII, 82 Stat. 81.

<sup>38</sup> Surprisingly, historians have not yet tried to describe the public-policy excitement that characterized the 1960s. This will eventually be described in the second volume of Robert Dallek's biography of Lyndon Johnson.

<sup>39</sup> Similarly, the traditions of the Warren Court were in many ways adhered to in the 1970s, as the Burger Court recognized abortion rights, applied the Equal Protection Clause to gender discrimination, and in many ways broadened the First Amendment.

<sup>40</sup> Clean Air Act Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676.

Occupational Safety and Health Act.<sup>41</sup> Indeed, more new federal agencies were created during the Nixon administration than had been created during the administration of Franklin Roosevelt.<sup>42</sup> Moreover, the new norm of policymaking activism developed at the federal level produced effects on state and local governments as well. Many of these governments were invigorated by the arrival of activist governors and mayors who brought into their administrations large numbers of talented professionals, many of them fresh from public-policy oriented graduate programs.

On some occasions, the creation of specific public programs exercised an especially clear influence on the development of tort doctrine. Consider the adoption of the National Traffic and Motor Vehicle Safety Act of 1966<sup>43</sup> and the Consumer Product Safety Act in 1972.<sup>44</sup> This latter statute had been recommended by the National Commission on Product Safety, whose *Final Report* was submitted in 1970.<sup>45</sup> The 1966 Safety Act was the consequence of a new public-policy consensus on the subject of product-related accidents—a new “legal culture.”<sup>46</sup> The new set of attitudes contained in this consensus also surrounded the deliberations of the National Commission (set up in 1967) and the subsequent adoption of the Consumer Product Safety Act.

These attitudes enabled policymakers to recognize and affirm that the level of highway fatalities (and the number of injuries due to dangerous consumer products) were unacceptably high; the resulting losses were hence recognized as a serious social problem, inviting the development of public-policy solutions. That new consensus, moreover, brought about a reconceptualization of the basic nature of the problem of highway and product safety. No longer was this seen as a problem of driver and consumer error; rather, the problem related in a fundamental way to vehicle and product design. During the congressional consideration of the 1966 Act, one

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<sup>41</sup> Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590.

<sup>42</sup> See GLEN O. ROBINSON, *AMERICAN BUREAUCRACY* 36 (1991).

<sup>43</sup> Pub. L. No. 89-563, 80 Stat. 718.

<sup>44</sup> Pub. L. No. 92-573, 86 Stat. 1207.

<sup>45</sup> NATIONAL COMM'N ON PROD. SAFETY, *FINAL REPORT* (1970) [hereinafter *FINAL REPORT*]. There were no law professors on the Commission itself, and only two lawyers.

<sup>46</sup> This is the term employed by Mashaw and Harfst. See JERRY L. MASHAW & DAVID L. HARFST, *THE STRUGGLE FOR AUTO SAFETY* 20, 40-68 (1990). One could also refer to a new public-policy “ideology.”

witness posed this rhetorical question: "Which is easier, to convince 195 million drivers to habitually refrain from panic application of the brake in emergencies or to design an anti-locking braking system in the vehicle?"<sup>47</sup> According to the National Commission, consumer injuries are due to the interaction between consumers and consumer products within the environment of the home. The "weak link" in the chain of causation of consumer injuries—the link that public policy could most effectively attack—was the product itself. "[Manufacturers] can accomplish more for safety with less effort and expense than any other body," including "consumers" themselves.<sup>48</sup> The Commission appreciated, of course, that many consumer injuries are immediately due to the careless use of products by consumers. But the Commission viewed human error as human nature; these are the occasional lapses in attention to which all of us are inevitably prone.<sup>49</sup> Indeed, in 1966, supporters of the Safety Act, having acknowledged the likelihood of driver error, were able to convert that acknowledgment into a strong argument favoring the proposed federal program: "[a] crashworthy vehicle can make [driver] failures failsafe."<sup>50</sup> The Senate Commerce Committee, in reporting out the bill, certainly made clear its concern for those features of auto design that bring about auto accidents; still, the Committee was particularly impressed "by the critical distinction between the cause of the accident itself and the cause of the resulting death or injury."<sup>51</sup> Improving the crashworthiness of cars was thus a major goal of the Act.

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<sup>47</sup> *Id.* at 65. Another witness, having presented a choice between "eugenics or engineering," was certain that the engineering solution comes out ahead; it is "the cheapest, because it is permanent while education and enforcement must be kept up year after year." *Id.* at 63. Consider also Senator Moynihan's assessment that the engineering approach can be implemented by changing the behavior of "a tiny population—the forty or fifty executives who run the automobile industry." *Id.* at 65.

<sup>48</sup> FINAL REPORT, *supra* note 45, at 3. As the OSHA program was implemented in the 1970s, OSHA officials, themselves participating in the new legal culture, displayed a strong preference for engineering solutions to job-safety problems; those officials were reluctant to support policies that might call for adjustments in employee behavior. See Sidney A. Shapiro & Thomas O. McGarity, *Reorienting OSHA: Regulatory Alternatives and Legislative Reform*, 6 YALE J. ON REG. 1, 11 (1989).

<sup>49</sup> FINAL REPORT, *supra* note 45, at 4.

<sup>50</sup> See MASHAW & HARFST, *supra* note 46, at 63.

<sup>51</sup> S. REP. NO. 1301, 89th Cong., 2d Sess. 3 (1966), reprinted in 1966 U.S.C.A.N. 2709, 2711. The Committee described "graphic evidence" that showed that current cars were poorly designed to protect against second collisions. *Id.*

In its final version, the Act sailed through Congress with fully unanimous votes.<sup>52</sup> The consensus brought forward by that Act undeniably helps explain the decision of the federal court of appeals two years later in *Larsen v. General Motors Corp.*<sup>53</sup> The *Larsen* court, perceiving that collisions are "a frequent and inevitable contingency" in the use of cars, ruled that negligence law imposes a "duty" on car manufacturers to design cars in ways that can effectively reduce the seriousness of resulting injuries.<sup>54</sup> Both this perception and this duty seem derived from the 1966 Act and its associated legal culture.<sup>55</sup> Moreover, 1970—the year in which the National Commission's *Final Report* was submitted—was also the year in which the California Supreme Court ruled in *Pike v. Frank G. Hough Co.*<sup>56</sup> that principles of both negligence and strict liability can be relied on to review the design choices rendered by product manufacturers, and that those principles can be applied even to design hazards that are "open and obvious."<sup>57</sup> Given the modern consensus affiliated with the 1966 and 1972 Acts, it is extremely easy to understand why courts would have become unwilling to allow traditional doctrines such as contributory negligence and assumption of risk to serve as broad affirmative defenses in modern products liability cases.

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<sup>52</sup> 112 CONG. REC. S14,256 (1966); 112 CONG. REC. H19,668-69 (1966).

<sup>53</sup> 391 F.2d 495 (8th Cir. 1968).

<sup>54</sup> *Id.* at 502.

Crashworthiness liability had previously been denied in *Evans v. General Motors Corp.*, 359 F.2d 822 (7th Cir.), *cert. denied*, 385 U.S. 836 (1966). The *Evans* majority suggested that any such basic change in the manufacturer's responsibility should be authorized by the legislature. *Id.* at 824. *Evans* was handed down several months before the Safety Act was passed; the dissent noted that legislation was then under consideration. *Id.* at 828.

<sup>55</sup> In a 1968 case like *Larsen*, a court might have perceived that the recent creation of a regulatory program reduced the need for expanded tort liability. But the attitude of the late 1960s made it far easier for courts to assume that regulators and the judiciary should combine their efforts in order to solve an urgent social problem. As a formal legal matter, the *Larsen* court properly relied on express language in the Safety Act indicating that the Act was not meant to preempt state tort liabilities. *Larsen*, 391 F.2d at 506. The National Commission on Product Safety, in recommending a new federal regulatory program, further recommended that products liability rules continue to expand. See FINAL REPORT, *supra* note 45, at 118.

<sup>56</sup> 467 P.2d 229 (Cal. 1970). The product in *Pike*—a bulldozer—was a workplace product. But the Occupational Safety and Health Act, which also was adopted in 1970, anticipated federal regulations governing the safety features of products that employers provide to their employees.

<sup>57</sup> *Pike*, 467 P.2d at 234-37.

Return now, however, to more general features in the public-policy mentality of the 1960s and early 1970s. One feature of public thinking in the 1960s was that major American corporations—and in particular, the Big Three automakers—were economic colossi that could easily bear whatever burdens might be imposed on them by way of regulation or liability. A second feature of public opinion was that these corporations should not be held in high respect; indeed, they should be frequently distrusted. When the steel industry announced price increases that somewhat insidiously evaded President Kennedy's efforts at jawboning, the President was widely quoted as saying that he now believed what his father had always told him: "all businessmen [are] sons-of-bitches."<sup>58</sup> After a dramatic confrontation, the industry rolled back its prices. During the 1960s, the consumer movement was gaining force; this movement portrayed innocent consumers as needing strong protection from manufacturers, which frequently treat consumers in shabby ways.<sup>59</sup> Ralph Nader's book, *Unsafe at Any Speed*,<sup>60</sup> depicted General Motors as a villain for selling Corvairs with a known tendency to turn out of control. General Motors then portrayed itself as a foolish and inept villain when it conducted an investigation of Nader's private life. By the late 1960s, the environmental movement had begun to gather momentum; and that movement was able to project the image of major corporations as nasty, insidious polluters. The willingness of courts by the late 1960s to impose strong liabilities on major corporations (especially on product manufacturers) was almost certainly facilitated by this discrediting of corporations that was occurring in the public outlook.

In the 1960s, moreover, a market analysis of problems in society was not held in high respect. To be sure, on the macro side federal economic policy was becoming far more sophisticated, incorporating Keynesian insights and eventually implementing a tax cut. On the micro side, however, a market approach was not being taken seriously. For example, in considering the 1966 Safety Act, the

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<sup>58</sup> See ARTHUR M. SCHLESINGER, JR., *ONE THOUSAND DAYS* 635-36 (1965). Schlesinger approvingly discusses Kennedy's condescending attitude toward "business." *Id.* at 638.

<sup>59</sup> The impact of the consumer movement (and then the environmental movement) on the values that underlie modern tort developments has been previously noted in Rabin, *supra* note 3, at 13-14. Both of these movements were aided by newly created public-interest law firms.

<sup>60</sup> RALPH NADER, *UNSAFE AT ANY SPEED* (1965).



Senate Commerce Committee made clear its view that the market could not produce appropriate safety in auto design; indeed, the Committee reported that auto manufacturers themselves believed that "safety didn't sell."<sup>61</sup> The 1970 *Final Report* of the Product Safety Commission reasoned that "market forces" cannot possibly produce appropriate product safety, since consumers are inevitably ignorant of the hazards that ordinary consumer products contain.<sup>62</sup> Indeed, the Commission relied on a U.S. Chamber of Commerce committee report for the idea that it would be hopelessly old-fashioned to believe that the process of "rational consumer choice" can provide an adequate measure of consumer protection.<sup>63</sup> In the Commission's view, a strong "[g]overnment presence" was undeniably required to bring about "responsible manufacturing practices in the interest of safety."<sup>64</sup>

Within universities, the faculty of economic departments were of course devoted to market reasoning, but these departments were somewhat isolated within their larger universities. Political scientists, for example, still defined their field in a way that largely excluded economics.<sup>65</sup> The new schools of public policy that universities were then creating tended to adopt an eclectic, pragmatic approach that did not place any primary value on a market approach.<sup>66</sup> And within law schools, the law-and-economics movement did not really begin until the 1970s.<sup>67</sup>

The general lack of interest in market arguments helps explain why courts themselves did not take such arguments seriously in their tort opinions.<sup>68</sup> Modern products liability cases found it

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<sup>61</sup> S. REP. NO. 1301, 89th Cong., 2d Sess. 3 (1966), reprinted in 1966 U.S.C.C.A.N. 2709, 2710.

<sup>62</sup> FINAL REPORT, *supra* note 45, at 69.

<sup>63</sup> *Id.* at 71.

<sup>64</sup> *Id.* at 72.

<sup>65</sup> Major works in the emerging literature of public choice were published during the 1960s. See, e.g., JAMES BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* (1962). Not until the mid-1970s, however, did political science departments begin to take this new literature seriously.

<sup>66</sup> After all, these were schools of "public policy": schools that favored various forms of government action.

<sup>67</sup> Among the works that helped launch this movement were GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970) and Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

<sup>68</sup> A "distrust of markets" is regarded as a basic feature of modern tort law in Peter H. Schuck, *The New Judicial Ideology of Tort Law*, in *NEW DIRECTIONS IN LIABILITY LAW* 4, 6-

plainly appropriate to reject a contract or warranty approach to questions of manufacturer liability.<sup>69</sup> Indeed, the cases referred derisively to the "intricacies of the law of sales" as obviously irrelevant to the formulation of proper products liability doctrines.<sup>70</sup> A contract analysis might well favor the enforcement of disclaimers of liability that consumers accept; yet courts gave no weight to this analysis in adopting a per se products liability rule rejecting disclaimers of liability for personal injury.<sup>71</sup> Because consumers, in encountering products whose hazards are open and obvious, can take those hazards into account in deciding whether to buy and use those products, contract ideas might support limitations on liability in cases of this sort. Courts disregarded these ideas, however, as they rejected the "open and obvious" doctrine<sup>72</sup> and narrowed the defense of assumption of risk. It might be thought that a web of contracts can often do an adequate job in protecting parties against economic loss. Some courts ignored this thought and created a tort cause-of-action for the negligent infliction of economic loss.<sup>73</sup> Note here that I do not mean to suggest the results reached by modern courts in these cases were necessarily wrong. Rather, my point is that contract-oriented arguments that were regarded as winners in 1950 were being dismissed as obvious losers by 1970—and that this switch in attitude was in significant part a consequence of the general devaluation of market reasoning in public-policy discourse.

The policymaking energy that characterized those years has been described above. How that sense of energy influenced the development of tort doctrine can now be more fully considered. Certainly, this new energy combined with the influence of the Warren Court to encourage state court judges to modernize tort law by eliminating seemingly obsolete restrictions on liability. For that

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8 (Walter Olson ed., 1988). Schuck does not, however, associate this judicial attitude with the more general attitudes that shaped the public-policy process.

<sup>69</sup> See *Greenman v. Yuba Power Prods.*, 377 P.2d 897, 901 (Cal. 1963).

<sup>70</sup> See *id.* at 901 (quoting *Ketterer v. Armour & Co.*, 200 F. 322, 323 (S.D.N.Y. 1912)).

<sup>71</sup> See *Vandermark v. Ford Motor Co.*, 391 P.2d 168, 172 (Cal. 1964); RESTATEMENT (SECOND) OF TORTS § 402A cmt. m (1965).

<sup>72</sup> See, e.g., *Pike v. Frank G. Hough Co.*, 467 P.2d 229, 235 (Cal. 1970); *Micallef v. Miehle Co.*, 348 N.E.2d 571 (N.Y. 1976).

<sup>73</sup> See *J'Aire Corp. v. Gregory*, 598 P.2d 60 (Cal. 1979), critiqued in Gary T. Schwartz, *Economic Loss in American Tort Law: The Examples of J'Aire and of Products Liability*, 23 SAN DIEGO L. REV. 37, 40-50 (1986).

matter, those judges were encouraged to take even bolder steps.<sup>74</sup> Consider, for example, *Sindell v. Abbott Laboratories*.<sup>75</sup> According to the *Sindell* court, "the most persuasive reason" for adopting a market-share theory of liability is that "as between an innocent plaintiff and negligent defendants, the latter should bear the cost of the injury."<sup>76</sup> So long as a court is willing to think boldly about the goals of negligence law, the "reason" given by *Sindell* is sufficiently persuasive. Absent *Sindell*, manufacturers of certain categories of products could anticipate an escape from liability for the harms caused by their negligence. This expectation could undermine the deterrence function of negligence law; the *Sindell* rule restores that function. Absent *Sindell*, the victims of negligently inflicted injury would receive no compensation, and the negligent causers of injury would bear no liability. The *Sindell* rule achieves the fairness goals of tort law by affording appropriate compensation to the victims of negligence and by imposing liability on defendants in proportion to the harms their negligence has caused.

Given, then, a bold appraisal of the ideas sustaining the negligence standard—and this was the kind of boldness that modern courts found quite congenial—the *Sindell* market-share rule can be properly defended. What renders the *Sindell* rule troublesome, however, are the massive problems of fact and law that predictably surround the administration of the market-share doctrine. The *Sindell* opinion approached these problems by way of a carefully drafted double negative: "We are not unmindful of the practical problems involved in defining the market and determining market share. . . ."<sup>77</sup> The opinion then went on to characterize these problems as involving "largely matters of proof" that accordingly can be ignored at "the pleading stage of these proceedings."<sup>78</sup> The court here may have been driving at either of two points. It might have been suggesting that such "practical problems" are *irrelevant* to the content of legal rules, which themselves should be formulated at a certain level of principle. More likely, the court was expressing its expectation that the problems involved in administer-

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<sup>74</sup> See *infra* text accompanying notes 187-188 for discussion of judicial development of the doctrine of strict liability for manufacturing defects.

<sup>75</sup> 607 P.2d 924 (Cal. 1980).

<sup>76</sup> *Id.* at 936.

<sup>77</sup> *Id.* at 937.

<sup>78</sup> *Id.* at 938.

ing the market-share rule would in fact turn out to be *manageable*. Insofar as the court, under either interpretation, was displaying a high regard for the capacity of the judicial process, its position can be seen as a legacy of the Warren era: if courts can administer district-wide school desegregation, they can certainly administer *Sindell*. But the court's position also stems from the more general ideas of the 1960s and 1970s that government should be incisive in diagnosing social problems, ambitious in devising solutions for those problems, and confident in its ability to implement those solutions.<sup>79</sup>

To recap, in expanding liability modern judges drew upon tort law's negligence tradition, upon the fairness and deterrence rationales embedded in that tradition, and upon the modern loss-distribution rationale, which could easily enough be linked with that tradition. Furthermore, those judges were emboldened both by the problem-solving judicial activism of the Warren Court and by the more general reform-minded public-policy discourse of the 1960s and 1970s. In this latter respect modern tort law can be regarded as one of those ambitious programs initiated during the Great Society and then confirmed and further institutionalized during the 1970s. To be sure, such a classification is normatively quite ambiguous. Many Great Society innovations—such as HUD—have turned out to be disappointments, if not debacles. But other innovations, such as the 1964 Civil Rights Act, have become cornerstones of contemporary America. Medicare relates to modern tort law in that both were based, in part, on a concern for insuring against losses. In conjunction with other amendments to Social Security, Medicare has largely solved the health-care access problems of older Americans and has also alleviated the more general societal problem of poverty among the aged.<sup>80</sup> These remedies, however, have proved to be far more expensive than 1960s reformers had originally expected. Modern products liability was able to draw on a new public-policy consensus that itself gave rise to new federal programs for the regulation of consumer products and motor vehicles. The activities of the Consumer Product Safety Commission

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<sup>79</sup> Whether, in the *Sindell* setting, this confidence was misplaced is a question that will be considered below. See *infra* text accompanying notes 451-454.

<sup>80</sup> This problem had been highlighted in MICHAEL HARRINGTON, *THE OTHER AMERICA* 101-20 (1962).

have turned out to be generally ineffectual;<sup>81</sup> but the federal program of auto regulation has produced safety benefits that on balance have been well worth their expense.<sup>82</sup>

### III. MODERN TORT LAW: NEGLIGENCE LIABILITY OR NEAR ABSOLUTE LIABILITY?

The doctrinal developments on which my earlier article relied in describing the vitality of negligence have been summarized in Part II. That article was partly a response to the views expressed by scholars like Calabresi to the effect that modern tort developments had entailed a rejection or subordination of the negligence standard in favor of strict liability.<sup>83</sup> In recent years, the scholar who has been most vigorous in stressing strict liability and downplaying negligence is George Priest. As noted, a frequent Priest position is that modern tort law approaches absolute liability in the burdens it places on products manufacturers and other institutional and professional defendants.<sup>84</sup> According to one article, "the rationale for the extension of liability has been that providers of products and services—chiefly corporations—are almost always in a better position than consumers to prevent accidents and to provide insurance for those accidents that cannot be prevented."<sup>85</sup> A few pages later, the "almost" qualifier is deleted: "[M]odern tort law presumes that the corporate provider is always in a better position than the consumer" both to prevent and to insure against inju-

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<sup>81</sup> See W. KIP VISCUSI, REGULATING CONSUMER PRODUCT SAFETY 101-04 (1984).

<sup>82</sup> See ROBERT W. CRANDALL ET AL., REGULATING THE AUTOMOBILE 45-84 (1986). The dormancy of the program in recent years is considered in MASHAW & HARFST, *supra* note 46. But the final version of the program's passive restraint regulation, now being implemented, will probably be quite effective in saving lives.

<sup>83</sup> See *supra* note 15.

<sup>84</sup> At times, Priest's concepts are somewhat less dramatic. One article, for example, merely refers to modern liability extending "far beyond the simple cost-benefit standard" associated with negligence law. George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1538 (1987) [hereinafter Priest, *Insurance Crisis*]. In much of Priest's writing, however, "absolute liability" is the rhetoric that dramatizes his argument and confirms the dominance of enterprise liability theory.

Accordingly, the Priest suggestion of near absolute liability is what this Part primarily considers. Even so, my review of modern tort doctrine will permit some evaluation of Priest's "far beyond" claim. One problem with this claim is that outside of products liability, Priest does not really identify judicial holdings that clearly move liability standards beyond the negligence level.

<sup>85</sup> George L. Priest, *Modern Tort Law and Its Reform*, 22 VAL. U. L. REV. 1, 7 (1987) [hereinafter Priest, *Modern Tort Law*].

ries.<sup>86</sup> As another article suggests, these ideas have been leading American tort law "inexorably toward absolute injurer liability."<sup>87</sup> Focusing on medical malpractice in one article, Priest suggests that the facts of the doctor's behavior in the individual case are not especially relevant; rather, courts impose liability on doctors merely because they comprise one of those "generic categories of actors [who are] in a better position to prevent injuries or to spread the costs of them."<sup>88</sup> In this article Priest equates municipalities and hospitals with manufacturers and doctors: all are commonly held liable merely because courts perceive that they are "in a better position than the plaintiff . . . both to control the determinants of risk and to spread the risks of injuries once they are suffered."<sup>89</sup>

Priest's articles undoubtedly comprise a remarkable exercise in the writing of intellectual history. He has succeeded in constructing a powerful narrative.<sup>90</sup> I have admired that narrative from the outset; even so, I have entertained doubts about its precision.<sup>91</sup> The idea of enterprise liability will be more fully considered in Part IV below, and is there taken seriously as one of several sources of modern tort doctrine. The notion of near absolute liability as a consequence of that idea is considered in this Part, and is explicitly rejected. As it happens, there is some uncertainty in Priest's portrayal of the law's approach to absolute liability. His exposition of the ideas governing modern tort law might be thought to imply that modern courts have adopted formal rules of absolute liability. This, however, is a claim that Priest clearly

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<sup>86</sup> *Id.* at 10.

<sup>87</sup> George L. Priest, *The Modern Irony of Civil Law: A Memoir of Strict Products Liability in the United States*, 9 TEL AVIV U. STUD. IN L. 93, 118 (1989) [hereinafter Priest, *Memoir*].

<sup>88</sup> George L. Priest, *The New Legal Structure of Risk Control*, DAEDALUS, Fall 1990, at 207, 217 [hereinafter Priest, *Risk Control*].

<sup>89</sup> *Id.* at 221. I should note here that I clearly agree with Priest that absolute liability would be bad tort policy. I therefore largely side with him in his recent debate with absolute liability advocates. Compare George L. Priest, *Can Absolute Manufacturer Liability be Defended?*, 9 YALE J. ON REG. 237 (1992) with Stephen P. Croley & Jon P. Hanson, *What Liability Crisis? An Alternative Explanation for Recent Events in Products Liability*, 8 YALE J. ON REG. 1 (1990).

<sup>90</sup> His narrative has been largely accepted, for example, by writers like Peter Huber. See PETER HUBER, *LIABILITY: LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988).

<sup>91</sup> See Gary T. Schwartz, *Directions in Contemporary Products Liability Scholarship*, 14 J. LEGAL STUD. 763, 768 (1985) [hereinafter Schwartz, *Directions*].

enough avoids making.<sup>92</sup> Rather much of the time his position on near absolute liability relates to judicial opinions which set forth the subsidiary rules that provide content to the law's basic liability standards.<sup>93</sup> On other occasions, near absolute liability seems to describe, in a more practical way, the actual pattern of claims and recoveries.<sup>94</sup>

Yet however Priest's thesis is interpreted, as a characterization of medical malpractice it is incorrect. In malpractice cases, negligence rather than strict liability clearly remains the formal liability standard.<sup>95</sup> Moreover, in malpractice cases courts have interpreted the negligence standard in ways that fix it at a level that seems considerably below the risk-benefit level that is generally associated with negligence.<sup>96</sup> As for the pattern of claims, a recent study<sup>97</sup> shows that for every 1000 patients who enter hospitals, about 40 suffer treatment-related injuries; and perhaps 10 of these injuries are due to malpractice. Yet on average only 1.2 malpractice claims are actually asserted.<sup>98</sup> A comparison of the number of these claims to the number of underlying injuries makes clear that the claims record falls ninety-seven percent short of any practice of absolute liability.<sup>99</sup>

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<sup>92</sup> Yet Priest does not really explain why courts, having embraced enterprise liability theory, have not been willing officially to endorse absolute liability standards. See *infra* notes 182-185 and accompanying text.

<sup>93</sup> In a recent article, Priest discusses various "presumptions" developed by courts in administering the products liability doctrine of defective warning. Given these presumptions, warning law has been led to a position "close to absolute liability." George L. Priest, *The Modern Expansion of Tort Liability: Its Sources, Its Effects, and Its Reform*, 5 J. ECON. PERSP. 31, 41 (1991) [hereinafter Priest, *Modern Expansion*]. In the same article, Priest acknowledges that courts after 1960 have continued to apply the negligence rule in many contexts. He goes on to emphasize, however, that after 1960 "the concept of negligence and the rules and standards attending it necessarily had to change." *Id.* at 38.

<sup>94</sup> See, for example, Priest's reference to "the reality of liability judgments," *id.* at 41, and his statement about the liability of drug manufacturers, discussed *infra* note 138.

<sup>95</sup> See *infra* note 183 and accompanying text.

<sup>96</sup> See *infra* text accompanying notes 328-332.

<sup>97</sup> A. Russell Localio et al., *Relation Between Malpractice Claims and Adverse Events Due to Negligence*, 325 N. ENG. J. OF MED. 245 (1991).

<sup>98</sup> See *id.* at 246, 250.

<sup>99</sup> As far as hospital liability is concerned, many hospitals as of 1960 were free of all liability, on account of doctrines of charitable and governmental immunities. With these immunities abolished, hospitals are now subject to liability for their managerial negligence and, like other employers, to vicarious liability for the negligence of their employees (for example, their nurses). To be sure, since 1960 some courts have considerably expanded the concept of the hospital's vicarious liability. But even the patient who relies on such an expansion needs

As for the liability of commercial landowners, even those jurisdictions that have expanded liability doctrines since 1960 have typically gone no further than generalizing a rule of negligence liability.<sup>100</sup> As for government agencies, their liability is now governed by tort claims statutes and state common-law rulings that either explicitly or implicitly establish negligence as the criterion of liability. Under the Federal Tort Claims Act, for example, the federal government is liable for its "wrongful act[s]";<sup>101</sup> in 1972, the Supreme Court, interpreting this language, ruled that a plaintiff suing the federal government cannot invoke those modern doctrines of strict liability that apply to comparable defendants in the private sector.<sup>102</sup> In California, the statutory provisions on liability for public property in a dangerous condition call on the court to balance, in a rather precise negligence-like way, the probability and severity of the injury risk against the cost or burden of preventing that risk.<sup>103</sup> Moreover, I am unaware of any evidence indicating that the claims process operates against public agencies or commercial landowners in a way that produces results that are grossly out of line with the official rules of liability.<sup>104</sup>

Turn now to product-related injuries and the doctrine of strict products liability. The *Second Restatement* adopts, in section

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to establish the negligence or malpractice of the physician who treated him; there is no hint here of absolute liability for the adverse results of medical treatment.

<sup>100</sup> See *infra* text accompanying notes 302-307 (discussing general landowner liability). The self-service cases are a special situation in which liability may now exceed the negligence level in a few states. These cases are described *infra* text accompanying notes 250-252.

<sup>101</sup> 28 U.S.C. § 1346(b) (1989).

<sup>102</sup> *Laird v. Nelms*, 406 U.S. 797, 803 (1972).

<sup>103</sup> CAL. GOV'T CODE §§ 830, 830.2 (West 1980). Moreover, if public officials can show that they had explicitly approved the original design plan, the plaintiff's burden of proof becomes even heavier. See *id.* § 830.6. For a similar qualified immunity under New York law, see *Friedman v. State*, 493 N.E.2d 893 (N.Y. 1986). The discretionary function immunity under federal law is discussed *infra* text accompanying notes 392-397.

<sup>104</sup> According to Priest, before 1960 tort defendants were found negligent only when their conduct showed "clear moral culpability substantially antagonistic to social norms". Priest, *Risk Control*, *supra* note 88, at 207. Call this "emphatic negligence" and assume *arguendo* that Priest is correct that before 1960 a defendant was held liable only when its "emphatic negligence" was proven. Assume now that after 1960 a showing of "ordinary negligence" becomes sufficient to justify liability. This shift would sharply increase the liability of injurers. Obviously, however, the shift would entail an increase in negligence liability rather than a move toward absolute liability. From this perspective one can consider Priest's discussion of suits against ladder manufacturers, doctors, and hospitals. Priest, *Modern Expansion*, *supra* note 93, at 38. Findings of negligence are of course rendered by juries. On this point, see *infra* note 217.



402A, a rule of strict liability that readily applies to cases involving manufacturing defects.<sup>105</sup> In his original article on enterprise liability, Priest focused on the *Restatement* and the years between 1960 and 1965 as the period in which enterprise liability came to dominate American tort law; also, he identified William Prosser as the *Restatement* figure who was most effective in advocating enterprise liability ideas.<sup>106</sup> However, my own essay in the symposium that included Priest's article offered a more moderate explanation for this strict liability rule—and pointed out that Prosser himself had supported that explanation.<sup>107</sup> This explanation relies on the high correlation between manufacturer negligence and manufacturing defects. By treating defect as a good enough proxy for negligence, the strict liability doctrine streamlines litigation and resolves some doubts in favor of plaintiffs without dramatically changing the pattern of litigation results that would ensue under a negligence standard.

In his more recent work, Priest has been led to reconsider section 402A, and has now explicitly abandoned his previous interpretation of the American Law Institute's effort.<sup>108</sup> He now understands section 402A as resting on a limited rationale similar to the one I had set forth. What is more, he suggests that a rule of strict liability for manufacturing defects makes good policy sense<sup>109</sup> and that the theory of enterprise liability did not play a significant role in the adoption of section 402A. Rather, the acceptance of enterprise liability—and the related judicial movement toward absolute liability—were in fact “inconsistent” with the intent of Prosser and most of his ALI advisers.<sup>110</sup> Those developments, Priest reports, occurred subsequent to 1965, as courts expanded on the doctrines of manufacturer liability for design defects and warning

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<sup>105</sup> RESTATEMENT (SECOND) OF TORTS § 402A (1965).

<sup>106</sup> See Priest, *Enterprise Liability*, *supra* note 5, at 505-07.

<sup>107</sup> Schwartz, *Directions*, *supra* note 91, at 768-69. My current views on this strict liability rule are set forth *infra* at notes 187-188 and accompanying text.

<sup>108</sup> George L. Priest, *Strict Products Liability: The Original Intent*, 10 CARDOZO L. REV. 2301 (1989) [hereinafter Priest, *Original Intent*]. Priest is gracious in acknowledging that my essay encouraged him to look again at § 402A. *Id.* at 2301.

<sup>109</sup> See *id.* at 2316-17; Priest, *Memoir*, *supra* note 87, at 108-10, 113. But see Priest, *Modern Tort Law*, *supra* note 85, at 24-25, seemingly deploring this strict liability rule.

<sup>110</sup> Priest, *Original Intent*, *supra* note 108, at 2304. In Priest's current view, Prosser and these advisers (except for Fleming James) would have “vigorously opposed” the modern applications of strict products liability. *Id.*

defects.<sup>111</sup>

How close, then, does current design defect law come to absolute liability?<sup>112</sup> Within the law of design liability, the risk-benefit test plays the primary role.<sup>113</sup> Priest further acknowledges that this test contains a basic core of negligence reasoning. He goes on to suggest, however, that this risk-benefit standard is frequently elaborated on in ways that depart from a proper negligence analysis, which would focus on the appropriateness of alternative designs.<sup>114</sup> The problem that Priest refers to here certainly exists. Yet it does not appear to be all that serious. First, many cases *do* apply a version of the risk-benefit test that seems quite close to a negligence approach.<sup>115</sup> And while other courts rely on a mix of factors that

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<sup>111</sup> *Id.* at 2324-27.

<sup>112</sup> Henderson and Twerski's new article reviews modern design defect law, and concludes that courts have clearly rejected absolute liability. James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263 (1991). The evaluation offered here supplements their valuable review.

<sup>113</sup> Here I agree with Priest's assessment. Priest, *Modern Tort Law*, *supra* note 85, at 26.

The consumer expectation standard currently plays a secondary role in design defect cases. While noting this, Priest nevertheless suggests that this standard "approach[es] absolute liability." George L. Priest, *The Disappearance of the Consumer from Modern Products Liability Law*, in *THE FRONTIER OF RESEARCH IN THE CONSUMER INTEREST 782* (E. Scott Maynes ed., 1988) [hereinafter Priest, *Disappearance of Consumer*]. To confirm this, Priest cites a case in which a California court affirmed a jury's apparent finding that the defendant's product violated the consumer expectations standard even though the jury also found that the product's overall benefits exceeded its overall risks. *Curtis v. State ex rel. Dep't of Transp.*, 180 Cal. Rptr. 843 (Ct. App. 1982). In *Curtis*, however, the jury also found that the manufacturer was guilty of negligence. *Id.* at 846. The facts in *Curtis* are not set forth in a way that would make it possible to ascertain the basis for the jury's various findings. Still, the explicit finding of manufacturer negligence makes it obviously inappropriate to characterize *Curtis* as reaching an absolute liability result.

As it happens, I am no admirer of the consumer expectations standard, finding it frequently shaggy and uncertain. Yet whatever its area of uncertainty, that standard cannot equal absolute liability, since on its face it accepts a liability limitation of consumer knowledge—of assumption of risk. Given this limitation, the standard can easily produce dramatic denials of liability. See, e.g., *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230, 236 (6th Cir. 1988) (cigarettes); *Delvaux v. Ford Motor Co.*, 764 F.2d 469 (7th Cir. 1985) (auto convertible without roll bar); *Rosburg v. Minnesota Mining & Mfg. Co.*, 226 Cal. Rptr. 299 (Ct. App. 1986) (silicon breast prosthesis); *Kutlar v. AMF Harley-Davidson*, 550 N.E.2d 1236 (Ill. Ct. App.) (motorcycle with extra-wide gas tank and no crash bars), *appeal denied*, 555 N.E. 2d 377 (Ill. 1990); *Lamke v. Futorian Corp.*, 709 P.2d 684 (Okla. 1985) (cigarette that is not self-extinguishing).

<sup>114</sup> Priest, *Modern Tort Law*, *supra* note 85, at 26-30.

<sup>115</sup> See, e.g., *Singleton v. International Harvester Co.*, 685 F.2d 112, 115 (4th Cir. 1981) ("[T]he issue is whether a manufacturer, knowing the risks inherent in his product, acted

may be somewhat lacking in analytic rigor,<sup>116</sup> the typical mix remaining with the general vicinity of the negligence risk-benefit standard.

As far as the manufacturer's modern obligation to warn is concerned, it is often expressed in terms of an obligation to give a "reasonable" warning; and many courts make clear that the manufacturer's warning obligation is essentially a negligence obligation. Indeed, Priest himself suggests that the "doctrinal structure of modern [warning] law requires little change."<sup>117</sup> One doctrine that does offend Priest is that expressed in *Beshada v. Johns-Manville Products Corp.*,<sup>118</sup> ruling that manufacturers can be held liable for

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reasonably in putting it on the market."); *Garst v. General Motors Corp.*, 484 P.2d 47, 61 (Kan. 1971) ("[T]he product-design duty of a manufacturer is that of reasonable care . . ."); *St. Germain v. Husqvarna Corp.*, 544 A.2d 1283, 1285-1286 (Me. 1988) (endorsing "danger utility" test for design defect that roughly equals negligence test); *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176, 186 (Mich. 1984) (adopting "a pure negligence, risk-utility test"); *Wilson v. Piper Aircraft Corp.*, 577 P.2d 1322, 1327 (Or. 1978) (ruling that plaintiff must show that "suggested alternatives are not only technically feasible but also practicable"); *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666, 683 (W. Va. 1979) (indicating that defectiveness depends on the standards of the "reasonably prudent manufacturer").

<sup>116</sup> Of these courts, the most important is the New York Court of Appeals. In *Voss v. Black & Decker Manufacturing Co.*, that court started out by reasoning that a product's design is defective if it renders the product "not reasonably safe." 450 N.E.2d 204, 208 (N.Y. 1983). In elaborating on this reasonableness concept, the court enumerated seven factors. Three of these are the magnitude of the product's risk, "the availability of a safer design," and "the potential for designing and manufacturing the product so that it is safer but remains functional and reasonably priced." *Id.* at 208-09. These factors are essential to a proper negligence analysis. Other factors mentioned by the court include "the ability of the plaintiff to have avoided injury by careful use of the product," the consumer's "degree of awareness of the potential danger of the product," and the overall utility of the product. *Id.* Two of these factors relate to notions of contributory negligence and assumption of risk that are certainly germane to a negligence evaluation; and all three factors can serve in many cases to contract the scope of the manufacturer's liability. Only the seventh factor—"the manufacturer's ability to spread any cost related to improving the safety of the design"—suggests any interest in enterprise liability.

Having set forth these various factors in the abstract, the court then discussed how the jury should analyze the design defect claim in the immediate case. And here the court suggested that the key question concerned the extent to which the product's design danger could be reduced by modifying that design in a "feasible" way that would entail no more than a "reasonable cost." *Id.* at 209. Hence: as the court rendered operational its list of factors, the risk-benefit theme became dominant.

Later New York cases, relying on *Voss*, have rejected the design defect claims of plaintiffs who fail to establish a safer and feasible design alternative. *E.g.*, *Burgos v. Lutz*, 512 N.Y.S.2d 424 (App. Div. 1987).

<sup>117</sup> Priest, *Modern Tort Law*, *supra* note 85, at 31.

<sup>118</sup> 447 A.2d 539 (N.J. 1982).

failures to warn even if the manufacturer at the time of the product sale neither knew nor had reason to know of the product hazard in question. Priest indicates that *Beshada* lies on "the leading edge of modern warning law."<sup>119</sup> Yet *Beshada* was all but overruled—limited to its asbestos facts—by the New Jersey Supreme Court in *Feldman v. Lederle Laboratories* only two years later.<sup>120</sup> While other failure-to-warn opinions sometimes employ the rhetoric of hindsight, this usually is little more than rhetoric; as James Henderson and Aaron Twerski point out, "no jurisdiction except New Jersey has [endorsed hindsight liability] in a case where it mattered on the facts."<sup>121</sup> There are no cases, for example, in which drug manufacturers have been held liable for their failure to warn of "unknowable risks."

Thus a review of the basic categories of products liability doctrine thus does not confirm Priest's claim that modern products liability approaches absolute liability. At times, however, Priest's claim seems to concern how the formal categories of doctrine are explained or worked out in typical judicial opinions. To consider this version of the Priest claim, I have selected one category of products—power saws and mechanical saws—and have read all the appellate opinions dealing with the liability of their manufacturers.<sup>122</sup> Of the forty-eight opinions I was able to find, in twenty-one the court ruled roughly in favor of plaintiffs, in twenty-five in favor of defendants. (Two cases contained a mix of holdings.) Several opinions, in denying or defining liability, expressly rejected abso-

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<sup>119</sup> Priest, *Modern Tort Law*, *supra* note 85, at 31. *Beshada* is a case on which Priest heavily relies. His article cites it four times, for four related (but distinct) propositions. *Id.* at 3 n.20, 9 n.40, 12 n.52, 31.

<sup>120</sup> 479 A.2d 374 (N.J. 1984). Priest's article does not mention *Feldman*. Indeed, the article suggests that modern courts characteristically adopt a "retrospective" or "hindsight" approach to liability that rejects defendants' "state-of-the-art" arguments. Priest, *Modern Tort Law*, *supra* note 85, at 8, 12, 28, 31.

It should be noted that in asbestos cases the issue of liability for unknowable harms is not very relevant. Plaintiffs are in fact generally able to show that manufacturers knew or should have known of the hazards of asbestos. *See, e.g., Borel v. Fibreboard Paper Prods.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974); MOLLY SELVIN & LARRY PICUS, *THE DEBATE OVER JURY PERFORMANCE: OBSERVATIONS FROM A RECENT ASBESTOS CASE* 21 (1987).

<sup>121</sup> James A. Henderson, Jr. & Aaron D. Twerski, *PRODUCTS LIABILITY: PROBLEMS & PROCESS* 612 (2d ed. 1992); *see infra* text accompanying notes 265-273.

<sup>122</sup> The cases are collected in Michael G. Walsh, Annotation, *Products Liability: Mechanical or Chain Saw or Components Thereof*, 22 A.L.R. 4TH 206 (1983 & Supp. 1991).

lute liability;<sup>123</sup> only one opinion contained rhetoric in any way sympathetic to enterprise liability;<sup>124</sup> and none of the opinions relied on reasoning at all suggestive of any practice of absolute liability. In the seven cases involving apparent claims of manufacturing defects, plaintiffs prevailed in four, as courts tried to figure out the extent to which various forms of circumstantial evidence can be probative of manufacturing defects.<sup>125</sup> Almost all of the thirty-two design defect cases dealt with the issue of the appropriateness of safety devices: a chain brake for a chain saw, a blade guard for a table saw, or a riving knife for a circular saw. In two of these cases, courts ruling for plaintiffs were satisfied with less evidence than an analyst like me would regard as satisfactory.<sup>126</sup> Still, the two courts seemed genuine in their belief that an improper design had been adequately established.

Moreover, as the breakdown of results itself suggests, these two cases did not set the general pattern. In other design defect cases, courts denied liability for a variety of reasons: for example, because they regarded jury verdicts rejecting such claims as supported by the evidence,<sup>127</sup> because they found that "victim fault, rather than any alleged design defect, was the cause of the accident";<sup>128</sup> and because they perceived that the safety device identified by the plaintiff would have impaired the utility of the saw.<sup>129</sup> There were nine cases involving claims of the saw manufacturer's failure to warn. In these nine, plaintiffs prevailed in only two.

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<sup>123</sup> *E.g.*, *Brown v. Sears, Roebuck & Co.*, 667 P.2d 750 (Ariz. Ct. App. 1983); *Kysor Indus. Corp. v. Frazier*, 642 P.2d 908, 911 (Colo. 1982); *Morningstar v. Black & Decker Mfg. Co.*, 253 S.E.2d 666, 677 (W. Va. 1979);

<sup>124</sup> This was the New York opinion in *Voss v. Black & Decker Manufacturing Co.*, 450 N.E.2d 204 (N.Y. 1983), discussed *supra* note 116. On its facts, *Voss* concerned a power saw.

<sup>125</sup> *Compare* *Skil Corp. v. Lugsdin*, 309 S.E.2d 921 (Ga. Ct. App. 1983) (affirming liability) with *Duncan v. Rockwell Mfg. Co.*, 567 P.2d 936 (Mont. 1977) (denying liability).

<sup>126</sup> *See* *Lynd v. Rockwell Mfg. Co.*, 554 P.2d 1000 (Or. 1976); *Peterson v. Lebanon Mach. Works*, 641 P.2d 1165 (Or. Ct. App. 1982). I am troubled by the absence of expert testimony in *Lynd*, 554 P.2d at 1002, and by the court's perception in *Peterson* that it is "self-evident" that the jump chain of an edger's in-feed table could have been wired through the control panel. 641 P.2d at 1167.

<sup>127</sup> *E.g.*, *Elliott v. Sears, Roebuck & Co.*, 527 N.E.2d 574, 579 (Ill. App. Ct. 1988).

<sup>128</sup> *Nevils v. Singer Co.*, 533 So. 2d 157, 160 (La. Ct. App. 1988).

<sup>129</sup> *See* *Wood v. Stihl, Inc.*, 705 F.2d 1101, 1106-07 (9th Cir. 1983); *Hagans v. Oliver Mach. Co.*, 576 F.2d 97, 101 (5th Cir. 1978); *St. Germain v. Husqvarna Corp.*, 544 A.2d 1283, 1285-86 (Me. 1988).

Courts denied liability because the hazard was obvious,<sup>130</sup> because the defendant's warning was legally adequate,<sup>131</sup> because the plaintiff was an experienced user,<sup>132</sup> and because there was no showing of causation between the allegedly inadequate warning and the plaintiff's injury.<sup>133</sup>

On balance, the evidence afforded by this set of products liability opinions does not support any claim of near absolute liability. In particular, the results reached in the warning cases reject Priest's indication that legal doctrines have "led warning law close to absolute liability."<sup>134</sup> What all these opinions do strongly suggest is that a liability-delimiting standard of "defect" has been applied by courts with some integrity.<sup>135</sup>

To be sure, it may be that Priest's general position relates not so much to judicial opinions as to the pattern of underlying tort claims. A major new report by the Rand Institute for Civil Justice has gathered data on the situation of accident victims.<sup>136</sup> The Rand data show that of every 100 victims who suffer "on-the-job product-associated injuries" only 7 take any action by way of pursuing a tort claim; of those suffering "nonwork, product-associated injuries" only 2 of every 100 take any action.<sup>137</sup> The Rand study certainly shows that no practice resembling absolute liability is in effect in products cases generally.

To flesh out the implications of Rand's aggregate data, let me

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<sup>130</sup> See *Hagans*, 576 F.2d at 102-03.

<sup>131</sup> See *Scott v. Black & Decker, Inc.*, 717 F.2d 251, 254 (5th Cir. 1983); *Gross v. Black & Decker (U.S.), Inc.*, 695 F.2d 858 (5th Cir. 1983); *Ducote v. Liberty Mut. Ins. Co.*, 451 So. 2d 1211, 1215 (La. Ct. App. 1984).

<sup>132</sup> See *Poland v. Beaird-Poulan*, 483 F. Supp. 1256, 1264-65 (W.D. La. 1980); *Ducote*, 451 So. 2d at 1215.

<sup>133</sup> *Hagan v. EZ Mfg. Co.*, 674 F.2d 1047, 1052-53 (5th Cir. 1982); *Kysor Industrial Corp. v. Frazier*, 642 P.2d 908, 912 (Colo. 1982).

<sup>134</sup> Priest, *Modern Expansion*, *supra* note 93, at 41. "Except where intentionally self-inflicted," all product-related injuries result, in legal principle, from inadequate warnings, though consumers do not "always" recover. *Id.*

<sup>135</sup> Granted, the process by which cases get selected for appeal makes any set of appellate opinions something less than conclusive as evidence.

<sup>136</sup> DEBORAH R. HENSLER ET AL., *COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES* 124 (1991). According to this report, in no single category of accidents do even 40 percent of all victims assert tort claims. Indeed, the highest level of claiming is about 33 percent—by the victims of auto accidents. Yet, as Priest acknowledges, claims between motorists remain covered by a rule and practice of negligence liability. See Priest, *Modern Expansion*, *supra* note 93, at 42.

<sup>137</sup> HENSLER ET AL., *supra* note 136, at 124.

now look at particular categories of dangerous products. Sometimes, television sets catch fire in homes. When they do, my sense is that products liability claims frequently ensue. Such a result is quite explainable in terms of a meaningful defect doctrine. A television set would certainly not catch fire unless the set then contained some defect, and given the way in which most television sets sit stationary in a corner of the consumer's room (not even requiring periodic maintenance), many juries could permissibly find that the defect in the set was present when the set itself was first purchased by the consumer.<sup>138</sup>

Television sets can here be compared to other household products ranked as dangerous by the Consumer Product Safety Commission. According to the Commission's data, there are over 417,000 knife injuries each year that are treated in the emergency rooms of American hospitals.<sup>139</sup> One hears, however, of almost no lawsuits brought against knife manufacturers. The obvious explanation is that the defect requirement in products liability law means business—and does *not* mean absolute liability. Knife injuries plainly result from the inherent hazards of the products themselves, in conjunction with their careless handling by consumers. Knives rarely include manufacturing defects; because their func-

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<sup>138</sup> Priest states that "[i]t is barely exaggeration that today pharmaceutical manufacturers are absolutely liable for adverse reactions to drugs." Priest, *Modern Tort Law*, *supra* note 85, at 36. This statement seems to refer to claims and settlements. Yet Priest offers no supporting data. I have recently reviewed JAMES W. LONG, *THE ESSENTIAL GUIDE TO PRESCRIPTION DRUGS* (1991), a 1000-page book discussing hundreds of drugs and hundreds of their serious side effects. From what I know, very few of these serious side effects have resulted in litigation. For observations that support my own understanding, see Judith P. Swazey, *Prescription Drugs Safety in Product Liability*, in *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* 291, 297, 328 (Peter W. Huber & Robert E. Litan eds., 1991).

Priest has also emphasized the liability burden of general aviation manufacturers. See George L. Priest, *Can Absolute Manufacturer Liability be Defended?*, 9 *YALE J. ON REG.* 237, 259-62 (1992). This burden is indeed substantial. See *infra* notes 214-216 and accompanying text. Still, I am advised by experienced defense counsel that only about 25% of all victims of general aviation crashes actually file products liability claims. Interview with William V. O'Connor (March 14, 1992); Interview with Frank Silane (April 10, 1992). The remaining victims evidently perceive that pilot error was the exclusive cause of the crash, or they are dissuaded from claiming by all the difficulties involved in proving a product defect.

<sup>139</sup> Also, these emergency rooms annually treat over 250,000 injuries resulting from nails, screws, carpet tacks, and thumbtacks. These data are drawn from an untitled document I have received from the Commission. NATIONAL ELECTRONIC INJURY SURVEILLANCE SYSTEM DATA (1990) [hereinafter NEISS DATA].

tion requires their dangerous design feature, their designs are hardly defective; and because consumers appreciate their hazards, no warnings are required, nor do these products defeat ordinary consumer expectations. No practice of near absolute liability prevails, and under the defect requirement there is very little liability in fact.

To be sure, because products such as knives seem innately dangerous, they might be thought to provide an awkward test for enterprise liability theory, given the way in which that theory incorporates the idea of providing manufacturers with incentives for improved product safety. Yet enterprise liability theory, as explained by Priest, includes loss distribution as well as loss prevention. Indeed, loss distribution is at times identified as the primary point behind enterprise liability;<sup>140</sup> and the larger the number of foreseeable injuries, the more important products liability's supposed loss distribution function becomes.

Still, to be more thorough in this review of the absolute liability rhetoric, consideration will now be given to two additional categories of danger-producing products. Look first at bicycles. Bicycles—unlike knives—are complex products that incorporate a range of design choices. The National Commission's *Final Report* in 1970 spent two pages discussing apparent design deficiencies in bicycles.<sup>141</sup> The Consumer Product Safety Commission subsequently adopted an extensive (though nonpreemptive) standard covering bicycle design.<sup>142</sup> Certainly, bicycle manufacturers are vulnerable to suit under theories of defective design and failure to warn. Furthermore, bicycles can also include a wide variety of manufacturing defects. Nevertheless, most bicycle accidents plainly result from user error. Even though many of these users are young and inexperienced, their inadequate management of their bicycles provides an explanation for their injuries that renders unlikely any plausible claim of defect. As of 1970, bicycle injuries constituted 1 out of every 15 injuries associated with consumer products.<sup>143</sup> By 1990, over 580,000 bicycle injuries required treat-

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<sup>140</sup> See Priest, *Insurance Crisis*, *supra* note 84, at 1525.

<sup>141</sup> FINAL REPORT, *supra* note 45, at 18-20.

<sup>142</sup> 16 C.F.R. §§ 1512.1 to 1512.20 (1992); see *Forester v. Consumer Product Safety Comm'n*, 559 F.2d 774 (D.C. Cir. 1977) (affirming standard).

<sup>143</sup> FINAL REPORT, *supra* note 45, at 10-11.



ment in American emergency rooms.<sup>144</sup> Yet in all the years since 1967 there have been only fourteen appellate opinions dealing with the products liability of bicycle manufacturers.<sup>145</sup> Such a small number of appeals strongly suggests that the number of actual claims against bicycle manufacturers is no more than a very small fraction of the total number of persons injured on account of their use of bicycles.

Finally, I have considered the liability exposure of the manufacturers of automobiles, and in doing so have been able to develop data that goes beyond appellate opinions. Car manufacturers loom large in the jurisprudence of products liability: consider, for example, *Henningsen v. Bloomfield Motors, Inc.*,<sup>146</sup> *Vandermark v. Ford Motor Co.*,<sup>147</sup> *Larsen v. General Motors Corp.*,<sup>148</sup> *Daly v. General Motors Corp.*,<sup>149</sup> *Dawson v. Chrysler Corp.*,<sup>150</sup> and any number of other leading products liability cases. How often, then, are auto manufacturers sued and subjected to liability? In the late 1980s, about 650 products liability actions for personal injury were filed in federal courts each year against auto manufacturers.<sup>151</sup> As far as state court actions are concerned, the data show that the percentage of all products liability cases (not just auto) filed in federal court varies from twenty-three percent (in Iowa) to sixty-six percent (in Massachusetts).<sup>152</sup> To err perhaps on the conservative side, assume here that only twenty percent of all personal injury products liability actions filed against auto manufacturers are commenced in federal court. Given the 650 federal court number, the total number of formal filings thus equals about 3,250.

Of course, possible tort claims are often settled before any for-

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<sup>144</sup> NEISS DATA, *supra* note 139.

<sup>145</sup> See Lee R. Russ, Annotation, *Products Liability: Bicycles and Accessories*, 76 A.L.R. 4TH 117 (1990 & Supp. 1991). Courts ruled in favor of plaintiffs in eight of these cases.

<sup>146</sup> 161 A.2d 69 (N.J. 1960).

<sup>147</sup> 391 P.2d 168 (Cal. 1964).

<sup>148</sup> 391 F.2d 495 (8th Cir. 1968).

<sup>149</sup> 575 P.2d 1162 (Cal. 1978).

<sup>150</sup> 630 F.2d 950 (3rd Cir. 1980), *cert. denied*, 450 U.S. 959 (1981).

<sup>151</sup> DIRECTOR OF THE ADMIN. OFFICE OF THE U.S. COURTS, ANNUAL REPORT OF THE DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS 180 (1989) (Table C-2A).

<sup>152</sup> U.S. GEN. ACCOUNTING OFFICE, PRODUCT LIABILITY: EXTENT OF "LITIGATION EXPLOSION" IN FEDERAL COURTS QUESTIONED 39 (1988). Twenty-three percent of all products claims brought against the members of National Machine Tool Builders Association were filed in federal court. *Id.* at 40.

mal lawsuits are filed.<sup>153</sup> Based on data I have (confidentially) received from two auto companies on the number of claims and the ratio of claims to lawsuits, I can extrapolate that there are about 2,000 instances each year in which personal-injury claims against auto companies are settled by some payment before the filing of suit. Combine, then, the number of formal personal-injury lawsuits and the number of pre-lawsuit settlements, and regard this combination as suggesting the total annual number of "serious claims" against auto manufacturers for personal injury. The two numbers add up to about 5,250 serious claims each year. Now admittedly 5,250 is quite a large number. The liability these claims can produce is a cause of legitimate and serious concern to auto makers. The number of claims has risen very dramatically over a forty-year period, and the level of liability that companies currently bear in the United States is many times the level they encounter in foreign legal systems.<sup>154</sup> Nevertheless, the number of serious claims looks quite modest when it is compared to the number of serious auto injuries. According to the National Safety Council, 1,700,000 Americans suffer disabling injuries each year in motor vehicle accidents.<sup>155</sup> Evidently, only 1 out of every 320 victims of disabling auto accidents pursues a serious claim against the auto manufacturer. Clearly, then, the defect requirement has not been trivialized in auto cases; rather, that requirement importantly confines victims' opportunities to bring suit against auto manufacturers.

In all, the analysis and evidence presented in this Part provides general support for the conclusion that modern tort liability depends in form—and to a large extent in fact—on a showing of negligence (or defect) and not on some practice of near absolute liability. However, while the claims Priest sometimes makes on behalf of

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<sup>153</sup> In tort fields such as auto and malpractice, these settlements are often initiated by insurance companies on the basis of information they receive from their own insureds about the circumstances of particular accidents. In products cases, by contrast, the manufacturer typically knows nothing about the accident until it is notified by the victim; and often this notification takes the form of a formal lawsuit. By initiating such a lawsuit, the victim not only notifies the manufacturer of his claim but also communicates to the manufacturer that he is serious about pursuing the claim. In some situations, however, the victim's lawyer, before filing suit, submits a demand letter to the manufacturer.

<sup>154</sup> See Gary T. Schwartz, *Product Liability and Medical Malpractice in Comparative Context*, in *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION*, *supra* note 138, at 47-51 [hereinafter Schwartz, *Comparative Context*].

<sup>155</sup> NATIONAL SAFETY COUNCIL, *ACCIDENT FACTS 1* (1990).

this practice should be rejected, it does *not* follow that the theory of enterprise liability he describes has been irrelevant in the development of modern tort doctrine. The possible forms of its relevance are discussed in Part IV below.

#### IV. ENTERPRISE LIABILITY

As described by Priest, the first tenet of the theory of enterprise liability is that tort law should strive to provide victims with insurance against the risk of accidents. The theory's second tenet is that liability rules should secure safety by internalizing accident costs on the organizations that create accident risks or by placing liability on the person or organization in the best position to control risks.<sup>156</sup> Its third tenet is that contract is not an appropriate way to allocate liability. Priest indicates that by the late 1950s tort scholars were almost unanimous in their support of this enterprise liability theory.<sup>157</sup>

According to Priest, the chief architects of enterprise liability were Fritz Kessler and Fleming James. Kessler is included in the Priest account because of his article on adhesion contracts,<sup>158</sup> which contributed to the delegitimation of contract reasoning in personal injury cases. Kessler was certainly relied on by the New Jersey court in *Henningsen*<sup>159</sup> as it invalidated a disclaimer of warranty liability. Even so, this invalidation was not due to Kessler alone. Long before 1960, American courts had been somewhat skeptical of efforts by corporate defendants to disclaim by contract their liability for personal injury.<sup>160</sup> Moreover, the more general ideas about public policy emerging in the 1960s would have made it especially difficult to uphold disclaimers of this sort.<sup>161</sup> In any event, Kessler is relevant only to the third tenet in enterprise lia-

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<sup>156</sup> The "internalization" theme is stressed in Priest, *Enterprise Liability*, *supra* note 5. The "best position" theme is stressed in Priest, *Risk Control*, *supra* note 88. The two are not quite the same. In malpractice cases, for example, the second theme may apply in ways in which the first does not.

<sup>157</sup> Priest, *Enterprise Liability*, *supra* note 5, at 463.

<sup>158</sup> Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943).

<sup>159</sup> *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 86 (N.J. 1960).

<sup>160</sup> See K.A. Drechsler, Annotation, *Validity of Contractual Provision by One Other Than Carrier or Employer for Exemption from Liability, or Indemnification, for Consequences of Own Negligence*, 175 A.L.R. 8 (1948).

<sup>161</sup> See *supra* notes 61-68 and accompanying text.

bility theory.

As for Fleming James, he was vigorous and effective in supporting loss distribution as an important social policy and in espousing the view that tort liability rules should be extended so as to do a better job of achieving loss distribution. Still, James' ultimate proposal was that tort law should be abolished in favor of a more general system of social insurance (combined with improved programs in safety regulation).<sup>162</sup> His approval of the broadening of tort liability rules was hence no more than an interim recommendation, to be accepted only until society is willing to adopt an appropriate program of social insurance.

Other tort scholars who took the loss-distribution objective seriously in the 1950s include Charles Gregory, Albert Ehrenzweig, Leon Green, and Clarence Morris. In a charming 1951 essay, Gregory relied on loss-distribution considerations by way of recommending a doctrine of the absolute liability of enterprise.<sup>163</sup> Ehrenzweig's 1951 book reached a similar conclusion.<sup>164</sup> In 1953, both Green<sup>165</sup> and Ehrenzweig,<sup>166</sup> endorsing loss distribution, urged the repudiation of the tort system and the adoption of social insurance; indeed, Ehrenzweig dismissed the tort system as a neurotic mess. A primary point of Morris's 1951 essay was that on some occasions the better loss distributor is the plaintiff rather than the defendant;<sup>167</sup> for Morris, then, the loss-distribution norm could either support or oppose tort liability. Morris, furthermore, was certainly appreciative of more traditional tort values. Consider, for example, his sympathetic reference to the idea of fault-based liability as being "deeply rooted in our culture."<sup>168</sup>

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<sup>162</sup> 2 HARPER & JAMES, *supra* note 27, at 762-63.

<sup>163</sup> Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359 (1951).

<sup>164</sup> See ALBERT A. EHRENZWEIG, *NEGLIGENCE WITHOUT FAULT* (1951), reprinted in 54 CALIF. L. REV. 1422, 1476-77 (1966).

<sup>165</sup> See Leon Green, *The Individual's Protection Under Negligence Law: Risk Sharing*, 47 NW. U. L. REV. 751, 770-77 (1953). Actually, Green's final proposal includes a somewhat incoherent mix of social insurance and other features.

<sup>166</sup> See Albert A. Ehrenzweig, *A Psychoanalysis of Negligence*, 47 NW. U. L. REV. 855, 871 (1953). In this article, Ehrenzweig recommends expanded tort liability only as a form of "partial relief" in the event that legislatures decline to adopt social insurance programs. *Id.* at 872.

<sup>167</sup> Clarence Morris, *Hazardous Enterprises and Risk-Bearing Capacity*, 61 YALE L.J. 1172, 1179 (1952).

<sup>168</sup> Clarence Morris, *Duty, Negligence and Causation*, 101 U. PA. L. REV. 189, 221 (1952).

Other tort scholars in the 1950s displayed little concern for loss distribution and other broad issues of public policy; rather, they remained primarily interested in the internal coherence of tort doctrine as supplemented by limited common-sense notions of right and wrong.<sup>169</sup> Moreover, a loss-distribution rationale for tort law was actually opposed by leading scholars such as William Prosser, Robert Keeton, and Harry Kalven. Over the years, Prosser was at times almost derisive in discussing loss distribution as an explanation for tort doctrine.<sup>170</sup> The whole point of Keeton's 1959 article on modern rules of strict liability was to show that those rules did *not* rest on loss-distribution ideas but rather on a proper sense of the moral responsibility of the individual defendant.<sup>171</sup> As late as 1964, Kalven relied on the criterion of fairness in opposing auto no-fault compensation plans.<sup>172</sup> Despite their possible insurance advantages, Kalven found these plans unjust in the way they imposed the burden of insurance premiums on motorists who were without fault.

This reference to auto no-fault not only brings our discussion into the 1960s but also takes that discussion into the larger national discourse on public policy. The Keeton-O'Connell auto compensation plan, presented to the public in 1965,<sup>173</sup> highlighted the

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The most extensive statement of Morris's views is CLARENCE MORRIS, *TORTS* (1953).

<sup>169</sup> This is a fair characterization of Page Keeton, *Trespass, Nuisance, and Strict Liability*, 59 COLUM. L. REV. 457, 461-62, 466-67 (1959). Priest cites this article as evidence of a scholarly consensus on behalf of enterprise liability. Priest, *Enterprise Liability*, *supra* note 5, at 504 & n.279. The Keeton article contains a single terse reference to loss distribution as one of many relevant factors to be taken into account in deciding one category of cases. Keeton, *supra*, at 473.

<sup>170</sup> Prosser's views are discussed in G. EDWARD WHITE, *TORT LAW IN AMERICA*, 171-72 (1980); Schwartz, *Directions*, *supra* note 91, at 768-69. Elements of ambivalence in Prosser are noted in *id.* at 768.

<sup>171</sup> Robert E. Keeton, *Conditional Fault in the Law of Torts*, 72 HARV. L. REV. 401 (1959). This article is likewise cited by Priest as evidence of a consensus for enterprise liability. Priest, *Enterprise Liability*, *supra* note 5, at 504 & n.279. Keeton does acknowledge that "risk-spreading capacity" may have some bearing on the community's understanding of moral fault. But he then points out that the growth of first-party accident insurance means that plaintiffs themselves are acquiring a capacity for effective risk-spreading. Keeton, *supra*, at 436-38.

<sup>172</sup> Walter J. Blum & Harry Kalven, Jr., *Public Law Perspectives on a Private Law Problem—Auto Compensation Plans*, 31 U. CHI. L. REV. 641 (1964).

<sup>173</sup> ROBERT E. KEETON & JEFFREY O'CONNELL, *BASIC PROTECTION FOR THE TRAFFIC VICTIM* (1965). Keeton's disapproval of a loss-distribution rationale for tort law has been described above. See *supra* text accompanying note 171. But while Keeton taught torts at Harvard, he also taught insurance; and his work on no-fault evidently came from the insurance side of

benefits of affording compensation to accident victims. That plan met with a very favorable political response. The new federal Department of Transportation launched, as one of its first projects, a major study of auto compensation plans;<sup>174</sup> at the state level, legislative consideration of these plans began almost immediately. Between 1970 and 1974, twenty-four states adopted some version of no-fault. Moreover, by the mid-1960s the general theme of affording public insurance to the victims of injury and disease was receiving a large play on the stage of national policymaking.<sup>175</sup> As the welfare state expanded, a new program was added to Social Security, affording public compensation to a new category of disabled persons.<sup>176</sup> Medicare and Medicaid were also adopted, socializing the health costs of the aged and many of the poor.

To recap, it is wrong to say that almost all tort scholars by the 1950s were relying on the loss-distribution idea in recommending broad rules of institutional liability. Many scholars were simply ignoring the loss-distribution concept; several others rejected it; and a further group regarded it as a reason for rejecting tort rather than expanding tort. Still, it would be right to say that by the 1960s a significant number of tort scholars had sympathetically developed the loss-distribution theme.<sup>177</sup> Furthermore, that theme

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his interests. Even while as an insurance expert Keeton was working on auto no-fault, as a torts expert he was preparing a book on the analytic intricacies of the tort doctrines of actual cause and proximate cause. ROBERT E. KEETON, *LEGAL CAUSE IN THE LAW OF TORTS* (1963).

<sup>174</sup> This study eventually yielded twenty-four publications, the last of which was JOHN A. VOLPE, *MOTOR VEHICLE CRASH LOSSES AND THEIR COMPENSATION IN THE UNITED STATES* (1971).

<sup>175</sup> For a previous discussion of this point, see David G. Owen, *The Intellectual Development of Modern Products Liability Law: A Comment on Priest's View of the Cathedral's Foundations*, 14 J. LEGAL STUD. 529, 533 (1985).

<sup>176</sup> The new program is described in Lance M. Leibman, *The Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of Social Welfare Estates*, 89 HARV. L. REV. 833 (1976).

<sup>177</sup> To what extent, however, did loss-prevention concepts join with loss-distribution concepts in a larger theory of enterprise liability? A scholar like Gregory, in supporting absolute liability, relied solely on its loss-distribution advantages, making no mention of its possible safety benefits. Gregory, *supra* note 163, at 382-85, 393-97. And Ehrenzweig's support of social insurance as a satisfactory alternative to absolute liability, see *supra* note 166 and accompanying text, shows that loss distribution was the only criterion on which he was relying. As for Fleming James, in his view the safety advantages of institutional liability were no more than moderate. Moreover, his explanation of how tort liability might achieve safety was rather quirky. Most accidents, he thought, are caused by a limited number of people who are innately "accident prone" and who cannot themselves be deterred by liability rules.

was then being amplified by the public-policy discourse of the 1960s.

By the mid-1960s, then, a theory of loss distribution was at least becoming available to American tort judges. Those judges engaged in the process of expanding tort liability by relying on the standard of negligence/defect. As suggested above, broad rules of liability for negligence or unreasonableness could be expected to afford compensation to significant numbers of accident victims. Judges hence were willing to endorse those rules at least partly because of their loss-distribution potential.<sup>178</sup>

Yet if this is how the loss-distribution rationale entered into judicial decisionmaking, then that rationale is not really problematic. For one thing, this account does *not* claim that the tort system has in fact adopted any rule or practice of near absolute liability; hence there is no need to worry about the range of adverse social consequences that such a practice might bring about. A second and re-

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2 HARPER & JAMES, *supra* note 27, at 734-40. Somewhat helpful results can be achieved, however, by shifting liability to their employers, who can then provide therapy to such persons or alternatively remove them from the particular positions in which they are capable of inflicting harm. *Id.* at 740-41.

Consider now, however, two other figures. The first was Roger Traynor, the author of a 1944 concurring opinion that contained broad language on the safety advantages of products liability. *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440-41 (Cal. 1944). Technically, this language was limited to the goal of discouraging "defects" in products; still, the language was susceptible to being interpreted in a broader absolute liability way. A second figure was a young scholar, Guido Calabresi. Calabresi elaborated on the loss-distribution rationale for tort law in his 1961 and 1965 articles and his 1970 book. Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499 (1961); Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965); GUIDO CALABRESI, *THE COSTS OF ACCIDENTS* (1970). Those writings also stressed how broad rules of liability can achieve the safety goals of resource allocation. Moreover, Calabresi's co-authored article in 1972 developed a theory of strict liability that rests on identifying those parties who are in the best position to prevent the creation of risks. Calabresi & Hirschhoff, *supra* note 15, at 1060. It thus is Calabresi who rounds out the development of enterprise liability theory, inasmuch as his writings highlighted the safety advantages of broad rules of institutional liability and additionally showed how those rules can provide both safety and risk distribution.

To be sure, while Calabresi suggested that in most instances the defendant is in the best position to reduce risks, he also acknowledged that in some instances plaintiffs are the best risk-avoiders, and therefore should be denied tort recoveries. *Id.* at 1056, 1062. To this extent, Calabresi's analysis lacks the dogmatism that Priest attributes to enterprise liability advocates.

<sup>178</sup> See *supra* text accompanying note 22. For somewhat similar views, see E. Donald Elliott, *Re-Inventing Defenses/Enforcing Standards: The Next Stage of the Tort Revolution?*, 43 RUTGERS L. REV. 1069, 1070-75 (1991); Trebilcock, *supra* note 4, at 949.

lated point is that in a sense the motives of judges might not be all that relevant. Take comparative negligence, which was adopted throughout the United States in the modern era. According to Priest, judges endorsed comparative negligence because of its ability to advance the program of enterprise liability.<sup>179</sup> Even if this claim is descriptively accurate, it may well be normatively irrelevant. Comparative negligence can easily be justified by considerations of interpersonal fairness and corrective justice.<sup>180</sup> Moreover, most economists, in evaluating liability rules, have concluded that comparative negligence can be commended as efficient.<sup>181</sup> If conventional tort reasoning is able to endorse comparative negligence as both fair and efficient, then it really does not matter that the judges who adopted comparative negligence may have been taking enterprise liability ideas into account.

Priest's position, of course, is that the minds of modern judges have been essentially dominated by enterprise liability theory. Moreover, as he points out, absolute liability is that theory's "unavoidable implication."<sup>182</sup> Given Priest's position, how might it happen that judges have managed to avoid the unavoidable? Those judges have not supported rules of absolute liability,<sup>183</sup> rather, they have largely limited themselves to endorsing rules of negligence and defect liability, even though those rules necessarily leave huge numbers of accident victims uncompensated. Priest himself suggests that judges after 1960 "sought to achieve [the goals of enterprise liability] largely through the structure of the law in place,

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<sup>179</sup> See Priest, *Insurance Crisis*, *supra* note 84, at 1536. This allegation of motive does seem doubtful, since by 1960 comparative negligence had been adopted in most countries' legal systems, which apparently had not been infected by the virus of enterprise liability. See *supra* text accompanying note 26.

<sup>180</sup> See Schwartz, *supra* note 20, at 699.

<sup>181</sup> E.g., Daniel Orr, *The Superiority of Comparative Negligence: Another Vote*, 20 J. LEGAL STUD. 119 (1991).

<sup>182</sup> Priest, *Enterprise Liability*, *supra* note 5, at 527.

<sup>183</sup> For example, modern courts have simply ignored Justice Tobriner's 1967 recommendation that courts adopt a rule rendering doctors strictly liable for the unanticipated harmful consequences of medical treatment. See *Clark v. Gibbons*, 426 P.2d 525, 535 (Cal. 1967) (Tobriner, J., concurring). Similarly, with the possible exception of some of the recent self-service cases, courts have ignored one scholar's recommendation, explicitly derived from enterprise liability theory, that commercial landowners be held strictly liable for injuries resulting from hazards on their premises. Edmund Ursin, *Strict Liability for Defective Business Premises—One Step Beyond Rowland and Greenman*, 22 UCLA L. REV. 820 (1975).



with minimum adjustment to then-existing legal doctrine."<sup>184</sup> He does not explain, however, why enterprise-liability judges were willing to accept an existing "structure of the law" that was so likely to fall so far short of full enterprise liability goals.<sup>185</sup>

The analyst who tends to sympathize with Priest's emphasis on enterprise liability might be able to offer several explanations. One explanation would be that judges, as judges, have felt constrained as a practical matter by the tradition of American tort law—a tradition that emphasizes the negligence standard. A second explanation could be that judges may have accepted the jurisprudence of negligence not simply because of the constraints of precedent but also because the judges themselves, whether realizing this or not, have internalized or assimilated the values that contribute to that jurisprudence.<sup>186</sup> A third explanation—a variation, no doubt, of the first and second—is that judges have intuited the fact that loss distribution standing alone does not provide an acceptable or legitimate basis for tort liability. Such a basis is provided, however, by a finding of negligence or unreasonableness.

Yet if any of these explanations is correct, enterprise liability is not nearly as dominant as Priest's account suggests; for each of them concede that modern judges—even though swayed by enterprise liability—have been concurrently operating, in one way or another, under the influence of negligence liability and its related ideas and values. In my view, however, these various explanations—even though they all do acknowledge the relevance of negligence—are still too begrudging. As Part II of this Article has suggested, tort judges in the 1960s and 1970s were genuinely responding to the appeal of the concept of liability for negligence or unreasonableness. That is, those judges did want car manufacturers to make proper decisions relating to crashworthiness; they did hope that design defect rules could induce the proper design of con-

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<sup>184</sup> Priest, *Modern Tort Law*, *supra* note 85, at 10. Priest also refers to a "judicial reluctance" to adopt formal rules of absolute liability. Priest, *Enterprise Liability*, *supra* note 5, at 527. But he does not explain the bases for this reluctance.

<sup>185</sup> For that matter, the "structure of the law" in the 1960s and early 1970s included the doctrine of strict liability for ultrahazardous activities. Yet modern judges did not bestow attention on this doctrine and did not give it a range of ambitious applications. Priest himself does not discuss this doctrine.

<sup>186</sup> This explanation is consistent with Priest's suggestion that "the legal heritage of corrective justice . . . has influenced the forms of modern law." Priest, *Modern Tort Law*, *supra* note 85, at 9 n.38.

sumer and industrial products; they did believe that when government is negligent it should compensate its victims; they did recognize that the locality rule is no longer helpful in identifying actual malpractice; they did perceive that the landowner who is negligent should generally bear liability; they did regard the traditional contributory negligence rule as unfair; and they did believe that therapists should give warnings when their patients become distinctly dangerous.

Admittedly, those judges approved broad rules of unreasonable-liability in part because of their perception that those rules could achieve at least a substantial measure of loss distribution. In this way, they were able to blend traditional negligence ideas with modern loss-spreading ideas. Also, as noted above, in the 1960s and early 1970s those judges endorsed a new rule of strict liability for manufacturing defects. This rule achieved a somewhat different blend of negligence and loss spreading. The rule was officially justified, at least in part, in loss-distribution terms. Hence modern judges in adopting the rule could gratify themselves by displaying their approval of the loss-distribution idea—an idea which was then being supported both by certain leading scholars and also by the public-policy discourse of the era. At the same time, these judges could appreciate that this rule actually extended liability only in a limited way. Prosser himself, in reviewing the legal practices of the 1950s, observed that plaintiffs, having identified some defect in the manufacturer's product, could then secure findings of manufacturer negligence from juries in ninety-nine percent of all cases.<sup>187</sup> As it happens, this figure is probably too high;<sup>188</sup> eighty-five percent might be a more accurate estimate. Still, a number as high as this suggests that modern judges, in adopting strict liability for manufacturing defects, could share in the excitement of the process of public-policy innovation even while reassuring themselves that they were not straying that far beyond the baseline of results already provided by the contemporary version of the negli-

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<sup>187</sup> William J. Prosser, *The Assault On the Citadel (Strict Liability to the Consumer)*, 70 YALE L.J. 1099, 1114 (1960). This is Prosser's "honest estimate." *Id.*

<sup>188</sup> Consider, for example, the trial judge's rejection of the plaintiff's negligence claim in *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 73 (N.J. 1960). The basis for the judge's ruling is unclear. The New Jersey Supreme Court's endorsement of implied warranty strict liability mooted the plaintiff's argument that the judge had erred in finding no possible negligence. *Id.* at 102.

gence rule.

In a variety of ways, then, modern judges could combine negligence ideas and loss-distribution ideas in a manner that produced results that could apparently make adequate social sense.<sup>189</sup> Yet despite this favorable tendency, there were at least two ways in which the process could go wrong. First of all, modern judges, in becoming enthusiastic about imposing liability on institutions whose conduct is found to be unreasonable, could end up under-rating a range of factors that might suggest the unwisdom of a broad deployment of liability. Several of these factors—described above<sup>190</sup>—relate to contract considerations that might well justify restrictions on liability. Other factors—considered further below<sup>191</sup>—concern the high monetary costs entailed by the aggressive application of a negligence idea. A third set of factors relate to all the problems involved in the administration of a broadly defined negligence standard; these problems include, for example, the uncertain competence of judges and juries in rendering the sophisticated judgments that a broad negligence standard frequently requires.<sup>192</sup>

A second disturbing possibility is that modern judges, motivated by notions of loss distribution, may have simply manipulated the rhetoric of negligence doctrine to achieve results that cannot be plausibly defended in any genuine negligence-like way. One opinion that is frequently cited as involving such a process is *Bigbee v. Pacific Telephone & Telegraph Co.*,<sup>193</sup> decided by the California Supreme Court in 1983. In *Bigbee*, the plaintiff was in a public telephone booth next to a liquor store when he was struck by a car driven by a drunk driver who had veered off the street into the parking lot where the telephone booth was located.<sup>194</sup> The plaintiff sued the defendants who had manufactured the telephone booth and placed it near the liquor store.<sup>195</sup> The trial judge's motion of

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<sup>189</sup> For further discussion, see *infra* note 483.

<sup>190</sup> See *supra* text accompanying notes 68-72.

<sup>191</sup> See *infra* text accompanying notes 455-459.

<sup>192</sup> As will be shown below, the stabilization of tort doctrine during the post-modern era has resulted in considerable part from a greater judicial appreciation of these various factors. See *infra* text accompanying notes 464-477.

<sup>193</sup> 665 P.2d 947 (Cal. 1983).

<sup>194</sup> *Id.* at 948.

<sup>195</sup> *Id.*

summary judgment in favor of the defendants was reversed by the California Supreme Court, in an opinion by Chief Justice Rose Bird.<sup>196</sup>

That opinion relied in part on the court's suggestion that the telephone booth was defective.<sup>197</sup> Utilizing the *Bigbee* opinion as a vehicle for its critique of the court's chief justice, *The Wall Street Journal* editorialized that "[p]hone booths would have to be made of reinforced concrete to withstand such accidents."<sup>198</sup> In fact, however, nothing in *Bigbee* concerned the issue of a crashworthy phone booth.<sup>199</sup> Rather, the plaintiff's allegation was that the phone booth's defective door had jammed, trapping the plaintiff inside the booth as the plaintiff attempted to escape the approaching car.<sup>200</sup> Authorizing liability in such a situation does not seem particularly disingenuous. The *Journal* editorial also cites language in the *Bigbee* opinion about liability insurance and characterizes that language as showing an intent by the court to redistribute wealth by relying on the defendant's insurance policy as a device for securing compensation for plaintiffs.<sup>201</sup> In fact, the court's opinion considered whether the "imposition of liability would . . . be unduly burdensome to defendants" and relied on the "probable availability" of liability insurance for low-frequency events as a way of reducing the likelihood of such a burden.<sup>202</sup> The court's analysis—suggesting how liability insurance can protect defendants against the harsh fortuities of risk—is both appropriate and conventional; on its own, it shows no distortion in the judicial appreciation of the significance of liability insurance.

Certain claims as to the disingenuousness of the *Bigbee* court should thus be rejected. What is troublesome in the court's opinion, however, is its additional holding that the telephone company can be found negligent merely for its location of a telephone booth fifteen feet from a major highway on which "[s]wift traffic . . . late

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<sup>196</sup> *Id.* at 953.

<sup>197</sup> *See id.* at 953.

<sup>198</sup> *The Case Against Rose Bird*, WALL ST. J., Oct. 20, 1986, at 26.

<sup>199</sup> A New York court recently found no merit in one plaintiff's claim that a manufacturer should bear liability when its telephone booth proves not to be bulletproof. *Perez v. New York Tel. Co.*, 554 N.Y.S.2d 576 (App. Div. 1990).

<sup>200</sup> *Bigbee*, 665 P.2d at 948.

<sup>201</sup> *The Case Against Rose Bird*, *supra* note 199, at 26.

<sup>202</sup> *Bigbee*, 665 P.2d at 953 n.14.

at night is to be expected," and on which drunk drivers are foreseeable as well.<sup>203</sup> Taken at face value, this holding has an amazing analytic sweep: it would expose to claims of negligence those persons and firms that engage in a wide variety of activities that take place on sidewalks or within fifteen feet of a well-traveled highway (for example, locating a newspaper rack on a sidewalk, or even proposing to a friend that she meet you on the sidewalk).<sup>204</sup>

Given all these excesses, it is at least plausible to interpret this *Bigbee* holding as indicating a judicial willingness to manipulate the negligence concept in order to reach a corporate deep pocket capable of risk distribution. For that matter, if certain applications of the negligence standard seem disingenuous, there may also be loss-distribution disingenuity in the creation of entire negligence causes of action. Take the abolition of interspousal immunity. That immunity may originally have rested on the conception of the husband and wife as a single jural entity. By 1960, this conception was not only archaic but indeed offensive. The inappropriateness of the original conception certainly made it appropriate for courts to reconsider the immunity doctrine. The issue of *jural* unity to one side, however, in the modern world husband and wife typically operate as a single economic unit, administering a single household budget. Given the functional reality of the *economic* unity of husband and wife,<sup>205</sup> no spouse would think of suing the other spouse for personal injury unless the other were covered by a liability insurance policy. Absent such a policy, collecting a tort judgment would merely take money out of one of the household's pockets in order to return it to another pocket. The judicial recognition of the cause of action becomes understandable, then, mainly if it is assumed that judges themselves were assuming and relying on the existence of such insurance policies. It hence is appropriate to believe that the judges who abolished interspousal immunity did so

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<sup>203</sup> *Id.* at 952. This highway is in Inglewood, and I have driven on it recently. The highway is quite straight. The car that hit *Bigbee* would have encountered a traffic signal two-tenths of a mile before the liquor store; another signal is about a hundred feet beyond the accident site.

<sup>204</sup> Notice that the person in a phone booth is at least protected by the structure of the phone booth itself. I myself shop at a grocery store on San Vicente Blvd. In the grocery store parking lot ten feet from the street, there are two pay telephones, unenclosed by any booths. On the sidewalk in front of the grocery store is a thriving newsstand that encourages passers-by to browse through its collection of magazines.

<sup>205</sup> In several states this reality is fortified by the law of community property.

not for genuine negligence-oriented reasons but instead in order to give one member of the family access to the other member's liability insurance policy.<sup>206</sup>

It seems proper to conclude, then, that judges, guided by the loss-distribution idea, have on some occasions "cheated" in the ways in which they have applied and deployed the negligence doctrine (and the related doctrine of product defect). The interesting question concerns how frequently such cheating occurs. Many accusations of disingenuity leveled at courts turn out to be unjustified, as my initial comments on *Bigbee* suggest.<sup>207</sup> For example, the California Supreme Court's affirmation of liability in *Weirum v. RKO General, Inc.*<sup>208</sup> has been frequently mocked.<sup>209</sup> Yet the court's finding of negligence in that case seems to me sound; the promotion engaged in by the defendant radio station was not only unusual and tawdry but also potentially quite dangerous. In products liability, there clearly are some cases in which judges' findings of inadequate warnings seem far-fetched;<sup>210</sup> yet when Part III of this Article reviewed all the modern cases involving power saws and mechanical saws, that review was unable to identify any cases—let alone any pattern of cases—in which judges have administered the defect requirement in a clearly manipulative manner.<sup>211</sup> In his study of the swine-flu vaccine litigation, Ed Kitch identifies two appellate opinions that seem to him disingenuous in a way that points toward absolute liability;<sup>212</sup> still, Kitch acknowl-

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<sup>206</sup> This interpretation is not, however, beyond dispute. Courts have abolished immunity in cases involving torts of intent as well as torts of negligence. See *Klein v. Klein*, 376 P.2d 70, 73 (Cal. 1962) (affirming husband's liability for negligence); *Self v. Self*, 376 P.2d 65, 70 (Cal. 1962) (affirming husband's liability for intentional torts). And liability insurance policies typically exclude coverage of intentional harms. In *Self*, the wife who was suing the husband was also in the process of divorcing him. 376 P.2d at 65. Their impending divorce explains her lawsuit in a way that is consistent with the concerns expressed in my text.

<sup>207</sup> See *supra* notes 193-202 and accompanying text.

<sup>208</sup> 539 P.2d 36, 40 (Cal. 1975). Here a radio station sponsored a contest offering a prize to the first listener to reach a disk jockey who was driving on Los Angeles streets and freeways.

<sup>209</sup> Lawyers' lines include: "On a clear judicial day you can foresee forever"; "The California Supreme Court has never met a plaintiff it doesn't like."

<sup>210</sup> See, e.g., *MacDonald v. Ortho Pharmaceutical Corp.*, 475 N.E.2d 65, 71 (Mass.) (finding an oral-contraceptive warning inadequate because it did not specifically mention disabling strokes, even though it did refer to life-threatening blood clots), *cert. denied*, 474 U.S. 920 (1985).

<sup>211</sup> See *supra* notes 122-135 and accompanying text.

<sup>212</sup> Edmund W. Kitch, *Vaccine and Product Liability: A Case of Contagious Litigation*, REGULATION, May/June 1985, at 11, 13-14, (citing *Petty v. United States*, 740 F.2d 1428,

edges that the federal government ultimately prevailed in almost every case in which it originally denied liability.<sup>213</sup> In the mid-1980s, there were over 200 claims pending against one leading general aviation company, even though (according to that company) the federal investigations of the underlying aviation crashes had identified none that were due to vehicle defects.<sup>214</sup> Yet I am advised that these federal investigations are structured in ways that reduce the likelihood of the uncovering of defects;<sup>215</sup> moreover, during a five-year period in the 1970s, general aviation manufacturers secured defense verdicts in more than eighty percent of all cases that actually went to trial.<sup>216</sup>

In all, it seems fair to assume that there has been *some* problem of disingenuity in the judicial application of the standards of negligence and defect.<sup>217</sup> The available evidence, however, does not sup-

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1437, 1441 (8th Cir. 1984); *Unthank v. United States*, 732 F.2d 1517, 1523 (10th Cir. 1984)). Both cases, in finding warnings inadequate, relied on reasoning that can be questioned.

<sup>213</sup> Out of 1600 flu vaccine cases, only 6 claimants who would not have recovered under the Department of Justice settlement policy eventually secured recoveries. Kitch, *supra* note 213, at 13. To be sure, the Department's settlement standards were themselves generous. *Id.*

<sup>214</sup> See Robert Martin, *General Aviation Manufacturing: An Industry under Siege, in THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION*, *supra* note 138, at 478, 485. Note, however, that the federal agency's most recent report shows that problems with the "aircraft" are a "broad cause or factor" in 27% of all general aviation fatalities. NAT'L TRANSP. SAFETY BD., ANNUAL REPORT OF AIRCRAFT ACCIDENT DATA: U.S. GENERAL AVIATION CALENDAR YEAR 1988, at 38 (1991). Of course, many or most "aircraft" problems are the result of inadequate maintenance.

<sup>215</sup> Telephone Interview with Professor Andrew Craig (January 7, 1992). Craig is the author of *Product Liability and Safety in General Aviation*, in *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION*, *supra* note 138, at 456. I should note that National Transportation Safety Board (NTSB) spokesmen dispute Professor Craig's evaluation. They acknowledge, however, that NTSB reports are only intermittently concerned with problems of uncrashworthiness (for example, the absence of shoulder harnesses). Yet these are problems that frequently give rise to plausible design defect claims.

<sup>216</sup> See Martin, *supra* note 214, at 483.

<sup>217</sup> What about the biases of jurors as they apply modern tort standards in individual cases? Priest sometimes assumes that juries generally favor plaintiffs. *E.g.*, Priest, *Disappearance of Consumer*, *supra* note 113, at 780-82. But he does not advance the claim that the attitudes of jurors have themselves shifted in any basic way between 1950 and now. My own assessment is that in certain categories of cases juries do resolve doubts in favor of sympathetic victims. See Gary T. Schwartz, *The Myth of the Ford Pinto Case*, 43 *RUTGERS L. REV.* 1013, 1061-62 (1991). But my sense is that there is nothing new in this practice. The available evidence on jury performance is usefully considered in Kevin M. Clermont & Theodore Eisenberg, *Trial by Judge or Jury: Transcending Empiricism*, 77 *CORNELL L. REV.* 1124 (1992). Admittedly, one quite relevant point is that modern tort law's broad deployment of "reasonableness" standards of liability increases the number of cases in which juries

port any claim that disingenuous applications have become systematic. A further point is that even if the evidence *did* show that judges manipulate the concepts of negligence and defect with some frequency, that evidence would *not* imply the absolute liability of injurers. So long as plaintiffs need to present their claims within the framework of the doctrine of negligence/defect, liability can in fact extend beyond genuine negligence/defect in only a limited way. That is, the requirement of negligence/defect operates as a "filter" that drastically reduces the number of claims that victims are able to bring.<sup>218</sup> That filter, for example, necessarily eliminates the vast majority of claims that children who fall off bicycles might be able to bring against the manufacturers of bicycles; for almost all the time, no claim of product defect would be respectable or tenable.<sup>219</sup> Similarly, the abolition of spousal immunity means that a wife can sue her husband if she slips on an icy sidewalk that the husband was expected to shovel.<sup>220</sup> But she has no possible claim against her husband if she simply slips and falls on the stairs in the family's house. In fact, falls on stairs in homes result in 600,000 hospitalizations each year.<sup>221</sup> Yet it is rare for such falls to result in tort claims—against the victim's spouse or, for that matter, against any other category of tort defendant.

## V. POST-MODERN TORT LAW

This Article until now has dealt with the rise in modern tort law, which occurred between 1960 and the early 1980s for reasons discussed in Parts II and IV. The Article now turns, as promised by its Introduction, to more recent years which have witnessed the end of that expansion. These years can perhaps be understood as constituting tort law's post-modern era.<sup>222</sup> To be sure, courts in many cases have routinely applied the strong liability rules developed in the earlier period. Yet only a limited number of cases have

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are in a position to render discretionary judgments.

<sup>218</sup> See Schwartz, *supra* note 217, at 1065-66.

<sup>219</sup> See *supra* notes 143-145 and accompanying text (discussing bicycle injuries).

<sup>220</sup> Brown v. Brown, 409 N.E.2d 717 (Mass. 1980).

<sup>221</sup> See NEISS DATA, *supra* note 139.

<sup>222</sup> In this context, a "post-modern era" is merely a time that comes immediately after a distinctive and powerful "modern era." Given this context, my use of the "post-modern" term seems just about inevitable. Still, I employ it with some reluctance, in light of the pretentiousness—or at least the elaborateness—of many of its utilizations.



actually served to broaden liability. Meanwhile, at least a few cases have overruled pro-liability precedents; and a number of major decisions have rejected proposals for new liability, resolved open legal questions in a manner unsympathetic to liability, or conservatively interpreted previous opinions which themselves had expanded liability.<sup>223</sup> Taking all these cases into account, one can fairly say that in recent years tort doctrine has stabilized.

Having set forth this characterization of the recent period, let me immediately acknowledge certain elements of shagginess in its operative terms. The relevant time frames are concededly somewhat ambiguous; the early 1980s mark both the end of the modern era and the beginning of the post-modern era. This ambiguity gives me some discretion in classifying cases that are decided, say, in 1982. The lack of firm dates in the periodization presented here is certainly less than ideal. Still, it is rendered understandable by the discussion in Part VI, which offers several different explanations for the apparent change in direction of tort doctrine. Some of these explanations were already in effect by 1980; others did not take effect until perhaps 1984. A measure of irresolution in the time frames is thus consistent with the number of possible explanations for that directional change.

Also, the terminology of "stabilization" is far from ideal. Such a term might well imply a degree of placidity in the consideration of tort doctrine. In fact, however, appellate tort litigation has been in obvious turbulence during much of the period in question. Plaintiffs have vigorously pressed new arguments on courts, and courts on some occasions have accepted these proposals. A further problem is that my characterization depends on a variety of judgment calls on my part,<sup>224</sup> judgment calls that certainly can be contested. Yet even if these various caveats and problems are recognized, it still makes sense to advance a characterization of stabilization to

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<sup>223</sup> This pattern may not be unique to the United States. A "retreat" of Anglo-Canadian tort law since 1985 is described in Lewis N. Klar, *Recent Developments in Canadian Law: Tort Law*, 23 OTTAWA L. REV. 177 (1991). Professor Klar regards this retreat as "an important development in the history of tort." *Id.* at 183.

<sup>224</sup> Is an appellate ruling on doctrine major or minor? Is the ruling new, or not so new? Does the ruling create new doctrine, or does it merely apply current doctrine to new facts? In considering whether an appellate ruling is major and new, one certainly takes into account both the status of the court itself and the ambitiousness of the court's opinion.

describe the recent period.<sup>225</sup>

As noted, the characterization does acknowledge that recent courts have very frequently affirmed and applied the broad proliability positions taken by courts in earlier years.<sup>226</sup> Moreover, during recent years there have been several areas in which liability has expanded. These areas can be brought together here. One concerns loss of a chance. A well-crafted law review article, published in 1981, recommended that medical malpractice recoveries be allowed when a doctor's negligence in diagnosis deprives the patient of a less-than-50-percent chance of recovery from his disease.<sup>227</sup> In subsequent years, proportionate recovery for loss of a chance has been affirmed by at least nine states' courts.<sup>228</sup>

In 1970, *Kline v. 1500 Massachusetts Avenue Apartment Corp.*<sup>229</sup> approved the liability of landlords for their failure to adopt reasonable security measures against the contingency of foreseeable criminal assaults on their tenants. Since 1980, this doctrine of liability for inadequate security against crime has been extended beyond landlords to a significant range of other landowners,<sup>230</sup> including high schools,<sup>231</sup> colleges,<sup>232</sup> shopping centers,<sup>233</sup>

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<sup>225</sup> It is worth noting that this characterization is supported, either explicitly or implicitly, by the 1990 edition of the Epstein coursebook and the 1992 edition of the Franklin-Rabin coursebook. RICHARD A. EPSTEIN, *CASES AND MATERIALS ON TORTS* xxix (5th ed. 1990); MARC FRANKLIN & ROBERT RABIN, *TORT LAW AND ALTERNATIVES* (5th ed. 1992). A book that focuses on 1980s cases is TERRENCE F. KIELY, *MODERN TORT LIABILITY: RECOVERY IN THE 1990S* (1990). Professor Kiely seems to favor (and to spend more time on) those opinions that broaden liability. Still, the bulk of the judicial evidence set forth in his book supports my own characterization.

<sup>226</sup> For example, in *Camacho v. Honda Motor Co.*, 741 P.2d 1240 (Colo. 1987), the Colorado Supreme Court affirmed the doctrine of crashworthiness liability, confirmed that this doctrine applies to motorcycles (citing a line of cases that dates back to 1978), and ruled that the doctrine does not exempt from liability design features that are open and obvious. Its combination of holdings makes this case a stand-out.

<sup>227</sup> Joseph H. King, Jr., *Causation, Valuation, and Chance in Personal Injury Torts Involving Preexisting Conditions and Future Consequences*, 90 YALE L.J. 1353, 1397 (1981).

<sup>228</sup> E.g., *Falcon v. Memorial Hosp.*, 462 N.W.2d 44, 56 (Mich. 1990); *Wollen v. DePaul Health Center*, 828 S.W.2d 681, 684-85 (Mo. 1992); *Herskovits v. Group Health Coop.*, 664 P.2d 474, 476-77 (Wash. 1983). But there have also been rejections. E.g., *Fennell v. Southern Maryland Hosp.*, 580 A.2d 206 (Md. 1990).

<sup>229</sup> 439 F.2d 477 (D.C. Cir. 1970).

<sup>230</sup> Granted, landowner liability in circumstances of this sort had seemingly been anticipated by the *Second Restatement*. RESTATEMENT (SECOND) OF TORTS § 344 (1965).

<sup>231</sup> *Fazzolari v. Portland School Dist. No. 1J*, 734 P.2d 1326 (Or. 1987). The court's opinion relies not so much on the school's status as landowner as on the school's obligation to supervise its students. *Id.* at 1337.

and hospitals.<sup>234</sup> Also, during this period victims of criminal attacks have become increasingly able to sue public agencies for their failure to prevent crime. These cases have dealt with negligence relating to the escape of detainees from correctional institutions,<sup>235</sup> the negligent supervision of people on probation<sup>236</sup> and in half-way houses,<sup>237</sup> the negligent failure to respond to a 911 emergency call,<sup>238</sup> and the negligent failure to intervene to protect a woman who had secured protective orders against her violent ex-husband.<sup>239</sup>

In several cases, the crime in question has been drunk driving; cities have been held liable when their police officers, having stopped a drunk driver, improperly failed to detain him.<sup>240</sup> Derivative liability for drunk drivers has extended in other directions as well.<sup>241</sup> Commercial bars—"dram shops"—have long been liable, under either statutory or common-law principles, for serving drinks to underage or to obviously intoxicated patrons. In the 1980s, there was extensive litigation on the common-law liability of the mere social host who serves drinks to an underage or plainly intoxicated guest. A majority of cases have in fact rejected this liability proposal, and cases that have endorsed liability have sometimes been abrogated by statute.<sup>242</sup> Even so, at least in cases in-

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<sup>232</sup> *Mullins v. Pine Manor College*, 449 N.E.2d 331 (Mass. 1983).

<sup>233</sup> *Galloway v. Bankers Trust Co.*, 420 N.W.2d 437 (Iowa 1988).

<sup>234</sup> *Small v. McKennan Hosp.*, 403 N.W.2d 410 (S.D. 1987).

<sup>235</sup> *Emig v. State Dep't of Health & Rehabilitative Servs.*, 456 So. 2d 1204 (Fla. Dist. Ct. App. 1984).

<sup>236</sup> *A.L. v. Commonwealth*, 521 N.E.2d 1017 (Mass. 1988).

<sup>237</sup> *Dudley v. Offender Aid & Restoration, Inc.*, 401 S.E.2d 878 (Va. 1991).

<sup>238</sup> *De Long v. County of Erie*, 457 N.E.2d 717 (N.Y. 1983).

<sup>239</sup> *Sorichetti v. City of New York*, 482 N.E.2d 70 (1985).

<sup>240</sup> *E.g., Weldy v. Town of Kingston*, 514 A.2d 1257 (N.H. 1986). In *Weldy*, the driver was not yet drunk but was illegally drinking in the car.

<sup>241</sup> The doctrine of negligent entrustment has been dramatically applied by some courts to cover the borrower of a car who returns that car to its inebriated owner, *Lombardo v. Hoag*, 566 A.2d 1185 (N.J. Super. Ct. Law Div. 1989), and the gas station that sells gas to a drunk driver, *O'Toole v. Carlsbad Shell Serv. Station*, 247 Cal. Rptr. 663 (Ct. App. 1988), but not the restaurant bartender who gives the keys to the drunk customer reclaiming his car, *Williams v. Saga Enters.*, 274 Cal. Rptr. 901 (Ct. App. 1990). In *Vince v. Wilson*, 561 A.2d 103 (Vt. 1989), an older woman lent money to her grandson so that he could buy a car. The grandmother knew that the grandson had repeatedly failed his driver's test and also that he had a drinking problem. The court affirmed the grandmother's liability, and likewise the potential liability of the car dealer, who allegedly knew that the buyer had flunked the driving tests.

<sup>242</sup> The cases and statutes are collected in JOSEPH A. PAGE, *THE LAW OF PREMISES LIABIL-*

volving underage drinkers, there now is a minority position in favor of social host liability—a position that did not exist a decade ago. Likewise, a few courts have innovated by way of imposing liability on employers who serve drinks to employees who later drive home while under the influence.<sup>243</sup>

Consortium rights is another area in which a substantial minority position has emerged. By 1980, the right of either spouse to recover loss-of-consortium damages when the other spouse is injured had been well recognized. Only one court, however, had affirmed a parent's right to recover consortium damages when a child is injured,<sup>244</sup> and no court had allowed a child to recover for the loss of a parent's consortium.<sup>245</sup> Since then, probably the majority of courts have continued to deny consortium recoveries in these cases;<sup>246</sup> but a significant number of courts have granted consortium rights to the parent (in the event of an injury to the child)<sup>247</sup> or to the child (in the event of injury to the parent).<sup>248</sup>

During the last decade, landowner liability has also witnessed one area of apparent growth. In many landowner cases, the plaintiff stumbles on litter (a banana peel, a candy-bar wrapper) left by a previous customer. Under traditional law, to prevail in such a case the plaintiff must show that the landowner had actual or constructive notice of the litter. Most courts in recent years have applied this notice requirement in a conventional way, which has frequently resulted in the denial of liability.<sup>249</sup> But in one line of

rry § 12.21 (2d ed. 1988 & Supp. 1991). The New Jersey Supreme Court's ruling in *Kelly v. Gwinnell*, 476 A.2d 1219 (N.J. 1984), has been modified by N.J. STAT. ANN. § 2A:15-5.7 (Supp. 1991).

<sup>243</sup> See PAGE, *supra* note 242, § 12.23. Sections 12.21, on social host liability, and 12.23, on employer liability, did not even exist in the original 1976 edition of this treatise.

<sup>244</sup> *Shockley v. Prier*, 225 N.W.2d 495 (Wis. 1975).

<sup>245</sup> See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS 935-36 (5th ed. 1984) [hereinafter PROSSER AND KEETON ON TORTS].

<sup>246</sup> *E.g.*, *Zorzos v. Rosen*, 467 So. 2d 305 (Fla. 1985) (denying claim by child); *Dralle v. Ruder*, 529 N.E.2d 209 (Ill. 1988) (denying claim by parent).

<sup>247</sup> *E.g.*, *Reben v. Ely*, 705 P.2d 1360 (Ariz. Ct. App. 1985).

<sup>248</sup> *E.g.*, *Pence v. Fox*, 813 P.2d 429 (Mont. 1991).

<sup>249</sup> Cases denying liability are collected in PAGE, *supra* note 242, at 29 & n.221 (Supp. 1991). In *Gordon v. American Museum of Natural History*, 492 N.E.2d 774 (N.Y. 1986), the New York Court of Appeals emphasized that the evidence must show the defendant's notice of the particular condition that results in the plaintiff's injury; it is not enough that the landowner knows of a related danger, or is clearly aware of the possible presence of litter. *Id.* at 775.

cases that has acquired prominence since the early 1980s, courts have perceived that self-service retail stores involve a "mode of operation" that is especially likely to generate litter. Responding to this perception, one court has shifted to the defendant the burden of proving its non-negligence,<sup>250</sup> while other courts have found actual negligence in the precise method by which the defendant displayed its goods.<sup>251</sup> Three further opinions<sup>252</sup> seem genuinely ambiguous, but can permissibly be read as imposing something close to strict liability.

In the various areas described above, modern tort law has continued to expand.<sup>253</sup> Nevertheless, the bulk of the recent opinions suggest that this expansion has now ended. As noted, Eisenberg and Henderson made this point two years ago in the context of products liability,<sup>254</sup> and products liability rulings since then tend to confirm their point. My own assessment, moreover, is that the point, valid as it is in products liability, can be generalized to much of tort law. Recent cases that in substance reject strict liability will be considered first. After that, discussion will turn to cases declining to create negligence-based causes of action, cases that recognize no-duty limitations, cases that narrowly interpret the negligence concept itself, cases that broadly define affirmative de-

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<sup>250</sup> *Safeway Stores, Inc. v. Smith*, 658 P.2d 255 (Colo. 1983). This approach was anticipated in *Wollerman v. Grand Union Stores, Inc.*, 221 A.2d 513 (N.J. 1966).

<sup>251</sup> *E.g.*, *Lingerfelt v. Winn-Dixie Texas, Inc.*, 645 P.2d 485, 486 (Okla. 1982) (strawberries "heaped high in uncovered containers"); *Corbin v. Safeway Stores, Inc.*, 648 S.W.2d 292, 296 (Tex. 1983) (grapes displayed in an open, slanted bin, with no covering on the floor).

<sup>252</sup> *Chiara v. Fry's Food Stores of Arizona, Inc.*, 733 P.2d 283 (Ariz. 1987); *Sheil v. T. G. & Y. Stores Co.*, 781 S.W.2d 778 (Mo. 1989); *Pimentel v. Roundup Co.*, 666 P.2d 888 (Wash. 1983).

<sup>253</sup> Further possibilities can be mentioned here: (a) According to Judge Posner in *Justice v. CFX Transp. Inc.*, 908 F.2d 119 (7th Cir. 1990), a landowner has a reasonable-care "duty" to avoid locating objects on its own property that unsafely block the view of drivers on adjacent highways. (b) On the confirmation of a minority view favoring recovery for the negligent infliction of economic loss, see *infra* notes 289-290. (c) For consideration of a "separate law of asbestos" that allegedly developed in some states in the 1980s, see Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative*, 13 *CARD. L. REV.* 1819, 1840-61 (1992). (d) *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992), preempts certain claims by cigarette smokers, but finds other claims non-preempted; *Cipollone* is discussed *infra* notes 358-360. (e) In cases involving plaintiffs exposed to toxic substances, many courts have become willing to approve awards for medical monitoring. See *infra* note 406.

<sup>254</sup> See *supra* notes 8-11 and accompanying text. This Article's discussion will revisit several of the examples which they mention. See *infra* notes 262-263, 268-270, 277-282, 339-341, 351, 357, 365-372 and accompanying text.

fenses limiting liability, cases that concern the headings and measure of damages in tort actions, and cases that bear on the exclusivity of workers' compensation in the context of workers' injuries. Consideration will then be given to the tort reform statutes of the mid-1980s.

#### A. REJECTING STRICT LIABILITY

This Article's discussion of modern products liability has suggested that a defect in a product typically suggests some negligence on the manufacturer's assembly line. In actions against that manufacturer, then, products liability doctrine is much less strict in fact than it is in form. However, in cases involving "natural" impurities in food, the correlation between product defect and assembly-line negligence breaks down in a way that attaches special importance to the strict liability issue. In *Mexicali Rose v. Superior Court*,<sup>255</sup> the California Supreme Court has recently ruled that in natural impurity cases the consumer *can* recover if he can prove the food preparer's negligence, but *cannot* invoke the doctrine of strict liability.<sup>256</sup>

Despite the general correlation between product defect and manufacturer negligence, the strict liability doctrine can also become meaningfully strict whenever it is applied to defendants other than the manufacturers themselves. One issue that has recently been litigated concerns the liability of pharmacies. In recent years, the Supreme Courts of California and Pennsylvania have ruled that pharmacies which sell defective prescription drugs are not subject to strict liability,<sup>257</sup> notwithstanding the general language in the *Restatement* imposing strict liability on all product sellers.<sup>258</sup> While pharmacies undoubtedly provide some range of services, it remains undeniable that they do sell the products that eventually result in

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<sup>255</sup> 822 P.2d 1292 (Cal. 1992).

<sup>256</sup> The case involved a one-inch chicken bone in a chicken enchilada which the defendant restaurant served to the plaintiff diner. Early California cases could be read as suggesting that the food preparer is free of liability even if it is negligent. In ruling that preparers can be sued in negligence but not in strict liability, *Clark* nicely demonstrates the continuing vitality of negligence. In *Clark*, even Justice Mosk's dissent did not advocate full strict liability. Rather, Mosk recommended that the jury consider whether the presence of a chicken bone was consistent with reasonable consumer expectations. *Id.* at 1309-10.

<sup>257</sup> *Murphy v. E.R. Squibb & Sons, Inc.*, 710 P.2d 247 (Cal. 1985); *Coyle v. Richardson-Merrell, Inc.*, 584 A.2d 1383 (Pa. 1991).

<sup>258</sup> RESTATEMENT (SECOND) OF TORTS § 402A (1965).

consumer injuries. Accordingly, the courts' opinions, as Justice Kaus's California dissent points out,<sup>259</sup> serve to cast doubt on the general notion of retailer strict liability, which had been accepted in classic products liability opinions such as *Vandermark v. Ford Motor Co.*<sup>260</sup> As for the Pennsylvania opinion, it not only denies the pharmacy's strict liability as a retailer but also rules that a pharmacy is not under an independent duty to give warnings to consumers as they purchase their medications.<sup>261</sup>

The liability of successor corporations for the defective products distributed by their predecessors raises another possibility of imposing liability on a company that is itself free of all fault. Modern courts, endorsing new doctrines, had become increasingly willing to subject successor corporations to liability for injuries resulting from products sold by their predecessors.<sup>262</sup> Since 1983, however, these broader versions of successor liability have been repeatedly rejected.<sup>263</sup> What makes these rejections especially interesting is that the 1970s idea of broad successor liability can be persuasively justified by a basic economic analysis.<sup>264</sup>

In suits against the actual manufacturer, products liability most resembles negligence liability when the plaintiff is complaining of a design defect or a failure to warn. Even in these cases, however, products liability would be distinctively strict if it allowed recoveries against manufacturers for hazards in products that were "unknownable" at the time of original product sale. The issue of "hindsight" in products liability remained uncertain through the 1970s.<sup>265</sup> In 1980, however, the Texas Supreme Court recognized a

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<sup>259</sup> *Murphy*, 710 P.2d at 267.

<sup>260</sup> 391 P.2d 168 (Cal. 1964).

<sup>261</sup> *Coyle*, 584 A.2d at 1386. The pharmacy's duty to warn has likewise been rejected by recent opinions in Washington and other states. See *McKee v. American Home Prods. Corp.*, 782 P.2d 1045, 1051 (Wash. 1989) (citing cases).

<sup>262</sup> A leading case is *Ray v. Alad Corp.*, 560 P.2d 3 (Cal. 1977). As of 1960, the general rule was that successor corporations did not bear liability. There were, however, several exceptions to this rule. The modern cases added two new exceptions: a "product line" exception, and a "continuity of enterprise" exception. For discussion, see KIELY, *supra* note 225, at 341.

<sup>263</sup> The most recent rejection is *Nissen Corp. v. Miller*, 594 A.2d 564 (Md. 1991). Other recent cases are cited in *id.* at 573-74.

<sup>264</sup> See Alan Schwartz, *Products Liability, Corporate Structure, and Bankruptcy: Toxic Substances and the Remote Risk Relationship*, 14 J. LEGAL STUD. 689 (1985).

<sup>265</sup> See Gary T. Schwartz, *Foreword: Understanding Products Liability*, 67 CALIF. L. REV. 435, 482-88 (1979).

"state of the art" limitation on liability with respect to safety devices that become available between the time of the product's sale and the time of the plaintiff's suit,<sup>266</sup> and the Illinois Supreme Court ruled that a manufacturer cannot be held liable for failure to warn unless the hazard in question was reasonably knowable at the time of the product's sale.<sup>267</sup> Two years later, the New Jersey Supreme Court, in *Beshada v. Johns-Manville Products Corp.*,<sup>268</sup> innovated by holding that a manufacturer can be held liable for failing to warn even of unknowable product hazards. Yet in 1984, the New Jersey court essentially overruled *Beshada* in *Feldman v. Lederle Laboratories*,<sup>269</sup> holding that in all but asbestos cases manufacturers can escape warning liability by showing that the hazards in question were not reasonably knowable. In 1988, the California Supreme Court, in *Brown v. Superior Court*,<sup>270</sup> held that "hindsight" strict liability is not appropriate in actions against drug manufacturers alleging design defect or a failure to warn; that is, the drug manufacturer cannot be held responsible for hazards not foreseeable at the time of product sale.<sup>271</sup> The *Brown* opinion, discussed above, is ambiguous as to whether its rejection of hindsight applies in all products cases or only cases brought against drug manufacturers. In its later decision in *Anderson v. Owens-Corning Fiberglas Corp.*,<sup>272</sup> the California court resolved this ambiguity by ruling that all failure-to-warn actions, even those involving asbestos, require a showing that the manufacturer knew or could have known of the product's hazard.<sup>273</sup>

A related problem of unknowability arises in suits by AIDS victims against blood banks and commercial blood-product manufacturers on account of the AIDS virus in donated blood. The typical

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<sup>266</sup> *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743 (Tex. 1980).

<sup>267</sup> *Woodill v. Parke Davis & Co.*, 402 N.E.2d 194 (Ill. 1980).

<sup>268</sup> 447 A.2d 539 (N.J. 1982).

<sup>269</sup> 479 A.2d 374 (N.J. 1984).

<sup>270</sup> 751 P.2d 470 (Cal. 1988).

<sup>271</sup> Eisenberg and Henderson read *Brown* as indicating that manufacturer's choices in formulating drugs are free from tort review. Eisenberg & Henderson, *The Quiet Revolution*, *supra* note 8, at 490-91. Yet the *Brown* opinion seems to say that drug companies' design decisions can be considered under negligence standards. See 751 P.2d at 482 n.12.

<sup>272</sup> 810 P.2d 549 (Cal. 1991).

<sup>273</sup> The most recent affirmation of a "knowledge component" in failure-to-warn cases is *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633, 641 (Md. 1992). However, courts in a handful of states continue to support a "hindsight" approach. *E.g.*, *Ayers v. Johnson & Johnson Baby Prods. Co.*, 818 P.2d 1337, 1347 (1991).



suit concerns the supply of blood or a blood product in 1983—a year in which the blood community was beginning to learn of its AIDS problem. To escape the burden of establishing negligence, plaintiffs have tried to invoke the doctrine of strict liability. In the 1960s and 1970s, strict liability claims against blood banks for the transmission of hepatitis had met with a mixed response under the common law;<sup>274</sup> but in most states these claims were defeated by the legislatures' adoption of blood shield statutes. In recent years, plaintiffs in AIDS cases have been clever in advancing arguments as to why these statutes should not be read as preventing strict liability. Courts, however, have been firm in rejecting these arguments.<sup>275</sup> To be sure, New Jersey and the District of Columbia do not have blood shield statutes; the original Maryland statute was limited to hepatitis; the original Washington statute, to hepatitis and malaria. Therefore, in recent AIDS cases in these four jurisdictions, courts have been able to address the underlying common law issue. The conclusion that these courts have all come to is that blood and blood derivatives are unavoidably unsafe products which hence are not subject to strict liability.<sup>276</sup>

#### B. REJECTING NEGLIGENCE-BASED CAUSES OF ACTION

Discussion can now turn to cases in which strict liability is not an issue, but in which the question is how broadly to define the liabilities that notions of negligence or reasonableness might im-

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<sup>274</sup> Compare *Cunningham v. MacNeal Memorial Hosp.*, 266 N.E.2d 897 (Ill. 1970) (supporting strict liability) with *Brody v. Overlook Hosp.*, 317 A.2d 392 (N.J. Sup. Ct.), *aff'd*, 332 A.2d 596 (N.J. 1975) (denying strict liability).

<sup>275</sup> For example, in *Coffee v. Cutter Biological*, 809 F.2d 191, 192 (2nd Cir. 1987), the plaintiff argued that the statute, drafted to protect "blood banks," should not be applied to the commercial manufacturers of blood-derivatives products. The court rejected this argument. *Id.* at 194. In *Cutler v. Graduate Hosp.*, 717 F. Supp. 338, 339-40 (E.D. Penn. 1989), the plaintiff argued that since the statute was drafted with hepatitis in mind, it should not be applied to a new disease like AIDS; the plaintiff further argued that the statute, in shielding "persons" from liability, was designed to protect donors rather than corporate hospitals and blood banks. The court rejected both arguments. *Id.*

<sup>276</sup> See *Doe v. Miles Labs., Inc.*, 927 F.2d 187 (4th Cir. 1991) (applying Maryland law); *Kozup v. Georgetown Univ.*, 663 F. Supp. 1048 (D.D.C. 1987) *aff'd in relevant part*, 851 F.2d 437 (D.C. Cir. 1988); *Miles Labs. v. Doe*, 556 A.2d 1107 (Md. 1989); *Snyder v. Mekhjian*, 582 A.2d 307 (N.J. Sup. Ct. 1990), *aff'd*, 593 A.2d 318 (N.J. 1991); *Rogers v. Miles Labs., Inc.*, 802 P.2d 1346 (Wash. 1991); *Howell v. Spokane & Inland Empire Blood Bank*, 785 P.2d 815 (Wash. 1990). On the negligence issue that remains once strict liability is rejected, see *infra* notes 333-337 and accompanying text.

pose on defendants. One of these questions concerns the reach of the risk-benefit test. Manufacturers have long been liable if particular design features in their products are found not risk-beneficial. In 1983, the New Jersey Supreme Court endorsed a so-called generic risk-benefit test for liability,<sup>277</sup> which holds a manufacturer liable if at the generic level all the hazards associated with his product exceed all that product's benefits, even if all of the design choices that go into that product are intelligently made. (In such cases, the manufacturer's marketing of its product can itself be regarded as unreasonable.) This idea of generic risk-benefit liability has since been repudiated by statute in New Jersey,<sup>278</sup> and has been rejected as a common-law matter in other states; those courts have refused to entertain plaintiffs' arguments that such products as handguns,<sup>279</sup> cigarettes,<sup>280</sup> trail bikes,<sup>281</sup> and auto convertibles<sup>282</sup> should entail liability in accordance with generic risk-benefit reasoning.

In what other contexts might a showing of negligence not suffice for purposes of establishing liability? In *Dillon v. Legg*<sup>283</sup> in 1968, the California Supreme Court affirmed the potential liability of a negligent party to bystanders who suffer emotional distress by watching a serious injury. The general doctrine of bystander liability set forth in *Dillon* gained adherents among additional states in the 1980s.<sup>284</sup> According to *Dillon*, a flexible set of guidelines should govern the eventual extent of bystander liability.<sup>285</sup> This flexibility was gutted, however, by *Thing v. La Chusa*,<sup>286</sup> in which the California court essentially limited the *Dillon* liability theory to the *Dillon* facts. Under *Thing*, a *Dillon* recovery is appropriate only if the bystander is member of the victim's immediate family; more-

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<sup>277</sup> *O'Brien v. Muskin Corp.*, 463 A.2d 298 (N.J. 1983).

<sup>278</sup> N.J. STAT. ANN. § 2A:58C-3 (1987).

<sup>279</sup> *Perkins v. F.I.E. Corp.*, 762 F.2d 1250 (5th Cir. 1985).

<sup>280</sup> *Kotler v. American Tobacco Co.*, 926 F.2d 1217, 1225-26 (1st Cir. 1990).

<sup>281</sup> *Baughn v. Honda Motor Co.*, 727 P.2d 655, 660-61 (Wash. 1986).

<sup>282</sup> *Delvaux v. Ford Motor Co.*, 764 F.2d 469 (7th Cir. 1985). Generic hazards in products are likely to be appreciated by consumers. In *Delvaux*, the court applied the consumer expectations test in order to defeat the plaintiff's claim that convertibles without roll bars are unreasonably dangerous. *Id.* at 474.

<sup>283</sup> 441 P.2d 912 (Cal. 1968).

<sup>284</sup> *E.g.*, *Ramirez v. Armstrong*, 673 P.2d 822 (N.M. 1983).

<sup>285</sup> *Dillon*, 441 P.2d at 920-21.

<sup>286</sup> 771 P.2d 814 (Cal. 1989).

over, the bystander needs to be an actual eye-witness, rather than someone who arrives on the scene in the aftermath of the accident.<sup>287</sup>

In 1979, the California Supreme Court's opinion in *J'Aire Corp. v. Gregory* seemingly created a new tort for the negligent infliction of mere economic harm.<sup>288</sup> The *J'Aire* approach has been followed in New Jersey<sup>289</sup> and a limited number of other states.<sup>290</sup> A majority of jurisdictions, however, have rejected it.<sup>291</sup> Indeed, given the breadth of Illinois' version of the no-recovery rule, the Illinois Supreme Court recently abolished the long-standing tort of attorney malpractice.<sup>292</sup> The court has now granted a rehearing in this case and may well end up withdrawing its original ruling. Still, this is a ruling that would have been inconceivable twenty years ago.

As far as products liability is concerned, in *East River Steamship Corp. v. Transamerica Delaval, Inc.*<sup>293</sup> the United States Supreme Court aligned federal admiralty law with the majority view that economic losses are not recoverable in a products liability action; rather, the commercial plaintiff is limited to its contract (or UCC) remedies.<sup>294</sup> Prior to *East River*, some states had allowed a recovery for economic loss upon a showing of the manufacturer's

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<sup>287</sup> *Id.* at 829-30.

<sup>288</sup> 598 P.2d 60 (Cal. 1979).

<sup>289</sup> *People Express Airlines, Inc. v. Consolidated Rail Corp.*, 495 A.2d 107 (N.J. 1985).

<sup>290</sup> *E.g.*, *Mattingly v. Sheldon Jackson College*, 743 P.2d 356 (Alaska 1987); *Hawthorne v. Kober Constr. Co.*, 640 P.2d 467 (Mont. 1982). The support which these cases provide to the *J'Aire* approach does mean that one can now speak of a "minority view" in favor of liability.

<sup>291</sup> *Rardin v. T. & D. Mach. Handling, Inc.*, 890 F.2d 24 (7th Cir. 1989) (Posner, J.) (applying and also explaining Illinois law); *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986); *Local Joint Executive Bd. v. Stern*, 651 P.2d 637 (Nev. 1982); *Koch v. Consolidated Edison Co.*, 468 N.E.2d 1 (N.Y. 1984), *cert. denied* 469 U.S. 1210 (1985); *Aikens v. Baltimore & O.R.R.*, 501 A.2d 277 (Pa. Super. Ct. 1985). *United Textile Workers of America v. Lear Siegler Seating Corp.*, 825 S.W.2d 83 (Tenn. Ct. App. 1990). *J'Aire* itself is ignored in *I.J. Weinrot & Son, Inc. v. Jackson*, 708 P.2d 682 (Cal. 1985) (holding that corporation cannot sue motorist who negligently disabled corporation's president).

<sup>292</sup> *Collins v. Reynard*, 60 U.S.L.W. 2318 (Ill. Oct. 31, 1991). The *Collins* court remanded for trial the client's contract claim against his lawyer. *Id.* at 2319. The scope of this contract claim is unclear.

<sup>293</sup> 476 U.S. 858 (1986).

<sup>294</sup> The minority position—allowing a products liability recovery for economic loss—had originally been staked out by *Santor v. A. & M. Karagheusian, Inc.*, 207 A.2d 305 (N.J. 1965). However, in 1985, the year before *East River*, the New Jersey Supreme Court overruled *Santor* in its application to commercial buyers. *Spring Motors Distribs., Inc. v. Ford Motor Co.*, 489 A.2d 660 (N.J. 1985).

negligence,<sup>295</sup> and other courts approved such a recovery if the plaintiff's economic loss was due to a "sudden and calamitous event" that could easily have produced a personal injury.<sup>296</sup> In *East River*, however, the Supreme Court seemingly rejected each of these lines of analysis.<sup>297</sup> Subsequently, in expositing state law, courts have tended to regard the *East River* reasoning as persuasive (even while acknowledging that its holding is limited to admiralty).<sup>298</sup> Therefore they have since repudiated the idea that either manufacturer negligence<sup>299</sup> or a calamitous event<sup>300</sup> warrants allowing a plaintiff to sue in products liability for economic loss.<sup>301</sup>

### C. "NO DUTY" DENIALS OF LIABILITY

Prior to the modern era, the tort concept of "duty" had frequently been deployed by courts in ways that denied the liability even of negligent defendants. After 1960, many of these duty limitations receded. Yet in the post-modern era, the duty concept has made a comeback.

Traditional tort law had employed the duty concept, for example, to limit the liability of landowners. These traditional rules were, however, repudiated by *Rowland v. Christian*<sup>302</sup> in 1968, replacing a system of entrants' classification with a general doctrine of negligence liability. The *Rowland* revolution was very much in evidence through the 1970s. At about 1980, however, this revolu-

<sup>295</sup> *City of La Crosse v. Schubert, Schroeder & Assocs., Inc.*, 240 N.W.2d 124 (Wis. 1976).

<sup>296</sup> *Pennsylvania Glass Sand Corp. v. Caterpillar Tractor Co.*, 652 F.2d 1165 (3d Cir. 1981) (guessing at Pennsylvania law).

<sup>297</sup> *East River*, 476 U.S. at 866-76.

<sup>298</sup> See *American Universal Ins. Group v. General Motors Corp.*, 578 So. 2d 451, 453 (Fla. Dist. Ct. App. 1991).

<sup>299</sup> *Sunnyslope Grading, Inc. v. Miller, Bradford & Risberg, Inc.*, 437 N.W.2d 213 (Wis. 1989).

<sup>300</sup> *Aloe Coal Co. v. Clark Equip. Co.*, 816 F.2d 110 (3d Cir.), cert. denied, 484 U.S. 853 (1987). On this issue, however, some courts have resisted the influence of *East River*. E.g., *Washington Water Power Co. v. Graybar Elec. Co.*, 774 P.2d 1199 (Wash. 1989).

<sup>301</sup> Also, one court has relied on *East River* in changing its mind and disallowing a tort recovery for damage to "other property." *Hapka v. Paquin Farms*, 458 N.W.2d 683, 686-88 (Minn. 1990). Under one theory or another several courts have allowed school districts and certain other building owners to recover for the economic costs of removing asbestos. E.g. *City of Greenville v. W.R. Grace & Co.*, 827 F.2d 975 (4th Cir. 1987); *Kershaw County Bd. of Educ. v. United States Gypsum Co.*, 396 S.E.2d 369 (S.C. 1990). Yet other courts have denied recovery. E.g., *Adams-Arapahoe Sch. Dist. No. 28-J v. United States Gypsum Co.*, 959 F.2d 868 (10th Cir. 1992).

<sup>302</sup> 443 P.2d 561 (Cal. 1968).

tion "came to a screeching halt."<sup>303</sup> Since then, there has been a steady stream of state court decisions either explicitly rejecting *Rowland*<sup>304</sup> or implicitly rejecting it by continuing to apply the traditional system of classification. Indeed, in recent years courts have frequently applied the traditional rules of limited liability even in cases involving commercial and institutional property.<sup>305</sup> What makes all these post-1980 cases especially interesting is that *Rowland* had been specifically relied on both by myself in documenting the vitality of negligence<sup>306</sup> and by Priest in showing the influence of enterprise liability.<sup>307</sup>

Another variation on the duty theme was relied on by the Illinois Supreme Court in 1989 in denying the liability of a railroad whose train was struck by the plaintiff's car when the train was stopped at a crossroad. The court ruled that in arranging their conduct railroads (and evidently other defendants) have no duty "to anticipate and guard against the negligence of others"; to impose such a duty, the court thought, would place "an intolerable burden on society."<sup>308</sup> This ruling stands in interesting contrast to earlier products liability holdings rendering manufacturers liable in cases involving the foreseeable misuses of their products. A year later, the same court held that the builders and renovators of apartment buildings do not have a duty—not even, apparently, under negligence law—to install child-proof screens in rental units.<sup>309</sup> While affirming the foreseeability of injury, the court nevertheless concluded that recognition of a duty would engender a variety of unfortunate "social and economic consequences."<sup>310</sup> Back in 1989, the Sixth Circuit held that under negligence law the supplier of an otherwise nondefective component part is under no duty to concern itself with the unsafe way in which that part is

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<sup>303</sup> PROSSER AND KEETON ON TORTS, *supra* note 245, at 433.

<sup>304</sup> See, e.g., *Lohrenz v. Lane*, 787 P.2d 1274 (Okla. 1990); *Younce v. Ferguson*, 724 P.2d 991 (Wash. 1986). See generally PAGE, *supra* note 242, § 6.7 (describing "[r]esistance to *Rowland*").

<sup>305</sup> See, e.g., *Mech v. Hearst Corp.*, 496 A.2d 1099 (Md. Ct. Spec. App. 1985); *Adams v. Fred's Dollar Store*, 497 So. 2d 1097 (Miss. 1986).

<sup>306</sup> Schwartz, *Vitality*, *supra* note 1, at 966-67.

<sup>307</sup> Priest, *Insurance Crisis*, *supra* note 84, at 1535-36.

<sup>308</sup> *Dunn v. Baltimore & O.R.R.*, 537 N.E.2d 738, 745 (Ill. 1989).

<sup>309</sup> *Lamkin v. Towner*, 563 N.E.2d 449 (Ill. 1990).

<sup>310</sup> *Id.* at 455.

being incorporated into the design of the final product.<sup>311</sup> Even more recently, the New York Court of Appeals ruled that the manufacturer of one product (a tire) designed exclusively for use with a latently dangerous companion product (a multi-piece tire rim) has no duty to warn consumers of those dangers.<sup>312</sup>

DES cases like *Sindell v. Abbott Laboratories*,<sup>313</sup> dealing with the issue of market-share liability, had assumed that DES, while harmless to the mother, subjects daughters to considerable risks of adenosis and vaginal cancer. Later medical studies have suggested that DES can harm grandchildren as well, who can be born with cerebral palsy as a result of DES-induced defects in their mother's reproductive system. Yet in *Enright v. Eli Lilly & Co.*,<sup>314</sup> the New York court held in essence that products manufacturers owe no duty to third-generation victims. The court noted that while new drugs may contain hazards, public policy nevertheless favors their distribution. The court also reasoned that the regulatory presence of the FDA somewhat reduces the need for strong liability rules.<sup>315</sup> In its desire to place reasonable limits on liability, *Enright* can be regarded as a late twentieth-century counterpart to the New York court's nineteenth-century ruling in *Ryan v. New York Central Railroad*;<sup>316</sup> drug companies have now replaced railroads as the defendants that should not be burdened with excessive liability.

<sup>311</sup> *Childress v. Gresen Mfg. Co.*, 888 F.2d 45 (6th Cir. 1989). *Childress* is one of several recent cases which defense lawyers see as providing "liability relief" for the suppliers of components. See Thomas G. Cardelli & Cheryl A. Cardelli, *Product Liability Relief for Component Manufacturers*, FOR THE DEF., May 1990, at 20, 20. One recent case, on extreme facts, imposed liability. *Estate of Carey v. Hy-Temp Mfg. Co.*, 929 F.2d 1229, 1234 (7th Cir. 1991).

<sup>312</sup> *Rastelli v. Goodyear Tire & Rubber Co.*, 591 N.E.2d 222 (N.Y. 1992). The court also rejected the plaintiff's claim that there was a concert of action between the manufacturers of these companion products that could render the tire manufacturer liable for the tire rim's hazards. *Id.* at 224-25. The court's opinion suggests that liability properly belongs exclusively with the manufacturer of the tire rim. The problem is that, as in *Rastelli* itself, the consumer is often unable to identify that manufacturer. See *infra* note 371.

<sup>313</sup> 607 P.2d 924 (Cal.), cert. denied, 449 U.S. 912 (1980).

<sup>314</sup> 570 N.E.2d 198 (N.Y.), cert. denied, 112 S. Ct. 197 (1991). *Enright* has recently been followed by the Ohio Supreme Court. *Grover v. Eli Lilly & Co.*, 591 N.E.2d 696 (Ohio 1992).

<sup>315</sup> *Id.* at 204.

<sup>316</sup> 35 N.Y. 210 (1866). *Ryan* held that a railroad whose negligent spark causes a spreading fire is liable only for the first building destroyed. Because their losses are too "remote," the owners of other structures should be denied recoveries. *Id.* at 213. In fact, the *Ryan* doctrine was rejected by most nineteenth-century courts. 1 THOMAS G. SHEARMAN & AMASA A. REDFIELD, A TREATISE ON THE LAW OF NEGLIGENCE § 33-34 (5th ed. 1898).

*Enright* relied upon *Albala v. City of New York*, a 1981 New York malpractice case that held a doctor not liable for pre-conception harms.<sup>317</sup> In 1991 *Albala* itself was relied on by a California court in holding that a negligent motorist has no "duty of care" with respect to pre-conception harms.<sup>318</sup> One of the innovations of modern tort law concerned the willingness of courts to impose liability on a variety of defendants whose negligence resulted in prenatal injuries. Since 1980, however, courts have proved reluctant to take the next step and afford recoveries for pre-conception injuries.

*Enright* has here been interpreted both as a prescription drug case and as a case involving pre-conception harms. It can further be seen as one of a line of cases in which the New York Court of Appeals has sought to control the breadth of liability. In one 1985 case, the court reaffirmed the privity rule in suits against negligent accountants.<sup>319</sup> In another case,<sup>320</sup> a power failure caused by Con Edison's negligence placed most of New York City in darkness. Because Con Edison did not deliver power to the plaintiff's landlord in accordance with its contract with that landlord, the tenant-plaintiff suffered a personal injury in the darkened basement of the apartment building; the court ruled that Con Edison's liability, even for personal injury, was limited by the doctrine of privity.<sup>321</sup> In late 1980s opinions, moreover, the New York court called a halt to the growth in a line of cases that had rendered local governments increasingly liable for the failure of police to intervene in order to prevent crimes. The facts of a 1989 case supported a plau-

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<sup>317</sup> 429 N.E.2d 786 (N.Y. 1981).

<sup>318</sup> *Hegyesh v. Unjian Enters., Inc.*, 286 Cal. Rptr. 85 (Ct. App. 1991). The case law prior to *Hegyesh* is reviewed in *id.* at 94-100. The first round of cases, in the 1970s, had tended to affirm liability.

<sup>319</sup> *Credit Alliance Corp. v. Arthur Andersen & Co.*, 483 N.E.2d 110 (N.Y. 1985). This case was the New York court's response to a 1983 New Jersey case that had affirmed liability, *H. Rosenblum, Inc. v. Adler*, 461 A.2d 138 (N.J. 1983). The state of the law is now somewhat confused, though the *Restatement's* intermediate position may be gaining adherents. See Brooke Wunnikke, *Accountants' Liability to Third Parties*, FOR THE DEF., Sept. 1990, at 16.

<sup>320</sup> *Strauss v. Belle Realty Co.*, 482 N.E.2d 34 (N.Y. 1985).

<sup>321</sup> Privity was also invoked to deny liability in *Eaves Brooks Costume Co. v. Y.B.H. Realty Corp.*, 556 N.E.2d 1093 (N.Y. 1990). In this case the defendant was under contract to inspect the sprinkler system in a building in which the plaintiff was a tenant. The defendant's negligence led to a malfunction in the sprinkler system, which in turn resulted in water damage to the plaintiff's property. The New York court, relying on "policy considerations," denied the plaintiff a recovery. *Id.* at 1096-97.

sible claim of a special relationship.<sup>322</sup> In rejecting that claim, the court was explicit that its concern was "to place controllable limits on the scope of" municipal liability.<sup>323</sup> In a 1987 case,<sup>324</sup> the plaintiffs were being threatened by a tenant in their duplex. The police promised the plaintiffs they would arrest the tenant the next morning. However, they failed to do so, and that evening the tenant attacked and injured the plaintiffs. Though acknowledging that the promise created a special relationship between the police and the plaintiffs, the court found that by the evening the plaintiffs were no longer *relying* on that promise, since they knew the arrest had not been effectuated that morning; hence the special relationship could not serve to justify liability.<sup>325</sup>

#### D. CONSERVATIVELY CHARACTERIZING WHAT CONDUCT IS NEGLIGENT OR UNREASONABLE

In many cases, it is conceded that something like negligence or reasonableness operates as the standard of liability; the key question concerns how properly to characterize that negligence standard. In medical malpractice, liability has always depended on a showing of professional negligence. Malpractice has always been a conservative corner of substantive tort law, and its conservatism has largely survived the 1980s. In malpractice actions, the doctor's performance has traditionally been assessed by comparing it to the normal practices of the medical community. This "professional"

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<sup>322</sup> In *Kircher v. City of Jamestown*, 543 N.E.2d 443 (N.Y. 1989), two persons, having witnessed the abduction of the plaintiff (their friend), reported it to a policeman on the beat, who assured them that he would "call it in." He failed to do so, and the witnesses, relying on his assurance, made no further efforts to report the crime. *Id.* at 444. The plaintiff ended up undergoing a twelve-hour ordeal of rape and brutalization. *Id.*

<sup>323</sup> *Id.* at 447-48. In recent years, the New York court has also conservatively interpreted the "duty" of hospitals, doctors, and landlords. See *Muniz v. Flohern, Inc.*, 570 N.E.2d 1074 (N.Y. 1991); *Purdy v. Public Adm'r*, 526 N.E.2d 4 (N.Y. 1988). As it happens, as early as 1976 the court had narrowly defined those circumstances in which one party has a duty to intervene so as to restrain another party from tortiously injuring the plaintiff. See *Pulka v. Edelman*, 358 N.E.2d 1019, 1021-23 (N.Y. 1976). Conservative opinions such as *Pulka* tended to get little attention in the 1970s, since they seemed out of line with what was then the dominant movement in tort opinions. With that movement now having receded, it becomes easier to appreciate the significance of cases like *Pulka*.

<sup>324</sup> *Cuffy v. City of New York*, 505 N.E.2d 937 (N.Y. 1987).

<sup>325</sup> *Id.* at 941-42. The Ohio Supreme Court has denied liability in a law enforcement case whose facts may well be even more "egregious" than those in *Cuffy*. See *Sawicki v. Village of Ottawa Hills*, 525 N.E.2d 468 (Ohio 1988), discussed in *KIELY, supra* note 225, at 185-87.



standard of care means that the doctor's compliance with medical custom serves as firm proof of the reasonableness of his own conduct. After 1960, however, this gloss on reasonableness was rejected by dicta<sup>326</sup> and holdings<sup>327</sup> in several states. The most famous of these holdings was in *Helling v. Carey*,<sup>328</sup> in which the Washington Supreme Court, conducting its own risk-benefit analysis, found an ophthalmologist guilty of malpractice as a matter of law, even though he had apparently complied with a pertinent custom. By the early 1980s, it was possible to assume that the minority position dramatized by *Helling* was in the process of acquiring majority status. During the intervening decade, however, it cannot be said that the balance has really shifted; in suits against doctors, the issue of the status of custom has not been frequently litigated.<sup>329</sup>

Yet put to one side questions of actual doctor customs. On many matters the medical community is divided as to the preferred method of therapy or treatment. Traditional malpractice law has long limited the ability of the jury to resolve such disagreements among doctors; when intelligent doctors can disagree, the defendant cannot be found guilty of malpractice. A 1977 Texas opinion, while somewhat ambiguous, could be read as moving away from this limitation on liability and allowing the jury to itself decide which course of conduct is best.<sup>330</sup> But the traditional limitation on liability has been reaffirmed by several courts in the 1980s.<sup>331</sup> "The

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<sup>326</sup> *E.g.*, *Darling v. Charleston Community Memorial Hosp.*, 211 N.E.2d 253, 257 (Ill. 1965).

<sup>327</sup> *Favalora v. Aetna Casualty & Surety Co.*, 144 So.2d 544, 550-51 (La. Ct. App. 1962); *Toth v. Community Hospital at Glen Cove*, 239 N.E.2d 368, 372-73 (N.Y. 1968); *Morgan v. Sheppard*, 188 N.E.2d 808, 816-17 (Ohio Ct. App. 1963); *Incollingo v. Ewing*, 282 A.2d 206, 216-18 (Pa. 1971); *Vassos v. Roussales*, 625 P.2d 768, 772 (Wyo. 1981). In *Toth*, the court subordinated the custom criterion to the doctor's obligation to employ his own "best judgment." 239 N.E.2d at 373.

<sup>328</sup> 519 P.2d 981, 982-83 (Wash. 1974).

<sup>329</sup> The traditional doctrine was applied in *Smith v. Menet*, 530 N.E.2d 277, 279-80 (Ill. Ct. App. 1988), *app. den.*, 535 N.E. 2d 921 (1989). It was denied, however, by dictum in *Kalsbeck v. Westview Clinic*, 375 N.W.2d 861, 868 (Minn. Ct. App. 1985). Writing in 1991, Clark Havighurst regarded *Helling v. Carey* as one "exception" to the "law's continuing use of customary practice as its benchmark for evaluating the performance of individual professionals." Clark C. Havighurst, *Practice Guidelines as Legal Standards Governing Physician Liability*, 54 LAW & CONTEMP. PROB. 86, 99 n.37 (1991).

<sup>330</sup> *Hood v. Phillips*, 554 S.W.2d 160 (Tex. 1977).

<sup>331</sup> Indeed, some courts (though not others) continue to hold that juries should be instructed "an honest error of judgment" is not malpractice. *Compare Marquis v. Nuss*, 451

rule is that, where competent medical authority is divided, a physician will not be liable if in the exercise of his judgment he followed a course of treatment supported by reputable, respectable, and reasonable medical experts."<sup>332</sup>

Turn now from the traditional tort of malpractice to the contemporary problem of AIDS-infected blood. As a tort defendant, an institutional blood bank seems quite different from an individual doctor.<sup>333</sup> Still, in cases in California, Colorado, and Georgia blood banks have persuaded courts that they deliver professional services and hence should be covered by malpractice liability rules. The California and Georgia courts have gone on to hold that compliance with custom by a doctor or blood bank is complete proof of non-negligence.<sup>334</sup> The Colorado Supreme Court has ruled that a blood bank or professional's custom compliance establishes a "presumption" of due care, which can be rebutted by expert testimony identifying "readily available" practices that are "substantially more protective" than the customary standards.<sup>335</sup> In several other cases against blood banks and blood-product suppliers, courts have considered plaintiffs' claims of negligence without explicitly relying on the malpractice analogy. Even so, courts have typically granted summary judgment to the defendants.<sup>336</sup> In doing so, they have relied on defendants' compliance with customs and regulations; they have noted that not until 1984 was a "consensus" reached that blood products can transmit the AIDS virus; and they have dis-

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N.W.2d 833 (Iowa 1990) (approving instruction) with *Ouellette v. Subak*, 391 N.W.2d 810 (Minn. 1986) (finding instruction unduly subjective). The "error of judgment" doctrine was rejected in England by the House of Lords in 1981. *Whitehouse v. Jordan*, 1 W.L.R. 246 (1981).

<sup>332</sup> *Furey v. Thomas Jefferson Univ. Hosp.*, 472 A.2d 1083, 1089 (Pa. Super. Ct. 1984). For similar reasoning, see *Kroll v. United States*, 708 F.Supp. 117, 118-19 (D.C. Md. 1989), *aff'd*, 900 F.2d 253 (4th Cir. 1990); *Borja v. Phoenix Gen. Hosp., Inc.*, 727 P.2d 355, 357 (Ariz. Ct. App. 1986); *Ouellette*, 391 N.W.2d at 815; *Trent v. Trotman*, 508 A.2d 580, 583-84 (Pa. Super. Ct. 1986).

<sup>333</sup> See the discussion of the strict liability issue in *supra* notes 274-276 and accompanying text.

<sup>334</sup> *Osborn v. Irwin Memorial Blood Bank*, 7 Cal. Rptr. 2d 101 (Ct. App. 1992); *Doe v. American Red Cross Blood Servs.*, 377 S.E.2d 323 (S.C. 1989).

<sup>335</sup> *United Blood Servs. v. Quintana*, 827 P.2d 509, 521 (Colo. 1992). On the subsequent trial in *Quintana*, see *infra* note 338.

<sup>336</sup> *Doe v. Miles Labs., Inc.*, 927 F.2d 187 (4th Cir. 1991); *McKee v. Cutter Labs., Inc.*, 866 F.2d 219 (6th Cir. 1989); *Kozup v. Georgetown Univ.*, 663 F. Supp. 1048 (D.D.C. 1987), *aff'd in relevant part*, 851 F.2d 437 (D.C. Cir. 1988);

missed as "hindsight opinions" the expert testimony offered by plaintiffs as to the donor screening precautions that were appropriate in the early 1980s.<sup>337</sup>

At least one of these blood product cases involved a claim that the manufacturer had failed to warn; the Fourth Circuit held that a drug manufacturers have no duty to warn of an alleged side effect that is "merely a *possibility*" rather than a confirmed certainty at the time of original product sale.<sup>338</sup> It is time now to consider other recent developments relating to the scope of manufacturers' warning obligation. In failure-to-warn cases, the manufacturer's liability is frequently expressed in terms of the reasonableness of its warning. Prior to the early 1980s, courts had typically expressed the idea that adding new items to warnings was a process that was essentially costless; therefore, a warning could easily be found unreasonable or inadequate if it failed to include any item that might be useful.<sup>339</sup> Since the early 1980s, some courts have persevered in this approach and hence have second-guessed actual warnings in doubtful ways.<sup>340</sup> But an important counter-trend has emerged. Other courts have begun to recognize the problems of information overload and consumer "information costs"<sup>341</sup> that are incurred as warnings become more prolix, and have therefore declined to fault warnings which leave out some particular item highlighted by the plaintiff.<sup>342</sup> Since 1980, courts

<sup>337</sup> See, e.g., *Doe v. Miles Labs., Inc.*, 927 F.2d at 193-94.

In the recent *Quintana* trial, the plaintiff's expert (a former doctor at the Centers for Disease Control) provided a quite new account. He testified that CDC officials *did* recommend donor screening in early 1983—and that the blood industry rejected this recommendation. Based on his testimony, the jury returned a verdict for the plaintiff. *Woman Dies of AIDS Just Before Victory in Court*, N.Y. TIMES, Aug. 5, 1992, at 12 (nat'l ed.).

<sup>338</sup> *Miles Labs*, 927 F.2d at 194.

<sup>339</sup> This idea is set forth, for example, in 1 M. STUART MADDEN, PRODUCTS LIABILITY 376 (2d ed. 1988) (citing 1970s cases).

<sup>340</sup> E.g., *MacDonald v. Ortho Pharmaceutical Corp.*, 475 N.E.2d 65 (Mass.), *cert. denied*, 474 U.S. 920 (1985) (discussed *supra* note 210).

<sup>341</sup> *Cotton v. Buckeye Gas Prods. Co.*, 840 F.2d 935, 937-38 (D.C. Cir. 1988).

<sup>342</sup> See *Doe v. Miles Labs.*, 927 F.2d 187, 194 (4th Cir. 1991); *Thomas v. Hoffman-La-Roche, Inc.*, 949 F.2d 806, 816 n.40 (5th Cir. 1992); *Scott v. Black & Decker, Inc.*, 717 F.2d 251, 254 (5th Cir. 1983); *Finn v. G.D. Searle & Co.*, 677 P.2d 1147, 1153 (Cal. 1984); *Brousard v. Continental Oil Co.*, 433 So.2d 354, 358 (La. Ct. App.), *writ denied*, 440 So. 2d 726 (La. 1983); *Dunn v. Lederle Lab.*, 328 N.W.2d 576, 580-81 (Mich. Ct. App. 1982).

Even courts that have found particular warnings inadequate have felt required to narrow their holdings so as to take into account the information overload problem. See, e.g., *Ayers v. Johnson & Johnson Baby Prods. Co.*, 818 P.2d 1337, 1343 (Wash. 1991) (limiting its hold-

have placed other limiting glosses on the manufacturer's obligation to give a reasonable warning. If the plaintiff—generally an employee—is deemed an “experienced” or “sophisticated user” of the product, courts have become much more willing to find that the plaintiff's experience renders a warning unnecessary.<sup>343</sup> Courts in recent years have also become more inclined to deny the manufacturer's warning liability by finding in essence that the employer is a knowledgeable intermediary.<sup>344</sup> Hence the manufacturer needs to warn only the employer, rather than the employees themselves; for that matter, if the employer already knows of the product's hazard, no warning at all is needed.<sup>345</sup> This recent development comes close to contradicting one of the key holdings in *Borel v. Fibreboard Paper Products Corp.*,<sup>346</sup> the Magna Carta of asbestos litigation.

In concluding this discussion of modern assessments of the concept of reasonable behavior, I can now move from the high drama of doctors, AIDS, and manufacturers to the ordinary drama of landowners and recreational activities. In *Keetch v. Kroger Co.*,<sup>347</sup> a shopper allegedly fell on a slippery spot created by the negligence of a grocery store's employee in overspraying plants in the store's plant area. According to the Texas Supreme Court, the store could *not* be held liable for the employee's negligent act as

ing to products “for use on babies”).

<sup>343</sup> “After years of expanding liability . . . the pendulum is beginning to swing back. . . . New defenses to a products liability action are emerging. One of [them] is the sophisticated user defense.” Robert E. Powell et al., *The Sophisticated User Defense and Liability for Defective Design: The Twain Must Meet*, 13 J. PROD. LIAB. 113, 113 (1991).

<sup>344</sup> See *id.* at 117 (citing cases).

<sup>345</sup> In *In re Asbestos Litigation* (Mergenthaler), 542 A.2d 1205 (Del. Super. Ct. 1986), the court held that a manufacturer can rely on the knowledgeable employer to provide its employees with proper warnings, unless the manufacturer has specific reason to believe that the employer will not do so. A concern for the practical problems a manufacturer would encounter in trying to provide a direct warning to employees is expressed in *Goodbar v. Whitehead Brothers*, 591 F. Supp. 552 (W.D. Va. 1984), *aff'd sub nom.* *Beale v. Hardy*, 769 F.2d 213 (4th Cir. 1985).

<sup>346</sup> 493 F.2d 1076, 1091-92 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974). The *Borel* court conceptualized the warning obligation as running directly from the manufacturer to the “ultimate consumer or user.” *Id.* at 1091. That court did not consider at all how practical it would have been for the manufacturer to have provided these direct warnings. The court did acknowledge a limited defense if the manufacturer can prove that the employer has “deliberately” withheld information from employees. *Id.* Even this defense would not apply if the product is “extremely dangerous.” *Id.* at 1092 n.29.

<sup>347</sup> No. D-0671, 1992 Tex. LEXIS 65 (June 3, 1992).

such, since this act at worst created a "condition" that half-an-hour later resulted in injury. Rather, to recover for a dangerous condition, the plaintiff must show the owner's actual or constructive knowledge of that danger; and in the court's view the fact that the condition is created by the conduct of the owner's employee is no more than some evidence of the owner's knowledge. In *Rinaldo v. McGovern*,<sup>348</sup> a golfer "mis-hit" a golf ball, slicing it badly. The ball, having soared over the screen of trees that bounded the golf course, landed on the windshield of a car being driven on the adjacent public road, shattering that windshield and thereby injuring the plaintiff, who was riding in the car. The New York Court of Appeals found that "the risk of a mis-hit golf ball is [not] a fully preventable occurrence";<sup>349</sup> on the basis of this finding, the court ruled—as a matter of law—that the golfer was not negligent. Moreover, the court did not express any interest in the possibility of imposing strict liability on the golfer on account of his causation of harm.<sup>350</sup> I had long wondered about how a court would handle the negligence issue presented by *Rinaldo*. The golfer who badly slices his ball is not at all equivalent to the baseball batter who merely fouls off a pitch; for the batter, unlike the golfer, is facing an opponent who is vigorously attempting to frustrate his performance.

#### E. AFFIRMATIVE DEFENSES AND OTHER LIMITATIONS ON LIABILITY

Affirmative defenses can, of course, limit the liability even of those defendants whose conduct can be assessed as negligent or unreasonable. In *Boyle v. United Technologies Corp.* in 1988, the Supreme Court affirmed a government-contractor defense in products liability design defect cases that can be invoked by manufacturers when they design their products in compliance with federal specifications.<sup>351</sup> Another possible defense is that the manufacturer has complied with federal regulations. The traditional unwillingness to find that federal regulatory programs do not preempt state tort actions was dramatized in 1984 by *Ferebee v. Chevron Chemi-*

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<sup>348</sup> 587 N.E.2d 264 (N.Y. 1991).

<sup>349</sup> *Id.* at 267.

<sup>350</sup> See also *Bolton v. Stone*, 1951 App. Cas. 850 (holding cricket club not liable to pedestrian hit by ball outside fence).

<sup>351</sup> 487 U.S. 500, 512-13 (1988).

*cal Co.*,<sup>352</sup> in which the D.C. Circuit ruled that a failure-to-warn claim was not preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).<sup>353</sup> During the last two years, however, the Tenth and Eleventh Circuits, explicitly rejecting *Ferebee*, have ruled that FIFRA does preempt tort claims for alleged failures to warn.<sup>354</sup> Recent courts have also held that federal law preempts plaintiffs from arguing that tampons lack adequate warnings<sup>355</sup>, and that the absence of air bags in cars is a design defect.<sup>356</sup> Beginning in the mid-1980s, most courts ruled that cigarette warnings on packs and in ads that comply with the Federal Labeling Act cannot be faulted as "inadequate" under the common law.<sup>357</sup> That important ruling has now been essentially affirmed by the Supreme Court.<sup>358</sup> That Court also ruled preempted smokers' claims that the images in cigarette advertisements improperly neutralize warnings that would otherwise be deemed legally adequate. Yet the Court found nonpreempted possible claims of express warranty, fraudulent misrepresentation, and an odd category of intentional concealments.<sup>359</sup> Of course, the preemption defense fits

<sup>352</sup> 736 F.2d 1529 (D.C. Cir.), *cert. denied*, 469 U.S. 1062 (1984).

<sup>353</sup> For the defendant to have given the warning recommended by the plaintiff would apparently have violated the Act. *Id.* at 1541.

<sup>354</sup> *Arkansas-Platte & Gulf Partnership v. Van Waters & Rogers, Inc.*, 959 F.2d 158 (10th Cir. 1992); *Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991).

<sup>355</sup> *See, e.g.*, *Moore v. Kimberly Clark Corp.*, 867 F.2d 243 (5th Cir. 1989). Design defect claims are, however, not preempted.

<sup>356</sup> *Wood v. General Motors Corp.*, 865 F.2d 395 (1st Cir. 1988) *cert. denied*, 494 U.S. 1065 (1990).

The preemption defense remains ineffective in many cases. *See, e.g.*, *Feldman v. Lederle Labs.*, 592 A.2d 1176 (N.J. 1991); *see generally* KIELY, *supra* note 225, at 380-82 (discussing cases). But the Tenth Circuit, rejecting precedent, has recently interpreted the Federal Railroad Safety Act as broadly preempting tort claims against railroads for not installing safety devices at grade crossings. *Hatfield v. Burlington N.R.R.*, 958 F.2d 320 (10th Cir. 1992). And the Seventh Circuit, rejecting precedent, has recently found preemption in a design defect suit brought against the manufacturer of an "intraocular lens" that had been awarded an investigational device exemption by the FDA. *Slater v. Optical Radiation Corp.*, 961 F.2d 1330 (7th Cir. 1992) (Posner, J.).

<sup>357</sup> *E.g.*, *Palmer v. Liggett Group, Inc.*, 825 F.2d 620 (1st Cir. 1987).

<sup>358</sup> *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608 (1992). My assumption here—evidently shared by the plurality opinion—is that the material on the package can be regarded as part of the product's "advertising and promotion."

<sup>359</sup> The example the plurality opinion gives of a nonpreempted express warranty is a cigarette company advertisement that promises to pay the medical expenses of any smoker who gets emphysema. *Id.* at 2622. The example that opinion gives of a nonpreempted intentional concealment is a state law that *both* obliges cigarette companies to disclose hazard information to a state administrative agency *and* gives the smoker a private cause-of-action for

somewhat awkwardly within this Part's discussion; the conservative judge who might be interested in limiting tort claims might also be wary about the casual extension, through preemption rulings, of federal hegemony.<sup>360</sup>

Doctrines of causation also influence the extent of manufacturers' liability. Back in 1973, the Fifth Circuit ruled in *Reyes v. Wyeth Laboratories*<sup>361</sup> that a finding of an inadequate warning calls into play a rebuttable presumption that a fuller warning of the product's inherent risks would have dissuaded the consumer from purchasing the product. Critics of modern tort law have tended to identify *Reyes* as a prime example of a case that points toward absolute liability.<sup>362</sup> In early 1992, however, *Reyes* was essentially overruled by the Fifth Circuit in *Thomas v. Hoffman-LaRoche, Inc.*<sup>363</sup> The *Thomas* court assumed that the warning accompanying Accutane (an anti-acne drug) was legally inadequate; even so, having rejected the presumption of causation and considered the lim-

harms caused by the companies' failure so to disclose. *Id.* at 2623.

<sup>360</sup> Modern tort opinions, such as *Ferebee*, had relied on an explicit pro-plaintiff preference—the idea that it is especially wrong to preempt personal injury claims. That idea can be found in Justice Blackmun's separate opinion in *Cipollone*, *id.* at 2630, but is interestingly absent from the plurality opinion. Relying on principles of statutory interpretation, the plurality opinion reasons that when a statute contains an explicit preemption section, an implied preemption analysis is inappropriate. *Id.* at 2618. Relying on principles of federalism, the opinion further reasons that express preemption sections should be "fairly but . . . narrowly" construed. *Id.* at 2621. Yet this latter reasoning the opinion honors in the breach: it broadly interprets a preemption section that focuses on additional "requirement[s] or prohibition[s]" . . . imposed under State law" as including liabilities affirmed by juries relying on state common-law standards. *Id.* at 2619-21.

*Cipollone* may undermine the implied preemption arguments relied on in the FIFRA and tampon cases discussed above. At the same time, *Cipollone* strengthens the explicit preemption arguments in these cases: for the relevant federal statutes explicitly preempt any further "requirements" imposed by state law.

<sup>361</sup> 498 F.2d 1264 (5th Cir.), *cert. denied*, 419 U.S. 1096 (1974).

<sup>362</sup> See, e.g., Kitch, *supra* note 212, at 12; Priest, *Enterprise Liability*, *supra* note 5, at 524 (discussing presumption of causation in failure-to-warn cases.)

<sup>363</sup> 949 F.2d 806 (5th Cir. 1992). The status of *Reyes* after *Thomas* is discussed in *id.* at 814 nn.30, 32.

In fact, *Thomas* is one of several failure-to-warn cases in recent years that seemingly have taken the causation requirement more seriously as a limitation on liability. See, e.g., *Hurt v. Coyne Cylinder Co.*, 956 F.2d 1319, 1329 (6th Cir. 1992); *Plummer v. Lederle Lab.*, 819 F.2d 349, 358-59 (2d Cir. 1987); *Conti v. Ford Motor Co.*, 743 F.2d 195, 198-99 (3rd Cir. 1984); *Gosewisch v. American Honda Motor Co.*, 737 P.2d 376, 379-80 (Ariz. 1987); *Staymates v. ITT Holub Industries*, 527 A.2d 140, 147-48 (Pa. Super. Ct. 1987). In some cases, the lack of causation can be tied to the plaintiff's status as an experienced user. E.g., *Lussier v. Louisville Ladder Co.*, 938 F.2d 299, 301-02 (1st Cir. 1991).

ited evidence of actual causation, the court denied the drug company's liability.<sup>364</sup> In *Sindell v. Abbott Laboratories*<sup>365</sup> in 1980, the California Supreme Court had announced a bold new rule of proportionate liability for the harms caused by DES. In the following years, *Sindell*—or at least some variation on the *Sindell* theme—has been accepted by several courts, including, most recently, Florida.<sup>366</sup> It has been rejected outright, however, by several others, including most recently Illinois and Rhode Island.<sup>367</sup> In any event, courts have almost uniformly declined to extend the *Sindell* rule beyond its DES setting. In refusing to apply *Sindell* in asbestos cases, courts have noted that prescription drugs are fungible in a way that asbestos products are not.<sup>368</sup> Courts have also refused, for various reasons, to extend *Sindell* to such products as DPT vaccines,<sup>369</sup> lead paint,<sup>370</sup> multi-piece tire rims,<sup>371</sup> and breast implants.<sup>372</sup>

The liability of a broad range of negligent defendants can be limited by affirmative defenses such as assumption of risk. By 1980, however, that defense seemed just about extinct: courts disapproved of explicit contractual disclaimers of liability,<sup>373</sup> and courts were inclined to “merge” implied assumption of risk into comparative negligence.<sup>374</sup> In the past decade, many courts have continued to approve this merger.<sup>375</sup> Even so, headlines in legal

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<sup>364</sup> *Thomas*, 949 F.2d at 814.

<sup>365</sup> 607 P.2d 924 (Cal.), *cert. denied*, 449 U.S. 912 (1980).

<sup>366</sup> *Conley v. Boyle Drug Co.*, 570 So. 2d 275, 281 (Fla. 1991).

<sup>367</sup> *Smith v. Eli Lilly & Co.*, 560 N.E.2d 324, 344-45 (Ill. 1990); *Gorman v. Abbott Lab.*, 599 A.2d 1364 (R.I. 1991). In *Gorman*, the Rhode Island Supreme Court indeed dismissed *Sindell* in one summary paragraph. *Id.* at 1364.

<sup>368</sup> *Goldman v. Johns-Manville Sales Corp.*, 514 N.E.2d 691, 700 (Ohio 1987).

<sup>369</sup> *Shackil v. Lederle Lab.*, 561 A.2d 511 (Ill. 1989).

<sup>370</sup> *Santiago v. Sherwin-Williams Co.*, 782 F. Supp. 186 (D. Mass. 1992).

<sup>371</sup> *E.g.*, *Tirey v. Firestone Tire & Rubber Co.*, 513 N.E.2d 825 (Ohio C.P. Montgomery County 1986); *Cummins v. Firestone Tire & Rubber*, 495 A.2d 963 (Pa. Super. Ct. 1985).

<sup>372</sup> *Lee v. Baxter Healthcare Corp.*, 721 F. Supp. 89 (D. Md. 1989), *aff'd*, 898 F.2d 146 (4th Cir. 1990).

Courts are divided, however, as to whether *Sindell* can be relied on in cases involving contaminated blood products. The application was approved in *Smith v. Cutter Biological Inc.*, 823 P.2d 717 (Haw. 1991). But it was disapproved in *Kellar v. Cutter Laboratories*, 60 U.S.L.W. 2620 (S.D. Fla. February 24, 1992) and *Poole v. Alpha Therapeutic Corp.*, 696 F. Supp. 351, 353-54 (N.D. Ill. 1988).

<sup>373</sup> *E.g.*, *Tunkl v. Regents of Univ. of Cal.*, 383 P.2d 441, 447 (Cal. 1963).

<sup>374</sup> *Li v. Yellow Cab Co. of Cal.*, 532 P.2d 1226, 1241 (Cal. 1975).

<sup>375</sup> *E.g.*, *Murray v. Ramada Inns, Inc.*, 521 So. 2d 1123, 1132 (La. 1988).



journals now talk about a "revival" of the assumption-of-risk doctrine.<sup>376</sup> Mainly in cases involving recreational activities, courts in New York and California have invoked the concept of assumption of risk to completely deny the defendant's liability.<sup>377</sup> In some jurisdictions, plaintiffs who previously would have lost because of their assumption of risk continue to lose because of the courts' assessment that defendants, though possibly negligent, violated no "duty."<sup>378</sup> Also, recent cases in several states have affirmed the legality of contractual disclaimers of liability accepted by plaintiffs as they sign up for a range of recreational activities.<sup>379</sup> For that matter, in states such as Indiana the assumption of risk defense continues to operate in a rather general way; a prisoner suing prison authorities for negligent supervision was recently found to have assumed the risk of being homosexually raped.<sup>380</sup>

By 1980, the fireman's rule, an apparent manifestation of the as-

<sup>376</sup> Gail Diane Cox, *Assuming Risks: An Old Concept Has a Revival*, NAT'L L.J., Oct. 28, 1991, at 24; see also Susan S. Faerber, Note, *The Reemergence of Implied Assumption of Risk in Florida*, 10 NOVA L.J. 1343 (1986).

<sup>377</sup> See *Ordway v. Superior Court*, 243 Cal. Rptr. 536 (Ct. App. 1988) (jockey suing another jockey); *Cuesta v. Immaculate Conception Roman Catholic Church*, 562 N.Y.S.2d 537 (App. Div. 1990) (volunteer umpire suing sponsor of Little League baseball game); *Marlowe v. Rush-Henrietta Cent. School Dist.*, 561 N.Y.S.2d 934 (App. Div. 1990) (student in gym class suing school and another student). *Ordway* is one of many recent California appellate cases supporting the doctrine of "reasonable implied assumption of risk." The state supreme court has now both recognized this doctrine as a partial defense and approved a significant rule of no duty. *Knight v. Jewett*, No. 5019021, 1992 WL 203943 (Cal. Aug. 24, 1992).

<sup>378</sup> See, e.g., *Arnold v. City of Cedar Rapids*, 443 N.W.2d 332, 333 (Iowa 1989) (spectator hit by thrown ball suing owner of softball field); *Gauvin v. Clark*, 537 N.E.2d 94 (Mass. 1989) (college hockey player suing opposing player); *Turcotte v. Fell*, 502 N.E.2d 964 (N.Y. 1986) (jockey suing another jockey and owner of racetrack); *Ridge v. Kladnick*, 713 P.2d 1131 (Wash. Ct. App. 1986) (skater suing owner of skating rink).

<sup>379</sup> E.g., *Guido v. Koopman*, 2 Cal. Rptr. 2d 437 (Ct. App. 1991) (horseback riding school); *Heil Valley Ranch, Inc. v. Simkin*, 784 P.2d 781 (Colo. 1989) (horse rental); *Harris v. Walker*, 519 N.E.2d 917 (Ill. 1988) (same). But see *Wagenblast v. Odessa School Dist.*, 758 P.2d 968 (Wash. 1988) (invalidating disclaimer required by school district as precondition for student's participation in interscholastic athletics).

<sup>380</sup> *McGill v. Duckworth*, 944 F.2d 344 (7th Cir. 1991) (Easterbrook, J.), cert. denied, 112 S. Ct. 1265 (1992). In *McGill*, the prisoner took a shower at a time when he knew that prison guards were absent and his likely predator nearby. *Id.* at 346. See also *Wassell v. Adams*, 865 F.2d 849 (7th Cir. 1989), affirming a jury verdict finding that a rape victim, who sued a motel for negligent security, was herself 97% at fault for her own rape. (Among other things, she had let a stranger into her room at night and had allowed him to remain even after his behavior became disturbing.) Judge Posner's opinion, while suggesting that the jury's 97% finding was "probably wrong," still developed an "interpretation" of the evidence that rendered that finding legally acceptable. *Id.* at 856.

sumption-of-risk doctrine, was evidently on the defensive.<sup>381</sup> Indeed, the Oregon Supreme Court abolished the rule in 1984.<sup>382</sup> However, in other decisions dating from the early 1980s, a large number of jurisdictions have either reaffirmed the rule<sup>383</sup> or adopted it for the first time.<sup>384</sup> In doing so, these courts have relied on the strength of the assumption-of-risk doctrine and also on other considerations of public policy. While certain limitations on the reach of the rule have been implemented,<sup>385</sup> its application to policemen<sup>386</sup> and volunteer firemen<sup>387</sup> as well as professional fire fighters has been confirmed. Also, many courts have moved the rule beyond the setting of landowner liability by allowing it to be invoked by manufacturers whose defective products result in the fires that attract firemen.<sup>388</sup>

If the doctrine of joint-and-several liability serves to broaden a defendant's liability, then the rejection of that doctrine can properly be regarded as a limitation on liability. In 1978, the Supreme Courts of California and Washington were invited to rule that their states' previous adoptions of comparative negligence called for the abrogation of the joint-and-several rule in favor of proportionate liability.<sup>389</sup> Both courts resisted the invitation and reaffirmed the joint-and-several doctrine, concluding that broad contribution rights did an adequate job of providing equity among defendants. In 1992, the Tennessee Supreme Court moved into the modern era by finally adopting comparative negligence.<sup>390</sup> At the same time,

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<sup>381</sup> To be sure, as early as 1977 the firemen's rule had been supported in *Walters v. Sloan*, 571 P.2d 609 (Cal. 1977), an opinion that surprised California court-watchers.

<sup>382</sup> *Christensen v. Murphy*, 678 P.2d 1210, 1218 (Or. 1984). The rule has been abolished by statute in Minnesota. MINN. STAT. ANN. § 604.06 (West Supp. 1992).

<sup>383</sup> *E.g.*, *Chapman v. Craig*, 431 N.W.2d 770, 771-72 (Iowa 1988); *Rosa v. Dunkin' Donuts*, 583 A.2d 1129, 1133 (N.J. 1991).

<sup>384</sup> *Kreski v. Modern Wholesale Elec. Supply Co.*, 415 N.W.2d 178, 180 (Mich. 1987); *England v. Tasker*, 529 A.2d 938, 940 (N.H. 1987).

<sup>385</sup> On the application of the rule in cases involving willful and wanton negligence, compare *Young v. Sherwin-Williams Co.*, 569 A.2d 1173 (D.C. 1990) (affirming rule) with *Mahoney v. Carus Chemical Co.*, 510 A.2d 4 (N.J. 1986) (finding rule inapplicable).

<sup>386</sup> *Berko v. Freda*, 459 A.2d 663 (N.J. 1983); *Santangelo v. State*, 521 N.E.2d 770 (N.Y. 1988).

<sup>387</sup> *Carpenter v. O'Day*, 562 A.2d 595 (Del. Sup. Ct.), *aff'd*, 553 A.2d 638 (Del. 1988).

<sup>388</sup> The cases are collected in John P. Ludington, Annotation, *Products Liability: "Fireman's Rule" as Defense*, 62 A.L.R. 4TH 727, 730-31 (1988).

<sup>389</sup> *American Motorcycle Ass'n v. Superior Court*, 578 P.2d 899 (Cal. 1978); *Seattle First Nat'l Bank v. Shoreline Concrete*, 588 P.2d 1308 (Wash. 1978).

<sup>390</sup> *McIntyre v. Balentine*, No. 1, 1992 Tenn. LEXIS 336 (May 4, 1992).

the court jumped into the post-modern era. Declaring that comparative negligence is "inconsistent" with the joint-and-several doctrine, the court ruled that this doctrine was "obsolete" and hence no longer in effect. Because the court chose to adopt comparative negligence in its "modified" form, in many future cases the plaintiff's fault will continue to completely bar his recovery. Yet the court evidently adopted a "pure" version of proportionate liability; no matter what the degree of the defendant's fault, the defendant is relieved of the burden of joint-and-several liability.

Under the Federal Tort Claims Act, the federal government, even if found negligent, can claim the protection of certain immunities. *Boyle v. United Technologies Corp.*<sup>391</sup> is the products liability case in which the Supreme Court conferred on manufacturers a government contractor defense. The Court's analysis in *Boyle* began with the premise that the government's choice of the design for a military product it wants to acquire is a "discretionary function" that would entail immunity if the government were itself sued under the Federal Tort Claims Act.<sup>392</sup> This reasoning provides a broad interpretation of the "discretionary" immunity that lies at the core of the Act.<sup>393</sup> That immunity had been originally interpreted by the Supreme Court in *Dalehite v. United States*.<sup>394</sup> The *Dalehite* Court, though denying liability on that case's facts, set forth what has become a standard interpretation of the discretionary immunity: the immunity covers decisions rendered at the "planning" level, but not actions undertaken by public employees

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<sup>391</sup> 487 U.S. 500 (1988).

<sup>392</sup> In the Court's view, recognition of the manufacturer's defense was thus necessary in order to preserve the integrity of the government's own immunity. *Id.* at 511.

In discussing that immunity, the Court emphasized the extent to which the government's choice of product design would be based on some tradeoff between product effectiveness and product safety. *Id.* Given this analysis, it is hard to see how the government's *Boyle* immunity can be limited to the government's choice of designs for *military* products.

<sup>393</sup> The Court had previously interpreted the discretionary function immunity in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984), and *Berkovitz v. United States*, 486 U.S. 531 (1988). Each of these opinions is difficult to parse. Moreover, while the general mood in *Varig Airlines* is opposed to liability in cases involving regulatory failure, the mood in *Berkovitz* seems favorable to liability in cases of this sort. The meaning of the two cases in the aggregate is unclear. In *DeShaney v. Winnebago County Department of Social Services* 109 S. Ct. 998 (1989), the Court declined to constitutionalize the idea of the government's affirmative duties.

<sup>394</sup> 346 U.S. 15 (1953).

in an "operational" way.<sup>395</sup> This is an interpretation that can easily justify liability in large numbers of cases. This test was explicitly discarded, however, by the Court in 1991 in a decision involving the alleged negligence of federal bank regulators.<sup>396</sup> According to that opinion, even operational actions call for immunity if they incorporate any real element of "choice or judgment."<sup>397</sup> Furthermore, the "discretionary function" immunity was not the only immunity in the Act that has fared well during recent years. The doctrine in *Feres v. United States* creates an implied immunity for injuries that are "incident to military service."<sup>398</sup> In 1987, the Supreme Court not only reaffirmed *Feres* but extended it so as to provide the government with immunity even when the federal employee whose negligence injures the serviceman is himself a civilian.<sup>399</sup>

#### F. THE ITEMS AND MEASURE OF DAMAGES

Having by now considered standards of liability and affirmative defenses in both conventional negligence actions and products liability, let me turn to issues relating to the range of harms that modern courts regard as compensable. By the early 1980s, the liability of medical professionals in wrongful-birth and wrongful-life cases was being extensively litigated. In wrongful birth, the most interesting issue concerns whether the parents of a healthy but unwanted child can recover for the economic costs of rearing that child. Invoking public policy, most courts in the last decade have rejected the parents' claim for compensation.<sup>400</sup> In disabled chil-

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<sup>395</sup> *Id.* at 42.

<sup>396</sup> *United States v. Gaubert*, 111 S. Ct. 1267, 1275 (1991).

<sup>397</sup> *Id.* Admittedly, the judgment, to be immune, must be in some sense "based on policy." *Id.* Yet there is no requirement that it be rendered at the "policymaking" level. *Id.*

In a recent case of first impression, the Tenth Circuit has ruled that the discretionary immunity bars the suit brought on behalf of a hiker killed while climbing in a national park. The suit alleged the National Park Service's negligent failure to adequately regulate recreational climbing; its failure to warn hikers of approaching hazards; its delay in initiating a rescue effort after first hearing of possible trouble; and its failure to conduct the eventual rescue effort in a reasonable way. *Johnson v. United States*, 949 F.2d 332, 335 (10th Cir. 1991). According to a spokesman for the American Alpine Club, "[i]t's hard to grasp how important this case was." Bill Stall, *Court Limits Suits on Backcountry Perils*, L.A. TIMES, Dec. 14, 1991 at A32. (Interestingly, the Club supported the government's defense.)

<sup>398</sup> 340 U.S. 135, 144 (1950).

<sup>399</sup> *United States v. Johnson*, 481 U.S. 681, 692 (1987).

<sup>400</sup> Russell G. Donaldson, Annotation, *Recoverability of Cost of Raising Normal, Healthy*

dren's wrongful-life claims, the pattern of judicial results has been even more noteworthy. All but three states have rejected the child's claim even for his own extraordinary medical expenses, and all courts have rejected the child's claim for general damages—damages for the emotional distress associated with his disability.<sup>401</sup>

As noted above, courts have recently allowed malpractice plaintiffs to recover for the loss of a chance of a recovery. The other side of this analytic coin is the right of a plaintiff who has been exposed to a toxic substance to recover now for the prospect of a disease that he might suffer in the future. Recovery for the tortious infliction of "risks" of this sort was sympathetically considered in 1980s articles by leading scholars.<sup>402</sup> However, the argument has been turned down by the huge majority of courts that have recently considered it.<sup>403</sup> In its own opinion rejecting the argument, the New Jersey Supreme Court complained that the argument entailed a "significant departure from traditional, prevailing legal principles" and that the argument, if accepted, would add to the complexity of litigation.<sup>404</sup> That court indicated that it would respond to the equities of risk exposure by allowing the plaintiff to recover for the expenses of medical surveillance, and also by relaxing the rules on *res judicata* and the limitation period so that the victim can eventually bring suit when and if the disease finally strikes.<sup>405</sup> Moreover, so long as the plaintiff has already suffered some physical injury on account of the exposure (for example, asbestosis), courts have also ruled that these plaintiffs can recover now for their emo-

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*Child Born as a Result of Physician's Negligence or Breach of Contract or Warranty*, 89 A.L.R. 4th 632, 637 (1991). Claims for child-rearing costs have been rejected outright in 29 states. Two states allow full recoveries; five others allow recoveries but with an offset to take into account the satisfactions of parenting. The vast majority of cases—including the cases rejecting liability—have come since 1980. And the minority position supporting liability is not new; there were holdings in favor of liability prior to 1980.

<sup>401</sup> See Michael B. Kelly, *The Rightful Position in "Wrongful Life" Actions*, 42 HAST. L.J. 505, 507 (1991).

<sup>402</sup> E.g., William M. Landes & Richard A. Posner, *Tort Law as a Regulatory Regime for Catastrophic Personal Injuries*, 13 J. LEGAL STUD. 417, 425-26 (1984).

<sup>403</sup> See *Mauro v. Raymark Industries*, 561 A.2d 257, 264-65 (N.J. 1989), and cases cited therein.

<sup>404</sup> *Id.* at 260, 266.

<sup>405</sup> *Id.* at 267. Some courts, however, have rejected medical monitoring awards in the absence of actual injury. E.g., *Potter v. Firestone Tire & Rubber Co.*, 274 Cal. Rptr. 885 (Ct. App. 1990), *hearing granted*, 806 P.2d 308 (Cal. 1991).

tional distress as they anticipate a possible future disease (for example, lung cancer).<sup>406</sup> Yet absent such a current injury, most courts have been reluctant to approve recoveries for the fear of future diseases. They have either denied such recoveries altogether,<sup>407</sup> or they have required proof of something like fraud on the part of the defendant.<sup>408</sup>

Discussion can now center on the formal rules of damages in personal-injury cases. The plaintiffs' bar has long complained about the unavailability of prejudgment interest in personal injury cases. In 1987, the Supreme Court ruled that an FELA plaintiff is not entitled to prejudgment interest.<sup>409</sup> A contrary ruling, especially if supported by a strong judicial opinion, might well have sparked a law-reform effort to render prejudgment interest compensable under state tort law.<sup>410</sup> In recent years there has been much con-

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<sup>406</sup> This is one of the *Mauro* holdings. *Id.* at 263. While the right to recover for anxiety in cases of this sort has become more prominent in recent years, that right had been affirmed by cases decided well before 1960. See David C. Minneman, Annotation, *Future Disease or Condition, or Anxiety Relating Thereto, as Element of Recovery*, 50 A.L.R. 4TH 13, 49-63 (1984).

<sup>407</sup> *E.g.*, *Ball v. Joy Technologies Inc.*, 958 F.2d 36, 38-39 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 876 (1992); *In re Hawaii Federal Asbestos Cases*, 734 F. Supp. 1563 (D. Haw. 1990); *Payton v. Abbott Labs*, 437 N.E.2d 171 (Mass. 1982).

<sup>408</sup> *Khan v. Shiley Inc.*, 266 Cal. Rptr. 106, 112 (Cal. Ct. App. 1990). This case involved a defective heart valve that could fracture at any time, causing the nearly immediate death of the patient in whom the valve is implanted. (Yet the fatality risk involved in surgically replacing the valve exceeds the risk entailed by allowing it to remain.) According to *Khan*, neither proof of a defective product nor a showing of manufacturer negligence suffices to allow the patient to recover for emotional distress. Such a recovery is allowable only if the plaintiff proves that the manufacturer is guilty of fraud. On balance, the *Khan* rules seem restrictive, calling to mind *Ultramares Corp. v. Touche*, 174 N.E. 441 (N.Y. 1931). Even so, California is the only state that currently allows these heart-valve emotional distress claims to proceed. Summary judgments have been granted against plaintiffs in Alabama, Indiana, Maryland, Missouri, Ohio, Oregon, New York, Pennsylvania, Texas, Washington, and Wisconsin. Telephone interview with Bruce Finzen (member of Robins, Kaplan, Miller & Ciresi, a national law firm specializing in catastrophic tort litigation) (May 11, 1992). For appellate affirmances, see *Pryor v. Shiley, Inc.*, 916 F.2d 716 (9th Cir. 1990) (*per curiam*); *Sill v. Shiley, Inc.*, 909 F.2d 508 (8th Cir. 1990); *Hagepanos v. Shiley, Inc.*, 846 F.2d 71 (4th Cir. 1988) (*per curiam*); *Spuhl v. Shiley, Inc.*, 795 S.W.2d 573 (Mo. Ct. App. 1990).

<sup>409</sup> *Monessen SW. Ry. v. Morgan*, 486 U.S. 330 (1988).

<sup>410</sup> As early as 1980, the Supreme Court ruled that FELA awards should be after-tax, and that juries should be instructed on their nontaxability. *Norfolk & W. Ry. v. Liepelt*, 444 U.S. 490, 498 (1980). During the 1980s, courts in certain other states, including New Jersey, approved this new approach. *Ruff v. Weintraub*, 519 A.2d 1384, 1388-89 (N.J. 1987); *Bussell v. De Walt Products Corp.*, 519 A.2d 1379, 1382 (N.J. 1987). *Liepelt* still represents, however, no more than a minority position. See John E. Theuman, Annotation, *Propriety of Taking Income Tax Into Consideration in Fixing Damages in Personal Injury or Death*

sideration of "hedonic damages." In 1989, however, the New York Court of Appeals ruled that a plaintiff cannot secure a separate recovery for the lost enjoyments of life; rather, lost enjoyments are compensable only as a subcategory of pain and suffering.<sup>411</sup> Given that evaluation, the court also ruled that there can be no recovery for lost enjoyment in actions brought by comatose plaintiffs; because these plaintiffs are unaware of the enjoyments they have been deprived of, they can secure no recovery for their loss of enjoyments.<sup>412</sup> By the early 1980s, emerging trends in punitive damage practices were troubling scholars, but their criticisms generally stopped short of any suggestions that these practices could be regarded as unconstitutional.<sup>413</sup> During the 1980s, however, the idea gained currency that punitive damage arrangements might contain elements of unconstitutionality. In *Pacific Mutual Life Insurance Co. v. Haslip*<sup>414</sup> in early 1991, the Supreme Court declined to rule that punitive damage practices are at a generic level unconstitutional. Yet the Court stressed the due process need for meaningful standards in the jury's calculation of punitive damage awards and in the judicial review of jury decisions. It will take a long time for the legal community to figure out what *Haslip* really "means." Already, however, at least twelve appellate courts have reversed or

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*Action*, 16 A.L.R. 4TH 589 (1982 & Supp. 1991) (collecting cases). In New York, a compromise has been reached: while damages are awarded pre-tax, see *Johnson v. Manhattan & Bronx Surface Transit Operating Authority*, 519 N.E.2d 326, 330 (N.Y. 1988), juries are instructed on their nontaxability, *Lanzano v. City of New York*, 519 N.E.2d 331, 332-33 (N.Y. 1988).

<sup>411</sup> *McDougald v. Garber*, 536 N.E.2d 372, 375-77 (N.Y. 1989).

The few cases denying that "lost enjoyments" are relevant to personal injury awards were decided prior to 1940. Pamela J. Hermes, *Loss of Enjoyment of Life—Duplication of Damages Versus Full Compensation*, 63 N. DAK. L. REV. 561, 565-68 (1984). Most cases prior to 1940, and essentially all cases since then, have agreed that lost enjoyments can be considered in assessing damages. Annotation, *Loss of Enjoyment as a Distinct Element or Factor in Awarding Damages*, 34 A.L.R. 4TH 293, 297 (1984). The key issue, then, is whether lost enjoyments count as a separate heading of damages. On this issue, the case law has been and remains divided; but *McDougald* has emerged as the leading contemporary opinion. See, e.g., EPSTEIN, *supra* note 225, at 733, FRANKLIN & RABIN, *supra* note 225, at 694.

<sup>412</sup> This reasoning necessarily implies the rejection of the argument advanced by leading law-and-economics scholars that wrongful-death damage rules should be expanded so as to allow recovery for the personal value of life to the victim himself. See, e.g., WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 314 (1987).

<sup>413</sup> See *Symposium, Punitive Damages*, 56 S. CAL. L. REV. 1 (1982) (debating propriety of punitive damages).

<sup>414</sup> 111 S. Ct. 1032 (1991).

remanded punitive damage verdicts because of apparent departures from the *Haslip* standards.<sup>415</sup> The Maryland Court of Appeals, encouraged by *Haslip*, has exercised its common law powers by way of narrowing the substantive standards for the allowance of punitive damages and raising the procedural burden of proof to clear and convincing evidence.<sup>416</sup> Similarly encouraged, the Tennessee Supreme Court has called for bifurcated trials in punitive damage cases, so that the amount of punitive damages can be given separate and careful consideration.<sup>417</sup>

#### G. TORT ACTIONS FOR WORKERS' INJURIES

This review can now turn to questions of the tort claims of injured workers. My 1981 article discussed the extent to which recent developments had eroded the exclusivity idea in workers' compensation—the idea that those programs provide the exclusive remedy for the victim injured on the job.<sup>418</sup> This erosion had occurred in each of three ways. First, employees' rights to bring third-party tort actions against product manufacturers had expanded. Second, some courts were allowing third-party defendants to bring contribution actions against negligent employers. Third, courts were increasingly identifying situations that allowed employees to bring actual tort actions against their own employers.

All three forms of erosion have been countered during recent years. As noted above, courts have become somewhat more willing to reject workers' claims of manufacturers' failures to warn by emphasizing that the employee is an experienced user or that the employer is a sophisticated intermediary.<sup>419</sup> By 1980, the manufacturer's right of contribution from the negligent employer had been approved in New York and Illinois,<sup>420</sup> and looked like it might be

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<sup>415</sup> See, e.g., *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 105-07 (4th Cir. 1991). The cases are identified in Victor E. Schwartz & Mark A. Behrens, *Haslip May Alter Tort-Claim Strategies*, *NAT'L L.J.*, Feb. 17, 1992, at 23. It should be noted that many other courts have found that their own states' punitive damage procedures do not violate the *Haslip* version of due process. E.g., *Hospital Authority v. Jones*, 409 S.E.2d 501, 504 (Ga. 1991).

<sup>416</sup> *Owens-Illinois, Inc. v. Zenobia*, 601 A.2d 633 (Md. 1992). Overruling its own precedents, the court rejected "implied malice" (at least in the sense of "gross negligence") as an acceptable basis for punitive damages. *Id.* at 651-52.

<sup>417</sup> *Hodges v. S.C. Toof & Co.*, 60 U.S.L.W. 2679 (Tenn. Apr. 20, 1992).

<sup>418</sup> See Schwartz, *Vitality*, *supra* note 1, at 974-75.

<sup>419</sup> See *supra* notes 343-346 and accompanying text.

<sup>420</sup> *Skinner v. Reed-Prentice Div. Package Mach. Co.*, 374 N.E.2d 437 (Ill. 1977), *cert.*



an emerging trend. Since then, however, that trend has not emerged; no other states have adopted the contribution idea, and many have rejected it.<sup>421</sup> Moreover, in 1991 the Illinois Supreme Court cut back sharply on its own precedent by ruling that the employer's contribution obligation cannot exceed the amount of the employer's potential liability under workers' compensation.<sup>422</sup> The exclusivity of workers' compensation was even more directly challenged in the 1970s by cases holding that "intentional risks" created by the employer are tantamount to "intentional torts," thereby enabling the employee to sue the employer for full tort damages.<sup>423</sup> Subsequent to the early 1980s, however, the doctrine equating intentional risks and intentional torts has been rejected by almost all courts that have considered it.<sup>424</sup> In the 1970s, some courts nurtured the idea that the employee could sue the employer in tort if the employee's injury resulted from the employer's "dual capacity." The high-water mark of the dual-capacity doctrine was the California Supreme Court's 1981 opinion in *Bell v. Industrial Vangas, Inc.*<sup>425</sup> The broad *Bell* version of this doctrine was promptly abrogated, however, by the California legislature;<sup>426</sup> and subsequent to *Bell* it has been rejected by all courts that have considered it.<sup>427</sup> In reviewing the recent rulings on intentional employer risks and dual employer capacities, the author of the pre-eminent workers' compensation treatise announces that the previous "trend" away from the exclusivity of workers' compensation has now been "not only halted but reversed."<sup>428</sup>

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*denied*, 436 U.S. 946 (1978); *Dole v. Dow Chem. Co.*, 282 N.E.2d 288 (N.Y. 1972).

<sup>421</sup> See 2B ARTHUR LARSON, *THE LAW OF WORKMEN'S COMPENSATION*, §§ 76.20, 76.30 to 76.39, 76.91(a) (1989 & Supp. 1991).

<sup>422</sup> *Kotecki v. Cyclops Welding Corp.*, 585 N.E.2d 1023 (Ill. 1991).

<sup>423</sup> *Blankenship v. Cincinnati Milacron Chems.*, 433 N.E.2d 572 (Ohio 1982); *Mandolidis v. Elkins Indus.*, 246 S.E.2d 907 (W. Va. 1978).

<sup>424</sup> See 2A LARSON, *supra* note 421, §§ 68.13, 68.15. Moreover, the pro-tort doctrine in West Virginia has been largely repealed by statute. See *id.* § 68.15. An intermediate position suggested in one Michigan case has also been abrogated by statute. *Id.*

<sup>425</sup> 637 P.2d 266 (Cal. 1981).

<sup>426</sup> CAL. LABOR CODE § 3602 (West 1989).

<sup>427</sup> See 2A LARSON, *supra* note 421, §§ 72.81(c) to 72.83.

<sup>428</sup> Arthur Larson, *Tensions in the Last Decade*, in *NEW PERSPECTIVES IN WORKERS' COMPENSATION* 21, 23 (John F. Burton, Jr. ed., 1988). Another exclusivity issue concerns the worker who tries to directly sue the fellow employee whose negligence has caused his injury. In the late 1970s, most states allowed these suits; by the late 1980s, most states disallowed them. *Id.* at 23.

## H. TORT-REFORM STATUTES

In discussing the restoration of the exclusivity doctrine in workers' compensation, this Article has taken into account not only judicial opinions but also various legislative enactments that have limited certain categories of tort claims. To round out my review of liability-limiting tendencies of post-modern tort law, I should certainly refer here to the legislative tort-reform movement of the mid-1980s. Tort-reform statutes have placed caps on pain-and-suffering damages, have modified or abrogated the rule of joint and several liability and the collateral source rule, and have revised punitive damage practices. Reform statutes have less frequently dealt with actual standards of liability, but certain statutes have placed limits on the liabilities of manufacturers, municipalities, and dram shops.

These tort-reform statutes are certainly of keen importance; as a practical matter, they can be at least as significant as the judicial rulings described above.<sup>429</sup> Most of those judicial rulings have merely prevented the expansion of tort or have interpreted previous expansions in somewhat conservative ways. The tort-reform statutes, by contrast, have frequently been in a position to repeal or roll back particular tort doctrines—even doctrines, like the collateral source rule, that have been part of the American tort system since the nineteenth century.

The operational significance of these statutes is hence obvious. They loom quite large in any account of liability-reducing and liability-restraining developments in the last half of the 1980s. For a variety of related reasons, however, it might not be wrong to somewhat slight these statutes in an article such as this one, which considers tort as an ongoing legal and intellectual enterprise. As far as legal effects are concerned, a judicial opinion provides a holding that later courts might be willing to expand; moreover, that opinion typically sets forth reasoning that later cases will regard as authoritative. A tort-reform statute, by contrast, is a legal measure that later courts could be justified in regarding as an isolated event.<sup>430</sup>

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<sup>429</sup> On their impact, see Glenn Blackmon & Richard Zeckhauser, *State Tort Reform: Assessing Our Control of Risks*, in *TORT LAW AND THE PUBLIC INTEREST: COMPETITION, INNOVATION, AND CONSUMER WELFARE* 272 (Peter H. Schuck ed., 1991).

<sup>430</sup> For a related evaluation in the constitutional context, see Frank Michelman, *Saving*

Furthermore, the reasoning set forth in judicial opinions contributes to the intellectual development of tort law. Tort-reform statutes, by contrast, are typically lacking in any such effort at reasoned explanation. As far as judicial decision making is concerned, even when the judges' opinions do not candidly set forth the judges' full reasons, one can still believe that judges generally decide cases on the basis of their perceptions of the public interest.<sup>431</sup> Yet if judicial decisions are public-interest oriented, legislative action frequently entails a response to special interests. This is the observation that Ralph Nader would insist on; it is likewise the observation approved by public-choice economists, who see the political process as a forum in which legislative advantages are bought and sold.<sup>432</sup> For Nader, special-interest legislation is a cynical but frequent departure from the theoretical norm of legislatures striving to achieve public interest goals. For public-choice economists, special-interest legislation makes excellent sense at the level of theory; it is precisely what their theory predicts.

To be sure, many scholars who take seriously the public-choice literature still conclude that not all statutes are special-interest measures; they acknowledge that some number of enactments are designed to further the public interest.<sup>433</sup> The analyst who adopts such an intermediate position subjects himself, however, to the difficult task of determining into which category a particular statute fits. Indeed, it may well be that many statutes result from some combination of special-interest and public-interest impulses. Separating out the various origins of such statutes can obviously be a daunting task. As for the tort-reform statutes of the mid-1980s, no literature has yet emerged that describes and assesses the political processes that generated their enactment.<sup>434</sup> As a result, what these

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*Old Glory: On Constitutional Iconography*, 42 STAN. L. REV. 1337 (1990).

<sup>431</sup> Admittedly, judicial perceptions of the public interest can be quite divergent. Some judges might feel that accident victims in general do not receive enough compensation; other judges might sense that manufacturers in general are burdened with an excess of liability.

<sup>432</sup> The literature is discussed in DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 12-37 (1991).

<sup>433</sup> See, e.g., Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest-Group Model*, 86 COLUM. L. REV. 223, 232 (1986).

<sup>434</sup> One version of the story behind the Texas statute is told in Joseph Sanders & Craig Joyce, "Off to the Races:" *The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207, 276-79 (1990). The story in California is odd, but still instructive. In 1987, the trial

statutes do or do not signify about the ideas or theory surrounding tort law cannot now be meaningfully ascertained.<sup>435</sup>

## VI. EXPLAINING THE POSSIBLE END OF THE RISE

Part II began by noting that American tort law had remained generally stable between 1900 and 1960. Parts II and IV then explored the explanations for the rise of modern American tort law after 1960. Part V described the end of that rise. The task of this Part is to explain why tort law seems to have recently leveled off.<sup>436</sup> One explanation is that modern American tort law had set for itself a certain agenda, and by the early 1980s had completed at least particular items on that agenda; with these agenda items satisfied, further expansions of liability were no longer needed. By way of modernizing tort law, there was a job to do; but the courts at some point had done that job, and could therefore reduce their efforts.

One goal of modern tort law, for example, was to eliminate a number of tort doctrines that were perceived as obsolete; once those doctrines were eliminated, modern tort law had essentially completed that mission. A broad rule of government immunity was

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lawyers and the tort reform lobby privately negotiated an agreement. This agreement set forth a limited tort reform proposal that both sides agreed to support. (This proposal then sailed through the legislature.) The agreement further provided for a five-year moratorium on proposing any initiatives to the voters (either tort reform initiatives, or insurance-regulating initiatives).

<sup>435</sup> How have courts responded to tort reform statutes? A strong contingent of state courts—perhaps, indeed, a majority—have relied on state constitutional principles (due process, equal protection, jury trial, or open courts) to invalidate key features of these statutes. See the helpful table in Marco de Sa e Silva, Comment, *Constitutional Challenges to Washington's Limit on Noneconomic Damages in Cases of Personal Injury and Death*, 63 WASH. L. REV. 653, 675 (1988). Especially noteworthy is a 1989 Washington decision rejecting a sophisticated cap on pain and suffering damages, *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989). State court decisions of this sort are difficult to characterize. On the one hand, they reveal a hostile and aggressive judicial attitude toward conservative legislative enactments. On the other hand, these judicial decisions are themselves conservative, insofar as they essentially serve to restore the tort status quo ante. That is, they display a high degree of judicial self-confidence that the tort system, in its pre-tort-reform condition, is quite all right.

<sup>436</sup> One possible explanation might be that tort law goes through cycles of liability expansions and liability stabilizations, and that we are merely now at one stage in that cycle. But in considering American tort history since the early nineteenth century, I find an absence of evidence that might support such a cyclical account. Hence, the explanation that builds on this account will not be further pursued (except to the extent that it relates to the judicial appointments explanation, to be discussed later).

one of those doctrines. Still, the 1960s law-reforming courts that abrogated that rule acknowledged that the government should remain immune for its discretionary acts;<sup>437</sup> judicial efforts in the late 1980s to give a proper definition to this discretionary immunity are thus quite harmonious with the earlier rulings eliminating the more general immunity doctrine. Consider, as well, the risk-benefit criterion in product design cases. Ambitious judges in the 1960s and 1970s evidently concluded that it made good sense to subject manufacturers' specific design decisions to negligence-like risk-benefit review by jury. Those same judges, however, might well have believed that it would extend the risk-benefit idea well beyond its institutional breaking-point to allow individual juries to consider whether entire genres of products—cigarettes, handguns, auto convertibles—should be regarded as deficient under risk-benefit reasoning. Those judges would hence find no incompatibility between their approval, in the 1970s, of the extensive use of the risk-benefit test to review particular design decisions and their unwillingness, in the 1980s, to endorse the use of that test to censor entire genres of products.

Examples such as these show that agenda completion can provide some assistance in explaining the recent stabilization of tort doctrine. For at least two reasons, however, its explanatory power is no more than partial. First of all, only some fraction of the liability-expanding opinions of the 1960s and 1970s can plausibly be characterized as agenda-completing; many other opinions seemed to anticipate future expansions of liability.<sup>438</sup> Secondly, even when judges do engage in the process of solving certain problems, they might well be led, in a pragmatic fashion, to identify and define new problems.<sup>439</sup>

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<sup>437</sup> See *Lipman v. Brisbane Elementary Sch. Dist.*, 359 P.2d 465, 467 (Cal. 1961).

<sup>438</sup> See, for example, *Tarasoff v. Regents of University of California*, 551 P.2d 334 (Cal. 1976), in which the court noted the existence of an "expanding . . . list of special relationships which will justify" imposing affirmative duties. *Id.* at 343 n.5.

<sup>439</sup> Of course, while this *might* happen, it also might not. Moreover, when new problems are recognized by way of this pragmatic process, those problems might or might not turn out to be susceptible to appropriate court-devised solutions. Consider the Supreme Court's experience with reapportionment. As the Court undertook the process of solving reapportionment by implementing a rule of one person, one vote (see *Reynolds v. Sims*, 377 U.S. 533 (1964)), the Court was led to recognize the problem of gerrymandering or redistricting. Problems of districting, however, turn out to be quite different from problems of malapportionment in their amenability to principled judicial remedies. When the Supreme Court fi-

Explanations that go beyond agenda-completion hence must be taken into account to more fully explain the apparent change in tort directions. One such explanation concerns changes in the identity of those judges who declare tort doctrine. Replacing "liberal" with "conservative" judges can make a difference for either of two reasons, which are related yet distinct. First, conservative judges are more likely to favor the outcome of less liability, as such. Second, conservative judges are more likely to subscribe to ideas and values which themselves tend to lead to holdings that limit liability.<sup>440</sup> As far as federal judges are concerned, they are designated pursuant to an appointment process that emphasizes the prerogatives of the President. Democrats controlled the White House from 1961 to 1969 and 1977 to 1981, and the Republican Presidents during the 1969-1977 period appointed a significant number of moderates to the federal courts. Beginning in 1981, however, the White House has been held by conservative Presidents who, quite mindful of the discretionary powers that judges exercise, have been eager to select conservative candidates for lifetime positions on the federal bench. *Boyle v. United Technologies Corp.*<sup>441</sup> is the 1988 Supreme Court opinion establishing a government-contractor defense for product manufacturers. The majority opinion in *Boyle* was written by Justice Scalia, and was concurred in by Justices Kennedy, O'Connor, and White, and Chief Justice Rehnquist. Justices Brennan, Marshall, Blackmun, and Stevens dissented. The division of the Court was hence along conventional conservative-liberal lines, and the three Justices appointed to the Court in the 1980s cast the deciding votes.

To be sure, *Boyle* is unusual as a tort case in that it raised an issue of purely federal law. However, a significant percentage of products liability suits are brought in federal courts under diversity jurisdiction. Given the uncertainties of state law on many is-

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nally faced the issue of gerrymandering, it ruled that the jurisdiction of courts should be quite limited. *Davis v. Bandemer*, 478 U.S. 109 (1986) (requiring a multi-factor showing that alleged gerrymandering consistently degrades a group's electoral influence). The "conservative" quality of the Court's ruling in *Davis* should not be regarded as in conflict with the "liberal" quality of its prior ruling in *Reynolds*.

<sup>440</sup> These values can include a belief in contract, a concern for the costs that liability will impose on defendants and on society, and a concern for the ability of courts to manage tort litigation.

<sup>441</sup> 487 U.S. 500 (1988).

sues, federal judges enjoy considerable discretion in making *Erie*-educated guesses as to what result a state court would reach. Moreover, the sophisticated opinions that federal courts prepare in these *Erie* cases often exert a significant influence on subsequent state court opinions.<sup>442</sup> In light of the discretion that federal courts possess, the outlook of federal judges is an important determinant of the opinions they write. *Cotton v. Buckeye Gas Products Co.* is the recent case that stresses the need for caution in requiring ever more elaborate product warnings.<sup>443</sup> The opinion for the D.C. Circuit in *Cotton* was authored by Stephen Williams. Before joining the bench, Williams had been a law professor doing distinguished conservative scholarship. Williams is an appointee of the sort that was characteristic of the Reagan Administration, but that would have been unimaginable during the administration, say, of Jimmy Carter.

Changes in judicial personnel also help explain the clear change of directions in California's tort decisions. As of 1980, that state's Supreme Court was dominated by liberal appointees of Governors Pat Brown and Jerry Brown and moderate appointees of Governor Reagan (who was far more "pragmatic" as a governor than he later turned out to be as the nation's chief executive). In 1983, however, George Deukmejian, a conservative Republican, began what turned out to be the first of two four-year terms as governor. By the end of 1991, the only holdover from the 1980 court was Justice Mosk. Five of the court's seven members had been nominated by Deukmejian; the final member was selected in 1991 by Pete Wilson, Deukmejian's Republican successor as governor. Deukmejian's opportunity to make appointments was facilitated by the public's rejection of three justices, all appointed by Jerry Brown, in a 1986 election;<sup>444</sup> that rejection was itself due to the public's perception of an excessive liberalism on the part of the Court majority.<sup>445</sup> For tort purposes, the California Supreme Court is of course an especially important court. This is partly because California now in-

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<sup>442</sup> For an early instance of this, look at *Larsen v. General Motors Corp.*, 391 F.2d 495 (8th Cir. 1968).

<sup>443</sup> 840 F.2d 935 (D.C. Cir. 1988); see *supra* note 341 and accompanying text.

<sup>444</sup> A fourth judge resigned the year before, evidently to avoid the ordeal of the reelection campaign.

<sup>445</sup> To be sure, the public's chief complaint related to the position taken by liberal justices in death penalty cases, not the views they had expressed on matters of tort liability.

cludes more than one-ninth of the nation's population, and partly because the California court's rulings played such a leadership role in the expansion of tort liability between 1960 and the early 1980s.

The altered composition of the judiciary is thus clearly relevant in explaining the recent change in tort directions. Still, its relevance should not be overstated. In *Pacific Mutual Life Insurance Co. v. Haslip*, for example, Scalia and Kennedy were the two Justices who concluded that, in light of original intent, punitive damages should be largely free of constitutional scrutiny.<sup>446</sup> In California, Justice Mosk, the one holdover from the liberal court of the 1970s, has assented to several of the new court's tort decisions.<sup>447</sup> Moreover, the change-in-judges explanation is of no relevance in many states. Most judges are initially appointed, and during the 1980s the mix of state governors did *not* become significantly more conservative. The justices of the New York Court of Appeals were publicly elected until the mid-1980s, and the politics of the electoral process in New York tended to favor judicial candidates with liberal affiliations. In the mid-1980s, New York shifted to a system that relies on gubernatorial appointments; and New York's governor since that time has been a liberal Democrat. The members of the Illinois Supreme Court are themselves elected, and in recent years the Court's liberal bloc has been able to maintain its slight majority.

Changes in courts' compositions thus go only so far in explaining the recent stabilization in doctrine. Another explanation refers to a common process in the development of public policy. New programs, once implemented, turn out to have unexpected adverse consequences that lead policymakers to recommend modifications. Thus, at least according to one standard account, the Wagner Act produced excesses and imbalances that explain the adoption of the

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<sup>446</sup> 111 S. Ct. 1032, 1046 (1991) (Scalia, J., concurring); *Id.* at 1054 (Kennedy, J., concurring); see *supra* note 414 and accompanying text.

<sup>447</sup> See *supra* notes 499-502 and accompanying text. At times, however, Mosk has dissented from the new court's rulings. See, e.g., *supra* note 256.

*Thomas v. Hoffman-LaRoche, Inc.*, 949 F.2d 806 (5th Cir. 1992), is the recent opinion that overrules the presumption of causation in inherent-risk failure-to-warn cases. See *supra* note 363 and accompanying text. The opinion in *Thomas* was written by Judge Wisdom. Appointed by President Eisenhower, Judge Wisdom became famous for his civil rights opinions in the 1960s. In 1973, he was the author of *Borel v. Fibreboard Paper Products Corp.*, 493 F.2d 1076 (5th Cir. 1973), *cert. denied*, 419 U.S. 869 (1974), which has provided much of the framework for modern asbestos litigation.



Taft-Hartly Act. Consider, in this regard, the 1970s idea that additional items in product warnings are essentially cost-free and therefore should be readily insisted on by the judiciary. By the mid-1980s, many consumers were complaining of the problem of warning clutter, and the problem was frequently being discussed in the mass media.<sup>448</sup> It is quite understandable, then, that some judges began to acknowledge this problem in judicial opinions and to become more cautious about insisting that warnings become more prolix. Consider, as well, punitive damages. Punitive damage awards in products liability cases were very rare until the mid-1970s.<sup>449</sup> In the intervening years, however, punitive damage awards in products (and other) cases became considerably more frequent.<sup>450</sup> Given this new frequency, problems could be perceived in the procedures by which punitive damages were awarded—problems that invited the attention first of state tort-reformers and then of the Supreme Court itself. Consider, as a further example, *Sindell*. As discussed above,<sup>451</sup> its possible problem concerned the administrability of the market-share liability doctrine. The *Sindell* court apparently believed that this problem would turn out to be manageable. Yet look at what has happened to the DES litigation in the 12 years since *Sindell*. I have spoken recently to plaintiffs' lawyers in both northern and southern California who have been deeply involved in the DES litigation that *Sindell* occasioned. They describe that litigation as "nightmarish." These lawyers themselves, of course, bear much of the overhead of litigation. And what they report is that the market-share remedy afforded by *Sindell* has turned out not to be "viable." That is, for plaintiffs and their lawyers the eventual verdicts available under *Sindell* are not large enough to justify all the costs, uncertainties, and delays in the *Sindell* litigation process.<sup>452</sup> From the plaintiffs' perspective, then, the adventure in litigation launched by *Sindell*

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<sup>448</sup> See, e.g., Steven Waldman, *Do Warnings Labels Work?*, NEWSWEEK, July 18, 1988, at 40.

<sup>449</sup> See David G. Owen, *Punitive Damages in Products Liability, Litigation*, 74 MICH. L. REV. 1257, 1260-61 (1976).

<sup>450</sup> To be sure, even now they are awarded only in a small percentage of tort cases. Still, over recent years that percentage has considerably increased.

<sup>451</sup> See *supra* notes 75-79 and accompanying text.

<sup>452</sup> Here the lawyers point to the way in which several ambiguities in *Sindell* were resolved in *Brown v. Superior Court*, 751 P.2d 470 (Cal. 1988).

has turned out to be a failure. My understanding, moreover, is that this sense of *Sindell*-as-failure is shared rather generally by appellate judges, at least in California. It hence might be fair to say that if the California Supreme Court knew then what it knows now, it would never have approved *Sindell*. Alternatively stated, given the sobering lessons of experience, it is understandable that some courts in recent years have rejected *Sindell* even in the context of DES itself,<sup>453</sup> and that almost all courts have refused to extend *Sindell* to products other than DES.<sup>454</sup>

The explanations above have referred to the unexpected consequences of expanded liability. One particular consequence is the cost burden that enhanced liability imposes on defendants. The basic advantages of broad practice of negligence liability have been referred to above.<sup>455</sup> Yet one disadvantage of negligence liability is that it can become quite expensive. Since there tend to be large numbers of injuries that are at least arguably due to the negligence of some defendants, the liability costs produced by a broad practice of negligence liability can be very substantial. Moreover, all the uncertainties entailed by the negligence issue mean that a negligence regime results in high litigation costs as well.<sup>456</sup>

The financial costs of modern tort liability have thus been driven up by changes in formal doctrine that have extended the range of negligence-based liabilities. Yet those costs have also gone up on account of factors that are unrelated to doctrine as such. In medical malpractice, for example, the rules of liability have not expanded in any fundamental way since 1960. Still, the number of claims actually filed has increased on a per-doctor basis by something like a factor of nine.<sup>457</sup> Evidently, patients (and their lawyers) have become much more willing to litigate;<sup>458</sup> moreover, if the

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<sup>453</sup> In 1988 the D.C. Circuit ruled against a DES plaintiff; the court was unwilling to predict that Maryland and D.C. would accept *Sindell*. In considering whether *Sindell* is "unworkable," the court took into account the plaintiff's concession that in California "*Sindell* is still in litigation 'seven years after the California Supreme Court's decision.'" *Tidler v. Ely Lilly & Co.*, 851 F.2d 418, 422 (D.C. Cir. 1988) (D. Ginsburg, J.).

<sup>454</sup> See *supra* notes 368-372 and accompanying text.

<sup>455</sup> See *supra* notes 18-22 and accompanying text.

<sup>456</sup> The fact that a claim of negligence (or product defect) involves an accusation about the improper unsafety of the defendant's conduct or product introduces an element that can add to the bitterness and expensiveness of litigation.

<sup>457</sup> See Schwartz, *Comparative Context*, *supra* note 154, at 60.

<sup>458</sup> Even so, the number of current claims remains well below the number of actual mal-

number of claims is up (in malpractice and also in other tort fields), so is the cost-per-claim. Though the formal rules on the measure of damages have *not* undergone major change, the size of the average tort award for personal injury has apparently tripled since the early 1960s, even in after-inflation dollars.<sup>459</sup>

In all, the increased costs of modern tort liability have been brought about by a combination of factors. Given that combination, this cost increase could have been foreseen by judges in part—but only in part—as they expanded the scope of formal liability during the 1960s and 1970s. In any event, it seems clear enough that those judges foresaw very little of the heavy cost burden of modern tort liability. Rather, those judges were clearly assuming that even in its expanded form liability would not be especially expensive for individual or institutional defendants.<sup>460</sup> In cases, for example, which tested the immunity of charities and governments, defendants typically argued that the elimination of immunity would subject them to serious financial burdens. Courts clearly regarded such representations as self-serving and unpersuasive.<sup>461</sup> In the products liability context, Justice Traynor's famous concurring opinion in *Escola v. Coca Cola Bottling Co.*<sup>462</sup>—appropriated by courts in the 1960s—reasoned that “[t]he cost of an injury . . . may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as the cost of doing business.”<sup>463</sup> Traynor certainly seemed to be assuming that for manufacturers and consumers the aggregate expenses of liability would be no more than moderate—substantial enough to induce some safety efforts by the manufacturer, but not

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practice incidents. See *Localio*, *supra* note 97.

<sup>459</sup> See Schwartz, *Comparative Context*, *supra* note 154, at 47. The prospect of larger awards may provide a partial explanation for the increase in the number of claims.

<sup>460</sup> Charles Gregory's 1951 essay suggested that the imposition of absolute liability on an enterprise would raise the prices that enterprise charges only by a “tiny” amount. Gregory, *supra* note 163, at 384.

<sup>461</sup> In *Molitor v. Kaneland Community Unit District No. 302*, 163 N.E.2d 89 (Ill. 1959), for example, the court abolished governmental immunity, relying on the view that “[t]ort liability is in fact a very small item in the budget of any well organized enterprise.” *Id.* at 95 (quoting Leon Green, *Freedom of Litigation (III): Municipal Liability for Torts*, 38 ILL. L. REV. 355, 379 (1944)).

<sup>462</sup> 150 P.2d 436 (Cal. 1944).

<sup>463</sup> *Id.* at 441.

so large as to seriously inflate the price of products, let alone to occasion any significant economic dislocations. By the 1980s, however, it had become clear that at least for certain service providers and product manufacturers, the costs of liability had become quite high. Then, during the tort crisis that began in late 1984, liability costs proceeded to soar. While the official mid-1980s tort crisis has by now receded, the price of liability insurance remains high even while the extent of its coverage has been considerably reduced.

We are hence left with a tort system that entails financial consequences that were very poorly anticipated 30 years ago. To gain a sense of the significance of the increased cost of liability, assume that you are a judge who is asked to rule on the extent of liability of a community health center serving a low-income community. In 1970, your understanding might well have been that the price of liability insurance is typically low, and this understanding would have enabled you to establish liability at the broad level that you deemed otherwise appropriate. Assume now, however, that you today read in a reliable journal that the high cost of liability insurance is requiring these centers to give up on certain medical services that the centers themselves regard as quite important to patients' welfare.<sup>464</sup> You may well suspect that these cost increases are due to some malfunction in the liability insurance mechanism.<sup>465</sup> Even so, faced with the reality of the clinics' new situation, you would be inhibited from issuing a ruling that might broadly define these clinics' tort liability.

Turn now to tort liability of more ordinary commercial enterprises. In the corporate context, by the 1980s high tort costs seemed to matter in quite a new way. Major American corporations—such as the Big Three automakers—which had appeared so dominant in the 1960s were now being perceived as fragile, buffeted by consumer resistance and foreign competition. Moreover, by the 1980s it had become clear that imposing liability on corporations could produce results that go beyond mere reductions in corporate profits. Consider *Brown v. Superior Court*,<sup>466</sup> the 1988

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<sup>464</sup> Robert Pear, *Health Clinics Cut Services As Cost of Insurance Soars*, N.Y. TIMES, Aug. 21, 1991, at A1. Absent the cost of liability insurance, these health centers could provide services to 500,000 additional patients nationwide. *Id.*

<sup>465</sup> See *id.*

<sup>466</sup> 751 P.2d 470 (Cal. 1988).

California case that remained with the negligence standard in cases involving prescription drugs and declined to adopt hindsight strict liability. Justice Mosk's opinion for the court expressed his awareness that the application of products liability to drug companies had already induced the tripling of the price of one drug, the decision by one company not to introduce at all another apparently valuable new drug, the unwillingness (absent federal support) of companies to supply a flu vaccine, the withdrawal from the market of most of the producers of the DPT vaccine, and the increase in the price of a dose of this vaccine from eleven cents to eleven dollars. As Justice Mosk noted, these were consequences that had ensued merely because of other courts' application of the negligence standard.<sup>467</sup> Faced with these social consequences, one can understand why Mosk and his California colleagues would be quite unwilling to extend liability, by virtue of the hindsight idea, well beyond the boundaries of negligence. Similarly, one can understand why the New York Court of Appeals would worry about the over-deterrence of drug companies in deciding to adopt its two-generation duty-like limitation on the scope of those companies' liability.<sup>468</sup> One can likewise appreciate that court's opinion in *McDougald v. Garber*.<sup>469</sup> As noted above, the size of the average tort award has increased dramatically during the modern era; moreover, the portions of awards attributable to general damages such as pain and suffering have apparently gone up even more sharply than the portions due to out-of-pocket special damages.<sup>470</sup> The New York court's undoubted awareness of these modern tendencies in tort verdicts certainly helps explain its unwillingness in *McDougald* to create a special heading of general damages for lost life enjoyments.

It should be noted that modern tort law is not the only program initiated or expanded in the 1960s that has turned out to pose a

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<sup>467</sup> How it happens that even a broad negligence standard leads to results such as these is not all that easy to figure out. On the recent oral polio vaccine litigation, one commentator has said: "So far as I can tell, the manufacturers have won a large number of cases. Yet the filings increase every year." Edmund W. Kitch, *Discussion of Paper by Richard Epstein*, *University of Chicago*, 10 *CARDOZO L. REV.* 2227, 2259 (1989). For Kitch's earlier discussion of vaccine liability problems, see Kitch, *supra* note 212.

<sup>468</sup> See *supra* notes 314-316 and accompanying text.

<sup>469</sup> 536 N.E.2d 372 (N.Y. 1989).

<sup>470</sup> See Schwartz, *Comparative Context*, *supra* note 154, at 73.

problem of severe cost overruns. In 1967—the first full year in which the Medicare program was in effect—its overall cost was over \$4 billion.<sup>471</sup> Yet by 1992, Medicare's annual cost had grown to over \$116 billion.<sup>472</sup> By the 1980s, Medicare policymakers were engaged in efforts to develop techniques of cost containment. Cost-containing strategies were also being applied to the Social Security Disability Insurance program, the expense of which had increased from \$3 billion in 1970 to \$12 billion in 1977.<sup>473</sup> Such efforts at cost control can be regarded in some ways as analogous to the process of tort reform that took place during the 1980s.<sup>474</sup>

A further explanation for the emergence of the post-modern tort era can be developed by turning again to the example of Judge Williams. When modern tort law began in the 1960s, almost all the intellectual life within the United States—and within American law schools—lay on the liberal left. There were an array of liberals, some number of centrists who would at times agree with the liberals and at times disagree, but almost no conservatives. The ideas relied on by modern tort judges as they expanded liability were perhaps vulnerable to conservative criticism—but there really was no one out there in academics in a conspicuous position to formulate such criticism. If any scholars in the 1960s had objected that modern tort law unduly disparages contract or is excessively costly, they would have been dismissed as old-fashioned and irrelevant.<sup>475</sup>

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<sup>471</sup> See COMPTROLLER GENERAL OF THE U.S., HISTORY OF THE RISING COSTS OF THE MEDICARE AND MEDICAID PROGRAMS AND ATTEMPTS TO CONTROL THESE COSTS: 1966-1975, at 4 (1976).

<sup>472</sup> *Fiscal 1992 Budget Resolution*, CONG. Q., Apr. 27, 1991, at 1043 (chart). Of course, a substantial fraction of this cost increase is the natural consequence of inflation and formal expansions of program coverage.

<sup>473</sup> Carolyn L. Weaver, *Reassessing Federal Disability Insurance*, PUB. INTEREST, Winter 1992, at 108, 108-112, 116-17. This amounted to a 150% increase in after-inflation dollars. *Id.* at 112.

<sup>474</sup> The analogy between the cost of Medicare and the cost of modern tort can be carried a bit further. If the increasing expense of medical services has driven up the Medicare bill, it has likewise increased the overall cost of tort liability. By providing first-dollar insurance coverage for most medical expenses, Medicare has turned out to occasion a moral hazard problem in terms of consumers' excessive utilization of medical services. Expanded rules of tort liability are likewise capable of producing certain problems of consumer moral hazard.

<sup>475</sup> In fact, in 1957, Marcus Plant argued against the strict products liability proposal partly on grounds that the market provided manufacturers with adequate incentives for safety. Marcus L. Plant, *Strict Liability of Manufacturers for Injuries Caused by Defects in Products—An Opposing View*, 24 TENN. L. REV. 938 (1957). During the 1960s, there were no scholars voicing such an argument, and even in 1957 Plant probably came across as an

By the 1980s, however, much of the intellectual vitality in public-policy analysis had switched to the neo-conservatives or to rejuvenated traditional conservatives.<sup>476</sup> Within legal education, the law-and-economics movement began in earnest in the early 1970s, and by the mid-1970s had become an important force in American legal scholarship. As for Judge Williams, it is not just that he would not have been appointed to the bench by President Johnson; the further point is that law professors like Williams, with strong law-and-economics interests, did not exist in significant numbers at the time of the Johnson Administration. No judge in the 1960s, then, would have been in a convenient position to argue that an expanded warning obligation might create a problem of "information costs" for consumers;<sup>477</sup> that concept did not make its way into legal scholarship until the 1970s. Once the law-and-economics movement gathered force, it proved capable of providing criticisms of modern tort law (often relating to contract, administrability, and liability costs) that simply had not been part of the inventory of available and acceptable ideas in the 1960s.

All of this suggests a relevant further explanation for the end of the tort-law rise. The process of innovating the law is facilitated when judges are provided with positive reinforcement—for example, a flow of scholarly articles commending their efforts or at least suggesting that these efforts are on the right track.<sup>478</sup> Certainly, the Warren Court in the 1960s received reinforcement of this sort; indeed, the ideas endorsed and unleashed by the Warren Court were so powerful as to lead directly or indirectly to the creation of

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old fogey. (He also argued that stricter liability rules would increase the number of fraudulent claims. *Id.* at 949-50.)

<sup>476</sup> The Brookings Institution has long been known as a liberal think-tank. However, its two recent volumes on tort liability tend to be conservatively oriented. See *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION*, *supra* note 139; *LIABILITY: PERSPECTIVES AND POLICY* (Robert E. Litan & Clifford Winston eds., 1988).

<sup>477</sup> See *supra* note 341 and accompanying text.

<sup>478</sup> Indeed, George Priest's enterprise-liability explanation for modern tort law assumes that ideas developed by legal academics were then accepted by judges in a way that explains modern tort developments. According to Priest's early articles, the ALI's products liability *Restatement* served as the vehicle by which scholars' ideas were transmitted to judges. *E.g.*, Priest, *supra* note 5, at 465, 515. But Priest's more recent articles suggest that judges did not begin adopting enterprise liability until the late 1960s, and did so in ways that if anything involved the betrayal of the *Restatement*. See *supra* notes 109-110 and accompanying text. Given his current deprecation of the *Restatement*, it is not clear how Priest now understands the process by which tort ideas were transmitted from legal scholars to judges.

whole new schools of legal scholarship. As far as tort law is concerned, when courts expanded liability in the 1960s and early 1970s, most tort scholars seemed to respond with general appreciation.<sup>479</sup> And this appreciation is easy enough to understand, given the normative appeal of modern tort law as described in Part I.

What is noteworthy, then, about modern American tort law in the 1980s is that despite its normative appeal, it has turned out to be without a major constituency within the legal academy. As noted, vocal elements in the law-and-economics movement are harshly critical of modern American tort law. What is equally interesting is that this law has failed to secure any major support among academic liberals or centrists. Leading liberals such as Marc Franklin,<sup>480</sup> John Fleming,<sup>481</sup> and Steve Sugarman<sup>482</sup> are as harsh in their critique of modern tort law as any of the law-and-economics conservatives. Indeed, all of these writers seemingly favor the abolition of tort law, so that it can be replaced by expanded systems of social insurance and safety regulation. They typically acknowledge the fairness and deterrence objectives associated with the negligence rule, but argue that for a variety of reasons—for example, extensive liability insurance—tort law is poorly equipped

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<sup>479</sup> The early years of the modern era are praised in Robert E. Keeton, *Judicial Law Reform—A Perspective on the Performance of Appellate Courts*, 44 TEX. L. REV. 1254 (1966). The *Restatement* sections on products liability were approved by a consensus of the ALI (including its law-professor members). Priest, *supra* note 108, at 2317. The creativity of the California Supreme Court was commended in John G. Fleming, *Foreword: Comparative Negligence at Last—By Judicial Choice*, 64 CAL. L. REV. 239 (1976). Modern products liability was treated quite sympathetically in Marc A. Franklin, *Tort Liability for Hepatitis: An Analysis and a Proposal*, 24 STAN. L. REV. 439 (1972).

Still, my language in the text is somewhat guarded. The number of leading articles supporting modern tort developments in the late 1960s and 1970s is smaller than one might have supposed. Moreover, criticisms of modern tort were available as early as 1967. See *supra* note 480 and accompanying text.

<sup>480</sup> Marc A. Franklin, *Replacing the Negligence Lottery: Compensation and Selective Reimbursement*, 53 VA. L. REV. 774 (1967). Franklin proposes that the compensation fund be given reimbursement rights against businesses whose activities result in injuries. *Id.* at 812.

<sup>481</sup> John G. Fleming, *Is There a Future for Tort Law?*, 44 LA. L. REV. 1193 (1984).

<sup>482</sup> Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555 (1985).

Robert Rabin has set forth his own serious doubts as to the soundness of the modern tort regime. See Robert L. Rabin, *Deterrence and the Tort System*, in SANCTIONS AND REWARDS IN THE LEGAL SYSTEM 79, 94 (M.L. Friedland ed., 1989). Jeffrey O'Connell, having advocated auto no-fault as early as 1965, has remained hugely hostile to modern tort law and strongly supportive of various compensation schemes. See, e.g., JEFFREY O'CONNELL, *THE LAWSUIT LOTTERY* (1979).



to achieve these objectives.<sup>483</sup> When they regard tort law from the perspective of loss distribution, they likewise deem it a failure, in light of the alternative of social insurance. Meanwhile, other liberals like Jon Hanson<sup>484</sup> and Howard Latin<sup>485</sup> contend that modern tort law has been hopelessly half-hearted in its pursuit of deterrence goals and therefore call for whole new regimes of expanded liability. Since 1973, James Henderson, a centrist scholar, has been complaining that modern tort law is formless in a way that threatens the integrity of the judicial process.<sup>486</sup> David Owen, as the co-author of a leading products liability course book,<sup>487</sup> a co-reviser of the Prosser treatise,<sup>488</sup> and as author of a very influential 1976 article urging the availability of punitive damages in products liability,<sup>489</sup> can easily be seen as a leading "insider" within American tort law. Even so, in a 1985 article Owen revealed that he ultimately opposes tort law, and would support Steve Sugarman's call for its replacement by schemes of social insurance and expanded regulation.<sup>490</sup> Oscar Gray's revision of the Harper and James treatise<sup>491</sup> generally takes positions that trial lawyers are happy to cite.

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<sup>483</sup> The question of the strength of these various "realistic" objections to tort law's fairness and deterrence rationales raises issues that are beyond the scope of this Article. The Article thus makes no claims as to exactly how successful modern tort law is in actually achieving fairness and deterrence. The specific issue of liability insurance is considered in Gary T. Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313 (1990).

<sup>484</sup> See Jon D. Hanson & Kyle D. Logue, *The First-Party Insurance Externality: An Economic Justification for Enterprise Liability*, 76 CORNELL L. REV. 129, 137 (1990) (recommending absolute enterprise liability for personal injury).

<sup>485</sup> See Howard A. Latin, *Problem-Solving Behavior and Theories of Tort Liability*, 73 CAL. L. REV. 677, 679-82 (1985) (recommending absolute liability in many categories of cases).

<sup>486</sup> See James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 IND. L.J. 467 (1976); James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973).

<sup>487</sup> W. PAGE KEETON ET AL., *CASES AND MATERIALS ON PRODUCTS LIABILITY AND SAFETY* (2d ed. 1989) (co-authored by W. Page Keeton, David G. Owen, John E. Montgomery, and Michael D. Green).

<sup>488</sup> PROSSER AND KEETON ON TORTS, *supra* note 245 (co-authored by W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, and David G. Owen).

<sup>489</sup> Owen, *supra* note 449.

<sup>490</sup> David G. Owen, *Deterrence and Desert in Tort Law: A Comment*, 73 CAL. L. REV. 665 (1985). However, Owen's current manuscript on products liability seems quite laudatory. David G. Owen, *The Moral Foundations of Products Liability Law—Toward First Principles* (unpublished manuscript, on file with the *Georgia Law Review*).

<sup>491</sup> FOWLER V. HARPER ET AL., *THE LAW OF TORTS* (2d ed. 1986).

Even so, in a 1987 article Gray revealed his ambivalences about the modern tort regime and his sympathy for Sugarman's recommendations.<sup>492</sup> It is a useful exercise to consider here all the tort scholars at the top ten law schools (or more precisely, the twenty law schools that claim to rank in the top ten). Among those scholars, only Marshall Shapo at Northwestern can be regarded as a strong supporter of the modern tort regime.<sup>493</sup>

On the significance of feedback,<sup>494</sup> consider the New Jersey Supreme Court, which had voted (unanimously) in favor of hindsight liability in failure-to-warn cases in *Beshada*, and then voted (unanimously) against hindsight liability in *Feldman* two years later.<sup>495</sup> In explaining this turnabout in *Feldman*, the court acknowledged

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<sup>492</sup> Oscar Gray, *On Sugarman on Tort-Chopping*, 24 SAN DIEGO L. REV. 851, 851 (1987). It is uncertain whether modern tort judges would be gratified from the support that might be provided by academic radicals. But even this support has not been forthcoming. Among CLS scholars, the one who has focused most on modern tort law is my colleague Richard Abel; and his attitude toward the tort system is extremely negative. Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785 (1990). Actually, many of the criticisms of modern tort law that Abel advances resemble the criticisms set forth by liberal scholars such as Fleming and Sugarman. Abel is in a position, however, to elaborate on these criticisms in a CLS way.

<sup>493</sup> SPECIAL COMM. ON TORT LIABILITY SYSTEM, TOWARDS A JURISPRUDENCE OF INJURY: THE CONTINUING CREATION OF A SYSTEM OF SUBSTANTIVE JUSTICE IN AMERICAN TORT LAW (1984). Shapo was the reporter for this ABA Special Committee.

Joseph Page has spoken out against the excessive rhetoric of the mid-1980s tort reformers. Joseph A. Page, *Deforming Tort Reform*, 78 GEO. L.J. 649 (1990). Yet his own attitude toward the modern tort system is notably equivocal. *Id.* at 687-89. David Rosenberg has defended modern tort law—but even in doing so has called for major structural reforms. David Rosenberg, *The Dusting of America: A Story of Asbestos—Carnage, Cover-Up, and Litigation*, 99 HARV. L. REV. 1692, 1702-06 (1986) (reviewing PAUL BRODEUR, *OUTRAGEOUS MISCONDUCT: THE ASBESTOS INDUSTRY ON TRIAL* (1985)). Landes and Posner, despite their “positive” economic theory of the common law, suggest that tort law has become somewhat less efficient in the modern era. See LANDES & POSNER, *supra* note 412, at 23 (discussing California), 27. Moreover, their defense of modern products liability seems peculiarly half-hearted. *Id.* at 272-308. The relevant point here is that while Landes and Posner generally support rules of negligence liability, they also favor strong affirmative defenses that take victim fault and contract considerations into account. And these are defenses that modern tort law tends not to recognize.

<sup>494</sup> My claim about the relevance of feedback is a limited one. Frequently, judges proceed ahead without taking academic opinion into account; indeed, the Rehnquist Court obviously appreciates that many of its rulings will be lamented by the majority of the most highly regarded constitutional law scholars. Still, when judges have proceeded ahead with what seems like general academic approval, and when they suddenly realize that a consensus of leading academics are in fact deploring their efforts, that change will foreseeably have an appreciable effect on judges' own attitudes.

<sup>495</sup> See *supra* notes 268-269 and accompanying text.

the heavy criticism that *Beshada* had provoked in the law reviews.<sup>496</sup> To further assess the relevance of feedback, consider the evolution of views of Justice Mosk. As a member of the California Court in the 1960s and 1970s, Mosk was deeply involved in the fashioning of the strict products liability doctrine. In 1978, the Court majority, in a somewhat conservative vein, ruled that principles of comparative negligence can reduce the plaintiff's recovery in a strict products liability action.<sup>497</sup> Justice Mosk's dissenting opinion began with the complaint that "[t]his will be remembered as the dark day when this court, which heroically took the lead in originating the doctrine of products liability . . . beat a hasty retreat almost back to square one. The pure concept of products liability so pridefully fashioned and nurtured by this court . . . is reduced to a shambles."<sup>498</sup> Ten years later, however, Justice Mosk authored the California court's opinion in *Brown v. Superior Court*, ruling that negligence principles, rather than hindsight strict liability, apply in prescription drug cases.<sup>499</sup> The drug background for the *Brown* result has been emphasized above. Three years after *Brown*, however, Justice Mosk concurred in the court's ruling in *Anderson v. Owens-Corning Fiberglas Corp.* that a hindsight analysis should be rejected in all cases involving a failure to warn, even when the product is asbestos.<sup>500</sup> Indeed, Mosk's concurring opinion suggests that the entire doctrine of failure-to-warn in products liability should probably be reclassified under the heading of negligence.<sup>501</sup> In this concurrence, Mosk quotes his own "pure concept of products liability" words from *Daly*—and then goes on, in essence, to eat his words.<sup>502</sup>

What accounts for this dramatic shift in Mosk's position? One possibility can here be mentioned. In 1985, Mosk was one of the number of state court judges who attended a conference at Yale put on by Yale's Program on Civil Liability. What Mosk might well have learned from that conference was that leading academics were quite hostile to modern tort law in general, and modern prod-

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<sup>496</sup> *Feldman v. Lederle Labs.*, 479 A.2d 374, 387-88 (N.J. 1984).

<sup>497</sup> *Daly v. General Motors Corp.*, 575 P.2d 1162, 1168-69 (Cal. 1978).

<sup>498</sup> *Id.* at 1181 (Mosk, J., dissenting).

<sup>499</sup> 751 P.2d 470, 480 (Cal. 1988).

<sup>500</sup> 810 P.2d 549, 559 (Cal. 1991).

<sup>501</sup> *Id.* at 561 (Mosk, J., concurring).

<sup>502</sup> *Id.*

ucts liability in particular. That conference included George Priest's article on the emergence and likely follies of the idea of enterprise liability;<sup>503</sup> Alan Schwartz's article rejecting, largely on economic grounds, the hindsight concept in products liability;<sup>504</sup> and Richard Epstein's article formulating moral hazard and adverse selection arguments against modern products liability.<sup>505</sup> There is no reason to believe that Mosk was persuaded by the reasoning and analysis in these articles; they go uncited in Mosk's opinion for the court in *Brown* and his concurring opinion in *Anderson*. It seems easy to assume, however, that Justice Mosk was taken aback to learn that his court's directions were being deplored rather than applauded by leading academics, and that there might be a variety of policy arguments against those directions which he and his judicial colleagues had never considered.<sup>506</sup>

## VII. CONCLUSION

As a matter of doctrine, the expansion of liability in modern tort law took place within the framework of the concept of negligence/unreasonableness. As a matter of judicial purpose, that expansion occurred in large part because of the inherent appeal of the negligence standard—its apparent ability to concurrently achieve fairness, deterrence, and a considerable measure of loss-spreading.<sup>507</sup> In broadening liability, modern courts were energized by the model of the Warren Court. Those courts were also influenced both by the general ferment in national public-policymaking and by a particular policy consensus that developed around the problem of product-related injuries.<sup>508</sup> Modern courts, operating under these

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<sup>503</sup> Priest, *Enterprise Liability*, *supra* note 5.

<sup>504</sup> A. Schwartz, *supra* note 264.

<sup>505</sup> Richard A. Epstein, *Products Liability as an Insurance Market*, 14 J. LEGAL STUD. 645, 650-54 (1985).

<sup>506</sup> I am in a somewhat awkward position in pointing this out, since I do not mean to concede the correctness of these various arguments. My own criticisms of Alan Schwartz and Epstein can be found in Schwartz, *Directions*, *supra* note 91, at 770-75; and this Article has set forth my critique of Priest. My observation rather is that the arguments *do* need to be taken seriously, and that Justice Mosk may have realized that his court had failed to do so.

<sup>507</sup> Note, however, the issues left open in note 483 as to tort law's actual success in achieving its goals of fairness and deterrence.

<sup>508</sup> In this regard, consumer-movement leaders such as Ralph Nader were at least as influential as scholars such as Fleming James in the development of modern products liability.

influences, ended up downplaying or ignoring considerations of contract, liability costs, and administratability that might have served to restrain the growth of liability.

What modern courts created was a broad practice of liability for negligence (or its frequent analogue, product defect). If modern tort law is sometimes described as approaching absolute liability, that description is at best an exaggeration. To be sure, by the early 1960s a theory of enterprise liability was being supported by a number of tort scholars. Standing on its own, this theory might justify a practice of absolute liability. Moreover, the theory clearly had some effect on the thinking of modern tort judges. For those judges, however, enterprise liability was not the only theory in town. Rather, it was an approach to liability that judges were able to accommodate with more traditional tort approaches—which themselves emphasized unreasonableness as the criterion for (selective) liability. The meaningfulness of this criterion is confirmed by a review of the liability exposure of products such as power saws, bicycles, and automobiles—a review that uncovers no signs of absolute liability. Granted, there is reason to believe that modern judges have sometimes manipulated the concept of unreasonableness in reaching results which themselves can be explained only in loss-distribution terms. Nevertheless, there is inadequate reason to believe that this practice has become a commonplace.

By the early 1980s, a new tort era had begun. Undeniably, in dozens of cases contemporary courts have routinely applied the strong liability rules inherited from preceding years; moreover, in some instances those courts have actually extended liability. Yet in many recent cases, courts have also rejected particular strict liability proposals, refused to recognize certain negligence-based causes of action, affirmed no-duty rules, narrowly interpreted the negligence concept, asserted the application of certain affirmative defenses, conservatively ruled on a number of damage issues, and rejected legal doctrines that might have subjected employers to tort liability on account of workers' injuries. This recent period can hence be described in terms of the stabilization and the mild contraction of doctrine. An important question concerns whether these tendencies are likely to continue into the future. (Otherwise, the recent period may merely be a respite, which could soon give rise to a new growth in liability.) The transition of tort law from its famous modern era into its less-noticed post-modern era can itself

be explained in several ways, and each of these explanations implies its own answer to the question of what happens next. To the extent that tort doctrine has leveled off on account of the identity of judges, the answer will depend on the identities of those candidates for national president and state governor that voters favor in the future. Inasmuch as doctrine has stabilized because tort judges have completed their reform agenda, that stabilization can be expected to continue—unless judges come up with a new reform agenda that could justify further desirable expansions of liability. Insofar as the recent period relates in some way to the ideas that prevail among academics and within the more general discourse of public-policy analysis, one obvious point is that the law-and-economics school—with its concerns for various forms of social efficiency—is certainly here to stay. Still, other schools of public-policy analysis which could diminish the law-and-economics school's significance could easily emerge in the future.<sup>509</sup> To the extent that the recent stabilization has resulted from a widespread appreciation of the costs and consequences of expanded liability, a new round of expansion cannot be expected until those costs have clearly subsided. The costs in question are in part a result of vagaries in the insurance cycle, and are hence capable of declining. In large measure, however, they are the natural result of broad rules of liability, in conjunction with contemporary claiming patterns and damage awards. Therefore, it seems unlikely that future years will witness any substantial decrease in the cost of liability (and liability insurance). Moreover, the effects of collective memory should not be underestimated. The severe inflation of the late 1970s was a traumatic national experience that seared the minds of federal policy-makers, and which will therefore influence their decisionmaking for many years to come. It is at least possible that the tort crisis of the mid-1980s was a similar trauma, which could therefore bear a continuing legacy.

Even so, one can confidently predict that courts, at least at times, will continue to innovate in imposing liability on institutions whose conduct can be acceptably characterized as unreasona-

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<sup>509</sup> Of course, the whole point of new schools of thought is that they are very difficult to predict in advance. In the late 1960s, no one anticipated the dramatic rise of law-and-economics; nor did many in the mid-1970s predict the emergence of CLS.

ble.<sup>510</sup> Moreover, even if the recent era does continue and doctrine hence remains relatively stable, that would by no means satisfy the many critics of the modern tort regime. Their goal is the repeal of much of modern tort. In fact, the last decade has witnessed a number of judicial overrulings. Thus New Jersey has reversed itself on manufacturers' liability for unknowable hazards;<sup>511</sup> Illinois has engaged in an interesting effort to abrogate the traditional tort of attorney malpractice;<sup>512</sup> the Fifth Circuit has essentially overruled its presumption of causation for inherent-risk warning cases;<sup>513</sup> Tennessee has eliminated joint-and-several liability;<sup>514</sup> and Maryland has overturned precedent in reducing the availability of punitive damages.<sup>515</sup> Still, for the most part the recent years have been marked by courts' unwillingness to extend precedent and by their resolution of open legal questions in a liability-restraining way. It seems unlikely that future courts will become more aggressive in cutting down on liability. Most of modern tort law can hence be expected to persevere.

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<sup>510</sup> Consider, for example, *Eisel v. Board of Education*, 597 A.2d 447 (Md. 1991), in which a school board was held potentially liable for the suicide of a 13-year-old student after school counselors had failed to notify her parents that she was telling her friends at school of her suicide plans. Relying on the relationship between school counselors and students, the court ruled that counselors, knowing of an "adolescent student's suicidal intent," have a duty "to use reasonable means" in attempting to prevent that suicide. *Id.* at 450-52, 456.

<sup>511</sup> See *supra* note 269 and accompanying text.

<sup>512</sup> See *supra* note 292 and accompanying text.

<sup>513</sup> See *supra* note 363 and accompanying text.

<sup>514</sup> See *supra* note 390 and accompanying text.

<sup>515</sup> See *supra* note 416 and accompanying text.