The Original Understanding of Strict Products Liability

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In the 1980s, George Priest published two seminal articles on the intellectual history of strict liability for injuries caused by defective products. First, he demonstrated that the states' remarkably quick acceptance of such liability starting in the mid-1960s reflected the consensus among prominent legal thinkers of the wisdom of "enterprise liability" theory, which had been developed over the previous three decades primarily by Fleming James, Friedrich Kessler, and William Prosser. This theory proposed that commercial enterprises should be liable to consumers who suffered product-related injuries in order to internalize accident costs to manufacturers and sellers, equitably allocate the risks of such accidents, and protect the public.

Second, Professor Priest argued that the "founders" of Section 402A of the Restatement (Second) of Torts (1964), which established strict liability for harms caused by "any product in a defective condition unreasonably dangerous" to a consumer, intended merely to streamline recovery for manufacturing defects. Accordingly, Section 402A's drafters did not foresee that courts would dramatically enlarge its scope to include design and warning defects.

Scholars have generally agreed that Professor Priest presented the definitive intellectual history of strict products liability. Nonetheless, various commentators have contended that he (1) overemphasized the impact of James, Kessler, and Prosser; (2) paid insufficient attention to larger political, social, and economic movements that influenced the development of strict liability; (3) did not adequately account for the role of lawyers (as contrasted with scholars and judges) in swiftly implementing such liability; (4) wrongly concluded that Section 402A's founders intended to limit its application to manufacturing defects; and (5) exaggerated the impact of enterprise liability on tort law developments after 1964. I will try to show that these critics have failed to refute Priest's historical analysis of strict products liability.

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Introduction

George Priest's prolific scholarship has significantly influenced the law of torts, antitrust, insurance, contracts, sales, regulated industries, and civil litigation. His towering academic reputation rests primarily on his rigorous economic analysis of these subjects and his ardent defense of democratic capitalism. But Professor Priest also had an abiding interest in history. This Essay focuses on his two important contributions to our historical understanding of strict liability for injuries caused by defective products.

First, in 1985 he argued that American states' swift embrace of such liability during the 1960s incorporated "enterprise liability" theory, which had originated three decades earlier and had gained nearly universal academic support by the late 1950s.[1] This theory posited that businesses should be liable to consumers for product-related losses to internalize accident costs to the manufacturer, fairly distribute the risks of such mishaps, and protect the public.[2]

Second, in 1989 he maintained that the drafters of Section 402A of the Restatement (Second) of Torts in 1964—which established strict liability for harm caused by "any product in a defective condition unreasonably dangerous" to consumers—intended merely to simplify recovery for manufacturing defects, but that courts later radically expanded its scope to encompass design and warning defects.[3]

I will begin by summarizing and evaluating Professor Priest's articles. I will then defend his ideas against his critics.

I. Priest's Intellectual History of Products Liability

A. The Pre-1960 Legal Regime

For most of Anglo-American history, liability for injuries resulting from defective products was limited. Under contract law, only buyers of goods in privity of contract with the seller could recover for breach of implied warranties of merchantability and fitness, and such warranties could be disclaimed.[4] In tort, negligence dictated that an injured consumer, who

1. George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985).

2. *Id.* at 463-65, 505-27.

3. George L. Priest, *Strict Products Liability: The Original Intent*, 10 CARDOZO L. REV. 2301 (1989).

4. *See* Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683, 695-97 (1993). A few visionaries endorsed liability for makers of defective products to injured parties who were not in privity on the ground that contract law should account for the increasing complexity of goods and their mass production. *See* KARL N. LLEWELLYN, CASES AND MATERIALS ON THE LAW OF SALES 340-42 (1930); Francis H. Bohlen, *Liability of Manufacturers to Persons Other than Their Immediate Vendees*, 45 L.Q. REV. 343, 358-59 (1929).

typically had scarce resources, had to prove a manufacturer's or seller's fault in causing the harm.[5]

Starting with Justice Cardozo's landmark 1916 opinion in *MacPherson*, some states began to allow negligence recovery against a manufacturer if its product (such as an automobile) was "imminently dangerous" and the purchaser would not have been expected to inspect it for defects.[6] Over the next four decades, certain jurisdictions extended negligence to other items, such as impure food and intimate bodily products.[7]

The major exceptions to negligence doctrine were the workers' compensation statutes enacted in the first part of the twentieth century.[8] These laws rested on two rationales. First, losses from employee injuries were a cost of business, which should be internalized to employers.[9] Second, enterprises could pass on these expenses to consumers and thereby spread the losses.[10] The attempt during the 1930s to extend the workers' compensation model to automobile accidents failed.[11] Thus, change occurred only through judicial tinkering with negligence rules.

B. Priest's Account of the Strict Liability Revolution

Beginning around 1964, many states suddenly adopted strict liability for defective products, and by the end of the decade traditional contract

5. *See* Richard C. Ausness, *Sailing Under False Colors: The Continuing Presence of Negligence Principles in "Strict" Products Liability Law*, 43 U. DAYTON L. REV. 265, 268-69 (2018).

6. MacPherson v. Buick Motor Co., 217 N.Y. 382 (1916). For a challenge to the standard narrative that *MacPherson* overhauled tort law, see Alexandra D. Lahav, *A Revisionist History of Products Liability*, 122 MICH. L. REV. 509, 511-19, 542-46, 555 (2023). She contended that American courts from 1850 to 1916 had routinely (1) held defendants liable in negligence for breaching their duty not to make or sell harmful products that injured consumers, and (2) disregarded privity defenses. *Id.* at 511-14, 519-54. She further asserted that although this basic duty did not change, mass production of consumer goods (e.g., medicine, canned meat, clothing, furnishings, and machines) during the latter part of the nineteenth century and the early years of the twentieth century for an increasingly urbanized population meant that liability for product-related injuries commensurately expanded. *Id.* at 511-13, 520-21, 525, 531-33, 538-40, 545-52, 555-59.

7. *See* RESTATEMENT (SECOND) OF TORTS § 402A (AM. L. INST., Tentative Draft No. 7, 1962).

8. Priest, *supra* note 1, at 465-67.

9. *Id.* at 466.

10. *See id.*; *see also id.* at 466 n.17 (citing Francis H. Bohlen, *The Basis of Affirmative Obligations in the Law of Torts*, 53 AM. L. REG. 209 (1905) (justifying this departure from negligence law on the ground that the tort duty to ensure others' safety should be imposed only on those, such as employers, who profited from the actions that put others (like workers) at risk of injury)); John Fabian Witt, *Speedy Fred Taylor and the Ironies of Enterprise Liability*, 103 COLUM. L. REV. 1, 2-4, 38-46 (2003) (agreeing with Priest that workers' compensation legislation incorporated enterprise liability theory, but arguing that such laws reflected the novel idea—implemented starting in the late 1800s—that a firm's management must scientifically control all aspects of its operations, including systematically addressing accidents by engineering better workplace safety and providing insurance for accident victims).

11. Priest, *supra* note 1, at 469 (describing proponents' position that automobile owners benefitted from driving and should therefore be liable for any injuries they caused, to be paid for out of a mandatory insurance fund that would internalize costs).

and negligence law had largely been abandoned.[12] Professor Priest offered the following explanation:

> [T]he contours of modern tort law reflect a single coherent conception of the best method to control the sources of product-related injuries. This conception, which its proponents called the theory of enterprise liability, provides in its simplest form that business enterprises ought to be responsible for losses resulting from products they introduce into commerce. The theory incorporates views of the relationship between product manufacturers and consumers, of the role of consumers in preventing losses, of the role of internalizing costs to affect accident levels, and of the most effective methods of distributing the risk of losses that remain. Starting about 1930, this theory was developed and refined in twenty-five years of discussion within the academic literature. By the mid-1950s, the theory of enterprise liability commanded almost complete support within the academic community, and it was accepted and implemented as a tool of social policy in the early 1960s, first by the courts and later by legislatures and other regulatory bodies.[13]

He credited this transformation mainly to three scholars: Fleming James, Friedrich Kessler, and William Prosser.

1. Fleming James

Beginning in the 1930s, James contended that traditional tort doctrines—particularly those requiring that plaintiffs prove fault and that their recovery be reduced or eliminated because of contributory negligence or assumption of risk—failed to allocate risks appropriately.[14] He submitted that (1) the fault system did not deter accidents; (2) injured victims did not have moral culpability; (3) a disproportionate percentage of accidents involved people who were prone to accidents, which could be reduced through education; and (4) appropriate risk distribution could best be achieved through a tax-funded comprehensive social insurance plan.[15] James's theme was that accident losses should be shifted from injured parties, who were usually poor and weak, to defendants—usually large companies that could widely spread the losses through insurance or price increases.[16]

In Professor Priest's view, James's main impact was to eventually persuade scholars that risk distribution was essential in analyzing the accident problem.[17] However, they did not share James's singular focus on this issue.[18] Rather, they also continued to consider the internalization of costs

12. *Id*. at 461-65.
13. *Id.* at 463-64.
14. *Id.* at 471-80.
15. *Id.*; *see also id*. at 478-79 (adding that, where parties had insurance, courts had quietly loosened formal negligence doctrine).
16. *Id.* at 465, 470-83.
17. *Id.* at 480, 497-98.
18. *Id.* at 481.

to the defendant's specific activities, which were accounted for in the common law regime.[19]

Priest emphasized that the intellectual climate began to change in the mid-1950s.[20] One reason was that James altered his approach. Instead of writing articles attacking negligence, he devoted his energy to a casebook and a three-volume torts treatise (with Fowler Harper) published in 1956.[21] This new format enabled James to compile a huge number of cases revealing exceptions to the fault requirement (with appended short passages on risk distribution), which supplied authority for lawyers to cite and courts to adopt.[22] James proposed "strict liability" (a term he coined in 1955) to help accident victims generally, and he did not apply this concept to defective products until he included a chapter on this subject in his treatise and published a related article in 1957.[23]

James found it illogical to confine strict liability to food or bodily-use products and urged its extension to all goods.[24] Manufacturers had far greater economic power than injured victims, and therefore could take safety measures and provide for insurance, passing the costs on to buyers.[25] After 1957, the academic debate shifted, as products liability emerged as a hot topic and strict liability became the ascendant theory.[26]

2. Friedrich Kessler

Professor Priest argued that Kessler infused risk spreading and cost internalization with a compelling moral and social message, which paved the way for political and legal acceptance of enterprise liability.[27] In 1934, Kessler emigrated from Germany and began to teach at Yale contemporaneously with James.[28] Kessler's big idea was that, in Western industrial economies, ever-more-powerful and vertically integrated firms were undermining free-market capitalism by becoming monopolistic and controlling the mass production, marketing, and distribution of goods.[29] Those economic changes had increased governmental authoritarianism in a way that imperiled liberal democracy and individual freedoms.[30]

19. *Id.*
20. *Id.* at 499-502.
21. *Id.* at 483, 499-502.
22. *Id.* at 483, 501.
23. *Id.* at 482, 501-03.
24. *Id.* at 503.
25. *Id.*
26. *Id.* at 504.
27. *Id.* at 483-84, 492, 494-96.
28. *Id.* at 465, 484.
29. *Id.* at 484-86.
30. *Id.* at 484-85.

For present purposes, Kessler's key claim was that contract law had facilitated this economic and political movement.[31] In particular, courts had clung to "freedom of contract" even though that notion, developed in an eighteenth and nineteenth century world of independent producers and individual merchants, had become illusory.[32] Large enterprises now dictated all terms in "contracts of adhesion," which smaller distributors and powerless consumers had to accept to obtain needed goods and services.[33]

Kessler asserted that courts had failed to account for this disparity in bargaining power, but instead had continued to employ outdated contract doctrines that allowed manufacturers to escape responsibility by invoking the privity requirement, disclaiming implied warranties, and limiting recovery for consequential damages (including personal injuries).[34] Accordingly, he recommended that judges directly regulate sales contracts by strengthening existing doctrines like economic duress and *culpa in contrahendo* and applying new rules such as unconscionability and an implied duty of good faith and fair dealing.[35]

Kessler's relentless attack on corporations' exploitation of contract rules eventually persuaded judges that they needed to reshape the law to protect consumers.[36] In 1967, he urged courts to apply his new contract principles to sales of defective products.[37] By then, however, his assault on contract doctrine had, ironically, persuaded the legal community that torts should be the legal vehicle for change.[38]

3. William Prosser

According to Professor Priest, Prosser synthesized the ideas of James and Kessler concerning product-related injuries—risk distribution, consumer protection, and cost internalization—and translated enterprise liability theory into practical legal reforms.[39] In 1960, Prosser published an article advocating that manufacturers be strictly liable for injuries to consumers, who had been victimized by contract rules such as the privity

31. *Id.* at 486-89.

32. *Id.* at 488-96.

33. *Id.* at 486-88, 490-94 (citing Friedrich Kessler, *Contracts of Adhesion—Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629 (1943)).

34. Priest, *supra* note 1, at 494-96.

35. *Id.* at 488-96. Judicial application of these contract rules would address manufacturers' bad faith actions, during both the negotiation process and the period after the contract had been executed, that caused harm to product consumers and users. *Id.*

36. *Id.* at 491-92, 494.

37. *Id.* at 489-92 (citing Friedrich Kessler, *Products Liability*, 76 YALE L.J. 887 (1967)). His theme was that a manufacturer, distributor, or seller of a defective article breached the duty of good faith and fair dealing (which they could not disclaim in a form contract) and were liable to the consumer for all resulting damages, including personal injuries.

38. Priest, *supra* note 1, at 491-92, 495-96.

39. *Id.* at 465, 505-07, 511-18.

requirement and disclaimers of warranties.[40] He predicted that courts would eventually adopt this approach,[41] which had been judicially endorsed only by California Supreme Court Justice Roger Traynor in his 1944 concurring opinion in *Escola v. Coca-Cola Bottling Company*.[42]

At the same time Prosser's article appeared, the New Jersey Supreme Court, working independently, released *Henningsen v. Bloomfield Motors*.[43] The court held that an automobile dealer was strictly liable in contract for defects that injured the purchaser's wife, regardless of the lack of privity or the seller's disclaimer of implied warranties and exclusion of damages for personal injuries.[44] The court relied heavily on Kessler and also cited James.[45] Priest observed that the uncanny timing of Prosser's article—virtually simultaneous with *Henningsen*'s confirmation of his prediction—created a sensation.[46]

Three years later, in *Greenman v. Yuba Power Products*,[47] Justice Traynor wrote for a unanimous California Supreme Court in establishing strict liability in tort for product defects that caused injury.[48] The court espoused the James/Prosser position that losses should be transferred from the consumer to the manufacturer.[49] Priest declared that "*Greenman* completely and unalterably shifted the grounds for decision in product defect cases involving injury from contract to tort law."[50]

In 1964, Prosser, as the Reporter for the Restatement (Second) of Torts, convinced the American Law Institute to pass Section 402A, which imposed strict liability on sellers for physical harm caused by "any product in a defective condition unreasonably dangerous to the user or consumer."[51] In an appendix to the final draft, he cited forty cases to support his claim that there had been an explosion in the law toward such liability.[52] Remarkably, no one questioned the relevance of that precedent until Priest did so two decades later.[53] He discovered that only three of those cases (*Henningsen*, *Greenman*, and a 1963 New York decision) clearly

40. William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099 (1960).

41. *Id.* at 1120, 1139.

42. 24 Cal. 2d 453, 461-68 (1944) (Traynor, J., concurring).

43. 32 N.J. 358 (1960).

44. *Henningsen*, 32 N.J. at 370-91, 404, 415.

45. Priest, *supra* note 1, at 508-09 (citing *Henningsen*, 32 N.J. at 371-72, 379-80, 383, 385-91, 415).

46. *Id.* at 505-07.

47. 59 Cal. 2d 57 (1963).

48. *Id.* at 62-63.

49. *Id.*

50. Priest, *supra* note 1, at 507-08.

51. Section 402A's extension of strict liability to "any product" was a bold leap from previous drafts in 1961 and 1962, which had proposed such liability only for food and intimate bodily products. *Id.* at 512-13 (describing this evolution). The ALI approved Section 402A in 1964, and it was formally published in 1965.

52. *Id.* at 513-15.

53. *Id.* at 513-17.

endorsed strict products liability and that five others possibly did so.[54] In the remaining thirty-two decisions, courts merely relaxed privity and allowed recovery based on either implied warranties or negligence.[55]

Professor Priest concluded that Prosser had wildly exaggerated the *judicial* trend toward strict products liability and instead implemented the *scholarly* consensus on that issue in Section 402A, which the ALI uncritically accepted.[56] This sleight of hand ultimately did not matter. The imprimatur of the ALI, which embodied the conservative legal establishment, led lawyers to quickly bring Section 402A lawsuits and judges to adopt this legal regime.[57] Indeed, within three years fourteen states had done so, and after about a decade the number had tripled.[58]

Priest identified two reasons for this abrupt and widespread embrace of strict products liability. First, it was far more sophisticated than warranty or negligence theories and also corresponded to judges' personal experiences as consumers.[59] Second, it allowed courts to exercise power as dynamic agents of a complex modern state to help the poor, distribute risks equitably, and internalize costs properly.[60]

C. Post-1964 Developments

Professor Priest maintained that modern tort law has incorporated the three basic tenets of enterprise liability.[61] First, as compared to consumers, manufacturers have vastly greater power over all aspects of product defects, such as quality control, safety features, and access to information. Second, manufacturers can spread the risk of losses from product-related injuries by adding a small insurance amount to the price of goods. Third, society benefits by internalizing to manufacturers the losses from such injuries.[62]

Priest asserted that Section 402A reflected those three concepts, but that its brief text proved inadequate to resolve many cases.[63] Consequently,

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54. *Id.* at 515-17.

55. *Id.* at 514-15.

56. *See id.* at 517; *but see* Keith N. Hylton, *The Law and Economics of Products Liability*, 88 NOTRE DAME L. REV. 2457, 2461, 2466-68 (2014) (arguing that the ALI may have deliberately adopted strict products liability to hasten a doctrinal change in a direction in which the law was already moving).

57. *See* Priest, *supra* note 1, at 511-12.

58. *Id.* at 518.

59. *Id.* at 518-19.

60. *Id.* at 519.

61. *Id.* at 520 (setting forth these three principles).

62. Two scholars have characterized the 1960s legal thinkers' justifications for enterprise liability somewhat differently, as addressing (1) consumers' inadequate information about product risks, which manufacturers hid in their mass advertising; (2) exploitative manufacturer market power, primarily attributable to adhesion contracts; and (3) risk distribution. *See* Croley & Hanson, *supra* note 4, at 706-12.

63. Priest, supra note 1, at 521.

judges often turned to the Official Comments, written mainly by Prosser, which tended to be vague.[64] Courts wrestled with three main issues.

First, Section 402 did not define "defect" or say whether it included not only manufacturing flaws but also defective designs.[65] Enterprise liability presuppositions swiftly led most courts to hold a manufacturer liable if its design did not meet the safety expectations of an ordinary consumer.[66]

Second, one Comment mentioned inadequate warnings on certain products, but Priest deemed it "unlikely that [Prosser] anticipated expanded liability on these grounds."[67] Nonetheless, in the 1970s many courts extended strict liability to defective warnings generally.[68] Priest contended that this expansion flowed from enterprise liability theory: Manufacturers virtually always had superior information about their products' dangerous characteristics and could internalize costs very cheaply, usually by affixing a warning label.[69]

Third, the Comments assumed that strict liability would be applied only to manufacturing defects and that, therefore, judges would continue to consider defenses such as contributory negligence and assumption of risk.[70] However, eventually many courts rejected such defenses, which were incompatible with the precepts of manufacturer power, consumer weakness, and cost internalization.[71]

Professor Priest concluded by noting that judges have resisted embracing absolute manufacturer liability for defective products and have instead struggled to identify coherent limits on strict liability.[72] He viewed this attempt as misguided because, under enterprise liability theory, "[t]he unavoidable implication of the three presuppositions of manufacturer power, manufacturer insurance, and internalization is absolute liability."[73]

II. Strict Products Liability: The Original Intent

In 1989, Professor Priest elaborated upon the post-1964 evolution of products liability.[74] Most notably, he clarified that enterprise liability theory came to fruition not in 1964, but rather several years later.

Initially, Priest stressed that the "founders" of Section 402A did not aim to revolutionize tort law, but merely sought to eliminate certain technical contract and negligence defenses for consumer injuries caused by

64. *Id.*
65. *Id.* 521-23.
66. *Id.* at 522-23 (citing cases).
67. *Id.* at 523.
68. *Id.* at 523-25.
69. *Id.*
70. *Id.* at 525-26.
71. *Id.* at 526.
72. *Id.* at 527.
73. *Id.*
74. Priest, *supra* note 3.

manufacturing defects.[75] He then argued that courts, starting in the late 1960s, interpreted Section 402A's vague text and Comments to justify the massive expansion of strict products liability to include design and warning defects, and in doing so relied upon enterprise liability theory in a manner that radically transformed tort law.[76]

A. The Founders' Understanding

Section 402A provides that (1) a business seller of "any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused;" and (2) this liability applies even if (a) "the seller has exercised all possible care in the preparation and sale of his product" and (b) the victim lacks a "contractual relation with the seller." Subsection (2) plainly does away with defenses based on the exercise of reasonable care under negligence law and on privity of contract. Less clear is the meaning of Subsection (1)'s phrase "defective condition unreasonably dangerous."

Professor Priest discerned the intent behind Section 402A(1) by analyzing its text and the Comments in light of the opinions, expressed in both ALI meetings and scholarship, by the Reporter William Prosser and his advisors Page Keeton, Wex Malone, Clarence Morris, Dix Noel, John Wade, Roger Traynor, and Fleming James.[77] These men consistently objected to legal rules that had unfairly denied recovery in a relatively small set of cases: where a plaintiff's injury resulted from a manufacturer's deviation from its own standards of production or quality control.[78]

For example, Priest described how some courts had enforced contract doctrine to deny relief to injured consumers because they (1) were not in privity with the manufacturer; (2) could not prove breach of the implied warranty of merchantability; (3) did not give timely notice of such a breach; or (4) entered into a contract in which the manufacturer or seller expressly disclaimed implied warranties and excluded recovery for consequential damages, including personal injuries.[79] Similarly, certain judges would not apply negligence law to plaintiffs who lacked privity, except where the product was "imminently dangerous"—as established in *Macpherson* in 1916 and later extended to include harmful food and "intimate bodily use"

75. *Id.* at 2302-24. Priest's recognition of the modest original understanding of Section 402A reflected the "perceptive criticisms" in Gary T. Schwartz, *Directions in Contemporary Liability Scholarship*, 14 J. LEG. STUD. 763, 768-69 (1985). *See* Priest, *supra* note 3, at 2301.

76. Priest, *supra* note 3, at 2302-04, 2324-27.

77. *Id.* at 2305-24.

78. *Id.* at 2305-17.

79. *Id.* at 2305-06, 2315-17. Furthermore, a consumer who elected to either rescind the contract and get a refund or accept a new model of the product thereby lost the opportunity to recover damages for personal injuries. *Id.* at 2306. All of these doctrines made sense only as to contracts that were actually negotiated by two parties who understood the nuances of contract law, as contrasted with vendor-drafted standardized agreements for the sale of goods that hurt an unwitting consumer. *Id.* at 2316-17.

products.[80] In most cases, however, courts had increasingly been manipulating these contract and tort rules or invoking doctrines like *res ipsa loquitur* to allow recovery for injuries caused by manufacturing defects.[81]

Professor Priest maintained that the Section 402A masterminds simply wanted to eliminate contract and negligence defenses and provide for automatic recovery where the product diverged from the manufacturer's own standards.[82] He supported this conclusion with six pieces of evidence.

First, the remarks and scholarship of all of Section 402A's drafters from 1960 to 1964 reveal their understanding that strict liability should apply chiefly to such manufacturing defects.[83] Even James interpreted Section 402A that way, although he would have preferred a revolutionary switch to absolute liability.[84] Again, the founders had a far more modest purpose.

Second, there were no serious objections (even by the corporate defense bar) to Section 402A's substantive provisions or to its implementation by lawyers and judges rather than through democratic processes.[85] That consensus suggests a shared view that Section 402A streamlined legal analysis in a discrete category of cases—where a defective product did not meet the manufacturer's own standards—in which injured consumers were usually recovering anyway.[86] The limited nature of this change explains why the ALI and state judges, who in 1964 tended to be conservative, approved Section 402A.[87]

Third, the Comments included 54 examples of cases in which Section 402A would now govern, and 51 of them dealt with manufacturing defects.[88] Indeed, almost all of the illustrative decisions concerned tainted food or intimate bodily products,[89] which most jurisdictions had recognized as "imminently dangerous" items that would result in liability to the consumer regardless of negligence.[90] However, Priest acknowledged that three

80. *Id.* at 2305-07, 2316-17.

81. *Id.* at 2302-09, 2315-17.

82. *Id.* at 2303, 2307-08.

83. *Id.* at 2302-24 (citing numerous examples from their published statements).

84. *Id.* at 2304 (citing James).

85. *Id.* at 2306, 2317.

86. Typically, a plaintiff who could prove such a manufacturing deviation would be held to have established negligence. *Id.* at 2317.

87. *Id.* at 2302.

88. *Id.* at 2317-21.

89. *Id.* at 2315, 2320-21.

90. *See supra* notes 80-81 and accompanying text; *see also* Denis Stearns, *Prosser's Bait and Switch: How Food Safety Was Sacrificed in the Battle for Tort's Empire*, 15 NEV. L.J. 106, 112-16, 137-39 (2014) (agreeing with Priest that (1) Prosser greatly exaggerated the trend toward strict liability by extrapolating from the food cases, and (2) the only coherent explanation for 402A's text and Comments is that they applied only to manufacturing defects—but further claiming that this narrow application reflected the drafters' focus on unsafe food, which always results from a manufacturing defect).

cases involved defective designs or warnings,[91] which he dubbed "minor exceptions" to the general understanding that strict liability would apply to manufacturing defects.[92] In short, the founders focused their attention on the overwhelming majority of cases involving such manufacturing flaws.

Fourth, Comment i explained that a defective product was "unreasonably dangerous" only if "dangerous to an extent beyond that which would be contemplated by the ordinary consumer . . . with the ordinary knowledge common to the community as to its characteristics." Comment i clarified that Section 402A applied when a malfunction in the manufacturing process resulted in a different product that was unreasonably dangerous.[93] By contrast, no strict liability would lie for "unavoidably unsafe products" like pharmaceuticals that a consumer knew might harm some people.[94] Rather, a plaintiff would have to prove negligence—that the number of persons injured by a product was so high that it was "unreasonably dangerous."[95] Comment i thereby reinforced Priest's thesis that Section 402A's drafters contemplated incremental rather than dramatic change.

Fifth, Comment n provided that a plaintiff's contributory negligence was not a defense when it was "merely a failure to discover the defect in a product," but could be a defense in a situation of assumption of risk—"voluntarily and unreasonably proceeding to encounter a known danger." Comment n makes sense if Section 402A was confined to manufacturing defects, because a consumer is rarely aware of this problem and cannot readily discover it.[96] Yet the drafters did not impose strict liability for all such defects, but rather retained the "assumption of risk" defense. Preserving this traditional tort doctrine further exemplifies the founders' cautious approach.

Sixth, Section 402A's drafters anticipated that it would govern defects in the manufacturing process, whereas negligence law would apply to defects in product design or warnings.[97] Nonetheless, Priest recognized that a few Comments might be construed otherwise.[98]

Some concerned the meaning of "defective condition." For example, Comment g clarified that this phrase indicated that a product's defect was "not contemplated by the ultimate consumer" and was unreasonably dangerous to him. Furthermore, Comment h stated that a product was "not in

91. Priest, *supra* note 3, at 2322 n.79.

92. *See id*. at 2303, 2321.

93. *Id.* at 2303, 2307-19.

94. *Id.* at 2318-19.

95. *Id.* at 2318-19. Comment i incorporated the insights of Page Keeton, who argued that strict liability should be applied only to manufacturing deviations, not to "unavoidably unsafe products." *Id*. at 2309-12 (citing Keeton). Prosser, Noel, Wade, and Traynor shared this understanding. *Id.* at 2309, 2311-15.

96. *Id.* at 2303, 2323.

97. *Id.* at 2303-04, 2311-15, 2318-24.

98. *Id.* at 2318, 2323-24.

defective condition when safe for normal handling and consumption." Priest conceded that Comments g and h did not distinguish between manufacturing and design defects.[99] Nonetheless, he emphasized that these Comments never suggested that "defective condition" extended strict liability to design flaws, which would have been a radical innovation.[100]

Finally, Comment j provided that "to prevent a product from being unreasonably dangerous, the seller may be required to warn against unreasonable dangers of which the public may be unaware." Priest acknowledged that this language was susceptible to a broad construction. He noted, however, that Comment j ended with a limitation: "Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous."

Professor Priest marshaled further evidence that the expected ambit of Comment j was narrow. Most significantly, all of its accompanying illustrations involved the special category of "unavoidably dangerous products," such as pharmaceuticals that were generally safe but could have harmful side effects for some users.[101] Moreover, he demonstrated that Comment j reflected the scholarship of Keeton and Wade, who had argued that warnings should be required only for this category of products and that such warnings, once provided, should shield manufacturers from strict liability.[102]

Priest concluded that Section 402A's framers intended to preserve negligence except where a consumer injury resulted from a defective product that did not conform to a manufacturer's own standards. He contended that courts have construed Section 402A's terse text and a few of its vague Comments to enlarge its scope far beyond that modest goal.[103]

B. The Dramatic Expansion of Strict Products Liability

It quickly became apparent that Section 402A was not adequate to address design defects—an issue that Ralph Nader popularized in demanding strict liability for such defects in automobiles.[104] John Wade took the scholarly lead in maintaining that, since Section 402A apparently restricted

99. *Id.* at 2318.

100. *Id.* Comment h further provided that a product's defective condition "may arise not only from harmful ingredients, not characteristic of the product itself, either as to presence or quantity, but also from foreign objects contained in the product, for decay and decomposition before sale, or from the way the product is prepared or packed." The "quantity" of an ingredient might be read to include a product that is defectively designed because it has excessive ingredient amounts, but otherwise this language plainly pertains to manufacturing defects. *Id*. I would add that the word "ingredient" typically is used in the food context, and most of the examples in the Comments involve unsafe food.

101. *Id.* at 2323.

102. *Id.* at 2323-24.

103. *Id.* at 2302-04, 2324-27.

104. *Id.* at 2324-25 (citing Nader).

strict liability to manufacturing defects, design defects should be handled by the existing negligence doctrine that set forth a cost-benefit analysis of many factors.[105] However, Professor Priest criticized Wade for not appreciating that this calculus "was to be conducted against alternative available actions that the defendant might have taken."[106] Instead, Wade weighed the utility of the product as a whole against its risk and later added insurance considerations.[107]

Priest described judges' struggles to formulate coherent standards for design defects.[108] Some followed Wade's risk-utility test, which did not contain any specific legal principles but rather gave courts discretion to consider any fact connected to the product.[109] Some judges invoked the "consumer expectation" verbiage in Comments g and i. Recall that those Comments aimed to limit liability for manufacturing defects when an ordinary consumer would know about possible risks or when someone used products like drugs that were unavoidably unsafe.[110] Priest pointed out that the consumer expectation language, conceived as a defense, became an affirmative standard for determining design defects and "vastly increased manufacturer liability, since it was a standard virtually without content."[111]

He lamented that courts similarly misconstrued Comment j and thereby enormously expanded strict liability for defective warnings. Comment j required warnings not for all products but only for those that were "unavoidably unsafe," and it absolved manufacturers of liability if they provided such warnings, even if the consumer did not read them.[112] However, judges cited Comment j to fashion a general duty to warn and to relieve plaintiffs of their burden of proving causation (i.e., the lack of a warning, by itself, would be assumed to have caused the injury).[113]

Professor Priest argued that, starting in the late 1960s, the stretching of strict liability to encompass defective design and warnings incorporated broader enterprise liability theory (risk distribution, cost internalization, and consumer protection).[114] He asserted that this expansion has moved all tort law in the direction of absolute liability.[115]

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105. *Id.* at 2313-14, 2324 (citing Wade).
106. *Id.* at 2325.
107. *Id.* at 2326.
108. *Id.* at 2304, 2326.
109. *Id.* at 2304, 2307.
110. *See id.* at 2326, discussed *supra* notes 93-95, 99 and accompanying text.
111. *Id.*
112. *See supra* notes 101-102 and accompanying text.
113. Priest, *supra* note 3, at 2324.
114. *Id.* at 2326-27.
115. *Id.* at 2327.

III. Critiques of Professor Priest's Historical Analysis

The academic consensus is that George Priest presented the definitive intellectual history of products liability law.[116] Indeed, even his critics share this opinion. Most notably, Gary Schwartz, who challenged Professor Priest's thesis that strict liability suddenly emerged in the mid-1960s, praised his "remarkable . . . writing of intellectual history."[117] Similarly, Gregory Keating has deemed Priest's scholarship "brilliant" for establishing that Section 402A rested on enterprise liability theory, but has questioned his further conclusion that this theory logically dictates absolute liability.[118] And Steven Croley and Jon Hanson, the most zealous modern defenders of enterprise liability for product-related injuries, have relied on Priest's historical account while disputing his economic analysis of such liability.[119]

116. Torts scholars tend to cite Priest's work as authoritative without questioning it. *See, e.g.*, DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS §§ 13, 459 (2d ed. 2010-2024); JANE STAPLETON, PRODUCTS LIABILITY 25 (1994); Mark A. Geistfeld, *Reformulating Vicarious Liability In Terms of Basic Tort Doctrine*, 99 NYU L. REV. 578, 591-94 (2024); Richard Marcus, *A Legend in His Own Time, and a Fixer for Mass Tort Litigation*, 84 L. & CONTEMP. PROBS. 183, 190-91 (2021); John L. Watts, *Fairness and Utility in Products Liability: Balancing Individual Rights and Social Welfare*, 38 FLA. ST. L. REV. 597, 619-22 (2011); A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Products Liability*, 123 HARV. L. REV. 1437, 1477, 1483-84 (2010); Christopher J. Robinette, *Why Civil Recourse Theory is Incomplete*, 78 TENN. L. REV. 431, 471-75 (2010); Roy Kreitner, *Fault at the Contract-Tort Interface*, 107 MICH. L. REV. 1533, 1543-46 (2009); Dominick Vetri, *Order Out of Chaos: Products Liability Design-Defect Law*, U. RICH. L. REV. 1373, 1374-75 (2009); Douglas A. Kyser, *The Expectations of Consumers*, 103 COLUM. L. REV. 1700, 1713 (2003); James J. Henderson, Jr., *Echoes of Enterprise Liability in Product Design and Marketing*, 87 CORNELL L. REV. 958, 961-62, 977-78 (2002); Martin A. Kotler, *Reconceptualizing Strict Liability in Tort: An Overview*, 50 VAND. L. REV. 555, 584-85, 588, 590, 596, 598-99, 603 (1997); Peter V. Schuck, *Rethinking Informed Consent*, 103 YALE L.J. 899, 913 (1994); Mary J. Davis, *Individual and Institutional Responsibility: A Vision for Comparative Fault in Products Liability*, 39 VILL. L. REV. 281, 283, 285, 340 (1994); Oscar S. Gray, *Reflections on the Historical Context of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512, 1526 (1992); Richard A. Epstein, *The Unchecked Revolution in Products Liability Law*, 10 CARDOZO L. REV. 2193, 2200 n.25 (1989); Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 369 (1988); John A. Siliciano, *Negligent Accounting and the Limits of Instrumental Tort Reform*, 86 MICH. L. REV. 1929, 1929-30, 1937, 1949-50, 1953, 1959, 1968-69, 1972, 1979 (1988); Michael J. Trebilcock, *Social Insurance-Deterrence Dilemma of Modern North American Tort Law: A Canadian Perspective on the Liability Insurance Crisis*, 24 SAN DIEGO L. REV. 929, 949-50 (1987); William M. Landes & Richard A Posner, *A Positive Economic Analysis of Products Liability*, 14 J. L. STUD. 535, 536 (1985); Ausness, *supra* note 5, at 270-77.

117. *See* Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601, 621 (1992) [hereinafter Schwartz, *Beginning*].

118. Gregory C. Keating, *Products Liability as Enterprise Liability*, 10 J. TORT L. 41, 41-43 (2017).

119. *See* Croley & Hanson, *supra* note 4, at 695-712. They examined all judicial and scholarly approaches to products liability through a "matrix" which considered (1) the liability standard (absolute consumer liability, negligence, strict liability, or absolute manufacturer liability); and (2) the "degree of mutability"—whether manufacturer liability is (a) a default rule that parties can contract around through warranties, disclaimers, and warnings, thereby allowing the market to determine the optimum level of product quality, safety, and price; or (b) a mandatory tort rule, required because of market failures. *See id.* at 687-95.

Croley and Hanson contended that courts typically view products liability as tort law, but noted that many scholars in that field have urged addressing product risk through regulation,

I will address the five main concerns that these scholars and others have expressed about Priest's work: that he (1) did not account for the larger political, social, and economic movements that influenced the development of strict liability; (2) gave too much credit to scholars and judges, rather than practitioners, for the swift implementation of such liability; (3) overemphasized the contributions of James, Kessler, and Prosser; (4) incorrectly concluded that Section 402A's founders intended to limit its application to manufacturing defects; and (5) exaggerated the impact of enterprise liability on post-1964 developments in tort law.

A. Political and Socioeconomic Trends

Before Professor Priest published his articles, a few scholars—most importantly Professor Schwartz—had maintained that the evolution toward strict products liability in the 1960s was a common law phenomenon that reflected wider political, social, and economic developments in America since the early 1930s.[120] Priest succinctly attempted to refute this

preferably through government administration (with the tort system as a backup). *Id.* at 690-91, 714-15, 736-60, 767-68. By contrast, starting in the 1980s, conservative law and economics scholars (including Priest) recommended a "contractarian" market framework that treats manufacturer liability as a default standard, which can be displaced through an agreement between informed, competent consumers and manufacturers who have incentives to offer high quality, safe products. *Id.* at 690-91, 713-35, 767.

Rejecting the "contractarian" approach, Croley and Hanson defended enterprise liability theory, which had animated the "first generation" of products liability thinkers in the 1960s, by presenting more modern economic arguments that stress continuing and systematic market failures. *Id.* at 691-92, 761-97. The most important failures are (1) imperfect consumer information, which cannot be rectified because doing so would be prohibitively expensive; (2) manufacturers' exploitation of their market power to maximize profits by making products that are not optimally safe and providing warranties that take advantage of consumers; and (3) inefficient risk distribution because of problems with consumers' first-party insurance. *Id.* at 770-86. Enterprise liability deals with these market failures by (1) giving manufacturers incentives to provide consumers with relevant information about product risks through effective warnings and price signals; (2) empowering consumers by disregarding contracts that provide sub-optimal product safety and warranties; and (3) redistributing monetary risks to appropriately insure product consumers. *Id.* at 786-97.

In an earlier article, these scholars had similarly advocated the further expansion of absolute liability to require manufacturers to internalize the full costs, monetary and non-pecuniary (e.g., pain and suffering), of product-caused injuries, thereby promoting the tort law goals of deterrence and risk spreading. *See* Steven P. Croley & Jon D. Hanson, *What Liability Crisis? An Alternative Explanation for Recent Events in Products Liability*, 8 YALE J. ON REGUL. 1 (1990). While sharply criticizing Priest's arguments to curb strict products liability, however, they accepted his historical account of the rise of such liability in the 1960s. *See id.* at 3-11.

120. *See* Gary T. Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58 NYU L. REV. 796 (1983). Many years before, a distinguished scholar had similarly argued that social and economic changes (particularly the growing concern for protecting relatively powerless individuals that the New Deal embodied) led courts in a common law process to gradually expand the kinds of injury-causing articles deemed so "inherently" or "imminently" dangerous that they would allow recovery in negligence—first automobiles, then bad food, then intimate bodily products. *See* Edward H. Levi, *An Introduction to Legal Reasoning*, 15 U. CHI. L. REV. 501, 507-18, 572-74 (1948).

claim,[121] but Schwartz continued to press it, with support from David Owen and Kyle Graham.[122]

Their argument proceeded chronologically. Initially, the New Deal and similar Progressive state legislation aimed to help relatively powerless individuals and groups (e.g., workers and consumers) with economic and social regulation designed to level the playing field.[123] After World War II, public sentiment grew for protecting ordinary people against callous Big Business.[124] In the 1950s, Congress responded to reformers' safety concerns about items such as cigarettes, automobiles, drugs, and flammable fabrics.[125] Then 1960s liberalism, as embodied in the public policy activism of the Warren Court and the Great Society, made judges more receptive to effectuating sweeping change.[126] All the foregoing trends increased the sympathy of judges and juries to consumers injured by products made by large firms. Courts tweaked common law on a case-by-case basis to find negligence more easily, with strict products liability culminating that effort.[127]

Admittedly, that final legal point is sound as of 1964. Indeed, Priest has recognized that Section 402A's founders merely intended to make explicit what many courts had already been doing, often surreptitiously: modifying or at least relaxing traditional negligence and contract doctrines by finding liability for injuries caused by defectively manufactured products.[128] Nonetheless, there was nothing gradual about the adoption of Section 402A, as 41 states did so within ten years.[129] Moreover, the extension

121. Priest, *supra* note 1, at 463-65.

122. *See* Schwartz, *Beginning*, *supra* note 117, at 601-02, 609-20; David G. Owen, *The Intellectual Development of Modern Products Liability Law: A Comment on Priest's View of the Cathedral's Foundations*, 14 J. L. STUD. 529, 532-33 (1985); Kyle Graham, *Strict Products Liability at 50: Four Histories*, 98 MARQ. L. REV. 555, 557-59, 565-67, 580-81, 585-92 (2014). Graham acknowledged that Priest's was "the leading work in this genre." Graham, *supra*, at 581.

123. *See* Owen, *supra* note 122, at 532; *see also* Carl T. Bogus, *War on the Common Law: The Struggle at the Center of Products Liability*, 60 MO. L REV. 1, 2-8, 70-88 (1995) (maintaining that the New Deal created a mentality that social and economic problems should be addressed through legislation that empowered technical experts rather than through judicial decisions, but that products liability later emerged as the main subject in which courts through common law adjudication appropriately made important public policy).

124. *See* Schwartz, *Beginning*, *supra* note 117, at 615; Graham, *supra* note 122, at 559, 567, 581, 583-92; Owen, *supra* note 122, at 532.

125. *See* Graham, *supra* note 122, at 587-90.

126. *See* Owen, *supra* note 122, at 532-33; Graham, *supra* note 122, at 580; *see also* Schwartz, *Beginning*, *supra* note 117, at 602-03, 609-20, 636-38, 694-95, 700-01 (noting the Warren Court's impact and describing how these liberal policies continued in the 1970s, as exemplified in federal statutes that protected consumers and the environment); Robert L. Rabin, *Tort Law in Transition: Tracing the Patterns of Sociolegal Change*, 23 VAL. L. REV. 1, 2-28 (1988) (concurring with Priest that enterprise liability theory helped spur the doctrinal movement toward strict products liability, but asserting that several nonlegal factors were more important: the post-World War II economic boom generating an array of new products; growing hostility toward corporations; and increasing public consciousness of safety and health concerns in the late 1960s and 1970s).

127. *See* Schwartz, *Beginning*, *supra* note 117, at 601-20.

128. *See supra* notes 75, 78-103 and accompanying text.

129. Priest, *supra* note 1, at 461-65.

of strict products liability starting in the late 1960s to include design and warning defects sharply broke from prior law.[130] That massive enlargement of Section 402A's scope, and the enterprise liability theory that undergirded it, were revolutionary. This widespread and abrupt shift belies Schwartz's argument that courts continually fine-tuned negligence standards.[131]

Turning to the critics' broader theory, Professor Priest would readily concede that political and social trends can influence legal change.[132] However, *general* New Deal policies in the 1930s or postwar sympathy for consumers cannot account for the legal establishment's *specific* acceptance of strict products liability between 1960 to 1964 and the subsequent swift, nationwide judicial embrace of that doctrine. Otherwise, one would have expected courts to have endorsed such liability in, say, 1938 or 1952. Likewise, the notion that Sixties' liberalism made judges more open to radical change has intuitive appeal, but does not explain why courts did not implement other equally novel ideas like Critical Legal Studies.

Scholars such as William Landes and Richard Posner have set forth a different historical explanation. They contended that courts' pivot from negligence to strict liability was an efficient response to the movement, beginning in the late nineteenth century, from an agrarian society with simple articles made by farmers and craftsmen to an increasingly urban economy featuring complex products manufactured by large companies.[133] Furthermore, Landes and Posner asserted that strict products liability internalizes costs to manufacturers at an optimal level.[134]

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130. *See supra* notes 3, 66-69, 72-73, 76, 104-115 and accompanying text.

131. *See* Priest, *supra* note 1, at 462-64, 498; Epstein, *supra* note 116, at 2196-2213 (similarly concluding that the judicial reform of products liability has been revolutionary, not incremental). Professor Owen, who initially supported Schwartz's view, later cited Priest in declaring that the scholarly consensus favoring strict products liability in the mid-to-late 1950s generated a "seismic shift" in the 1960s, as such liability rapidly swept away longstanding doctrines of negligence and warranty. *See* David G. Owen, *Bending Nature, Bending Law*, 62 FLA. L. REV. 569, 581-83, 607 (2010).

132. *See* Priest, *supra* note 1, at 464.

133. *See* Landes & Posner, *supra* note 116, at 535-37, 547-50; *see also* Graham, *supra* note 122, at 565 (likewise stressing that (1) "the rise of mass production and the transportation revolution of the 1800s and early 1900s placed physical distance between the makers and users of many products," making it difficult for consumers to learn about product quality, and (2) "the introduction of wholesaler and retailer intermediaries . . . further alienated consumers from the manufacturers"); Lahav, *supra* note 6, at 511-14, 519-21, 540-41, 546-47, 549, 552, 556-59 (arguing that negligence law evolved from 1850 to 1916 to recognize manufacturers' liability for injuries caused by their products, as courts responded to economic and social changes such as the ever-increasing mass production of consumer goods); Ausness, *supra* note 5, at 275-76 (contending that mass production disconnected manufacturers from their remote customers).

134. *See* Landes & Posner, *supra* note 116, at 535-43, 547-67 (emphasizing that the cost of information increases as goods become more complex); William M. Landes & Richard A Posner, *The Positive Economic Theory of Tort Law*, 15 GA. L. REV. 871, 871-77, 904-08 (1981) (maintaining that products liability law promotes efficiency because both manufacturers and consumers must decide if the cost of insurance added to the price of a product that is potentially dangerous makes it worthwhile to sell it); Steven Shavell, *Strict Liability Versus Negligence*, 9 J. L. STUD. 1, 1, 3-5, 8, 24 (1980) (concluding that strict liability is normally more efficient than negligence in giving sellers incentives to take the proper level of care to reduce accident losses).

On the latter point, Priest would concur that cost internalization, a pillar of enterprise liability, supported strict products liability.[135] Whether Section 402A, especially as extended to design and warning defects, has resulted in economic efficiency is debatable.[136] But from a historical standpoint, it seems dubious to claim that urbanization and increasing mechanization, which began in the last quarter of the nineteenth century and have steadily continued, somehow led to the sudden acceptance of strict products liability in the 1960s.

In short, this quick implementation cannot plausibly be attributed to political, social, and economic movements that had been slowly increasing in force for many years, such as progressive social welfare ideas and urbanization. Rather, something must have happened in the mid-twentieth century that precipitated this legal change. The rapidly forming intellectual consensus in the late 1950s favoring strict liability for business enterprises is the likeliest catalyst.[137]

B. The Role of Lawyers

Some commentators have maintained that Professor Priest exaggerated the importance of scholars and judges, and underestimated the contributions of attorneys, in dramatically altering products liability law. For instance, Professors Rubin and Bailey have argued that tort lawyers' long-term financial and professional interests primarily shaped the direction of such law.[138] Initially, they declared:

> One plausible explanation for the timing of the changes . . . is that the legal tendencies leading to the New Deal sharply increased opportunities for rent seeking in all forms and increased courts' willingness to nullify contracts for all sorts of reasons. . . . The change did not begin to have its full effect on product liability law until after World War II. Even then, changing the law through the relitigation process would perforce take time once the process

135. *See supra* notes 2, 13, 19, 27, 39, 60, 62, 69, 71, 73 and accompanying text.

136. *See infra* notes 190-216 and accompanying text.

137. One might claim that the progressive political, social, and economic developments over many previous decades eventually reached a tipping point in the mid-1960s that triggered a monumental alteration of tort law. But such an argument cannot explain why these broader trends did not similarly coalesce to bring about thoroughgoing changes in other areas. Indeed, the revolutionary embrace of strict products liability in the late 1960s and 1970s coincided with Americans' growing discontent with the liberal agenda, as evidenced by the decisive presidential victories of the conservative Republican Richard Nixon in 1968 and 1972.

Admittedly, some reformist programs were implemented during that era, such as environmental laws. Change does not move totally in one direction, left or right. Rather, particular policies must be considered on an individual basis. As for strict products liability, its swift acceptance between 1965 and 1975 most likely reflects not general social and political movements, but rather the specific agreement among experts about its desirability that had emerged shortly beforehand.

138. Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. L. STUD. 807 (1994).

> began. Judges cannot simply announce a new rule. They must provide reasons, and the production of acceptable reasoning takes time.[139]

Rubin and Bailey identified the main driver of this breakthrough: the American Trial Lawyers Association (ATLA), founded in 1946.[140] In 1950, ATLA added products liability attorneys, and in the 1960s it established a huge Exchange for such practitioners which enabled them to pool information about recent cases, litigation strategy, expert witnesses, and the like.[141] Rubin and Bailey contended that these well-organized lawyers had strong incentives to bring products liability suits, which often resulted in large damages (and hence contingency fees) and also created uncertainty that bred even more lawsuits.[142] Moreover, counsel for corporate defendants were paid handsomely and thus stood to gain from burgeoning products liability litigation.[143] Not surprising, attorneys' income increased markedly in the mid-to-late 1960s.[144]

Building upon Rubin and Bailey, Kyle Graham has posited that, after World War II, an expanding cadre of personal injury lawyers capitalized on consumers' increased consciousness of their rights and provided the effective representation needed to transform products liability law.[145] Plaintiffs' attorneys organizations created information-sharing networks that facilitated such litigation.[146] These cases proved to be far more lucrative than other kinds of personal injury suits, but could also be rationalized as part of a noble cause of helping innocent victims.[147]

Professor Priest did not purport to study the role of lawyers in implementing strict products liability. Furthermore, he would hardly deny that

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139. *Id*. at 814.

140. *Id*. at 812, 814-15.

141. *Id.* at 812, 815-17.

142. *Id.* at 808, 817-23.

143. *Id*. at 808-09 (citing Richard A. Epstein, *The Political Economy of Product Liability Reform*, 78 AM. ECON. REV. 311, 313-14 (1988)).

144. *Id.* at 821-29.

145. *See* Graham, *supra* note 122, at 558, 593-600. Attorneys had a steady supply of motivated plaintiffs. As consumers gradually became more knowledgeable about their class interests and rights, they increasingly recognized that they would likely be able to recover damages for injuries caused by defective products. *Id*. at 558-59, 585-92, 623.

146. *Id.* at 593-99.

147. *Id.* at 559, 593-600. Graham presented two other original insights. First, *Escola* was merely the most famous of a huge number of cases in the 1940s through the 1960s involving bottles that had exploded, shattered, or chipped. These decisions supplied an especially clear practical argument favoring strict products liability over negligence and thereby provided a blueprint for extension to other products. *Id*. at 558-60, 601-12, 623-24.

Second, the adoption of a pure tort approach was not the inevitable result of the logical appeal of the James/Prosser position, as Priest suggested. *Id.* at 560, 584, 613-14, 621, 624. Indeed, five holdout states did not follow the post-1964 trend toward establishing strict liability for injury-causing products in tort, but rather expanded recovery by adjusting warranty doctrine. *Id.* at 560, 584, 614, 618-19. However, as Graham conceded, the unduly narrow protections of warranty in the 1950s and early 1960s made the tort alternative more attractive, and by the time these warranty rules were liberalized in the early 1970s, strict liability under Section 402A had become dominant. *Id.* at 614-22.

they respond to economic incentives and must bring cases before judges can expound the law, including new products liability rules. Rather, Priest's point was that attorneys in the 1960s did not invent strict liability arguments, but rather borrowed them from the academic literature. As he said: "Lawyers whose practices required them to swim in the mainstream, of course, were compelled to learn what enterprise liability was about."[148] Priest also emphasized that Fleming James's switch to a treatise format was especially useful to attorneys because it contained reams of supporting precedent and had become authoritative.[149]

I would add that neither Priest nor his critics directly considered two procedural innovations shortly after 1964 that made products liability law vastly more remunerative. First, the 1966 revisions to Federal Rule of Civil Procedure 23 created the modern class action. Second, in 1968, Congress authorized Multi-District Litigation (MDL) to consolidate similar cases pending in many federal district courts.[150] These two devices enabled a single law firm (or a small group of firms) to represent hundreds or thousands of plaintiffs in mass products liability actions, often with multi-billion dollar judgments or settlements.[151]

Overall, scholarship on lawyers' contribution to the adoption of strict products liability after 1964, as well as my insight about novel mass tort litigation, actually complement Priest's thesis. Legal practitioners simply repackaged, and profited from, the ideas that had been painstakingly developed by James and other top scholars.[152]

C. The Influence of James, Kessler, and Prosser

David Owen, Gary Schwartz, and James Hackney have argued that Professor Priest's focus on James, Kessler, and Prosser understated the contributions of other legal thinkers.[153] In a similar vein, Carl Bogus has

148. Priest, supra note 1, at 511.

149. *Id*. at 462, 483, 501.

150. 28 U.S.C. § 1407 (2022).

151. *See* Robert J. Pushaw, Jr. & Charles Silver, *The Unconstitutional Assertion of Inherent Powers in Multidistrict Litigations*, 48 BYU L. REV. 1869, 1898-99 (2023); *see also* G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 330-31 (expanded edition 2003) (maintaining that the emergence of strict products liability in the 1960s and 1970s has been a key factor in the huge growth of mass tort suits); Victor Schwartz & Cary Silverman, *The Case in Favor of Civil Justice Reform*, 65 EMORY L.J. ONLINE 2065, 2066-68 (2016) (approving Priest's thesis that Section 402A's framers intended to limit strict liability to manufacturing defects and arguing that its extension to other defects, combined with the rise of mass tort litigation, resulted in unjustifiably high damages awards).

152. *See* Witt, *supra* note 10, at 3 (rejecting the notion that the plaintiffs' bar or earlier Progressive era reforms were primarily responsible for the development of the enterprise liability theory that undergirded strict products liability).

153. *See* Schwartz, *Beginning*, *supra* note 117, at 634-38; Owen, *supra* note 122, at 530-31. In his treatise, however, Owen repeatedly cited Priest's work favorably for the proposition that products liability law in contracts and torts evolved gradually during the first part of the twentieth century, then exploded in the early 1960s as enterprise liability theory—risk distribution, cost

contended that the true fathers of products liability were Cardozo, Traynor, and Prosser, whereas Priest's elevation of James and Kessler was "idiosyncratic."[154] Likewise, Robert Rabin has asserted that "Priest's focus on James and Kessler . . . seems unduly narrow."[155]

However, Priest repeatedly acknowledged that his "Big Three" relied upon the pioneering studies of many other legal giants—not just

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internalization, and protecting consumers—became widely accepted. *See* DAVID G. OWEN & MARY J. DAVIS, PRODUCTS LIABILITY §§ 5.2, 5.6, 5.9, 5.10, 5.11, 5.12 (4th ed. rev. 2024).

Professor Hackney has agreed with Priest that James and Prosser had the most immediate impact on the implementation of strict products liability in the 1960s. James R. Hackney, *The Intellectual Origins of American Strict Products Liability*, 39 AM. J. L. HIST. 443, 444, 489 (1995). However, Hackney traced their ideas to the "pragmatic instrumentalism" developed in the late nineteenth and early twentieth century by legal pragmatists like Holmes; institutional economists such as Thorstein Veblen; and Legal Realists like Leon Green (who maintained that tort liability should focus on defendants for the probable consequences of their action instead of on the intricacies of causation), Karl Llewellyn (who highlighted the disparity of bargaining power in modern contracts and also stressed risk distribution and social insurance); and Benjamin Cardozo (whose seminal *MacPherson* opinion acknowledged the relevance of social justice in tort law). *See id*. at 444-504; *see also* Anita Bernstein, *A Model of Products Liability Reform*, 27 VAL. L. REV. 638, 638, 641-42, 648-50, 653-58, 673-74 (1993) (largely accepting Priest's theme that James, Prosser, and Kessler were the main drivers of strict products liability, but contending that such liability owed much to the Legal Realists and to Traynor for concretely translating this idea into judicial doctrines).

This Essay responds to critics of Priest's 1985 and 1989 articles, but I should note that there are several excellent pre-1985 works. Most notably, Professor White concluded that Legal Realists such as Leon Green and Fleming James spearheaded the shift in tort law from negligence to compensating accident victims and fairly distributing risks and costs, which in the 1960s resulted in the rapid doctrinal movement toward strict products liability led by Prosser and Traynor. *See* G. EDWARD WHITE, TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY 63-113, 139-79, 198-202 (1980).

154. *See* Bogus, *supra* note 123, at 19-20; *see also* Owen, *supra* note 122, at 530-31 (downplaying the influence of Kessler and James). Professor Bogus did amplify Priest's insights about Section 402A's ambiguous language by arguing that the imposition of strict liability for products in a "defective condition unreasonably dangerous" has led to two different analytical models. Bogus, *supra* note 123, at 2-17. First, some judges and commentators have focused on "defective condition": whether the product has a flaw that the buyer did not contract for, so that the risk of injury caused by the defect should fall on the manufacturer or seller who can better distribute the losses. *Id.* at 8-16, 34, 49. Second, other legal thinkers have emphasized the phrase "unreasonably dangerous," which allows them to consider not just the individual consumer but also broader social and public policy concerns (especially for safety) through a risk-utility balancing test, and hence stresses the goals of deterrence and cost internalization. *Id.* at 10-11, 14-17, 26, 34, 49. During the 1980s, that second paradigm, which had been ascendant since the mid-1960s and had greatly increased costs, came under attack by both businesses and conservative "law and economics" scholars, including Priest. *Id.* at 2, 5-8, 12-13, 17-30.

155. *See* Robert L. Rabin, *Some Thoughts on the Ideology of Enterprise Liability*, 55 MD. L. REV. 1190, 1192 (1996); *see also id*. at 1190-98, 1204-09 (contending that courts and scholars (1) recognized strict liability for well over a century before they connected it to enterprise liability ideology during the 1960s in the context of defective products, and (2) thereafter have been attempting to work out the tension between the risk-spreading and safety-enhancement strands of that ideology).

Cardozo[156] and Traynor[157] but also Karl Llewellyn,[158] Francis Bohlen,[159] Albert Ehrenzweig,[160] William Douglas,[161] Lester Feezer,[162] Clarence Morris,[163] and Leon Green.[164] For example, Priest recognized that "James's influence . . . cannot be attributed to the novelty or persuasiveness of his theories. James's work built on propositions well established . . . . Instead, James's influence . . . derived from his radical single-mindedness [on risk distribution]."[165] Similarly, Priest noted that Prosser's impact derived not from his originality, but from his gift for synthesizing and popularizing the ideas of others.[166]

Having independently read the relevant literature, I conclude that Llewellyn and Green were especially important in developing the idea of strict products liability and that Traynor had the greatest practical influence on its judicial adoption. Nonetheless, I agree with Priest that James, Kessler, and Prosser deserve the most credit for generating the academic consensus in the late 1950s about the wisdom of enterprise liability. That intellectual background paved the way for courts to implement strict products liability starting in the mid-1960s.

156. Priest, *supra* note 1, at 468-69 (analyzing Cardozo's landmark *MacPherson* opinion).

157. *Id*. at 469, 483, 498-99, 505-07, 510-12, 521 (describing Traynor's groundbreaking opinions in *Escola* and *Greenman* and his academic publications).

158. *Id.* at 463 n.4, 490, 495, 497 (crediting Llewellyn's pioneering work starting in the 1930s recommending the extension of contract liability to manufacturers of injury-causing products).

159. Priest extensively explained Bohlen's "benefit theory"—that tort duties should be imposed only on those who benefit from the actions that place the victim at risk. *See id.* at 463 n.4, 466-69, 481 n.128, 482 nn.134 & 137.

160. *See id.* at 463 n.10, 499, 511 n.324 (referencing Ehrenzweig's publications on negligence without fault).

161. *See id.* at 473-74, 478 (praising Douglas's scholarship focusing on parties' relative risk-bearing capacities).

162. *See id.* at 463 n.6, 467 n.28, 472 n.65, 480 n.122, 481 n.128, 482 (citing Feezer's articles on manufacturers' tort liability for defective products).

163. *See id.* at 467 n.28, 480 nn.120 & 125, 481 n.128, 499, 512 (discussing Morris's efforts to extend negligence liability to all products that caused personal injury).

164. *See id*. at 480 n.125, 481 n.128, 499 -500, 503, 519 n.365 (noting Green's original treatment of risk distribution, cost internalization, and problems with the fault system); *but see* Edmund Ursin, *The Missing Normative Dimension in Brian Leiter's Reconstructed Legal Realism*, 49 SAN DIEGO L. REV. 1, 10 (2012) (claiming that Priest failed to recognize Green's seminal contribution to the broader development of enterprise liability because Priest narrowly focused on strict products liability and resulting damages awards). David Owen has argued that Priest ignored a longstanding principle of contract and tort law that was a major precursor of enterprise liability: that sellers are liable for misrepresentations of product quality and safety that frustrate consumers' expectations and harm them. Owen, *supra* note 122, at 531-33. Although Priest did not discuss the misrepresentation angle specifically, he did highlight the work of other scholars (like Kessler) who advocated protecting weak consumers from unfair sales contracts, including those in which a manufacturer attempted to disclaim warranties and liability for product-related injuries. Priest, *supra* note 1, at 486-96.

165. *See* Priest, *supra* note 1, at 470.

166. *See supra* notes 39-42 and accompanying text.

D. Section 402A's Applicability to Non-Manufacturing Defects

Professor Priest surmised that Section 402A's founders understood that strict liability would apply principally to manufacturing defects, whereas design and warning defects would continue to be governed by negligence doctrines.[167] James Henderson and Aaron Twerski concurred with Priest's historical analysis,[168] and as the Reporters for the Restatement (Third) of Torts helped to enshrine that position in 1998.[169]

Nevertheless, several scholars have denied that Section 402A's drafters shared this restrictive view. Most notably, Michael Green has maintained that the founders sought to establish strict liability for products that performed in an excessively dangerous manner, regardless of the source of the defect that created the danger (manufacturing, design, or warning).[170] Gregory Keating and Kenneth Abraham have echoed this claim,[171] but only Green has reevaluated all of Priest's supporting evidence.[172]

Textually, Green construed Section 402A's reference to "defective products unreasonably dangerous" as stressing the nature of the danger, not the kind of defect.[173] The most natural reading of that language, however, is that a product must be both "defective" in some way and "unreasonably dangerous."

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167. *See* Priest, *supra* note 3, at 2302-04, 2307-27, discussed *supra* notes 75-115 and accompanying text.

168. *See* James A. Henderson, Jr. & Aaron Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867, 879-81, 895 (1998) (relying on Priest's argument that Section 402A's drafters did not address strict liability for design or warning defects—and that they surely did not endorse a hopelessly vague "consumer expectation" test for such defects).

169. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY §§ 1-2 (1998).

170. *See* Michael D. Green, *The Unappreciated Congruity of the Second and Third Torts Restatements on Design Defects*, 74 BROOK. L. REV. 807, 808-15, 823-29, 832, 835-37 (2009).

171. *See* Keating, *supra* note 118, at 52 n.24 (deeming Priest's view that Section 402A was limited to manufacturing defects an "overstatement" because this provision reflected a broader concept: that liability should lie whenever "product failure causes physical harm"). Professor Abraham cited both of Priest's articles, recognized him as the foremost scholar of Section 402A history, and conceded that Prosser (as Reporter) focused mainly on manufacturing defects. *See* Kenneth S. Abraham, *Prosser's Fall of the Citadel*, 100 MINN. L. REV. 1823, 1830-43 (2016). Nonetheless, Abraham asserted that Prosser (1) approved the extension of Section 402A to defective product design and warnings, and (2) expected 402A to be a major reform, not a minor technical adjustment to tort and contract law. *See id*. at 1833, 1840-44.

On the first point, Professor Abraham relied upon Prosser's revised treatise in 1971, whereas his pre-1964 editions did not discuss design and warning defects. Abraham speculated that this omission may have reflected Prosser's overriding interest in holding manufacturers strictly liable for injuries resulting from shoddy products, regardless of what defect caused the injury. *Id.* at 1824-25, 1832-44. But Abraham adduced no specific evidence that Prosser in 1964 anticipated the expansion of strict products liability to encompass design and warning defects. On the second point, Section 402A did usher in a revolution, but Priest has persuasively demonstrated that its founders did not intend to do so.

172. Green acknowledged that Priest's thesis has commanded "widespread contemporary acceptance." Green, *supra* note 170, at 809.

173. *Id.* at 812, 827-29.

Turning to the Comments, Green observed that they did not exclude design or warning defects.[174] He then seized on the few Comments that Priest had admitted were ambiguous and might be read as extending to such defects.[175] Most pertinently, Comment j provided that "to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning." Green saw Comment j as imposing a general duty to warn,[176] whereas Priest submitted that it was limited to those products that were "unavoidably unsafe" (as all the illustrative cases demonstrated).[177] Green has the better interpretation of the plain meaning of Comment j's words, but Priest has the more persuasive argument when that language is considered in its larger context.[178] The other relevant Comments have generated a similar debate between Green and Priest.[179]

Looking at the Comments as a whole, however, Professor Priest correctly emphasized that they contained 54 examples of cases in which Section 402A strict liability would apply, and all but three dealt with manufacturing defects (usually food or intimate bodily products).[180] Green explained this imbalance as reflecting that most precedent before 1964

174. *Id.* at 829.

175. *Id.* at 827-32 (citing Priest, *supra* note 3, at 2317-24).

176. *Id.* at 829-30.

177. *See* Priest, *supra* note 3, at 2303, 2307-19, discussed *supra* notes 94-95, 101-102 and accompanying text; *but see* Green, *supra* note 170, at 829 (contending that if Section 402A were limited to manufacturing defects, Comments j and k would have been unnecessary because they focus on unavoidably unsafe products, which do not result from manufacturing flaws).

178. A prominent torts scholar has agreed with Priest that Comment j, as originally understood, narrowly required only sellers of inherently dangerous products like liquor to warn about their unavoidable dangers, but has further claimed that manufacturers of all other products could not evade their duty of safe design merely by providing a warning. *See* David G. Owen, *The Puzzle of Comment j*, 55 HASTINGS L.J. 1377, 1380-98 (2004).

179. For instance, Comment n states that contributory negligence is not a defense when it is "merely a failure to discover the defect in a product," but that "assumption of risk" can be a defense. This language could be read as eliminating a seller's contributory negligence defense if the consumer failed to detect any kind of defect. Green, *supra* note 170, at 831. But Comment n most plausibly applies to manufacturing defects. Consumers could not be negligent simply because they did not discover that the product they were using was defective (as they ordinarily cannot perceive manufacturing flaws), but a consumer assumes the risk of injury if he knows a product is dangerous and uses it anyway. Priest, *supra* note 3, at 2303, 2323, analyzed *supra* note 96 and accompanying text. Put differently, it is possible (albeit unusual) for a consumer to discern a manufacturing defect, but virtually impossible for a lay person to discover a design defect. Moreover, "a failure to discover a defect in a product" cannot plausibly refer to warnings, as they are not a defect within the product itself.

Comment h provides that a product "is not in defective condition when safe for normal handling and consumption . . . [but that such a condition] may arise not only from harmful ingredients, not characteristic of the product itself, either as to presence or quantity, but also from foreign objects contained in the product, for decay and decomposition before sale, or from the way the product is prepared or packed." Priest argued that Comment h clearly concerned manufacturing defects in items such as food. *See* Priest, *supra* note 3, at 2318, discussed *supra* notes 99-100 and accompanying text. Green did not effectively respond to this point. Green, *supra* note 170, at 827, 830. Moreover, he barely mentioned Comment i (*id.* at 829 n.113) and did not discuss Comment g, thereby implicitly accepting Priest's interpretation of them as referencing manufacturing defects.

180. *See* Priest, supra note 3, at 2317-22, described *supra* notes 88-92 and accompanying text.

concerned such defects, not that the drafters intended to exclude defective designs or warnings (which three of the cases involved).[181] Yet Priest's evidence that 95% of the case illustrations concerned manufacturing defects strongly substantiated his conclusion that the Section 402A's drafters were "chiefly" concerned with such defects.[182] However, the three other cited cases involving design and warning defects indicate that the founders were aware that strict liability might be extended to these defects.[183]

Ultimately, it is impossible to determine definitively whether Section 402A's founders intended for strict liability to apply beyond manufacturing defects.[184] Neither the text nor the Comments expressly resolved this issue. This silence can plausibly be interpreted in opposite ways, either as not authorizing the extension to design and warning defects or as not

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181. *See* Green, *supra* note 170, at 814-16, 827.

182. *See* Priest, *supra* note 3, at 2321, discussed *supra* notes 88-90 and accompanying text.

183. Green asserted that the scholars who drafted Section 402A had recognized strict liability for non-manufacturing product defects in their pre-1964 published work. Green, *supra* note 170, at 814-26. However, the Reporter, William Prosser, focused squarely on manufacturing defects. *See* Priest, *supra* note 3, at 2307-09, 2321-22. In fact, Prosser did not say that such liability extended to design and warning defects until the fourth revision of his treatise in 1971. *See supra* note 171.

Also unpersuasive is Green's citation of Dix Noel, *Manufacturers' Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816 (1962). *See* Green, *supra* note 170, at 814, 817-18. As the title indicates, Noel recommended recovery in negligence rather than strict liability, and his later approval of design and warning defects does not reveal his thinking in 1964. *See* Priest, *supra* note 3, at 2307, 2311-12. Green also cited articles by Page Keeton and John Wade as suggesting the extension of strict liability beyond manufacturing defects. Green, *supra* note 170, at 816-17, 820-23. Again, however, their brief treatment of such non-manufacturing defects before 1964 focused on negligence. *See* Priest, *supra* note 3, at 2307, 2309-14, 2325-26.

Furthermore, Priest noted that Justice Traynor's seminal opinions in *Escola* and *Greenman* involved manufacturing defects (a faulty bottle and lathe). *See* Priest, *supra* note 3, at 2314-15. Green claimed that Traynor would have wanted to extend strict liability to design defects. Green, *supra* note 170, at 819-20, 825-26. That may be true, but Traynor did not think Section 402A did so.

Likewise, the Restatement Advisor Fleming James favored imposing virtually absolute liability on enterprises for all accidents (including those caused by products) on the ground that businesses could best absorb the risks and spread the losses. *See* Green, *supra* note 170, at 818-20; *see also supra* Part I.B.1 (summarizing James's position). Nonetheless, James acknowledged that Section 402A did not incorporate his extreme risk-distribution position. *See supra* notes 83-84 and accompanying text.

184. A possible objection to Priest's thesis is that the broad understanding of Section 402A's implementers (particularly judges), not the narrow intent of its founders, should be legally controlling. However, interpretation of most legal documents (e.g., contracts, wills, and statutes) consists of discerning the likeliest intent of their author. *See* Robert J. Pushaw. Jr., *Comparing Literary and Biblical Hermeneutics to Constitutional and Statutory Interpretation*, 47 PEPP. L. REV. 1, 4, 11-12, 25-26 (2019). An exception is the Constitution, which might be read according to (1) its original "meaning"—the sense of its words held by ordinary people; (2) the "intent" the framers had in including a provision; or (3) the understanding of the Constitution's ratifiers and early implementers. *See, e.g.,* Robert J. Pushaw, Jr., *The Original "Market" Understanding of the Commerce Clause: Insights from Early Federal Government Practice and Precedent*, 48 BYU L. REV. 535, 536-71 (2022); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 396-97 (1996). Here my limited focus is on whether Priest correctly determined the *intent* of Section 402A's founders.

prohibiting this expansion. The reality seems to be that the founders did not give much thought to different possible types of product defects.[185]

Finally, I should note that Green agreed with Priest on two crucial points about Section 402A's drafters. First, they mainly sought to eliminate technical tort and contract impediments to recovery for plaintiffs injured by products.[186] Second, they did not anticipate the legal analysis that courts later employed in design and warning defect cases (such as the "consumer expectation" test) and the attendant explosion of strict liability litigation.[187] I will briefly discuss why this novel legal regime emerged and whether it reflects sound economic and social policy.

E. The Impact of Enterprise Liability After 1964

Professor Priest ended both of his articles with the claim that enterprise liability theory, based on protecting consumers against manufacturers who had far greater economic power and superior ability to bear risks and internalize costs, influenced later developments not only in products liability but in tort law generally.[188] I will flag these issues but not fully enter this debate, which is peripheral to pre-1965 history. Priest's thesis—that Section 402A's founders were primarily concerned with manufacturing defects[189]—has two pertinent ramifications for subsequent tort law.

First, the drafters did not mean to establish unlimited strict liability; rather, judges would continue to evaluate defenses such as assumption of risk and contributory negligence.[190] Most courts, however, read Section 402A to eliminate such defenses.[191] Priest argued that this interpretation, although contrary to the original understanding, made sense under enterprise liability theory: Large corporations should absorb the risks and costs of their products that injure poor and weak consumers.[192]

185. *See* Richard L. Cupp, Jr. & Danielle Polage, *The Rhetoric of Strict Products Liability Versus Negligence: An Empirical Analysis*, 77 NYU L. REV. 874, 889-90 (2002).

186. *See* Green, *supra* note 170, at 815, 824, 826, 836.

187. *See id.* at 813, 832.

188. *See* Priest, *supra* note 1, at 463-64, 520-27, discussed *supra* notes 61-73 and accompanying text; Priest, *supra* note 3, at 2302-04, 2324-27, described *supra* notes 114-115 and accompanying text.

189. *See supra* Section II.A.

190. *See* Priest, *supra* note 1, at 525-26, analyzed *supra* note 70 and accompanying text; Priest, *supra* note 3, at 2303-04, 2307-08, 2311-15, 2318-24, examined *supra* notes 95-97, 167 and accompanying text.

191. *See* Priest, *supra* note 1, at 525-26, discussed *supra* notes 71-72, 103, 112-113, 187 and accompanying text.

192. *See id.* at 526-27. Relatedly, some courts extended strict liability to manufacturers for failure to protect against reasonably foreseeable risks from misuse of their products. *Id*. at 527 (citing cases). Such holdings make no sense under traditional tort rules (especially contributory negligence), but logically flow from enterprise liability theory.

Second, Priest contended that the founders did not foresee the later extension of strict liability to design defects (starting in the late 1960s)[193] or inadequate warnings (in the 1970s).[194] Again, however, enterprise liability theory justified this expansion.[195] In fact, Priest observed that this theory should logically result in absolute liability for defective products, but he recognized that courts were reluctant to reach such an extreme conclusion.[196]

Gregory Keating has contested Priest's assertion that the enterprise liability theory undergirding modern product-injury law is boundless and thus ineluctably leads to absolute liability.[197] Rather, he maintained that enterprise liability focuses on the characteristic risks of an activity, which has led judges and scholars to try to delineate the zones of responsibility between the activities of those who design, manufacture, and market products versus those who buy and use such products.[198] Keating thought that this line was relatively easy to draw in the case of manufacturing defects because the company had made a flawed product that hurt a blameless user.[199] By contrast, defining responsibility for characteristic activity risks in the context of design and warning defects proved difficult because of the complexities of product design and marketing on the one hand and consumers' varying degrees of knowledge and risky conduct on the other.[200]

For present purposes, it is irrelevant if Keating is correct as to absolute liability, because he agreed that Priest's intellectual history was sound (i.e., Section 402A's founders accepted enterprise liability).[201] Nor does it matter if Priest is right that the logical implication of enterprise liability is absolute liability, for "the life of the law has not been logic; it has been experience."[202]

Indeed, several years before publishing his work on strict liability history, Professor Priest himself had concluded that the presuppositions of

193. Priest, *supra* note 1, at 521-23, discussed *supra* notes 65-66 and accompanying text; Priest, *supra* note 3, at 2304-07, 2313-14, 2324-26, described *supra* notes 3, 76, 90-92, 100, 103-111, 114 and accompanying text.

194. Priest, *supra* note 1, at 523-25, analyzed *supra* notes 67-69 and accompanying text; Priest, *supra* note 3, at 2324-27, examined *supra* notes 3, 76, 90-92, 102-103, 112-114 and accompanying text.

195. Priest, *supra* note 1, at 523-25, discussed *supra* notes 61-69 and accompanying text; Priest, *supra* note 3, at 2326-27, considered *supra* notes 3, 76, 114 and accompanying text.

196. Priest, *supra* note 1, at 527, discussed *supra* notes 72-73, 115 and accompanying text

197. Keating, *supra* note 118, at 42-50, 55, 77, 94-97.

198. *Id*. at 43.

199. *Id*. at 43, 49-52, 56-75, 78-94.

200. *Id*. at 43, 49-52, 56-75, 78-94.

201. *See id*. at 42-43; *see also* Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266, 1266-78, 1359-77 (1997) (recognizing that Priest's scholarship on the rise of enterprise liability theory to justify strict products liability in the 1960s has profoundly influenced later academic and judicial analysis, but asserting that his focus on economic factors ignored the critical fairness rationale for enterprise liability).

202. OLIVER WENDELL HOLMES, THE COMMON LAW 1 (1881).

enterprise liability lacked an empirical basis.[203] He showed that (1) manufacturers had market incentives to make safe, high-quality products for a reasonable price and did not exploit their bargaining power by limiting their contractual duties; (2) consumers were not necessarily powerless folks who underestimated product risks—and hence did not need either warranties to signal the mechanical reliability of goods or legal protections against supposedly unfair contract provisions; and (3) strict liability, by requiring manufacturers alone to increase safety investments and provide insurance, was an inefficient way to distribute risks.[204]

Rather, Priest argued that individual product warranties created the optimal system for supplying goods by allocating responsibility between a manufacturer and consumer for investments that would prolong a product's useful life and insure against losses (including personal injuries), with the specific contract terms determined by the relative investment costs to each party.[205] Thus, he recommended that manufacturers and consumers be free to avoid strict liability by agreeing to provisions (including disclaimers of warranties and exclusions of coverage) that would meet the customer's preference to get a lower price by accepting responsibility for certain product care, safety, and insurance costs.[206]

Professor Priest's scholarship was part of a larger movement among law and economics scholars beginning in the early 1980s that challenged the mushrooming strict products liability regime that had emerged since the mid-1960s. Most notably, Professors Polinsky and Shavell have demonstrated that the three asserted benefits of products liability—promoting safety, compensating the injured, and increasing prices to signal product risks to consumers—are overstated[207] and, in any event, are outweighed by

203. *See* George L. Priest, *A Theory of the Consumer Product Warranty*, 90 YALE L.J. 1297, 1298 (1981).

204. *See id.* at 1297-1353.

205. *See id.* at 1298, 1307-19; *see also id*. at 1319-47 (demonstrating the superior explanatory power of this "investment theory" by examining a representative sample of 63 product warranties).

206. *See id*. at 1298-99, 1319-51. Priest provocatively declared that modern warranty law, contrary to its stated purposes, had increased the rate of losses from defective products (including for personal injuries). *Id.* at 1299, 1347-51. The optimal product liability standard would place responsibility on the party who could have taken a particular cost-effective action to prevent the injury. *See id.* at 1315-16, 1328-35, 1343-46.

207. *See* Polinsky & Shavell, *supra* note 116, at 1440-76. First, market forces, regulations, and readily available information about product safety all induce firms to provide safe products (especially those that are widely sold, like automobiles and drugs), thereby greatly reducing any incremental benefit from products liability litigation. *Id.* at 1440-41, 1443-59. Second, any price-signaling benefit is offset by price distortions, as all buyers must pay more for products and some will forego purchases altogether. *Id.* at 1441, 1459-62. Third, litigation overcompensates victims because they (1) usually have insurance and (2) recover for non-monetary losses such as pain and suffering. *Id.* at 1441, 1462-69.

the massive costs of legal expenses and the higher prices all buyers must pay.[208]

The post-1964 legal framework gave consumers and attorneys huge incentives to litigate products liability claims, however strained, in the hopes of getting a big payday in a jury verdict or a settlement.[209] Relatedly, manufacturers, distributors, and sellers—and ultimately responsible buyers—bore the burden of the carelessness of many product consumers and users. These economically wasteful practices raised prices for everyone and sometimes led companies to simply stop marketing certain products—all to the detriment of the poor consumers that strict liability originally was supposed to help.[210]

The takeaway here is that Priest did not believe that absolute liability was a wise policy, but rather that products liability had proceeded in this direction. Indeed, he asserted that courts have relied on enterprise liability to shift the basis of all tort law from the modest goal of correcting morally negligent conduct to the ambitious project of regulating safety and compensating accident victims generally.[211] His best example of this movement was the ever-increasing liability of institutional and professional defendants like medical care facilities and doctors, who are almost always better equipped than consumers to prevent injuries and insure against them.[212]

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208. *See id.* at 1441, 1469-72 (making this point, and adding that legal expenses are typically about as much as the compensation paid to plaintiffs). They concluded that most judges and scholars praise the benefits of products liability but ignore its costs. *Id.* at 1476-90.

209. *See, e.g.*, Hylton, *supra* note 56, at 2458-59 (noting that the huge expense of litigation in relatively few cases is passed on to all consumers). Since the 1960s, average personal injury damages have tripled in inflation-adjusted dollars. *See* Schwartz, *Beginning*, *supra* note 117, at 689-90, 692, 701.

210. *See* George L. Priest, *Can Absolute Manufacturer Liability Be Defended?*, 9 YALE J. ON REGUL. 237 (1992) (arguing that the boom in strict liability forced manufacturers to provide not only goods and services but also third-party insurance and thereby inefficiently increased prices, which resulted in the withdrawal of several products (like aircraft), a dramatic increase in insurance costs, and an overall reduction in social welfare).

211. *See* Priest, *supra* note 3, at 2302-04, 2324-27, discussed *supra* notes 76, 114-115, 188 and accompanying text. For an earlier influential work positing that strict liability was overtaking fault-based analysis, see Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Tort*, 81 YALE L.J. 1055 (1972). In that piece and other publications, Professor Calabresi maintained that tort law should prioritize efficient accident deterrence by identifying the "cheapest cost avoider": which party was in the best position "to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made." *Id*. at 1060; *see also id*. at 1061-68 (applying that test to products liability). Defendants typically, but not always, were better equipped to (1) provide safety measures that would prevent accidents (or at least lower their risk), and (2) spread losses if accidents happened. *See, e.g.*, GUIDO CALABRESI, THE COSTS OF ACCIDENTS (1970); *see also* Guido Calabresi, *The Decision for Accidents: An Approach to Nonfault Allocation of Costs*, 78 HARV. L. REV. 713 (1965) (advocating modified nonfault enterprise liability to achieve general deterrence by apportioning accident costs to activities according to their involvement in accidents and specifically recommending that a product's market price reflect its total costs—including accident expenses).

212. *See* Priest, *supra* note 3, at 2327; *see also* George L. Priest, *Modern Tort Law and Its Reform*, 22 VAL. L. REV. 1 (1987); George L. Priest, *The New Legal Structure of Risk Control*, 119 DAEDALUS 207 (1990).

Priest's argument rested on practical results, not a claim that courts have explicitly changed the law to adopt absolute liability.[213]

Again, Gary Schwartz became Priest's leading opponent. He contended that tort law liability rapidly expanded between 1964 and the early 1980s because of the creative application of negligence principles, which were flexible enough to permit judges to reasonably balance fairness, deterrence, and loss-spreading goals.[214] Schwartz presented considerable evidence that, after about 1983, courts generally preserved the tort innovations of the prior two decades but declined to make further radical changes, in part because of judges' growing recognition of the high economic and social costs of imposing liability on manufacturers too liberally.[215] Schwartz did, however, agree with Priest that absolute liability would be bad tort policy.[216]

I have not studied the relevant post-1983 precedent and therefore do not take sides in the Priest-Schwartz debate over the direction of tort law generally. Rather, I simply note that I share Priest's and Schwartz's low opinion of absolute liability.

Conclusion

Scholars of strict products liability have treated George Priest's intellectual history as authoritative. Indeed, the overwhelming majority have simply cited his articles approvingly. Other commentators have exhaustively critiqued Professor Priest's work, but have not refuted his two main themes. First, the rapid approval of strict products liability starting in the mid-1960s reflected the enterprise liability theory that had been carefully developed over the prior three decades, primarily by Professors James, Kessler, and Prosser. Second, Section 402A's founders simply sought to streamline recovery for manufacturing defects and did not anticipate the later elephantine expansion of strict liability to include design and warning defects.

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213. *See, e.g.*, George L. Priest, *The Modern Expansion of Tort Liability: Its Sources, Its Effects, and Its Reform*, 5 J. ECON. PERSP. 31, 38-41 (1991). Two scholars have contended that James and other early proponents of enterprise liability in all areas of tort law (not just products liability) sought efficient prevention of injuries and adequate compensation for accident victims in a cost-effective manner—for example, through no-fault legislative compensation plans and damages reform such as eliminating unlimited pain-and-suffering awards. *See* Virginia E. Nolan & Edmund Ursin, *Enterprise Liability and the Economic Analysis of Tort Law,* 57 OH. ST. L.J. 835, 835-43 (1996). They claimed that modern law and economics scholars (including Priest) have misunderstood James and others as radically advocating absolute accident liability against firms based on risk distribution and then have relied upon this misunderstanding of enterprise liability to attack strict liability as economically inefficient. *Id*. at 836, 844-61. Yet Priest recognized that enterprise liability theory had many components, not merely risk distribution. *See supra* notes 1-2, 13, 39, 60-62, 69-73, 114-115, 188, 192, 195-196 and accompanying text. Furthermore, the combination of those parts does logically culminate in something approaching absolute liability.

214. Schwartz, *Beginning*, *supra* note 117, at 601-02, 605-08, 625-34, 638-47.

215. *Id.* at 603-04, 647-702.

216. *Id*. at 621 n.89.