

## **ABSTRACT**

Title of Dissertation: **THE TORT REVOLUTION: PRODUCT LIABILITY AND THE RULE OF COURTS**

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This dissertation is a history of the changes in tort law, specifically in products liability law, from the fault-based negligence standard to the no-fault strict liability standard. It covers a period from the late nineteenth century through the end of the twentieth century. The historical questions this dissertation seeks to answer are i) what caused the change from negligence to strict liability, ii) who were the historical actors responsible for this change, iii) what was the political character of this change, and iv) what were the political consequences of this change.

This dissertation reveals that the revolutionary expansion in product liability law in the states in the 1960s was the product of the Progressive ideologies of state court judges. During the Progressive Era, American legal education responded and adapted to the political climate of the wider society by adopting a new philosophical disposition regarding how the courts should address civil wrongs. The political and ideological responses to the industrialization of the late nineteenth century and early twentieth century resulted in legal academics and practitioners advocating new ideologically oriented theories about how law does and should affect citizens. These theories, known

as sociological jurisprudence and legal realism, became popular in American law schools. The law students of the 1920s became the judges and legal academics of the 1950s and 1960s. In the latter decades, Progressive state court judges instituted dramatic, revolutionary changes in the area of law known as torts, particularly products liability law. Products liability law was changed from a fault-based system to an insurance or no-fault system. These politically motivated changes in the courts had the unintended consequence of making a theretofore non-political issue into an inherently political issue, subjecting tort law to the pluralism of the American political system at the state and federal levels. Accordingly, this dissertation contributes to our understanding of the process of legal change, and explores the methods by which social and political changes filter into court decisions.

**The Tort Revolution: Product Liability and the Rule of Courts**

by

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To Linda, Owen, and my mother, Nancy Drake

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## **LIST OF ABBREVIATIONS**

ABA: American Bar Association

ALI: American Law Institute

ATLA: Association of Trial Lawyers of America

CAB: Civilian Aeronautics Board

COA: Court of Appeals (federal)

CPSC: Consumer Products Safety Commission

FDA: Food and Drug Administration

FTC: Federal Trade Commission

GAO: General Accounting Office

GE: General Electric

GM: General Motors

ICC: Interstate Commerce Commission

ISO: Insurance Services Office

MAAC: Multi-Association Action Committee

MAP: Marketing assistance program

MAPI: Machinery Allied Products Institute

NAACP: National Association for the Advancement of Colored People

NAW: National Association of Wholesaler-Distributors

NFIB: National Federation of Independent Business

UCC: Uniform Commercial Code

UPLA: Uniform Model Products Liability Act

USAOC: Administrative Office of the United States Courts

**Chapter 1: Introduction – A Short History of Tort Law through the Early Twentieth Century**

On a Tuesday morning in August 1888, a Mr. Heizer was assisting Ira Ellis, a farmer on the rural prairie lands of Audrain County, Missouri, in the use of a new threshing machine. The machine had worked without incident the previous Saturday and Monday, but on Tuesday morning, when Heizer began feeding grain into it, the cylinder disintegrated and a part struck Heizer in the head. He later died of his injury. The thresher had been made by the Kingsland & Douglass Manufacturing Company, a Missouri corporation, and sold to the farmer, Mr. Ellis. Mr. Heizer's widow, representing her husband's estate, brought suit against the manufacturer.

The Missouri Supreme Court, pursuant to the prevailing common law rules of the time, held that the manufacturer was not liable to Heizer's estate because there was no contractual relationship between Kingsland & Douglass and Mr. Heizer. The manufacturer could only be liable to a third party (someone not a party to the contract between it and farmer Ellis) if the thresher were considered "necessarily and inherently dangerous to human life." The court distinguished the thresher from the special case of a poisonous drug, which would have carried liability regardless of a contractual relationship between the maker and user. The thresher, said the court, "speaks for itself ... [and was analogous to] a handsaw or the many other implements and machines in daily use." The thresher was simply "entirely different" from a poisonous drug.<sup>1</sup>

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<sup>1</sup> *Heizer v. Kingsland & Douglass Mfg. Co.*, 110 Mo. 605; 19 S.W. 630 (1892).

This outcome was predictable in 1892. Under the law of all states in the United States, the maker of a defective good was liable only to those with whom he had a contract of sale.<sup>2</sup> A century later, in 1992, the outcome probably would have been very different.<sup>3</sup> At the end of the twentieth century the existence of a contract would have been irrelevant to the machine maker's liability. In all likelihood, the machine's manufacturer would never have been sued because its liability insurance company would have negotiated a settlement with the estate. A pre-suit settlement would have been advisable because the law at the end of the twentieth century in much of the United States applied a standard called strict liability. Strict liability is mandatory liability, which exists without regard to one's fault or whether a contract exists between the maker and user of a product. The dramatic difference in results under nineteenth-century law versus twentieth-century law is the consequence of a revolution in legal liability – the Tort Revolution. This revolution is the subject of this dissertation.

Tort law became one of the most important areas of law in American life over the course of the twentieth century. Ever since the Industrial Revolution of the nineteenth century helped stimulate the state courts to develop aspects of tort law, the field of torts has become one of the most salient areas of law in American history. Tort law is more

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<sup>2</sup> The only caveat to this rule was the concept of inherent dangerousness. As will be discussed below, drugs, blasting activities, etc., were goods or activities considered inherently dangerous. In such cases, most states allowed for a third party – one without a contract with the manufacturer – to sue under a theory of absolute, or strict, liability. The concept of strict liability will be discussed in detail below.

<sup>3</sup> Missouri adopted strict tort liability in 1969. *Keener v. Dayton Elec. Mfg. Co.*, 445 S.W. 2d 362, 365 (Mo. 1969). Missouri, like other states that recognized strict liability in tort, also allowed for the defense of assumption of the risk, which under Missouri law meant the plaintiff “voluntarily and unreasonably encounter[ed] a known danger.” It is unknown whether Mr. Heizer would have been considered to have assumed the risk of the thresher causing him injury.

than a body of doctrines developed by courts through the processes of the common law. It is, as one of the last century's most respected and prolific scholars on torts, William L. Prosser, once described it, "a battleground of social theory."<sup>4</sup> That is, tort law has been a field of law in which different actors have sought to achieve their policy goals in order to shape the ways in which Americans conduct their lives.

This dissertation is concerned with the development of a particular area of tort law in the twentieth century: products liability. The term revolution is used because the changes in tort law signified a complete overthrow of the nineteenth-century negligence-based, moral fault-based tort regime, and its replacement by a compensatory, no-fault tort regime.<sup>5</sup> The thesis is rather straightforward: American tort law changed because a cadre of academics and judges determined to reform American law. This was a top-down revolution, led by legal professionals. That is, elites – rather than people without apparent political power – were the driving force behind the revolution. Once this change was effectuated in the states' courts, tort law was taken from the court-centered policy-making realm and injected into the pluralistic political realm. Thereafter, a battle ensued between legislatures at the state and federal level and state courts over which institutions would control policy formation in torts. These battles continue to this day and the response to the Tort Revolution has taken on a name: tort reform. The efforts to enact federal tort laws in the mid- to late-1970s were actually a bottom-up reaction to the

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<sup>4</sup> William L. Prosser, *Handbook on the Law of Torts*, 3d ed. (St. Paul, MN: West Publishing Co., 1964), p. 14. Prosser first used this phrase in a review of a torts textbook in 1935. Prosser, Book Review, *Minn. L. Rev.*, Vol. 19, No. 2 (Jan., 1935), p. 257.

<sup>5</sup> The famous plaintiffs' torts attorney, Melvin Belli, apparently was the first to use the term "tort revolution" to describe the change in tort law in the twentieth century. Belli, ed., *Trial and Tort Trends, 1964-65 Seminar*, p. 3 (quoted in Ben Field, *Activism in Pursuit of the Public Interest: The Jurisprudence of Chief Justice Roger J. Traynor* (Berkeley: Berkeley Public Policy Press, 2003), p. 103).

common law activism that was the Tort Revolution. The term activism is apt because in the Anglo-American common law tradition judges are limited in their lawmaking power by adherence to precedents. However, the Tort Revolution was a product of conscious decisions by state court judges to disregard precedents in order to create new legal rules.

The Tort Revolution reflected the political goals of early twentieth-century progressivism, especially in regard to the political economy. Among progressivism's many goals perhaps the foremost was to regulate businesses that profited at the expense of the consuming public. Anti-trust law is an example of progressive-style reforms of business practices. Anti-trust law was the product of legislative action at the federal level. However, the less visible efforts to change American tort law were equally progressive in their political character, justifications, and goals. These efforts were less salient because state supreme courts led the changes, and they have never received the media scrutiny accorded to state and federal legislative bodies or the U.S. Supreme Court. The expansion of manufacturer liability for defective products was a key progressive legal reform throughout the twentieth century.

Additionally, the Tort Revolution reveals the manner of legal change in America. Legal change can occur in multiple institutional venues: legislatures, executive offices, administrative agencies, and courts. The Tort Revolution was a court-centered revolution. Also, legal change occurs as a result of the efforts of different kinds of actors. It can occur in the proverbial "bottom-up" context, wherein institutional outsiders or those who at first blush appear to lack political power are able to effect legal change through sheer will power, determination against seemingly superior forces, organizing to act collectively, and adhering to moral norms and standards. One example of such

change would be the NAACP's legal strategy in overturning Jim Crow laws in the states. This was a bottom-up legal campaign, wherein the NAACP lawyers and brave litigants sought to effectuate legal and societal change through litigation campaigns challenging the "separate, but equal" doctrine of constitutional law. By contrast, the Tort Revolution did not involve concerted litigation campaigns or lawyers and clients challenging the conventions of tort law. Rather the Tort Revolution was born out of the social theories and policy preferences of legal academics and state court judges, especially state supreme court justices. Although the policy preferences of judges certainly controlled the success of the litigation campaigns in civil rights, the Tort Revolution did not see an analogous litigation campaign effort on the part of litigants and their attorneys.

The Tort Revolution also demonstrates the primacy of pluralism – the contestation of organized interests over the allocation of resources through public law – in the post-New Deal polity. Although the strength of organized special interests has been a theme of American history since the mid-nineteenth century, pluralism gained legitimacy in the New Deal, notably at the national policy-making level. The Tort Revolution occurred in the states, led by state supreme courts, but it caused a reaction on both the state and national levels. A pluralistic reaction was provoked among citizens – chiefly the owners of small businesses that made capital goods – who sought aid from the federal government to reduce or eliminate their exposure to litigation, high insurance premiums, and high monetary damages in tort lawsuits. In some ways, this reaction could be considered a bottom-up reaction, led by manufacturers, to the top-down Tort Revolution, led by the state courts. Yet, that reaction – which began in the mid-1970s –

achieved only moderate success, or, in the view of many of its adherents, no real success at all.

Modern tort law reveals the character of federalism in the post-New Deal state. What became a well-known battle for “tort reform” in the 1980s, started at the national level in the 1970s. It is important to note that “tort reform” is not the same as – and is in many ways opposite of – the Tort Revolution. The Tort Revolution was an effort to broaden manufacturer liability; it was a revolt against the common law system. By contrast, tort reform was an effort to have state and federal governments take over tort law from the courts. The chief goal of tort reform was to federalize tort law and, on the part of many reform proponents, return tort law to the common law norms of the nineteenth century. The push for federal tort legislation in the 1970s was the product of citizens’ complaints to federal lawmakers, but it foundered at the national level partly because of federalism concerns of lawmakers, but chiefly because of the pluralism evident in the national legislative debate. The workers’ compensation systems of the states would have been impacted by the legal changes proposed at the federal level in the 1970s. It was the concern with preserving the states’ powers in relation to their workers’ compensation systems that shaped the debate at the federal level over tort reform and this concern was a federalist concern. However, the legislation that was eventually enacted in the early 1980s had less to do with federalism than the compromises inherent in American pluralist politics of the post-New Deal state.

Tort reform became a common term of American national politics in the 1980s and has remained a viable political issue of pluralist politics to this day. It is an issue that concerns not merely products liability law. It concerns medical malpractice, mass tort



suits, and auto insurance law; however, these issues are beyond the scope of this study. This study is concerned with the area of tort law foremost in the minds of the progressive legal reformers of the twentieth century: products liability. With the enactment of a moderate federal measure in the early 1980s – insurance law allowing for risk-sharing pools among affected manufacturing businesses – the federal government confirmed its place as a political institutional player in an area of law that had previously been chiefly governed by states.

The unintended effect of the Tort Revolution was that state supreme courts, with the support of legal academics, took an issue that had previously been controlled almost exclusively by state courts and was a low priority item to political actors, and thrust it into the political spotlight. It triggered a political response from affected interests and their allies. In short, the state courts made a small matter into an issue of great political importance. They converted a state-level legal issue into a national political issue. The Tort Revolution and tort reform resonate to this day.

### ***The Origins and Character of American Tort Law***

Modern American tort law is often described as having its historical origins in the American industrial revolution of the mid- to late-nineteenth century. However, its conceptual and doctrinal origins are rooted in the common law as developed by medieval English courts and the courts of the European continent. American tort law was doctrinally developed at least as early the first half of the nineteenth century. Tort law was a body of law derived from the common law *forms of action* used by English courts. The forms of action were very precise methods of bringing and sustaining lawsuits

developed during the Middle Ages. They encompassed both procedural and substantive law. The procedural element was the need to adhere to strict forms of stating the substance of a claim of right and choosing the correct form in a given case. If a litigant failed to use the correct form, the case would have been irrevocably harmed. The substantive element was the fact that the forms themselves were substantive statements of the claims allowed under English law. That is, if a form did not exist for vindicating a litigant's complaint, then there was effectively no substantive law in existence that would allow for a claim of right.<sup>6</sup>

Under English law, it appears that a notion of moral wrongfulness was the basis of liability for harmful acts to others. One early case was recorded in 1214 during the reign of King John:

Roger Stainton was arrested because in throwing a stone he by misadventure killed a girl. And it is testified that this was not by felony. And this was shown to the king, and the king, moved by pity, pardoned him the death. So let him be set free.<sup>7</sup>

The ability to escape the penalty of death because a harm, often the death or severe injury of another by "misadventure" (as it was known under Norman English law), was inflicted through carelessness by merely making amends through the payment of money was common in England and on the Continent during the late Middle Ages and Renaissance. For instance, during the reign of Charlemagne, in 819, a royal ordinance stated that "if one has offended ignorantly, let him not be obliged to pay according to the full rule, but

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<sup>6</sup> J. H. Baker, *An Introduction to English Legal History*, 3d. ed. (London: Butterworths, 1990), pp. 65-67. *Black's Law Dictionary* 6th ed., (St. Paul, MN: West Publishing Co., 1990), p. 651. G. Edward White, *Tort Law in America: An Intellectual History* (Expanded Edition) (New York: OUP, 1980, 2003 ed.), pp. 8-10.

<sup>7</sup> Selden Society, *Select Pleas of the Crown*, Vol. 1, No. 114, quoted in John H. Wigmore, "Responsibility for Tortious Acts: Its History," *Harv. L. Rev.*, Vol. 7, No. 6 (Jan. 26, 1894), p. 323.

as near as seems possible.” In England during the reign of Henry I (r. 1100-1135) “accidents” – wherein “a man intends one thing, and another eventuates” – were recognized by English courts and the wrongdoer was assessed a “small fine and a fee.”<sup>8</sup>

One nineteenth-century legal scholar, Joel Prentiss Bishop, termed tort law “non-contract law,” which concerned “things not bargained about.”<sup>9</sup> Modern scholars have used the same definition.<sup>10</sup> The modern, nineteenth- and twentieth-century definition of a tort as civil wrong, which is *not* a contractual wrong, points toward its origins in the Middle Ages.

During the Middle Ages in England a “tort” denoted any “any kind of legal injury.” The word “tort” was a French legal term, which was derived from the Latin word “injuria.”<sup>11</sup> It was only in the early seventeenth century that tortious claims of right were considered separate from contractual claims. The kinds of wrongful acts that were considered tortious were wrongs done intentionally. For example, the misuse of a hired horse and the failure to pay for its use were considered separate causes of action in 1665. The concept of negligence, upon which so much of modern tort law is based, existed

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<sup>8</sup> Ibid., p. 324.

<sup>9</sup> Joel Prentiss Bishop, *Commentaries on the Non-contract Law : And Especially as to Common Affairs not of contract or the every-day rights and torts*. (Chicago, 1889), p. iii. *The Making of Modern Law*. Gale. 2009. Gale, Cengage Learning, available online: <<http://galenet.galegroup.com.proxy-um.researchport.umd.edu/servlet/MOML?af=RN&ae=F3701218410&srchtp=a&ste=14>>. Harv. L. Sch. Library, Gale Doc. No.: F3701218410.

<sup>10</sup> Tort law “governs infringements of interests protected by the law independently of private agreement.” J. H. Baker, *An Introduction to English Legal History*, 3d. ed. (London: Butterworths, 1990), p. 360.

<sup>11</sup> J. H. Baker, *An Introduction to English Legal History*, 3d. ed. (London: Butterworths, 1990), p. 454. *Black’s Law Dictionary* provides the etymology of “tort” as the Latin word “torquere” (to twist). 6th ed., (St. Paul, MN: West Publishing Co., 1990), p. 1489.

before 1700, but it was always a minor consideration in most plaintiffs' writs.<sup>12</sup> The forms of action (the bases upon which claims of right were founded at common law) were sufficient to cover most wrongs that we would today recognize as carelessness, or negligence.<sup>13</sup>

The seventeenth century in England saw an affirmation of compensation as a concern of tort law. In 1681 an English jurist noted, "In all civil acts the law doth not so much regard the intent of the actor, as the loss and damage of the part suffering. ... And the reason is because he that is damaged ought to be recompensed."<sup>14</sup>

Yet, deterrence was also a primary concern of tort law. The eighteenth century in England saw the formulation of the modern definition of negligence used in American law. One treatise asserted: "Every man ought to take reasonable care that he does not injure his neighbour; ... if [an injury] be occasioned by negligence or folly the law gives [the injured party] an action to recover damages ... ."<sup>15</sup> This was the statement of the "reasonable man" standard, which is, putatively, an objective standard that required the jury to determine what a reasonable person in the same situation would have done. It

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<sup>12</sup> Writs were the written documents that began lawsuits in English royal courts. They were used as early as the late Anglo-Saxon period, and were addressed to sheriffs to issue a command to a defendant, with an alternative to come before the king's courts and explain himself. The writs issued in the name of the crown were not ended entirely until 1980. Writs were used in conjunction with the English forms of action, which were the theoretical bases upon which claims of right were made. Baker, *An Introduction to English Legal History*, pp. 64, 81.

<sup>13</sup> Baker, *An Introduction to English Legal History*, p. 464.

<sup>14</sup> James Barr Ames, "Law and Morals," *Harv. L. Rev.*, Vol. 22, No. 2 (Dec., 1908), p. 97, 98 (citing *Lamber v. Bessey*, T. Ray, p. 421); Oliver W. Holmes, Jr., *The Common Law* (Boston: Little, Brown, 1881, 1909 ed.), pp. 92-95.

<sup>15</sup> Baker, *An Introduction to English Legal History*, p. 469 (quoting *An Institute of the Law relative to Trials at Nisi Prius* (1768), pp. 35-36; B. & M. 578-579).

emphasized the responsibility of actors to behave with care. This standard is still used in British and American negligence cases.

In the eighteenth century, the American colonies' courts and lawyers tried (often imperfectly) to follow English common law precedents.<sup>16</sup> Much of the development of American law in the eighteenth century was closely correlated with the increase in commercial activity. As more commercial activity occurred, more lawsuits resulted from broken promises and accidents attendant to all human interactions.

American tort law began a rather rapid change during the nineteenth century when American technological changes, especially in the field of transportation technology, resulted in increased incidents of injuries to persons and damage to personal and real property.<sup>17</sup> Tort law developed in the state trial and appellate courts. Each state had its own doctrines as developed by case precedents in its state courts, but states many followed each other's precedents by citing them as authorities – although not mandatory controlling authorities – in analogous cases. In other words, tort law developed throughout the United States in a roughly uniform fashion because states' courts looked to sister states' courts for guidance on novel tort issues. Although there were state (and, later, federal) tort statutes, tort law has always been common law, or judge-made law, made at the state level. That is, the courts have always been the chief policy-making institution in the realm of torts. This was due to the fact that tort law was a product of the English common law system of private law that was largely left to courts to adjudicate in

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<sup>16</sup> Peter Charles Hoffer, *Law and People in Colonial America* (Baltimore: John Hopkins Univ. Press, 1998), p. *xiii*.

<sup>17</sup> Kermit L. Hall, ed. *Tort Law in American History* (New York: Garland Publishing Co., 1987), p. *xiii*; Lawrence Friedman, *A History of American Law*, 3d ed. (New York: Touchstone, 2001, 2005 ed.), pp. 223-25; Thomas H. Koenig and Michael L. Rustad, *In Defense of Tort Law* (New York: NYU Press, 2001), p. 12; G. Edward White, *Tort Law in America*, p. 16.

the context of individual rights. Contractual disputes, property disputes, and tort cases had traditionally been left to English (and American) courts to resolve. They were part of the “private law” (realm of law between private citizens) more so than subject to the “public law” (or law of the legislative body that worked upon the citizenry).

Policy and policy preferences are present in all law. The historical question is how the preferences are determined, implemented, and developed as public policy. As we shall see more thoroughly in Chapter Three, courts have played a policy-making role in English and American political and legal history. As one scholar has noted, “The whole process of modification and change [of tort law over time] is most profitably studied by investigating the various theories of liability for unintended harm.”<sup>18</sup> That is, the underlying policy justifications are key to understanding why legal rule and standards changes occurred. The appeal of negligence as a basis for liability was that it concentrated on the fault, or wrongful conduct of the defendant.<sup>19</sup> Notwithstanding the reliance upon fault, the application of the doctrine was sufficiently scarce that the body of decisions classified under torts was not substantial enough to warrant separate scholarly treatment. For example, Francis Hilliard published the first treatise called “Torts” in 1861.<sup>20</sup>

Legal historians have debated whether tort law in the nineteenth century was dominated by negligence or strict liability. Negligence is fault-based liability, premised upon the existence and breach of a duty of care one owes to another. Negligence law was

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<sup>18</sup> Charles O. Gregory, “Trespass to Negligence to Absolute Liability,” *Va. L. Rev.*, Vol. 37, No. 3 (April, 1951), p. 359, 360.

<sup>19</sup> David G. Owen, “The Fault Pit,” *Ga. L. Rev.*, Vol. 26, No. 3 (Spring, 1992), p. 701.

<sup>20</sup> Francis Hilliard, *The Law of Torts or Private Wrongs* (Boston: Little, Brown, 1861).

a matter of private law that emphasized individual responsibility for one's actions. Under the Anglo-American adversarial system, wherein parties are responsible for proving their claims against one another and the judge plays the rather limited role of determining which party has met their burden of proof, the law stresses individual responsibility. Until the end of the nineteenth century, tort law sought to place the burden of loss upon those who bore the responsibility for loss, regardless of whether that person could financially bear the loss. Such a burden was the product of the policy preference born out of the common law's preference for deterring harmful conduct.

By contrast, strict liability is liability without regard to fault. In the nineteenth century it applied to a few areas of conduct and emphasized compensation over deterrence. At common law, in both English law as of the nineteenth century and American law well into the twentieth century, strict liability was placed upon employers in the form of vicarious liability for the negligent acts of their employees and upon those who possessed animals that escaped to harm others, or landowners with materials or conditions that "escape to harm others," although the latter examples involve affirmative actions which pose risks to others and arguably lie within the realm of a kind of fault-based liability.<sup>21</sup> Such near-fault-based forms of liability were related to extremely hazardous activities, such as – the classic example – blasting operations.<sup>22</sup> In order to be liable, all one had to do was commit a prohibited act. If an injury to person or damage to property occurred, then the wrongdoer was automatically liable. No investigation was

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<sup>21</sup> Warren A. Seavey, "The Principles of Torts," *Harv. L. Rev.*, Vol. 56, No. 1 (Sept., 1942), p. 72, 78. Arthur A. Ballantine, "Compensation Plan for Railway Accident Claims," *Harv. L. Rev.*, Vol. 29, No. 7 (May, 1916), pp. 711-12.

<sup>22</sup> William L. Prosser, *Handbook of the Law of Torts* (Second Ed.) (St. Paul: West Publ. Co., 1941, 1955 ed.), p. 334 (citation omitted).

needed as to fault because carelessness or failure to live up to a duty was not relevant to determining liability. Under strict liability, one was an insurer of one's acts.

Legal historian Morton Horwitz has argued that the precursor to the negligence liability that was common in the late nineteenth century was absolute, or strict, liability. Horwitz's argument, which has been accepted by many legal historians, is that negligence was a doctrinal innovation of judges in the mid-nineteenth century to give greater protection to corporations and individual defendants in the emerging industrial economy. This protection provided a kind of subsidy to industrialism and harmed injured plaintiffs. Horwitz argues that strict or no-fault liability was the dominant rule prior to the development of fault-based negligence law.<sup>23</sup> Scholars at the beginning of the twentieth century also held the view that negligence was a late-nineteenth century invention of judges. For example, Thomas Atkins Street, writing in 1906 claimed, negligence was "mainly of very modern growth," noting that no mention was made of negligence in English legal reporters prior to the mid-eighteenth century.<sup>24</sup> Yet, as legal historian Gary Schwartz has demonstrated, the concept of fault and taking due care in one's actions (which are the key elements of negligence) were present throughout the nineteenth century in America. Schwartz notes that negligence appeared to nineteenth- and twentieth-century jurists to achieve multiple goals: "fairness, deterrence, and a

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<sup>23</sup> Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge: Harv. U. Press, 1977); Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: OUP, 1992); Lawrence M. Friedman, *A History of American Law* (2005).

<sup>24</sup> Thomas Atkins Street, *The Foundations of Legal Liability: A Presentation of the Theory and Development of the Common Law* (Northport, NY: Edward Thompson Co., 1906), p. 182; Jeremiah Smith, "Liability for Substantial Damage to Land by Blasting – The Rule of the Future," *Harv. L. Rev.*, Vol. 33, No. 4 (Feb., 1920), pp. 542, 551-52; Charles O. Gregory, "Trespass to Negligence to Absolute Liability," *Va. L. Rev.*, Vol. 37, No. 3 (April, 1951), p. 359. See a listing of other scholars who agree with the Horwitz thesis at Gary T. Schwartz, "Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation," *Yale L. J.*, Vol. 90, No. 8 (July, 1981), p. 1717, n. 1.



considerable measure of loss-spreading.”<sup>25</sup> Schwartz has demonstrated that in the antebellum period courts regularly used phrases such as the “highest degree of care” in explaining business enterprises’ legal responsibilities and, pace the strict liability theorists, early- to mid-nineteenth century jurists were concerned with the “risks created by modern enterprise” and exhibited a “judicial willingness to deploy liability rules so as to control those risks” and “resolve uncertainties in the law liberally in favor of” injured plaintiffs. The claim that American tort law was “invented” or “created” as a result of the post-Civil War industrialization of America is simply a misnomer or distortion of the actual history of torts. Contemporary commentators designated “negligence” as a distinct body of law in the latter half of the nineteenth century, but its core elements had long-existed in English and American common law.<sup>26</sup> Negligence is far older than the late nineteenth century.

As for strict liability (or what was termed absolute liability) in the nineteenth century, in 1881 Oliver Wendell Holmes, Jr. noted that absolute liability was disfavored and the “prevailing view” (among judges and lawyers) was that the state should not use its “cumbrous and expensive machinery” to become a “mutual insurance company against accidents.” Holmes argued that “universal insurance,” a wholly compensatory regime, could be better achieved by the private sector.<sup>27</sup> Holmes was describing the old

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<sup>25</sup> Gary T. Schwartz, “The Beginning and the Possible End of the Rise of Modern American Tort Law,” *Ga. L. Rev.*, Vol. 26, No. 3 (Spring, 1992), p. 601, 699.

<sup>26</sup> Schwartz examined the antebellum tort cases from New Hampshire, California, South Carolina, Maryland, and Delaware. Gary T. Schwartz, “The Character of Early American Tort Law,” *UCLA L. Rev.*, Vol. 36, No. 4 (April, 1989), pp. 641, 661, 665, 670-680; Schwartz, “Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation,” *Yale L. J.*, Vol. 90, No. 8 (July, 1981), p. 1717.

<sup>27</sup> Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little, Brown, 1881, 1909 ed.), p. 96.

regime of fault-based liability, which reigned throughout the nineteenth century and well into the twentieth century.

The development of tort law in the nineteenth was accompanied by the development of insurance law and contracts. Prior to the application of tort law to the accidents arising out of the new industries and rail transportation in the middle of the nineteenth century, liability insurance was considered by courts to be “against public policy, because it was thought to create excessive moral hazard.”<sup>28</sup> Moral hazard is the term of art that describes the presumed reduction in the degree of care exercised by a person when that person knows that another has underwritten his or her actions.<sup>29</sup>

American courts were confronted with the problem of how much of a burden upon one’s liberty of action tort law would become. That is, as Oliver Wendell Holmes, Jr. put it in 1881, tort law “is intended to reconcile the policy of letting accidents lie where they fall, and the reasonable freedom of others with the protection of the individual from injury.”<sup>30</sup>

However, by the end of the nineteenth century courts overcame objections to the moral hazards encouraged by insurance by adopting the preference for compensation of those who were injured or harmed by one’s acts. That is, courts adopted the view that moral hazards were acceptable because insurance did not deprive injured parties of compensation, but merely shifted the risk of loss from the wrongdoer to the insurance

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<sup>28</sup> Kenneth S. Abraham, *The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11* (Cambridge, MA: Harvard Univ. Press, 2008), p. 17; Kenneth S. Abraham, “The Rise and Fall of Commercial Liability Insurance,” 87 *Va. L. Rev.* 85, 86 & n.6 (2001).

<sup>29</sup> Tom Baker, “On the Genealogy of Moral Hazard,” *Tex. L. Rev.*, Vol. 75, No. 2 (Dec., 1996), p. 236, 239; Kenneth J. Arrow, “Uncertainty and the Welfare Economics of Medical Care,” *Am. Econ. Rev.*, Vol. 53, No. 5 (Dec., 1963), p. 941, 961.

<sup>30</sup> Oliver W. Holmes, Jr., *The Common Law* (Boston: Little, Brown, & Co., 1881, 1909 ed.), p. 144.

company.<sup>31</sup> By the end of the nineteenth century, liability insurance was increasingly accepted as not only a normal part of commerce, but as an essential method of spreading the risk of loss in commercial transactions. Thus, the socialization of risk was recognized during this period and the tradition of individual responsibility was potentially undermined.

All of these nineteenth-century changes in tort, insurance, and contract law were closely related to technological changes of the American Industrial Revolution. For example, as regards the industry emblematic of the Industrial Revolution – the railroads – the ultimate liability rested upon a plaintiff who could prove fault by the railroad, even though the railroad, as a common carrier of the public, was held to a higher duty of care, which made its ability to escape liability through the assertion of defenses much more difficult.<sup>32</sup>

As a matter of late-nineteenth and early-twentieth-century legal theory, scholars saw torts as an area of law that increasingly sought to compensate individuals for the injuries suffered due to the acts of others.<sup>33</sup> This view became popular among legal progressives and dominated much scholarly commentary on torts in the twentieth century. For example, Harvard professor Warren Seavey, writing in 1942, described torts as a “remedial” form of law, with “compensation” being “the most important function of

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<sup>31</sup> Abraham, *The Liability Century*, p. 26. Abraham dates this shift in judicial “attitude” to the U.S. Supreme Court’s decision in *Phoenix Ins. Co. of Brooklyn v. Erie & Western Transportation Co.*, 117 U.S. 312 (1886), wherein the Court upheld a putatively negligent common carrier’s claim that it retained the benefit of first-party insurance coverage purchased by the shipper, the named insured on the policy.

<sup>32</sup> Albert A. Ehrenzweig, *Negligence Without Fault: Trends Toward an Enterprise Liability for Insurable Loss* (Berkeley: Univ. of Calif. Press, 1951), p. 15 and n. 44 (citations omitted).

<sup>33</sup> H.L.A. Hart, *The Concept of Law* (New York: OUP, 1961), p. 27.

tort actions.”<sup>34</sup> Nevertheless, tort law in the nineteenth century, similar to criminal law, also remained a system that sought to deter harmful conduct by imposing costs on careless behavior.<sup>35</sup> That is, since modern tort law has so often been premised upon fault, the law has sought to not only compensate the injured but to deter the would-be wrongdoer. Thus, in the early twentieth century torts had come to be seen as having the double function of “prevention and compensation.”<sup>36</sup> In this sense tort law was similar to criminal law because both distinguish a defendant’s liability upon his state of mind. Intentional torts (e.g., assault or false imprisonment) were distinguished from carelessness (i.e., negligence).<sup>37</sup>

This goes far toward explaining the appeal of the common law principle of individual rights and the later preference by progressive reformers for an expanded liability system. The private law system of the common law – regardless of whether the subject was torts, contracts, property, or even what is now thought of as a separate area of criminal law – was based upon the individual bringing suit to recoup his/her losses at the hands of another. Individuals had been the focal point of the common law. Individuals were responsible for their acts and had to bear the consequences of them, whether they sought to be plaintiffs or found themselves as defendants. The common law provided claim rights and defenses based upon these notions of individual rights and

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<sup>34</sup> Warren A. Seavey, “Principles of Torts,” *Harv. L. Rev.*, Vol. 56, No. 1 (Sept., 1942), p. 72.

<sup>35</sup> John C. P. Goldberg, “Twentieth-Century Tort Theory,” *Geo. L.J.*, Vol. 91, No. 3 (Mar., 2003) p. 513, 514. Goldberg identifies five theories justifying the existence of tort law: compensation-deterrence theory, enterprise liability theory, economic deterrence theory, social justice theory, and individual justice theory.

<sup>36</sup> Roscoe Pound, “The Causes of Popular Dissatisfaction with the Administration of Justice,” in *Report of the Twenty-Ninth Annual Meeting of the American Bar Association, Aug. 29-31, 1906* (Philadelphia: Dando, 1906), p. 396.

<sup>37</sup> Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little, Brown, 1881, 1909 ed.), p. 81.

responsibilities. In this way, the common law system of negligence preserved individual liberty. Yet, contrary to the contemporary law and economics theorists, common law torts was more than a system that, as Richard Epstein has argued, marked the boundaries of one's actions (*i.e.*, one's liberty ends where harm to another begins).<sup>38</sup> Negligence liability does more than just balance costs against claims of right.<sup>39</sup> Rather the fault-based tort system preserved individual liberty in multiple ways: by allowing one liberty to act, placing burdens upon individuals to act with care, and requiring individuals to bring their own claims in the adversarial system without the aid of the state. Additionally, and importantly for this study, the fault-based tort system requires individuals to be responsible for their own careless acts, placing the burden for wrongful behavior upon the individual who committed the act. The burden of loss is placed upon the wrongdoer only after a showing of fault. Also, law has a normative function in society, not merely defining boundaries of behavior, but prescribing or reinforcing societal norms. The societal norm that fault-based negligence law reinforced was individual responsibility for one's own acts. This applied to both plaintiffs and defendants. Defendants were liable for their wrongful acts and plaintiffs were prevented from recovering if they had been negligent in their own behavior.

Yet, as the nineteenth century's industrialization occurred, the experiences of individuals were seen as the experiences of whole classes or categories of people. Workers, for example, were a key class of the late industrial revolution in America. They

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<sup>38</sup> Richard Epstein, "A Theory of Strict Liability," *J. Legal Studies*, Vol. 2, No. 1 (Jan., 1973), pp. 151, 203-04.

<sup>39</sup> Richard Posner, "A Theory of Negligence," *J. Legal Studies*, Vol. 1, No. 1 (Jan., 1972), p. 29, 33. Posner argues that negligence – the "fault system" – sought to achieve a level of efficiency, or "cost-justification," regarding accidents and safety.

did not only present a “labor question” regarding their rights vis-à-vis their employers, they also presented a question for those who saw them as a class oppressed by the common law’s individualized treatment of duty and risk. Another class or category was the consumer. The consumer was potentially anyone in the emergent national economy that saw production locales geographically distant from the final purchase points. The rights and responsibilities of consumers were seen as being in tension with the nascent national economic order. This explains the appeal to progressives of a system to replace the fault-oriented legal regime governing consumer/producer relations.

The question presented by products liability law was what kind of liability, if any, would attach to a manufacturer of a defective product that injured a remote user. As stated by legal scholar Francis Wharton, writing in 1878, “There must be a causal connection between the negligence and the hurt, and such causal connection is broken by the interposition of a conscious human agency.” Wharton was referring to the idea that a chain of causation can be broken, or interfered with, by an intervening cause or event. In such a case, the original wrongful act’s “natural consequences” would have been averted or sufficiently altered so that the original wrongdoer would not be held liable for any harm caused by the more recent wrongful, intervening event or cause. Legal scholar Francis H. Bohlen thought Wharton’s statement, well known among legal scholars of the late nineteenth and early twentieth centuries, was influential in maintaining the general products manufacturer’s insulation from liability for negligently manufactured goods.<sup>40</sup>

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<sup>40</sup> Francis H. Bohlen, “The Basis of Affirmative Obligations in the Law of Tort,” (Philadelphia, 1905), p. 77 in *The Making of Modern Law*, Gale. 2009. (Gale, Cengage Learning, 2009) (quoting Francis Wharton’s *A Treatise on the Law of Negligence* (2d ed., 1878; § 438)), from the Harvard L. Sch. Library, Gale Doc. No. F3751720838. Available online: <http://galenet.galegroup.com.proxyum.researchport.umd.edu/servlet/MOML?af=RN&ae=F3751720838&srchtp=a&ste=14>.

The lack of a contractual relationship between a manufacturer and consumer would fit nicely into this notion of a “chain of causation.” The possibility (or likelihood) of a distributor or other buyer altering the product was heightened.

Some scholars have argued that strict liability was primarily a consequence of the changes wrought by industrialism. For example, they argue that strict liability was an effort by courts to respond to the conditions of “modern life” or the increased mechanization of production and transportation. This was certainly the view of strict liability’s proponents. As we shall repeatedly see, the proponents of strict liability argued throughout the twentieth century that modern production, distribution, and transportation methods required a change from a fault-based liability system to a no-fault compensatory system. Writing in 1927, Harvard Law professor Warren A. Seavey accurately characterized the disposition of strict liability enthusiasts and made a prediction about the future of tort law: “With a mechanistic philosophy as to human motives and a socialistic viewpoint as to the function of the state, we may return to the original result of liability for all injurious conduct, or conceivably have an absence of liability for any conduct, with the burden of loss shifted either to groups of persons or to the entire community.”<sup>41</sup> Seavey presciently predicted the move that would be advocated by academics and made by judges later in the century from negligence to strict liability for manufacturers of defective products. He was also correct about the rationale for this change: the notion that manufacturers (and in turn consumers) should bear the burden of costs for manufacturers’ harmful conduct.

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<sup>41</sup> Warren A. Seavey, “Negligence – Subjective or Objective?” *Harv. L. Rev.*, Vol. 41, No. 1 (Nov., 1927), p. 1, 28.

One commentator, writing in 1951, noted the distinctions between liability based on fault (negligence) and strict liability in relation to consumer goods:

Liability for injuries incurred is absolute with respect to a particular kind of defect when it is made to depend solely on the existence of the defect. It is based on culpability when it is made to depend upon the defendant's failure to meet an accepted or prescribed standard of conduct which is reasonably attainable and which, if attained, normally intercepts the defect.<sup>42</sup>

That is, the strict liability standard looks only to the character of the product, not the carefulness of the defendant's actions regarding the product's manufacture or design.

### ***The Manner of Legal Change in the Twentieth Century***

The history of twentieth-century tort law is a history of dramatic changes in the common law, with long periods of apparent inactivity. This assessment runs counter to much of the early twentieth century's scholarly opinion regarding how the common law changed over time. As popularized by Harvard Law dean Christopher Columbus Langdell, common law "arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries."<sup>43</sup> Justice Oliver Wendell Holmes, Jr. described judges' engagement with legal doctrinal change as occurring "interstitially," or slowly and almost imperceptibly over long periods of time.<sup>44</sup> Roscoe Pound, one of

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<sup>42</sup> Reed Dickerson, *Products Liability and the Food Consumer* (Boston: Little, Brown, 1951), p. 132.

<sup>43</sup> Langdell, C. C. (Christopher Columbus), *A selection of cases on the law of contracts: with a summary of the topics covered by the cases : prepared for use as a text-book in Harvard Law School*, 2nd ed. (Boston, 1879), p. viii. *The Making of Modern Law*. Gale. 2010. Harvard Law School Library. Gale, Cengage Learning.  
<<http://galenet.galegroup.com.proxyum.researchport.umd.edu/servlet/MOML?af=RN&ae=F3706371448&srchtp=a&ste=14>>. Gale Document Number: F3706371448.

<sup>44</sup> *Southern Pacific Co. v. Jensen*, 244 U.S. 205, 221 (1917) (dissenting).



the foremost progressive proponents of law and court reforms in the early twentieth century, agreed that legal change occurred in a (frustratingly, for him) slow fashion.<sup>45</sup> Similarly, justice Harlan Fisk Stone described the common law of torts in 1936 as “a system of judicial precedent” of which “the most significant feature of the common law, past and present, and the essential element in its historic growth, [is] the fact that it is preeminently a system built up by *gradual accretion of special instances*.”<sup>46</sup> William Prosser, one of the chief proponents of changes in tort law in the twentieth century wrote in mid-century that common law change occurred through the “accretion” of decisions.<sup>47</sup> This was the popular view of doctrinal change in the common law throughout most of the century, well into the 1960s when the Tort Revolution was occurring. For example, one scholar writing in 1970 identified “tort incrementalism: the influence of a single academic commentator, the long time span, the gradual recruitment and coalescence of sentiment, the role of case books, and the response to a specific problem long before a general statement of policy or an integration of the policy into the rest of tort policy emerges.”<sup>48</sup> However, the change from negligence to strict liability in the realm of product liability law did not follow this path.

The twentieth century’s history of doctrinal change in the common law of torts is

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<sup>45</sup> Roscoe Pound, “The Causes of Popular Dissatisfaction with the Administration of Justice,” in *Report of the Twenty-Ninth Annual Meeting of the American Bar Association, Aug. 29-31, 1906* (Philadelphia: Dando, 1906), pp. 400-401.

<sup>46</sup> Harlan Fisk Stone, “The Common Law in the United States,” *Harvard L. Rev.*, Vol. 50 (1936), pp. 5-6 (emphasis added).

<sup>47</sup> G. Edward White, *Tort Law in America: An Intellectual History* (New York: OUP, 1980), pp. 155-57.

<sup>48</sup> Martin Shapiro, “Decentralized Decision-Making in the Law of Torts,” in S. Sidney Ulmer, ed., *Political Decision-Making* (New York: Van Nostrand Reinhold Co., 1970), p. 65. Shapiro was specifically concerned with minors and their tort responsibility.

less analogous to ecological interstitial change than to punctuated equilibrium, the physical anthropological theory that explains some evolutionary changes as occurring over short periods of time, rapidly, followed by long periods of *apparent* stasis.<sup>49</sup> This describes the changes in the common law of torts in the twentieth century: periods of calm punctuated by sudden, important, lasting changes. In particular, the law of products liability changed rapidly – “abruptly” in the words of strict liability enthusiast Robert Keeton – in the 1960s from a primarily negligence-based, fault-based model to a strict liability, no-fault model.<sup>50</sup>

In this history the actors were courts and the judges who populated these institutions and the academic scholars who analyzed and advocated for legal change through the courts. Other actors include legislators, who often respond to the rulings of courts and seek to alter the prevailing court-created common law. These institutional actors are easily anticipated. Other important actors included lawyers representing litigants in tort lawsuits, who advocated not only for their clients, whether consumers or manufacturers, but also for themselves as lawyers. Lawyers as a class profit from the potential increase in litigation that changes in law, especially the broadening of rights, can hold. Other actors, especially in the area of products liability, included manufacturers and distributors of products, who were the usual defendants in tort lawsuits. Their insurance companies were the “hidden” parties in such suits, providing defense counsel and insurance coverage. A final actor is the ubiquitous consumer. In the

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<sup>49</sup> Stephen Jay Gould, *The Structure of Evolutionary Theory*, 6<sup>th</sup> ed. (Cambridge: Harvard Univ. Press, 2002), pp. 75 *et seq.*

<sup>50</sup> Robert E. Keeton, *Venturing to Do Justice: Reforming Private Law* (Cambridge: Harvard Univ. Press, 1969), p. 3.

American context everyone, no matter their trade or profession or political sentiments, is a consumer. This point is important because the Tort Revolution affected all Americans, though not to the same degree. Each of these entities and types of individuals play roles in the history of products liability and mass torts in the twentieth century.

What are the prime elements of doctrinal change in tort law? In the view of the author, tort law's doctrinal changes in the twentieth century were a combination of structural factors and ideologically based perceptions about how law should govern the interactions of people. On this latter point, I generally agree with G. Edward White that changes in tort law "reflect [the] prevailing intellectual assumptions about the purposes of tort law" rather than being merely a response to technological changes.<sup>51</sup> White was concerned with the contingency of historical change. He argued that actors in the tort systems at points of doctrinal change, primarily in state governments, were acting within and reflecting the intellectual presumptions and habits of their times. Although White suggests a kind of inevitability about tort law doctrinal changes, his narrative history demonstrates that certain actors were key in producing and propagating those changes. The central point of White's work, which is subtitled *An Intellectual History*, is that changes in tort law in the United States have been greatly influenced by "ideas," a conclusion that I share.

This study will refine White's view of historical change in tort law and, hopefully, be a bit more specific about the particular agents of those changes in regard to product liability law. Although tort law's changes in the last century were shaped by structural factors, the prime factor was the ideological disposition and conscious policy choices

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<sup>51</sup> G. Edward White, *Tort Law in America*, p. x.

made by state court judges. That is, the changes in American tort law in the twentieth century were not inevitable results of technological change or the structure of the American economy in the twentieth century.<sup>52</sup> Rather they were the result of conscious policy choices made by particular actors. Institutional structures – the state courts in the federal nation-state, for example – shaped the *manner* in which particular changes in a given state’s tort law occurred. The central element in change was the determination of state court judges to write tort policy preferences into the law of their respective states. This resolve was the product of particular assumptions about economics, industrialism, the role of judges in the American political system, and concepts of justice.<sup>53</sup> As explained below in Chapters Two, Three, and Four, scholars laid the theoretical framework for the Tort Revolution and state court judges implemented and refined the bases upon which product liability law existed in America.

The Tort Revolution was a top-down imposition of legal doctrinal change. The changes in legal doctrine were not spurred by the post-war mass consumers’ movement, by any litigation campaign by activist lawyers and their clients, or by the irresistible forces of modernity. Judges and their academic supporters produced these doctrinal changes. The most vociferous modern defenders of court-controlled changes in tort law

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<sup>52</sup> In this respect, the author echoes the views of George L. Priest, “The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law,” *J. Legal Stud.*, Vol. 14, No. 3 (Dec., 1985), pp. 461-528.

<sup>53</sup> Early in the twentieth century, scholars like Roscoe Pound thought the reverence for the idea of the common law as a body of law that changed only incrementally, over long periods of time, made the common law independent of the larger political and economic environment. As Morton Horwitz has pointed out, this view was itself a product of the Pound’s time, when lawyer-scholars tended to think of the formative conditions of the past as so “distant” from the present as to be unconnected to it. Morton Horwitz, “The Conservative Tradition in the Writing of American Legal History,” *Am. J. Leg. Hist.*, Vol. 17, No. 3 (July, 1973), p. 277.

claim that torts “evolve in order to constrain new forms of oppression.”<sup>54</sup> However, “oppression” was not the chief factor in the twentieth-century development of common law tort doctrines. Instead the ideologically motivated acts of judges, who were from the same social class, were the chief factors in the Tort Revolution.

The Tort Revolution was the product of progressivism in the courts. The ideology of legal progressivism was informed by the legal positivist belief that law was what the court said it was in individual cases. These cases added up to a body of law, but that body was ever changing. The legal progressives believed law changed because law was a reflection of the society in which the judges who made decisions were living. When judges made their decisions they were implementing policy preferences. Those judges saw the needs of the society and responded by “making law” through their decisions to meet those new or altered conditions in the wider society. Judges knew that precedents would usually be respected. They depended upon the norms of the common law, which were norms of honoring precedent.

The judges and academics that supported the Tort Revolution were from the same educational background and were exposed to legal realism and sociological jurisprudence at about the same time, in the 1920s. They were willing and enthusiastic about the Tort Revolution because their education prepared them for taking action to make the changes needed to adapt the law to modern industrial society. This was the product of progressive ideology. There were also other factors that contributed to the success of the Revolution: the changes in the twentieth century regarding attorney-client relations in torts practice,

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<sup>54</sup> Koenig and Rustad, *In Defense of Tort Law*, p. 4.

the channels of communication among state court judges, and increases in litigation in the latter half of the century. Each of these will be reviewed below, in Chapter Four.

As the widow Mrs. Heizer experienced to her disappointment in 1892, the legal regime of the late nineteenth century presented significant barriers to those claiming injuries from defective products. The old regime of common law negligence reigned throughout the nineteenth century, but it was a contested regime. Although the Tort Revolution occurred in the 1960s, the history of product liability law's changes begins in the nineteenth century. It is to this history to which we now turn.

## **Chapter 2: The Progressive Intellectual Foundations of the Changes in Product Liability Law and the Reformers in the Academy**

*I am sure that the power of vested interests is vastly exaggerated compared with the gradual encroachment of ideas ... sooner or later, it is ideas, not vested interests, which are dangerous for good or evil.*

John Maynard Keynes<sup>55</sup>

### ***The Early History of Products Liability Law***

The English rule of the eighteenth century, which was adopted by American jurisdictions in the early nineteenth century, was *caveat emptor* (“buyer beware”). That is, consumers were responsible for inspecting and evaluating goods prior to agreeing to purchase them. This doctrine was praised in American courts of the nineteenth century for accommodating the law to the practices of the marketplace. The rule was intended to allow for the inequality in knowledge and experience between parties to a contract and discouraged resort to courts to establish prices or otherwise second-guess a contract. In regard to contracts for the sale of goods, the leading *caveat emptor* case, *Seixas v. Woods* (N.Y., 1804), held that recovery was allowed against a merchant only if he *knowingly* sold defective goods. Legal historian Morton J. Horwitz has contended that this rule was not merely the product of the evolving market economy of the English Industrial Revolution or the early National Period in the United States. Rather it was the product of a conscious policy choice by early nineteenth-century jurists to “overthrow” an equitable theory of contract, wherein a good was thought to have an objective value, independent

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<sup>55</sup> Keynes, *The General Theory of Employment, Interest and Money* (New York: Harcourt, Brace, 1936), pp. 383-84.

of the value placed on it by the parties to a contract. Thus, historians like Horwitz have interpreted “buyer beware” as a “procommercial [*sic*] attack” upon communal values, which essentially separated law from morals and created a harsher, more speculative, more individualistic, and combative marketplace.<sup>56</sup>

English courts provided precedents for American courts throughout much of the nineteenth century.<sup>57</sup> In products liability, the pertinent English case was *Winterbottom v. Wright*,<sup>58</sup> wherein an employee was injured while riding on a carriage, for which the contract was between the post office (the employer) and the carriage maker. The postal employee was held to have no rights against his employer, the post office, because he had no contract (called “privity of contract”) with the manufacturer of a carriage. The Progressive legal scholar Francis Bohlen noted the court in *Winterbottom* did not specify whether the carriage was defective or was merely not kept in repair by the post office after it had purchased the carriage. If the latter was the case, the post office-employer was the at-fault party. So, it was never clear whether this was truly a defective products case.<sup>59</sup> Nevertheless, *Winterbottom* was interpreted as such by American legal scholars and judges. Legal historian Vernon Palmer has persuasively contended that the *Winterbottom* court used the privity requirement as a way of preventing concurrent actions. That is, the court did not want multiple actions for the same occurrence, such as

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<sup>56</sup> Morton J. Horwitz, *The Transformation of American Law 1780-1860* (Cambridge: Harvard U. Press, 1977), pp. 180-85, 330 n. 113. *Seixas v. Woods*, 2 Cai. R. 48 (N.Y. Sup. Ct. 1804), is cited in Horwitz at p. 180.

<sup>57</sup> C. Sumner Lobingier, “Precedent in Past and Present Legal Systems,” *Mich. L. Rev.*, Vol. 44, No. 6 (June, 1946), p. 955, 962.

<sup>58</sup> 10 M&W 100 (1842).

<sup>59</sup> Francis H. Bohlen, “The Basis of Affirmative Obligations in the Law of Tort,” *Am. L. Reg.*, Vol. 53, No. 5 (May, 1905), p. 209 & 273, 282.



one for breach of contract and another for a tort, because that would allow a double remedy to the plaintiff. This would have been an administrative rule for courts and thereby served judicial economy. But it also prevented plaintiffs from using more favorable tort concepts of causation and recovering greater damages under a tort theory, when a contract theory was deemed (by the courts) to be sufficient. Thus, the rule for both contracts and torts was that a contractual relationship was needed in order to sue.<sup>60</sup> American courts and most scholars widely interpreted the *Winterbottom* case as a precedent demonstrating the need for contractual privity before any tort rights accrued to an injured plaintiff.<sup>61</sup>

The earliest instances in America of allowing suits against remote manufacturers of products were those related to foods. During the late nineteenth and early twentieth century state courts throughout the nation adopted an approach that considered foods to be distinct in character from other goods. The first step in construing foods as different was to allow injured consumers to sue manufacturers for negligence, regardless of contractual privity. It is important to note that this was *not* an application of strict liability to foods, but rather an abrogation of the common law doctrine requiring contractual privity between plaintiff-consumers and defendant-manufacturers.

In a New York case in 1852, *Thomas v. Winchester*,<sup>62</sup> a drug maker erroneously put a dandelion label on a bottle containing the poison belladonna. Thereafter, a local

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<sup>60</sup> Vernon Palmer, "Why Privity Entered Tort – An Historical Reexamination of *Winterbottom v. Wright*," *Am. J. Legal Hist.*, Vol. 27, No. 1 (Jan., 1983), pp. 85, 89-90.

<sup>61</sup> *Huset v. J.I. Case Threshing Mach. Co.*, 120 F. 865, 870 (8<sup>th</sup> COA, 1903); William L. Prosser, *Cases and Materials on Torts* 8<sup>th</sup> ed. (Westbury, NY: Foundation Press, Inc., 1988), pp. 700-701 n. 1.

<sup>62</sup> 6 N.Y. 397 (1852).

pharmacist unknowingly selected the mislabeled drug to treat a sick woman.<sup>63</sup> The Court of Appeals of New York held that although privity of contract was the general rule in cases of negligence, in the case of a “poisonous drug,” where “death or great bodily harm of some person was the natural and almost inevitable consequence of the sale,” then privity of contract was not needed in order to bring suit. Since the drug maker intended it to be consumed only by a remote purchaser, rather than any of the intermediaries to whom it was sold, then the drug presented an “immanent danger” to remote consumers.

The court distinguished the English case, *Winterbottom*, by noting that the owner of the carriage was not under a duty to the injured driver, but only to the customer to whom the coach was rented. The instant case was different because the duty of care was not owed to the intermediary but to the ultimate consumer. This was a negligence case and the court did not think of it in terms of contractual duties but in terms of duties of care regarding the “nature of his [the druggist’s] business and the danger to others incident to its mismanagement.”<sup>64</sup>

In terms of precedential value *Thomas* stood as a case demonstrating that, at a minimum, drugs were different from other consumer goods in terms of legal duty. The duty the manufacturer owed regarding the wholesomeness and quality of the drug was not to the supply chain members, but to the ultimate consumer. However, it is easy to see how a court could broaden this principle of duty defined by the harm presented to

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<sup>63</sup> Belladonna is a poison known since antiquity. It has been used for the medicinal purposes of stomach and intestinal problems. Margaret F. Roberts and Michael Wink, eds., *Alkaloids: Biochemistry, Ecology, and Medicinal Applications* (New York: Plenum Pr., 1998), pp. 20-21. Dandelion has been used for a variety of gastrointestinal, liver, digestive, gallbladder and other health conditions. Dandelion, University of Maryland Medical Center, <http://www.umm.edu/altmed/articles/dandelion-000236.htm>.

<sup>64</sup> 6 N.Y. at 410. The court also noted an example of inherently dangerous acts, such as when an adult places a loaded gun in the hands of a child and it is accidentally discharged by the child. The adult will be liable for the negligence of his act of placing the gun with a child. *Ibid.* at 410 (citing 5 Maule & Sel. 198).

intended remote users. In fact, what made drugs different from other goods? Most manufacturers intended their products to be used by remote purchasers. The principle of *Thomas* – immanent dangerousness – would seem to have been applicable to any good, not just drugs. Yet, it seems that the contract law principle of *caveat emptor*, although unstated in both *Winterbottom* and *Thomas*, may have influenced the courts. This principle effectively required buyers to inspect goods prior to purchase. Failure to do so was a failure to live up to the obligation to protect one’s self. *Caveat emptor* was long established in American contract law by the late nineteenth century.<sup>65</sup> At the time *Thomas* was decided, 1852, the decision was not seen as a potential beginning of a slippery slope. The ability to inspect drugs was obviously limited. Drugs were “immanently” dangerous because if defective they would injure upon usage, whereas other defective products would not necessarily injure a person. They might not work as intended but their use would not automatically lead to physical harm of a person.<sup>66</sup>

Nevertheless, *Thomas* proved a precedent that served to make foodstuffs different in kind from other goods, too. Other state courts in the nineteenth century recognized the *Thomas* rule in drug cases.<sup>67</sup> *Thomas* was not seen as a rule of potentially broad application to all products meant for remote consumers. It was regarded more for its facts (concerning drugs) than for the abstract legal principle of due care for remote purchasers. After drugs, food soon became an exception in many states to the general

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<sup>65</sup> Walton H. Hamilton, “The Ancient Maxim Caveat Emptor,” *Yale L. J.*, Vol. 40, No. 8 (June, 1931), pp. 1133, 1178-87.

<sup>66</sup> Note, “Liability of Manufacturers to Remote Consumer,” *Alta. L. Q.*, Vol. 1, No. 1 (1934-1936), p. 40.

<sup>67</sup> *Blood Balm Co. v. Cooper*, 83 Ga. 857, 10 S.E. 118 (1889) (mislabeled instructions for drug’s use); *Porter v. Johnson, Jackson & Co.*, 50 W. Va. 644, 41 S.E. 190 (1901) (mislabeled saltpeter); *Meshbesher v. Chamelene Oil Mfg. Co.*, 107 Minn. 104, 119 N.W. 428 (1909) (poisonous mineral oil; violation of statute).

rule requiring privity of contract to sue a manufacturer. But some states started ruling that goods beyond foodstuffs were subject to the rule.<sup>68</sup> Yet, these cases never led to a general rule that consumer goods or general goods manufacturers were liable for their negligence to the ultimate consumer.

One reason is that the judiciary of the time was trained in the formalist school of legal education, wherein law was considered to be a science that discerned permanent, fixed rules. The training of judges is very important. It is in the training stage – the early stage of legal education – where a judge learns the norms of the legal community and seeks to work within them. The norm of the nineteenth century was formalism and respect for precedent, which usually meant narrow construction of cases in terms of legal principle and facts. As we shall see, it was partly due to the legal realist or anti-formalist training of the judges of the 1960s who led the Tort Revolution that the revolution was possible. Notwithstanding that most state court judges in the latter half of the nineteenth century were subject to some form of popular election, the judges of the period were proudly formalist. They “insisted they never made law.” The most notable state court justice of this period – who notably diverged from this norm – was Charles Doe of the New Hampshire Supreme Court from 1876 to 1896. Doe was described as a judge who thought “the function of the court [was] to furnish a remedy for every right.”<sup>69</sup> Although this disposition made Doe well known among legal scholars and practicing judges and lawyers, it also denotes how unusual he was among his colleagues.

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<sup>68</sup> *Wellington v. Downer Kerosene Oil Co.*, 104 Mass. 64 (1870) (naptha); *Lewis v. Terry*, 111 Cal. 39; 43 P. 398 (1896) (defective bed).

<sup>69</sup> John P. Read, *Chief Justice: The Judicial World of Charles Doe* (1967), p. 300, quoted in Lawrence M. Friedman, *A History of American Law*, 3d ed. (New York: Touchstone, 2005 ed.), p. 287.

Legal historian Lawrence Friedman has described state court judges of the period as “lesser men” and “conservative” and has argued that their decisions reflected their adherence to precedent as a value to be upheld.<sup>70</sup> As legal realist scholar Karl Llewellyn described it, the period from 1880 to 1910 was one where judges “felt in general a prime duty to order within the law and a duty to resist any ‘outside’ influence. ‘Precedent’ was to control, not merely to guide.”<sup>71</sup> As we shall see, such a disposition was deplored by champions of common law innovators, like Llewellyn and the other legal realists of the twentieth century. Yet, this restrained disposition of late nineteenth-century judges serves to explain the unwillingness to extend liability of manufacturers beyond the bounds of contractual relations, with the generally recognized exceptions of drugs and foodstuffs.

Even contemporary proponents of the courts’ controlling role in the American tort system have claimed that “courts do not lay down general principles; rather they decide specific controversies.”<sup>72</sup> However, the seminal products liability tort law holdings in American law – *MacPherson v. Buick Motor Co.* (N.Y., 1916), *Henningsen v. Bloomfield Motors Inc.* (N.J., 1960), and *Greenman v. Yuba Power Products, Inc.* (C.A., 1963), all of which are reviewed in this dissertation – demonstrate that courts sought to lay down general, broadly applicable principles *in the context of* individual court cases. Each of these cases was seminal because the rule of law upon which each case was decided was not mandated by precedent and in fact was seen, at the time of the respective decisions, as

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<sup>70</sup> *Ibid.*, pp. 288-89.

<sup>71</sup> Karl N. Llewellyn, “Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed,” *Vand. L. Rev.*, Vol. 3, No. 3 (Apr., 1950), p. 395, 396.

<sup>72</sup> Koenig and Rustad, *In Defense of Tort Law*, p. 8.

a break with precedent and a new direction in the law of torts. As in the nineteenth century, the court-centered development of tort law in the twentieth century was a form of policy-making statecraft.

### ***Legal Progressivism***

The Progressive Era of the early twentieth century was the *sine qua non* of the Tort Revolution of the 1960s. The progressive period of reform movements, lasting roughly from the 1890s through World War I, was the genesis of the ideological foundations for the Tort Revolution of the later period. Those state court judges who designed and led the Tort Revolution were ideological progressives and the changes in tort law, particularly product liability law, which they initiated at the state court level were the logical consequence of their understandings of how law should function in American society. The remainder of this chapter will chronicle and analyze the development of the intellectual foundations of the Tort Revolution.

The first two decades of the twentieth century saw the emergence of social and political reform movements, usually referred to collectively as progressivism. These reform movements were not made out of whole cloth. Rather they embraced and built upon the programmatic political reforms of an earlier post-Civil War generation and sought to use the enlarged post-Civil War sphere of the national government. The early post-Civil War reform efforts were aimed at political reform of parties at the state and national levels. One example of the early political reforms was the attempt to reduce political patronage in favor of merit appointments to the federal civil service jobs. As

historian Richard Hofstadter famously noted, progressives were rooted in (and reacted to) the Mugwumps of the late nineteenth century.<sup>73</sup>

Recent scholars have noted that progressivism was not a unified “movement”. When political reforms were enacted into law, they were often the product of a “peculiar combination of events.”<sup>74</sup> Nevertheless, it was an era of social, political, and economic reform both domestically and in Europe.<sup>75</sup> Sometimes self-identified progressives held conflicting goals or vehemently differed on the means for reaching shared goals. For example, many progressives sought greater regulation of the economy. Yet, some wanted to rely upon state legislatures to enact regulation, while other progressives wanted greater federal role. Additionally, some self-identified progressives were chiefly concerned with economic regulations, social inequality produced by the emerging industrial state and free market capitalism, and the apparent power of private corporations over the lives of workers.<sup>76</sup> Yet, other progressives were primarily concerned with moral reform efforts, such as the temperance movement and the relief of plight of the poor. Progressivism also found its way into the academy. Historical debates, especially regarding the founding period of the United States, were couched in Progressive terms.<sup>77</sup>

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<sup>73</sup> Richard Hofstadter, *The Age of Reform: From Bryan to F.D.R.* (New York: Vintage, 1955), p. 139. David Tucker presents a more favorable view of the Mugwumps in *Mugwumps: Public Moralists of the Gilded Age* (Columbia, MO: U. of Missouri Pr., 1998).

<sup>74</sup> Jerrold Waltman, “Origins of the Federal Income Tax,” *Mid-America*, Vol. 62, No. 3 (Oct., 1980), p. 147, 154.

<sup>75</sup> Daniel T. Rodgers, “An Age of Social Politics,” in Thomas Bender, ed., *Rethinking American History in a Global Age* (Berkeley: Univ. of California, 2002), pp. 250-73.

<sup>76</sup> Bruce Ackerman, *We The People: 1: Foundations* (Cambridge: Harvard, 1991), p. 227.

<sup>77</sup> Charles A. Beard, *An Economic Interpretation of the Constitution of the United States* (New York: Free Pr., 1913, 1986 ed.); Richard Hofstadter, *The Progressive Historians: Turner, Beard, Parrington* (New York: Vintage, 1968).

These are the areas of reform most frequently and popularly associated with progressivism: poor relief, workers' rights, antitrust laws, political corruption, etc. However, progressivism was intimately connected with legal reforms in the early twentieth century. Lawyers and law school academics saw the potential for progressive reforms in legal education, law practice, jurisprudence, and in how judges approached their task of judging. Although legal progressives were not always identified as "progressives" (nor did they often self-identify as such), they shared the concerns and methods of progressives in other reform movements. Just like the progressives in other areas of American life, legal progressives sought the application of scientific methods of inquiry and analysis in resolving legal problems. They wanted to improve how people lived by improving the legal regimes under which they lived. The facts of life, or realities of society and the application of legal rules, would point to solutions to society's problems.

Legal progressives sought changes in the way government, at the state and federal levels, treated individuals. These would later be known as civil liberties laws. Also, they sought reforming how contracts were legally formed and reviewed by courts. Legal progressives also sought reform in how the emergent national industrial economy and the resultant interstate migration of individuals affected legal disputes. This area of law is known as conflicts of laws and it concerns how state courts handle the claims and rights of parties formed across state lines and within other states. This is a unique problem in America's federal system and legal progressives sought to accommodate the states' resolution of legal problems to the changing nature of internal migration and business transactions.



Although the conventional account of progressivism contends that the Progressive Era ended around 1920,<sup>78</sup> it is more accurate to note that progressivism went into hibernation for a decade and the Great Depression gave progressives new opportunities on the national level, chiefly in the form of the Roosevelt administration's New Deal.<sup>79</sup> As historian Daniel Rodgers has noted, the New Deal was "the cosmopolitan progressives' moment" because it was their "response" to the worldwide depression.<sup>80</sup> Most importantly, for our purposes, legal progressives also sought to reform the nature and administration of American tort law. Progressives wanted tort law to adapt to the industrial economy and wanted to allow for greater protection of individuals vis-à-vis other individuals, employers, and manufacturers of goods.

### ***Sociological Jurisprudence and Legal Realism***

The best way to understand how progressivism manifested itself in legal circles is to analyze the nature of two schools of jurisprudence from the Progressive period: sociological jurisprudence and legal realism. Legal realism in particular was appealing to progressives because it was "a continuation of the reformist agenda of early-twentieth-

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<sup>78</sup> Michael McGerr, *A Fierce Discontent: The Rise and Fall of the Progressive Movement in America, 1870-1920* (New York: Oxford U. Pr., 2005); Robert H. Wiebe, *The Search for Order, 1877-1920* (Westport CT: Greenwood Pr., 1967, 1980 ed.).

<sup>79</sup> Bruce Ackerman, *We The People: 2: Transformations* (Cambridge: Harvard, 1998), p. 323.

<sup>80</sup> Daniel T. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge: Harvard Univ. Pr., 1998), pp. 411, 446. Richard Lowitt's biography of George Norris, a progressive U.S. senator from Nebraska, notes the realization of some progressive goals through the New Deal. *George W. Norris: The Triumph of a Progressive, 1933-1944* (Urbana, Ill.: U. of Ill. Pr., 1978).

century Progressivism.”<sup>81</sup> That is, legal realism and sociological jurisprudence were what we can term “legal progressivism.”

The nineteenth century was the heyday of legal realism’s precursor, legal formalism. Formalism was the loose term used to refer to almost any adherence to formal systems of legal rules and institutions. Defined as such, formalism was the norm in most European countries and the United States during the nineteenth century.<sup>82</sup> Critics regarded the adherence to formal systems as uselessly detached from the real effects of legal rulings. These critics, later collectively called the adherents of sociological jurisprudence (and later the legal realists), argued that formalists, especially formalist judges, concentrated on abstract legal concepts and ideals to the detriment of understanding the effects of legal rulings on litigants and the larger society. As described by a critic of the realists, Lon Fuller, realism was concerned “not in what judges *say*, but in what they *do*.”<sup>83</sup> The most important actor for the realists was the judge. Courts were seen as central to the functioning of any legal system and its rules. Thus, any reform of the law would need to start with reform of the courts; namely replacing formalist judges with realist judges.

Sociological jurisprudence was a philosophy of law that regarded law not as a fixed body of rules, but as ever-changing social experience. Rules are derived from a

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<sup>81</sup> Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford, 1994), p. 169.

<sup>82</sup> Neil MacCormick, *H.L.A. Hart* (Stanford: Stanford U. Pr., 1981), p. 121; Karl N. Llewellyn, “Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed,” *Vand. L. Rev.*, Vol. 3, No. 3 (Apr., 1950), p. 395, 396; Thomas C. Grey, “Langdell’s Orthodoxy,” *U. Pitt. L. Rev.*, Vol. 45, No. 1 (Fall, 1983), p. 1; Stephen M. Feldman, *American Legal Thought from Premodernism to Postmodernism: An Intellectual Journey* (New York: OUP, 2000).

<sup>83</sup> Lon L. Fuller, *The Law in Quest of Itself* (Chicago: Foundation Pr., 1940), p. 52.

society constantly in flux. Sociological jurisprudence's most famous apologist was Benjamin Cardozo. Legal realist Jerome Frank described Cardozo as being "in the forefront of those who realistically face the unavoidable uncertainties in law, the actualities of judicial law-making."<sup>84</sup> In terms of actual judging, Cardozo's views and performance as a judge reveal the sociological jurisprudential view. Cardozo saw formal rules of law in instrumental terms: "If they [legal rules] do not function, they are diseased. If they are diseased, they must not propagate their kind." Formal rules went through a cycle: After rules were initially stated, they were subject to "a force of logical consistency, then of its gradual breaking down before the demands of practical convenience in isolated or exceptional instances, and finally of the generative force of the exceptions as a new stock ... Gradually the exceptions broadened till today they have left little of the [original] rule."<sup>85</sup> Cardozo's reasoning in *MacPherson* was what Oliver Wendell Holmes, Jr. described as "the result of the often proclaimed judicial aversion to deal with such considerations [*i.e.*, the weighing of social advantages] [and thus] leav[ing] the very ground and foundation of judgments inarticulate, and often unconscious."<sup>86</sup> In essence, there was little distinction between the actual judicial behavior of Cardozo and the idealist judge of the legal realists.

Legal realism, in terms of a substantive philosophy of law, essentially posited that legal rules – if they exist at all – only exist when courts make rulings and parties follow

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<sup>84</sup> Jerome Frank, *Law and the Modern Mind* (New York: Brentano's, 1930; New Brunswick, N.J.: Transaction Publ., 2009), p. 252.

<sup>85</sup> Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale, 1922), pp. 98-99.

<sup>86</sup> Oliver W. Holmes, Jr., "The Path of the Law," *Harv. L. Rev.*, Vol. 10, No. 8 (Mar. 25, 1897), p. 467.

them. As H.L.A. Hart, the legal philosopher noted, this is a kind of “rule-skepticism.”<sup>87</sup> Hart noted some legal realists claimed that a law did not exist until a court made a ruling and affected parties. Even a statute could not be said to actually be “law” until a court had applied it to a case.<sup>88</sup> Roscoe Pound provided a corollary to this when, writing in 1931, he noted: “[W]hat courts and law makers and jurists do is not the whole task of a science of law. [Another essential fact] is the impossibility of divorcing what they do from the question of what they ought to do or feel they ought to do.”<sup>89</sup> This “ought” was key to understanding one of the chief aims of the realist project: to reform the law through the courts.

Legal historian Grant Gilmore is probably correct that the legal realists were only marginally different from the adherents of the Langdellian<sup>90</sup> case-method because both groups believed that law was a science and there was a “one true rule of law.”<sup>91</sup> The conventional historical understanding of the Langdellians is that their case method of study and view that law was a scientific endeavor led to legal formalism. Such formalism was the antithesis of legal realism, which saw the law as a “social science” that needed to reflect the lived experience of people. That is, the realists opposed the formalists’ rigid

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<sup>87</sup> H.L.A. Hart, *The Concept of Law* (New York: OUP, 1961), pp. 132-44.

<sup>88</sup> *Ibid.*, p. 64.

<sup>89</sup> Roscoe Pound, “The Call for a Realist Jurisprudence,” in William W. Fisher, et al., eds., *American Legal Realism* (New York: Oxford U. Pr., 1993), p. 61.

<sup>90</sup> Christopher Columbus Langdell (1826-1906) was a professor and dean of Harvard Law School from 1870 to 1890. He developed and institutionalized the case study method at Harvard. Under this method, students were taught the rules and principles guiding the law through study of appellate court’s reasoning in real cases. The case method of study is referred to as “Langdellian” and the study of law as a science is often associated with Langdell, too.

<sup>91</sup> Grant Gilmore, *The Ages of American Law* (New Haven: Yale Univ. Press, 1977), p. 87. Robert B. Stevens, *Law School: Legal Education in America from the 1850s to the 1980s* (Union, NJ: The Lawbook Exchange, Ltd., 2001), p. 53.

application of rules, favoring instead the development of rules derived from experience.<sup>92</sup> However, as William P. LaPiana has argued, the Langdellian method of case law instruction relied upon experience in its own right.<sup>93</sup> Thus, both Langdellians and Realists were convinced that law was formed through the lived experiences of people and was reflected in the necessities of rule-bounded decision making in the courts.

Historian G. Edward White has noted that, although sociological jurisprudence was “generative of [legal realism], the exponents of the two [schools of thought] saw them as antagonistic.”<sup>94</sup> Yet, both schools of jurisprudence saw themselves in reformist political terms. As historian John Henry Schlegel has pointed out, “social relationships between scholars” were key to understanding legal realism. As Schlegel noted, “Realism is not just, and maybe not even most importantly, a jurisprudence.”<sup>95</sup> Rather, it was a school of common interest among like-minded legal academics and judges. Although there were differences in doctrinal emphasis, both schools of thought wanted a more consumer friendly law and both sought a legal regime that served the interests of injured litigants. The sociological jurisprudence adherents and the legal realists are essentially indistinguishable when it comes to their writings and goals for tort law.

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<sup>92</sup> Kermit L. Hall, *The Magic Mirror: Law in American History* (New York: OUP, 1989), pp. 220-25.

<sup>93</sup> William P. LaPiana, *Logic and Experience: The Origin of Modern American Legal Education* (New York: OUP, 1994), pp. 168-70. But see, John Henry Schlegel, “Langdell’s Legacy Or, The Case of the Empty Envelope,” *Stanford L. Rev.*, Vol. 36 (1984), p. 1529-33, wherein it is argued that the Langdellian case method was a product of the belief that law is really a set of finite rules.

<sup>94</sup> G. Edward White, “From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America,” *Va. L. Rev.*, Vol. 58, No. 6 (Sept., 1972), p. 999.

<sup>95</sup> John Henry Schlegel, *American Legal Realism and Empirical Social Science* (Chapel Hill: UNC Pr., 1995), pp. 7, 274 n. 30. Also, G. Edward White has noted the very personal nature of the history of both schools of thought, especially legal realism. *Ibid.*

One starting point for the progressives' influence upon legal academics and lawyers can be found in an address given by Oliver Wendell Holmes, Jr. (1841-1935) in 1897. Although Holmes should not be seen as a progressive, his arguments, made in the late nineteenth century, were of the kind that legal progressives – especially the legal realists – would make later regarding law reform. Holmes argued that the public wanted and needed to know how the law would affect them. Lawyers were essential in providing this kind of public service. Holmes saw public and private law as having real effects on peoples' lives; it shaped their lives in ways they did not always (or often) understand. The law was a “history of the moral development of the [human] race.” The practice of law “tends to make good citizens and good men.”<sup>96</sup> Such comments are the reason later legal scholars like Lon Fuller thought of Holmes “the most illustrious realist of them all.”<sup>97</sup>

Holmes contended that law was not born out of logical thought and did not emanate from “the sovereign” nor was it the “voice of the *Zeitgeist*.” Rather law was the product of “fixed quantitative relations” (cause and effect relations) between the public and the judges.<sup>98</sup> That is, public opinion eventually worked its way into a judge's decisions regarding formal legal rules. Legal rules were, to some degree, the product of public opinion. It was important to understand “how large a part of our law is open to reconsideration upon a slight change in the habit of the public mind.”<sup>99</sup>

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<sup>96</sup> Oliver W. Holmes, Jr., “The Path of the Law,” *Harv. L. Rev.*, Vol. 10, No. 8 (Mar. 25, 1897), p. 459.

<sup>97</sup> Lon L. Fuller, *The Law in Quest of Itself* (Chicago: Foundation Press, 1940), p. 62.

<sup>98</sup> Oliver W. Holmes, Jr., “The Path of the Law,” *Harv. L. Rev.*, Vol. 10, No. 8 (Mar. 25, 1897), pp. 465-66.

<sup>99</sup> *Ibid.*, p. 466.

In fact, Holmes predicted some of the thought that would later be used by strict liability proponents in the 1960s when he noted how tort law was a reflection of changing times:

Our law of torts comes from the old days of isolated, ungeneralized [*sic*] wrongs, assaults, slanders, and the like, where damages might have been taken to lie where they fell by legal judgment. But the torts with which our courts are kept busy today are mainly the incidents of certain well-known businesses. They are injuries to person or property by railroads, factories, and the like. The liability for them is estimated, and sooner or later goes into the price paid by the public. The public really pays the damages, and the question of liability if pressed far enough, is really the question of how far it is desirable that the public should insure the safety of those who work it uses.<sup>100</sup>

This reasoning would be modified in later in the century for the purpose of shaping the tort law for manufacturing defects in consumer products from a system of fault (or negligence) to one of no-fault, or strict liability. Holmes was arguing that judges needed to “adequately recognize their duty of weighing considerations of social advantage.”<sup>101</sup> As we shall see, a willingness to openly recognize this propensity of judges was a distinguishing characteristic of the progressive judges of the 1960s. However, in the late nineteenth and early twentieth centuries, judges were too sensitive to the demands of legal formalism and the traditional restraint expected of them in the policymaking role to (openly) follow Holmes’s advice.

Holmes’s plea for judges to recognize their policymaking role in the law was taken up by legal academics in the early twentieth century. In 1912 Stanford Law School

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<sup>100</sup> Holmes, “The Path of the Law,” *Harv. L. Rev.*, Vol. 10, No. 8 (Mar. 25, 1897), p. 467.

<sup>101</sup> *Ibid.*

professor Joseph W. Bingham gave a systematic description of the purported faults of legal formalism and virtues of realism. Bingham argued that law needed to be treated as a kind of science, in which the causes and effects of judicial actions were analyzed in order to determine the reality of law. For example, Bingham wrote:

The law, as does the scientist, studies sequences of external phenomena and he studies them with a similar purpose – to determine their causes and effects and to acquire an ability to forecast sequences of the same sort.<sup>102</sup>

Another realist, Roscoe Pound (1870-1964), was one of the foremost legal theorists of his time and was one of the leading lights of sociological jurisprudence. While a law professor and dean of Harvard Law School, Pound made a name for himself as a legal theorist in a series of articles written in the first decade of the twentieth century. Pound contended that law should be “scientific,” by which he meant it was comprised of “reason, uniformity, and certainty,” and that law was “scientific as a means toward an end, [and] it must be judged by the results it achieves ... [and] the extent to which it meets its end.” In arguing that law must adapt as society changes, Pound contended that, “Legal theory can no more stand as a sacred tradition in the modern world than can political theory.”<sup>103</sup> Pound lamented, “[L]aw does not respond quickly to new conditions. It does not change until ill effects are felt; often not until they are felt acutely.” Changes take place first in society, courts must respond, but until they did so, “friction must ensue” in the application of old law to changed conditions. Pound believed the early twentieth century was “an age of rapid moral, intellectual and

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<sup>102</sup> Joseph W. Bingham, “What is the Law?” *Mich. L. Rev.*, Vol. 11, No. 1 (Nov., 1912), p. 1, 9, continued at 109.

<sup>103</sup> Roscoe Pound, “Mechanical Jurisprudence,” *Colum. L. Rev.*, Vol. 8, No. 8 (Dec., 1908), pp. 605-07.



economic changes.”<sup>104</sup> He warned against adherence to formal rules merely because they were such; he warned against the decay of “scientific jurisprudence” into “mechanical jurisprudence.”<sup>105</sup> Others who agreed with Pound believed that “lawyers and judges” needed to be “trained in the investigation and analysis” of “great social and economic problems.”<sup>106</sup>

Pound was the key figure in the formation of sociological jurisprudence and a key figure in legal realism.<sup>107</sup> N.E.H. Hull has provided a history of Pound’s role in both schools of thought and the extensive overlap between the two. As Hull has described it, sociological jurisprudence and legal realism “were really two movements that laid the foundation for modern legal thought.” Pound was a leading proponent of expressly arguing for “judicial decision making sensitive to currents of public opinion.” He emphasized an adherence to “principles over rules and argued, as a Progressive would, that rules and principles should be adapted to social, economic, and political changes.”<sup>108</sup> He advocated for broad, sweeping changes in the way courts administered the law. He wanted to facilitate better ways of conducting commerce unencumbered by “archaic judicial organization and obsolete procedure.” Courts needed to be flexible in the early

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<sup>104</sup> Roscoe Pound, “The Causes of Popular Dissatisfaction with the Administration of Justice,” in *Report of the Twenty-Ninth Annual Meeting of the American Bar Association, Aug. 29-31, 1906* (Philadelphia: Dando, 1906), pp. 400-401.

<sup>105</sup> Roscoe Pound, “Mechanical Jurisprudence,” *Colum. L. Rev.*, Vol. 8, No. 8 (Dec., 1908), pp. 605-07.

<sup>106</sup> Ray A. Brown, Book Review, *Harv. L. Rev.*, Vol. 39, No. 7 (May, 1926), p. 909, 912 (reviewing book containing an introduction by Roscoe Pound).

<sup>107</sup> Roscoe Pound, “Spurious Interpretation,” *Colum. L. Rev.*, Vol. 7, No. 6 (June, 1907), p. 379 (referencing the “sociological jurist”); “The Scope and Purpose of Sociological Jurisprudence: I. Schools and Methods of Jurisprudence,” *Harv. L. Rev.*, Vol. 24, No. 8 (June, 1911), p. 591-619; Part II, Vol. 25, No. 2 (Dec., 1911), p. 140-168; Part III, “Sociological Jurisprudence,” Vol. 25, No. 6 (Apr., 1912), p. 489-516.

<sup>108</sup> N.E.H. Hull, “Reconstructing the Origins of Realistic Jurisprudence: A Prequel to the Llewellyn-Pound Exchange Over Legal Realism,” *Duke L. J.*, Vol. 1989, No. 5 (Nov., 1989), pp. 1306-08.

twentieth century, which Pound described as a “time of transition in the very foundations of belief and of conduct.”<sup>109</sup>

Roscoe Pound and other legal realists demonstrate the Progressive-Era roots of strict liability theory. Pound argued that the prevailing common law rule regarding purchases of goods, *caveat emptor* (“buyer beware”), was a “scheme of individual initiative” that was “breaking down” in “our modern industrial society.”<sup>110</sup> This is almost a verbatim predecessor of the arguments used by proponents of strict liability later in the century. Pound advocated an early version of strict liability, or liability without regard to fault, in an article in 1914. In it he argued that “in the exigencies of social justice” businesses could best “bear the loss” arising from activities that led to injury, even when neither party was at fault. He referred to this as liability for the “enterprise.”<sup>111</sup> Pound’s argument regarding the presumed ability and utility of businesses being best able to “bear the loss” would later be used in the 1940s through the 1960s by academics and state court judges who favored the elimination of negligence-based liability in favor of strict liability, including the most famous judicial proponent of strict liability in the post-war period, Justice Roger Traynor of the California Supreme Court, and the best known academic proponent, William L. Prosser, both of whom are reviewed in detail in subsequent chapters.<sup>112</sup>

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<sup>109</sup> Roscoe Pound, “The Causes of Popular Dissatisfaction with the Administration of Justice,” in *Report of the Twenty-Ninth Annual Meeting of the American Bar Association, Aug. 29-31, 1906* (Philadelphia: Dando, 1906), pp. 414-415.

<sup>110</sup> *Ibid.*, p. 403.

<sup>111</sup> Roscoe Pound, “The End of Law as Developed in Legal Rules and Doctrines,” *Harv. L. Rev.*, Vol. 27, No. 3 (Jan., 1914), p. 195, 233.

<sup>112</sup> Prosser is discussed *infra* in this chapter; Traynor is discussed *infra*, Chapter 3.

### *Early Progressive Tort Reform*

There were inroads made on the general rule against suing a remote manufacturer without benefit of privity. *Winterbottom*'s purported requirement of privity was recognized as the prevailing rule "throughout the English speaking nations."<sup>113</sup> One of the very few exceptions was a case from Minnesota in 1892, *Schubert v. J.R. Clark Co.*<sup>114</sup> In *Schubert*, the plaintiff was a house painter whose employer bought a stepladder from a retailer, which in turn had bought it from the manufacturer. The plaintiff was injured when the ladder collapsed. Neither the plaintiff nor his employer had privity of contract with the manufacturer. These facts made it remarkable that the Minnesota Supreme Court held that the employee could still sue the manufacturer for its negligence. The Court assumed the manufacturer knew of the defects at the time of delivery.<sup>115</sup>

The Court cited several cases from other states holding a manufacturer liable for negligence, even though no privity of contract existed, including the *Thomas v. Winchester* case from New York. Those cases dealt with drugs, food, animal food, diseased animals, and explosive fluids.<sup>116</sup> These items were inherently dangerous or presented an immanent danger, an exception already gaining ground in American courts.

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<sup>113</sup> *Huset v. J.I. Case Threshing Mach. Co.*, 120 F. 865, 870 (8<sup>th</sup> COA, 1903).

<sup>114</sup> 49 Minn. 331; 51 N.W. 1103 (1892).

<sup>115</sup> The court suggested in dicta that the defendant might be liable for what he "knew or had reason to apprehend," which is an objective standard allowing a defendant to be held liable not based on actual knowledge but on what a jury thinks the defendant should have known under the circumstances. *Schubert*, 49 Minn. at 338; 51 N.W. at 1105.

<sup>116</sup> *Ibid.* at 336-39; 51 N.W. at 1104-05 (case citations omitted).

Thus, foodstuffs and drugs were not the only goods to which this rule was applied. A minority of courts was willing to apply the principle to other goods.

The Court reasoned that the manufacturer “should be held to responsibility” for its negligence and “that no reason of policy forbids this.”<sup>117</sup> The Court had simply decided to join the minority of jurisdictions that allowed a plaintiff to sue a remote manufacturer for negligence. The court did not provide a lengthy articulation of its policy-based rule. Rather it simply stated that the law “should” provide such liability. The Court was concerned with what it viewed as a clear case of moral fault, which the prevailing rule would allow to be done with impunity.

There were other cases that allowed recovery when the good was “imminently dangerous” when used “for the purpose for which it was constructed.” Things like guns, drugs, and industrial threshing machines fell into this category.<sup>118</sup> Most of these cases allowed recovery, notwithstanding lack of privity, because they were construed as falling within one of two exceptions to the general rule: there was deceit or fraud involved; or there was an “inherently dangerous” product involved. Defective food was easily considered to be of the latter category.

By the second decade of the twentieth century, there were indications by some courts that manufacturers’ liability should be justified on bases other than just moral fault. Those progressives who sought to expand manufacturer liability in the realm of products could look to another area of torts, where another kind of tort revolution had occurred: the plight of injured workers under common and the then-new system of

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<sup>117</sup> Ibid. at 340; 51 N.W. at 1106.

<sup>118</sup> *Huset v. J.I. Case Threshing Machine Co.*, 120 F. 865 (1903) (and cases cited therein); *Statler v. George A. Ray Mfg. Co.*, 195 N.Y. 478; 88 N.E. 1063 (1909) (exploding coffee urn).

workers' compensation. Although this system will be explained in greater detail in Chapter Five, it is important to note that many contemporaries saw the nineteenth-century legal system for injured workers as harsh and cruel. This was because workers injured on the job had little hope of success in suing their employer or a fellow employee. Injured workers were faced with covering their own medical bills and bearing the loss themselves, even if the injury was the fault of a careless employer or fellow employee. Workers compensation was a compensatory system designed to allow injured workers to recover regardless of fault. That is, it was a no-fault system intended to be a solution to the common law's refusal to entertain many injured workers' claims, and the futility of bringing common law claims. The workers' compensation system was recent in the experience of judges who sat upon state courts and considered the claims of consumers injured by defective products in the Progressive Era.

For example, the progressive sensibility was on display in *Ketterer v. Armour & Co.* (1912), wherein the federal circuit court judge in Manhattan held that the Armour pork company could still be sued notwithstanding a lack of contractual privity between it and the ultimate consumer, who was sickened by trichinae-infected pork. This case falls within the exception to the general privity rule because it dealt with defective food, which was considered "inherently dangerous." Yet, it is notable because of the judge's explanation for his decision.

Responding to the pork manufacturer's contention that it owed no duty to a party with whom it had no contract, Judge Walter Chadwick Noyes, a Theodore Roosevelt appointee, wrote "I am wholly unable to apply this rule [regarding privity] in the present case; much more to apply in the name of public policy. ... The remedies of injured

consumers ought not to be made to depend upon the intricacies of the law of sales. The obligation of the manufacturer should not be based alone upon privity of contract. It should rest, as was once said, upon ‘the demands of social justice.’” Noyes contended that unlike an iron manufacturer, who could not foresee his iron would be part of an exploding boiler, the food manufacturer had reason to know that his rancid food would be consumed by a person and therefore injure them.<sup>119</sup> Noyes’s analogy elided the question of whether the grade of iron would or should be a factor in the liability of an iron manufacturer.

Nevertheless, Noyes’s remarks provide an early, Progressive-Era example of the judicial function that would be periodically repeated later in the century, as state courts expanded the liability of manufacturers. First, Noyes made his decision based upon “public policy” rather than the rules of contract or sales law. This term has often been used when no positive law exists on a matter and a court seeks a rule upon which to justify a decision. Noyes’s opinion cited no precedent to support his decision. The only rationale was his invocation of “public policy.” Tellingly, Noyes personalized the decision by using the first person in his reasoning: “Public policy regards the public good and *I* am yet to be convinced that the public welfare will be promoted by holding that producers and manufacturers owe no duty to consumers to guard against diseased and poisonous meats and provisions . . . . [And] *in my opinion*, every consideration to law and public policy requires that the consumer should have a remedy” (italics added). Second, Noyes expressly looked to the good of “consumers” and placed liability on the

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<sup>119</sup> *Ketterer v. Armour & Co.*, 200 F. 322, 323 (S.D.N.Y. 1912).

manufacturer, which “should be held responsible for the results of negligent acts which he [the manufacturer] can readily foresee.”<sup>120</sup>

Foreseeability became a standard for measuring duty under all American tort law. In the famous case of *Palsgraf v. Long Island Railroad* (1928),<sup>121</sup> Judge Benjamin Cardozo authored an opinion that became the leading American case regarding duty in tort law. Cardozo held that *actual causation* of an injury was not the only proof needed in tort cases. What was also needed was proof that the loss was a foreseeable loss based on the facts of the case. If the loss was so remote or improbable that it was not deemed reasonably foreseeable, then no duty existed between the defendant and the plaintiff. *Palsgraf* was not a products liability case but the reasoning could apply in the defective products context. A remote purchaser, for whom the product was intended, would certainly be within the ambit of reasonable foreseeability and hence the manufacturer was legally liable for negligence causing injury to the remote purchaser. This was implicit in the 1916 *MacPherson* case (discussed below), but the concept of foreseeability was not expressly relied upon in *MacPherson*.

*Ketterer* was a rare case, where a judge stridently stated his desires for the direction of tort law in America. Most judges of this period were reluctant to openly appeal to normative goals and reference “public policy” as a justification for reaching them. Most judges were attentive to the formalist norms of judging, which frowned upon innovation. One example of a progressive reformist judge, who was more acutely

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<sup>120</sup> Ibid.

<sup>121</sup> 248 N.Y. 339.

attentive to the judicial process norms of the Progressive Era was Benjamin Cardozo, a judge of the New York Court of Appeals from 1914 to 1932.<sup>122</sup>

In 1916, the New York Court of Appeals, the highest appellate court in the state, issued a ruling in *MacPherson v. Buick Motor Co.*,<sup>123</sup> a product liability case that became the lodestar for changing the law throughout the nation. In 1909, Donald MacPherson purchased a Buick from a local dealer in Schenectady, New York. The wheels for the car, manufactured by a supplier, were made with wooden spokes. The car maker, Buick, bought the wheels from a separate wheel manufacturer and assumed they were in good working order. Thereafter, the car was sold to a dealer and the dealer, in turn, sold it to MacPherson. Shortly thereafter, MacPherson was driving down the road (at eight miles per hour) when one of the wheels collapsed, causing MacPherson to be thrown from the car and injured. It was later determined by the court that the wheels were defective. In his lawsuit MacPherson contended that the Buick dealer was negligent for having failed to ascertain the defect in the tirewheel.<sup>124</sup>

Judge Cardozo authored the majority opinion for the New York Court of Appeals in *MacPherson*. Cardozo wrote that when a product was negligently made, then it became “a thing of danger.” This was different from the *Thomas v. Winchester* view that only things like drugs were inherently dangerous. Any defective good exposed the manufacturer to liability for the negligence that led to the good’s faulty condition.

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<sup>122</sup> Unlike many other states, New York’s highest appellate court is called the “Court of Appeals.” The highest court in most other states is called the Supreme Court. Cardozo was elected Chief Judge of the Court from 1927 through his resignation in 1932 to accept the nomination of Herbert Hoover to the U.S. Supreme Court.

<sup>123</sup> 217 N.Y. 382; 111 N.E. 1050 (1916).

<sup>124</sup> *MacPherson v. Buick Motor Co.*, 160 A.D. 55, 56-57; 145 N.Y.S. 462, 462-63 (1914).



Cardozo was mindful of, and subtly acknowledged, the public policy arguments that underlay the decision. He implicitly pointed out the then-prevailing conditions of the modern industrial state and how consumer goods were produced and marketed: “We are dealing now with the liability of the manufacturer of the finished product, who puts it on the market to be used without inspection by his customers.”<sup>125</sup> Under such conditions, a manufacturer was liable for the tort of negligence – regardless of whether any contract existed between it and the ultimate consumer. Mr. MacPherson won his case against Buick and earned his place in American legal history.

Such a holding was a change in New York law, making manufacturers in New York state and those who sold their products in the state liable to remote purchasers (and other foreseeable users) for their negligence in the manufacture of all kinds of products. Although a plaintiff would still need to prove that a manufacturer had been negligent in making the product and that the products was defective, the *MacPherson* case was a considerable expansion of the manufacturer’s liability.

Cardozo is one of the earliest exemplars of progressivism applied to tort law. His role in some of the seminal tort cases of the twentieth century and the appeal to others (lawyers, judges, and scholars) of his jurisprudential approach to torts are important in understanding products liability law in the early twentieth century. Legal historian G. Edward White has characterized Cardozo’s common law jurisprudence as one where judges are frequently “free to shape the course of the law.” That is, Cardozo was cognizant of the perception of common law judging as an internalist enterprise, a development of doctrine by its application to novel factual situations. Yet, he was quite

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<sup>125</sup> *MacPherson*, 217 N.Y. at 390; 111 N.E. at 1053.

externalist in his own judicial performance. He was concerned with the effects of rulings beyond the parties in a given case.

Cardozo once described his willingness to disregard precedent in favor of new rules thusly:

I am ready to concede that the rule of adherence to precedent, though it ought not to be abandoned, ought to be in some degree relaxed. I think that when a rule, after it has been duly tested by experience, has been found to be inconsistent with the sense of justice or with the social welfare, there should be less hesitation in frank avowal and full abandonment. ... There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of institutions or conditions which have gained a new significance or development with the progress of the years.<sup>126</sup>

Like many progressives, Cardozo looked to the complex industrial state of the early twentieth century and saw problems that could be ameliorated by changes in legal doctrine. G. Edward White has described Cardozo's disposition as shaped by a belief in the common law tradition of "the adaptability of previous common law principles to new situations," but combined with a competing belief that "common law courts should be responsive to social or economic change." When faced with a conflict between these beliefs a judge could "appeal to contemporary social values" to resolve the conflict. Thus, when Cardozo was faced with such situations he would, in White's words, "search for a means of making novel results appear to be the logical products of established

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<sup>126</sup> Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale Univ. Pr., 1922), pp. 150-151.

doctrines, so that changes in the common law *seemed* to underscore common law continuity.”<sup>127</sup>

*MacPherson* was published only two years into Cardozo’s tenure on the Court of Appeals. As for Cardozo’s understandings of the scope of one’s duty in *MacPherson*, G. Edward White contends that Cardozo’s opinion was the result of his effort to make the fault system of torts “more responsive to the conditions of modern industrial life.”<sup>128</sup> Although White does not specifically refer to Cardozo as a progressive, such motives are squarely within the public policy aims of progressivism. As White rightly notes, in *MacPherson* Cardozo “employed the method[s] of sociology” in order to meet – in Cardozo’s words – “the needs of life in a developing civilization.”<sup>129</sup> As Cardozo’s recent biographer Andrew Kaufman has noted, Cardozo was careful in the *MacPherson* case to not expand upon his conception of the “needs of . . . a developing civilization.” Yet, Kaufman suggests his agreement with Cardozo’s extension of the law in *MacPherson*, seeing it as an improvement based upon Cardozo’s endorsement of sociological analysis in judging.<sup>130</sup>

Warren A. Seavey, a contemporary and colleague of Cardozo on the American Law Institute’s Advisory Committee on the first *Restatement of Torts*, wrote of Cardozo: “He was a progressive judge but not primarily a reforming judge. He did not remake the

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<sup>127</sup> G. Edward White, *The American Judicial Tradition: Profiles of Leading American Judges* (New York: OUP, 1976), pp. 256, 258, 277 (emphasis added).

<sup>128</sup> White, *The American Judicial Tradition*, p. 280.

<sup>129</sup> *Ibid.*, p. 283 (quoting Cardozo’s majority opinion in *MacPherson*, 217 N.Y. at 391, 111 N.E. at 1053).

<sup>130</sup> Andrew L. Kaufman, *Cardozo* (Cambridge: Harvard, 1998), p. 275. Similarly, Richard Polenberg has concluded that *MacPherson* was a case “which demonstrated the law’s ability to adapt to modern needs.” *The World of Benjamin Cardozo: Personal Values and the Judicial Process* (Cambridge: Harvard, 1997), p. 2.

law of torts. On the contrary, by and large, he accepted the common law as he found it, merely choosing between precedents where choice was possible, and choosing the best.”<sup>131</sup> Seavey was correct that Cardozo was a progressive. However, Seavey was wrong to conclude Cardozo was not a reformer. It would be more accurate to say that Cardozo worked reform into the law without *explicitly proclaiming* his work as reformist.

The progressive nature of the New York Court of Appeals during this period was best summarized by two of Cardozo’s colleagues on that court. Chief Judge Frank Harris Hiscock, writing in 1924, responded to critics of the Court by defending the “progressiveness of New York law.” Hiscock endorsed the idea that, “The law is not a fixed body of dogmatic rules. It is as varying as the changing requirements of a progressive civilization.”<sup>132</sup> This was the heart and soul of Cardozoan sociological jurisprudence: law is not fixed (nor should it be) because it is a reflection of society, which is ever changing. Hiscock, Cardozo, and the other judges on the Court also endorsed the sociological-cum-realist approach made famous by the U.S. Supreme Court’s consideration of Louis Brandeis’s social statistics brief in *Muller v. Oregon*. In *People v. Charles Schweinler Press* (1915), a unanimous Court of Appeals upheld an hours law, enacted to “protect the health and morals” of women factory workers, under the state’s police power. The Court, in an opinion by Judge Hiscock, relied upon sociological research, which provided “new and additional knowledge,” in adjudging the hours legislation as protecting “public health.”<sup>133</sup> This approach was within the legal

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<sup>131</sup> Warren A. Seavey, “Mr. Justice Cardozo and the Law of Torts,” *Harv. L. Rev.*, Vol. 52, No. 3 (Jan., 1939), p. 372.

<sup>132</sup> Frank Harris Hiscock, “Progressiveness of New York Law,” *Cornell L.Q.*, Vol. 9, No. 4 (June, 1924), p. 371, 374.

<sup>133</sup> 214 N.Y. 395, 412; 108 N.E. 639, 644 (1915).

progressive vein, which proclaimed the necessity of law responding to the changing conditions in society.

Another judge of that court, Cuthbert Pound, also writing in 1924, defended the Court thus:

Anyone who follows the decisions of the United States Supreme Court and of our own Court of Appeals cannot fail to observe that in these supposed shelters of reaction the law is being steadily rewritten to conform more nearly to the standards of the time and that an occasional display of atavism excites more wonder than the most advanced example of evolution and progress ... I can readily point to recent liberalized decisions of courts of last resort which would have been deemed revolutionary even ten years ago, and might have been decided otherwise without affronting authority.<sup>134</sup>

Pound was quite right. In 1916 it would have been unexceptional for the New York Court of Appeals to hold that Buick Motor Company was not liable to a negligence claim by Mr. MacPherson because of the privity doctrine.

Chief Judge Hiscock defended the *MacPherson* decision by noting that the doctrine of negligence overruled the old rule of privity of contract because, “With all of the physical agencies now commonly used and which are a source of danger if negligently prepared, the rule against setting afloat mislabeled poisons [as in *Thomas v. Winchester*, above] has become of minor importance when compared with other sources of danger. New perils have created a need for new protection.”<sup>135</sup> The *MacPherson* case was an example of “new protection” in light of “new perils.” This was a clearly

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<sup>134</sup> Cuthbert W. Pound, “The Relation of the Practicing Lawyer to the Efficient Administration of Justice,” *Cornell L.Q.*, Vol. 9, No. 3 (April, 1924), p. 235, 242.

<sup>135</sup> Frank Harris Hiscock, “Progressiveness of New York Law,” *Cornell L.Q.*, Vol. 9, No. 4 (June, 1924), p. 371, 378-79 (citing *MacPherson*).

progressive understanding of legal rule development. The industrial society presented “new perils” to citizens and the courts needed to use their power to craft “new protections” for injured parties. Drugs and foods could no longer be special exceptions; privity had to give way to the needs of the consumer to be compensated for injury by any defective product.

After *MacPherson* was issued, progressive scholarly commentators supported its holding. For example, the progressive legal scholar Herbert Goodrich, of Michigan Law School, wrote of the need to apply tort principles of duty of care to remote manufacturers. He disagreed that one’s liability in tort should be premised on a contractual relationship; rather it should be based on the “general rule of liability for the consequences of negligent acts.” Goodrich supported the application of negligence liability to a manufacturer not in privity with the injured consumer.<sup>136</sup>

However, there were some courts which initially rejected the rule and reasoning of *MacPherson*. For example, in 1922 in *Pitman v. Lynn Gas & Electric Co.*, the Massachusetts Supreme Court heard a case where a plaintiff was injured by a defective flatiron, which was loaned to her by another individual who had purchased it from a dealer. The dealer bought the flatiron as part of an inventory from the manufacturer. The dealer, not the manufacturer, was sued. The Court refused to adopt the *MacPherson* rule, noting the “many reasons” for the then-prevailing rule requiring privity of contract between plaintiff and manufacturer. The court noted “the absence of legal duty to a mere stranger”; the “break in the chain of legal causation”; and the fear of a “multiplicity of

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<sup>136</sup> Herbert Goodrich, “Privity of Contract and Tort Liability,” *Mich. L. Rev.*, Vol. 21, No. 2 (Dec., 1922), p. 200, 201-02 (citing *MacPherson*).

suits which would follow if” plaintiffs could recover against remote manufacturers.<sup>137</sup> Yet, the court left open the possibility of adopting the *MacPherson* rule in the future by expressly distinguishing *MacPherson*, noting that in *MacPherson* the defendant “was the manufacturer of the automobile, and not a mere dealer” as in the instant case.<sup>138</sup> (The court was incorrect. In *MacPherson*, the defendant was the assembler of the final automobile, but the defective wheel was actually made by an independent supplier.<sup>139</sup>) Massachusetts eventually adopted the *MacPherson* rule in 1946, with the state Supreme Court concluding: “The time has come for us to recognize that [the rule requiring privity] no longer exists. In principle it was unsound. It tended to produce unjust results. It has been abandoned by the great weight of authority elsewhere. We now abandon it in this Commonwealth.”<sup>140</sup>

In 1924, Cardozo wrote that he considered *MacPherson* to be part of a “development” of the tort law. He coined a phrase, which formed the titled of a notable article two generations later; Cardozo considered *MacPherson* as “a phase of the assault . . . upon the ancient citadel of privity.”<sup>141</sup>

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<sup>137</sup> *Pitman v. Lynn Gas & Elec. Co.*, 241 Mass. 322, 323-24; 135 N.E. 223, 223-24 (1922).

<sup>138</sup> *Ibid.*, at 324; 135 N.E. at 224.

<sup>139</sup> *MacPherson*, 217 N.Y. 382, 385; 111 N.E. 1050, 1051. Notwithstanding this error on the *Pitman* Court’s part, the most important difference between the cases was the fact that the evidence in *Pitman* suggested the dealer inspected the flatirons and lacked knowledge of the defect. Nevertheless, the jury still found the dealer guilty of negligence. The jury’s verdict might have been based on the contention the dealer *should have known* of the defective condition of the flatiron. Even if the defendant did know of the defect, however, the Court stated the plaintiff, because she did not purchase the item, had no claim rights. It was unclear whether the defect was due to a design flaw (which would have been present in all of the flatirons), or a manufacturing flaw (which would only be present in the single flatiron).

<sup>140</sup> *Carter v. Yardley & Co.*, 319 Mass. 92, 104; 64 N.E. 693, 700 (1946) (perfume).

<sup>141</sup> Benjamin N. Cardozo, *The Growth of the Law* (New Haven: Yale Univ. Pr., 1924), p. 77. In 1960, reigning torts scholar and proponent of strict liability for general products, William L. Prosser, would use Cardozo’s phrase “assault upon the citadel” for the title of an article cataloguing the erosion of the privity

But *MacPherson* did not present a frontal assault upon the citadel of early twentieth-century tort law because it was decided upon a prevailing tort principle: negligence. As previously noted, moral fault was the key concept of tort law in the early twentieth century.<sup>142</sup> Although *MacPherson* overturned the prevailing construction of sales cases which led to personal injuries, the principle that replaced the no-privy defense was one already deeply imbedded in existing tort law and, therefore, was not a radical departure from the normative goals of tort law. Also, it is conceded that Cardozo's opinion challenged the prevailing tort rule of products cases – that one only owed a duty to someone with whom one had contractual relations. Yet, duties to strangers existed in other tort contexts. This made *MacPherson* easier to swallow and adopt for other states' courts. By contrast, the switch to strict liability later in the century was a very radical change because it replaced a prevailing principle of fault-based liability with a completely contrary principle of no-fault liability.

Yet, Cardozo's comments were prophetic. Many other states' supreme courts soon followed the New York Court of Appeals' decision, so that by 1960 only two states (Mississippi and Virginia) did not follow the expanded rule of liability established in *MacPherson*.<sup>143</sup> In fact, the case was so uncontroversial that legal scholars did not even

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defense. "The Assault Upon the Citadel (Strict Liability to the Consumer)," *Yale L. J.*, Vol. 69, No. 7 (June, 1960), p. 1099.

<sup>142</sup> James Barr Ames, "Law and Morals," *Harv. L. Rev.*, Vol. 22, No. 2 (Dec., 1908), p. 97, 99. "The ethical standard of reasonable conduct has replaced the unmoral standard of acting at one's peril." *Ibid.*

<sup>143</sup> William L. Prosser, "The Assault Upon the Citadel (Strict Liability to the Consumer)," *Yale L. J.*, Vol. 69, No. 7 (June, 1960), p. 1099; Andrew L. Kaufman, *Cardozo* (Cambridge: Harvard, 1998), pp. 269-75.



discuss it in law review articles until the 1950s.<sup>144</sup> These would have been the locus of scholarly debates and arguments against *MacPherson*.

The *MacPherson* case has been rightly adjudged one of the most important in American legal history. It was influential for many other courts and was usually cited by other states' courts when expanding their liability rules and eliminating the privity requirement in defective products cases. Lawrence Friedman has contended that *MacPherson* was adopted rapidly by other states' courts, "not because of Cardozo's reputation and skill, but because it struck judges as intuitively correct."<sup>145</sup> This fails to account for the unique popularity of Cardozo and his persuasiveness in writing. As we have seen, *MacPherson* was not the first case to allow remote manufacturers to be sued, even in the case of consumer goods. However, as Friedman correctly suggested, Cardozo's opinion appealed to the progressive sensibilities of other states' courts and was persuasive in convincing other courts of the legitimacy of changing their own states' tort laws.

*MacPherson* was decided during the height of the Progressive Era in American politics and culture. Benjamin Cardozo cannot blithely be characterized as a legal progressive. He was not a wholesale reformer in all areas of law, including tort law. For example, he famously qualified the duty one owes to others in *Palsgraf v. Long Island Railroad* by limiting one's duty only to those who could reasonably be foreseen as being affected by one's acts.<sup>146</sup> An ardent progressive judge, unconcerned – as Cardozo was –

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<sup>144</sup> Search of Shepard's case citation service through Lexis database.

<sup>145</sup> Lawrence M. Friedman, *A History of American Law* 3<sup>rd</sup> ed. (New York: Touchstone, 1973, 2005 ed.), p. 520.

<sup>146</sup> 248 N.Y. 339; 162 N.E. 99 (1928).

with adherence to (or apparent adherence to) the precedents of the time would have championed the extension of liability to all who were *de facto* affected, not just those who could be reasonably foreseen. Yet, Cardozo was, as G. Edward White has described him, a reformer who worked within the context of his time. He sought the “creative derivation of rules” but could not afford to be “too assertive nor too candid” in his creative reformist efforts.<sup>147</sup>

The New York Court of Appeals that decided *MacPherson* and especially Judge Cardozo were progressive in their orientation toward tort law in the products liability context. Progressivism not only influenced the *MacPherson* decision, it also influenced other courts of the period and extended well into the remainder of the twentieth century.

H.L.A. Hart’s description of the legal realist seems an apt description of the sociological jurist Cardozo:

[A] disappointed absolutist; he has found that rules are not all they would be in a formalist’s heaven, or in a world where men were like gods and could anticipate all possible combinations of fact, so that open-texture was not a necessary feature of rules. The sceptic’s conception of what it is for a rule to exist, may thus be an unobtainable ideal, and when he discovers that it is not obtained by what are called rules, he expresses his disappointment by the denial that there are, or can be, any rules.<sup>148</sup>

This paradox – the desire to escape inefficacies of formalism, only to wind up with an adherence to rules – is exemplified in the mission and publications of one of the leading

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<sup>147</sup> G. Edward White, *Tort Law in America: An Intellectual History* (New York: OUP, 1980, 2003 ed.), p. 137.

<sup>148</sup> Hart, *The Concept of Law*, p. 135.

institutions of the twentieth century for progressive legal reform – an institution of which Cardozo was a founding member – the American Law Institute.

### *The American Law Institute*

One of the chief arguments of this dissertation is that the Tort Revolution was a top-down, judge-led revolution. As one scholar of the period noted, state courts of the 1920s and 1930s, “in an effort to keep law apace with the changing systems of marketing, and to obtain desirable results, have expanded many theories of legal liability.”<sup>149</sup>

However, as some scholars have contended, proposals for legal change are usually only perceived by judges as legitimate if other institutions within the society have already consented to such change or given some indications of support. For example, Michael Klarman has noted that court-centered changes in civil rights laws and standards of review occurred after the courts, especially the U.S. Supreme Court, had perceived support for such change from other elite institutions in the society.<sup>150</sup>

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<sup>149</sup> Lindsey R. Jeanblanc, “Manufacturers’ Liability to Persons Other Than Their Immediate Vendees,” *Va. L. Rev.*, Vol. 24, No. 2 (Dec., 1937), p. 134, 155.

<sup>150</sup> Michael J. Klarman, *From Jim Crow to Civil Rights: The Supreme Court and the Struggle for Racial Equality* (New York: OUP, 2004). An example from the area of torts, in addition to the Tort Revolution, is law professor Robert E. Keeton. He was a professor at Harvard Law School from 1953 until 1979. While a professor, he promoted his views in support of no-fault auto insurance and co-authored books and articles in support of such reform. In the area of products liability, key members of the legal academy supported and articulated the theoretical bases for change from a fault-based negligence standard for defective products to a no-fault-based strict liability standard. Once such support was forthcoming, the ability of sitting judges to endorse such change was made much easier and more acceptable to some parts of the legal community. Dennis Hevesi, “Robert E. Keeton, 87, Author of Influential Law Treatises, Is Dead,” *The New York Times*, Aug. 4, 2007; Robert E. Keeton and Jeffrey O’Connell, *Basic Protection for the Traffic Victim: A Blueprint for Reforming Automobile Insurance* (Boston: Little Brown, 1965); Robert E. Keeton and Jeffrey O’Connell, *After Cars Crash: The Need for Legal and Insurance Reform* (Homewood, Ill.: Dow Jones-Irwin, 1967); Robert E. Keeton, Jeffrey O’Connell, and John H. McCord, eds., *Crisis in Car Insurance* (Urbana: University of Illinois Press, 1968); George L. Priest, “The Invention of Enterprise Liability: A Critical History of the Intellectual Foundation of Modern Tort Law,” *Journal of Legal Studies* 14 (Dec., 1985), pp. 461-528.

Two elite institutions that paved the way for the Tort Revolution were the legal academy and non-profit advocacy organizations of elite lawyers. Such institutions would allow for the careful and express call for programmatic reforms in law and other areas of American life. Early private law reform efforts were led by the American Bar Association, which was succeeded in the area of torts (and other areas of law, including contracts, conflict of laws, etc.) by the American Law Institute.

The American Bar Association (ABA), founded in 1878, was the earliest example in America of a private lawyers association urging the reform of public and private law. Since the earliest days of the Progressive Era, the ABA had supported the uniformity of state laws throughout the nation and U.S. territories and possessions.<sup>151</sup> For example, beginning in 1912 it promoted the idea of legal process reform by appointing a committee to study and urge such the unification of equity and legal actions in American law. Such a change would allow for streamlined case handling, the unification of remedies in a single lawsuit, and greater efficiency in the administration of law. This was probably the ABA's most notable success in law reform. The product was a federal procedural law in 1934, which designated the U.S. Supreme Court as a rule maker for federal district courts.<sup>152</sup> Thereafter, a minority of states also adopted the federal rules and subsequent amendments. This was an example of progressive legal reform. The ABA progressive-era reform effort achieved success only during the New Deal. This provides another example of the continuation of progressive reform politics into the 1930s.

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<sup>151</sup> M. Louise Rutherford, *The Influence of the American Bar Association on Public Opinion and Legislation* (PhD Diss., Philadelphia, 1937), pp. 276-86.

<sup>152</sup> "Supreme Court Adopts Rules for Civil Procedure in Federal District Courts," *A.B.A. J.*, Vol. 24, No. 2 (Feb., 1938), p. 97. M. Louise Rutherford, *The Influence of the American Bar Association on Public Opinion and Legislation* (Philadelphia, 1937), pp. 235-38.

Similarly, the American Law Institute (ALI) became another leading institutional proponent of progressive legal reform. Founded in 1923 by Benjamin Cardozo and a group of progressive legal academics and practicing lawyers, the Institute was housed (and remains) at the University of Pennsylvania, where the Institute's first president, William Draper Lewis, was a law professor. Lewis explicitly noted the Institute's progressive ideological origins: "[The ALI] is what Mr. [Elihu] Root and I intended it to be: an organization to carry out specific legal projects for the constructive improvement of the law and its administration."<sup>153</sup> Although Elihu Root's political positions have been rightly characterized as conservative, he greatly favored the reform of the common law. Root was a practitioner and Lewis an academic. The two of them brought these respectively conservative-to-moderate and progressive groups together in support of reform of the common law. Also, the ALI was aided in its inception by Root's influence with the Carnegie Corporation. As the legal historian, N.E.H. Hull, has ably demonstrated, the ALI's purpose was "progressive, programmatic reform of the law, and his [William Draper Lewis's] triumph was the co-option of the leading lawyers and judges of his day to this goal."<sup>154</sup>

The methods by which these reform efforts occurred were the Institute's projects to "restate" the law in a rule-like format. That is, areas of American law – contracts, real property, conflict of laws between states, and, of course, torts – would each have their own restatement of the law. The restatements were advertised as literal re-statements of the law in rule-like form as induced from the welter of cases from state and federal courts

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<sup>153</sup> N.E.H. Hull, "Restatement and Reform: A New Perspective on the Origins of the American Law Institute," *Law & Hist. Rev.*, Vol. 8, No. 1 (1990), pp. 55-56.

<sup>154</sup> *Ibid.*, pp. 56, 74-75.

throughout the nation. It is notable that a reform effort like the *Restatement* project would be presented in a formal, rule-oriented fashion. As one scholar termed it, the *Restatements* were a kind of “American positivism.”<sup>155</sup> They were supposed to be based on the cumulative effect of different decisions in states’ appellate courts, both intermediate and supreme courts; yet, there would be no distinction between the laws of different jurisdictions or states. In the torts area, at least, the restatements would treat the entire nation as if it were one large common law jurisdiction. Positions taken by majorities of the states were supposed to trump those endorsed by only a minority. The restatements were fashioned by groups of lawyers, judges, and academics working in groups called “advisory committees.” The Restatements were progressivism in institutional form: the law could be scientifically *induced* from the experiences of the states’ courts. As one of the early academic members, Warren Seavey, put it, the Restatements were intended “to bring back to our American law some semblance of order and consistency.”<sup>156</sup>

In one sense, the idea of “reform” and the common law go hand in glove. As one scholar noted, “The whole history of the [common] law is a history of a desire for reform, for simplification and for wholesale re-evaluation in the light of modern conditions.”<sup>157</sup> Yet, the ALI was an institutional effort at a particular kind of reform: making the common law into a body of rules that served the interests of citizens in the modern

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<sup>155</sup> Alan Milner, “Restatement: The Failure of a Legal Experiment,” *U. Pitt. L. Rev.*, Vol. 20, No. (1959), p. 795.

<sup>156</sup> Livingston Hall, “Warren Seavey and the Age of the Restatement,” *Harv. L. Rev.*, Vol. 79, No. 7 (May, 1966), p. 1329, 1330.

<sup>157</sup> Alan Milner, “Restatement: The Failure of a Legal Experiment,” *U. Pitt. L. Rev.*, Vol. 20, No. (1959), p. 795, 796.

industrial state of the early twentieth century. As the first director of the Institute, William Draper Lewis, noted, “The object of the Institute . . . is ‘to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.’”<sup>158</sup>

Some scholars have argued that the ALI, far from being spawned by legal realism, was a reaction against the legal realists and fears of a twentieth-century attempt to codify the common law.<sup>159</sup> Yet, more recently, it has been argued that the restatements were efforts to clarify the law in rule-based forms, like the nineteenth-century codification movement, and the realists also wanted codification and were sometimes at odds with the goals of the ALI.<sup>160</sup> However, it is the contention of this author that the realists’ reformist goals for American tort law were not different than the ALI’s goals and that the ALI was an institution that incorporated sociological jurisprudence adherents and legal realists into their membership. For example, prominent legal realists Herman Oliphant and Karl Llewellyn generally supported the ALI at its inception.<sup>161</sup>

Historian N.E.H. Hull has related the origins of ALI to the Progressive views of not only its founders, including Lewis, but also of Roscoe Pound. In 1906, Pound gave an address to the annual convention of the American Bar Association. Pound contended

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<sup>158</sup> William Draper Lewis, “The Restatement of the Law by the American Law Institute,” *Proceedings of the Academy of Political Science in the City of New York*, Vol. 10, No. 3, Law and Justice (July, 1923), p. 7.

<sup>159</sup> Lawrence M. Friedman, *A History of American Law* (New York: Simon & Schuster, 1973), p. 582; Grant Gilmore, *The Death of Contract* (Columbus, OH: OSU Pr., 1974), pp. 58-59.

<sup>160</sup> Nathan M. Crystal, “Codification and the Rise of the Restatement Movement,” *Wash. L. Rev.*, Vol. 54, No. 2 (Mar., 1979), p. 239-40.

<sup>161</sup> *Ibid.*, at 245.

“courts are distrusted” by citizens and were “behind the times.” The “times” needed “scientific study of the law” in law schools. Pound decried the courts’ “strong aversion to straightforward change of any important legal doctrine.” He lamented that courts were forced to bear the brunt of administering “archaic” laws that legislatures had failed to abolish or change. He deplored the apparent inability of the courts to adapt the common law to deal with “our modern industrial society.”<sup>162</sup> Pound referred to a conflict between the common law’s “respect for the individual” and the “present age’s” (writing in 1905) “needs of society.” Pound thought the pre-industrial society saw the common law as an aid to justice, but that industrial society saw the common law as a body of law that “prevents everything and does nothing.”<sup>163</sup> That is, the common law had an “individualist spirit” but America’s “modern industrial society” had a “collectivist spirit” that sought relief from the purportedly harsh results of common law rules.<sup>164</sup> As we shall see below, other realists supported and these goals were in accord with the ALI.

Herbert Goodrich, another member of the ALI and dean of the University of Pennsylvania Law School, argued that the ALI’s reason for being was to “relieve the law of some of its growing complexity and uncertainty.” As Goodrich noted at the very first organizational meeting of the ALI in Washington, D.C. on February 23, 1923, the founders proclaimed the ALI’s mission: “To promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of

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<sup>162</sup> Roscoe Pound, “Causes of Popular Dissatisfaction with the Administration of Justice,” *J. Am. Jud. Soc.*, Vol. 20, No. 5 (Feb., 1937), pp. 183, 186.

<sup>163</sup> Roscoe Pound, “Do We Need a Philosophy of Law?” *Colum. L. Rev.*, Vol. 5, No. 5 (May, 1905), p. 344.

<sup>164</sup> Pound, “Causes of Popular Dissatisfaction with the Administration of Justice,” *J. Am. Jud. Soc.*, Vol. 20, No. 5 (Feb., 1937), p. 181.



justice, and to encourage and carry on scholarly and scientific legal work.”<sup>165</sup> Such a mission – adapting law to “social needs” and “scientific legal work” – was clearly well within the emergent progressive tradition and couched in the progressive vernacular of sociological jurisprudence and legal realism. New York judge Adolphus J. Rodenbeck, another member of ALI,<sup>166</sup> noted in 1919 that the law needed a “scientific treatment” of “classification and restatement.”<sup>167</sup> Thus, the restatements were established in the vein of a scientific approach to the law, with the object of improving the “efficient administration of the law” and the “respect of the public for the administration of justice.” Restatements would also allow the law to be “systematized which would make it more easily remembered” by lawyers and judges. Such a “uniform study and conception of the law” would “affect the future development of the law.” A lawyer who supported a restatement of the law would be doing “his bit to serve the interest of the public by advancing the development of the administration of the law.”<sup>168</sup> Thus, the project of restating the law was in itself a kind of political and moral reform effort in the vein of other progressive reforms. As Rodenbeck proclaimed, “he who serves the cause of justice, serves the highest concern of man.”<sup>169</sup>

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<sup>165</sup> Herbert F. Goodrich, “The Work of the American Law Institute,” *Tenn. L. Rev.*, Vol. 6, No. 4 (June, 1928), p. 273, 276.

<sup>166</sup> Membership noted in Box 8015, Item 10, ALI/Minutes of the 43<sup>rd</sup>, 44<sup>th</sup>, and 45<sup>th</sup> Meetings of the Council/May 9 & 12, 1934, p. 20, in the Meeting Minutes of the Council and Executive Committee, Biddle Law Library, University of Pennsylvania Law School, Philadelphia, PA, available online at <http://www.law.upenn.edu/bll/archives/ali/minutes/8015-10/43-44-45.pdf>.

<sup>167</sup> Adolphus J. Rodenbeck, “The Classification and Restatement of the Law,” *a paper presented at the forty second annual meeting of the New York State Bar Association, held in the city of New York, 17th and 18th of January, 1919*. [U.S.], [1919?], p. 3. *The Making of Modern Law*. (Gale, Cengage Learning, 2009), from the Harvard L. Sch. Library, Gale Doc. No. F3752098804. Available online.

<sup>168</sup> *Ibid.*, pp. 8-10.

<sup>169</sup> *Ibid.*, p. 10.

The ALI had different advisory committees of scholars in select areas of the law. The original torts advisory committee of 1929 included fourteen members, mostly judges and law professors. Among them were the Institute's director, William Lewis Draper, and the first reporter for torts, Francis Bohlen. The reporter was the designated leader of the debates and effort to restate the law. He would make proposals to the advisors about various topics of the subject area, the topics would be debated among the working group of advisors, and then the advisors would vote. Bohlen was the author of a casebook used to teach law students about torts.<sup>170</sup> Benjamin Cardozo referred to him as "a great Master of Torts."<sup>171</sup> He had been an early proponent of making manufacturers of defective products (not merely foodstuffs or inherently dangerous products) liable to remote purchasers. Writing in 1905, Bohlen argued that courts needed to "look to actualities instead of legal fictions and hold the vendor [seller] liable for what he must, had he thought, have realized would probably result from his [negligent] conduct" of making a defective product.<sup>172</sup> This is the kind of view later endorsed by those scholars who were identified with the sociological jurisprudence and legal realism schools of thought.

Bohlen led a group of torts advisors, known as the Advisory Committee, which included some of the leading progressive judicial and scholarly authorities of the day.<sup>173</sup>

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<sup>170</sup> Francis H. Bohlen, *Cases on the Law of Torts* (Indianapolis, IN: Bobbs-Merrill, 1915 & 1925).

<sup>171</sup> Laurence H. Eldredge, "William Lloyd Prosser," *Cal. L. Rev.*, Vol. 60, No. 5 (Sept., 1972), p. 1245.

<sup>172</sup> Francis H. Bohlen, "The Basis of Affirmative Obligations in the Law of Tort," (Philadelphia, 1905), pp. 73-74 in *The Making of Modern Law*, Gale. 2009. (Gale, Cengage Learning, 2009), from the Harvard L. Sch. Library, Gale Doc. No. F3751720838. Available online: <http://galenet.galegroup.com.proxyum.researchport.umd.edu/servlet/MOML?af=RN&ae=F3751720838&srchtp=a&ste=14>.

<sup>173</sup> The full list of advisors is William Lewis Draper, Director of ALI; Francis Bohlen, Reporter.; Hon. Oliver W. Branch of Manchester, NH; Hon. Rousseau A. Burch of the Supreme Court of Kansas; Hon. Benjamin Cardozo, Chief Judge of the New York Court of Appeals; Dean Herbert F. Goodrich of the Univ.

A review of the backgrounds of some of these tort law advisors will illustrate the progressive foundations of the ALI and particularly the tort section. For example, Benjamin Cardozo, a founder of the ALI, was among the tort law advisors. As previously noted, Cardozo was a legal progressive and considered one of the leading appellate judges in the nation. He was a proponent of sociological jurisprudence, which was a progressive jurisprudence. As noted above, Cardozo's opinion in *MacPherson v. Buick Motor Co.* (1916) was the leading case throughout the nation in making manufacturers liable to the ultimate consumer for their negligence in making a defective product.

Another tort group advisor was Rousseau A. Burch, a justice of the Supreme Court of Kansas. Burch was a legal progressive who argued that the common law of torts consisted of "court-made rules, invented to meet certain ideals of justice respecting certain social and economic conditions and relations. Should those conditions and relations be completely changed, and those ideals wholly fail of realization, the reason for the rules, which is the life of all rules of the common law, would then be wanting and the court which would go on enforcing them would be a conscious minister of injustice and not of justice."<sup>174</sup> Burch noted that his own court had "developed the jurisprudence of the state [of Kansas] to meet the new and complex conditions of progressive civilization."

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of Pennsylvania Law School; Hon. Irving Lehman of the New Court of Appeals; Hon. Emmett N. Parker of the Supreme Court of the State of Washington; Sidney S. Schulman, Philadelphia, PA; Warren A. Seavey of Harvard Law School; Dean Young B. Smith of Columbia Law School; Edward S. Thurston of Harvard University; Hon. George W. Wheeler, Chief Justice of the Supreme Court of Bridgeport, CT; Lyman P. Wilson of Cornell Law School. Box 1018, Item 4, Folder 30-21, ALI/First/Torts/Meeting Minutes/1929, Dec. 14-15, in the First Restatement of the Law Records, ALI.04.001, Biddle Law Library, University of Pennsylvania Law School, Philadelphia, PA.

<sup>174</sup> *Burgin v. The Missouri, Kansas & Texas Railway Co.*, 90 Kan. 194, 198, 133 P. 560, 561 (1913) (opinion by Justice Burch).

Burch contended that his court had responded to changing conditions to which the state legislature had refused to respond, such as “oil and gas, electricity, the telephone, and the automobile.” His court had attempted to adapt the law to what he understood as the new and prevailing conditions and to do so in a “scientific” manner: “In feeling its way forward the court has pursued the inductive rather than the deductive method. Time and again it has insisted upon the supremacy of fact over theory as a guide to judicial conduct.” But Burch cautioned, “Facts, however, are not always such simple things. Frequently they take the comprehensive and complex form known as economic and sociological conditions.”<sup>175</sup> This is a derivation of Roscoe Pound’s concept of “sociological jurisprudence.” Justice Burch was endorsing the courts’ role as policy-making institutions, which used scientific methodology in analyzing “social facts” in contemporary society. Such analyses yielded new and ever-changing understandings of society and the rules best suited to it.

Another member of the tort advisory group was Herbert F. Goodrich, the then-new dean of the University of Pennsylvania’s law school. He served as dean from 1929 to 1940. Goodrich was instrumental in drafting the Uniform Commercial Code.<sup>176</sup> In 1940, President Roosevelt appointed Goodrich to the Third Circuit Court of Appeals.<sup>177</sup> In 1947, Goodrich succeeded Draper as director of ALI, serving until his death in 1962,

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<sup>175</sup> Rousseau Angelus Burch, “Two Years’ Work of the Kansas Supreme Court,” The President’s Address, Delivered before the Kansas State Bar Association, January 27, 1914 (Topeka, Kan.: Kan. St. Printing Office, 1914), pp. 22-23 in *The Making of Modern Law* (Gale, Cengage Learning, 2009) from the Harvard L. Sch. Library, Gale Doc. No. F3752545562.

<sup>176</sup> ALI, Publications Catalog, UCC 2007 Edition (Official Text with Comments), available online: [http://www.ali.org/index.cfm?fuseaction=publications.fpage&node\\_id=86&product\\_code=1UCCOTC07](http://www.ali.org/index.cfm?fuseaction=publications.fpage&node_id=86&product_code=1UCCOTC07).

<sup>177</sup> Lawrence Kestenbaum, *The Political Graveyard* (Ann Arbor, MI: Mar. 24, 2009 updated ed.) <http://politicalgraveyard.com/bio/goodrich.html>.

and was a well-respected scholar in the field of conflict of laws.<sup>178</sup> Goodrich was known as a strong proponent of extending liability against remote manufacturers and he supported such an extension of the law based upon Cardozo's sociological jurisprudence. As Goodrich once noted, holding a party liable for harm caused to a third party, because of acts performed under contract, was "a step forward." He argued, in the Cardozoan vein, "Not only does it [such liability] make for logical consistency in the law of torts; it helps to bring the law on this point into harmony with the facts of life. Here, it would seem, philosophy and sociology speak with the same voice."<sup>179</sup>

Another member was Judge Irving Lehman, who was a colleague of Cardozo's on the New York Court of Appeals and a very close friend of Cardozo. Judge Lehman's tenure on the Court of Appeals was described as one where "decisions ... placed an increased emphasis on those conditions of actual life to which the law must be applied and less emphasis on the terms of the law itself."<sup>180</sup> As Lehman himself once said in praise of Cardozo's tenure on the Court, "A court which clings to outworn precedents under changing conditions, which attempts to read permanently into law any social philosophy, cannot be a great court even though composed of judges of learning, wisdom, and public spirit."<sup>181</sup> This statement of jurisprudence was in itself something of a social philosophy. Precedent, upon which the common law was grounded, was accorded lesser

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<sup>178</sup> Harrison Tweed, "Herbert F. Goodrich," *U. Pa. L. Rev.*, Vol. 111, No. 1 (Nov., 1962), p. 1, 2.

<sup>179</sup> Herbert F. Goodrich, "Privity of Contract and Tort Liability," *Mich. L. Rev.*, Vol. 21, No. 2 (Dec., 1922), p. 200, 203 (citing Cardozo's *The Nature of the Judicial Process*, Lecture 2).

<sup>180</sup> Edmund H. Lewis, "The Contribution of Judge Irving Lehman to the Development of the Law," *Colum. L. Rev.*, Vol. 51, No. 6 (June, 1951), p. 734, 737.

<sup>181</sup> Irving Lehman, "Judge Cardozo in the Court of Appeals," *Colum. L. Rev.*, Vol. 39, No. 1 (Jan., 1939), p. 12, 15.

importance in light of “changing conditions.” The world was always changing and, so too, should the law. This was the heart of sociological jurisprudence.

Other members of this first advisory group were academic scholars. For example, Warren Seavey was a torts professor at Harvard Law School from 1927 until 1955, teaching at other institutions thereafter. As one of his colleagues put it, “He [Seavey] believed the form of the Restatements to be an ideal vehicle through which law teachers might influence the development of case law.”<sup>182</sup> Another colleague noted Seavey’s “strong interest in law reform . . . primarily to reform in courts rather than in legislatures.” Or, put more bluntly, “Seavey was not a prisoner of the prevailing mood of his day, a mood conservative toward judicial exercise of the power to overrule intolerable precedents.” That is, Seavey “urged that the courts themselves accomplish reform candidly by overruling their own precedents.”<sup>183</sup> As Seavey himself once noted, “in tort cases, where the need for [respect for precedent] is least, they [American courts] have become willing to change viewpoints as new wisdom is found.”<sup>184</sup> The first reporter for the ALI’s *Restatement of Torts* was Francis Bohlen and Seavey succeeded him. Seavey was also credited with bringing to notoriety the best-known torts scholar of the twentieth century, William L. Prosser. Prosser, writing in 1966, said of his mentor that Seavey’s

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<sup>182</sup> Livingston Hall, “Warren Seavey and the Age of the Restatement,” *Harv. L. Rev.*, Vol. 79, No. 7 (May, 1966), p. 1329-30.

<sup>183</sup> Robert E. Keeton, “Warren Abner Seavey,” *Harv. L. Rev.*, Vol. 79, No. 7 (May, 1966), p. 1333, 1335-1336.

<sup>184</sup> Warren A. Seavey, “Judge Magruder and Torts,” *Harv. L. Rev.*, Vol. 72, No. 7 (May, 1959), p. 1248, 1250.

law reform advocacy “persuaded the courts to make the continued and consistent changes that have left us as far advanced as we are today.”<sup>185</sup>

As the foregoing suggests, this roster of torts advisors was comprised of legal progressives, who endorsed courts as policy-making institutions. Also, they endorsed legal reform that would adapt the rules of law to the needs of society in the industrial age. They were largely representative of many in the legal academy and on the bench who wanted to expand tort liability in a number of areas.<sup>186</sup> The systematic restatement of the law was seen as a way of improving the administration of justice, which would in turn increase the public’s confidence in the law and how courts administered it.

Notwithstanding this collection of relatively like-minded, pro-reformist scholars, reporter Francis Bohlen claimed the purpose of the *Restatement* of torts was to provide a disinterested “Restatement of the law as it exists at this time [writing in 1923], it can not consider whether any particular interest now unprotected should be given the protection necessary to make it a legal right.”<sup>187</sup> As Bohlen noted, clarity and concision were the goals. The *Restatement* was “not prepared as an exhaustive statement of the general principles which govern Tort law.” Rather Bohlen wanted a “statement of the general nature of the conduct” covered by tort law. He wanted to “adopt short but definite terms

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<sup>185</sup> William L. Prosser, “Warren Seavey,” *Harv. L. Rev.*, Vol. 79, No. 7 (May, 1966), p. 1338.

<sup>186</sup> Jeremiah Smith, “Tort and Absolute Liability – Suggested Changes in Classification,” *Harv. L. Rev.*, Vol. 30, No. 3 (Jan. 1917), p. 241; Kenzo Takayanagi, “Liability Without Fault in the Modern Civil and Common Law – [Part] IV,” *Ill. L. Rev.*, Vol. 17, No. 6 (Feb., 1923), p. 416, 438-39; Rufus C. Harris, “Liability Without Fault,” *Tul. L. Rev.*, Vol. 6, No. 3 (Apr., 1932), pp. 337, 368.

<sup>187</sup> Box 1001, Item 1, Folder 30-27, ALI/First/Torts/Drafting/PD No. 1, 1923 Dec. 10, p. 5, in the First Restatement of the Law Records, ALI.04.001, Biddle Law Library, University of Pennsylvania Law School, Philadelphia, PA.

to designate certain constantly recurring concepts, and thus to prevent the necessity of an elaborate statement of these concepts, whenever they become important.”<sup>188</sup>

However, the work of the Advisory Committee members on the first *Restatement of Torts* reveals the Committee members’ very personalized and reformist approach to crafting tort rules. For example, during one meeting the torts advisory group discussed the issue of the liability of an employer of an independent contractor for harm caused by the contractor to a third party. Judge Emmett Parker, a justice of the Supreme Court of Washington state, stated:

We are living in a new age and I am getting a little impatient at extending damages. The claimant always has a chance, two to one against the other fellow just because he is the first to complain. Everybody must take some chances that come with events in the industrial and commercial world. It is the age of the independent contractor. Instead of breaking down that relationship I am very strongly inclined to hold it up and let the liability rest upon the independent contractor who actually does the work and creates the thing rather than passing it on to the employer because I think that when the owner has employed a competent independent contractor he is in much the same situation and ought to have the same protection if he has employed a skilled workman to do some particular thing.<sup>189</sup>

Judge Parker supported the holdings from New York state cases, even though he knew such cases were in the minority among American jurisdictions. Parker’s comment is indicative of many from the Committee’s meeting minutes: these eminent scholars,

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<sup>188</sup> Box 1001, Item 1, Folder 30-27, ALI/First/Torts/Drafting/PD No. 1, 1923 Dec. 10, p. 2, in the First Restatement of the Law Records, ALI.04.001, Biddle Law Library, University of Pennsylvania Law School, Philadelphia, PA.

<sup>189</sup> Comments of Hon. Emmett N. Parker, Box 1018, Item 4, Folder 30-21, ALI/First/Torts/Meeting Minutes/1929, Dec. 14-15, p. 12, in the First Restatement of the Law Records, ALI.04.001, Biddle Law Library, University of Pennsylvania Law School, Philadelphia, PA.



although familiar with the holdings of pertinent cases, couched their discussions in very personal, idiosyncratic terms. Use of the phrase “I would hold ...” was common. In short, these were not discussions about identifying and clearly “restating” the majority of state and federal courts’ positions on tort law; rather these were debates about what the law *should* be, with only sporadic reference to existing cases. The way the torts advisory group actually worked was contrary to what William Draper Lewis proclaimed was the ALI’s job: “It [the ALI] should not promote or obstruct political, social or economic changes.”<sup>190</sup>

One wonders whether William Draper Lewis’s original conception of the ALI as merely re-stating the law was ever realistic or plausible. After all, leading judges and academics of the day were not necessary or even ideal if the only task for them was the relatively clerical (albeit high-skilled clerical) task of simply assessing the majority position on a point of law and presenting it in rule form. Any group of competent law students could have completed such a task. It seems implausible that Lewis’s purported vision of simply restating the law was his and the ALI’s real objective. The well-established scholars selected for the torts advisory group and their progressive backgrounds of the torts advisors suggest that Lewis knew from the beginning that the ALI’s restatements would be guided works. The aims of such reformist scholars were both a *clarification* of the existing law, as revealed through the states’ courts’ decisions, for administrative reform purposes; and a *shaping* of the substantive law for the future.

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<sup>190</sup> William Draper Lewis, “The Restatement of the Law by the American Law Institute,” *Proceedings of the Academy of Political Science in the City of New York*, Vol. 10, No. 3, Law and Justice (July, 1923), p. 7, 8.

The members of the Group, based on their personal preferences, gave higher priority to one goal over the other.

Nevertheless, as to strict liability the Committee remained within the bounds of the majority of states' decisions as of the early 1920s. In his introduction to the first draft of the *Restatement* Francis Bohlen noted that strict liability (called "liability without fault") was "not based upon the [moral] wrongfulness of the conduct," but "(1) the persistence of a concept universal in all primitive law" that violation of a right "must be satisfied by a money composition" and "(2) upon a modern tendency to require that an activity whose utility is such that it must be permitted but which contains a perceptible probability of harm . . . must be carried on at the risk of the actor rather than of those in whose proximity it is carried on." Thus, strict liability was still seen – as of the late 1920s – as being rooted in the long-standing precedents regarding dangerous activities for which there was an increased likelihood of injury from their mere existence. The activities included keeping cattle, fires on land, wild animals over which one has custody, and "contractual duties, assumed by the consent of the parties," especially in bailments.<sup>191</sup> This latter category was not inherently dangerous, but related to contractual relations, where vicarious liability existed for a non-negligent party for the harm caused by the other contracting party to a third party.

The first *Restatement* addressed the issue of strict liability in the context of abnormally dangerous, or ultrahazardous, activities, wherein the defendant would be held

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<sup>191</sup> Box 1001, Item 1, Folder 30-27, ALI/First/Torts/Drafting/PD No. 1, 1923 Dec. 10, pp. 11-13, in the First Restatement of the Law Records, ALI.04.001, Biddle Law Library, University of Pennsylvania Law School, Philadelphia, PA. A bailment is a delivery of goods to another without relinquishing title to the goods. Usually such goods are pursuant to a contract for repair or temporary possession, either for the benefit of bailor or bailee, often benefiting both.

strictly liable for the injuries resulting from the risk that made the activity highly dangerous.<sup>192</sup> As regarded liability to the ultimate consumer for general goods, the *Restatement* took the view of *MacPherson* that a manufacturer was liable to consumers, even though there was no contractual privity, as long as the manufacturer knew or should have known the product was dangerous for its intended use, has no reason to believe the users will realize the danger, and “fails to exercise reasonable care to” warn of the danger.<sup>193</sup> This was a negligence-based rule. As one court noted in 1936, the *Restatement*’s view of liability to third parties, which was premised upon negligence liability, “embodies a conservative statement of the prevailing law in this country as it exists today.”<sup>194</sup> Although “conservative” in this sense seems to have meant that the ALI was not taking a reformist position on strict liability, yet the ALI and its members wholly supported the extension of *negligence* liability for acts effecting third parties.

Yet, as advisor Warren Seavey noted much later, writing in 1954, the *Restatement*’s use of “tortious” did not mean wrongful conduct, but “harmful conduct, whether or not wrongful.”<sup>195</sup> This conceptualization left room for strict liability because the phrase was concerned with harm, not the wrongfulness of the acts leading to harm. In 1936, Harlan Fisk Stone, then serving as an associate justice of the U.S. Supreme Court, noted that tort law had begun to change in a way that would have been alien to jurists and

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<sup>192</sup> *Restatement, Torts* § 519 (ALI, 1934) cited in Page Keeton, “Products Liability – Liability Without Fault and the Requirement of a Defect,” *Tex. L. Rev.*, Vol. 41, No. 7 (Oct., 1963), p. 855, 856.

<sup>193</sup> *Restatement, Torts* § 388 (ALI, 1934) cited in *Lenz v. Standard Oil Co.*, 88 N.H. 212, 214; 186 A. 329, 331 (1936) (holding gas manufacturer not liable to injured consumer because defendant lacked requisite knowledge that gas would be dangerous when used “for the purpose for which it was supplied”).

<sup>194</sup> *Ibid.*

<sup>195</sup> Warren A. Seavey, “Liberal Construction and the Tort Liability of the Federal Government,” *Harv. L. Rev.*, Vol. 67, No. 6 (April, 1954), p. 994, 998.

legal scholars of the nineteenth century. He presciently articulated the direction of tort law that would form the basis for the switch from negligence to strict liability in the 1960s, noting “that the basis of liability is not the fault of a wrongdoer, but such method of distributing the burden of loss as accepted social policy dictates.”<sup>196</sup> The members of the original torts Advisory Committee for the first *Restatement* aimed to help craft that “social policy” through their efforts on the *Restatement*. These advisors wholly supported judicial policy-making, judicial creativity, and legal reform led by the judiciary. Also, they were progressives in the Cardozoan vein. They sought legal reform through the very existence and mission of the ALI and their participation in it.

During the 1930s, there were scholars who argued in favor of applying a strict or absolute liability system to common carriers. Common carriers of the nineteenth century, such as passenger railroads or carriage services, were construed as owing a greater duty of care to those who paid for their services than other people owed to people with whom they interacted. Yet, courts developed presumptions to make the obligation even stricter; the obligation became one of strict liability in all but name.<sup>197</sup>

In the 1930s, some scholars – again these were law faculty rather than practicing attorneys – argued in favor of expanding strict liability to other kinds of products beyond food, drugs, and common carriers’ heightened liability. For example, Robert C. Brown, a professor of law at Indiana, wrote in 1939, “it would seem that [the rule applying strict liability in foodstuffs] should be extended to all articles where there is substantial danger

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<sup>196</sup> Harlan Fisk Stone, “The Common Law in the United States,” *Harv. L. Rev.*, Vol. 50, No. 1 (Nov., 1936), p. 4.

<sup>197</sup> Francis H. Bohlen, “The Effect of Rebuttable Presumptions of Law Upon the Burden of Proof,” *U. Pa. L. Rev.*, Vol. 68, No. 4 (June, 1920), p. 307; Edmund M. Morgan, “Some Observations Concerning Presumptions,” *Harv. L. Rev.*, Vol. 44, No. 6 (Apr., 1931), p. 906.

of personal injury from defects.”<sup>198</sup>

There were assumptions underlying these proposals for strict liability. First, consumers were ignorant about the goods they bought and unable to determine the nature and quality of a product. This was the opposite of how nineteenth-century commentators saw consumers. Second, manufacturers, distributors, and retailers were seen as wealthy, powerful actors who were best suited to insure their products.<sup>199</sup>

The first *Restatement of Torts* was completed in 1939. The then-relatively young torts professor William L. Prosser, of the University of Minnesota, voiced uncertainty about whether courts would be influenced by the *Restatement*. Nevertheless, Prosser would frequently cite the *Restatement's* views on an issue in his torts class in the late 1930s.<sup>200</sup> In a review of a textbook by Harper Fowler in 1933 – Fowler was a protégé of Francis Bohlen, who was the reporter for the first *Restatement of Torts* – Prosser somewhat mockingly referred to Bohlen as “St. Francis” and contended that the *Restatement* under Bohlen was a “complete re-examination of the law [of torts], and the modification of fundamental assumptions and concepts.” Prosser accused Harper Fowler of writing “an exposition on a theory, rather than a disquisition on the law as it stands.”<sup>201</sup> This was ironic, since – as we shall see – much the same criticism can be leveled at

Prosser when he later occupied the same position previously held by Francis Bohlen,

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<sup>198</sup> Robert C. Brown, “The Liability of Retail Dealers for Defective Food Products,” *Minn. L. Rev.*, Vol. 23, No. 5 (Apr., 1939), p. 585, 591-92; A. J. Russell, “Manufacturers’ Liability to the Ultimate Consumer,” *Ky. L. J.*, Vol. 21, No. 4 (May, 1933), p. 388, 402 (arguing for a negligence standard for all products rather than an “inherently dangerous” standard for selected products to carry strict liability).

<sup>199</sup> A. J. Russell, “Manufacturers’ Liability to the Ultimate Consumer,” *Ky. L. J.*, Vol. 21, No. 4 (May, 1933), p. 404 (“The manufacturer gets well paid for his product.”).

<sup>200</sup> Christopher J. Robinette, “The Prosser Notebook: Classroom as Biography and Intellectual History,” *U. Ill. L. Rev.*, Vol. 2010, No. \_\_ (forthcoming 2010), pp. 33-34, 36.

<sup>201</sup> William L. Prosser, Book Review, *Minn. L. Rev.*, Vol. 19, No. 2 (Jan., 1935), pp. 257, 259.

serving after 1955 as the reporter for the *Restatement (Second) of Torts*, the successor work to Bohlen et al's first *Restatement*.<sup>202</sup>

Yet, Prosser's pessimism about the potential influence of the ALI's *Restatement of Torts* was misplaced. As Herbert Goodrich, a member and enthusiast of the ALI, stated, "the final test ... must be found in the use that has been made of the Restatement by the bench, bar and law schools."<sup>203</sup> Many legal scholars, throughout the remainder of the twentieth century, thought courts had been greatly influenced by the *Restatements*, not only in torts but in other areas of law, too. In the early 1930s, many practitioners considered the ALI's publications in various areas of law as essential reading. One practitioner referred to the ALI's publications as not just restatements of majority rules, but books that "frequently furnish ideas as well as leads and rules that are very valuable."<sup>204</sup> Even before its official publication in 1939 lawyers and courts cited the *Restatement of Torts* as an authoritative source, with one attorney in 1940 referring to it as a "highly reputed authority."<sup>205</sup>

Only rarely was there any dissent about the influence of the Restatements. For example, Alan Milner, writing in 1959, contended the *Restatements* were rather localist in composition and effect. Pennsylvania, Milner noted, provided "more citations than

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<sup>202</sup> Robinette, "The Prosser Notebook: Classroom as Biography and Intellectual History," *U. Ill. L. Rev.*, Vol. 2010, No. \_\_ (forthcoming 2010), p. 35.

<sup>203</sup> Herbert F. Goodrich, "The Story of the American Law Institute," *Wash. U. L. Q.*, Vol. 1951, No. 3 (June, 1951), p. 283, 290.

<sup>204</sup> Stanley M. Rosewater, "The Insurance Lawyer's Library," *Ins. Counsel J.*, Vol. 3, No. 4 (Oct., 1936), p. 22.

<sup>205</sup> M.L. Landis, "What Is Automobile 'Theft' Insurance?" *Ins. Counsel J.*, Vol. 7, No. 2 (Apr., 1940), p. 23, 30; J.M. Sweitzer, "Beware of Independent Contractors," *Ins. Counsel J.*, Vol. 6, No. 3 (July, 1939), p. 54; Gerald P. Hayes, "Joint Adventure – Its Eccentricities and Complications," *Ins. Counsel J.*, Vol. 6, No. 1 (Jan., 1939), p. 26. The *Insurance Counsel Journal* was (and remains) a defense-oriented journal for attorneys representing civil litigation defendants and insurance companies.

any other State” for the *Restatements* and the state’s courts paid “close attention to the suggestions made and rules set out in the various volumes” of the *Restatements*.<sup>206</sup> Such was very true of the Pennsylvania Supreme Court, which in the first decade after the *Restatement of Torts* was published (1939-1949), only once did it cite the Restatement without following it.<sup>207</sup> However, courts around the nation often cited and followed the *Restatement of Torts* and Restatements of other areas of law, and the majority of opinion among scholars has been that the ALI was very influential on courts.

The restatements “served as authoritative guides for both legal briefs and judicial opinions.”<sup>208</sup> Between 1932 and 1950, appellate courts cited the various Restatements almost 18,000 times.<sup>209</sup> By 1972, the various Restatements in all areas of law had been cited over 46,000 times by American courts.<sup>210</sup> By 1991, the Restatements had been cited by appellate courts over 114,000 times, with almost *forty percent* of those citations being to the *Restatement of Torts*.<sup>211</sup>

The changes in the law of torts that occurred over the period between the first *Restatement of Torts*’ publication in 1939 and the late 1940s were deemed substantial enough that a revision and new *Restatement* was necessary. Work on the second

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<sup>206</sup> Alan Milner, “Restatement: The Failure of a Legal Experiment,” *U. Pitt. L. Rev.*, Vol. 20, No. 4 (June, 1959), pp. 795, 799-800.

<sup>207</sup> Herbert F. Goodrich, “The Story of the American Law Institute,” *Wash. U. L. Q.*, Vol. 1951, No. 3 (June, 1951), p. 283, 290.

<sup>208</sup> Jonathan R. Macey, “The Transformation of the American Law Institute,” *Geo. Wash. L. Rev.*, Vol. 61, No. 4 (Apr., 1993), p. 1212, 1216.

<sup>209</sup> Herbert F. Goodrich, “The Story of the American Law Institute,” *Wash. U. L. Q.*, Vol. 1951, No. 3 (June, 1951), p. 283, 292.

<sup>210</sup> Editorial, “The A.L.I. at Fifty,” *A.B.A. J.*, Vol. 59, No. 7 (July, 1973), p. 761.

<sup>211</sup> Hans A. Linde, “Courts and Torts: ‘Public Policy’ Without Public Politics?” *Val. U. L. Rev.*, Vol. 28, No. 3 (Spring, 1994), p. 821, 841 n. 86.

*Restatement* of torts began in 1955.<sup>212</sup> This later period of work will be reviewed in Chapters Three and Four below.

### ***Progressivism and Legal Education***

The legal progressivism of the 1920s quickly became a fixture of the legal academy, where future lawyers and judges were trained. The commonality and near uniformity of legal education in America during the 1920s suggests a link between the academic Progressives and their ideologically oriented opinions on strict liability and privity and the transmission of such views to future judges on state supreme courts in the 1960s and 1970s. By the early decades of the twentieth century, law schools throughout the country were imitating the Langdellian case method of teaching, “buying [Harvard’s] methods and its casebooks.” Most law schools were attempting to professionalize their faculty and curriculums. They sought “to be ‘national’ [institutions], that is, ... to teach more general truths and more national skills.”<sup>213</sup>

For example, in 1924 the University of North Carolina “modernized” its curriculum by patterning it after the curriculums at the University of Chicago, Harvard, and Columbia law schools.<sup>214</sup> Nevertheless, in the 1920s the only schools that required a college degree prior to admission were Harvard, Pennsylvania, Pittsburgh, and Stanford. It was not until the 1950s, as a result of pressure from accrediting institutions like the American Bar Association and the American Association of Law Schools, that three

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<sup>212</sup> ALI, “Past and Present Projects,” available online at [http://ali.org/doc/past\\_present\\_ALIprojects.pdf](http://ali.org/doc/past_present_ALIprojects.pdf). The work of the *Restatement (Second) of Torts* was not completed until 1979.

<sup>213</sup> Lawrence M. Friedman, *A History of American Law* (New York: Touchstone, 2001, 2005 ed.), p. 542.

<sup>214</sup> Anna R. Hayes, *Without Precedent: The Life of Susie Marshall Sharp* (Chapel Hill: UNC Press, 2008), pp. 36-37.



years of college were required before admission; then four years were required in the 1960s.<sup>215</sup> North Carolina's Susie Sharp, later the first female justice of the state's supreme court, applied and was accepted to UNC's law school after only after having completed two years of college. One year of college was all that was required in 1926, the year of Sharp's acceptance to law school.<sup>216</sup> At Rutgers, during future New Jersey Supreme Court Justice John Francis's attendance, a student needed only a high school diploma to matriculate.<sup>217</sup> This uniformity of curriculum meant that most American law students started reading much the same cases in order to learn the same legal rules.<sup>218</sup> Appellate cases became the "core materials of legal education in America."<sup>219</sup>

Legal historian Grant Gilmore has claimed "what is taught in the law schools in one generation will be widely believed by the bar in the following generation."<sup>220</sup> The legal realists became prevalent in law schools in the 1920s and 1930s. For example, Roger Traynor's law school in the 1920s, Berkeley (later called Boalt Hall), was well

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<sup>215</sup> Lawrence M. Friedman, *American Law in the Twentieth Century* (New Haven: Yale Univ. Press, 2002), p. 481. Although the AALS was important in the standardization movement in law schools in the early part of the twentieth century, its influence waned by mid-century because it had "unrealistically high" standards for membership and there were so few members that they "could not bring effective pressure on legislatures" to enact law school standards. Kermit L. Hall, *The Magic Mirror: Law in American History* (New York: OUP, 1989), p. 219.

<sup>216</sup> Hayes, *Without Precedent*, pp. 31, 56, 448 n. 64.

<sup>217</sup> Harold S. Wechsler, *Brewing Bachelors: The History of the University of Newark*, p. 4, available at the Inventory to the Records of the New Jersey Law School, 1908-1950, under References, available online at <http://www.newark.rutgers.edu/history/history-wechsler.pdf>.

<sup>218</sup> Kermit L. Hall, *The Magic Mirror: Law in American History* (New York: OUP, 1989), pp. 220-21.

<sup>219</sup> G. Edward White, "The Appellate Opinion as Historical Source Material," *J. of Interdisciplinary Hist.*, Vol. 1, No. 3 (Spring, 1971), p. 491.

<sup>220</sup> Grant Gilmore, *The Ages of American Law* (New Haven: Yale Univ. Press, 1977), p. 87. Geoffrey Kabaservice has noted how the liberal "establishment" that governed Yale in the 1960s was greatly influenced by Progressivism. Kabaservice, *The Guardians: Kingman Brewster, His Circle, and the Rise of the Liberal Establishment* (New York: Holt, 2004), pp. 38-43.

staffed by political progressives and legal realists.<sup>221</sup> Traynor himself, while a state supreme court justice, was very attuned to how the Court was perceived by the legal academic community. Traynor “followed the law reviews assiduously. Every issue that came to the court library was first sent to him before being shelved. He [Traynor] was very sensitive to areas where he knew the professors thought the California Supreme Court theories were cockeyed.”<sup>222</sup> Thus, not only was Traynor influenced by academics’ substantive arguments, he was also very conscious of the esteem in which the Court was held by the legal academic community and he sought to please it. As his long-time clerk, Donald Barrett, noted:

I always felt that being a law professor was perhaps his [Traynor’s] true love. Being a judge, of course, gave him the opportunity to exert tremendous influence for what he thought was right and just. You certainly have more power as a judge than as a professor, but you also have to be more circumspect.<sup>223</sup>

Although most American law schools had adopted Langdell’s case study method, other elements of Langdell’s pedagogy were rejected in the 1920s and 1930s. Langdell thought of law as a science, whereby rules were deduced from the experience of actual cases,

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<sup>221</sup> Sandra P. Epstein, *Law at Berkeley: The History of Boalt Hall* (Berkeley, CA: Inst. of Governmental Studies Press, 1997), pp. 103-08.

<sup>222</sup> Donald P. Barrett, Esq., Supreme Court of California on Chief Justice Roger J. Traynor, (July 28, 1986), p. 22, Box T028, File 01a, Oral history interview with Donald P. Barrett, Posthumous, The Roger J. Traynor Collection, U.C. Hastings College of the Law, Traynor Center/Special Collections. One example comes from the law of evidence. Traynor “would draw on all of those [scholarly] sources to try to come up with a rational approach to” the evidentiary issue. See e.g., *Pacific Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co., Inc.*, 69 Cal. 2d 33 (1968). Ibid., p. 23 (citing case at n. 11).

<sup>223</sup> Donald P. Barrett, Esq., Supreme Court of California on Chief Justice Roger J. Traynor, (July 28, 1986), p. 31, Box T028, File 01a, Oral history interview with Donald P. Barrett, Posthumous, The Roger J. Traynor Collection, U.C. Hastings College of the Law, Traynor Center/Special Collections.

similar to the deductive schools of the physical sciences.<sup>224</sup> Yet, by the 1920s the adherents of sociological jurisprudence were arguing that law bore a close relation to the social sciences by necessity because of the effects that legal rules, institutions, and structures had on people's lives. Also, legal realists were sometimes skeptics who argued that law was a value-laden political system.<sup>225</sup>

The legal progressives of the day urged that law school curriculums be improved for the benefit of "society."<sup>226</sup> They urged that lawyers must be educated to "meet the economic and social problems" of the day in practice, much of which had been necessitated by the recent specialization in many fields of law. In some ways, these sentiments were traditional, since the legal academics wanted theoretical knowledge to become applied knowledge.<sup>227</sup> Also, many law schools did not abandon the case method of study; rather they just sought to adapt it to training lawyers as practitioners.<sup>228</sup> Yet, the perceived importance of recognizing the need for lawyers to help solve societal problems was well within the progressive ambit. So, too, was the view that legal education needed

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<sup>224</sup> Barry B. Boyer and Roger C. Cramton, "American Legal Education: An Agenda for Research and Reform," *Cornell L. Rev.*, Vol. 59, No. 2 (Jan., 1974), p. 221, 225. There was a debate about whether Langdell considered law a deductive or inductive science, with the latter being an even more "formalist" enterprise. Under an inductive theory, law would apply general rules to the specific cases. *Ibid.*, n. 14, citing Calvin Woodard, "The Limits of Legal Realism: An Historical Perspective," in Herbert L. Packer and Thomas Ehrlich, *New Directions in Legal Education* (New York: McGraw-Hill, 1972); James Parker Hall, "Some Observations on the Law School Curriculum," *Am. L. Sch. Rev.*, Vol. 5, No. 2 (Mar., 1923), p. 61, 63.

<sup>225</sup> Robert Stevens, "Two Cheers for 1870: The American Law School," in Donald Fleming and Bernard Bailyn, eds., *Law in American History* (Boston: Little, Brown, 1971), pp. 480-81.

<sup>226</sup> Cuthbert W. Pound, "The Law School Curriculum as Seen by the Bench and Bar," *Am L. Sch. Rev.*, Vol. 5, No. 2 (Mar., 1923), p. 66 (arguing not merely for professional preparation, but for a realistic approach to the needs of practice).

<sup>227</sup> William Browne Hale, "Theory of Legal Education," *Am. L. Sch. Rev.*, Vol. 5, No. 3 (May, 1923), p. 160, 163.

<sup>228</sup> Alfred Z. Reed, "Recent Progress in Legal Education," *Am. L. Sch. Rev.*, Vol. 5, No. 12 (May, 1926), p. 695.

to adapt to the realities of modern practice. Thus, the Langdellian case method was accused of not teaching students the argumentative and reasoning skills daily law practice required, rather than just knowledge of legal rules induced from the study of cases.<sup>229</sup>

These values were stressed in law schools of the 1920s, when most of the judges of the Tort Revolution were in law school. Once the law students became practicing lawyers, they participated in the debates about the kind of tort system that should exist in America.

### *The Lawyers' Perspectives*

One way of assessing the character of the Tort Revolution is to understand how practicing lawyers saw the potential for tort law changes at the time those changes seemed to be on the horizon. The best sources for understanding lawyers' views from the first six decades of the twentieth century are legal trade publications, especially those that sought to instruct lawyers, both practicing plaintiffs' and defense attorneys, on how to approach and respond to legal developments. It is important to note that these are not law reviews, edited and published by law students at law schools. Rather these are publications of lawyers associations and the articles were usually written by practicing attorneys. These publications were the product of the movement toward professionalism among lawyers, which began in the late nineteenth century and continued through at least the 1920s and early 1930s.<sup>230</sup> Most publications, for plaintiffs' and defense attorneys

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<sup>229</sup> Ray A. Brown, "An Experiment with a New Application of the Principles of the Case Method," *Am. L. Sch. Rev.*, Vol. 5, No. 4 (Dec., 1922), p. 207, 208.

<sup>230</sup> Lawrence M. Friedman, *American Law in the 20<sup>th</sup> Century* (New Haven: Yale, 2002), pp. 497-501; Friedman, *A History of American Law* 3<sup>rd</sup> ed., (New York: Touchstone, 1973, 2005 ed.), pp. 481-82; Ronen Shamir, "Professionalism and Monopoly of Expertise: Lawyers and Administrative Law, 1933-1937," *Law & Soc. Rev.*, Vol. 27, No. 2 (1993), p. 371, n. 9.

alike, did not concern themselves specifically with products liability law until much later in the twentieth century. For example, the American Bar Association's *Tort Trial & Insurance Practice Law Journal* did not begin publication until 1965, well into the Tort Revolution.<sup>231</sup> Instead, most publications were concerned with the judicially created and led expansion of tort liability.

Beginning in 1934, the International Association of Insurance Counsel, a lawyers association that claimed to have eleven hundred members, started publishing the *Insurance Counsel Journal*. The Association's purpose was to protect the interests of its "clients and society as a whole" through opposition to "futile and defective laws" and "the plethora of costly, oppressive and ineffective suits which paralyze the orderly processes of the law and irritate the people and burden them with unnecessary taxation and expense."<sup>232</sup> The publication was and remains one of the leading national trade journals for informing insurance companies' in-house and external counsel about the emerging issues in American tort and insurance law.<sup>233</sup> Insurance defense attorneys, who were the attorneys that would develop and implement the litigation strategies used in defense of their clients, insurance companies and their insured manufacturers, used this journal to stay abreast of emergent issues that could affect their clients' liabilities and to gain advice for handling legal issues. Products liability was not a concern of writers for the journal until the late 1940s. The earliest concerns were voiced over chemicals

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<sup>231</sup> The first issue was published in October 1965 and contained one article praising the trend in expanding products liability. John L. Hill, "Manufacturer's Product Liability in the Absence of Negligence – 1965," *Tort Trial & Ins. Prac. L.J.*, Vol. 1, No. 1 (Oct., 1965), p. 31.

<sup>232</sup> Walter R. Mayne, "To the Members of the International Association of Insurance Counsel," *Insurance Counsel J.*, Vol. 1, No. 3 (Oct., 1934), p. 1.

<sup>233</sup> It has been called the *Defense Counsel Journal* since 1987.

contained in common household products, including lotions, cosmetics, cleaning materials, etc.<sup>234</sup>

It was only in 1950 that the *Journal*'s first article expressly concerning "products liability" claims was published. At this time, only theories based upon negligence and breach of warranty were available to plaintiffs for injuries caused by consumer goods beyond foodstuffs, drugs, and in some states products for "intimate bodily use," such as cosmetics or creams. Even negligence claims required privity of contract between the consumer and the manufacturer, except when "the cause of the injury is a noxious or dangerous instrument, (2) fraud or deceit in passing off the products, (3) invitation to use defective appliance upon owner's premises, [and] (4) food cases." There was no hint of any fear on the part of the author that strict liability might be a goal of the plaintiffs' bar or was the inclination of any state courts regarding general consumer products, beyond foods and products for "intimate bodily use." The California Supreme Court's *Escola* case of six years before (reviewed in Chapter 3 below), in which Justice Roger Traynor had made an impassioned argument in favor of strict liability, was not referenced.<sup>235</sup> This demonstrates that strict liability was not perceived as a threat by the chief defenders and strategy makers of the manufacturers' interests: insurance defense counsel.

By 1953, the *Insurance Counsel Journal* saw fit to print an advice piece specifically directed at products liability cases. The only theories upon which liability could be based in 1953 were breach of warranty, negligence, or deceit or false

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<sup>234</sup> See Paul F. Ahlers, "Claims for Injury or Death from Eating Commercial Compound Not Intended for Internal Consumption," *Ins. Counsel J.*, Vol. 14, No. 2 (Apr., 1947), p. 47.

<sup>235</sup> Hugh E. Reynolds, "Products Liability Claims," *Ins. Counsel J.*, Vol. 17, No. 2 (Apr., 1950), pp. 150-56. The article chiefly concerned the notice requirements of the Uniform Sales Act for breach of warranty claims.

representation.<sup>236</sup> Although California's *Escola* case was referenced, it was the majority's opinion on *res ipsa loquitur* that was discussed, not Roger Traynor's concurrence urging a switch to strict liability.<sup>237</sup> Nowhere is there an inkling of a fear that strict liability may be a future development in the law and no techniques are advised for anticipating or rebutting any plaintiff's counsel's argument for the alteration of the law to a strict liability standard. This was true, even though ten years before this article torts professor William Prosser had been suggesting in his treatise on torts that strict liability might be legitimately applied to general products. Again, this is evidence that consumers or their attorneys were not the leaders of the Tort Revolution. Rather it was a judge-made revolution.

By the early 1950s, the defense bar was concerned with the possibility of strict liability in foodstuff cases, especially exploding beverage bottle cases. The first products liability treatise, published in 1951, was devoted to liability for injuries from foods. The treatise's author, Reed Dickerson, noted that strict liability (then referred to as "absolute liability") was a way to "correct the evil at its source" and provide a "kind of consumer insurance."<sup>238</sup> Dickerson noted that the trend toward absolute liability for foodstuffs was "doing a generally adequate job" of protecting individual consumers, but complained that "diffuse and cumulative injuries" needed a more serviceable claim system. He unequivocally advocated "frankly adopting absolute liability at all levels of production

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<sup>236</sup> Gerald A. Gleason, "Investigation, Preparation and Defense of Products Liability Cases," *Ins. Counsel J.*, Vol. 20, No. 2 (Apr., 1953), p. 114.

<sup>237</sup> *Ibid.* at 122 (citing *Escola* at n. 47).

<sup>238</sup> Reed Dickerson, *Products Liability and the Food Consumer* (Boston: Little, Brown, 1951), p. 135.

and distribution” and doing so, preferably, “by common law decision.”<sup>239</sup> This was the kind of complaint that was accommodated by the class action lawsuit.<sup>240</sup>

It was a somewhat frequent occurrence to have product liability cases based on exploding bottles. The standard scenario concerned a store employee injured during the shelving of new bottles of soda or beer. Usually such cases were decided under a negligence standard called *res ipsa loquitur*, which was a standard allowing for negligence to be presumed if the item that caused the injury was solely under the defendant’s control at the time of the negligent conduct. In the case of exploding bottles, although the incident happened after the bottling process was complete, the negligent use of faulty bottles or glass, or the negligence involved in the bottling process, was usually presumed, since the bottling was completely under the defendant bottler’s control.

In 1954, practitioner William E. Night feared that the “extreme position” of strict liability lay in the future for exploding bottle cases. Night saw a “judicial trend” toward a theory that would uphold liability for bottlers regardless of fault. He presumed that jurors, who usually heard experts from both sides, knew liability insurance existed for the bottler and, “being practical men,” were therefore inclined to find for the plaintiff, presumably more for the purpose of compensation rather than because the jury believed the bottler had in fact been negligent. (This is a perennial fear of civil defense counsel.) The advice given to counsel and insurers was based upon the negligence theories and the need for better bottle inspection and manufacturing methods.<sup>241</sup> Nevertheless, it was

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<sup>239</sup> Ibid., p. 279-80.

<sup>240</sup> Discussed *infra*.

<sup>241</sup> William E. Night, “Let the Bottler Beware!” *Ins. Counsel J.*, Vol. 21, No. 1 (Jan., 1954), pp. 72-77.



feared by insurers that *res ipsa loquitur* was a backdoor method of achieving liability without fault.<sup>242</sup>

Similarly, in cases based upon breach of warranty theories, the fear was that a judicially-created trend away from a requirement of privity of contract was developing among the state supreme courts.<sup>243</sup> Nevertheless, in a journal given to anticipating plaintiffs' litigation techniques and strategies and advising on how defense lawyers could thwart them, there was no advice given to combating plaintiffs' counsels' arguments, since the trend was a "judicial" one. This lack of advice to combating plaintiffs' arguments and the lament that the future held a judicial trend in favor of strict liability shows, again, that the Tort Revolution was a judge-made revolution, not a consumer-litigant revolution. Although the state appellate courts were hearing appeals brought forth by litigants and their attorneys, the bases upon which the expansive holdings were made were not those advanced by the litigants themselves. The vast majority of the defective products cases that came before the appellate courts could be decided on existing precedents regarding either negligence or warranty law. The theories contained in the plaintiffs' complaints rarely advocated for a change or expansion of existing law. Rather they sought to recover within the existing liability framework. It was only because of the willingness of the state appellate court judges to expand the existing law, regardless of precedents, that the Tort Revolution occurred.

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<sup>242</sup> R. Crawford Morris, "'Res Ipsa Loquitur' – Liability Without Fault," *Ins. Counsel J.*, Vol. 25, No. 1 (Jan., 1958), p. 97.

<sup>243</sup> Wallace E. Sedgwick, "Report of the Casualty Committee – 1955 – Part II: Liability of a Manufacturer of Chattels to Persons Other Than Immediate Purchasers, on the Theory of Warranty," *Ins. Counsel J.*, Vol. 22, No. 4 (Oct., 1955), p. 431; William E. Knepper, "Let the Manufacturer Beware," *Ins. Counsel J.*, Vol. 25, No. 2 (Apr., 1958), p. 175.

In addition to foodstuffs, in the early 1950s most practitioners were concerned with the long-standing category of “ultrahazardous activities.” For example, although Professor Prosser’s torts textbook had characterized aviation as novel enough to be classed as “ultrahazardous” as late as 1941, the defense bar was arguing that aviation was safe and sound enough to be reviewed under the general negligence standard of liability.<sup>244</sup>

Yet, the fear of a judge-driven revolution was probably even more palpable than a lawyer-recommended revolution. Law reviews and lawyer trade journals in the mid-1950s saw increases in articles concerned with the expansion of manufacturers’ liability to consumers.<sup>245</sup> Law professors, of course, were the authors of many law review articles; and they often supported expanded liability for manufacturers of general products. For some authors, the expansion of manufacturer liability was simply the logical consequence of the modern industrial economy. For example, one author noted, “[T]he legal problems arising from the function of manufacturers in the modern social organization cannot be handled adequately on the basis of negligence alone. Proof of

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<sup>244</sup> George W. Orr, “Is Aviation Ultra Hazardous?” *Ins. Counsel J.*, Vol. 21, No. 1 (Jan., 1954), p. 48.

<sup>245</sup> William J. Condon, “Product Liability – Food, Drug and Cosmetic Law – 1954,” *Ins. L. J.*, Iss. 7, No. 390 (July, 1955), p. 465; Robert Martin Davis, “A Re-Examination of the Doctrine of MacPherson v. Buick and Its Application and Extension in the State of New York,” *Fordham L. Rev.*, Vol. 24, No. 2 (Summer, 1955), pp. 204, 234 (practitioner endorsing “judicial recognition” of manufacturer liability; citing Prosser and Smith’s 1952 casebook on torts for the proposition that strict liability incentives making products safer and allocates risk of loss on manufacturer, which can bear loss through insurance); Harry Cross Dillard and Harris Hart, II, “Product Liability: Directions for Use and the Duty to Warn,” *Va. L. Rev.*, Vol. 41, No. 2 (Feb., 1955) (law professor and attorney noting the possibilities for extending manufacturer liability regarding a negligence-based duty to warn consumers of potential harms from foreseeable uses of products); Eddy S. Feldman, “Liability of Manufacturers of Home Furnishings for Harm Done by the Product,” *Ins. L. J.*, Iss. 8, No. 391 (Aug., 1955), p. 519; James D. Ghiardi, “Manufacturer’s Control as an Element of Res Ipsa Loquitur,” *Ins. L. J.*, Iss. 9, No. 380 (Sept., 1954); Robert W. Miller, “Liability of a Manufacturer for Harm Done by a Product,” *Syracuse L. Rev.*, Vol. 3, No. 1 (Fall, 1951), p. 106; Robert W. Miller, “Manufacturers’ Product Liability Re-Visited,” *Ins. Counsel J.*, Vol. 23, No. 2 (Apr., 1956), p. 175; Aron Steuer, “Privity as a Factor in Actions for Personal Injuries in New York,” *N.Y. L. Forum*, Vol. 1, No. 2 (June, 1955), p. 133; William N. Strack, “Product Liability in the Meat-Packing Industry,” *Ins. L. J.*, Iss. 7, No. 390 (July, 1955), p. 470.

negligence is impossible in many cases where *human nature instinctively senses obligation* (emphasis added).”<sup>246</sup> Although not expressly advocating for strict liability, even U.S. Supreme Court Justice Robert Jackson wrote in favor of *expanded* manufacturer liability:

This is a day of synthetic living, when to an ever-increasing extent our population is dependent upon mass producers for its food and drink, its cures and complexions, its apparel and gadgets. There are no longer natural or simple products but complex ones whose composition and qualities are often secret. Such a dependent society must exact greater care than in more simple days and must require from manufacturers or producers increased integrity and caution as the only protection of its safety and well-being. ... *Forward-looking courts*, slowly but steadily, have been adapting the law of negligence to these conditions [in which twentieth-century consumers find themselves]. (emphasis added)<sup>247</sup>

Jackson was known for his advocacy of liberalism in lawyers. He viewed “progress in society” as one of the chief tasks of lawyers.<sup>248</sup> Although his comments were couched in terms of the prevailing negligence system, Justice Jackson’s views on manufacturers’ liability encapsulate the disposition of some supporters of strict liability: rather than a liability system based on moral fault, the law – first and foremost – should seek to compensate injured parties; expanding enterprises’ liability was the best way to achieve this goal.

By the mid-1950s, the fears of a tort revolution were beginning to be felt by insurance companies’ counsel and hoped for by plaintiffs’ counsels. One defense counsel

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<sup>246</sup> Lester W. Feezer, “Manufacturer’s Liability for Injuries Caused by His Products: Defective Automobiles,” *Mich. L. Rev.*, Vol. 37, No. 1 (Nov., 1938), p. 3.

<sup>247</sup> *Dalehite v. U.S.*, 346 U.S. 15, 51-52 (1953) (Jackson, dissenting).

<sup>248</sup> Robert H. Jackson, “The Call for a Liberal Bar,” *Nat’l Law. Guild Q.*, Vol. 1, No. 2 (Mar., 1938), p. 88.

summarized the views of proponents of strict liability: “Judicial decision, rather than legislation, was and is the primary impetus in [strict liability’s] development. . . . [And] a partial explanation for it, is the social philosophy that each individual has a vested interest in security. Injury, therefore, seems to beget payment from somebody and, where a product is involved, the cases show an ever increasing ease of recovery against the producer.”<sup>249</sup>

The chief cases of concern by the mid-1950s were related to whether a manufacturer’s instructions to consumers were sufficient to warn of known dangers and the willingness of state appellate courts to extend the doctrine of *res ipsa loquitur* to product liability situations.<sup>250</sup> Insurance defense counsel and insurers feared not only the possibility of strict liability, but also other avenues of extending manufacturers’ liability. For example, although by the 1950s courts throughout the nation had long allowed an injured consumer to recover against a manufacturer under a breach of warranty theory, such successful suits had been limited to instances of direct and specific statements made to the consumer by the seller, whether the manufacturer or a retailer. In 1958 the Ohio Supreme Court caused trepidation among insurers when it held that a television advertisement for a hair permanent contained express warranties that allowed a consumer, who purchased the item from a separate retailer, to sue the manufacturer, notwithstanding lack of privity. The majority opinion noted that, although the decision was contrary to the court’s precedents, the holding was “a reasonable and logical

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<sup>249</sup> Robert W. Miller, “Manufacturers’ Product Liability Re-Visited,” *Ins. Counsel J.*, Vol. 23, No. 2 (Apr., 1956), pp. 176-77.

<sup>250</sup> *Ibid.*

approach today in keeping with the modern methods of doing business.”<sup>251</sup> Again, this was another instance of the Progressive viewpoint of judges regarding the contemporary American economy. One commentator saw this case as “the pinnacle of this move [by state courts] toward ‘products compensation’ and toward extension of the scope of manufacturers’ liability.” It was another effort by those the author labeled the “plaintiff-obsessed, overly-sympathetic members of the bench and bar.”<sup>252</sup>

This commentator wrote what most defense bar attorneys probably believed: the expansion of manufacturer liability was not the inevitable result of modern manufacturing and marketing conditions. Rather it was the result of judges who wanted plaintiffs to win their lawsuits. Additionally, compensation was the theme of expanded liability. Judges were emphasizing compensation and the socializing of costs over individual responsibility and the deterrence of the fault-based tort system.

### ***William L. Prosser***

The ALI’s second *Restatement* of tort law was begun in 1952, with the first draft proposed in 1955. The reporter for this new *Restatement* was William L. Prosser (1898-1972), who in the 1950s was the dean of the University of California’s law school at Berkeley. By the time he was appointed the reporter he was also considered a “dean” of tort law in America. Professor Prosser is rightly considered to have shaped much of the academic and judicial understanding of tort law in the latter half of the twentieth century. As one commentator, writing in the 1980s, noted, “‘Prosser on Torts’ remains in the

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<sup>251</sup> *Rogers v. Toni Home Permanent Co.*, 167 Ohio St. 244, 249, 147 N.E. 2d 612, 616 (1958).

<sup>252</sup> Warren Freedman, “A Brief for Products Liability Today,” *Ins. Counsel J.*, Vol. 27, No. 3 (July, 1960), pp. 396-97.

minds of students, teachers, the bench, and the bar alike a single thought, its parts indistinguishable one from the other.”<sup>253</sup>

William Lloyd Prosser was born in New Albany, Indiana in 1898. After obtaining his undergraduate degree from Harvard in 1918, he served in the Marines during World War I. Although after World War I, he attended Harvard Law School for a year, he left school to work for a company in Minneapolis. In 1926, he enrolled the University of Minnesota and obtained his law degree in 1928. That year he practiced with a firm in Minneapolis. He was hired for the faculty of Minnesota Law School from 1929 (or possibly 1930) until 1947, although he returned to private practice in 1943.<sup>254</sup> In 1947, Harvard Law School persuaded Prosser to join its faculty for a year. Thereafter, he served as the dean of Berkeley’s law school, Boalt Hall, from 1948 until 1963.<sup>255</sup> He was employed at the Hastings College of Law in San Francisco from 1963 until his death in 1972. He published in the area of torts starting with a hornbook (treatise on the law) in 1941 and a textbook for law students in 1952. The textbook was very popular throughout the remainder of the twentieth century and, as of 2008, remained the market leader for law school curriculums.<sup>256</sup> As one colleague noted, his textbook’s success was partly

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<sup>253</sup> Craig Joyce, “Keepers of the Flame: Prosser and Keeton on the Law of Torts (Fifth Edition) and the Prosser Legacy,” Review Essay, *Vand. L. Rev.*, Vol. 39, No. 3 (April, 1986), p. 851.

<sup>254</sup> Notes, *Minn. L. Rev.*, Vol. 15, No. 1 (Dec., 1930), p. 76. See Laurence H. Eldredge, “William Lloyd Prosser,” *Cal. L. Rev.*, Vol. 60, No. 5 (Sept., 1972), p. 1245, 1247. Craig Joyce dates Prosser’s hiring at Minnesota as 1930. Joyce, “Keepers of the Flame: Prosser and Keeton on the Law of Torts (Fifth Edition) and the Prosser Legacy,” Review Essay, *Vand. L. Rev.*, Vol. 39, No. 3 (April, 1986), p. 851, 852 n. 5. Robert A. Stein places his hiring as a part-time lecturer at Minnesota in around 1928 or 1929 (although the date is not given) and then as an assistant professor by 1930. Robert A. Stein, “In Pursuit of Excellence – A History of the University of Minnesota Law School – Part III: The Fraser Years – A Time of Excellence and Innovation,” *Minn. L. Rev.*, Vol. 62, No. 6 (July, 1978), p. 1161, 1172-73 n. 56.

<sup>255</sup> *Hutchinson’s Biography Database*, “William Lloyd Prosser, 1898-1972,” (2003), p. 1.

<sup>256</sup> Christopher J. Robinette, “The Prosser Notebook: Classroom as Biography and Intellectual History,” *U. Ill. L. Rev.*, Vol. 2010, No. \_\_ (forthcoming 2010), p. 4 n. 16.

based on his ability to “rally broad consensus around humane and liberal (though hardly ‘radical’) policies.”<sup>257</sup>

Beyond this cursory sketch of his career, there is little known of William Prosser other than the writings and recollections of others. Prosser is not known to have left any papers and – quite surprisingly in light of his importance in American legal history – there are no biographies of him.<sup>258</sup>

During Prosser’s student days at the University of Minnesota Law School, Dean Everett Fraser led the school. As the dean from 1920 to 1948, Fraser wanted “the law students to become more acutely aware of their social responsibilities and of the breadth and depth of learning required for those responsibilities.” Fraser served the ALI as a reporter for the *Restatement of Property* and a co-reporter with Francis Bohlen on the *Restatement of Torts*.<sup>259</sup> As dean of Minnesota’s law school, he advocated the adherence to high standards, not only of academic merit, but also moral character. He noted, “It is a fine thing that in America the profession of law is open to everyone ... But we have been too prone to keep the office down to the level of the man instead of raising the man to the level that the office demands. This is a common error of democracy.”<sup>260</sup> Although this was a somewhat conservative, or traditional, statement at the time, Fraser exhibited other

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<sup>257</sup> Elizabeth Josselyn, “William Lloyd Prosser, Law: Berkeley and Hastings,” 1975, *University of California: In Memoriam* (Berkeley: UC (System) Academic Senate, July, 1975), p. 127.

<sup>258</sup> Christopher J. Robinette, “The Prosser Notebook: Classroom as Biography and Intellectual History,” *U. Ill. L. Rev.*, Vol. 2010, No. \_\_ (forthcoming 2010), pp. 6-7. In fact, the foregoing Robinette article attempts to discern Prosser’s early-career thought almost solely from a student’s detailed class notes from 1938.

<sup>259</sup> Robert A. Stein, “In Pursuit of Excellence – A History of the University of Minnesota Law School – Part III: The Fraser Years – A Time of Excellence and Innovation,” *Minn. L. Rev.*, Vol. 62, No. 6 (July, 1978), p. 1161, 1162, 1164-65.

<sup>260</sup> Everett Fraser, “Academic Training for the Bar,” *Minn. L. Rev.*, Vol. 11, No. 6 (May, 1927), p. 582, 583.

classically progressive qualities. Fraser was also an active, vocal Democrat. As historian and (as of this writing) current Minnesota Law School dean Robert A. Stein has noted, Fraser's support of Franklin Roosevelt was "ardent to the point adamancy." For example, Fraser enthusiastically supported FDR's court-packing plan in 1937.<sup>261</sup> William Prosser was both a student during Fraser's tenure as dean and an employee: Fraser hired him to teach at Minnesota.<sup>262</sup>

Fraser, in a true progressive vein noted, "The law and its administration have not kept up to the necessities of changing conditions." He advocated for the law school to be a research resource for the state, "working for the improvement of the law."<sup>263</sup> Fraser created what became known as the "Minnesota Plan" of legal education: a curriculum that included courses beyond standard contracts, property, and torts. It was a curriculum with a "broader study of the law" than most law schools theretofore had required. It was a program to train lawyers "for public service." It was envisioned that "this program will produce a better type of lawyer. He will have a broader vision, will see law as a phase of human relations varying in time and place."<sup>264</sup> This was the professional atmosphere in which Prosser worked from 1928 through 1943.

As a torts professor, Prosser was a thorough academic, illustrating rules of law by reviewing current cases and providing students with historical perspectives on how the

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<sup>261</sup> Stein, "In Pursuit of Excellence," *Minn. L. Rev.*, Vol. 62, No. 6 (July, 1978), p. 1167 n. 22.

<sup>262</sup> *Ibid.*, p. 1171.

<sup>263</sup> *Ibid.*, p. 1186.

<sup>264</sup> Notes, The Four Year Law Course, *Minn. L. Rev.*, Vol. 15, No. 1 (Dec., 1930), pp. 78-83; Robert A. Stein, "In Pursuit of Excellence," *Minn. L. Rev.*, Vol. 62, No. 6 (July, 1978), pp. 1188-89.



law had changed over time. In the classroom, he did not shy away from giving his personal opinions on what the law *should* be.<sup>265</sup>

By 1941 Prosser had published the first edition of his treatise on tort law. He contended that the then-prevailing rule requiring privity in order to sue a remote manufacturer under a warranty theory to be a harmful convolution of tort and contract law. He considered adherence to privity “a fetish to vex the law of both contract and tort.” He applauded the New York Court of Appeals’ case, *MacPherson*, as an exposure of the “error” inherent in adherence to privity.<sup>266</sup>

Prosser considered strict liability to be the law of the future. He clearly indicated support for the application of strict liability in products cases:

There is an obvious argument that in the public interest the consumer is entitled to the maximum of protection at the hands of some one, and that the producer, practically and morally, is the one to provide it.<sup>267</sup>

He added, “Also, of course, the argument that strict liability provides an incentive for the greatest possible care.”<sup>268</sup> Thus, Prosser believed strict liability was not only a way of compensating injured consumers but it would also provide incentives to manufacturers to create safer products.

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<sup>265</sup> Christopher J. Robinette, “The Prosser Notebook: Classroom as Biography and Intellectual History,” *U. Ill. L. Rev.*, Vol. 2010, No. \_\_ (forthcoming 2010), p. 23 n. 198.

<sup>266</sup> William L. Prosser, *Handbook of the Law of Torts* (St. Paul: West Publ. Co., 1941), § 33, p. 206.

<sup>267</sup> *Ibid.*, § 83, p. 689.

<sup>268</sup> *Ibid.*, p. 689 n. 48.

Also, he wanted strict liability to be applied to all consumer goods, a position which was well beyond what any court had yet done. He noted:

No reason is apparent for limiting [strict liability] to food cases, and it may be anticipated that it will extend, first to other products involving a high degree of risk, and perhaps eventually to anything which may be expected to do harm if it is defective.<sup>269</sup>

Prosser described the basis for strict liability in terms that would be repeated verbatim, paraphrased, summarized, and echoed by state supreme courts in justifying and explaining their switch to strict liability in the 1950s and 1960s. It is no exaggeration to say that Prosser was the prophet of strict liability and gave voice to its most ardent supporters among the judiciary and academia. Prosser contended that the policy of strict liability was rooted in “a social philosophy which places the burden of the more or less inevitable losses due to a complex civilization upon those best able to bear them, or to shift them to society at large.”<sup>270</sup> By those who were “best able to bear” the costs of injuries from defective products, Prosser meant manufacturers, wholesalers, distributors, and retailers. Prosser endorsed the no-fault approach of strict liability by relating it back to what he described as the nineteenth-century concerns of tort. Rather than being concerned with fault, Prosser described the law as being concerned with “keeping the peace between individuals, by providing a remedy which would be accepted in lieu of private vengeance.”<sup>271</sup> However, this was true of law in general, what is known in modernity as both criminal and civil law. Contemporary scholars have long recognized

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<sup>269</sup> Ibid., p. 692.

<sup>270</sup> Prosser, *Handbook of the Law of Torts*, 2d ed. (St. Paul: West Publ. Co., 1955), p. 315.

<sup>271</sup> Ibid.

that formal judicial systems were key in stemming recourse to private help, or vengeance, in resolving one's problems and disputes.<sup>272</sup>

Prosser portrayed civil law as seeking compensation of injured parties, rather than punishment of wrongdoers. Although compensation was a purpose of the civil law system, as G. Edward White has noted, the civil system also sought to punish wrongdoers.<sup>273</sup> Nevertheless, Prosser's apparently disinterested review of American tort law was in fact an argument that endorsed the switch from negligence to strict liability in the area of products liability. He quoted Roscoe Pound's recognition that American law in 1914 evidenced a "strong and growing tendency ..., in view of the exigencies of social justice, [to place liability on those] who can best bear the loss and hence to shift the loss by creating liability where there has been no fault."<sup>274</sup> Prosser noted that courts that endorsed such liability had done so because the defendant's conduct was "socially unreasonable" in the risks the behavior posed to the community. However, at the time Prosser was writing the kind of conduct deemed subject to strict liability was rather narrow in American civil society. The cases in the United States consisted of narrow band of activities like blasting operations, accumulated water in dangerous locations, fumigating buildings with cyanide gas, drilling wells, industrial gas emissions, and

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<sup>272</sup> "One of the first causes of a legal system is the desire to prevent or discourage feuding and private warfare, by offering some peaceful alternative." J.H. Baker, *An Introduction to English Legal History*, 3d Ed. (London: Butterworths, 1990), p. 4. Also, formal law "nourishes respect for both polity and principle and hence for the claims of one's fellow citizens." Peter H. Schuck, *The Limits of Law: Essays on Democratic Governance* (Boulder, CO: Westview Press, 2000), p. 442.

<sup>273</sup> G. Edward White, *Tort Law in America: An Intellectual History*, Expanded Edition (New York: OUP, 1980, 2003 ed.), p. 62.

<sup>274</sup> Prosser, *Handbook*, 2d ed., p. 317 (quoting Roscoe Pound, "The End of Law as Developed in Legal Rules and Doctrines," *Harv. L. Rev.*, Vol. 27, No. 3 (Jan., 1914), p. 233; other authorities cited omitted).

dangerous constructions of roofs and walls.<sup>275</sup> However, as late as the 1950s there were some state courts that held that absolute, or strict, liability would not be applied even in the situation of explosives, since “explosives are necessary in creating and maintaining progress.”<sup>276</sup>

Legal philosopher H.L.A. Hart, writing in 1961, noted that strict liability was “defended on the ground that it is in the interest of ‘society’ that those accidentally injured should be compensated.” Yet, Hart noted that, although strict liability contained “an implicit appeal to the general welfare of society” and was sometimes called “social justice,” it “differs from the primary forms of justice which are concerned simply to redress, as far as possible, the status quo as between two individuals.” Instead, according to Hart, claims that strict liability supported “society” were misnomers. Such a system “provides benefits for one class of the population only at the cost of depriving others of what they prefer.” Hart contended that claims that a system supported “the ‘public good’ or the ‘common good’” were spurious unless the lawmaking body considered “the interests of all sections of the community.” It is important to note that Hart was only thinking of a legislative lawmaker, not a judicial one.<sup>277</sup> Thus, Hart gave a philosophical criticism of the justification of strict products liability law: it was partial and was a kind of class-biased rule. It should be noted that the absence of a strict liability rule did not necessarily involved class bias in the other direction. That is, in the absence of strict liability there is the common law rule of negligence. Under negligence theory, the loss is

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<sup>275</sup> Prosser, *Handbook*, 2d ed., p. 334 (citations omitted).

<sup>276</sup> Harley J. McNeal, “Use of Explosives and Liability Questions Involved,” *Ins. Counsel J.*, Vol. 23, No. 1 (Jan., 1956), p. 125.

<sup>277</sup> H.L.A. Hart, *The Concept of Law* (New York: OUP, 1961), pp. 162-63.

born by the party guilty of moral fault. The question of proof of negligence is a separate matter. There is no class bias involved in allocating responsibility to the party guilty of fault because it is not liable simply by virtue of being a producer. Also, there was the implicit criticism that a judge-made change in the law was inherently illegitimate in a democratic system of government. (However, this applies most clearly when the legislature is the originator of the rule. Hart did not address a rule originally developed by the judiciary.) Hart's criticism was never really answered by strict liability's proponents. It was simply assumed that "justice" broadly construed was meted out when costs were socialized through strict liability.

Prosser stated the reasoning in support of allocating strict liability against defendants in terms that could easily apply to *any* manufacturer. He questioned whether liability based upon fault "is of any real assistance in dealing with" questions about how liability should be allocated. Prosser considered fault to be a standard traditionally and popularly associated with "moral wrongdoing" and:

Once the legal concept of "fault" is divorced, as it has been, from the personal standard of moral wrongdoing, there is a sense in which liability with or without "fault" must beg its own conclusion. The term requires such extensive definition, that it seems better not to make use of it at all, and to refer instead to strict liability, apart from either wrongful intent or negligence.<sup>278</sup>

This clearly displays Prosser's disposition regarding strict liability. He sought to divorce part of the compensatory system of torts from fault and make it a no-fault system. The argument was centered on the purposes of the torts system. If it was primarily compensatory, then fault limited the ability of the system to seek compensation for

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<sup>278</sup> Prosser, *Handbook on the Law of Torts*, 2d ed., p. 318.

injured parties. The no-fault theory was not only applicable to unusual activities, like using dynamite to create a mine seam, but implicitly could be applied to any activity that traditionally had been evaluated under the standard of fault. Almost any activity carries a degree of risk of injury to others. Thus, strict liability's "ultimate limits must be a question of the social policy of the future."<sup>279</sup>

Prosser was conscious of the fact that tort liability, whether imposed by a statute or a court's holding, was the product of "new social viewpoints," and was therefore inherently a political issue. The clearest example in the early 1940s was workers' compensation law. Other examples were the federal laws concerning railroads and child labor and state laws regarding foods and intoxicating liquors. Prosser noted that although aviation was a "developing industry," it was sufficiently novel to construe it as an "ultrahazardous activity." (However, courts were still gradually adopting this view in the mid-1950s.)<sup>280</sup> As for common law expansion of liability, Prosser noted that products liability – chiefly for foods – had been broadened under the contract-based theory of implied warranty, sometimes even without privity of contract between the seller and the ultimate consumer. As Prosser noted with approval, although liability had been expanded mostly for food products, "there is no essential reason for so limiting it, and it may eventually be applied to any articles where there is a high risk of injury from any defects." He suspected that the surge in purchases of liability insurance in the 1950s was a factor in courts' increased willingness to allow some matters to be decided by juries. Prosser confidently predicted further "developments" in strict liability (presumably

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<sup>279</sup> Prosser, *Handbook*, 2d ed., p. 344.

<sup>280</sup> George W. Orr, "Is Aviation Ultra Hazardous?" *Ins. Counsel J.*, Vol. 21, No. 1 (Jan., 1954), p. 48.

toward the expansion of liability) and saw an expansion “in many additional fields, both compulsory liability insurance and compensation.”<sup>281</sup> In fact, he suggested that if courts in the future were willing to extend strict liability beyond food to other products, then “it seems better to discard the troublesome sales concept of ‘warranty,’ and impose strict liability outright in tort, as a pure matter of social policy.” Ultimately, “[i]f the producer is to be required to guarantee his products, no further justification will be needed than that public opinion will have arrived at the point where it places full responsibility for the injury upon him.”<sup>282</sup>

Yet, the 1940s found other academics noting the trends toward a form of liability often referred to as “enterprise liability,” or liability based upon the existence of a business enterprise that presented risks to the public through its regular business activities.<sup>283</sup> Scholars noted that the law of contracts, sales, and the purchase of insurance in the 1940s were proving as bases for the expansion of liability for risks presented by routine business activities.<sup>284</sup>

By the late 1950s, scholars were openly acknowledging their debt to the legal realists. For example, Cornelius Gillam, a law professor at the University of Washington, argued in favor of abolishing privity between manufacturers and consumers in the contract context and in favor of implementing strict liability. He acknowledged his debt

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<sup>281</sup> Prosser, *Handbook*, 2d ed., pp. 345-49.

<sup>282</sup> *Ibid.*, pp. 510-11.

<sup>283</sup> Warren A. Seavey, “Principles of Torts,” *Harv. L. Rev.*, Vol. 56, No. 1 (Sept., 1942), p. 86; Albert A. Ehrenzweig, *Negligence Without Fault: Trends Toward an Enterprise Liability for Insurable Loss* (Berkeley: Univ. of Calif. Press, 1951).

<sup>284</sup> Ehrenzweig, *Negligence Without Fault*, pp. 55-56; Fleming James, Jr. and John V. Thornton, “The Impact of Insurance Law on the Law of Torts,” *Law and Contemp. Prob.*, Vol. 15, No. 3 (Summer, 1950), p. 438.

to “Holmes, Dicey, Pound, Cardozo, Walter Wheeler Cook, and the legal realists.”<sup>285</sup>

These legal realists and sociological jurisprudence adherents were the godfathers of the Tort Revolution. Not only were some of them judges who paved the way by making expansive rulings on product liability issues, all of them were also writers who influenced later generations of judges and academics to support the expansion of tort liability for defective products in the 1960s. It is to these later generations of judges – those who made the Tort Revolution – to which we shall now turn.

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<sup>285</sup> Cornelius W. Gillam, *Products Liability in the Automobile Industry: A Study in Strict Liability and Social Control* (Minneapolis: Univ. of Minn. Pr., 1960), p. vii.



### **Chapter 3: The Tort Revolution Begins**

*“Lawyers are encouraged to bring a case only when they see that someone has gone before them and succeeded. And to have that prior success you need a judge either at the trial level or the appellate level creating law in an atmosphere that allows cases to go to the jury.”*

-- Paul Rheingold, plaintiffs’ products liability litigation attorney (1975)<sup>286</sup>

As we have seen, the academic community’s arguments for the reformulation of American tort law were laid long before the 1950s. State legislatures had traditionally played only a minor role in the setting of tort policy. Common law tort rules had been left in the hands of the traditional common law policy makers, state court judges, and the question was whether they would support strict liability. This chapter will investigate and analyze the policy-making roles of the state courts in America in the 1960s that affected the Tort Revolution. The process of legal change began in state courts in the 1940s and 1950s and exponentially grew in the 1960s, when many state supreme courts followed the lead of a few notable state courts and changed their products liability standards from negligence to strict liability. The tipping point in the gradual expansion of manufacturer liability was a 1963 case decided by the California Supreme Court. Led by associate justice Roger Traynor, his court applied strict liability to a manufacturer of *any* defective product. The case became the model for other state courts that sought to change their states’ laws, as well.

Although the intellectual firmament of the Tort Revolution comprised mostly the work of academic scholars throughout the twentieth century, it took equally dedicated judicial policymakers in the state courts to implement the academics’ recommended

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<sup>286</sup> Jonathan Evan Maslow, “Products Liability Comes of Age,” *Juris Doctor* (Feb., 1975), p. 23, located in Box 25, File 7, The Roger J. Traynor Collection, U.C. Hastings College of the Law, Traynor Center/Special Collections.

reformulations of state tort law. The courts took the lead in formulating and implementing the strict liability doctrine, making manufacturers (and others in the production and distribution chain) liable, regardless of fault, for the bodily injuries caused by defectively manufactured and designed products. (Defects would certainly be evidence of fault on the part of a manufacturer, but under a strict liability regime, the plaintiff would only have the burden of proving to a jury that the defect existed and would not need to prove that the manufacturer did something wrong. This is why strict liability makes recovery much more likely for a plaintiff). The action of the courts shifted tort law from the realm of academic theory to legal practice and into the political realm of the post-New Deal state. Torts – specifically products liability law – became a political issue in the pluralistic American polity. What had theretofore been a matter of private law became a quasi-public law issue.

Once strict liability became a subject of pluralist politics, the legislatures of some states (and later the federal government, as is reviewed in Chapters Five and Six) began to implement their policy preferences regarding tort liability. In some states the traditional provenance of the courts in tort law was challenged just at the time judges were taking the lead in the reformulation of tort policy. Thus, in the midst of the Tort Revolution legislatures contended with the courts in the formation of tort law. When the courts became policy innovators in an area of law previously immune to political interference, it was an unintended consequence that legislators and pluralist politics challenged their authority over tort law. Put simply, what had been apolitical became inherently political. The Tort Revolution demonstrated that the issue of courts as policy-making bodies was not resolved in the post-New Deal state and, more pointedly, that the

separation of powers doctrine had not been sanguinely accepted by many state judiciaries.

### ***American Courts as Policy-Making Institutions***

This chapter will demonstrate that state court judges of the 1960s intentionally played a policy-making role in American tort law. It is something of a cliché that judges' decisions in matters of private law have ramifications far beyond the litigants in any given case.<sup>287</sup> Yet, this truism points out the function of judges throughout the history of the American legal system. The debate about the role of courts as policy-making institutions is older than the Republic. The debate in the American context revolved around the role of courts when separated from the legislative and executive functions under the "separation of powers" doctrine.

Ever since the John Locke divided civil government into three powers and Montesquieu argued that liberty did not exist if there was no separate judicial power, there has been a concern among European and American political theorists about the judiciary as a policy-making institution.<sup>288</sup>

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<sup>287</sup> Martin Shapiro, "From Public Law to Public Policy, or the 'Public' in 'Public Law,'" *PS*, Vol. 5, No. 4 (Autumn, 1972), p. 418.

<sup>288</sup> John Locke and Baron de Montesquieu articulated the theoretical foundations for the doctrine of separation of powers. Locke divided civil government into three powers: the legislative, executive, and federative. Although the executive and federative (the power to make war and treaties) were joined, the executive and legislative needed to be separate in order to prevent tyranny at the hands of a single body of governors. Huntington Cairns, *Law and the Social Sciences* (London: Kegan Paul, Trench, Trubner & Co. Ltd., 1935), p. 241 (citing Locke's *Two Treatises of Civil Government*, Bk. II, Ch. XII (Morley's Ed., 1884)). Montesquieu adapted Locke's ideas. He made the division between not only the legislative and executive powers but also distinguished a judicial power. If the judicial power were joined with one of the other powers, then the courts would be legislators and oppressors. Baron De Montesquieu, *The Spirit of the Laws*, Bk. XI, Ch. 6 (orig. publ. 1748) (New York: Hafner Press, 1949), p. 152. (Cairns, above, incorrectly cites this passage as Book VI in *Law and the Social Sciences*, p. 241.)

Under the American colonial system of government courts performed so many non-adjudicative functions – ordering the clearing of roads, setting fines and fee schedules, collecting local taxes – that, as Peter Charles Hoffer has noted, “there was no concept of separation of powers in early America.”<sup>289</sup> Yet, in the early national period the new states’ constitutions and the U.S. Constitution formally separated the judiciaries’ functions. But the policy-making role of the courts was never formally proscribed.

The early Progressive period in America saw arguments for a formal separation of politics from administration. Progressives argued for a “realistic” understanding of the lawmaking functions of the executive branch of government while professing adherence to a separation of powers premised upon the distinction “politics and administration.”<sup>290</sup> This “realist” approach to analyzing the implementation of political theory was adopted by many legal scholars in the United States in the late nineteenth and early twentieth centuries. Scholars of the period doubted that the formal branches of government actually effectuated truly separate spheres of responsibility and power. Even today the extent and breadth of the judicial review power remains controversial among legal historians.<sup>291</sup>

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<sup>289</sup> Peter Charles Hoffer, *Law and People in Colonial America*, Revised Ed. (Baltimore: Johns Hopkins Univ. Press, 1998), p. 29. The colonial courts were “general instruments of government.” Lawrence M. Friedman, *A History of American Law*, Third Ed. (New York: Touchstone, 2005 ed.), p. 9.

<sup>290</sup> Alfred H. Kelly, Winfred A. Harbison, and Herman Belz, *The American Constitution: Its Origins and Development*, Vol. II, 7<sup>th</sup> ed. (New York: Norton, 1991), p. 414.

<sup>291</sup> Although Hamilton argued in favor of the power in *Federalist* No. 78, his was only one man’s opinion. Historian Robert Clinton has argued that the power of judicial review was a departmental power, which empowered the Supreme Court to declare unconstitutional only those acts of Congress that impinged upon judicial functions; thus, the Court could not rule upon the constitutionality of legislation concerning non-judicial functions or powers of Congress. According to Clinton, *Marbury v. Madison* was merely the early example of the proper functioning of judicial review. The Court was concerned with the Judiciary Act of 1789 and how it affected the Court’s power and jurisdiction. Robert Lowry Clinton, *Marbury v. Madison and Judicial Review* (Lawrence: Univ. Press of Kansas, 1989). Of course, *Marbury* was not the

In addition to the formal U.S. constitutional separation of powers, there was a common law separation of powers between the judicial and the legislative powers. Sir Edward Coke, an important early seventeenth-century English jurist and member of Parliament, was credited with articulating (and perhaps formulating) the separation of powers idea in English common law jurisprudence. Coke, writing in the famous *Bonham's Case* (1610), noted that a statute of Parliament could be “against common right and reason.”<sup>292</sup> The common law of England “retained supremacy” and had an “almost independent development.”<sup>293</sup> This suggested the common law (and therefore the courts that created and administered it) was a limit upon legislative power. Common law adherents and scholars of the nineteenth century, like the British scholar Frederic William Maitland, saw the common law as a “unified” body of law; a coherent whole. But Maitland feared that “the unity of the [common] law is precarious.”<sup>294</sup> One threat to the common law’s unity was the power of the legislative branch. As the late nineteenth-century German legal historian Heinrich Brunner saw it in 1888, “The period of the uncontested supremacy of the Common Law appears to be passing away in England as elsewhere. . . . The idea of Codification . . . has assumed tangible shape. . . . Comprehensive reforms have thus been carried out in the way of legislation. The

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first instance of judicial review, even at the U.S. Supreme Court level. Keith Whittington, “Judicial Review of Congress Before the Civil War,” *Georgetown L. J.*, Vol. 97, No. 5 (2009), p. 1315.

<sup>292</sup> Charles Grove Haines, *The American Doctrine of Judicial Supremacy* (New York, 1914), pp. 29-30 (quoting *Bonham's Case*); available online through *The Making of Modern Law*. Gale. 2009. Gale, Cengage Learning, Harv. L. Sch. Lib., Gale Doc. No. F3751274515.

<sup>293</sup> Eugene Wambaugh, *The Relation Between General History and the History of Law* ([Iowa]: State Hist. Socy. of Iowa, 1907), p. 22; available online through *The Making of Modern Law*. Gale. 2009. Gale, Cengage Learning, Harv. L. Sch. Lib., Gale Doc. No. F3750127278.

<sup>294</sup> Frederic W. Maitland, *English Law and the Renaissance* (Cambridge: CUP, 1901), p. 33; available online through *The Making of Modern Law*. Gale. 2009. Gale, Cengage Learning, Harv. L. Sch. Library, Gale Doc. No. F3750205346.

importance of the Statutes as a source of Law, has thus been considerably increased in comparison with the Common Law.”<sup>295</sup> In 1914, an American scholar, Charles Grove Haines, noted that nineteenth-century jurists and scholars in the United States gave the English idea of the supremacy of the common law “the dignity of a practical and effective legal principle” in America.<sup>296</sup>

Well in to the New Deal period, there was a commonly held view that courts were policy-making bodies in the common law, almost co-equal with the legislature:

Whether the judicial process be philosophically characterized as ascertainment of preexisting but previously unformulated law, as application of known law to novel facts, as reshaping of law, as making of law, or simply and frankly as declaration of choice between conflicting theories of social interest, the fact remains that in case after case decisions have in truth depended upon judicial notions of wise public policy.<sup>297</sup>

Thus, in the United States there was a perception on the part of scholars and judges that the common law, although perhaps not superior to the legislative branch, was at least separate from it and remained in the purview of the courts, mainly the state courts, unless altered by legislative action.

One might argue that in a republic the law always should be subject to majority rule rather than left to a minority like the judiciary. This would have been a defensible

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<sup>295</sup> Heinrich Brunner, *The Sources of the Law of England: An Historical Introduction to the Study of English Law*, Trans. W. Hastie (Edinburgh, 1888), p. 46; available online through *The Making of Modern Law*. Gale. 2009. Gale, Cengage Learning, Harv. Law Sch. Lib., Gale Doc. No. F3700620010.

<sup>296</sup> Charles Grove Haines, *The American Doctrine of Judicial Supremacy* (New York, 1914), p. 34; available online through *The Making of Modern Law*. Gale. 2009. Gale, Cengage Learning, Harv. L. Sch. Lib., Gale Doc. No. F3751274515.

<sup>297</sup> John Barker Waite, “Reasonable Search and Research,” *U. Pa. L. Rev. and Am. L. Regis.*, Vol. 86, No. 6 (Apr., 1938), p. 623.

position in 1900, but so too would the formalist response that policymaking was restrained by precedent. As Oliver Wendell Holmes, Jr. wrote in 1870, “It is the merit of the common law that it decides the case first and determines the principle afterwards.”<sup>298</sup> The formalist would have endorsed Holmes’s statement, arguing that nothing was amiss in the co-existence of an English-style common law system and the American republican system because the common law’s policy choices, although concededly made by judges, were severely restricted because the system relied upon adherence to precedent.

Most scholars writing in the twentieth century who were concerned with courts as policy-making institutions concentrated on the United States Supreme Court. Yet, some of the arguments made regarding the nation’s highest appellate court can be applied to the state supreme courts as well. The mode of scholarly debate regarding the U.S. Supreme Court has developed along the lines of pluralist political theory. The most famous discourse, begun by political theorist Robert Dahl in the late 1950s, revolved around the question of whether the U.S. Supreme Court was a counter-majoritarian institution. Dahl, writing in 1957 in the context of the New Deal Court and early Warren Court decisions, argued that the Court was not counter-majoritarian, but rather reinforced legislative policy preferences and was (and should be) a policy-making institution.<sup>299</sup> Dahl used the concept of a “law-making majority” in order to determine what is a majority policy preference, reasoning that public opinion was usually in line with congressional policies. Thus, he equated a legislative majority (*i.e.*, the majority that enacts a bill into public law) to a “national majority” of the citizenry. Similarly, the Supreme Court was usually

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<sup>298</sup> Frederick Schauer, “Do Cases Make Bad Law?” *U. Chi. L. Rev.*, Vol. 73, No. 3 (Summer, 2006), p. 883.

<sup>299</sup> Robert A. Dahl, “Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker,” *J. Pub. L.*, Vol. 6, No. 2 (Fall, 1957), p. 279.

also in line with the Congressional majority. If the Court thwarted majority opinion, then it often did so only temporarily, either being reversed by legislative action or eventually reversing or distinguishing prior cases. Thus, Dahl could conclude that the elite in Congress were not divergent from, or counter to, the majority in the American context.<sup>300</sup>

Dahl's approach and that of many scholars who have analyzed the U.S. Supreme Court from the field of political science have concluded that the Court's decisions are best understood from the externalist perspective. That is, the Court's decisions are obviously political, not only in terms of their consequences for the rules that must be followed in the future by the affected members of society, but also in terms of the intentional efforts of the justices to achieve their ideologically-oriented policy preferences.<sup>301</sup> For Dahl and those who have agreed with his analytical approach, court personnel are very important to interpreting why a court decides as it does.

The chief difference between the U.S. Supreme Court, which was Dahl's concern, and state supreme courts is the fact the federal Court is a constitutionally non-democratic institution. The federal justices are appointed and hold their seats for life tenure. By contrast, most state appellate court judges hold their seats for defined periods of years and are selected through one of five methods: "partisan election, nonpartisan election, election by the legislature, gubernatorial appointment, and merit selection." Even under

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<sup>300</sup> Ibid., pp. 284-85. However, later scholars have suggested that the frequency and availability of public opinion polling data allows for using public opinion as a synonym for "majority." William Mishler and Reginald S. Sheehan, "The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions," *A.P.S.R.*, Vol. 87, No. 1 (Mar., 1993), p. 88. However, public opinion should not be equated with elite opinion. Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: Univ. of Chicago, 1991), p. 31, n. 21.

<sup>301</sup> William Mishler and Reginald S. Sheehan, "The Supreme Court as a Countermajoritarian Institution? The Impact of Public Opinion on Supreme Court Decisions," *A.P.S.R.*, Vol. 87, No. 1 (Mar., 1993), p. 95. The authors see the Court not only as reflecting majority opinion but also shaping and "legitimizing" majority opinion.



the appointive and merit selection systems (wherein a commission selects the judges), most judges are eventually subject to popular re-election.<sup>302</sup> Accordingly, the state courts retain a different character than federal courts regarding independence and interaction with policy preferences. The state courts are designed to be part of the majoritarian political process and are (ostensibly) accountable to the voters.

Just like the U.S. Supreme Court, state supreme courts have played the role of policy makers. Arguably the state supreme courts' policy-making role has been even more influential than the U.S. Supreme Court's because of the expanded responsibilities of state supreme courts. As previously discussed in Chapter One, state supreme courts were very important policy-makers in tort law ever since the late nineteenth century saw the burgeoning of negligence law. A clear example is *MacPherson v. Buick Motor Co.* (1916), discussed in Chapter Two, where after the Court of Appeals of New York altered its state's tort law it became a seminal case and other states' courts referenced the holding and endorsed the reasoning of Cardozo's opinion in changing their own state's law. Similarly, in the 1960s additional seminal decisions (reviewed below) served as lodestars for state courts seeking to change their states' tort laws and expand liability of product manufacturers. The state courts' doctrinal changes caused a reaction among political interest groups – including manufacturers, wholesalers/distributors, consumers, and lawyers – on the state level and, later in the 1970s, on the national level. Some state legislatures responded by enacting laws that returned their tort law to the fault-based standard.

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<sup>302</sup> G. Alan Tarr, "Rethinking the Selection of State Supreme Court Justices," *Williamette L. Rev.*, Vol. 39, No. 4 (Fall, 2003), p. 1445; G. Alan Tarr, "Designing an Appointive System: The Key Issues," *Fordham Urb. L.J.*, Vol. 34, No. 1 (Jan., 2007), p. 291; Craig F. Emmert and Henry R. Glick, "The Selection of State Supreme Court Justices," *American Politics Quarterly*, Vol. 16, No. 4 (Oct., 1988), p. 445.

It remains questionable whether the state courts' policy preferences in favor of expanded tort liability reflected the policy preferences of dominant elites in the various states or accorded with majority opinion, or accorded with both. However, it is safe to conclude that the state courts were not playing the role of a protector of minority rights. The expansion of tort liability was justified by the argument that consumers were being protected from the carelessness of manufacturers. "Consumer" is a broad category that includes everyone who purchases or uses goods, which presumably includes, to one degree or another, *everyone* in American society. Thus, the state courts were ostensibly protecting the majority of the public and playing a majoritarian policy-making role. But this view also reinforces the point that this was a top-down legal revolution, where the state judges took it upon themselves to create new rules benefiting consumers. The Tort Revolution could not have occurred without the growth of judicial policy making throughout the nation.

The lack of a clear distinction between judicial and legislative (or regulatory) functions for courts contributed to the view of many twentieth-century jurists that judges were policy makers and should simply realize their roles, thereby disabusing themselves and the public of the illusory claims of disinterested decision making. That is, judges should embrace the powers inherent in judicial policy making. For example, Benjamin Cardozo, writing in 1921 while a justice of New York's highest appellate court, appeared to counsel judges to be cautious in their policy making. He warned that judges "must keep within those interstitial limits which precedent and custom" and the norms of common law jurisprudence "have set to judge-made innovations" in the law. However, he shirked any real constraint upon judicial policy making when he advocated the

following: “Every judge consulting his own experience must be conscious of times when a free exercise of will, directed of set purpose to the furtherance of the common good, determined the form and tendency of a rule which at that moment took its origin in one creative act.”<sup>303</sup> Furthermore, Cardozo echoed the Progressives’ view of the upward course of the law and the power of government to improve itself and society by his endorsement of “symmetrical development” of the law and the need to use “judicial process” to “shape the progress of the law.” Yet, this “judicial process” was one guided by the judge’s wisdom, “just as the legislator gets it, from experience and study and reflection; in brief, from life itself. . . . The process, being legislative, demands the legislator’s wisdom.”<sup>304</sup>

Many legal scholars and judges endorsed Cardozo’s views. For example, in early 1933 Max Lerner concluded that the “contemporary trend” among legal scholars was to view a judge’s rulings as “rationalizing or deliberately manipulating his legal views into conformity with his social views.”<sup>305</sup> In 1935, Felix Cohen, a leading legal realist scholar, argued: “A judicial decision is a social event.” By this he meant that “social forces” – more than the individual personal characteristics of a judge – produce judicial rulings. Understanding a decision required “probing behind the decision” to find the social forces that produced it.<sup>306</sup> As legal realist Max Radin forthrightly admitted and

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<sup>303</sup> Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven: Yale Univ. Press, 1921), pp. 103-04.

<sup>304</sup> Cardozo, *The Nature of the Judicial Process*, pp. 112-15.

<sup>305</sup> Max Lerner, “The Supreme Court and American Capitalism,” *Yale L.J.*, Vol. 42, No. 5 (Mar., 1933), p. 668, 697.

<sup>306</sup> Felix S. Cohen, “Transcendental Nonsense and the Functional Approach,” *Colum. L. Rev.*, Vol. 35, No. 6 (June, 1935), p. 809, 843.

endorsed, writing in 1925, judges reached desired conclusions first and then sought legal principles to justify their conclusions.<sup>307</sup> One federal judge, writing in 1929, urged the law schools of the nation to endorse such “intuitional” judging, or deciding upon “hunches,” as the way to reach a “just decision.”<sup>308</sup>

The judges of the 1960s adhered to the same progressive view of judicial policy-making. As California Supreme Court Justice Roger Traynor made clear a generation later, state court judges operated under no illusions regarding their powers as policy makers:

We should not be misled by the cliché that policy is a matter for the legislature and not for the courts. There is always an area not covered by legislation in which the courts must revise old rules or formulate new ones, and in that process policy is often an appropriate and even a basic consideration. ... [N]o conscientious judge will set bounds to his enquiry. If he finds no significant clues in the lawbooks [*sic*], he will not close his eyes to a pertinent study merely because it was written by an economist or perhaps an anthropologist or an engineer.<sup>309</sup>

Traynor – writing in 1957, the same year of Dahl propounded his majority reinforcement thesis – was echoing the views of scholars, judges, and lawyers of the period who saw judges as policy makers operating within boundaries defined by appellate

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<sup>307</sup> Max Radin, “The Theory of Judicial Decision: Or How Judges Think,” *A.B.A.J.*, Vol. 11, No. 6 (June, 1925), p. 357, 359 & 362.

<sup>308</sup> Joseph C. Hutcheson, Jr., “The Judgment Intuitive: The Function of the ‘Hunch’ in Judicial Decision,” *Cornell L.Q.*, Vol. 14, No. 3 (Apr., 1929), p. 274, 288. Hutcheson was a U.S. District Court judge in the Southern District of Texas.

<sup>309</sup> Roger J. Traynor, “Some Open Questions on the Work of State Appellate Courts,” *Chicago L. Rev.*, Vol. 24, No. 2 (Winter, 1957), p. 219.

courts.<sup>310</sup> Another member of the Traynor Court (1964-70), Allen E. Broussard (1964-96), voiced a similar view regarding the Court's role in California government.

Broussard contended "the law is essentially what the supreme court says it is." The Court, he continued, was confronted with "many issues in which policy considerations are important." Although he conceded that "the parameters of judging are different from the parameters of legislating," Broussard noted, "We are making it [the law] as we go along."<sup>311</sup>

Cardozo's, Traynor's, and Broussard's sentiments are far cries from Alexander Hamilton's distinctions between "judgment" and "will". They are forceful defenses of the judge-as-legislator, beyond the mere *de facto* policy-making function of judges as decision-makers. Cardozo and Traynor's understanding of the common law judge's function is akin to the legal scholars who use the past as an instrument for present purposes. Cardozo's homage to "precedent and custom" reflects his mission to utilize the past for present purposes, or as legal historian Laura Kalman has termed such judicial use of past sources: "imbue the past with prescriptive authority."<sup>312</sup> Cardozo may have been more concerned with the consequences of forthrightly admitting his allegiance to doctrinal innovation. His reluctance is similar to and reflects Oliver W. Holmes, Jr.'s understanding of common law decisions as those which correspond to what the judge

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<sup>310</sup> Charles E. Wyzanski, Jr., "A Trial Judge's Freedom and Responsibility," *Harv. L. Rev.*, Vol. 65, No. 8 (June, 1952), p. 1282: "While [the trial judge] has choice, he cannot exercise even to his own satisfaction unless it is disciplined according to standards. The minima are supplied by reversals administered by appellate courts."

<sup>311</sup> Allen E. Broussard, *A California Supreme Court Justice Looks at Law and Society, 1964-1996* (Berkeley: Regents of the Univ. of CA, 1997), p. 83.

<sup>312</sup> Laura Kalman, "Border Patrol: Reflections on the Turn to History in Legal Scholarship," *Fordham L. Rev.*, Vol. 66, No. 1 (Oct., 1997), p. 103.

considers “convenient” at present, but which the “form and machinery [of the law] ... depend very much upon its past.”<sup>313</sup> As we shall see, Roger Traynor was different from Cardozo only in that Traynor forthrightly eschewed rhetorical homage to common law precedent.

Many legal scholars of the post-war period supported this view. As one commentator, writing in 1951, noted, “To create a balance between social and individual interests in this field [of modern torts] has been the task and toil of the courts.”<sup>314</sup> Additionally, Robert Keeton, writing in 1969 while a member of the Harvard Law School faculty, argued that state legislatures had demonstrated themselves to be ill suited to law reform since they had failed to enact suggested reforms and other political issues were more important to legislators. Accordingly, Keeton contended, not only must courts overrule “outmoded” precedents but they must complete the reforms that state legislatures were unwilling to enact and “be willing in the future to overrule precedents more frequently than in the past.”<sup>315</sup> (Keeton later served as a U.S. District Court judge in Boston from 1979 until 2006.)

Well into the 1970s scholars were acknowledging (and advocating the idea) that courts were policy-making institutions in the Cardozoan sociological vein. Policies were formulated not only based on precedents, but on the judges’ views of the efficacy of old

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<sup>313</sup> Oliver Wendell Holmes, Jr., *The Common Law* (Mineola, NY: Dover Publications, 1881, 1991 ed.), pp. 1-2.

<sup>314</sup> Albert A. Ehrenzweig, *Negligence Without Fault: Trends Toward an Enterprise Liability for Insurable Loss* (Berkeley: Univ. of Calif. Press, 1951), p. 2.

<sup>315</sup> Robert E. Keeton, *Venturing to Do Justice: Reforming Private Law* (Cambridge: Harvard, 1969), pp. 17-18. Keeton was the designated successor to William Prosser as the author of Prosser’s casebook on torts, which is still used in American law schools to this day. Keeton also co-authored a study and supported the development of no-fault auto insurance. President Carter appointed him to the Federal District Court in Massachusetts, serving from 1979 to 2006.

versus new policies for the general society.<sup>316</sup> As Harry W. Jones, the Cardozo Professor of Jurisprudence at Columbia University Law School, put it in 1974 in what he termed his “Jones Hypothesis”: “[T]he durability of a legal principle ... is determined far more by the principle’s social utility, or lack of it, than by its verbal elegance or formal consistency with other legal precepts.”<sup>317</sup> That is, good law was to be achieved by judges consciously making good policy with an “ends-in-view” jurisprudence. This was a view that was shared by many scholars regarding the constitutional decisions of the Supreme Court by the 1970s (most writing in the wake of the then-recent activist Warren Court of the 1960s).

Cardozo and Traynor’s sentiments were representative of the views of judges in the state courts and described how state courts functioned as policy-making bodies in the twentieth century. The studies of state courts are much fewer in comparison to federal courts and the U.S. Supreme Court. Most studies, for obvious logistical reasons of time and research resources, are only able to encompass several selected states’ courts. However, the studies that do exist suggest that the Cardozo/Traynor view was orthodoxy.

One source is the fact that during Traynor’s 30-year tenure on the California Supreme Court his court was the most frequently cited state supreme court in the nation. Prior to World War II, New York’s highest court had held that distinction. Yet, after the war California developed a reputation for policy innovation. Scholars have noted that California’s population of roughly twenty million made its supreme court the most

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<sup>316</sup> Robert A. Leflar, “Sources of Judge-Made Law,” *Okla. L. Rev.*, Vol. 24, No. 3 (Aug., 1971), pp. 322-24 (arguing that the “long-term effectiveness” of doctrines are more important than precedents). Ruggero J. Aldisert, “An American View of the Judicial Function,” in Harry W. Jones, ed., *Legal Institutions Today: English and American Approaches Compared* (Chicago: American Bar Assn, 1977), p. 46.

<sup>317</sup> Harry W. Jones, “An Invitation to Jurisprudence,” *Colum. L. Rev.*, Vol. 74, No. 6 (Oct. 1974), p. 1025.

consequential in the country. Also, between 1945 and 1970 over ninety percent of that court's cases were cited at least three times by other states' courts, which indicates a "prestige factor" in other states' assessment of the California court. State courts also frequently cited New Jersey's state supreme court decisions during the post-war period.<sup>318</sup> Such frequent references to California indicate a degree of respect not only for the California court but also for the kind of policy innovation for which it was popular in the post-war period.

For example, in 1971 Henry Robert Glick studied the supreme courts of four states, Louisiana, Pennsylvania, Massachusetts, and New Jersey. Glick concluded that the preferences of judges for active policy-making roles versus much more restrained judicial interpretive roles were "linked to distinctive traditions and dominant values found in their own state political systems."<sup>319</sup> Glick saw different judicial attitudes in each state after interviewing supreme court justices regarding jurisprudence/methods of decision making, the importance of precedent, and the importance of non-legal factors in making decisions. As we shall see, the New Jersey Supreme Court was an important factor in the Tort Revolution. In Glick's study just over two-thirds of the justices on the New Jersey Supreme Court saw themselves as realists, whereas only just over one-fourth of the Louisiana justices saw themselves similarly.<sup>320</sup> Only 42.9 percent of New Jersey justices thought precedent was "very important" in deciding cases, whereas 71.4 percent of

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<sup>318</sup> Lawrence M. Friedman, Robert A. Kagan, Bliss Cartwright, and Stanton Wheeler, "State Supreme Courts: A Century of Style and Citation," *Stanford L. Rev.*, Vol. 33, No. 5 (May, 1981), pp. 805-06.

<sup>319</sup> Henry Robert Glick, *Supreme Courts in State Politics: An Investigation of the Judicial Role* (New York: Basic Books, 1971), p. 151.

<sup>320</sup> *Ibid.*, p. 75. Glick defined a "realist" judge as one who employs a "wide variety of factors in addition to legal principles" in deciding a case. These are judges with a psychological awareness that "attitudes independent of the law are needed to make decisions." *Ibid.*, pp. 74-75.



Louisiana justices thought so.<sup>321</sup> Most strikingly, one hundred percent of New Jersey justices thought non-legal factors were important in deciding cases; whereas only 14.3 percent of the Louisiana justices thought so.<sup>322</sup> Glick concluded that these differences were closely correlated with the general political environments of the states. Louisiana was generally a conservative state and New Jersey was generally liberal. The other states in the study, Massachusetts and Pennsylvania, fell in the middle, with more even divisions between policy innovation and restraint. It is important to note that Glick found little correlation between the state's method of judicial selection and retention and the willingness of the courts to be active policy innovators. For example, the most actively innovative of the four state supreme courts studied was New Jersey's, which had justices who had been appointed for life. In contrast, the least active policy-innovating court, Louisiana's, had justices who had been subject to periodic elections in order to retain their offices.<sup>323</sup> Nevertheless, although "innovation can carry risks for judges ... who are elected[,] ... the judges who gain the greatest recognition tend to be innovators."<sup>324</sup>

These institutional variations suggest that the different political cultures of the states *may* have helped determine the willingness of states' courts to innovate. Other scholars have also concluded that political cultural variations can partially account for the different dispositions of state supreme court justices.<sup>325</sup> Certainly, this political-

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<sup>321</sup> Ibid., p. 76.

<sup>322</sup> Ibid., p. 83.

<sup>323</sup> Glick, *Supreme Courts in State Politics*, p. 154.

<sup>324</sup> Lawrence Baum, "Courts and Policy Innovation," in John B. Gates and Charles A. Johnson (eds.), *The American Courts: A Critical Assessment* (Washington, D.C.: CQ Press, 1991), p. 419.

<sup>325</sup> Susan P. Fino, *The Role of State Supreme Courts in the New Judicial Federalism* (New York: Greenwood Press, 1987), p. 31. Fino identifies correlations between "moralistic", "individualistic", and

environment view suggests that political culture and institutional frameworks (such as the methods of judicial selection and retention) interact to produce trends in justices' dispositions regarding policy innovation, or enthusiasm for active policy creation.

However, the differences in regional and statewide political culture do not account for many states' rapid adoption of the strict liability doctrine in the early to mid-1960s. The rapid adoption of strict liability around the nation demonstrated that – notwithstanding the variations in state political culture – most of the states' supreme courts were willing to adopt a radically new rule of law. Also, the state courts during the decade from 1958 to 1968 were extremely active in overruling common law precedents on a wide array of tort issues. The change from negligence to strict liability is arguably the most important of these changes; yet it is only one of many.<sup>326</sup> Therefore, it is warranted to conclude that Cardozo's and Traynor's views of the judicial policy-making role were reflective of the justices who voted to adopt strict liability in the 1960s. Even as recently as the mid-1970s scholars were agreeing that judges resorted “more and more to the method of sociology as a primary decisional tool,” especially in tort law.<sup>327</sup> This was the method of decision-making championed by Cardozo and carried on by Traynor.

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“traditionalistic” political cultures and legal systems. She concludes that differences in state courts can be ascertained in terms of “cultural, institutional, and personal characteristics.” *Ibid.*, p. 21.

<sup>326</sup> Robert E. Keeton, *Venturing to Do Justice: Reforming Private Law* (Cambridge: Harvard, 1969), pp. 169-76. Keeton listed thirty-six different examples of doctrinal changes in or affecting tort law, which he termed overruling of case precedents. Some of these changes were minor, such as jury instructions on unavoidable accidents and the standard for a directed verdict, and some very significant, such as the abrogation of governmental and charitable immunity to private suits and abrogation of the contractual privity doctrine in cases of product defects under warranty theory.

<sup>327</sup> Ruggero J. Aldisert, “An American View of the Judicial Function,” in Harry W. Jones, ed., *Legal Institutions Today: English and American Approaches Compared* (Chicago: American Bar Assn, 1977), p. 41. Aldisert noted that tort and constitutional law were the prime areas of sociological judging in the mid-1970s.

The Tort Revolution was one of the primary avenues through which such a method of judging was implemented.

### ***Roger Traynor – The Revolutionary in the West***

Most state supreme court justices are not household names. Unlike United States Supreme Court justices of the twentieth century, state justices do not often decide many high-profile political issues. Although they are as important to their state's government as federal justices are to the national government, state justices work in relative obscurity. Many state justices are elected by popular vote, yet they are less visible than they would be if appointed by the state's governor. Their electoral route to office means that they are not seen reflective of the governor's policy preferences. Therefore, it is all the more notable that Roger Traynor became a well-known justice of the California Supreme Court, known among not only lawyers and judges but covered in the national media.<sup>328</sup> Traynor is important not only for his role in the famous *Greenman* case (reviewed below) but also because he is an archetypal example of the Progressive mentality present on state courts in the 1960s and 1970s, the period when strict liability became the rule of a majority of American states.

Roger J. Traynor was born in Park City, Utah on February 12, 1900. He was the son of first-generation immigrants from County Down, Ireland. His father worked in mining and eventually owned a drayage business.<sup>329</sup> Traynor's educational background

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<sup>328</sup> See e.g., "Courts: Pioneering California," *Time*, Friday, Jan. 21, 1966; "The Law: A Pioneer Retires," *Time*, Monday, Jan. 19, 1970; "Milestones: May 30, 1983," *Time*, Monday, May 30, 1983 (Traynor's obituary); "Died," *Newsweek*, May 30, 1983, p. 102 (obituary).

<sup>329</sup> J. Edward Johnson, *History of the Supreme Court Justices of California*, Vol. II (San Francisco: Bancroft-Whitney, 1966), pp. 184-85.

consisted of not only a law degree from the University of California at Berkeley but also a Ph.D. in political science, wherein he analyzed the amendment process for the U.S. Constitution.<sup>330</sup> Both degrees were awarded in 1927. He taught courses in Berkeley's Political Science department from 1926 until 1929 in constitutional law, the government of England, and state and local government.<sup>331</sup> Not only was Traynor academically accomplished, but so too was his wife, Madeleine E. Traynor. She held a Masters degree in political science and a law degree, both from Berkeley.<sup>332</sup>

While at Berkeley, Traynor was instructed by legal realists and, as will be discussed below, his law school experience appears to have been influential upon his later jurisprudence.<sup>333</sup> After obtaining his law degree, he was asked to head the California state agency responsible for executing new state tax laws.<sup>334</sup> Thereafter, Traynor was considered the “chief architect” of California's tax laws.<sup>335</sup> He was also a “New Dealer,” working as a consultant to the U.S. Treasury Department in 1937-38.<sup>336</sup> He ardently supported the New Deal's approach to governance, noting with approval that FDR's programs “burst traditional bounds and recognized an enlarged responsibility of

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<sup>330</sup> Ben Field, *Activism in Pursuit of the Public Interest: The Jurisprudence of Chief Justice Roger J. Traynor* (Berkeley: Berkeley Public Policy Press, 2003), pp. 2-3.

<sup>331</sup> Mrs. Eleanor Van Horn, Univ. of California, Roger J. Traynor and the Political Science Department, Box T028, File 11a., pp. 9, 12. Oral history interview with Mrs. Eleanor Van Horn. Posthumous; 04/10/86. The Roger J. Traynor Collection, U.C. Hastings College of the Law, Traynor Center/Special Collections.

<sup>332</sup> J. Edward Johnson, *History of the Supreme Court Justices of California*, Vol. II (San Francisco: Bancroft-Whitney, 1966), pp. 189.

<sup>333</sup> Sandra P. Epstein, *Law at Berkeley: The History of Boalt Hall* (Berkeley: Inst. of Governmental Studies Press, 1997), p. 106.

<sup>334</sup> Epstein, *Law at Berkeley*, p. 139.

<sup>335</sup> James E. Sabine, “Taxation: A Delicately Planned Arrangement of Cargo,” *Cal. L. Rev.*, Vol. 53, No. 1 (Mar., 1965), p. 173.

<sup>336</sup> Epstein, *Law at Berkeley*, p. 152.

government for the maintenance of the economic life of its people.”<sup>337</sup> Therefore, “A policy of permanent public investment in certain social enterprises, as well as in self-liquidating works, in effect amounts to intensive cultivation of our present standard of living.”<sup>338</sup>

Governor Edmund Brown appointed Traynor as chief justice of the California Supreme Court.<sup>339</sup> He served from 1940 to 1964 as an associate justice, and from 1964 to 1970 as the chief justice. When Traynor joined the Court in 1940 he had yet to publish anything clearly conveying his views on jurisprudence or the role of courts as policy-making institutions. Prior to his nomination to the Court, his only publications consisted of law review articles dealing with various taxation and property rights issues.<sup>340</sup> Most of these early articles concerned analyses of such legal issues and proposals for remedying problems. Although the articles did not reveal Traynor’s views on tort law and how courts should shape common law doctrine, they did evidence Traynor’s keen legal mind, particularly his ability to carefully identify the meaning of precedent and, therefore, intelligently speculate on the possible ramifications for practicing lawyers and private and public actors subject to conforming their behavior to such precedents. For example, one of Traynor’s earliest articles, published in 1929 only two years after his graduation from law school, concerned California’s power to tax national banks. Traynor sought to

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<sup>337</sup> Roger J. Traynor, “Public Spending and Recovery,” Speech given to the Berkeley Club, Sept. 13, 1939. Box T008, File 01a, p. 2. Manuscripts. Academic; 09/13/39, The Roger J. Traynor Collection, U.C. Hastings College of the Law, Traynor Center/Special Collections.

<sup>338</sup> *Ibid.*, p. 11.

<sup>339</sup> Edmund G. Brown, Dedication, *Cal. L. Rev.*, Vol. 53, No. 1 (Mar., 1965), p. 9.

<sup>340</sup> All seven articles were published in the California Law Review, which was (and continues to be) published by the University of California Berkeley School of Law, Traynor’s alma mater.

refute the popular belief among practitioners, legal scholars, and legislators that the only way a state could “tax national banks or national bank shares in the hands of individuals” was to obtain passage of federal legislation granting the state permission to enact a tax. Traynor argued that a careful examination of the holding and dicta in the U.S. Supreme Court’s landmark case of *McCulloch v. Maryland* (1819) revealed that states could tax, without permission from Congress, the real property of national banks and the shares held by individuals in such banks. It was only the *operations* of national banks – such as the Second Bank of the United States’ notes in *McCulloch* – that were beyond the states’ tax jurisdiction.<sup>341</sup> Traynor reviewed subsequent federal legislation and U.S. Supreme Court cases regarding the powers of states to tax capital in order to arrive at an informed opinion regarding the status of the law in 1929.

Traynor’s analysis of the subject materials was not particularly unusual. What his analytical method revealed was his ability to closely scrutinize legislative and judicial texts and derive, as any good practicing lawyer must, a plausible and cogent argument regarding the possible meanings and implications of the texts. From a political point of view, the article was a brief in favor of expanding the taxing power of the state, which was in accord with Traynor’s political sympathies. One commentator referred to this article as a “small classic” in tax law.<sup>342</sup> These early articles demonstrated Traynor’s talents as a practitioner but did not reveal his jurisprudence or views regarding tort law. Traynor was a professor in what was then called the School of Jurisprudence at UC

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<sup>341</sup> Roger J. Traynor, “National Bank Taxation in California,” *Calif. L. Rev.*, Vol. 17, No. 2 (Jan., 1929), pp. 84-86.

<sup>342</sup> James E. Sabine, “Taxation: A Delicately Planned Arrangement of Cargo,” *Cal. L. Rev.*, Vol. 53, No. 1 (Mar., 1965), p. 174.

Berkeley. Although Traynor was a specialist in tax law, which is “based almost entirely on statutes,” he would become best known for his judicial opinions in common law cases.<sup>343</sup>

Traynor’s disposition toward courts as enforcers of public policy was evident in an essay published just two years before his appointment to the California Supreme Court. He argued that the high volume of federal tax cases and the lengthy delays in resolving such cases, whether by judgment or some form of negotiated settlement, was in need of reform. He was concerned with the efficacy of the judicial system in promptly resolving cases and the need for all parties to have their rights and duties determined in a timely manner. Traynor noted that the high volume of tax cases resulted in clogging the federal Board of Tax Appeals’ docket, creating a long backlog carried over for multiple years, and resulted in the “loss of substantial amounts of revenue” for the federal government.<sup>344</sup> The then-existing structure for resolving tax disputes presumed the taxpayer’s duty to “self-assess” ended upon the filing of the tax return and any future inquiry was allocated to the Tax Board. Traynor argued such a system made “impossible a fair and expeditious determination of tax liabilities.”<sup>345</sup> Additionally, the court system for resolving tax disputes was both administrative and judicial. That is, the Tax Board was “one of 87 tribunals of original jurisdiction”; the other tribunals being the then-existing 85 federal District Courts and the United States Court of Claims.<sup>346</sup> The parties

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<sup>343</sup> Roger J. Traynor, Book Review, *Harv. L. Rev.*, Vol. 45, No. 4 (Feb., 1932), p. 759.

<sup>344</sup> Roger J. Traynor, “Administrative and Judicial Procedure for Federal Income, Estate, and Gift Taxes – A Criticism and a Proposal”, *Colum. L. Rev.*, Vol. 38, No. 8 (Dec., 1938), p. 1396.

<sup>345</sup> *Ibid.*, p. 1402.

<sup>346</sup> *Ibid.*, p. 1403 n. 19.

to matters handled by the Tax Board were dispersed throughout the country, but all motions had to be heard in Washington, D.C. Although the Board would travel circuit to conduct dispositive hearings, the “time and expense” of such trips caused the Board to await an accumulation of cases sufficient to “justify the trip.”<sup>347</sup> Additionally, the tax laws were subject, as all federal laws, to multiple interpretations throughout the different circuit courts of appeal.<sup>348</sup>

Traynor was concerned with the burden such a structure had on all parties. Among his reform proposals were informal preliminary conferences to settle more disputes,<sup>349</sup> a protest procedure that could be conducted in the field, and a forced disclosure of facts by the IRS Commissioner.<sup>350</sup> This was an early form of alternative dispute resolution: the resolution of controversies prior to the full-scale hearings before the Tax Board. The cases that would be heard by the Board would be composed primarily of legal issues. This entire proposal sought to reduce the number of cases in the formal, centralized tax legal system and thereby reduce the backlog of federal tax cases. It was hoped that the reduction in a backlog would result in more efficient handling of cases at the hearing and appellate stages of the system. Traynor would serve in several capacities, notably as California’s first administrator of the state’s sales tax and a Deputy Attorney General for tax litigation.<sup>351</sup>

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<sup>347</sup> Ibid., pp. 1405-06.

<sup>348</sup> Traynor, *Colum. L. Rev.*, Vol. 38, No. 8 (Dec., 1938), p. 1411.

<sup>349</sup> Ibid., pp. 1411-12.

<sup>350</sup> Ibid., pp. 1413, 1415.

<sup>351</sup> James E. Sabine, “Taxation: A Delicately Planned Arrangement of Cargo,” *Cal. L. Rev.*, Vol. 53, No. 1 (Mar., 1965), p. 173, 179; J. Edward Johnson, *History of the Supreme Court Justices of California*, Vol. II (San Francisco: Bancroft-Whitney, 1966), pp. 188-89.



The point of this discussion of Traynor's ideas on tax court procedures and policies is to note his concern with the functioning of the courts as systems for equitable and timely resolution of disputes. Traynor's later criticisms of the tort system's requirement that negligence be proven regarding a particular actor's conduct and his recommendation that the tort law simply be changed to allow for the primacy of compensation to the injured party are better understood in light of his earlier admonitions to refashion the tax enforcement system to benefit the taxpayer and government. Traynor was less concerned with legal formalism than substantive resolution of disputes. Additionally, Traynor's proposals are reflective of the Progressive tradition of reform for the betterment of government functionality. If the government's proper objectives can be efficiently and equitably obtained, then so much the better for citizens. Traynor saw his policy proposals – whether tax or tort issues – as responding to the realities of the legal and economic worlds. He sought to adapt the law to the real world as he understood it.

Traynor was appointed to the California Supreme Court in 1940. At the time, the governor appointed justices, “subject to [the] approval of a commission,” for twelve-year terms. As Traynor himself noted, “In practice this is virtually equivalent to an appointment for life. When a justice chooses to succeed himself by standing for re-election, the voters have only a veto power, which they have never used to reject an incumbent.”<sup>352</sup> Nevertheless Traynor was aware that he could be turned out of office.

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<sup>352</sup> Roger J. Traynor, “Some Open Questions on the Work of State Appellate Courts,” *U. Chi. L. Rev.*, Vol. 24, No. 2 (Winter, 1957), p. 213, n. 1. Traynor was describing the California variant of what came to be known as the “merit retention” election system for state court judges. Starting with a constitutional amendment in 1934, nonpartisan popular election of judges was replaced with an appointment system. Under the California system, the governor appointed a judge, subject to confirmation by an *ex officio* Commission on Qualifications. The judge's name was then placed on the ballot at the next election. Voters were asked “Shall Judge Doe be elected for the term prescribed by law?” The term for supreme court justices was twelve years and, if retained by the voters, the judge would serve the remainder of the

He enthusiastically supported the judicial appointment system and extolled the virtues of California's judicial appointments method of selecting judges over an elective system. Although an admittedly political judge, he believed judges should be chosen in a "non-political context," and prohibiting competitive elections "insured a climate of independence" for the courts.<sup>353</sup> Traynor's view harkened back to a progressive disposition: the belief that the administration of government could be divorced from political considerations.

Although Traynor was in a relatively secure job on the Court, he did not immediately voice his support for strict liability. For example, in August 1943 he joined a majority in reversing a judgment in favor a minor injured by an exploding milk bottle. A fourteen-year-old girl was sent by her teacher to buy three milk bottles from a local dairy. The bottles were removed from refrigeration by a dairy employee and given to the girl. On the way back to her school, one of the bottles exploded and cut the girl's hand. She sued the dairy, alleging negligence for failure to wrap the bottles and for supplying a

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term and then decide whether to resubmit his name for another retention election. The judge would run "on his record," unopposed by any other candidate. If defeated, the governor would be required to nominate another candidate. Malcom Smith, "The California Method of Selecting Judges," *Stanford L. Rev.*, Vol. 3, No. 4 (July, 1951), p. 572. There are some states with competitive retention elections. Recent studies have suggested that judicial retention elections became competitive in the latter years of the twentieth century, with experienced challengers having significantly better chances of defeating incumbent state court judges. Melinda Gann Hall and Chris W. Bonneau, "Does Quality Matter? Challengers in State Supreme Court Elections," *American Journal of Political Science*, Vol. 50, No. 1 (Jan., 2006), pp. 20-33. Other studies from the 1970s and 1980s suggest that retention elections indicate most state judges were insulated from voters, but that voters would turn out judges in whom they had lost trust. William K. Hall and Larry T. Aspin, "What Twenty Years of Judicial Retention Elections Have Taught Us," *Judicature*, Vol. 70, No. 6 (April-May, 1987), pp. 340-47; William Jenkins, Jr., "Retention Elections: Who Wins When No One Loses?" *Judicature*, Vol. 61, No. 2 (Aug., 1977), pp. 79-86. Additionally, it appears that state supreme courts, in particular, had rather "frequent membership change" as a norm near the end of the twentieth century. Paul R. Brace and Melinda Gann Hall, "Is Judicial Federalism Essential to Democracy? State Court in the Federal System," in *The Judicial Branch*, Kermit L. Hall and Kevin T. McGuire, eds., (New York: OUP, 2005), pp. 196-97.

<sup>353</sup> "Good Judges, Good Courts," p. 3, Box 8, File 14a (Jan. 2, 1968), The Roger J. Traynor Collection, U.C. Hastings College of the Law, Traynor Center/Special Collections. (Speech dedicating the Earl Warren Legal Center at the Berkeley School of Law.)

defective bottle. The trial court decided in favor of the plaintiff, holding the dairy's bottle was defective and the dairy was negligent for failing to wrap them. The California Supreme Court held the mere explosion, standing alone, was not evidence of negligence by the dairy. The "defect in the bottle might well have been caused either by the manufacturer [who was not a party to the suit] or by some third person." The court noted that the plaintiff had failed to present evidence that the bottle was defective. The lone dissent, authored by Justice Jesse W. Carter, argued the dairy was liable under the theory of *res ipsa loquitur* because the dairy controlled the bottle at the time when negligence had to have occurred.<sup>354</sup> The majority no doubt found this argument unconvincing because they did not think evidence of a defect had been presented.<sup>355</sup>

Traynor did not write a separate opinion, so his specific views on the case are unknown. However, his silence regarding an issue on which he would soon voice strong opinions can be explained by the facts of the case. Exploding bottle cases were fairly common throughout the nation at this time. Most such cases were resolved in favor of the bottler if the liquid inside was "ordinarily harmless." The *Honea* majority expressly reserved judgment on whether an exploding bottle of "carbonated liquid" would produce the same result. Traynor may have thought this was a poor candidate for voicing his views on strict liability, especially when no proof existed as to a defect.

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<sup>354</sup> "Res ipsa loquitur" ("the thing speaks for itself") means that a loss occurred in a factual situation in which negligent behavior can be presumed, even if factual proof of actual negligent behavior is lacking or impossible to obtain. *Black's Law Dictionary*, Sixth Ed. (St. Paul, Minn.: West Publ., 1990), p. 1305. In other words, *res ipsa loquitur* applies to hold a defendant liable for negligence when the instrument causing injury was in the exclusive control of the defendant at the time of the injury; it is presumed from such a fact that if there was negligence, then it was the defendant that was the only party who could have been negligent.

<sup>355</sup> *Honea v. City Dairy, Inc.*, 22 Cal. 2d 614; 140 P.2d 369 (1943).

Traynor took the opportunity to strongly state his views on product liability, less than a year after *Honea*, in July 1944, in *Escola v. Coca Cola Bottling Co. of Fresno*.<sup>356</sup> In *Escola* a waitress, Gladys Escola, was injured when a Coke bottle exploded in her hand while she was packing a restaurant refrigerator. She experienced a five-inch cut that severed nerves and muscles in her hand. Escola underwent an operation under general anesthesia and suffered a permanent disability. Escola, who was represented by the “King of Torts,” Melvin Belli, received workmen’s compensation in the amount of \$42.60, “which did not even cover her medical expenses and lost wages.” Belli argued the theory of *res ipsa loquitur* to the jury and the jury returned a verdict in Escola’s favor.<sup>357</sup> At trial, Belli made no argument regarding strict liability.<sup>358</sup> The plaintiff won at the trial level damages in the amount of \$2,900.00.<sup>359</sup>

On appeal, the parties argued over whether the theory of *res ipsa loquitur* applied. This was the kind of carbonated liquid case the Supreme Court had expressly not decided in *Honea* the year before. There was no argument about strict or absolute liability by the parties in *Escola*. Belli, for the plaintiff, argued that *res ipsa loquitur* applied to make Coca Cola liable for negligence, even though there was no direct evidence of any careless conduct on the company’s part. The defendant, Coca Cola, argued that *res ipsa loquitur* did not apply because the doctrine required that the defective good be in the “exclusive

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<sup>356</sup> 24 Cal.2d 453, 150 P.2d 436.

<sup>357</sup> Field, *Activism in Pursuit of the Public Interest*, pp. 96-97.

<sup>358</sup> Field, *Activism in Pursuit of the Public Interest*, pp. 108-09.

<sup>359</sup> Using the CPI, \$2,900.00 in 1944 would be worth approximately \$16,966.38 in 2009 U.S. dollars. Using the Consumer Bundle, it would be worth approximately \$13,713.33 in 2009 U.S. dollars. Samuel H. Williamson, "Six Ways to Compute the Relative Value of a U.S. Dollar Amount, 1790 to Present," *MeasuringWorth*, 2009. URL <http://www.measuringworth.com/uscompare/>.

possession and control” of Coca Cola, which of course it was not, since the bottle exploded long after it had left the factory and had passed through the hands of the distributor to the retailer.<sup>360</sup>

The California Supreme Court held that the plaintiff could proceed on a negligence theory of *res ipsa loquitur* against Coca Cola. The holding was unexceptional under the then-existing law; yet, Justice Traynor’s concurring opinion was notable and revealed his aspirations for tort law. Traynor agreed with the majority that *res ipsa loquitur* applied but went on to argue that another basis for liability existed. Traynor’s argument is a clear example of the public policy rationales offered by proponents of strict liability in tort law.

In *Escola*, Traynor, citing Cardozo’s *MacPherson v. Buick* (1916) opinion regarding the elimination of the privity requirement, argued that manufacturers should have “absolute liability” solely by virtue of placing a good into commerce, regardless of negligence. He contended strict liability would provide an incentive to manufacturers to make safer (or safe) goods. The “risk of injury [would] be insured by the manufacturer and distributed among the public as a cost of doing business.” All of this was done in the name of the “public interest.” He thought manufacturers were “best situated” to afford financial protection because they could socialize the costs by raising prices. Traynor thought warranty theories of recovery were “needlessly circuitous” because they “engender[ed] wasteful litigation.” Traynor explicitly disposed of any misapprehension that this proposed rule was the product of incremental, interstitial common law

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<sup>360</sup> Appellant’s Closing Brief, filed on April 14, 1943 in the District Court of Appeal, First Appellate District, Div. One, *Escola v. Coca-Cola Bottling Co.*, 1 Civil No. 12,415, S.F. 16951, at California State Archives, Sacramento, California.

development. He declared that “public policy demands” strict liability. The source of this “demand” was not identified.

Traynor explained that modern “mass production” and marketing conditions and transportation mechanisms had altered the theretofore “close relationship between the producer and consumer.” Consumers were ill educated and incompetent to “investigate ... the soundness of a product.” Also, consumers’ “erstwhile vigilance” had been “lulled” by manufacturers’ “advertising and marketing devices.” Traynor blamed trademarks for persuading consumers to “accept ... on faith” the quality of a product.<sup>361</sup> Of course, this usage was the inherent legal purpose of trademarks, which had been in existence under English law since the sixteenth century, long before the Industrial Revolution.<sup>362</sup> Traynor concluded by proclaiming that the law “must keep pace with the changing relationship between” the manufacturer and consumer.<sup>363</sup>

Traynor’s concurrence in *Escola* is reminiscent of Cardozo’s sociological method of judging. G. Edward White has characterized Benjamin Cardozo’s common law jurisprudence as one where judges are frequently “free to shape the course of the law.” That is, Cardozo was cognizant of the *perception* of common law judging as an internalist enterprise: a development of doctrine by its application to novel factual situations. Traynor, like Cardozo, was quite an externalist in his own judicial performance. He was concerned with the effects of rulings beyond the parties to a given case. He looked to the complex modern industrial state and saw problems that could be

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<sup>361</sup> *Escola*, 24 Cal.2d at 461-468, 150 P.2d at 440-444 (J. Traynor, concurring).

<sup>362</sup> The first adjudication of a trademark claim was in 1584 in *J.G. v. Samford* (1584) B. & M. 615, cited in J.H. Baker, *An Introduction to English Legal History*, 3d ed., (London: Butterworths, 1990), p. 522 n. 68.

<sup>363</sup> *Escola*, 24 Cal.2d at 461-468, 150 P.2d at 440-444 (J. Traynor, concurring).

ameliorated by changes in legal doctrine. White's description of Cardozo applied equally to Traynor. Traynor believed in the common law tradition of "the adaptability of previous common law principles to new situations," but combined with a competing belief that "common law courts should be responsive to social or economic change." When faced with a conflict between these beliefs a judge could "appeal to contemporary social values" to resolve the conflict. Cardozo would, in White's words, "search for a means of making novel results *appear* to be the logical products of established doctrines, so that changes in the common law *seemed* to underscore common law continuity."<sup>364</sup> By contrast, Traynor would forthrightly see what he thought was a changing social landscape and openly proclaim the necessity of altering the law to conform to it.

Traynor's active career occurred a generation after Cardozo's, but Traynor's judicial philosophy evinced the same desire to have tort law adapt to the prevailing industrial and economic conditions, as understood by judges. As Traynor himself put it, he endorsed "finding what Justice Cardozo called the least erroneous answers to insoluble problems" in the law. He sought to promote "approximate justice" rather than "harsh legalism."<sup>365</sup> More to the point, as Traynor himself once wrote, "Courts have a creative job to do when they find that a rule has lost its touch with reality and should be

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<sup>364</sup> G. Edward White, *The American Judicial Tradition: Profiles of Leading American Judges* (New York: Oxford Univ. Press, 1976), pp. 256, 258, 277 (emphasis added). Traynor "like ... Cardozo in his innovative decisions, was to create an impression that flows naturally from a canvass of available sources and arguments" in order to reach a decision. White, *Tort Law in America: An Intellectual History*, Expanded Edition (New York: OUP, 2003), pp. 189-90.

<sup>365</sup> Roger J. Traynor, "Address Delivered at Los Angeles Lawyers' Club," Box T008, File 02a. Manuscripts. Supreme Court; 09/23/40, p. 4. The Roger J. Traynor Collection, U.C. Hastings College of the Law, Traynor Center/Special Collections.

abandoned or reformulated to meet new conditions and new moral values.”<sup>366</sup> Could there be a clearer statement of Cardozoan sociological jurisprudence?

Justice Traynor considered Cardozo’s reasoning and methods of judging to be “revealing” and chided critics of such Cardozoan judging as “mystics” and “anti-judges”:

Even today, some forty years after Justice Cardozo’s revealing commentary on the judiciary process, occasional lawyers cling to the notion that it is for judges to state, restate, and even expand established precedents, but that they go beyond the bounds of the judicial process when they create new ones. These mystics avoid the blunt fact that all precedents had once to be created by an obscure thought process that apparently equates the creativeness of ancient judges with divination and then equates divination with antiquity. Those befogged by such double equations are untroubled by the attendant assumptions that the judges of another time have been wise beyond the capacity of contemporary judges and that they have had foresight enough to anticipate contemporary problems, when there is evidence so overwhelmingly to the contrary that it cannot be ignored by even the most obtuse. These mystics are still not ready to concede that contemporary revision or innovation can be left to the judges of our day. They would leave such tasks instead to the legislators of our day.

...

[A judge’s] training, his experience, and his very office combine to develop in a judge a reliable sense of responsibility for the continuity of the law that perforce develops daily.<sup>367</sup>

Traynor’s *Escola* concurrence had little to do with the doctrine of *res ipsa loquitur* and everything to do with his own vision for what the legal landscape should be in the future and the justice of such a vision. Traynor echoed the vision of Progressives

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<sup>366</sup> Roger J. Traynor, “Law and Social Change in a Democratic Society,” *Univ. Ill. L. Rev.*, Vol. 1956, No. 2 (Summer, 1956), p. 232.

<sup>367</sup> Roger J. Traynor, “Star Decisis Versus Social Change,” Box T008, File 08. Manuscripts. Supreme Court; 04/63, pp. 1-4. The Roger J. Traynor Collection, U.C. Hastings College of the Law, Traynor Center/Special Collections.



and New Deal supporters, who sought to provide “economic security” for society through government action.<sup>368</sup> Placing the manufacturer in a position of insuring his product was unproblematic for Traynor; and there was no hint of a role for the legislature in deciding such a significant reallocation of legal responsibility. Traynor thought the wisdom of his desires was obvious and the law simply had to be changed in order to accord with his understanding of how the modern industrial economy interacted with the psychological and sociological dispositions of consumers. Later in his career, Traynor contended that dissenting opinions should be “impersonal.”<sup>369</sup> He also professed to dislike the proliferation of laws in America, especially those that “try to legislate morals.”<sup>370</sup> However, his *Escola* concurrence was certainly a distinct, closely held personal political view of what the law *should* be and what was morally correct. As we shall see, Traynor maintained his reformist zeal throughout his career.

Writing in the mid-1950s, Traynor stated, “Courts have a creative job to do when they find that a rule has lost its touch with reality and should be abandoned or reformulated to meet new conditions and new moral values.”<sup>371</sup> Regarding common law cases, an area where precedent was the guide for judges, Traynor argued that “novelties” were always presented to judges. Therefore, “Given the accelerating birthrate of extraordinary novelties, we [judges] must achieve some acceleration in the death rate of

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<sup>368</sup> Jennifer Klein, *For All These Rights: Business, Labor, and the Shaping of America's Public-Private Welfare State* (Princeton: PUP, 2003), pp. 3-4. Field, *Activism in Pursuit of the Public Interest*, p. 115.

<sup>369</sup> Roger J. Traynor, “Some Open Questions on the Work of State Appellate Courts,” *U. Chi. L. Rev.*, Vol. 24, No. 2 (Winter, 1957), p. 218.

<sup>370</sup> “The Law: A Pioneer Retires,” *Time*, Monday, Jan. 19, 1970.

<sup>371</sup> Roger J. Traynor, “Law and Social Change in a Democratic Society,” *Univ. Ill. L. Rev.*, Vol. 1956, No. 2 (Summer, 1956), p. 232.

antiques,” or precedents that are in the process of “disintegrating.”<sup>372</sup> “The main preoccupation of [the] ... law must be with the future.”<sup>373</sup>

His *Escola* concurrence was his attempt at such creativity. Traynor was less poetic than Cardozo, but he was just as innovative in terms of policy creation. One scholar has credited Traynor’s concurrence in *Escola* as “creat[ing] the field of products liability.”<sup>374</sup> This is too strong a characterization of Traynor’s *Escola* concurrence. As we have seen, the legal progressives’ desire to implement strict liability long predated Traynor’s 1944 opinion.

After his retirement, Traynor contended his position in *Escola* was required because he thought the majority (with which he concurred) “was manipulating the doctrine of *res ipsa loquitur* to get a result that could be more forthrightly obtained by imposing strict liability.” But he also wholeheartedly believed manufacturers had “lulled the public into a [false] sense of security” about the risks of products and he wanted manufacturers to “bear the risks of injuries from [their] products.” This was because he thought the manufacturer “the better loss distributor and can recoup, I hope, its costs ... from the people who consume” their products.<sup>375</sup>

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<sup>372</sup> Roger J. Traynor, “No Magic Words Could Do It Justice,” *Cal. L. Rev.*, Vol. 49, No. 4 (Oct., 1961), p. 625. “Some are concerned lest judges invoke so-called neutral principles that reach too ambitiously into the void of tomorrow. One the other hand ... a judge should have at least the day after tomorrow in mind.” *Ibid.*

<sup>373</sup> Roger J. Traynor, “Comment on Courts and Law Making,” (1958) in Monrad G. Paulsen, ed., *Legal Institutions Today and Tomorrow: The Centennial Conference Volume of the Columbia Law School* (New York: Columbia U. Pr., 1959), p. 50.

<sup>374</sup> Mark Geistfeld, “*Escola v. Coca Cola Bottling Co.*: Strict Products Liability Unbound,” in Robert L. Ragin and Stephen D. Sugarman, eds., *Torts Stories* (New York: Foundation Press, 2003), p. 235.

<sup>375</sup> Roger J. Traynor, Speech to the Virginia Trial Lawyers Association, pp. 1-3, Box 8, File 24 (April, 1970), The Roger J. Traynor Collection, U.C. Hastings College of the Law, Traynor Center/Special Collections.

Traynor continued to urge his colleagues to adopt the strict liability standard. In 1949 in another exploding pop bottle case, just five years after *Escola*, Traynor again complained that doctrines such as *res ipsa loquitur* afforded insufficient protection to injured plaintiffs. He contended that a manufacturer should incur “absolute liability” for products deemed defective, which meant strict liability for injuries that could be “traced to the product as it reached the market.” Traynor was advocating liability for the manufacturer for problems that arose in the course of “normal marketing procedures,” which included transportation and any attendant risks incurred during that phase of distribution. Traynor wanted to create strict liability even for defects that were created during the post-release distribution phase simply because “not uncommonly a plaintiff will be unable to trace a defect” to the manufacturer.<sup>376</sup> As in *Escola*, Traynor was alone (on the Court, at least) in his views; no other justice joined his concurrence and one justice, Douglas L. Edmonds, dissented, specifically noting that he did “not agree with the rule of strict liability” advocated by Traynor.<sup>377</sup> (Justice Edmonds left the Court in 1955.)<sup>378</sup>

Nevertheless, academic commentators generally supported Traynor’s views and the importance of such widespread support is analytically important. As Lawrence Baum has argued, judges not only have specific audiences for whom they write opinions; there is a great likelihood that judges’ opinions are shaped by their audiences’ expectations and

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<sup>376</sup> *Gordon v. Aztec Brewing Co.*, 33 Cal. 2d 514, 530 (1949), J. Traynor concurring.

<sup>377</sup> *Gordon*, 33 Cal. 2d at 533, J. Edmonds dissenting.

<sup>378</sup> *The Supreme Court of California, 2007 Edition* (San Francisco: S. Ct. of CA, 2007), p. 58.

preferences.<sup>379</sup> Legal academics are certainly one of the chief audiences of judges. Academics did not merely agree with Traynor's *Escola* reasoning, they also generally liked Traynor himself. In 1951, Harvard law professor Louis Jaffe, although he cautioned that Traynor may have been too bold and sweeping in his desires in *Escola*, noted his (and other law professors') general approval: "We professors prefer Judge Traynor's clear, analytic approach."<sup>380</sup> Harry Kalven, a law professor at the University of Chicago, proclaimed, "Roger Traynor is a law professor's judge."<sup>381</sup> Kalven proclaimed that "the tort law of the United States has been all the better for his [Traynor's] twenty-five years of service on the bench."<sup>382</sup> Walter V. Schaefer, writing in 1961 while serving as chief justice of the Illinois Supreme Court, proclaimed there was "no sounder currency in the court across the country than a Traynor opinion."<sup>383</sup> Many other academics, judges, and lawyers alike echoed these sentiments.<sup>384</sup> Traynor was, of course, well aware

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<sup>379</sup> Lawrence Baum, *Judges and Their Audiences: A Perspective on Judicial Behavior* (Princeton: PUP, 2008).

<sup>380</sup> Louis L. Jaffe, "Res Ipsa Loquitur Vindicated," Vol. 1, No. 1 (Spring, 1951), p. 13.

<sup>381</sup> Harry Kalven, Jr., "Torts: The Quest for Appropriate Standards," *Cal. L. Rev.*, Vol. 53, No. 1 (Mar., 1965), p. 189.

<sup>382</sup> Harry Kalven, Jr., "Torts: The Quest for Appropriate Standards," *Cal. L. Rev.*, Vol. 53, No. 1 (Mar., 1965), p. 189, 206.

<sup>383</sup> Walter V. Schaefer, "Justice Roger J. Traynor," *Stan. L. Rev.*, Vol. 13, No. 4 (July, 1961), p. 717.

<sup>384</sup> Brainerd Currie, "Justice Traynor and the Conflict of Laws," *Stan. L. Rev.*, Vol. 13, No. 4 (July, 1961), p. 719, 778 ("Traynor is almost invariably right in conflict-of-law matters"); Wex S. Malone, "Contrasting Images of Torts – The Judicial Personality of Justice Traynor," *Stan. L. Rev.*, Vol. 13, No. 4 (July, 1961), p. 779, 780 (It was Traynor's "mission to ... help impregnate the law of California with the wealth of new ideas that were in the process of development."); Stewart Macaulay, "Justice Traynor and the Law of Contracts," *Stan. L. Rev.*, Vol. 13, No. 4 (July, 1961), p. 812 (Traynor's "work in contracts excites all this academic interest because he is willing, perhaps even eager, to strike out in new directions, overturning and modifying old rules and establishing new ones."); Walter V. Schaefer, "Chief Justice Traynor and the Judicial Process," *Cal. L. Rev.*, Vol. 53, No. 1 (Mar., 1965), p. 11 (Schaefer proclaimed he did not "know of any other judge whose work has been so significant in so many areas of the law," placing Traynor in the same company as "Holmes, Cardozo, and Doe of New Hampshire."); Monrad G. Paulsen, "Criminal Law Administration: The Zero Hour Was Coming," *Cal. L. Rev.*, Vol. 53, No. 1 (Mar., 1965), p. 103 ("It is true that Chief Justice Traynor does envy the legislature and its task."); Brainerd Currie, "Civil Procedure: The

of these opinions and it is possible that they were influential on his continued willingness to act boldly on the bench. Many of the favorable opinions were voiced *before* he authored the *Greenman* decision in 1963. After he wrote *Greenman*, he was even more highly praised. One example was the bestowal upon him, in 1965, of the plaintiff-oriented American Trial Lawyers Association's Award of Merit.<sup>385</sup>

In addition to endorsing Traynor, academics, such as Albert A. Ehrenzweig, of Berkeley, specifically endorsed Traynor's substantive views on strict liability as stated in *Escola*.<sup>386</sup> Reed Dickerson, who wrote the first treatise on product liability law relating to food in 1951, argued in favor of "absolute liability at all levels of production and distribution, abolishing the privity requirements . . . ."<sup>387</sup> One of the leading torts treatises of the day, Fowler Harper and Fleming James, Jr.'s *The Law of Torts*, wholeheartedly endorsed Traynor's views. The authors supported the underlying policy rationale and contended "society's interest transcends that of protecting reasonable business expectations. It extends to minimizing the danger to consumers and putting the burden of their losses on those who are best able to minimize the danger and distribute equitably the losses that do occur. And . . . the court should extend [implied warranties] as far as the

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Tempest Brews," *Cal. L. Rev.*, Vol. 53, No. 1 (Mar., 1965), p. 25 ("In what areas of the law will the genius of Roger Traynor have its greatest impact?"); Robert B. McKay, "Constitutional Law: Ideas in the Public Forum," *Cal. L. Rev.*, Vol. 53, No. 1 (Mar., 1965), p. 67, 76 ("Traynor's greatness is that he is beholden to no man and to no immutable principle save the sacredness of free and full inquiry."); James E. Sabine, "Taxation: A Delicately Planned Arrangement of Cargo," *Cal. L. Rev.*, Vol. 53, No. 1 (Mar., 1965), p. 173, 175 ("Traynor ingeniously solved the problem" of tax equalization.). Much of the March 1965 issue of the *California Law Review*, published by Traynor's alma mater, was dedicated to reviewing his judicial career.

<sup>385</sup> J. Edward Johnson, *History of the Supreme Court Justices of California*, Vol. II (San Francisco: Bancroft-Whitney, 1966), p. 184.

<sup>386</sup> Albert A. Ehrenzweig, *Negligence Without Fault: Trends Toward an Enterprise Liability for Insurable Loss* (Berkeley: Univ. of Calif. Press, 1951), p. 81.

<sup>387</sup> Reed Dickerson, *Products Liability and the Food Consumer* (Boston: Little, Brown, 1951), pp. 279-80.

relevant social policy requires. The interest in consumer protection calls for warranties by the maker that do run with the goods, to reach all who are likely to be hurt by the use of the unfit commodity . . . .”<sup>388</sup> Fleming James, Jr., a professor of law at Yale, argued that injured consumers were a “class economically ill-equipped” to bear the burden of injuries from products.<sup>389</sup>

Shortly after *Escola* was decided, William Prosser, by then the dean of Berkeley’s law school, and Warren Seavey, a Harvard Law School professor, – both advisors to the ALI’s *Restatement of Torts* – went on record as being skeptical of the *res ipsa loquitur* rule’s wisdom.<sup>390</sup> Also, Prosser largely thought of *Escola* in the limited terms of a food contamination case, rather than a general statement regarding products liability, Traynor’s expansive concurrence notwithstanding.

Although one law review article tracing the then-recent developments in tort law toward “absolute liability” did not mention *Escola*,<sup>391</sup> this is not surprising, considering the case was not decided on an expansive view of existing law; rather it was decided upon the application of a traditional common law doctrine. What was unusual about *Escola* was Traynor’s famous concurrence.

Francis E. Lucey, a Georgetown law professor writing from a putatively natural law perspective, argued that “social justice” principles necessitated strict liability, which

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<sup>388</sup> Fowler V. Harper and Fleming James, Jr., *The Law of Torts*, Vol. 2 (Boston: Little, Brown, 1956), p. 1570-72.

<sup>389</sup> Fleming James, Jr., “General Products – Should Manufacturers Be Liable Without Negligence?” *Tenn. L. Rev.*, Vol. 24, No. 7 (Spring, 1957), p. 923.

<sup>390</sup> William L. Prosser, “Res Ipsa Loquitur in California,” *Calif. L. Rev.*, Vol. 37, No. 2 (June, 1949), p. 183, 232; Warren A. Seavey, “Res Ipsa Loquitur: Tabula in Naufragio,” *Harv. L. Rev.*, Vol. 63, No. 4 (Feb., 1950), p. 643.

<sup>391</sup> Charles O. Gregory, “Trespass to Negligence to Absolute Liability,” *Va. L. Rev.*, Vol. 37, No. 3 (April, 1951), p. 359.

would result in socialization of risk through increased prices for all goods.<sup>392</sup> Dix Noel, a law professor at the University of Tennessee and supporter of strict liability for all products, writing in 1957, correctly predicted that strict liability would be extended from foodstuffs, to “articles intimately used,” and, finally, to “general products.”<sup>393</sup> In general, most law professors who committed their opinions to paper supported the extension of strict liability beyond foodstuffs and did so along lines of reasoning articulated earlier in the century by legal realists and more recently by Justice Traynor.<sup>394</sup>

However, there was a minority of legal scholars who dissented from the judicial and scholarly enthusiasm for expanded products liability and particularly the argument for strict liability. Roscoe Pound was one academic who vehemently disagreed with Traynor’s *Escola* opinion. Pound, who as we have seen made his career, first as a sociological jurisprudence advocate, then as a legal realist scholar in the early twentieth century, was by the 1940s disillusioned with legal realism. He contended that strict liability was a court-created “humanitarian” measure that created the “involuntary Good Samaritan.” Pound objected to the consequence of private actors raising prices for the general consumer in order to pay for insuring products under the strict liability standard. For Pound, this was an unfair allocation of the burden of loss upon the entire society *without* any incentive for the costs to be reduced, since judges would be the one

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<sup>392</sup> Rev. Francis E. Lucey, S.J., “Liability Without Fault and the Natural Law,” *Tenn. L. Rev.*, Vol. 24, No. 7 (Spring, 1957), p. 952, 962. However, Lucey also considered the possibility of spreading risk among an even wider area through “state insurance.” Yet, he rejected this because of “the danger of state socialism.”

<sup>393</sup> Dix W. Noel, “Manufacturers of Products – The Drift Toward Strict Liability,” *Tenn. L. Rev.*, Vol. 24, No. 7 (Spring, 1957), p. 962, 1018.

<sup>394</sup> Virginia E. Nolan and Edmund Ursin, *Understanding Enterprise Liability: Rethinking Tort Reform for the Twenty-first Century* (Philadelphia: Temple Univ. Pr., 1995).

“control[ing] the imposition of liability.”<sup>395</sup> In other words, state entities served the public, but judges who favored strict liability were serving a particular part of the public: the plaintiff-consumer. Pound believed the judges were not very concerned with lowering costs to the general consuming public. Pound was also cognizant of this a judge-made (or “jural”) argument, rather than a consumer-made movement. Pound considered this a variant of Marx’s famous axiom: “To everyone according to his wants, from everyone according to his means.”<sup>396</sup>

Other academic dissenters noted that Traynor’s rationale of risk spreading by the manufacturer was impractical because many manufacturers, due to competition in their respective markets, were incapable to redistributing risk via a pricing mechanism.<sup>397</sup>

Leon Green, a University of Texas law professor writing in 1957, argued that negligence offered the best balance between a manufacturer who owed a duty of care to the consuming public and a consumer who bore the burden of showing a breach of the duty by the manufacturer, rather than a presumption of fault and automatic compensation. Green made an argument entirely at odds with the prevailing opinion of legal academics. He contended that contemporary methods of production had resulted in “steady progress ... in providing safer products and in shifting the risks of enterprise through insurance and price controls back to the consumers.” Strict liability would place too heavy a

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<sup>395</sup> Roscoe Pound, “Law in the Service State: Freedom versus Equality,” *A.B.A. J.*, Vol. 36, No. 12 (Dec., 1950), p. 981.

<sup>396</sup> *Ibid.*, p. 1050.

<sup>397</sup> C. A. Peairs, Jr., “The God in the Machine: A Study in Precedent,” *B.U. L. Rev.*, Vol. 29, No. 1 (Jan., 1949), p. 37; Marcus L. Plant, “Strict Liability for Manufacturers of Injuries Caused by Defects in Products – An Opposing View,” *Tenn. L. Rev.*, Vol. 24, No. 7 (Spring, 1957), p. 938.



burden on manufacturers, rather than the then-existing system for risk distribution and compensation.<sup>398</sup>

In 1960, Justice Traynor again voiced his support for strict liability. In *Peterson v. Lamb Rubber Co.* an employee was injured while working with a rubber bonded abrasive wheel, which is used in grinding and burring work, when the wheel disintegrated and injured his face.<sup>399</sup> The plaintiff sued under the theories of breach of warranty and negligence. The plaintiff lost in the trial court, partly because of the *res ipsa loquitur* doctrine and partly because the court rejected the plaintiff's warranty claim since there was no privity of contract between the injured employee and the manufacturer. Upon appeal, the plaintiff argued that the doctrine of privity was "fast disappearing" and, citing Justice Traynor's concurrence in *Escola*, incorrectly argued that Traynor's views were "probably the true law in California today."<sup>400</sup> This was patently incorrect, since Traynor's concurrence – in which he urged strict liability as the alternative basis for the decision – was clearly only wishful thinking; it was definitely not the law of California.

The California Supreme Court unanimously held the plaintiff's warranty claim was meritorious because the injured employee was a successor to the rights of his employer, which had privity of contract with the manufacturer.<sup>401</sup> The Court, affirming the intermediate appellate court, gave privity an expansive reading – tracking the

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<sup>398</sup> Leon Green, "Should the Manufacturer of General Products Be Liable Without Negligence?" *Tenn. L. Rev.*, Vol. 24, No. 7 (Spring, 1957), pp. 928, 937.

<sup>399</sup> 54 Cal. 2d 339, 340; 353 P.2d 575, 576 (1960).

<sup>400</sup> Appellant's Opening Brief, filed Feb. 18, 1959 in the District Court of Appeal, Second Appellate District, State of California, *Peterson v. Lamb Rubber Co.*, LA. 25635, pp. 7, 12, in the California State Archives, Sacramento, California.

<sup>401</sup> *Ibid.* at 348; 353 P.2d at 581.

plaintiff's argument – by including the employee as being in privity with the defendant manufacturer, even though the employer was the actual party in privity. The Court reasoned that, “in view of modern industrial usage employees should be considered a member of the industrial ‘family’ of the employer ...”<sup>402</sup> Although the Court did not adopt strict liability, their reasoning showed a willingness to construe concepts expansively to reach a particular result in favor an injured plaintiff.

Traynor filed a lone concurrence, simply referring to his prior reasoning in *Escola* and *Gordon*.<sup>403</sup> Notwithstanding Traynor's practice in “rare cases” of trying to find “at least three other [justices who] agreed with him,” it appears that Traynor was very dedicated to the strict liability doctrine, regardless of his peers.<sup>404</sup> These cases suggest that Traynor, as late as 1960, remained alone on the Supreme Court as a supporter of strict liability in cases other than food or products intended for intimate bodily use.

However, it is important to note that Traynor was not the only member of the California Supreme Court willing to alter the law when he deemed it archaic. For example, the Court's judicial “creativity” was displayed in 1958, when a majority of justices (including Traynor) held that a tort defendant could not have a jury instruction on unavoidable accident.<sup>405</sup> This instruction had been expressly allowed defendants for the previous six years under a case in which Traynor and the chief justice, Phil Gibson, had

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<sup>402</sup> *Ibid.* at 347; 353 P.2d at 581.

<sup>403</sup> *Ibid.* at 350; 353 P.2d at 582.

<sup>404</sup> Donald P. Barrett, Esq., Supreme Court of California on Chief Justice Roger J. Traynor, (July 28, 1986), p. 14, Box T028, File 01a, Oral history interview with Donald P. Barrett, Posthumous, The Roger J. Traynor Collection, U.C. Hastings College of the Law, Traynor Center/Special Collections.

<sup>405</sup> *Butigan v. Yellow Cab Co.*, 49 Cal. 2d 652; 320 P.2d 500 (1958).

joined the majority and later switched their positions on the rule.<sup>406</sup> Chief Justice Gibson was known as a political liberal, as well, who “shared [Traynor’s] sense of how far the court should properly go” in shaping the law.<sup>407</sup> The ruling was in the vein of Traynor’s advocacy for changing negligence law evident in his *Escola* concurrence. The Court held the instruction had “no legitimate place in our pleading” because it was “an obsolete remnant” from an earlier era of tort law.<sup>408</sup> However, as Justices Schauer and Spence pointed out, writing in dissent, the rule had existed since 1897 and was in no sense obsolete. In fact, the dissenters suspected that what the majority really wanted to do was to make the plaintiff’s burden easier by removing an instruction that prevented a jury from simply assuming that by virtue of an accident someone had to have been at fault.<sup>409</sup>

### ***Traynor’s Jurisprudence***

By the late 1950s, Traynor, writing in the period of the early Warren Court when the most salient issue was the power and reach of the U.S. Supreme Court in overturning racially discriminatory practices at the state and local levels in the wake of the *Brown v. Board of Education*, Traynor expressed his views on jurisprudence. In this national context, Traynor thought he could “speak freely of appellate review itself.” One scholar

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<sup>406</sup> *Parker v. Womack*, 37 Cal. 2d 116; 230 P.2d 823 (1951).

<sup>407</sup> Donald P. Barrett, Esq., Supreme Court of California on Chief Justice Roger J. Traynor, (July 28, 1986), p. 6, Box T028, File 01a, Oral history interview with Donald P. Barrett, Posthumous, The Roger J. Traynor Collection, U.C. Hastings College of the Law, Traynor Center/Special Collections.

<sup>408</sup> *Butigan v. Yellow Cab Co.*, 49 Cal. 2d at 658; 320 P.2d at 504.

<sup>409</sup> *Butigan v. Yellow Cab Co.*, 49 Cal. 2d at 661, 664-65; 320 P.2d at 506, 508 (Justices Schauer and Spence dissenting).

has argued that Traynor never directly engaged in the debate about legal realism.<sup>410</sup> However, Traynor's comments from the late 1950s clearly show that he was greatly influenced by legal realism. He argued in an expressly progressive vein that "the law must keep pace with the times."<sup>411</sup> Although he was referring to the need to reassess the efficacy and efficiency of appellate procedures, the tenor of his remarks bespoke a truly legal progressive concern with how the courts functioned within and served the wider society.

Traynor was probably introduced to the principles of legal realism during law school. He graduated from the University of California's law school in 1927. The school, then formally known as the School of Jurisprudence (but hereinafter referred to as Berkeley), was greatly influenced by the then-emergent school of legal realist scholars. As previously noted in Chapter Two, legal realists saw law "as a product of human experience, related to changing social and economic conditions." Legal realists criticized legal education for failing to account for how judges decided (and *should have* decided) cases. Berkeley during this period was "firmly committed to the study of law as it related to the larger society."<sup>412</sup> Traynor shared the realists' "distaste for abstraction, a preference for reform, and an insistence on the need to take into account the societal effects of the law."<sup>413</sup> As noted in Chapter Two, the realists were not different from the

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<sup>410</sup> John W. Poulos, "The Judicial Philosophy of Roger Traynor," *Hastings L.J.*, Vol. 46, No. 6 (Aug., 1995), pp. 1643, 1674-75.

<sup>411</sup> Roger J. Traynor, "Some Open Questions on the Work of State Appellate Courts," *Chicago L. Rev.*, Vol. 24, No. 2 (Winter, 1957), p. 211.

<sup>412</sup> Sandra P. Epstein, *Law at Berkeley: The History of Boalt Hall* (Berkeley, CA: Inst. of Governmental Studies Press, 1997), p. 103.

<sup>413</sup> Field, *Activism in Pursuit of the Public Interest*, p. 11.

Langdellians in their belief that law was a science, although the realists expressly saw law as a social science that needed to reflect the experience – which the realists thought was susceptible to empirical measurement, of course – of society.<sup>414</sup>

The reorientation of American legal scholarship and legal education from a natural law to a legal progressivism or legal realist pedagogy was cemented during this period. The generation of students who, like Traynor, became the judicial leaders of the Tort Revolution in the 1950s and 1960s were educated in the law during this formative period. Traynor was taught constitutional law by Thomas Reed Powell, then one of the most prominent legal realists in America. Powell had been a professor of law at Columbia and was known for his arguments that law “is not in books, but in the lives of men and women.”<sup>415</sup> Additionally, in the 1920s Berkeley instituted curriculum changes that comported with the legal realists’ ideas about how law functioned and should be taught. For example, it introduced a course on criminology, “which was cotaught [*sic*] by the Berkeley police chief.” Also, Berkeley’s dean after 1924, Orin Kip McMurray, endorsed legal realism view that legal doctrinal change resulted from “human factors” rather than “formal logic” and that the “personalities of judges” were “not the least” of such human factors.<sup>416</sup> The prestige of legal realism in the legal academy during the

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<sup>414</sup> Grant Gilmore, *The Ages of American Law* (New Haven: Yale Univ. Press, 1977), pp. 88-91. As White noted, the realists were concerned with law as a “process” that effected behavior and they emphasized the compensatory function of torts. G. Edward White, *Tort Law in America: An Intellectual History* (New York: OUP, 1980, 2003 ed.), pp. 167-68; William W. Fisher, III, Morton J. Horwitz, and Thomas Reed, *American Legal Realism* (New York: OUP, 1993); John Henry Schlegel, *American Legal Realism and Empirical Social Science* (Chapel Hill: UNC Press, 1995).

<sup>415</sup> Thomas Reed Powell, “Law as a Cultural Study,” *Am. L. Sch. Rev.*, Vol. 4, No. 6 (Fall, 1917), p. 330.

<sup>416</sup> Field, *Activism in Pursuit of the Public Interest*, pp. 3-4.

1920s would have been attractive to Traynor, whose inclinations favored viewing law and society as interconnected.

However, Traynor disagreed with the realists' skepticism regarding the virtue of judges as policy makers. Traynor did not fear such policy making was anti-democratic or eroded the certainty thought necessary – even by the realists – in the law, especially the common law.<sup>417</sup> Traynor was almost flippant in his disregard for this traditional trait of the common law. For example, he wrote that realist Jerome Frank's arguments in favor of fact skepticism should not result in "we [judges] ... making fact skepticism our main preoccupation," since judges dealt in "probabilities."<sup>418</sup> Nevertheless, Traynor was personally close to one of the leading realists of the period, Max Radin. Radin was dean of Berkeley's law school when Traynor was on the faculty and recommended Traynor for the state's Supreme Court.<sup>419</sup>

Additionally, Traynor had a liberal political disposition, encapsulated in his view that "social problems find their solution in legislation" and "enduring prosperity requires planning in terms of the economic development of the nation as a whole."<sup>420</sup> While on the California Supreme Court his political views were, of course, only voiced to his

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<sup>417</sup> Field, *Activism in Pursuit of the Public Interest*, p. 11.

<sup>418</sup> Roger J. Traynor, "Fact Skepticism and the Judicial Process," *Univ. of Penn. L. Rev.*, Vol. 106, No. 5 (Mar., 1958), p. 636.

<sup>419</sup> Field, *Activism in Pursuit of the Public Interest*, p. 12. Governor Culbert Olson's first choice for the Court was Radin himself. However, the California Commission on Judicial Qualifications, for the first time ever, rejected Radin's nomination without explanation. Scholar Sandra P. Epstein has argued that the most likely explanation for Radin's rejection by the Commission was his left-wing political activities, which were repugnant to the majority of the three-man commission. The two votes against Radin were made by then-Attorney General Earl Warren and John T. Nourse, of the State Court of Appeals. Epstein, *Law at Berkeley*, pp. 155-56.

<sup>420</sup> Roger J. Traynor, "Law and Social Change in a Democratic Society," *Univ. Ill. L. Rev.*, Vol. 1956, No. 2 (Summer, 1956), pp. 231-32.

friends and close work associates. Donald P. Barrett, Justice Traynor's law clerk at the Court from 1948 through 1970, described him as an ardent supporter of the Democratic Party. Traynor once asked a clerk if he was a Democrat, the clerk answered that he was and Traynor responded, "Well, most intelligent people are." Traynor was "absolutely ecstatic" over Truman's election in 1948 and thought that those who celebrated MacArthur, after Truman had fired him in 1951, were "knuckleheads."<sup>421</sup> These were rare glimpses into his partisan disposition and sentiments regarding those who held opposing political views. Yet, they also reflect his disposition on the state supreme court, where he reached decisions favored by political liberals. In examples beyond tort law, Traynor was known for deciding cases and authoring opinions that rejected alienage distinctions,<sup>422</sup> racial discrimination,<sup>423</sup> inequality in divorce law,<sup>424</sup> and illegal police practices,<sup>425</sup> and supported organized labor.<sup>426</sup> He was seen as a "pioneer" in conflicts of

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<sup>421</sup> Donald P. Barrett, Esq., Supreme Court of California on Chief Justice Roger J. Traynor, (July 28, 1986), pp. 4, 12, Box T028, File 01a, Oral history interview with Donald P. Barrett, Posthumous, The Roger J. Traynor Collection, U.C. Hastings College of the Law, Traynor Center/Special Collections.

<sup>422</sup> Field, p. 28, citing *People v. Oyama*, 29 Cal.2d 164 (1946) (Traynor concurring) (prohibiting Japanese who were ineligible for citizenship from owning land) and *Takahashi v. Fish and Game Comm'n*, 30 Cal.2d 719 (1947) (Traynor dissenting) (regulation barring Japanese who were ineligible for citizenship from obtaining fishing licenses).

<sup>423</sup> Field, pp. 28-29, citing *Fairchild v. Raines*, 24 Cal.2d 818 (1944) (refusing to enforce racially restrictive home ownership covenant); *Prendergast v. Snyder*, 64 Cal.2d 877 (1966) and *Mulkey v. Reitman*, 64 Cal.2d 529 (1966) (holding state law barring the state from interfering with landlords' and home sellers' racially discriminatory renting and sales practices unconstitutional); *Perez v. Sharp*, 32 Cal.2d 711 (1948) (striking California's anti-miscegenation statute).

<sup>424</sup> *DeBurgh v. DeBurgh*, 39 Cal.2d 858 (1952) (abrogating the state's recrimination statute). Traynor told his law clerk that the decision, which was contrary to precedent, was "based on my strong right arm," thereby conceding his outright creation of a new judicial policy. Field, p. 60.

<sup>425</sup> *People v. Cahan*, 44 Cal.2d 434 (1955) (creating exclusionary rule for California police violations search and seizure laws).

<sup>426</sup> Field, p. 113, citing *Messner v. Journeyman Barbers*, 53 Cal. 2d 873 (1960) (reversing a lower court's injunction against picketing a barber shop that refused to allow a union).

law.<sup>427</sup> By the mid-1960s, Traynor had become very well known and popular with liberal lawyers and state court judges. As an Illinois Supreme Court justice proclaimed, Traynor was “the nation’s No. 1 state judge.”<sup>428</sup>

A tort law example of Traynor’s willingness to innovate was the abolition of the doctrine of sovereign immunity in California in 1961. Although some states had led the way before California, Traynor was intent on abolishing the doctrine. The case that achieved this result was *Muskopf v. Corning Hospital Dist.*, which presented the issue of whether a public hospital would be immune from lawsuits under the sovereign immunity doctrine.<sup>429</sup> Traynor went to the oral argument with a prepared memorandum abolishing the doctrine, but he also had “a backup position” just in case the other justices thought Traynor’s position was “too forward looking for the moment.” Traynor’s fallback position was to construe the public hospital’s function as “proprietary rather than governmental. Sovereign immunity didn’t apply to proprietary functions.” Traynor was “delighted when Justice Thomas P. White ... joined the majority to support abolishing the doctrine.”<sup>430</sup>

In addition to evidencing a willingness to innovate, *Muskopf* shows the legal academy’s influence on the judiciary and particularly Justice Traynor, the other justices of the California Supreme Court, and tort law. In the *Muskopf* case, Traynor cited

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<sup>427</sup> Donald P. Barrett, Esq., Supreme Court of California on Chief Justice Roger J. Traynor, (July 28, 1986), p. 10, Box T028, File 01a, Oral history interview with Donald P. Barrett, Posthumous, The Roger J. Traynor Collection, U.C. Hastings College of the Law, Traynor Center/Special Collections.

<sup>428</sup> “Courts: Pioneering California,” *Time*, Friday, Jan. 21, 1966 (quoting Illinois Supreme Court Justice Walter V. Schaefer).

<sup>429</sup> 55 Cal. 2d 211 (1961).

<sup>430</sup> Donald P. Barrett, Esq., Supreme Court of California on Chief Justice Roger J. Traynor, (July 28, 1986), p. 19, Box T028, File 01a, Oral history interview with Donald P. Barrett, Posthumous, The Roger J. Traynor Collection, U.C. Hastings College of the Law, Traynor Center/Special Collections.



Kenneth C. Davis's writings on sovereign immunity. As Traynor's long-time clerk noted, "Davis's scholarship showed that abolishing sovereign immunity would not lead to hopeless chaos." A worry shared by the Court, governmental entities and other potential parties to tort suits was what kind of liability and defenses would exist if state entities were not immune to tort suits. After *Muskopf* the state legislature created a statute governing the issue, but accepting the "basic principal" of sovereign immunity.<sup>431</sup> This demonstrates how the Court was willing to innovate and take an issue that had been solely within the purview of the courts and made it into an issue to be resolved by the legislative branch. As we shall see below, a similar result occurred with products liability law.

Traynor's views on tort law were greatly shaped by his personal association with legal academic William Prosser. As noted in Chapter Two, Prosser was not only one of the preeminent tort scholars from the 1940s through the 1970s, he was the most salient and persuasive of the academic scholars to advocate for the adoption of strict liability in tort. The two men had a close and mutually supportive professional relationship. In 1947, Traynor recommended Prosser and two other candidates for the deanship of Boalt Hall, Berkeley's law school, and Prosser was selected as dean.<sup>432</sup> Additionally, Traynor served on Prosser's Advisory Committee on the *Restatement (Second) of Torts* in the 1950s.<sup>433</sup> In 1963, only four months after the famous *Greenman* case (discussed below)

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<sup>431</sup> Donald P. Barrett, Esq., Supreme Court of California on Chief Justice Roger J. Traynor, (July 28, 1986), p. 20, Box T028, File 01a, Oral history interview with Donald P. Barrett, Posthumous, The Roger J. Traynor Collection, U.C. Hastings College of the Law, Traynor Center/Special Collections.

<sup>432</sup> Epstein, *Law at Berkeley*, p. 193. Field, *Activism in Pursuit of the Public Interest*, p. 105.

<sup>433</sup> Box 2812, Item 1, Folder 67-1, ALI/Second/Torts/Meetings, 1955 Sept. 15-17, in the Second Restatement of the Law Records, American Law Institute Archives, ALI.04.002, Biddle Law Library, University of Pennsylvania Law School, Philadelphia, PA.

had been decided Traynor was invited to join the Council of the ALI, which was equivalent to the board of directors. Prosser sat on the Council, too.<sup>434</sup>

Historian Ben Field has contended that Traynor's support for strict liability in products liability predated academics' calls for adopting the standard as a replacement for fault, or negligence. Field agrees with William Prosser that calls for strict products liability were an outgrowth of the application of strict liability in the case of adulterated food, "not with the academy's desire for reform." Field also notes that Prosser called for strict liability only in adulterated food but not other products in the *Restatement (Second) of Torts*, § 402(a) in 1962, the year before California's *Greenman v. Yuba* case. Thus, Field concludes, "the trend toward strict liability reflected more widespread changes in attitudes toward product liability case. Tort reform was not just the concern of a few influential academics, it was a matter of growing societal interest."<sup>435</sup> However, as we have seen, academics had called for strict liability or expanded liability long before 1944 and Field cites no evidence for the alleged attitudinal changes or that product liability was a matter of growing societal interest in the 1940s. In regard to strict liability, the attitudes that mattered were those of academics and judges. Nevertheless, Traynor's connection with Prosser and the American Law Institute, which published the *Restatements*, exemplified a connection between the key actors in this drama: academics and judges.

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<sup>434</sup> ALI, The 119<sup>th</sup> Meeting of the Council (May 21, 1963), p. 5; ALI, The 120<sup>th</sup> Meeting of the Council (Dec. 12-14, 1963), p. 2 in Council Meeting Minutes (1923-1990), Biddle Law Library, University of Pennsylvania Law School, Philadelphia, PA, available online at <http://www.law.upenn.edu/bll/archives/ali/minutes/8019-11.pdf>.

<sup>435</sup> Field, *Activism in Pursuit of the Public Interest*, p. 106 (citing Prosser's "The Assault Upon the Citadel (Strict Liability to the Consumer), *Yale L. J.*, Vol. 69, No. 7 (June, 1960), pp. 1144-45).

As Ben Field has noted, although Traynor’s express advocacy and defense of judicial activism was “extreme, ... many of [Traynor’s] most innovative opinions gained widespread acceptance and generated surprisingly little controversy.”<sup>436</sup> Yet, perhaps Traynor should be seen as “extreme” only in the sense of the *explicitness* of his advocacy for judicial policy making. Since the California Supreme Court was so frequently cited and Traynor was so well known and respected by other states’ judges during his tenure on the Court, there is little doubt that his brand of activism was welcomed by state supreme court justices around the nation.<sup>437</sup>

As noted above, Traynor advocated for judges to be policy makers, not merely decision makers limited to the context of a given case: “We should not be misled by the cliché that policy is a matter for the legislature and not for the courts.”<sup>438</sup> He also claimed that judging involves a combination of “analysis and intuition culminating in decisions that prove prophetic.”<sup>439</sup> Traynor relished this prophetic role for judges. In the common law realm, where judges are the central lawmakers, without the participation of legislatures, Traynor argued that “the great strength of the common law has its reconciliation of ... stability with a continuing evolution that has enabled it to respond sooner or later to the recurring reminder that there is nothing forever as of old under the

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<sup>436</sup> Field, *Activism in Pursuit of the Public Interest*, p. xiv.

<sup>437</sup> Traynor’s long-time clerk, Donald Barrett, noted that Traynor’s “stature as a judge was head and shoulders above anybody else on the [California] Court” by the time he was appointed Chief Justice. Donald P. Barrett, Esq., Supreme Court of California on Chief Justice Roger J. Traynor, (July 28, 1986), p. 16, Box T028, File 01a, Oral history interview with Donald P. Barrett, Posthumous, The Roger J. Traynor Collection, U.C. Hastings College of the Law, Traynor Center/Special Collections.

<sup>438</sup> Roger J. Traynor, “Some Open Questions on the Work of State Appellate Courts,” *Chicago L. Rev.*, Vol. 24, No. 2 (Winter, 1957), p. 219.

<sup>439</sup> Roger J. Traynor, “Badlands in an Appellate Judge’s Realm of Reason,” *Utah L. Rev.*, Vol. 7, No. 2 (Fall, 1960), p. 160.

sun.”<sup>440</sup> As Traynor contended in 1966, “The real danger to law is not that judges may take off onward and upward, but that all too many of them have long since stopped dead in the tracks of their predecessors.”<sup>441</sup> Traynor also rejected the view that judges could disinterestedly apply “neutral principles” in the process of judging. Traynor thought the “impurities and complications” of facts presented to judges in cases often required innovative approaches to resolving disputes.<sup>442</sup> This was a view of judging that directly echoed the legal realists’ views of judging. As Max Radin, one of the realist professors at Berkeley in the 1920s, contended, judges “act more frequently than otherwise by discovering the desirable result first and summing their category to justify it afterwards.” It is perhaps not surprising that Radin divulged (and not merely as a joke) that, “The one desire I have cherished – and I fear in vain – is to be a judge.”<sup>443</sup> Traynor’s view of the role of judges was well known and admired by commentators in the 1960s. As one commentator noted, Traynor was “undaunted by the cautious rule of ... (adhere[nce] to precedents). Always he asks: what is the fair, practical policy for today?”<sup>444</sup>

It should be noted that Traynor did not think all matters were fit for the courts, even in tort law. For example, he uncharacteristically argued that the reform of the rule of contributory negligence, which was very unpopular with plaintiffs, was a matter best left to the legislature. This was especially odd since Traynor claimed that the court

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<sup>440</sup> Roger J. Traynor, “Stare Decisis Versus Social Change,” p. 4, Box 8, File 8 (April 26-27, 1963), The Roger J. Traynor Collection, U.C. Hastings College of the Law, Traynor Center/Special Collections.

<sup>441</sup> “Courts: Pioneering California,” *Time*, Friday, Jan. 21, 1966.

<sup>442</sup> Roger J. Traynor, “No Magic Words Could Do It Justice,” *Cal. L. Rev.*, Vol. 49, No. 4 (Oct., 1961), p. 615, 624.

<sup>443</sup> Max Radin, “The Theory of Judicial Decisions: Or How Judges Think,” *A.B.A. J.*, Vol. 11, No. 6 (1925), pp. 357, 359.

<sup>444</sup> “Courts: Pioneering California,” *Time*, Friday, Jan. 21, 1966.

should not take it upon itself to change the rule because administrative details and the “structure of liability insurance” would be affected by such a change.<sup>445</sup> As we shall see in great detail in Chapters Five and Six, below, liability insurance was greatly affected by the court-led switch from negligence to strict liability.

As Traynor expressly conceded, it was a matter of “judge-made law expanding products liability;” and such expansion was required of the courts because of “conflicting interests in terms of a changing social context.” Those “interests gradually vitiate[d] the authority of established precedents.”<sup>446</sup> As we shall see in our review of the California Supreme Court’s *Greenman* case, that vitiation was anything but gradual. Yet, prior to Traynor’s leading role in the Tort Revolution there were developments elsewhere.

### ***Precursors of the Tort Revolution***

The Tort Revolution occurred between 1960 and approximately 1966, when many states adopted either an implied warranty theory or a strict liability tort theory holding manufacturers automatically liable to remote consumers for defectively made or designed products. The Revolution had precursors in the 1940s and 1950s. Not only had legal academics argued in favor of expanded manufacturer liability since the beginning of the twentieth century, but some courts had decided cases in favor of it, too. As we have seen, strict liability was commonplace regarding foodstuffs and products for intimate bodily use. Yet, even in the 1940s some courts urged an extension of negligence liability or

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<sup>445</sup> Roger J. Traynor, “Stare Decisis Versus Social Change,” pp. 10-11, Box 8, File 8 (April 26-27, 1963), The Roger J. Traynor Collection, U.C. Hastings College of the Law, Traynor Center/Special Collections.

<sup>446</sup> Roger J. Traynor, “Stare Decisis Versus Social Change,” p. 5, Box 8, File 8 (April 26-27, 1963), The Roger J. Traynor Collection, U.C. Hastings College of the Law, Traynor Center/Special Collections.

outright switch to strict tort liability for “public policy” reasons. The precursor cases decided in the 1940s and 1950s evinced state judges’ desire to expand manufacturer liability, but the 1960s was a difference in degree that was so substantial and extensive that it was a difference in kind. What made the early 1960s revolutionary was the fact that strict liability was adopted by a majority of states in a short time and that the liability was no-fault liability rather than extensions of fault-based liability.

In a Texas Supreme Court case in 1942 a woman and her son were made ill after consuming spoiled canned spinach. The majority held the retailer liable under an implied warranty theory, even though the retailer had no way of ascertaining the canned food at issue was defective. This was a minority position among the states. The court reasoned that such liability was merely a “so-called [*sic*] implied warranty,” a legal fiction to affect “a matter of public policy for the protection of public health.”<sup>447</sup> The dissent urged adherence to the majority rule prohibiting warranty liability against a retailer who lacked any opportunity to observe the defective condition. The dissent simply disagreed with the policy rationale: “The term ‘public policy’ is a vague and indefinite one ... [and] no practical benefit to the public health can be obtained by” the majority’s new rule.<sup>448</sup> The majority’s adoption of a broader rule was illustrative of the compensatory nature of strict liability. It was liability without fault and an innocent retailer was simply responsible for deriving profit from distributing what turned out to be a defective product. Thus, the majority reasoned, the retailer should bear part of the risk of loss. Not only is this an example of the judge-made character of the Tort Revolution, it shows how early the

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<sup>447</sup> *Griggs Canning Co. v. Josey*, 139 Tx. 623, 626; 164 S.W. 2d 835, 836 (1942).

<sup>448</sup> 139 Tx. at 637; 164 S.W. 2d at 842 (J. Critz, dissenting).

impetus to expand liability was in American courts. Most courts limited strict liability to foodstuffs or products for intimate bodily use. Roger Traynor's advocacy of general strict liability was unusual in the 1940s. Yet, apparently he was not alone, since other courts were happy to use an implied warranty theory to extend strict liability to general consumer products.

Throughout the immediate post-War period, progressive legal scholars advocated abandoning negligence-based liability in favor of expanded (or comprehensive) no-fault theories. Fleming James, writing in 1948, contended that strict liability would socialize the costs of accidents through "social insurance," by which he meant a compulsory compensation system administered by the state.<sup>449</sup> Clarence Morris of the University of Texas Law School, writing in 1952, argued in favor of what he termed "enterprise liability," which was liability without fault.<sup>450</sup> The thrust of such articles was to urge the key actors – state court judges – to endorse strict liability for general products. The rationale was the progressive concept of "social insurance" or "social security." As one proponent urged, "Today we must regard the advance of social security measures ... as a development common to all modern industrial countries."<sup>451</sup> Strict products liability would merely be a logical step in the progression to a comprehensive social insurance-based polity.

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<sup>449</sup> Fleming James, Jr., "Accident Liability Reconsidered: The Impact of Liability Insurance," *Yale L.J.*, Vol. 57, No. 4 (Feb., 1948), p. 549, 550; Fleming James, Jr., and John V. Thornton, "The Impact of Insurance on the Law of Torts," *Law and Contemp. Probs.*, Vol. 15, No. 3 (Summer, 1950), p. 431, 443-44; Albert A. Ehrenzweig, "Assurance Oblige – A Comparative Study," *Law and Contemp. Probs.*, Vol. 15, No. 3 (Summer, 1950), p. 445 (looking at Europe).

<sup>450</sup> Clarence Morris, "Hazardous Enterprises and Risk Bearing Capacity," *Yale L.J.*, Vol. 61, No. 7 (Nov., 1952), p. 1172, 1176, 1179.

<sup>451</sup> W.G. Friedmann, "Social Insurance and the Principles of Tort Liability," *Harv. L. Rev.*, Vol. 63, No. 2 (Dec. 1949), p. 241.

By the 1950s there were several cases that extended negligence and/or implied warranty liability beyond foodstuffs and products “intended for intimate bodily use.”<sup>452</sup> Although torts scholar William Prosser noted that many of the following cases were examples of “strict liability” having been extended to non-foodstuff and non-intimate bodily use products, these cases actually represent the application of either a warranty-based theory of recovery or a negligence-based theory of recovery, rather than recovery on a theory of strict liability in tort. In other words, these cases are simply following Cardozo’s *MacPherson* opinion, applying negligence (not strict liability) to non-foodstuffs. What these cases *do* show is the willingness of state courts to broaden the application of negligence and/or implied warranties to cover ultimate consumers. As Prosser correctly believed, the use of implied warranties achieved a strict liability effect by using contract liability rules, wherein fault was irrelevant to the question of whether a breach had occurred.

A couple of cases dealt with foodstuffs, such as animal foods, whereby the rule for human foods was simply extended by analogy to animal foods. Both cases were implied warranty cases and did not make sweeping statements regarding general products or strict liability.<sup>453</sup> Several cases dealt with industrial equipment, such as grinding wheels,<sup>454</sup>

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<sup>452</sup> The citation list for these cases was contained in Folder 68-25, ALI/Second/Torts/Drafting/CD [Council Draft] No. 11, 1962 March 1, pp. 17-18, in the Second Restatement of the Law Records, American Law Institute Archives, ALI.04.002, Biddle Law Library, University of Pennsylvania Law School, Philadelphia, PA. However, additional cases, not included on the ALI list, have been considered here.

<sup>453</sup> *McAfee v. Cargill, Inc.*, 121 F. Supp. 5 (1954) (dog food supported by analogy to the human foodstuff rule established in California; claims were negligence and breach of warranty); *Midwest Game Co., Inc. v. M.F.A. Milling Co.*, 320 S.W. 2d 547 (Mo., 1959) (commercial trout food; plaintiff successful under theories of breach of implied warranty of fitness and negligent failure to warn).

<sup>454</sup> *DiVello v. Gardner Machine Co.*, 102 N.E. 2d 289; 46 Ohio Op. 161; 65 Ohio L. Abs. 58 (1951) (based on implied warranty of merchantability and negligence; citing *MacPherson v. Buick Motor Co.*, (NY, 1916); citing first *Restatement of Torts*, § 398, p. 1073 regarding duty of care to third parties); *Peterson v. Lamb Rubber Co.*, 54 Cal. 2d 339; 353 P.2d 575 (1960) (unanimous holding extending privity to include an



industrial containers,<sup>455</sup> gasoline,<sup>456</sup> saw balance wheels,<sup>457</sup> cinder blocks,<sup>458</sup> and airplanes.<sup>459</sup> Also, some cases concerned general consumer goods, such as beds,<sup>460</sup> chairs,<sup>461</sup> ladders,<sup>462</sup> automobiles,<sup>463</sup> tires,<sup>464</sup> insecticides,<sup>465</sup> herbicides,<sup>466</sup> mobile

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injured employee of the original purchaser of the defective grinding wheel; J. Traynor concurring separately).

<sup>455</sup> *Gilbride v. James Leffel & Co.*, 47 N.E. 2d 1015; 37 Ohio L. Abs. 457 (1942) (employee killed by collapsed industrial boiler; recovery allowed regardless of privity based on negligence); *Saganowich v. Hachikian*, 348 Pa. 313; 35 A.2d 343 (1944) (employee injured by defective drum liquid caustic soda; recovery allowed based on negligence; duty of care owed to those in privity and “those whom [manufacturer] should expect to be in the vicinity of its [product’s] probable use”).

<sup>456</sup> *Lenz v. Standard Oil Co.*, 88 N.H. 212, 214; 186 A. 329, 331 (1936) (using the *Restatement*, § 388 to hold gas manufacturer not liable to injured consumer because defendant lacked requisite knowledge that gas would be dangerous when used “for the purpose for which it was supplied.”).

<sup>457</sup> *Davidson v. Montgomery War & Co.*, 171 Ill. App. 355 (1<sup>st</sup> Dist., 1912) (noting exception to general rule on privity where the manufacturer fails to give notice to the consumer about an inherently dangerous product). This case was notable because it pre-dated *MacPherson* (NY, 1916) and was subsequently disapproved when the Illinois Supreme Court expressly adopted strict liability in tort for general products in *Suvada v. White Motor Co.*, 32 Ill. 2d 612; 210 N.E. 2d 182 (1965).

<sup>458</sup> *Spence v. Three River Bldrs. & Masonry Supply, Inc.*, 353 Mich. 120; 90 N.W. 2d 873 (1958) (negligence liability).

<sup>459</sup> *Hinton v. Republic Aviation Corp.*, 180 F. Supp. 31 (SDNY, 1959) (negligence and warranty claims; applying Calif. law). Although the federal district court cited the California Supreme Court’s holding in *Escola* for the proposition that warranty claims are not prohibited by a lack of privity, the Court quoted at length Justice Traynor’s concurrence, wherein Traynor argued for strict liability. *Ibid.*, 180 F. Supp. at 33.

<sup>460</sup> *Lill v. Murphy Door Bed Co.*, 390 Ill. App. 328; 8 N.E. 2d 714 (1937) (negligence liability).

<sup>461</sup> *Sheward v. Bullock’s Inc.*, 20 Cal. 2d 410; 126 P. 2d 345 (1942) (negligence liability); *Thomas v. Leary*, 15 A.D.2d 438; 225 N.Y.S.2d 137 (1962) (office furniture; implied and express warranty liability).

<sup>462</sup> *Kalash v. Los Angeles Ladder Co.*, 1 Cal. 2d 229; 34 P.2d 481 (1934) (citing *MacPherson* (NY, 1916); negligence liability). The majority agreed that this extension of the negligence doctrine was part of the “progressive development of the rules of law.” 1 Cal. 2d at 233; 34 P.2d at 482.

<sup>463</sup> *General Motors Corp. v. Dodson*, 47 Tenn. App. 438; 338 S.W. 2d 655 (1960) (warranty, negligence, and fraud liability regardless of privity).

<sup>464</sup> *B.F. Goodrich Co. v. Hammond*, 269 F. 2d 501 (10<sup>th</sup> COA, 1959) (applying Kansas law; implied warranty).

<sup>465</sup> *McQuaide v. Bridgeport Brass Co.*, 190 F. Supp. 252 (U.S. Dist. Ct. of Conn., 1960), (applying Pennsylvania law; warranty).

<sup>466</sup> *Spada v. Stauffer Chemical Co.*, 195 F. Supp. 819 (U.S. Dist. Ct. of Ore., 1961) (applying Oregon law to claim for property damage; implied warranty and negligence).

homes,<sup>467</sup> children's playground swings,<sup>468</sup> riveting machines,<sup>469</sup> and water heaters.<sup>470</sup>

The foregoing cases – many of which essentially showed how popular the *MacPherson* (NY, 1916) decision had been throughout the nation's state courts – were based upon negligence or warranty theories, not strict liability in tort. It should be noted that William Prosser considered warranty theories essentially to be strict liability in tort because he thought the historical origin of warranty in tort law had carried through into twentieth-century American law. That is, he thought courts were wrong to construe warranty claims as contract-based rather than (the more historically accurate) tort-based.<sup>471</sup> What these precursor cases demonstrate is the willingness and desire of state court judges to extend liability to manufacturers of general consumer and/or industrial goods. These cases served as groundwork for the Tort Revolution. Viewed from the standpoint of 1960, they do not add up to a tort revolution because they were sporadic and no clear majority view had developed about manufacturer liability.

Another avenue of legal reform was through the legislative process. This route was taken in only a few instances. For example, in 1957 the Georgia General Assembly enacted a “little noticed” sales statute with the following language:

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<sup>467</sup> *Beck v. Spindler*, 256 Minn. 543 (1959) (warranty and negligence considered so similar that warranty-type strict liability should apply to this and perhaps all products).

<sup>468</sup> *McBurnette v. Playground Equipment Corp.*, 137 So. 2d 563 (1962) (child was “reasonably contemplated beneficiary” of father buyer).

<sup>469</sup> *Hoffman v. Cox*, 35 Misc. 2d 103; 229 N.Y.S.2d 485 (1962) (implied warranty liability).

<sup>470</sup> *Deveny v. Rheem Mfg. Co.*, 319 F.2d 124 (1963) (applying Vt. law; negligence, *res ipsa loquitur*, and warranty).

<sup>471</sup> See *Beck v. Spindler*, 256 Minn. at 559 (quoting Prosser, *The Law of Torts*, 2d ed., § 84, p. 506).

The manufacturer of any personal property sold as new property, either directly or through wholesale or retail dealers, or any other person, shall warrant the following to the ultimate consumer, who, however, must exercise caution when purchasing to detect defects, and provided there is no express covenant of warranty and no agreement to the contrary: 1. The article sold is merchantable and reasonably suited to the use intended. 2. The manufacturer knows of no latent defects undisclosed.<sup>472</sup>

This appeared to create a right of action for consumers against manufacturers based upon an implied warranty, regardless of privity of contract. The Georgia Supreme Court held the right created was “not contractual” but was merely “a statement of a legal result of the transactions covered thereby.”<sup>473</sup> This rather odd formulation was considered by William Prosser to be an early example of statutory strict liability.<sup>474</sup> However, arguably this was merely a statutory creation of an implied warranty claim right, albeit one that provided extensive protection to the “ultimate consumer.”

In 1977, the Georgia Supreme Court expressly held that strict liability was a policy of the state legislature, not the courts. As such, only the legislature could expand the statutory right to sue under strict liability for defective products to other causes of action, such as wrongful death.<sup>475</sup> This is an example that stands in opposition to the route taken by other states regarding the creation of rights under strict liability. Instead of the courts leading the way with new declarations of common law rights, the state legislature created

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<sup>472</sup> Ga. Code Ann. § 96-307 cited in *Bookholt v. General Motors Corp.*, 215 Ga. 391; 110 S.E. 2d 642 (1959) (upholding constitutionality of the implied warranty provision); Lyman Ray Patterson, “Manufacturer’s Statutory Warranty: Tort or Contract?” *Mercer L. Rev.*, Vol. 10, No. 2 (Spring, 1959), p. 272 (“little noticed” language).

<sup>473</sup> *Ibid.* at 394; 110 S.E. 2d at 645.

<sup>474</sup> William L. Prosser, “The Assault Upon the Citadel (Strict Liability to the Consumer),” *Yale L.J.*, Vol. 69, No. 7 (June, 1960), p. 1114, no. 117.

<sup>475</sup> *Ford Motor Co. v. Carter*, 239 Ga. 657, 659; 238 S.E.2d 361, 363 (1977).

strict liability via statute.

The Georgia legislature's action shows the path that might have been taken by state governments that sought to expand consumers' rights against manufacturers via the political process. Just such a path was begun in the 1910s, when the state governments enacted workers' compensation statutes and the federal government enacted legislation covering matters under interstate commerce, especially regarding the railroads and their obligations to passengers. States also enacted such statutes.<sup>476</sup> In the 1930s, legal academics made proposals for statutory strict liability.<sup>477</sup> This should not be characterized as a historical "missed opportunity." Rather it is merely an alternative path not followed by most states over the course of the 1960s. In the 1950s and 1960s consumerism was an ongoing political concern and it is entirely conceivable that state legislatures might have followed Georgia's lead. However, their paths would have been varied and perhaps difficult for those who sought to enact such changes to the common law of sales and torts. Instead the state courts took the lead and fashioned their own solutions to the perceived problems regarding consumers' rights against manufacturers of defective products.

Let us consider a representative case from the 1950s precursors, the *Spence v. Three Rivers* case from the Michigan Supreme Court, which concerned defective cinder blocks.<sup>478</sup> In *Spence*, the Michigan court eliminated the rule requiring privity of contract. In explaining its reasoning, the Court stated that adherence to the old privity rule was

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<sup>476</sup> Rufus C. Harris, "Liability Without Fault," *Tul. L. Rev.*, Vol. 6, No. 3 (Apr., 1932), pp. 337, 338-39.

<sup>477</sup> C.C. Regier, "The Struggle for Federal Food and Drugs Legislation," *Law & Contemp. Probs.*, Vol. 1, No. 1 (Dec., 1933), p. 3-15 and see the other articles contained in this issue.

<sup>478</sup> *Spence v. Three River Bldrs. & Masonry Supply, Inc.*, 353 Mich. 120; 90 N.W. 2d 873 (1958).

“typical of the various things courts can bring themselves to do and say when they try vainly to wed the outmoded thinking and legal clichés of the past to the pressing realities of modern life.”<sup>479</sup> This is a fairly clear progressive legal statement. The Court expressly endorsed suits against manufacturers based only on negligence and/or breach of implied warranty; it did not expressly endorse strict tort liability. The Court gave “a fervent amen” to what it saw as the long-overdue death of the privity requirement. The majority endorsed Justice Cardozo’s “historic decision” in *MacPherson*. Writing in 1963, William Prosser considered *Spence* as *the* turning point in extending strict liability beyond products for intimate bodily use.<sup>480</sup>

However, if *Spence* was such an important turning point, it was not recognized as such by many commentators or courts. One wonders why *Spence*, rather than the later case of *Henningsen* (reviewed immediately below), was not considered the leading case on pursuing a remote manufacturer under a breach of warranty theory regardless of privity of contract. As we shall see below, *Henningsen* became a lodestar case (at least until *Greenman* (1963)) because it provided a lengthy, explicit rationale for eliminating the privity rule and extending implied warranties to the ultimate consumer. *Spence* endorsed a similar rationale but it never caught on among academic commentators or judges in other states, even though they often cited it alongside *Henningsen*. The failure of *Spence* to receive the same notoriety as *Henningsen* did two years later is likely due to the *Spence* opinion’s lack of impassioned eloquence regarding modern commercial conditions. It did

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<sup>479</sup> 353 Mich. at 129; 90 N.W. 2d at 878.

<sup>480</sup> Folder 69-10, ALI/Second/Torts/Drafting/[Council Draft] CD No. 16, 1963 Nov. 1, p. 4 Cmt. b, 2d para., in the Second Restatement of the Law Records, American Law Institute Archives, ALI.04.002, Biddle Law Library, University of Pennsylvania Law School, Philadelphia, PA.

not provide a rationale that commentators and supporters of strict liability could rally around. Simply put, *Henningsen* had more of a political punch.

**The Tort Revolution Begins in the East: *Henningsen v. Bloomfield Motors, Inc.* (1960)**

Under the common law of the nineteenth century, sellers of goods were responsible for the statements they made about goods. Such statements were considered promises, or warranties, for which the seller could be sued under a contract-based theory of breach of warranty should the goods fail to conform to the seller's promises. Such statements were express warranties. However, there was also an implied warranty, a warranty that the law imposed upon the transaction regardless of the failure of the seller to mention it. The "implied warranty of title" was the only implied warranty under nineteenth-century common law. Yet, in the twentieth century a law reform movement occurred among state legislatures to transform, "modernize," and make uniform among the states the law of contracts. Part of this reform movement included the widespread adoption of the Uniform Sales Act. A "uniform" model act is a proposed act that is intended for adoption by individual states. It is uniquely adaptable to the American federal system, since it allows individual states to make their own judgments and refinements to the proposed law, even while seeking to make the area of law covered by the act more uniform throughout the nation.

The Uniform Sales Act was a Progressive-era model law reform effort originally promulgated by the National Conference of Commissioners on Uniform State Laws in 1906.<sup>481</sup> The Act was part of a second wave of attempts to codify areas of American law

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<sup>481</sup> Kevin M. Teeven, "A History of Legislative Reform of the Common Law of Contract," *U. Tol. L. Rev.*, Vol. 26, No. 1 (Fall, 1994), pp. 71-72.

and was chiefly the product of Progressive legal academics.<sup>482</sup> (The first wave occurred in the nineteenth century but was largely unsuccessful.)<sup>483</sup> One provision of the Act was to create implied warranties that did not exist at common law. The Act created an “implied warranty of fitness for a particular purpose” (which meant the goods would conform to a particular purpose of the buyer which was known or should have been known to the seller) and a “warranty of merchantable quality” (which meant the goods conformed to what the seller claimed to be selling).<sup>484</sup>

Those who supported these new warranties used arguments rooted in the progressive understanding of the twentieth-century American economy. For example, William Prosser argued in support of such warranties: “[G]oods have become more highly specialized, marketing processes more complex, and buyers more helpless to form any intelligent estimate of the character of the goods on the basis of their own examination or tests.”<sup>485</sup> A professor at the University of Arkansas, writing in 1946 upon the occasion of the state’s consideration of the proposed Sales Act, contended:

The law should conform to a higher standard of dealing today than in former days when the retailer was usually the small corner storekeeper, who knew no more about his wares than his neighbor. Under modern commercial transactions,

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<sup>482</sup> N.E.H. Hull, “Restatement and Reform: A New Perspective on the Origins of the American Law Institute,” *Law & Hist. Rev.*, Vol. 8, No. 1 (Spring, 1990), p. 55.

<sup>483</sup> Gunther A. Weiss, “The Enchantment of Codification in the Common-Law World,” *Yale J. Int. L.*, Vol. 25, No. 2 (Summer, 2000), p. 435.

<sup>484</sup> Uniform Sales Act, § 15(1) & (2).

<sup>485</sup> William L. Prosser, “The Implied Warranty of Merchantable Quality,” *Minn. L. Rev.*, Vol. 27, No. 2 (Jan., 1943), p. 156.

the imposition of liability without fault on the part of the retailer seems justified.<sup>486</sup>

Notwithstanding these new implied warranties and the progressive arguments in support of them, the original proposed Uniform Sales Act did not eliminate the common law requirement of privity of contract between the buyer and the seller in order for a buyer to recover for breach of warranty. However, in 1944 a proposed revision to the Uniform Act, drafted by the American Law Institute and the National Conference of Commissioners on Uniform State Laws, extended the implied warranties to “any natural person whose relationship to the buyer is such as to make it reasonable to expect that such person may use, consume or be affected by the goods.”<sup>487</sup> The Act’s drafters, among them William Prosser, desired to extend the liability of manufacturers beyond the common law contractual boundaries. This was the incorporation of tort rhetoric and concepts into contract law.

By the mid-1950s, the states leaning toward altering the law of warranty – regardless of any provisions of the Uniform Sales Act – were broadening the law by way of abrogating the rule of privity in cases of foodstuffs and (in fewer cases) products applied to the body, such as skincare creams. Only a very few states allowed recovery against manufacturers, without benefit of privity of contract, for goods other than foodstuffs and personal creams.<sup>488</sup> Cornelius Gillam, an academic writing in 1959,

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<sup>486</sup> Frederick W. Whiteside, Jr., “Effect of the Adoption of the Uniform Sales Act Upon Arkansas Law,” *Ark. L. Rev.*, Vol. 1, No. 2 (Spring, 1947), p. 132.

<sup>487</sup> Uniform Revised Sales Act, Proposed Final Draft No. 1, § 43 (ALI, 1944), quoted in Whiteside, p. 135.

<sup>488</sup> Wallace E. Sedgwick, “Report of the Casualty Committee – 1955 – Part II: Liability of a Manufacturer of Chattels to Persons Other Than Immediate Purchasers, on the Theory of Warranty,” *Ins. Counsel J.*, Vol. 22, No. 4 (Oct., 1955), pp. 431-38.



argued that the abrogation of the privity rule should be applied to automobiles. He argued that an auto manufacturer “really is in economically meaningful privity of contract with automobile consumers.”<sup>489</sup> This argument was given legitimacy among judges and academics in a New Jersey case in 1960.

The first battle in the Tort Revolution was waged in the New Jersey Supreme Court.<sup>490</sup> As late as 1952, New Jersey adhered to the common law rule that privity of contract was required in order to recover against a party for breach of warranty.<sup>491</sup>

However, eight years later in *Henningsen v. Bloomfield Motors, Inc.*,<sup>492</sup> the New Jersey Supreme Court made an impassioned political argument for broadening manufacturer liability under a breach of warranty theory.

In 1955, Claus Henningsen bought a new Plymouth Plaza “6” Club Sedan for his wife, Helen, as a Mother’s Day gift. Ten days later, Mrs. Henningsen was driving the car when it veered sharply to the right and collided into a wall, destroying much of the front of the car. An expert hired by the Henningsens gave the opinion that the car’s steering

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<sup>489</sup> Cornelius W. Gillam, *Products Liability in the Automobile Industry: A Study in Strict Liability and Social Control* (Minneapolis: Univ. of Minn. Pr., 1960), pp. 6-9. Gillam’s progressive roots were evident in his acknowledgement that he “owe[d] a heavy debt to the theories of Holmes, Dicey, Pound, Cardozo, Walter Wheeler Cook, and the legal realists.” *Ibid.*, p. vii.

<sup>490</sup> As previously noted, prior to the 1960s many states had extended strict liability beyond ultra-hazardous activities to food products. However, there were additional extensions in the 1930s to products such as dog food, soap, detergent, grinding wheels, crop-dusting chemicals that could migrate via air. With the exception of crop-dusting, these were not ultra-hazardous products or activities. However, none of these was deemed by scholars then or since to indicate a trend toward expanded liability. Prosser, *Handbook*, 2d ed., p. 510 (citations omitted).

<sup>491</sup> *Duncan v. Juman*, 96 Atl. 2d 415, 25 N.J. Super. 330 (1952) (holding privity required even in a suit regarding defective foodstuffs).

<sup>492</sup> 32 N.J. 358, 161 A.2d 69 (1960).

mechanism was defective. The Henningsens sued both the dealer and the manufacturer, Chrysler Corporation.

A unanimous New Jersey Supreme Court, in an opinion authored by associate Justice John J. Francis, used progressive language in justifying its decision. In announcing the rule of law to be applied in the case, the majority relied upon its contention that “modern marketing conditions” justified the extension of an implied warranty to the “ultimate purchaser,” and any family members or other authorized users of the goods, regardless of contractual privity. Additionally, the court was motivated by what it termed the “gross inequality of bargaining position occupied by the consumer in the automobile industry.” Even more to the point, the court saw its function as “administer[ing] the spirit as well as the letter of the law. On issues such as the present one, part of that burden is to protect the ordinary man against the loss of important rights through what, in effect, is the unilateral act of the manufacturer.”<sup>493</sup> The Court concluded that Chrysler had grossly disproportionate bargaining power,” which prevented the Henningsens from exercising any “real freedom of choice.”<sup>494</sup>

Thus, the Henningsens won their case against Chrysler and others like them were able to recover against manufacturers of general consumer goods based on a breach of an implied warranty of merchantability, which ran from the manufacturer to the ultimate consumer and *anyone else who would be likely to be injured* by a defective product. As

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<sup>493</sup> 32 N.J. at 403, 161 A.2d at 73.

<sup>494</sup> 32 N.J. at 404, 161 A.2d at 75-76.

the Court stated, “We see no rational distinction between a fly in a bottle of beverage and a defective automobile.”<sup>495</sup>

This was arguably a unilateral creation of rights by the New Jersey Supreme Court, done because the letter of the law did not do it for the Court. Nevertheless, the court’s concerns were unique to the times: the court wanted to benefit the consumer over the producer because it was convinced the nature of modern industrial society unjustifiably disadvantaged the consumer. The majority’s awareness of the letter of the law and the Court’s desire to avoid adherence to the state’s Sales Act are demonstrated in the following passage from *Henningsen*:

In the area of [the] sale of goods, the legislative will has imposed an implied warranty of merchantability as a general incident of sale of an automobile by description. . . . the judicial process has recognized the right to recover damages for personal injuries arising from a breach of that warranty. The disclaimer of the implied warranty and exclusion of all obligations except those specifically assumed by the express warranty signify a studied effort to frustrate that protection. True, the Sales Act authorizes agreements between buyer and seller qualifying the warranty obligations. But quite obviously the Legislature contemplated lawful stipulations . . . arrived at freely by parties of relatively equal bargaining strength. The lawmakers did not authorize the automobile manufacturer to use its grossly disproportionate bargaining power to relieve itself from liability and to impose on the ordinary buyer, who in effect has no real freedom of choice . . . .<sup>496</sup>

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<sup>495</sup> 32 N.J. at 383; 161 A.2d at 83.

<sup>496</sup> 32 N.J. at 404, 161 A.2d at 75-76.

The Court sought to protect its prerogatives, as the justices understood them, as the institution that decided tort issues, notwithstanding the legislature's power to enact law not only regarding contracts and warranties but also torts.

This was an important turning point in the move to strict liability. As noted above, *Henningsen* was not the first case to eliminate the privity requirement in implied warranty cases. States' courts had allowed exceptions to the privity rule in cases of foods and drinks<sup>497</sup> and drugs<sup>498</sup> and other kinds of goods, even automobiles. The factors that made *Henningsen* a turning point were the Court's forceful argument, its unanimity, and its defense of itself as an independent policymaking institution vis-à-vis the state legislature.

Only a little is known about the personal and political background of the opinion's author, John Joseph Francis. He was born in 1903 and identified as a Democrat in 1944 when he ran unsuccessfully for Congress for the 11<sup>th</sup> District of New Jersey. From 1948 until 1972, Francis was a judge, first serving as a county judge in New Jersey, then a superior court judge, and, from 1957 until 1972, as an associate justice of the state supreme court.<sup>499</sup> Francis obtained his first law degree, a LL.B. (Bachelors of Law), in 1925 from Rutgers University. He later earned an LL.M. (Masters of Law) in 1947 from

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<sup>497</sup> See e.g., *Ketterer v. Armour & Co.*, 200 F. 322 (S.D.N.Y. 1912) (pork manufacturer); *Parks v. C.C. Yost Pie Co.*, 93 Kan. 334, 144 P. 202 (1914) (pie); *Davis v. Van Camp Packing Co.*, 189 Iowa 775, 176 N.W. 382 (1920) (canned pork and beans); *Coca Cola Bottling Works of Greenwood v. Simpson*, 158 Miss. 390, 130 So. 479 (1930) (soda); *Jacob E. Decker & Sons, Inc. v. Capps*, 139 Tex. 609, 164 S.W.2d 828 (1942) (sausage).

<sup>498</sup> *Thomas v. Winchester*, 6 N.Y. 397 (1852) (belladonna extract); *Cody v. Toller Drug Co.*, 232 Iowa 475, 5 N.W.2d 824 (1942) (prescription drug).

<sup>499</sup> Lawrence Kestenbaum, The Political Graveyard website, John Joseph Francis (1903-1984), <http://politicalgraveyard.com/bio/francis.html>, (last revised Mar. 24, 2009).

New York University and an LL.D. (Doctors of Law) in 1959 from Rutgers.<sup>500</sup> Like Roger Traynor, Justice Francis's legal education occurred at a time when legal realism and sociological jurisprudence were predominant in many law schools. The Rutgers Law School at Newark in the 1920s was known as a school for the children of immigrants and by 1926, the year after Francis's graduation, it was the second largest law school in the nation.<sup>501</sup> During Francis's education at Rutgers, one only had to have a high school diploma to matriculate.<sup>502</sup> The curriculum was a three-year curriculum, which was becoming a standard of American law schools that wanted to recruit better students and adhere to trends in the professionalism of legal education.<sup>503</sup>

Judge Francis and other members of the New Jersey Court also voiced their enthusiasm for progressive policy-making by the courts. Francis voiced admiration for the abrogation of common law doctrines "inconsistent with the needs of modern society," even if that meant not "waiting for legislative action."<sup>504</sup> Similarly, in 1969 Chief Justice Joseph Weintraub proclaimed, "We are in an era of unprecedented demand upon the judicial branch of government. . . . The little man has been overwhelmed by bigness in many places. Legal doctrines that assumed he could bargain equally have lost their

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<sup>500</sup> John J. Francis, "Joseph Weintraub – A Judge for All Seasons," *Cornell L. Rev.*, Vol. 59, No. 2 (Jan., 1974), p. 186 (biographical footnote regarding author).

<sup>501</sup> "History of Rutgers School of Law – Newark," at the Rutgers school website, <http://law.newark.rutgers.edu/about-school/history-rutgers-school-law-newark> (2009).

<sup>502</sup> Harold S. Wechsler, *Brewing Bachelors: The History of the University of Newark*, p. 4, available at the Inventory to the Records of the New Jersey Law School, 1908-1950, under References, available online at <http://www.newark.rutgers.edu/history/history-wechsler.pdf>.

<sup>503</sup> *Ibid.*, p. 4; Note: Washington Conference on Legal Education, *Am. L. Sch. Rev.*, Vol. 4, No. 14 (May, 1922), p. 834; Barry B. Boyer and Roger C. Cramton, "American Legal Education: An Agenda for Research and Reform," *Cornell L. Rev.*, Vol. 59, No. 2 (Jan., 1974), p. 221, 224 n. 11.

<sup>504</sup> John J. Francis, "Chief Justice Joseph Weintraub: A Tribute," *Rutgers L. Rev.*, Vol. 30, No. 3 (1976-77), p. 479, 481.

footing.” Modern society presented the “little man” with risk “he cannot avoid and is unable to absorb. Hence rules [of law] which were just in another setting became the instruments of overreaching and oppression.” Chief Justice Weintraub thought his colleague, Justice Francis, had “sensitivity to the needs of the average man and a determination that the law shall not be turned against him.”<sup>505</sup> Another colleague on the Court, Associate Justice Haydn Proctor, admired Judge Francis’s “keen sense of right and wrong which goes beyond the mechanical application of cold legal principles and injects a sense of humanness into the resolution of our cases.”<sup>506</sup>

In 1969, in a fawning tribute from the head of the plaintiff-oriented editor-in-chief of the American Trial Lawyers Association, Thomas F. Lambert, Jr., proclaimed that saying that Justice Francis was scholar regarding products liability was “like saying Cellini was clever with his hands or that Ted Williams had a way with a bat.” *Henningsen*, asserted Lambert, was “the spark that ignited the white flame of progress” in products liability law’s wide-scale adoption of strict liability.<sup>507</sup>

*Henningsen* is an example of the Progressive mentality in the civil justice system in the latter half of the twentieth century. Progressive thought is key to the understanding of the cases that altered the tort laws in New Jersey and the subsequent states that adopted the *Henningsen* rule on privity in warranty cases and, as will be seen below, the rule

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<sup>505</sup> Joseph Weintraub, “Justice John J. Francis Symposium,” Introduction, *Rutgers L. Rev.*, Vol. 24, No. 3 (Spring, 1970), p. 423.

<sup>506</sup> Haydn Proctor, “Justice Francis – As Seen By A Colleague,” *Rutgers L. Rev.*, Vol. 24, No. 3 (Spring, 1970), p. 424, 425.

<sup>507</sup> Thomas F. Lambert, Jr., “Justice Francis and Products Liability Law,” *Rutgers L. Rev.*, Vol. 24, No. 3 (Spring, 1970), pp. 426, 428.

regarding strict tort liability. The *Henningsen* Court's willingness to sidestep the express intent of the state's legislature is reminiscent of Stephen Skowronek's description of the late nineteenth century as a period of rule by courts and parties.<sup>508</sup> So too was the mid- to late-twentieth century a period of rule by courts. In this instance, the New Jersey Supreme Court thwarted a legislative position and retained its own preeminence in the crafting of legal public policy.

After *Henningsen*, other states rapidly began to adopt the rule that a lack of privity would not prohibit a plaintiff from suing the original manufacturer under an implied warranty theory. The warranty was implied by law and it effectively amounted to a strict liability for manufacturers. The *Henningsen* case inspired other states' courts to openly move toward allowing warranty claims regardless of privity. It was no accident that as the judges opened up new avenues of recovery, plaintiffs' attorneys followed suit. For example, it was in 1960-61 that the president of the Association of Trial Lawyers of America, Alfred Julien, established the Products Liability Exchange in Cambridge, Massachusetts.<sup>509</sup> This was a warehouse information exchange for plaintiffs' attorneys to obtain information on defective products, or allegedly defective products to aid in their consideration of suits or in the litigation stage after suit had been filed. *Henningsen* was significant, but it was soon accompanied in importance by an equally radical case from an equally innovative California Supreme Court.<sup>510</sup>

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<sup>508</sup> Stephen Skowronek, *Building A New American State: The Expansion of National Administrative Capacities, 1877-1920* (Cambridge, UK: Cambridge Univ. Press, 1982, 1990 ed.), pp. 26-29.

<sup>509</sup> Jonathan Evan Maslow, "Products Liability Comes of Age," *Juris Doctor* (Feb., 1975), p. 26, Box 25, File 7, The Roger J. Traynor Collection, U.C. Hastings College of the Law, Traynor Center/Special Collections.

<sup>510</sup> It is worth noting that Justice Francis led his court in extending the scope of strict liability even beyond what Roger Traynor and the California Supreme Court were willing to do. In *Santor v. A & M*

## **The American Law Institute and the *Restatement (Second) of Torts***

In 1962, the American Law Institute's (ALI) *Restatement (Second) of Torts* was being developed by its torts Advisory Committee. As noted above in Chapter Two, the changes in the case law of torts through the 1930s and 1940s were deemed substantial enough by the early to mid-1950s to warrant a second restatement. The drafting process had begun in 1955 and was led by one of the foremost torts scholars in America, William L. Prosser.

The project's advisory group of scholars included leading academics and judges of the day, several of whom were then on record as supporting strict liability in products cases.<sup>511</sup> These included academics Page Keeton, dean of the University of Texas Law School, and Fleming James, Jr., a professor at Yale Law School, both of whom had supported strict liability.<sup>512</sup> James was a particularly vociferous advocate of risk spreading through mechanisms like strict liability, or "absolute liability" as it was often then known.

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*Karaghuesian, Inc.*, 44 N.J. 52; 207 A.2d 305 (1965), the Court held that a consumer could sue a manufacturer in strict liability for loss of value for a defective product. Four months later, the California Supreme Court refused to extend the doctrine of strict liability to cover such situations. In an opinion authored by Justice Traynor for a 6-1 majority, the Court held that economic losses, without physical injury to persons or physical damage to property, could not be recovered under a strict liability theory. *Seely v. White Motor Co.*, 63 Cal. 2d 9, 17-18, 403 P.2d 145, 151-52 (1965).

<sup>511</sup> Box 2812, Item 1, Folder 67-1, ALI/Second/Torts/Meetings, 1955 Sept. 15-17, in the Second Restatement of the Law Records, American Law Institute Archives, ALI.04.002, Biddle Law Library, University of Pennsylvania Law School, Philadelphia, PA.

<sup>512</sup> W. Page Keeton and H. Henry Foster, Jr., "Liability Without Fault in Oklahoma," *Okla. L. Rev.*, Vol. 3, No. 2 (May, 1950), p. 173, 179; Fleming James, Jr., "Accident Liability Reconsidered: The Impact of Liability Insurance," *Yale L. J.*, Vol. 57, No. 4 (Feb., 1948), p. 549; James, "Some Reflections on the Bases of Strict Liability," *La. L. Rev.*, Vol. 18, No. 2 (1957-1958), p. 293.



The judicial members of the torts Advisory Committee included Herbert Goodrich, an early supporter of the ALI's reformist goals.<sup>513</sup> Goodrich, born in 1889, was a progressive legal reform advocate. After graduating from Harvard Law School in 1914, he had a career as a law professor and dean before President Roosevelt appointed him in 1940 to the Third Circuit Court of Appeals, where he remained until his death in 1962. Goodrich was also the Director of the ALI and carried on its early progressive tradition of seeking reform in the law. Goodrich candidly conceded that the *Restatement's* provisions were crafted by the Advisory Committee in a very subjective manner: In "cases of a division of opinion choices had to be made and naturally we chose the one we thought was right."<sup>514</sup>

Another member of the Advisory Committee was Roger Traynor. As noted above, Judge Traynor was a progressive and had advocated for strict liability for general products since his concurrence in the California case of *Escola* in 1944. By 1963, Traynor merited such respect among legal academics, lawyers, and judges that he was nominated and, later that year, confirmed to be an officer of the ALI Council, which was essentially the board of directors.<sup>515</sup>

The Advisory Committee initially met to begin debating the second *Restatement* in September 1955. As per the usual drafting procedure, the reporter, in this case Prosser,

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<sup>513</sup> Herbert F. Goodrich, "The Work of the American Law Institute," *Annals of the American Academy of Political and Social Science*, Vol. 136, Progress in the Law (Mar., 1928), p. 10.

<sup>514</sup> Herbert F. Goodrich, *Report of the Director*, 25 A.L.I. Proc., 18, 18 (1948) cited in John W. Wade, "The Restatement (Second): A Tribute to Its Increasingly Advantageous Quality, and an Encouragement to Continue the Trend," *Pepp. L. Rev.*, Vol. 13, No. 1 (1985), p. 59, 65 n. 11.

<sup>515</sup> ALI, The 119<sup>th</sup> Meeting of the Council (May 21, 1963), p. 5; ALI, The 120<sup>th</sup> Meeting of the Council (Dec. 12-14, 1963), p. 2 in Council Meeting Minutes (1923-1990), Biddle Law Library, University of Pennsylvania Law School, Philadelphia, PA, available online at <http://www.law.upenn.edu/bll/archives/ali/minutes/8019-11.pdf>.

made an initial draft, with his own annotations, which was then submitted for the Committee's review and comments.<sup>516</sup> Prosser continued the very subjective, idiosyncratic style of annotation established by the first *Restatement's* drafters in the 1920s. For example, Prosser would often note his personal opinion on whether a court had decided a case "correctly." For instance, his review of cases regarding "Failure to Perform a Promise to Render Service" was peppered with his disagreements with the holdings of different state courts. He would usually say, "I think this case is wrong, because ...".<sup>517</sup>

The early drafts of the provision covering strict products liability were correlated to the status of the law prior to *Greenman*. In 1961 and 1962, for example, when Prosser and his scholarly Advisory Committee made tentative drafts, the initial draft of what became the famous § 402A of the *Restatement* was originally entitled "Special Liability of Sellers of *Products for Intimate Bodily Use*" (emphasis added).<sup>518</sup> Thus, the original draft of 1962 only concerned the cases that dealt with products like drugs, cosmetics, creams, and lotions (in addition to the long-standing foodstuffs) but did not expressly envision applying strict liability to *all general* defective products. In addition to liability

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<sup>516</sup> Letters from Paul A. Wolkin, Asst. Dir. of ALI, to members of Torts Advisory Group, July 18, 1955 in Box 2812, Item 1, Folder 67-1, ALI/Second/Torts/Meetings, 1955 Sept. 15-17, in the Second Restatement of the Law Records, American Law Institute Archives, ALI.04.002, Biddle Law Library, University of Pennsylvania Law School, Philadelphia, PA.

<sup>517</sup> Restatement of the Law, Second, Torts: Preliminary Draft No. 3 §§ 215-280, on Trespass to Chattels and Conversion (May 4, 1956) p. 163, regarding *Jacobs, Malcom & Burt v. Northern Pacific R. Co.*, 71 Cal. App. 42, 238 p. 328 (1925)) in Box 2812, Item 1, Folder 67-11, ALI/Second/Torts/ Drafting/PD [Preliminary Draft] No. 2, 1956 Oct. 8, in the Second Restatement of the Law Records, American Law Institute Archives, ALI.04.002, Biddle Law Library, University of Pennsylvania Law School, Philadelphia, PA.

<sup>518</sup> Folder 68-25, ALI/Second/Torts/Drafting/CD [Council Draft] No. 11, 1962 March 1, p. 1, in the Second Restatement of the Law Records, American Law Institute Archives, ALI.04.002, Biddle Law Library, University of Pennsylvania Law School, Philadelphia, PA.

for the manufacture, sale, and distribution of a defective product “intended for intimate bodily use,” the definition of “defective” was extended to include a failure to warn of the dangers posed by a “particular use” of an otherwise non-defective product – such as overuse of a non-defective drug.<sup>519</sup> Also, the “consumer” was not just the person who bought the product, but also included “a member of the family of the purchaser, or his employee, or a guest at his table, or a mere donee from the purchaser.” Since this was a tort-based theory, the liability was not limited by contractual relationships.<sup>520</sup>

The Advisory Committee added a comment noting that the law of products liability was rapidly changing:

In very recent years, ... several courts have extended [strict liability] to other products, such as grinding wheels, building blocks, electric cables, automobiles and their tires, insecticides, or even airplanes. It is possible that the law in this field is undergoing a rapid process of change which may expand the rule here stated to cover a large number of such other products. If so, the limits of such expansion cannot at the present time be stated, where no court ever has attempted to do so. In the absence of a sufficient number of decisions, and of any guide for the statement of a rule, the question of expansion of this Section, and of its limits, is left entirely open ... Nothing that is said here is intended to indicate either approval or disapproval of the application of [strict liability] to any product not intended for intimate bodily use.<sup>521</sup>

Additionally, the Committee noted that potential parties of “non-consumers” – those who are “casual bystanders” – were not covered by the strict liability rule because courts had not allowed any recoveries by such plaintiffs. However, the Committee noted, “[t]here

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<sup>519</sup> Ibid., Comment *h*, p. 6.

<sup>520</sup> Ibid., Comment *l*, p. 8.

<sup>521</sup> Ibid., Comment *n*, pp. 9-10.

may be no reason why such plaintiffs should not be brought within the scope of” strict liability.<sup>522</sup> Importantly, the Committee noted that – as of the time of March 1962 – “most courts” in the United States had rejected the extension of strict liability to general products. The few exceptions have been discussed above.<sup>523</sup>

In his note to his fellow Advisory Committee members, Prosser, in his typically dispassionate manner, noted the “numerous letters” he had received “protesting” the proposed § 402A. (It is important to remember that these objections were made against the proposed rule applying to products for intimate bodily use and *before* Prosser’s far more expansive proposal of applying strict liability generally, to *all* defective products.) Some critics accused Prosser of perpetrating “an outrage, and an attempt to adopt a theory of state socialism and compulsory liability insurance, which is not only un-American, but if it is to be adopted is for the legislatures and not the courts.” Others objected that the extension of strict liability to things such as drugs was based on the thin reed of a single case, rather than a body of cases from different jurisdictions. Prosser conceded the extension to drugs was based on a single case, but argued (using his usual dry wit) that such an inclusion was proper analogical reasoning and: “There may be no case on canned asparagus, but this does not mean that it is not to be included with other food products.”<sup>524</sup> Although funny, Prosser did not effectively elide the writer’s objection. The lack of a specific case on asparagus was unimportant not because it was presumed to be included by analogy, but because there was a substantial body of case law

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<sup>522</sup> Ibid., Comment *p*, p. 10.

<sup>523</sup> Ibid., Caveat, pp. 16-17.

<sup>524</sup> Folder 68-25, ALI/Second/Torts/Drafting/CD [Council Draft] No. 11, 1962 March 1, p. 1, in the Second Restatement of the Law Records, American Law Institute Archives, ALI.04.002, Biddle Law Library, University of Pennsylvania Law School, Philadelphia, PA.

from many jurisdictions that applied strict liability to foodstuffs. As of 1962, there was only a single case applying strict tort liability to drugs.<sup>525</sup>

Prosser also directly debated the propriety of strict liability. One writer objected, contending “strict liability is undesirable, because if a seller is liable for negligence he will be under an incentive to use due care.” Prosser tersely responded, “The argument that [the seller] will use less care if he is held to strict liability is one that escapes me.”<sup>526</sup> Thus, Prosser implicitly believed in strict liability’s power to create incentives for greater standards of care in product manufacturing. However, in rejecting the argument that strict liability would create a disincentive to innovate, Prosser played down the expansiveness of the doctrine. He wrote that strict liability, in comparison to the then-existing negligence liability, was only a “relatively slight increase in responsibility” for manufacturers.<sup>527</sup> One wonders whether Prosser was merely using debating tactics. If he really believed strict liability provided a marginal expansion of manufacturer liability, then why push the envelope and endorse such a controversial doctrine? Based on Prosser’s response, negligence liability, which existed in most of the nation’s jurisdiction, provided sufficient protection to consumers and incentives for manufacturers to exercise due care. Obviously, Prosser did not believe this; rather he knew strict liability was controversial because it made manufacturers insurers of their goods, without regard to

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<sup>525</sup> *Gottsdanker v. Cutter Laboratories*, 182 Cal. App. 2d 602; 6 Cal. Rptr. 320 (Cal. App. 1<sup>st</sup> Dist., 1960) (polio vaccine), which was cited by the letter writer and included by Prosser in CD No. 11, 1962 March 1, at p. 1.

<sup>526</sup> Folder 68-25, ALI/Second/Torts/Drafting/CD [Council Draft] No. 11, 1962 March 1, p. 2, in the Second Restatement of the Law Records, American Law Institute Archives, ALI.04.002, Biddle Law Library, University of Pennsylvania Law School, Philadelphia, PA.

<sup>527</sup> *Ibid.*

fault. This was no marginal expansion, but a dramatic increase in manufacturers' liability.

### **The Tort Revolution Advances in the West:**

#### ***Greenman v. Yuba Power Products (1963)***

The most influential case in the history of product liability law was decided by the California Supreme Court in 1963 under the leadership of Justice Roger Traynor:

*Greenman v. Yuba Power Products, Inc.*<sup>528</sup> In addition to changing the law from a negligence standard to a strict liability standard, *Greenman* also represents the state courts as policy-making institutions, which not only compete with their respective state legislatures but also challenge them.

In 1955, William Greenman's wife gave him a new Shopsmith-brand combination power tool for Christmas. The manufacturer of the tool was Yuba Power Products, Inc. The tool "could be used as a saw, drill, and wood lathe." Almost two years later, Greenman bought some attachments so the device could be used as a lathe to form a large piece of wood into a chalice. After working with the piece of wood in the machine several times without incident, the wood was suddenly ejected from the machine and hit Greenman on the forehead causing "serious injuries." (Justice Traynor later said that the problem with the machine was its lack of a safety device to prevent "the object from flying off.")<sup>529</sup>

Greenman sued both the retailer and the manufacturer, Yuba Power Products,

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<sup>528</sup> 59 Cal.2d 57, 27 Cal.Rptr. 697, 377 P.2d 897 (1963).

<sup>529</sup> Roger J. Traynor, Speech to the Virginia Trial Lawyers Association, p. 3, Box 8, File 24 (April, 1970), The Roger J. Traynor Collection, U.C. Hastings College of the Law, Traynor Center/Special Collections.

alleging claims for breach of express and implied warranties, which sounded in contract, and for negligence, which sounded in tort. At trial, Greenman had expert witnesses testify that the screws used in the machine were unable to hold the machine together, thereby allowing the wood to separate from the tool and fly out of it, and that Yuba could have designed and constructed the lathe function differently so that such an accident would not have happened.<sup>530</sup>

The trial court submitted to the jury the issues of whether the retailer had breached any implied warranties and whether Yuba, the manufacturer, had breached any express warranties and was negligent. The jury's verdict found that the retailer was not guilty of any wrongdoing; yet, Yuba was found guilty – although the verdict did not specify whether it was based on both the warranty and negligence claims, or just one of the claims – and Greenman was awarded \$65,000, which was a considerable sum in 1962.

On appeal to the intermediate appellate court, the District Court of Appeal, the court held in favor of Greenman, citing *Henningsen* and holding that Greenman was not required to give notice to the manufacturer of his warranty claim.<sup>531</sup> The Court of Appeal treated the case as an implied warranty matter.

On appeal to the California Supreme Court, the manufacturer only argued about the purported errors regarding whether statutory notice of a warranty claim was required of the plaintiff. Yuba argued that statutory notice of a warranty claim was required; otherwise it would be subject to the “strict liability” of a warranty claim. That is, notice

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<sup>530</sup> Ibid. at 59-60, 377 P.2d at 898-99, 27 Cal.Rptr. at 698-99.

<sup>531</sup> Opinion, District Court of Appeal – Fourth District, pp. 26-27, 30, filed July 5, 1962 (citing *Henningsen v. Bloomfield Motors, Inc.*, among other authorities), included as part of Appendix of Yuba's Petition for Hearing, filed on Aug. 13, 1962, by Yuba Power Products, Inc., in the Supreme Court of the State of California, in California State Archives, Sacramento, California.

of warranty claims was required because “early warning” was thought appropriate for a defendant facing the “strict liability” of a warranty claim.<sup>532</sup> Yet, Yuba was not concerned with strict liability in tort and, therefore, it did not attempt to anticipate any arguments regarding strict liability, either based on prior cases (namely Traynor’s prior opinions) or public policy rationales.

Similarly, Greenman, the plaintiff, only argued the issue of whether the case involved a “sale” requiring statutory notice of a warranty claim. The plaintiff argued it was not such a case and no notice was required. Strict tort liability was not addressed. The plaintiff even cited William Prosser’s well-known article on strict liability, but only to the effect that Prosser had given support to the idea that requiring notice of an injured plaintiff in a warranty case was “a booby trap for the unwary plaintiff.”<sup>533</sup> This was merely an example of a common effort to enlist Prosser, a nationally recognized authority on torts, to sway the appellate court’s opinion on whether notice was needed in such a case. The plaintiff argued that Prosser supported the idea of a “public policy” requiring a negligence-based remedy, rather than a remedy based on contract in a remote manufacturer case. Greenman addressed “strict liability,” but only in the context of warranty, not tort.<sup>534</sup> The plaintiff was not seeking the creation of a new legal rule in this case. This demonstrates how the Tort Revolution was neither the product of an organized

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<sup>532</sup> Petition for Hearing, filed on Aug. 13, 1962, by Yuba Power Products, Inc., in the Supreme Court of the State of California, p. 11 (quoting *American Mfg. Co. v. United States Shipping Board, E.F. Corp.*, 7 F.2d 565, 566 (2d COA, 1925)), in California State Archives, Sacramento, California.

<sup>533</sup> Respondent’s Answer to Appellant’s Petition for a Hearing by the Supreme Court, filed by Greenman on Aug. 21, 1962, in the Supreme Court of the State of California, 4 Civ. No. 6574, L.A. 26976, p. 3, in California State Archives, Sacramento, California (quoting from Prosser, “The Assault Upon the Citadel (Strict Liability to the Consumer),” *Yale L. J.*, Vol. 69, No. 7 (June, 1960), pp. 1099, 1130).

<sup>534</sup> *Ibid.*, pp. 6-8. Greenman also argued simple negligence. *Ibid.*, pp. 10-18.



consumers' movement, nor the result of a plaintiffs' tort bar. It was the result of judges who sought new common law rules governing product defects.

Also, there was no industry-sponsored defense of Yuba. There was only one *amicus curae* brief filed: the Plastic Process Company, which faced a similar case, filed an *amicus* brief in support of Yuba. The *amicus* brief argued only in regards to the issue of whether notice was statutorily required in a breach of warranty case.<sup>535</sup> (The plastic company eventually lost its case and the appellate court held, citing *Greenman*, that even in a case without personal injuries, notice was not required.)<sup>536</sup> The absence of other *amici* briefs shows both the insurance industry and the general manufacturing industry failed to foresee the possibility that this case might present a threat to the prevailing law in California.

A unanimous California Supreme Court, in an opinion under Justice Traynor's name, decided in favor of Greenman. The Court ruled in Greenman's favor on two different bases. Since the Court noted that the jury's verdict did not specify which legal claim – the warranty claim or the negligence claim – was the claim upon which the jury based its verdict, the Court rendered a decision allowing Greenman a victory on both claims. The decision is famous for how the Court handled the negligence claim. However, it is important to first review the Court's holding and supporting reasoning regarding the warranty claim.

It should be noted that Roger Traynor had a particular method for writing (or

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<sup>535</sup> Amici Curiae Brief in Support of Appellant Yuba Power Products, Inc., by attorneys for Plastic Process Company, filed on Nov. 26, 1962, *Greenman v. Yuba Power Products, Inc.*, in the Supreme Court of the State of California, L.A. No. 26976, p. 2, in California State Archives, Sacramento, California.

<sup>536</sup> *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints v. Cavanaugh*, 217 Cal. App. 2d 492, 514-15; 32 Cal. Rptr. 144, 157 (Cal. App. 1963).

managing the writing of) legal opinions. Justice Traynor's long-time clerk, Donald P. Barrett, noted that Traynor would assign an opinion's first draft to a clerk and tell him, "[P]roduce the best opinion you can in this case, and then, when you have done that bring it back to me and we will start working on it." He would assign his clerks the tasks of "analyz[ing] the briefs and record [on appeal] and come up with a solution from which he [Justice Traynor] could take off to reach his own conclusions." The clerk "never knew ... how it was going to come out." Traynor would review the work and "work out what he thought was the solution."<sup>537</sup> This was a method similar to many appellate judges in both the federal and state courts. The numbers of cases, briefs (by parties and *amici curae*), and the voluminous records on appeal would be difficult for a single person to handle. However, Donald Barrett claimed that he wrote Traynor's opinion in *Greenman*.<sup>538</sup>

A warranty is a promise from a seller or manufacturer of a good to the consumer, which usually covers how the product will perform. Warranties can be implied or express. Implied warranties are those imposed by law upon the seller/manufacturer by virtue of engaging in the sale of a product. Express warranties are promises that result from statements made by the manufacturer in advertisements or during the pre-sale discussions between employees or representatives of the seller/manufacturer and the buyer. In *Greenman's* case, prior to his wife's purchase of the Shopsmith tool, he had seen a demonstration of the tool by the retailer and had "studied" (presumably meaning

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<sup>537</sup> Donald P. Barrett, Esq., Supreme Court of California on Chief Justice Roger J. Traynor, (July 28, 1986), p. 13, Box T028, File 01a, Oral history interview with Donald P. Barrett, Posthumous, The Roger J. Traynor Collection, U.C. Hastings College of the Law, Traynor Center/Special Collections.

<sup>538</sup> Field, *Activism in Pursuit of the Public Interest*, p. 111.

he had read) a brochure made by Yuba Power Products.<sup>539</sup> The Supreme Court concluded that the jury could have determined the brochure statements were express warranties that turned out to be untrue. However, Yuba defended itself under the provisions of the Uniform Sales Act, the model sales law enacted in California and many other states that governed the contractual relations between buyers and sellers/distributors/manufacturers of goods. Yuba claimed that Greenman had failed to give Yuba timely notice of the alleged breach of warranty in accord with the statute and, therefore, Greenman should have been barred from being able to assert the claim at all. The Court conceded that Yuba retained rights under the Sales Act and that a failure of a buyer to give proper notice of a claim under the Act would bar any suit. *However*, the Court then sidestepped the Sales Act by holding that Greenman retained a right to assert his warranty claim because it arose out of an agreement that had “independent” legal meaning. Thus the agreement fell within the purview of the Act, but it also was an agreement with “common-law” ramifications. Greenman’s rights were not limited to those granted by the legislature under the Sales Act; he held other rights by virtue of “common-law decisions” regarding rights not subject to the Sales Act.<sup>540</sup>

The Court’s reasoning in support of this “independent” warranty right was somewhat confusing. Traynor, writing for a unanimous Court, cited two law review articles, one by Fleming James and the other by William Prosser, both recognized

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<sup>539</sup> 59 Cal.2d 59, 377 P.2d 898, 27 Cal.Rptr. 698. As the Supreme Court noted “the trial court limited the jury to a consideration of two statements in the manufacturer’s brochure. (1) ‘When Shopsmith Is in Horizontal Position -- Rugged construction of frame provides rigid support from end to end. Heavy centerless-ground steel tubing insures perfect alignment of components.’ (2) ‘Shopsmith maintains its accuracy because every component has positive locks that hold adjustments through rough or precision work.’” Ibid. at 60, 377 P.2d at 899, 27 Cal.Rptr. at 699, fn.1.

<sup>540</sup> Ibid. at 61, 377 P.2d at 899, 27 Cal.Rptr. at 699.

authorities in tort law, which argued that the doctrine of notice was a “sound commercial rule” that protected sellers from dilatory claimants. However, as Prosser had argued, the notice requirement was often onerous for the consumer, especially one without lawyer. James and Prosser were arguing that the consumer was rightly put out of court if he had had a face-to-face dealing with a seller, but was wrongly put out of court if he had had no contact with the defendant, such as was the case with a remote manufacturer. This reasoning, which Traynor wholly endorsed, was rather weak. James and Prosser contended that the consumer was ignorant of the rule and therefore needed legal counsel in order to know how to protect his rights.<sup>541</sup> However, this ignorance remains the same regardless of whether the defendant was a retailer (with whom the buyer had had actual contact) or a manufacturer (with whom the buyer never had contact). How a notice requirement can be a “sound commercial rule” against a retailer but not against a manufacturer is difficult to rationalize. Nevertheless, the California Supreme Court adopted these policy-oriented arguments in rejecting Yuba’s contention that Greenman had failed to give timely notice of his warranty claim.

This is a clear example of the California Supreme Court seeing itself as a policy-making institution separate from the state legislature, with its own competencies in the areas of tort and contract law. As will be explained below, the Court’s contention that Greenman possessed rights independent of the warranty rights created by the legislature, when combined with the no-fault doctrine of strict liability, demonstrated not only the creation of a new, potentially powerful tort doctrine, but also the weakening of the

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<sup>541</sup> Ibid. at 61, 377 P.2d at 900, 27 Cal.Rptr. at 700 (citing Fleming James, Jr., “Products Liability,” *Texas L. Rev.*, Vol. 34 (1955-56), pp. 44, 192, 197 and William L. Prosser, “The Assault Upon the Citadel (Strict Liability to the Consumer),” *Yale L. J.*, Vol. 69, No. 7 (June, 1960), pp. 1099, 1130).

legislature's attempt to govern contractual relations.

It is important to recognize that the Court reasoned that, “Implicit in the machine's presence on the market . . . was a representation that it would safely do the jobs for which it was built.”<sup>542</sup> This conclusion suggests that the case could have been decided upon a holding that the trial court had erred by not submitting the case to the jury with an implied warranty claim. Yet, the Supreme Court was not seeking to remedy William Greenman's claim. It wanted to establish a new public policy of strict liability for *all manufacturers, wholesalers, distributors, and retailers* of products. The implied warranty theories, whether statutory or common law, were obstacles or at least distractions from achieving this policy goal. Accordingly, the Court did not decide *Greenman* in accord with the rules of construction, which held that cases should be decided on the narrowest grounds possible.<sup>543</sup> If the Court agreed with Greenman's express warranty claim, that alone should have been the basis for deciding the case. Similarly, if the Court agreed with Greenman's implied warranty claim, then *that* should have been the basis for reversing the trial court. Instead the Court wanted to reach the issue of negligence and find an opportunity for imposing strict liability upon the manufacturer.

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<sup>542</sup> *Greenman*, 59 Cal. 2d 57, 64; 377 P.2d 897, 901 (1963).

<sup>543</sup> Karl Llewellyn noted that, although courts are able to legitimately use multiple rules of statutory and common law construction in order to achieve what the court deems a just result, there are norms understood by courts that encompass legitimate decision making, one of which includes the rule that a case should be decided on a narrow basis and not multiple bases. Karl N. Llewellyn, “Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to be Construed,” *Vand. L. Rev.*, Vol. 3 (1949-50), p. 395. Also, Llewellyn noted that courts often chose a narrow ground for their rulings, even though the members were attracted to a broader ground for the ruling, but remained unconvinced of its applicability in the instant case. Llewellyn, *The Common Law Tradition* (Boston: Little, Brown, 1960), pp. 388-89, 427-29. Also, Robert Keeton referred in 1969 to the principle that when a court acts “creatively [it] should adopt the narrowest possible ground of departure that will cover the case at hand.” Keeton, *Venturing to Do Justice: Reforming Private Law* (Cambridge: Harvard, 1969), p. 29.

Justice Traynor later admitted, “I was prompted in *Greenman* ... to have no more truck with warranty and to forthrightly state that recovery is based on strict liability with no contract, warranty overtones at all.”<sup>544</sup> Yet, he included the warranty explanation as an acknowledgement of the trend in other states to allow recovery based on an implied warranty. But, as Traynor noted, the real importance of *Greenman* was in regard to strict liability.

The California Supreme Court was not content to decide in favor of William Greenman on the basis of the warranty claim. Instead, the Court agreed with Traynor to provide an additional decisional basis: the question of whether Yuba Power Products had been negligent. The *Greenman* case is famous for the nature of the liability imposed by the court upon Yuba Power Products – strict liability. *Greenman* served as the opportunity to implement Justice Traynor’s views, first articulated almost twenty years before in his *Escola* concurrence.<sup>545</sup> In expressly adopting the strict liability standard in *Greenman* Traynor wrote, “A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being.”<sup>546</sup> Thus, the manufacturer’s liability was no longer based upon fault (*e.g.*, negligence or misfeasance). Rather it was premised upon the fact it was a manufacturer, the product was found to have been defective, and such defect caused an injury or property damage. That is, the status of being a manufacturer of a defective product that injured a “human being” (not restricted

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<sup>544</sup> Roger J. Traynor, Speech to the Virginia Trial Lawyers Association, p. 5, Box 8, File 24 (April, 1970), The Roger J. Traynor Collection, U.C. Hastings College of the Law, Traynor Center/Special Collections.

<sup>545</sup> Traynor cited his prior concurrence in *Escola* as the source containing an explanation for the imposition of strict liability upon manufacturers. 59 Cal.2d at 63, 377 P.2d at 901, 27 Cal.Rptr. at 701.

<sup>546</sup> 59 Cal.2d at 62, 377 P.2d at 900, 27 Cal.Rptr. at 700.

to the buyer) was sufficient to impose liability. This rule of law effectively made a manufacturer an insurer of its product.

Notwithstanding this rationale, which sought to divorce product liability law from fault-based concepts – especially from moral fault – and create a no-fault compensation system, only a couple of years later Traynor contended that, “The reasons justifying strict liability emphasize that there is something *wrong*, if not in the manner of the manufacturer’s production, at least in his product.”<sup>547</sup> Traynor himself could not escape the moral basis for his policy position. Traynor sought to make compensation easier (assured) for injured consumers, but also to deter *wrongful, negligent* conduct by manufacturers. Although Traynor himself claimed “the whole purpose of strict liability [was] to get away from notions of fault,”<sup>548</sup> he could not escape the fault-orientation when he wrote that, after *Greenman*, manufacturers could no longer effectively say, “We let our victims fall where they may, redressing only the injuries of the privity-privileged.”<sup>549</sup>

It seems that jurors could not escape the idea of fault either. As one products liability plaintiff’s attorney noted, “I prefer to use the old common law negligence, with strict liability as a very remote fallback argument. You’ve got make jurors see who’s at fault in the injury, not that the product’s no good.”<sup>550</sup>

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<sup>547</sup> Roger J. Traynor, “The Ways and Meanings of Defective Products and Strict Liability,” *Tenn. L. Rev.*, Vol. 32, No. 3 (Spring, 1965), p. 363 (emphasis added).

<sup>548</sup> Roger J. Traynor, Speech to the Virginia Trial Lawyers Association, p. 4, Box 8, File 24 (April, 1970), The Roger J. Traynor Collection, U.C. Hastings College of the Law, Traynor Center/Special Collections.

<sup>549</sup> *Ibid.*, p. 364.

<sup>550</sup> Comments of attorney Alfred Julien in Jonathan Evan Maslow, “Products Liability Comes of Age,” *Juris Doctor* (Feb., 1975), p. 24, Box 25, File 7, The Roger J. Traynor Collection, U.C. Hastings College of the Law, Traynor Center/Special Collections.

*Greenman* was a decision based expressly upon public policy preferences of the California Supreme Court. As Justice Traynor stated for the Court, “The purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.”<sup>551</sup> The rule announced by the Court was a “black letter” rule of law; there was no ambiguity about its function, the reasons underlying its creation, and the intended consequences. In other words, the California Supreme Court was not merely creating a new rule; it was creating a new public policy, complete with a justification and a judicial form of “legislative intent” expressed in its opinion.<sup>552</sup>

It very instructive to note Traynor’s understanding of precedent in tort law. As this study has noted, tort law has been justified under two theories: 1) deterrence of wrongful and careless conduct and 2) compensation for injured parties. In 1963, only about four months after the *Greenman* decision was published, Justice Traynor proclaimed that, “A person does not ordinarily commit or suffer a tort in reliance upon a tort precedent.”<sup>553</sup> This statement was made in defense of retroactive rulings, which are rulings that apply a new rule to past acts, which occurred when no rule (or a different rule) existed.

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<sup>551</sup> *Greenman*, 59 Cal. 2d 57, 63; 377 P.2d 897, 901.

<sup>552</sup> Justice Traynor was not given to embracing ambiguities in the law. For example, in his book on harmless error, Justice Traynor argued in favor of a “high probability” test of whether an error in the trial court affected a judgment. That is, he wanted a standard that usually led to reversal of the court below when an error affected a substantial right. Traynor argued that giving appellate judges more leeway under a less strict standard risked allowing the reviewing judge to decide in accord “with his own predilections.” Roger J. Traynor, *The Riddle of Harmless Error* (Columbus: Ohio St. Univ. Press, 1970), pp. 34-35. Arguably, indulging such predilections was exactly what led the Court in *Greenman* to change the law from negligence to strict liability.

<sup>553</sup> Roger J. Traynor, “Stare Decisis Versus Social Change,” p. 8, Box 8, File 8 (April 26-27, 1963), The Roger J. Traynor Collection, U.C. Hastings College of the Law, Traynor Center/Special Collections.



Traynor's contention was premised upon an assumption that parties, especially tort suit defendants, do not act in relation to the known law, or precedents. Traynor was arguing that precedent is essentially socially meaningless. However, this is contrary to what positive law presupposes: actors adjust their actions in accord with their known legal liabilities. Such liabilities are only known based upon the positive law, whether by enactment or court decision. If an act carries legal liability it is presumed that such liability provides an incentive to not engage in such acts, or at least reduce the harmful effects therefrom. More relevant to Traynor, such disincentives to harmful behavior were part of the reason he had championed strict liability in the first place.

Traynor was also flippant about the consequences of eviscerating precedents and applying the new rules retroactively: "Whatever the hardship the retroactive overruling may impose on a government or a charity that has failed to anticipate the risks of litigation by precautionary measures such as insurance, it would hardly outweigh the hardship that its tort has brought to others."<sup>554</sup> Traynor was arguing that manufacturers must insure against tort liability, even if current law did not deem such acts tortious. This evidenced a blithe disregard for the purpose of insurance, which is to efficiently allocate the costs of *known* risks.

The *Greenman* case was a veritable explosion in the legal world. When it detonated the concussion reverberated throughout not just California (which was the only jurisdiction to which the holding applied, of course) but throughout all of the states and

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<sup>554</sup> Ibid., pp. 8-9. Traynor was referring to governmental and charitable tort immunity, both of which had been mainstays of the common law in America throughout the twentieth century, but were eroded by courts, including California's, in the latter part of the century.

caused vociferous debate among practitioners and academics. Its apparent importance was indicated by the fact the national popular media reported on the case. For example, *Time* magazine noted the trend among state supreme courts in 1965 to expand liability and traced the trend to the *Greenman* case, referring to strict liability as a “Draconian doctrine” and “easily the most spectacular development in modern tort law.”<sup>555</sup> One reporter noted that *caveat emptor* (“let the buyer beware”) had once dominated the common law of sales, but “it’s now the manufacturer who’d better beware.”<sup>556</sup> Traynor was aware of the potential effects of a single decision. As he once noted, a decision “not only persists as precedent, but gains in weight.”<sup>557</sup> Yet, the *Greenman* case did not gain weight slowly; it immediately ballooned in importance by being cited throughout the nation by all courts that changed their tort standards from negligence to strict liability over the next few years. As Traynor himself later noted, his objective in the *Greenman* case was to help effectuate “[t]he transition from industrial revolution to a settled industrial society.”<sup>558</sup> Regardless of whether that happened, the legal academic world was energized into a debate about the decision’s propriety.

The scholarly reaction to the *Greenman* decision, shortly after its publication, varied; some scholars saw it as a lodestar for tort law, others seemed to see it as yet another step in a broad judicial trend to expand manufacturer liability. This latter

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<sup>555</sup> “Torts: A Big Stick for Consumers,” *Time*, Friday, Aug. 6, 1965.

<sup>556</sup> Chew, “The Suing Grows for Products That Are Faulty,” *The National Observer* (Jan. 14, 1963), p. 21, col. 3 quoted in Page Keeton, “Products Liability – Liability Without Fault and the Requirement of a Defect,” *Tex. L. Rev.*, Vol. 41, No. 7 (Oct., 1963), p. 855.

<sup>557</sup> Roger J. Traynor, “Some Open Questions on the Work of State Appellate Courts,” *Chicago L. Rev.*, Vol. 24, No. 2 (Winter, 1957), p. 214.

<sup>558</sup> Roger J. Traynor, “The Ways and Meanings of Defective Products and Strict Liability,” *Tenn. L.R.*, Vol. 32, No. 3 (Spring, 1965), p. 363.

reaction was no doubt due to the fact the case could have been decided on the implied warranty language and the strict liability language might have been construed as dicta. First, *Greenman* was not especially surprising since it came from the California Supreme Court, a court known for its jurisprudential liberalism in a variety of areas. Yet, in light of the esteem in which other courts held the California high court, *Greenman* represented a new, bold direction for tort law and potentially the most consequential step to date in the expansion of liability. Some commentators clearly saw the decision as one that “revolutionized” tort law.<sup>559</sup> The decision was approvingly described as a “daring act of judicial creativity” by a “law professor’s judge.”<sup>560</sup> Another commentator called the decision “well justified.”<sup>561</sup> One writer speculated the decision was a moderate effort to protect consumers, presuming manufacturers and sellers would be protected “from a torrent of frivolous suits” because surely some degree of foreseeability of injury would “seem” to have been required and the plaintiff would need to prove the product to be “defective.”<sup>562</sup> But other commentators saw the case as “depart[ing] from all previous authority” to make manufacturers veritable “insurers” of the goods they produced. One academic considered *Greenman*’s imposition of strict liability to be the “new rule not

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<sup>559</sup> “A Comparison of California Sales Law and Article Two of the Uniform Commercial Code,” *UCLA L. Rev.*, Vol. 10, No. 5 (July, 1963), p. 1163. *But see* Richard H. Hart, “Current Decisions,” *U. Colo. L. Rev.*, Vol. 36, Nos. 1 & 2 (1963), p. 305 (arguing that *Greenman* was merely a clarification of liability and not an extension” since the product still had to be proven to be defective and that the plaintiff used it in the way it was intended to be used and the plaintiff was unaware of the defect).

<sup>560</sup> Harry Kalven, Jr., “Torts: The Quest for Appropriate Standards,” Vol. 53, No. 1 (Mar., 1965), p. 190, 206.

<sup>561</sup> “Recent Cases,” *Vand. L. Rev.*, Vol. 16, No. 2 (Mar., 1963), p. 447 (discussing both warranty and strict liability issues in context of whether adherence to notice requirements of the Sales Act or U.C.C. was required of consumers).

<sup>562</sup> Leila Obier Cutshaw, “Torts – Strict Liability of Manufacturer,” *La. L. Rev.*, Vol. 23, No. 4 (June, 1963), p. 815.

only in California but in the United States.”<sup>563</sup> Another academic, writing almost a year after *Greenman*’s publication, cautioned practitioners that “many lawyers may not realize ... the extent to which liability” had been expanded.<sup>564</sup> By 1965, lawyers were realizing that *Greenman* “signalized more clearly than any other single case the recognition that what was going on was a major evolution of tort law, rather than an extension of the law of sales.”<sup>565</sup>

One unsigned student-written note in a law review,<sup>566</sup> written the year *Greenman* was decided, speculated that Traynor’s discussion of strict liability was “probably ... dictum” because theretofore Traynor had been the only member of the California Supreme Court to openly voice support for the rule of strict liability in matters beyond foods and products for “intimate bodily use.”<sup>567</sup> It is true that Traynor had been the only member of the Court to openly support strict liability in such cases and the author’s speculation that *Greenman* was really a case based on warranty law was plausible.<sup>568</sup> However, the subsequent willingness of the Court to adhere to strict liability as the rule in

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<sup>563</sup> Banker Phares, “Recent Developments,” *Sw. L.J.*, Vol. 17, No. 4 (Dec., 1963), p. 670-71.

<sup>564</sup> Dix W. Noel, “Strict Liability of Manufacturers,” *A.B.A. J.*, Vol. 50, No. 5 (May, 1964), p. 446.

<sup>565</sup> Benjamin E. Haller, “Products Liability: How Strict is Strict?” *Forum*, Vol. 1, No. 4 (July, 1966), p. 23.

<sup>566</sup> Law reviews have traditionally contained student-written articles on matters of recent interest. Such articles have traditionally been published unsigned. As of this writing, many law reviews continue this practice.

<sup>567</sup> “Recent Developments: Manufacturers’ Warranties and the Sales Act,” *Stan. L. Rev.*, Vol. 15, No. 2 (Mar., 1963), p. 388, n. 27.

<sup>568</sup> The author contended that *Greenman* represented an example of an exception to the general rule that warranty claims required privity of contract. The exception upon which the author contended *Greenman* was decided was the claim for breach of “express warranties contained in labels or other advertising materials.” *Ibid.* at 382 (case citations omitted). *See also* “Legislation and Administration,” *Notre Dame L.*, Vol. 38, No. 5 (Aug., 1963), p. 606, n. 432 (ignoring strict liability and construing *Greenman* as holding that an implied warranty of merchantability existed because the warranty is “not based on any contractual relationship”); Michael M. Shea, “Products Liability: Strict Liability in Tort,” *Santa Clara Lawyer*, Vol. 4 (1963-64), p. 218 (questioning whether the strict liability discussion was “law or dictum”).

California and the failure of any other justice to write a concurrence in *Greenman* explaining which theory was the basis for the decision indicates that the strict liability language was the basis for the *Greenman* decision.

Also, the following year the California Supreme Court decided another case on strict liability grounds. In *Vandermark v. Ford Motor Co.* the Court was confronted with a case of a defective automobile. Traynor, again writing for a *unanimous* Supreme Court, made clear that strict liability not only applied to manufacturers, as in *Greenman*, but to retailers. The opinion cited *Greenman* as its chief precedent and based the holding firmly on strict liability grounds. Again, the rationale for extending the liability was Traynor's belief that manufacturers and retailers "can adjust the costs of such protection between them in the course of their continuing business relationship[s]."<sup>569</sup> There is no doubt that strict liability was the new rule adopted by the California Supreme Court in *Greenman* and followed thereafter. Another student note concluded, "Only the breadth of public policy that inspired imposition of liability without fault can be looked to as a rational limitation upon [product liability's] scope."<sup>570</sup> Who (or what institution) – the courts or state legislatures – would determine the breadth of public policy was an open question.

Insurance defense attorneys started advising their corporate clients in response to expanded liability. As previously noted, long before *Greenman* insurance defense counsel were concerned about the emergent trend toward expanded liability. The use of warranties and negligence law to expand liability caused counsel to advise insurers to take "preventive" action regarding potential claims exposure for products that caused

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<sup>569</sup> *Vandermark v. Ford Motor Co.*, 61 Cal. 2d 256; 391 P. 2d 168 (1964).

<sup>570</sup> Note, "Strict Products Liability and the Bystander," *Colum. L. Rev.*, Vol. 64, No. 5 (May, 1964), p. 935.

injuries. For example, in 1960 one commentator advised insurers to “[i]nsist upon receipt of research and test reports for every product; [and] liaison between the technical and legal departments ... [regarding] labeling and advertising of the product.” Additionally, insurers needed to remain abreast of “FDA and FTC decisions” and “scientific developments in the products field.” Also, claims examiners needed to promptly investigate claims in order to respond to consumer claims and deter litigation. A “S.O.P.”, or standard operating procedure, for claims handling was essential, especially the “preservation of records of complaints,” which would limit “the number of false and exaggerated claims.”<sup>571</sup>

It is important to note that the risk spreading rationale of *Greenman* was not nearly as strong a case in 1963 as it had appeared when Traynor wrote his *Escola* concurrence in 1944. A minority of Americans owned health insurance coverage in the 1940s and the idea of risk spreading through the entities well suited to purchase insurance against loss appeared cogent in 1944. However, by 1963 a majority of the American population owned health insurance policies, provided most frequently through employers.<sup>572</sup> Such coverage had spread the risk of loss throughout much of the American population by the mid-1960s, thereby weakening Traynor’s and supporters’ justification for placing compensatory responsibility on manufacturers, distributors, wholesalers, and retailers.

Justice Traynor was a member of the Court during a period “after the philosophy of modern liberalism had become acceptable.”<sup>573</sup> The political climate of California was

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<sup>571</sup> Warren Freedman, “A Brief for Products Liability Today,” *Ins. Counsel J.*, Vol. 27, No. 3 (July, 1960), p. 406.

<sup>572</sup> Jennifer Klein, *For All These Rights: Business, Labor, and the Shaping of America’s Public-Private Welfare State* (Princeton: PUP, 2003), pp. 230, 242-43.

<sup>573</sup> G. Edward White, *The American Judicial Tradition*, p. 245.

one in which Traynor's idea of the need for the law to progress and meet the conditions of the contemporary industrial economy were relatively uncontroversial. Some scholars have seen the efforts of legal reformers such as Traynor as necessitated by the nature of American society in the twentieth century.<sup>574</sup> Certainly, the *Greenman* opinion reflected the views of Progressives from an earlier generation, who saw the American economy as having changed dramatically in the twentieth century. Traynor's opinion echoed the views of Progressives like Traynor's former law professor, Thomas Reed Powell, who in 1917 saw American "individualism, not as a necessary implication from our constitutional system, but as a social philosophy bred from conditions of former generations, and still revered by those who fail to appreciate how largely the conditions which gave it birth have passed away."<sup>575</sup>

Yet, other scholars have noted that *Greenman* was simply a policy preference that was in no sense mandated by the economy of the 1960s.<sup>576</sup> The change in the law made by *Greenman* seemed to go against Traynor's maxim that judges have a responsibility to "keep the law straight," by which he meant predictable for parties and the public, which had to comply with courts' rulings.<sup>577</sup> During this time, it was acknowledged by some

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<sup>574</sup> For example, G. Edward White has argued that Traynor's career was the necessary response to the "need ... for a body of judge-made law that could coexist with the proliferating social problems and legislative responses of the 1940s, 1950s, and 1960s." White, *The American Judicial Tradition*, p. 246.

<sup>575</sup> Thomas Reed Powell, "Law as a Cultural Study," *Am. L. Sch. Rev.*, Vol. 4, No. 6 (Fall, 1917), p. 333. One scholar considers Traynor a "disciple" of Powell. Sandra P. Epstein, *Law at Berkeley: The History of Boalt Hall* (Berkeley, CA: Inst. Of Governmental Studies Press, 1997), p. 106.

<sup>576</sup> Peter W. Huber, *Liability: The Legal Revolution and Its Consequences* (New York: Basic Books, 1990), p. 6-8, 38-40, 157; Huber and Robert E. Litan, eds., *The Liability Maze: The Impact of Liability Law on Safety and Innovation* (Washington: Brookings, 1991), p. 15.

<sup>577</sup> Roger J. Traynor, "Some Open Questions on the Work of State Appellate Courts," *Chicago L. Rev.*, Vol. 24, No. 2 (Winter, 1957), p. 219.

scholars that judicial policy making was a product of judges' political preferences, or what was then termed their "values."<sup>578</sup>

After his retirement from the California Supreme Court, Justice Traynor seemed to revise his previous strident position in favor of policy innovation. He contended, with Cardozoan deftness, that a court does not (or should not) "innovate changes" in the law. Rather courts should "keep the law responsive to significant changes in the customs of the community." Without mentioning *Greenman*, Traynor claimed that courts "must lag a respectful pace [in] back of popular mores ..." in order to "delay legal formalization of community values until they have become seasoned." This statement echoed Roscoe Pound's 1906 contention that court-administered "rules [of law], being formulations of public opinion cannot exist until public opinion has become fixed and settled, and cannot change until a change of public opinion has become complete."<sup>579</sup> Traynor's statement suggested a democratic character to courts' policy innovations: courts must change the law only after the preferences of "the community" have been made sufficiently clear. Pound and Traynor both seemed to display some ambivalence about when courts must follow and lead. Justice Traynor failed to indicate how and by what methods the preferences of the community would be made known to judges or who comprised the community. But Traynor made sure to qualify this seemingly moderate position by

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<sup>578</sup> David J. Danelski, "Values as Variables in Judicial Decision-Making: Notes Toward a Theory," *Vanderbilt L. Rev.* Vol. 19 (1966), pp. 721-40; Danelski, "Legislative and Judicial Decision-Making: The Case of Harold H. Burton," in S. Sidney Ulmer, ed., *Political Decision-Making* (New York: Van Nostrand Reinhold Co., 1970), p. 140.

<sup>579</sup> Roscoe Pound, "The Causes of Popular Dissatisfaction with the Administration of Justice," in *Report of the Twenty-Ninth Annual Meeting of the American Bar Association, Aug. 29-31, 1906* (Philadelphia: Dando, 1906), p. 399-400.



noting that lagging “makes good sense so long as the lag does not deteriorate into a lapse.”<sup>580</sup>

*Henningsen* and *Greenman* were seen in different ways by lawyers and academic commentators. Some thought they were stark departures from the prevailing common law among the states; others thought they were continuations of trends in tort law expansion long pre-dating the 1960s. Nevertheless, after these cases, commentators, legislatures, and other states’ courts began to react to these decisions. When other states dealt with the issue of products liability beyond the areas of food and products for intimate bodily usage, the *Greenman* case was usually cited. We now turn to the reactions of other states and the trends occurring after these notable cases.

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<sup>580</sup> Roger J. Traynor, “Quo Vadis, Prospective Overruling: A Question of Judicial Responsibility,” (Birmingham, England: Univ. of Birmingham, 1975), p. 5.

## **Chapter 4: The Tort Revolution Spreads**

### ***How Other States Responded to Henningsen and Greenman***

By 1966, courts in eighteen states and the District of Columbia had adopted strict liability; and six states' legislatures had adopted some restrictions on the privity requirement or adopted a strict liability-like regime under their states' commercial law. The courts that adopted strict liability or broadened warranty claim rights usually cited *Henningsen* and/or *Greenman*. In four states, federal courts had assumed the states' courts would apply a strict liability standard. In two states courts wrote dicta indicating a move toward strict liability; two other states' courts remained at the level of applying strict liability for products of intimate bodily use; and six others' courts remained at the level of applying strict liability to food and drink. Thirteen states' supreme courts had either rejected strict liability or had not yet passed upon the issue. Most of those states, however, had enacted the Uniform Commercial Code, which allowed for expansion of sellers' warranties to those beyond the initial purchaser of goods.<sup>581</sup> Nevertheless, within six years of the *Henningsen* decision thirty-nine states had moved toward expanding tort liability for manufacturers of defective products beyond the common law rules that had theretofore prevailed regarding warranties and negligence.

The rapidity of the switch to expanded liability in the post-*Henningsen* and post-*Greenman* period is the heart of the Tort Revolution. It was as if state courts had merely been awaiting an excuse to change their tort standards. The reaction to both cases was

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<sup>581</sup> William L. Prosser, "The Fall of the Citadel," *Minn. L. Rev.*, Vol. 50, No. 5 (1965-66), pp. 794-99. By the mid-1970s, additional states had expressly adopted ALI's *Restatement (Second) of Torts*, §402A (which provided for strict liability in general products cases) and/or the *Greenman* and/or *Henningsen* rule.

rather swift and it happened in state courts *and* legislatures. As legal scholar George Priest has noted, the bulk of the changes in favor of erasing the privity requirement and adopting strict liability happened within about four to five years of the *Henningsen* decision.<sup>582</sup> However, it should be noted that the *Henningsen* case, although influential, was eclipsed by the more radical strict liability holding of *Greenman*. There were only a few states that adopted the *Henningsen* rule on privity prior to the holding in *Greenman*.<sup>583</sup> Although William Prosser saw *Henningsen* as defeating the citadel of privity, it was *Greenman* that occupied the vanquished fort.

There were very few instances of resistance to the judicial trend in favor of strict liability for manufacturers, but one case from 1963 does present an example of how such dissent was presented. In *Goldberg v. Kollsman Instrument Corp.*,<sup>584</sup> an estate administrator sued an airplane manufacturer, Lockheed, for the death of a passenger. The defective part was the altimeter, which had been manufactured by a separate supplier, but warranty liability was extended by the New York Court of Appeals to cover only the manufacturer (assembler) of the entire airplane, not the supplier-manufacturer, which made the actual defective part. Among the cases cited in the majority opinion were *Henningsen* and *Greenman*. The decision was a close 4-3.

In dissent, Judge Adrian P. Burke, joined by John F. Scileppi and John Van Voorhis, rejected the majority's holding that the airplane assembler, Lockheed, was liable

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<sup>582</sup> George L. Priest, "The Invention of Enterprise Liability: A Critical History of the Intellectual Foundation of Modern Tort Law," *Journal of Legal Studies* 14 (Dec., 1985), pp. 461-528.

<sup>583</sup> For example, of the eighteen states William Prosser referred to in 1966 as having adopted strict liability and disregarding the privity requirement by virtue of court decision, most of the cases were decided after *Greenman* in 1963. Prosser, "Fall of the Citadel," *Minn. L. Rev.*, Vol. 50 (1965-66), pp. 794-95, n. 10-27.

<sup>584</sup> 12 N.Y. 2d 432; 240 N.Y.S. 2d 592 (May 9, 1963).

under strict liability, while the defective part manufacturer was not liable at all. First, the dissenters argued that no warranty existed for the passengers. Second, they contended that the majority was simply evading its proper function of clearly stating the basis for its decision. That is, the dissent contended “the warranty rationale is at best a useful fiction. . . . If a strict product or enterprise liability is to be imposed here, this court cannot escape the responsibility of justifying it. We cannot accept the implication of the majority that the difference between warranty and strict products liability is merely one of phrasing.”<sup>585</sup>

The dissenters were troubled by the placement of liability upon the assembler, rather than the airline or the defective part maker:

In a theory of liability [i.e., strict liability] based, not on the regulation of conduct, but on economic considerations of distributing the risk of accidents that occur through no one’s neglect, the enterprise most strategically placed to perform this function – the carrier, rather than the enterprise that supplies an assembled chattel [personal property] thereto, is the logical subject of the liability, if liability there is to be.<sup>586</sup>

The dissenters concluded that strict tort liability was “a theory of social planning that is still much in dispute.” They cited William Prosser’s treatise on torts, Roscoe Pound’s *An Introduction to the Philosophy of Law*, and Edwin W. Patterson’s article on apportioning risk on businesses through the law.<sup>587</sup> The dissenters posed questions such as, “It is easy, in a completely free economy, to envision the unimpeded distribution of

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<sup>585</sup> *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y. 2d at 439-40 (Burke, dissenting).

<sup>586</sup> *Ibid.* at 441.

<sup>587</sup> Prosser, *Handbook of the Law of Torts*, 2d ed., § 84; Roscoe Pound, *An Introduction to the Philosophy of Law* (New Haven: Yale Univ. Pr., 1921); Edwin W. Patterson, “Apportionment of Business Risks Through Legal Devices,” *Colum. L. Rev.*, Vol. 24, No. 4 (April, 1924), p. 335.

risk by an enterprise on which it is imposed; but how well will such a scheme work in an industry which is closely regulated by Federal agencies?” They were referring to the airline industry. Also, they queried, “In consideration of international competition and other factors weighed by those responsible for rate regulation, how likely is it that rate scales will rise in reflection of increased liability?” And, “how likely is it that the additional risk will be effectively distributed as a cost of doing business?” Their answer was, “Such questions can be intelligently resolved only by analysis of facts and figures compiled after hearings in which all interested groups have an opportunity to present economic arguments. These matters ... are classically within the special competence of the Legislature to obtain.” The dissenters accused the majority of claiming “an omniscience not shared by us.”<sup>588</sup> This was the post-New Deal conservative argument against the imposition of strict tort liability: the court should not take on a political function – the distribution of risk in the political economy – which should be resolved in a pluralistic fashion in the legislative branch.

Legal historian William E. Nelson has argued that the dissenters were more concerned with efficiency in the allocation of risk and the efficacy of placing the burden automatically upon a producer. He contends that the nineteenth-century moral fault view of negligence, which the dissenters did not utilize, was a “wealth-protection” argument.<sup>589</sup> This characterization of fault-based torts is plausible only if one looks to financial results (*i.e.*, who pays) as being the gravamina of the fault doctrine. The essence of fault-based systems is not the protection of wealth. Rather it is the need for

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<sup>588</sup> *Ibid.* at 442-43.

<sup>589</sup> William E. Nelson, *The Legalist Reformation: Law, Politics, and Ideology in New York, 1920-1980* (Chapel Hill: UNC Press, 2001), pp. 190-91.

individual responsibility in a system that protects individual liberty. Obligations to others that rest upon fault are ways of preserving individual liberty and responsibility, not merely protecting wealth.

Political scientist Ron Steinberg conducted a study of the New York Court of Appeals during this period. Although Judges Burke and Scileppi were Democrats and Roman Catholic and Van Voorhis was a Republican and Episcopalian, such characteristics were too loosely correlated to decision-making (or voting) behavior to be predictive. Nevertheless, on a scale of whether these judges were deemed “sympathetic” to the claims of individual plaintiffs, all three judges were considered rather consistently unsympathetic during the early 1960s.<sup>590</sup> Judge Burke, the author of the dissent in *Goldberg*, was a liberal Democrat. He provided important support in the adoption of the New York Constitution’s “aid the needy” clause, which mandated public funds for the indigent. Also, Burke wrote the majority opinion in *Battalla v. State*,<sup>591</sup> which held that plaintiffs could sue for personal injury damages for physical or emotional distress claims, with residual physical injury, negligently induced by fright.<sup>592</sup> This was not the record of a conservative judge. Rather, Judge Burke’s reasoning in his *Goldberg* dissent was moderate and within the tradition of adherence to precedent in the common law.

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<sup>590</sup> Ron Steinberg, “Sympathetic Voting Dimensions on the New York Court of Appeals,” *Alb. L. Rev.*, Vol. 41, No. 4 (1977), p. 699, 702, 729-31.

<sup>591</sup> 10 N.Y. 2d 237; 176 N.E. 2d 729 (1961).

<sup>592</sup> Wolfgang Saxon, “A.P. Burke, 95, Appeals Court Judge Dies,” *N.Y. Times* (Sept. 9, 2000), p. B8 (N.Y. ed.).

A majority of states were supportive of the *Henningsen* and *Greenman* decisions. Yet, not all states were fully supportive. The following are examples of the kinds of responses other states made to the changes in the wakes of *Henningsen* and *Greenman*.

**a) Alabama**

One response was to make product liability law more consumer-friendly by providing plaintiffs with an easier *prima facie* case standard against manufacturers (and others in the distribution chain), but to allow defendants to retain the ability to raise common law defenses. Such a system retained fault and adhered to the individual rights understanding of the common law tradition.

Shortly after *Greenman* was decided in 1963, the Alabama legislature enacted a “non-uniform” version of the Uniform Commercial Code (UCC).<sup>593</sup> The legislature expanded liability under the “Sale of Goods” article – thereby creating greater consumer protection rights – to allow for consequential damages in cases of personal injury, prohibited sellers from limiting their liability in the case of personal injuries from goods, made the damages for personal injury claims under the act the same as those at common law, expanded liability to include any expected user or consumer of a good, and extended the statute of limitations on such actions.<sup>594</sup> The most significant modification of the model act was the prohibition on sellers attempting to exclude liability for personal injury damages arising “in the case of consumer goods.”<sup>595</sup> All of these enactments convinced

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<sup>593</sup> *Atkins v. American Motors Corp.*, 335 So. 2d 134, 141-42 (Ala., 1976). The U.C.C. was a model act and any deviation from the provisions of the model act was referred to as “non-uniform.”

<sup>594</sup> Alabama Act No. 549, §§ 2-316, 2-318, 2-714(2), 2-715(2)(b), 2-719(4), 2-719(2) (1965, effective 1967) as cited in *Atkins*, 335 So. 2d at 141-42.

<sup>595</sup> Code of Ala. § 7-2-316(5) (2008). As the Official Alabama Comment on the provision notes, this prohibition “does not appear in the [model] Uniform Commercial Code”.

torts scholar William Prosser that Alabama had enacted the equivalent of strict liability by statute.<sup>596</sup>

A decade later the Alabama Supreme Court adopted what it referred to as a “negligence per se” standard, or what it officially termed the “Alabama Extended Manufacturer’s Liability Doctrine,”<sup>597</sup> citing the pro-strict liability *Restatement (Second) of Torts*, § 402A<sup>598</sup> provision on strict liability as its theoretical guide.<sup>599</sup> However, the Court claimed it was *not* adopting strict liability because such was a no-fault liability, which did not allow for common law defenses. The “negligence per se” rule the Alabama Court adopted still entertained “affirmative defenses not recognized by the

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<sup>596</sup> William L. Prosser, “The Fall of the Citadel,” *Minn. L. Rev.* Vol. 50 (1965-66), p. 796.

<sup>597</sup> *Casrell v. Altec Industries, Inc.*, 335 So. 2d 128, 134 (Ala., 1976).

<sup>598</sup> The American Law Institute’s *Restatement (Second) of Torts* (1965) was a publication that was considered a scholarly, often authoritative, “restatement” of the common law of torts. It was often viewed by courts that sought to adopt its sections as law in their state as an authoritative statement of the law of the various states. However, some sections of the *Restatement* were actually statements of how its authors thought the common law *should* be construed. The *Restatement (Second)*’s section on strict liability was not based on any case authority when it was originally proposed and included in the *Restatement (Second)*. After *Greenman*, the strict liability section of the *Restatement (Second)* cites *only Greenman* as authority for the strict liability rule. This was the only time a section was based solely on the existence of a single case. Nevertheless, *Restatement (Second) of Torts*, § 402A was cited as authoritative when many courts adopted its standard of strict liability. The section provided:

- (1) One who sells 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 to the ultimate user or consumer, or to his property, if
  - (a) the seller is engaged in the business of selling such a product, and
  - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule stated in Subsection (1) applies although
  - (a) the seller has exercised all possible care in the preparation and sale of his product, and
  - (b) the user or consumer has not bought the product from or entered into any contractual relationship with the seller.

<sup>599</sup> *Atkins v. American Motors Corp.*, 335 So. 2d 134 (Ala., 1976) (defective manufacture and design) and *Casrell v. Altec Industries, Inc.*, 335 So. 2d 128 (Ala., 1976) (defective design). Both cases were decided on the same day, May 21, 1976, and largely dealt with the same policy issues.



*Restatement* [(*Second*)'s] no-fault concept of liability".<sup>600</sup> Also, the Court noted that negligence principles still controlled.<sup>601</sup> The Court claimed the negligence per se doctrine was concerned with the manufacturer's "methods" and "processes" of production rather than the strict liability standard's concern with the "characteristics of the end product." The Court noted a defendant manufacturer, supplier, or seller could assert the common law defenses of no causal relation, assumption of the risk, and contributory negligence.<sup>602</sup> These defenses were not allowed under the rule in *Greenman* or the *Restatement (Second)*.

This was the Alabama Supreme Court's attempt to find a kind of "third way" alternative to the strict liability of *Greenman* and the traditional common law rule based on fault. The Court saw itself as a policymaking institution that was achieving policy goals necessitated by the nature of the contemporary economy. However, it thought its modified fault-based approach was preferable to the *Greenman* strict liability approach. (Views on just what was "necessary" could differ.) The argument for altering the prevailing fault-based rule was based on the "two obstacles to consumers' recovery against suppliers of defective" goods: "(1) the intricacies of the law of sales (such as privity, disclaimer of warranty, and notice of breach) which thwarted consumer recovery

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<sup>600</sup> *Atkins*, 335 So. 2d at 137.

<sup>601</sup> The "marketing" of a product by a "manufacturer, or supplier, or seller" that was dangerous when applied to its "intended use" was "negligence as a matter of law." *Casrell v. Altec Industries, Inc.*, 335 So. 2d at 132.

<sup>602</sup> *Atkins*, 335 So. 2d at 140-43. The Court listed the "allowable defenses" as follows: (a) general denial (defendant can present evidence refuting the plaintiff's prima facie case, usually involving whether there was a defective condition at all) and (b) affirmative defenses, including (b)(1) no causal relation (defendant did not know nor should have known of defective condition and did nothing to contribute to the defective condition); (b)(2) assumption of the risk (the plaintiff was adequately warned of the "unavoidably unsafe" condition of the product or the condition was apparent to the consumer); and (b)(3) contributory negligence (the plaintiff contributed to his/her injury by his own negligent conduct). *Atkins*, 335 So. 2d at 143; *Casrell*, 335 So. 2d at 134.

under the theory of warranty, and (2) the difficulty of proving standards of care and negligence within the complex manufacturing system which brings most consumer goods to the market place.”<sup>603</sup> The Court argued that it was preserving tort law’s distinction from contract law, specifically warranty law.

Also, the Court rejected the moral argument that the fact of “distribution” of a defective product was the harm that strict liability sought to prevent. Rather, the Court contended, the moral argument was best made in holding manufacturers, suppliers, or sellers liable for their “fault” in regard to the design or manufacture and subsequent sale of a product. Therefore, the Court suggested that under their approach non-contributory, non-negligent parties in the vertical distribution chain (*i.e.*, marketers and retailers) could not be held liable for the fault of the manufacturer. From the Court’s point of view, their rule placed the moral culpability on the proper party – the manufacturer – instead of simply roping in all possible monetary contributors. (However, it is important to note that the Court expressly forbade the manufacturer to avail itself of the tort defenses of adhering to the standard of care in making the product. As the Court stated, “the care with which a defective product is manufactured and sold is immaterial.”<sup>604</sup>) Unlike the *Greenman* court’s policy, which was created for socializing the risk of loss across all parties in the distribution chain, the Alabama Court claimed it sought to retain a modified fault-based standard that targeted only those at fault but made the chances of recovery higher than under the old common law standard.<sup>605</sup> The policy of socializing risk *per se*

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<sup>603</sup> *Atkins*, 335 So. 2d at 137.

<sup>604</sup> *Atkins*, 335 So. 2d at 139-40.

<sup>605</sup> The *Atkins* court stated that “selling a dangerously unsafe chattel is negligence within itself.” 335 So. 2d at 140. It is hard to see how this preserves the at-fault concept, since the standard is a *per se* standard once the character of the product as defective has been determined. Presumably the only causal defense a

was not one of the Alabama court's objectives. Rather the Court was socializing risk among *at-fault* parties in the distribution chain by making it easier to successfully sue manufacturers.

Associate Justice Richard L. Jones authored the *Atkins* opinion for a unanimous court. The court that decided *Atkins* was a relatively new court, with three of its nine justices having been appointed just the year before.<sup>606</sup> The Court was an elected body and its chief justice was Howell Heflin, who would be elected as a Democrat to the U.S. Senate in 1978. Of the members of the *Atkins* court only one, Justice Pelham J. Merrill, had been a member of the court for more than eight years.<sup>607</sup>

As scholar Gerald Rosenberg has noted, courts can effectuate (or contribute to) social change when certain conditions are met in the wider society, which allow for the courts as institutions to initiate the structural changes (*i.e.*, changes in rules) that other institutions, groups, and individuals are willing to follow.<sup>608</sup> In the case of the Alabama legislature's rapid move to enact reforms that supported the policy approach begun by the *Greenman* case, the state legislature's action indicates that a significant degree of support (or at least little organized opposition) existed among the populace to effectuate the consumer-oriented protections sought in *Greenman*. However, the Alabama Supreme Court's subsequent adoption of an alternative to the *Greenman* rule shows not only the

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manufacturer retained under this new approach was to prove that *when* it sold the product it was not defective and was only defective by some subsequent, post-sale occurrence. *Atkins*, 335 So. 2d at 140-41.

<sup>606</sup> The three new justices were Reneau P. Almon, Janie L. Shores, and T. Eric Embry. Justice Shores was the first woman to serve as a justice on the state's supreme court.

<sup>607</sup> George Earl Smith and Bilee Cauley, *A History of the Alabama Judicial System, 1819-1991* (1991), available online at [http://www.judicial.state.al.us/documents/judicial\\_history.pdf](http://www.judicial.state.al.us/documents/judicial_history.pdf).

<sup>608</sup> Gerald N. Rosenberg, *The Hollow Hope: Can Courts Bring About Social Change?* (Chicago: Univ. of Chicago, 1991), pp. 35-36.

Court's attempt to formulate a public policy regarding tort law and its goals; but to do so independent of the state legislature. The Court saw the legislature's adoption of the UCC as merely a form of "guidance."<sup>609</sup> The Alabama Supreme Court was formulating a political-economic policy for the citizens of Alabama and for manufacturers who made products sold or used in Alabama.<sup>610</sup> The Court was playing an activist role – altering the common law to meet its policy goals in a case that could otherwise have been decided under then-existing common law rules. The Court noted that it had "not attempted to answer all the questions which may arise on the trial of every products liability case."<sup>611</sup> Yet the Court saw itself as an independent actor, neither following nor deferring to the state legislature's policy decisions and refusing to wholly adopt the rationale of the California Court's *Greenman* case or the ALI's *Restatement (Second)*.

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<sup>609</sup> *Atkins*, 335 So. 2d at 141.

<sup>610</sup> Under the U.S. Supreme Court's decisions regarding the Fourteenth Amendment's Due Process Clause, of course, only a manufacturer who had established "minimum contacts" with the state of Alabama could be sued in Alabama state courts, depending on the state's long-arm jurisdiction statute. *International Shoe v. Washington*, 326 U.S. 310, 319 (1945) and *Hanson v. Denckla*, 357 U.S. 235, 253-54 (1958). These were the most pertinent U.S. Supreme Court precedents in effect at the time of the Alabama Supreme Court's *Atkins* decision. However, in 1980 the U.S. Supreme Court decided *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, a product liability case wherein the Court held that New York state residents could not sue a New York corporation in Oklahoma just because the motor vehicle incident occurred in Oklahoma. The Court held that "if the sale of a product of a manufacturer or distributor such as Audi or Volkswagen is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State." 444 U.S. at 297-98. However, any suit between an Alabama resident and a manufacturer from another state who lacked minimum contacts might be brought in federal district court under federal diversity jurisdiction, assuming the amount in controversy requirement was met. 28 U.S.C. § 1332.

<sup>611</sup> *Atkins*, 335 So. 2d at 144.

## **b) North Carolina**

Another response, maintained by a minority of states by the late 1960s, was to altogether expressly refuse to adopt strict liability. One of these states was North Carolina. In November 1964, almost two years after the California *Greenman* case had been published and in the midst of the adoption of strict liability by many states' courts, the North Carolina Supreme Court reaffirmed its commitment to not only pre-*Greenman* tort law but also to pre-*Henningsen* warranty law.<sup>612</sup> In *Terry v. Double Cola Bottling Co., Inc.*, a case involving a bottle of soda that contained a green fly, the Court held that the bottling company was not liable to the ultimate consumer under a warranty theory (express or implied) because the plaintiff lacked privity of contract with the bottling company.<sup>613</sup>

The complaint in *Terry* was originally filed in July 1962, almost one year prior to the publication of California's *Greenman* case but two years after the *Henningsen* case.<sup>614</sup> The suit was premised upon a negligence theory.<sup>615</sup> However, in June 1964, the plaintiff filed an amended complaint, alleging the defendant breached an implied warranty of fitness, a contractual claim.<sup>616</sup> The plaintiff lost at the trial stage and appealed to the North Carolina Supreme Court. At the Supreme Court, the plaintiff argued her case

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<sup>612</sup> *Terry v. Double Cola Bottling Co., Inc.*, 263 N.C. 1, 138 S.E.2d 753 (1964). This case was filed by the Court on November 25, 1964. California's *Greenman* decision was filed by the Court on January 24, 1963.

<sup>613</sup> 263 N.C. at 3, 138 S.E.2d at 754.

<sup>614</sup> *Terry v. Bottling Co.*, *Records and Briefs*, Fall Term, 1964, Fourth, Fifth, Sixth and Twenty-Seventh Districts, Vol. IV, Record on Appeal (Complaint), p. 2, located at the N.C. Supreme Court Clerk of the Supreme Court's Office, Raleigh, North Carolina. Hereinafter cited as "*Records and Briefs*, Vol. IV (4,5,6,27)".

<sup>615</sup> *Terry v. Bottling Co.*, *Records and Briefs*, Vol. IV (4,5,6,27), Record on Appeal (Complaint), p. 4.

<sup>616</sup> *Terry v. Bottling Co.*, *Records and Briefs*, Vol. IV (4,5,6,27), Record on Appeal (Amended Complaint), pp. 8-9.

based only upon the theory of warranties of “wholesomeness” and “fitness for human consumption.”<sup>617</sup> Both of these were contractual claims. The plaintiff never argued that the Court should apply a strict liability or no-fault standard; also, she did not cite California’s *Greenman* case.

Unlike New Jersey’s supreme court in *Henningsen*, the North Carolina Supreme Court refused to find an implied warranty of fitness as a matter of law.<sup>618</sup> The defendant manufacturer won, with the Court holding that no implied warranty from the manufacturer existed because there was no privity of contract between the plaintiff and the bottling company.

In a concurring opinion, Justice Susie Sharp argued that the plaintiff’s evidence failed to demonstrate that the bottle was in the same condition when she bought it as when it left the manufacturer. Proving non-interference after leaving the manufacturer would only have been relevant if a claim of *res ipsa loquitur* had been made, which the plaintiff did not make in this case. Justice Sharp may have taken this position chiefly for the purpose of allowing a concurrence on the warranty issue, while staking out a different doctrinal position upon which she believed the case should have been decided. Justice Sharp disagreed with the Court’s implication that the lack of privity should have been the death of the plaintiff’s case.<sup>619</sup> She contended that the privity rule was a relic of “the

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<sup>617</sup> Plaintiff Appellant’s Brief, *Terry v. Bottling Co.*, *Records and Briefs*, Vol. IV (4,5,6,27), pp. 1-6 (arguing that the instant case fell within an exception to the privity rule). Similarly, the manufacturer restricted its argument to the privity issue. *Ibid.*, Defendant Appellee’s Brief, pp. 1-5.

<sup>618</sup> *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960).

<sup>619</sup> 263 N.C. at 4, 138 S.E.2d at 755 (J. Sharp, concurring). Sharp was the first woman justice on the North Carolina Supreme Court. She was appointed in 1962 and was the first woman elected to the chief justice position in any state in 1974. Anna R. Hayes, *Without Precedent: The Life of Susie Marshall Sharp* (Chapel Hill: UNC Press, 2008), p. *xiii*.

‘good old days’ when marketing was simple, products were uncomplicated and open to inspection, and the buyer was able to evaluate their quality.”<sup>620</sup> First, she claimed that manufacturers could be held liable under an implied warranty to the consumer, regardless of privity.<sup>621</sup> Next, she urged the adoption of a form of strict liability. Justice Sharp wished she could have “assault[ed] the citadel” on behalf of a more severely injured plaintiff.<sup>622</sup> Notwithstanding the weak case at bar, she felt “compelled to champion [the plaintiff’s] cause” and argued for a policy change as follows:

Whether we call the rule for which I contend strict liability in tort, as the professors and chaste logic might require, or an implied warranty of fitness imposed by law, makes no difference. It seems to me that reason and justice should now impel this Court to hold that, under modern merchandising conditions, a manufacturer of food products in sealed containers represents to all who acquire them in legitimate channels of trade that his goods are wholesome and fit for human consumption; and that, if they are not, and injury results to the ultimate consumer, he may recover as well against the manufacturer as against his immediate vendor.<sup>623</sup>

Justice Sharp’s reference to “modern merchandising conditions” was reminiscent of Justice Traynor’s reasoning in *Greenman* regarding why strict liability was needed to replace negligence.

Sharp bore a profile that was within the vein of mid-century progressive judges.

For example, she was very vocal in the late 1950s in supporting civil women’s rights and

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<sup>620</sup> 263 N.C. at 7, 138 S.E.2d at 757 (citing and adopting the arguments of William L. Prosser’s “The Assault Upon the Citadel (Strict Liability to the Consumer),” 69 *Yale L. J.* 1099 (1960)).

<sup>621</sup> 263 N.C. at 12, 138 S.E.2d at 760 (citing *Davis v. Radford*, 233 N.C. 283, 63 S.E.2d 822 (1951)).

<sup>622</sup> The plaintiff apparently suffered some indigestion or perhaps vomiting and nausea or, as Justice Sharp put it, “minimal damage.” 263 N.C. at 13, 138 S.E.2d at 761.

<sup>623</sup> *Ibid.*

women's participation in the economy and workplace.<sup>624</sup> She contended, in the tradition of difference feminism, that "women, who are generally conceded to have a high moral sense, know instinctively that the two are inseparable. That is an additional reason [*sic*] we why we need women citizens in politics, and may it always be said that women politicians are exemplars of both public and private virtue."<sup>625</sup> However, in her writings she voiced equalitarian sentiments. For example, she referenced psychological studies supporting her contention that there were few psychological differences between men and women. Also, she saw few differences in how men and women should be treated by government and in how they should participate in civil society.<sup>626</sup> Nevertheless, in comparison to other feminists of the 1970s, Sharp would have been considered rather conservative. For example, she opposed the Equal Rights Amendment, noting that the legal consequences of the proposed constitutional amendment could not be predicted, that the Fourteenth Amendment "will prevent any real discrimination between the sexes," and that the "physiological and functional differences between men and women" that resulted in "bar[ring] women from operating saloons, engaging in professional wrestling, and which impose weight-lifting restrictions on" women "do not offend me."<sup>627</sup>

North Carolina allowed for the election of state supreme court justices and in 1976 Sharp ran for the chief justiceship, after holding an associate justice position since

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<sup>624</sup> Susie Sharp Papers, Collection No. 4898, Subseries 1.5: Speeches. Box 43, Folder 453. North Carolina Collection, UNC Chapel Hill. Undated speech from period of Eisenhower administration entitled, "Breaking the Barriers which Face Women in Public Affairs," pp. 1-5 (hereinafter "Sharp Papers").

<sup>625</sup> Sharp Papers, Subseries 1.5: Speeches. Box 44, Folder 477. Untitled judicial electoral speech for N.C. Supreme Court chief justiceship (1974), p. 4.

<sup>626</sup> Sharp Papers, Subseries 1.5: Speeches. Box 44, Folder 477. Untitled judicial electoral speech for N.C. Supreme Court chief justiceship (1974), pp. 6-8.

<sup>627</sup> Sharp Papers, Subseries 1.1 General Subject File. Box 7, Folder 73. Letter to Sen. Sam J. Ervin, Jr., 28 Aug., 1970.



1962. She gave many speeches around the state in her campaign for office, often noting that although there was “much dirt in politics,”<sup>628</sup> she saw appellate judging as a “solitary” job in “cloisters,” above politics.<sup>629</sup> In 1962, the year she was appointed to the North Carolina Supreme Court, she noted, “in the Cloisters [meaning the Supreme Court] we do not have to worry as much about the impact we will have upon individual lives as do the Superior Court [trial court] judges. The authority of the Supreme Court is quite impersonal; the power of the Superior Court is very personal indeed.”<sup>630</sup> Sharp was aware that “government touches people more perceptibly in the courtroom than at any other point in their lives and its impact upon them depends upon the spirit of those who administer the law.”<sup>631</sup> By the 1970s, she was cognizant of the popular perception of judges as policymakers. During her campaign for chief justice she sought to quell fears that she was a political judge, noting that “one of the greatest services a judge can render the public [unreadable] which elected him is to conduct himself so that his decisions are never questioned on the ground that they were politically motivated.”<sup>632</sup> Sharp stated that “as a matter of judicial propriety” she had always “abstained from any active participation in partisan politics” since she had become a judge. However, Sharp, like Roger Traynor, was publicly identified with the Democratic Party, even though Democrats in the one-party South of the period could be quite politically conservative.

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<sup>628</sup> Sharp Papers, Subseries 1.5: Speeches. Box 43, Folder 453. Undated speech from period of Eisenhower administration entitled, “Breaking the Barriers which Face Women in Public Affairs,” p. 3.

<sup>629</sup> Sharp Papers, Subseries 1.5: Speeches. Box 43, Folder 468. “North Carolina State Bar Annual Meeting in Raleigh, N.C., 26 Oct. 1962,” p. 1.

<sup>630</sup> *Ibid.*, p. 2.

<sup>631</sup> *Ibid.*

<sup>632</sup> Sharp Papers, Subseries 1.5: Speeches. Box 44, Folder 477. Untitled judicial electoral speech for N.C. Supreme Court chief justiceship (1974), p. 4B.

As Sharp noted in remarks introducing Joan Mondale, the wife of then-senator from Minnesota, Walter Mondale, “of course, I always voted the straight Democratic ticket.”<sup>633</sup>

Sharp, Traynor, and other judges who supported adopting strict liability believed that the common law needed to change with the economic conditions, as understood by the courts. Justice Sharp did not see precedent as an obstacle to policy formation or innovation. For example, she agreed wholeheartedly with Karl Llewellyn’s statement:

You must know where you want to go in the case in hand before you can utilize the precedents effectively. They can limit you, before you decide, but they cannot deprive you of choice ... The precedents are multiform, ambiguous, and never fixed, and ... the tradition-hallowed techniques for dealing with them permit you to squeeze out of the same set of precedents any one of a dozen different conclusions or rules.<sup>634</sup>

Llewellyn was, of course, a famous apologist for legal realism. Sharp’s concurring opinion in *Terry* was the kind of statement of policy preference that accorded with the legal realists’ point of view: modern conditions mandated a change in the rules governing behavior.<sup>635</sup> For Justice Sharp there was no hesitancy about whether the legislature should be the governing entity responsible for deciding such a change in public policy. It

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<sup>633</sup> Sharp Papers, Subseries 1.5: Speeches. Box 43, Folder 462. Undated introduction entitled, “Joan Mondale Introduction,” (probably 1974), Note cards, p. 1.

<sup>634</sup> Karl Llewellyn, *Jurisprudence: Realism in Theory and Practice*, (Chicago: Univ. of Chicago Press, 1962), quoted in Hayes, *Without Precedent*, p. 287. Hayes quotes Justice Sharp’s responses to a questionnaire from the University of Connecticut in 1973 as agreeing “100 percent.”

<sup>635</sup> As G. Edward White has noted, realism in the realm of tort law was, above all, concerned with doctrines that promoted “functional efficacy” of how tort laws functioned were administered, or how the “processes” of the administration of the law actually effected behavior; and, of course, the realists were concerned with compensating injured parties. White, *Tort Law in America: An Intellectual History* (New York: OUP, 1980, 2003 ed.), pp. xiv, 167-68.

was the courts that had traditionally shaped tort law and should remain the institution capable of implementing new tort policies to meet new conditions in the society.

Although Sharp's biographer, Anna R. Hayes, contends that Justice Sharp's "general preference was not to appear too far out of the mainstream, due in part to her deep respect for mechanisms promoting consistency and stability in the judicial system," Sharp's *Terry* concurrence is a clear statement in support of policy making, which advocated a radical departure from North Carolina's tort precedents.<sup>636</sup>

In 1967 in *Tedder v. Pepsi-Cola Bottling Co. of Raleigh*, the North Carolina Supreme Court implicitly declined to adopt strict liability. In *Tedder* a woman who bought a Diet Pepsi six pack and consumed a "deleterious substance," the Court held that "[i]f the bottling company is to be held liable in this case, it must be on implied warranty."<sup>637</sup> The Court acknowledged that the limitation of warranties had been "under vigorous assault over all the country [and that] [t]he assault has been successful in all but a few jurisdictions."<sup>638</sup> However, North Carolina would remain a bastion that would continue to fend off the assault.

In *Tedder*, in which the complaint was filed in February 1966, the plaintiff based her case on theories of negligence, violation of a state food safety statute, and breach of express and implied warranties.<sup>639</sup> Again, as in *Terry* above, the counsel for the plaintiff

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<sup>636</sup> Hayes, *Without Precedent*, p. 286.

<sup>637</sup> *Tedder v. Pepsi-Cola Bottling Co. of Raleigh, N.C., Inc.*, 270 N.C. 301, 304, 154 S.E.2d 337, 339 (1967).

<sup>638</sup> 270 N.C. at 305, 154 S.E.2d at 339 (citing most of William L. Prosser's then-recent articles on the abrogation of negligence, warranties, and the doctrine of privity in favor of strict liability).

<sup>639</sup> *Tedder v. Bottling Co.*, *Records and Briefs*, Spring Term, 1967, Tenth and Twentieth Districts Appeals, Vol. III, Record on Appeal (Complaint), pp. 4-7, located at the N.C. Supreme Court Clerk of the Supreme Court's Office, Raleigh, North Carolina. Hereinafter cited as "*Records and Briefs*, Vol. III (10, 20)".

did not argue for strict liability and did not cite the *Greenman* case. This is somewhat surprising considering that Justice Sharp's *Terry* concurrence, wherein she had written in favor of strict liability, was only cited by the plaintiff to support an argument in favor of an implied warranty claim.<sup>640</sup> Surprisingly, Justice Sharp apparently joined the majority in this case. She did not write separately to renew her call for strict liability. The *Tedder* case demonstrates that the movement toward strict liability in North Carolina would not be led or even expressly encouraged by lawyers in their briefs. If the Tort Revolution were going to come to North Carolina, then it would have to be brought about by the courts or the legislature.

The only citation by any North Carolina court to the *Greenman* case did not occur until 1976.<sup>641</sup> In that case, the North Carolina Court of Appeals, the intermediate appellate court for the state, assumed in dicta "*arguendo*, the viability of strict liability in tort in North Carolina" and cited *Greenman* for the purpose of holding that the doctrine of strict liability only applies if "the product [is] not only defective but present[s] an unreasonable danger to health."<sup>642</sup> The case concerned a plaintiff who injured his teeth after biting on an unshelled nut from a store-bought bottle of mixed nuts. The Court of Appeals construed strict liability as "a substantially more narrow basis of liability than breach of implied warranty of merchantability under" the state's version of the Uniform Commercial Code. The Court held that the facts failed to show a defective product or one that "present[ed] an unreasonable danger to health and safety". The court endorsed a

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<sup>640</sup> *Tedder v. Bottling Co.*, *Records and Briefs*, Vol. III (10, 20), pp. 7-8.

<sup>641</sup> This remains the *only* citation of *Greenman* by a North Carolina court as of this writing in 2009.

<sup>642</sup> *Coffer v. Standard Brands, Inc.*, 30 N.C. App. 134, 142, 226 S.E.2d 534, 539 (1976).

comment to the *Restatement (Second) of Torts* § 402A regarding strict liability to the effect that “certain commodities such as food and drugs cannot be manufactured without some element of risk due to their very nature.”<sup>643</sup>

Three years later, in 1979, the North Carolina legislature enacted the Products Liability Act, which provided protection to manufacturers.<sup>644</sup> Justice Sharp’s biographer contends that Sharp’s concurrence in *Terry* in 1964 gave a “substantial push” to the effort to enact North Carolina’s Products Liability Act.<sup>645</sup> However, there is no apparent evidence Sharp’s opinion, so remote in time (fifteen year prior), was influential at all in passing the Act in 1979. Rather, the state law was the result of post-New Deal pluralist politics. That is, many interests petitioned North Carolina legislators in order to affect the state’s products liability law.

In May 1977, four state senators introduced the first products liability bill in North Carolina history.<sup>646</sup> The proposed legislation was friendly to manufacturers. The

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<sup>643</sup> 30 N.C. App. at 142, 226 S.E.2d at 539 (citing N.C. Gen. Stat. § 25-2-314(1) and *Restatement (Second) of Torts* § 402A, comments i and k (1965)).

<sup>644</sup> N.C. Gen. Stat. § 99B-2(b) (1979). Invaluable research assistance regarding this Act was provided by the work of Kenneth Kyre, Jr., an attorney in private practice in North Carolina, who compiled and photocopied many original public legislative documents regarding the legislative history of the Product Liability Act in its various incarnations and amendments. Mr. Kyre’s legislative history is not an interpretive or analytical work and apparently none of the text is his own, with the exception of a chronologically organized table of contents. Rather it is a compilation and organization of photocopies of original public documents. All interpretations regarding these materials are my own. His compilation is available at the North Carolina Legislative Library in Raleigh, North Carolina and is entitled *Legislative History of the Products Liability Act and the Products Liability Statute of Repose: Senate Bill 189, N.C. Gen. Stat. Chapter 99B and § 1-50(a)(6) (And the History of Senate Bill 746, House Bill 235, and House Bill 993)*, 1 vol. (various foliations): ill.; 30 cm., by Kenneth Kyre, Jr., of Pinto Coates Kyre & Brown, PLLC of Greensboro, N.C. (August, 2007). Call No. KFN 7597.7 .L44 2007. Hereinafter cited as “Kyre”.

<sup>645</sup> Anna R. Hayes, *Without Precedent*, p. 289.

<sup>646</sup> S.B. 746, “Product Liability Act,” North Carolina Senate Journal, First Session 1977 (May 23, 1977), pp. 574-75 [Kyre, pp. 82-84]. Introduced by Senators E. Lawrence Davis III (D-Winston-Salem), J. J. Harrington (D-Lewiston), Carl D. Totherow (D-Winston-Salem), and Robert B. Jordan, III (D-Mount Gilead). [Kyre, p. 11.]

bill would have limited product liability lawsuits by requiring any suit to be brought “within six years after the date of initial purchase ... or ten years after the date of manufacture.” Also, in order to be “defective,” a product had to be “unreasonably dangerous,” which meant it was dangerous to an extent “beyond that which would be contemplated by the ordinary and prudent buyer.” Also, there was a rebuttable presumption that a product was not defective if it complied with government or industry standards in design or method of production. Finally, there would be no liability if the product had been altered after it was sold.<sup>647</sup>

As Senator E. Lawrence Davis, III, a Democrat, publicly noted in committee, the bill was propelled by the complaints of manufacturer constituents. The owner of the Burress Equipment Company of Winston-Salem, North Carolina had complained to Senator Davis that the company’s “product liability insurance had gone up 400%, [and] that some companies could not even buy such insurance.”<sup>648</sup> Also, Davis claimed he was inspired to limit the time in which a suit could be brought because of a lawsuit in which damages were awarded for injuries caused by a product that was seventeen years old.<sup>649</sup> The plaintiff-oriented North Carolina Academy of Trial Lawyers appeared in opposition to the bill, presenting the testimonies of accident victims regarding the need for product liability insurance.<sup>650</sup> Such a strongly pro-manufacturer bill could not pass out of the

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<sup>647</sup> N.C. Bill Book (Senate Bill 746), pp. 1-3, [Kyre, pp. 82-84].

<sup>648</sup> Minutes of N.C. Senate Judiciary II Committee, at 2 (May 31, 1977), [Kyre, pp. 85-86].

<sup>649</sup> Minutes of N.C. House Judiciary II Committee, at 2-3 (June 28, 1977), [Kyre, p. 105].

<sup>650</sup> Minutes of N.C. Senate Judiciary II Committee, at 2 (May 31, 1977), [Kyre, pp. 85-86]. The committees’ minutes are summarized by legislative clerks and no verbatim transcripts are available. Therefore, quotes in this paper are from the summaries, which paraphrase the views or statements of members and witnesses; there are rarely any first-person quotes from particular members or witnesses.

state's Senate Judiciary Committee. It was pared down to a bill only limiting the time in which a lawsuit could be filed.<sup>651</sup> This truncated bill passed the Senate and was later modified by the House.<sup>652</sup> However, the modified bill ultimately failed in the state Senate.<sup>653</sup>

Although this initial foray into legislating upon product liability claims did not pass, it yields insight into the pluralistic nature of the product liability issue at the state level. The courts across the nation had interjected the question of product liability into the political process. Throughout the nation, as discussed in Chapter Five below, commercial general liability insurance premiums had substantially increased in the mid-1970s. Constituents complained to both state and federal legislators for state and/or federal protective legislation regarding either insurance premiums or substantive products liability law. The rise in premiums indicates the interstate nature of the product liability issue. Even in North Carolina, a state where the supreme court had clearly indicated it would not expand its products liability law, the liability insurance rates had dramatically increased as they had in other areas of the nation. The complaints to the legislature in North Carolina demonstrate that insurance rate increases motivated the reaction to the

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<sup>651</sup> Minutes of N.C. Senate Judiciary II Committee, at 2 (June 15, 1977), [Kyre, p. 88]. The minutes erroneously refer to a statute of limitations, when the bill actually concerned a statute of repose.

<sup>652</sup> 1977 N.C. House Journal (June 29, 1977), p. 1211; N.C. Bill Book (Senate Bill 746), Roll Call, N.C. House of Representatives, June 29, 1977, [Kyre, pp. 113-14]. The Senate roll call votes indicated no votes against the bill, but substantial abstentions. For example, on the first amended bill the "ayes" numbered 28 and the abstentions numbered 22. There were no listed "no" votes. N.C. Bill Book (Senate Bill 746), [Kyre, p. 98]. It has been common practice on controversial bills for members to abstain rather than vote "no". Members often abstain when they do not wish to appear on the public record as specifically opposing a bill.

<sup>653</sup> 1978 N.C. Senate Journal, p. 1418, [Kyre, p. 123]. Senator Marshall A. Rauch (D-Gastonia) moved that the Senate and House versions not be reconciled; he specifically requested the Senate not request conferees. Ibid.

Tort Revolution. This reaction – later called tort reform in the early 1980s – is discussed at greater length in Chapters Five and Six below.

The bill that eventually resulted in North Carolina’s first product liability law was introduced in 1979.<sup>654</sup> Again, manufacturers had organized to propel this bill. The effort started with a private “task force” created by wholesalers and retailers in North Carolina, who claimed they could not purchase liability insurance at affordable rates.<sup>655</sup>

Manufacturers sought to prohibit lawsuits against manufacturers whose products complied with regulatory standards, or had been altered after sale, or when a consumer had been “negligent in using and maintaining” the product.<sup>656</sup> Manufacturers claimed they were “having difficulties securing products liability insurance or that costs are so prohibitive businesses cannot afford [*sic*] it.”<sup>657</sup> The manufacturers that supported the bill were makers of both consumer goods and capital goods in the state.<sup>658</sup> The bill’s

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<sup>654</sup> 1979 N.C. Senate Journal (Senate Bill 189) (Jan. 29, 1979), p. 60, [Kyre, p. 126]. The bill had 23 co-sponsors. The House version was introduced on the same day. 1979 N.C. House Journal (House Bill 235) (Jan. 29, 1979), pp. 82-83, [Kyre, pp. 141-42]. The House bill had ten co-sponsors.

<sup>655</sup> Charles F. Blanchard and Doug B. Abrams, “North Carolina’s New Product Liability Act: A Critical Analysis,” *Wake Forest L. Rev.*, Vol. 16, No. 2 (April 1980), p. 171. One of the authors of this law review article, Charles F. Blanchard, was counsel for the plaintiff in *Tedder*, reviewed above.

<sup>656</sup> Minutes of N.C. Committee on Manufacturing, Labor and Commerce, pp. 1-2 (Feb. 8, 1979), [Kyre, pp. 155-56]. Senator Robert B. Jordan, III, (D-Mount Gilead) introduced Howard Manning, a lobbyist on behalf of the North Carolina Products Liability Task Force, a group of manufacturers who wanted restrictions on product liability suits. Minutes of N.C. House Judiciary II Committee (Feb. 8, 1979), p. 2, [Kyre, p. 158].

<sup>657</sup> Minutes of N.C. House Judiciary II Committee (Feb. 8, 1979), p. 2, [Kyre, p. 158].

<sup>658</sup> Nineteen companies appeared before the N.C. Senate Committee on Manufacturing, Labor and Commerce, including Cross Sales and Engineering of Greensboro; the N.C. Textile Manufacturing Association based in Greensboro; Seaboard Foods of Rocky Mount; and Smith Hardware of Goldsboro; and Winchester Surgical Supply of Charlotte, North Carolina. Minutes of the North Carolina Senate Committee on Manufacturing, Labor, and Commerce on Senate Bill 189 – Products Liability. Feb. 28, 1979, p. 1 [Kyre, p. 161].



opponents included groups such as the Ethics League, the N.C. Consumer Council, and the N.C. Academy of Trial Lawyers.<sup>659</sup>

Manufacturers complained to legislators about the “products liability roulette,” where the law in the state had allegedly become “an instrument of oppression and a happy hunting ground for the plaintiffs’ bar.” As one textile manufacturer stated, the bill’s provisions protecting manufacturers through a statute of limitations, quelling *ad damnum* clauses,<sup>660</sup> and providing a state-of-the-art defense were welcome aid and plaintiffs had sufficient protection under the law if they had a “timely and valid claim.”<sup>661</sup> The need for protective legislation was purportedly demonstrated by “changing court decisions, increasing damage awards, and higher insurance costs.”<sup>662</sup>

By contrast, interest groups like the North Carolina Academy of Trial Lawyers argued that there was “no insurance crisis” except one “deliberately created by insurance companies” in order to obtain protectionist legislation that would “deprive the consumers of their rights.” The insurers, driven by their “insatiable appetite for money,” were the real culprits, not the manufacturers. The Academy opposed the entire bill and contended

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<sup>659</sup> Ibid., p. 2 [Kyre p. 162].

<sup>660</sup> The *ad damnum* clauses, literally meaning “to the damage,” are included in complaints that make specific requests for monetary relief from the court in civil cases.

<sup>661</sup> Statement of Jack Elam, General Counsel of Cone Mills Corporation of Greensboro, North Carolina. Statement to the North Carolina Senate Committee on Manufacturing, Labor, and Commerce, and the North Carolina House Judiciary II Committee on Senate Bill 189 – Products Liability and House Bill 235 – Products Liability. Minutes of these committees, Feb. 28, 1979, p. 2 [Kyre, pp. 166-70].

<sup>662</sup> Statement of W.L. Beerman, Jr., Chairman of the Government Liaison Council of the Greensboro Chamber of Commerce to the North Carolina Senate Committee on Manufacturing, Labor, and Commerce, and the North Carolina House Judiciary II Committee on Senate Bill 189 – Products Liability and House Bill 235 – Products Liability. Minutes of these committees, Feb. 28, 1979. [Kyre, p. 188].

that its position was not based on “protection of personal income” of attorneys but rather the trial lawyers’ concern for the “fundamental rights” of injured citizens.<sup>663</sup>

It should be noted that in the 1970s, the Republican Party was almost non-existent in North Carolina state politics. For example, of the fifty-five state senators that served in 1977, only four were Republicans. In the 1977 House, of the 129 representatives that served that year, only six were Republicans, and only fifteen in 1979-80.<sup>664</sup> As will be discussed in Chapters Five and Six below, the federal tort reform efforts of the late 1970s would initially see bipartisan support. However, by the early 1980s, at the federal level Democrats were less supportive and Republicans more supportive of federal legislation to protect manufacturers from product liability claims. Yet, since the Democratic Party dominated North Carolina during the mid-to-late 1970s, the move in favor of state legislation to protect manufacturers was not clearly partisan. There was an apparently dramatic split within the legislature – within the Democratic Party – regarding this legislation. As noted above, both the 1977 and 1979 bills had substantial numbers of unofficial abstentions, with few excused absences. It was (and remains) the practice in both houses of the North Carolina legislature for members who do not wish to appear “on the public record” as voting for or against a bill to unofficially abstain by simply walking

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<sup>663</sup> Statement of Allen Bailey of the N.C. Academy of Trial Lawyers to the North Carolina Senate Committee on Manufacturing, Labor, and Commerce, and the North Carolina House Judiciary II Committee on Senate Bill 189 – Products Liability and House Bill 235 – Products Liability. Minutes of these committees, Feb. 28, 1979. [Kyre, pp. 201-07].

<sup>664</sup> *North Carolina Manual 1977* (Raleigh: Secretary of State, 1977), pp. 305-06 (Senate), 365-67 (House); *North Carolina Manual 1979-80* (Raleigh: Secretary of State, 1979), pp. 287-88 (Senate), 347-49 (House).

out of the legislative chamber when a bill has been called for a vote. These product liability bills saw substantial numbers of such unofficial abstentions.<sup>665</sup>

Nevertheless, once called for a final vote, both houses of the General Assembly passed the bill overwhelmingly.<sup>666</sup> The North Carolina Products Liability Act effectively prohibited strict liability in product defect cases and retained the primacy of North Carolina's previously enacted version of the Uniform Commercial Code, which governed disputes between sellers and consumers under the principles of contract law.<sup>667</sup> However, contrary to prior North Carolina case law, the Act eliminated the manufacturer's defense of lack of contractual privity.<sup>668</sup> The legislature was endorsing the Progressive-Era approach of the *MacPherson* case, allowing negligence claims against remote manufacturers. That is, a consumer could sue the manufacturer, even though the consumer lacked any contractual relationship with the manufacturer. Thus, the legislature intervened in an area theretofore dominated by the courts. Not only was the legislature stepping in to prevent any chance of the judiciary implementing strict liability but it was also overturning previous judge-made common law rules regarding contractual claims.

After the different paths taken in Alabama and North Carolina, both states ended up in basically the same place: privity was no longer required, but fault was still

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<sup>665</sup> 1977 N.C. House Journal (June 29, 1977), p. 1211; N.C. Bill Book (Senate Bill 746), Roll Call, N.C. House of Representatives, June 29, 1977, [Kyre, pp. 113-14].

<sup>666</sup> N.C. Bill Book (House Bill 189) (May 23, 1979 for Senate, passing with 41 yes votes, 0 no votes, 11 absences) (May 24, 1979 for House, passing with 91 yes votes, 0 no votes, 29 absences) [Kyre, pp. 394-96, 405].

<sup>667</sup> N.C. Gen. Stat. § 99B-2(a) (1979).

<sup>668</sup> N.C. Gen. Stat. § 99B-2(b) (1979).

necessary. The experiences of both states demonstrate the pluralistic nature of product liability law after the Tort Revolution. The states' courts had affected the business interests of manufacturers and those producers went to their legislatures to seek protection. In some states, like Alabama and North Carolina, they received such protection through statutes. North Carolina was somewhat unusual in having a rather traditional majority that rejected strict liability. Yet, even these states were not hidebound regarding tort law. They placed fault on a higher plane than even the original nineteenth-century's common law privity doctrine. Manufacturers were responsible to remote purchasers, but only if the producer had done something wrong. These are examples of legislative reforms of an area of law traditionally controlled by state courts. Yet, the legislative bodies were unwilling to go so far as to reshape their states' tort law on the *Greenman* strict liability model.

### ***Why Did Other States' Courts Follow New Jersey and California?***

The massive and rapid adoption of strict liability by a majority of state courts in the 1960s may appear to have been inexorable, especially if one agrees with the rationale offered in support of strict liability: that no-fault liability is necessary in a complex commercial society with vertical distribution chains and a lack of first-hand knowledge on the part of consumers to evaluate the condition of a product prior to purchase. Many scholars who have commented on the rapidity of change across the nation during the 1960s have described it as one of "momentum" created by the first courts, namely New Jersey and California's.<sup>669</sup> Charles Lopeman has noted that among legal scholars most

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<sup>669</sup> G. Alan Tarr and Mary Cornelia Aldis Porter, *State Supreme Courts in State and Nation* (New Haven: Yale, 1988), p. 40.

research has “been directed toward better understanding of the *policy produced* rather than to the basic decision whether or not to produce it. There has been no investigation of what causes some court to embrace the policy-making role and others to reject it.”<sup>670</sup> The California Supreme Court’s *Greenman* decision and the various state court decisions reviewed herein demonstrate that judges made conscious policy decisions, which were prudential in character. California only became a “leader” in tort law policy making because other courts consciously chose to follow it. The historical question that arises in light of the rapid adoption of strict liability by so many states is *why* other jurisdictions chose to follow New Jersey and California’s examples. The remainder of this section is an investigation of the reasons *why* state courts embraced policy innovation and made the Tort Revolution.

The scholarly term for the judicial adoption of new legal rules is “innovation,” and the question of why courts innovate is referred to as the problem of adoption and diffusion.<sup>671</sup> The second issue, why new policy doctrines are diffused (i.e., adopted by other courts) is our concern. Lawrence Baum has argued that new legal doctrines are formed within “policy communities,” including scholars, practicing lawyers, and, of course, judges.<sup>672</sup> The opinions wherein state courts abrogated privity and/or adopted strict liability show that judges were aware of two things: the scholarly articles

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<sup>670</sup> Charles S. Lopeman, *The Activist Advocate: Policy Making in State Supreme Courts* (Westport, CT: Praeger Publ., 1999), p. 2.

<sup>671</sup> Lawrence Baum, “Courts and Policy Innovation,” in Gates, John B. and Charles A. Johnson (eds.), *The American Courts: A Critical Assessment* (Washington, D.C.: CQ Press, 1991), p. 413.

<sup>672</sup> *Ibid.*, p. 419.

championing the doctrine and the *Henningsen* and *Greenman* cases and any others that cited and followed it in other states.<sup>673</sup>

By the 1970s, with the massive shift to a strict liability standard being the most radical, prominent, and recent of the many changes in tort law over the course of the century, scholars started debating the character of courts not only as political or policy-making institutions but in terms of what kind of “organizations” courts represented. For example, Martin Shapiro, writing in 1970, argued that in matters of tort policy formation state courts were a non-hierarchical, non-Weberian “headless, decentralized organization.”<sup>674</sup> However, this was a search for too precise a formulation for political scientific model making. The reality, as we have seen above, was more complex and less systematic than it appeared to some at the time.

The history of the Tort Revolution shows that state courts, at least in the context of tort policy, were not an “organization” in the 1960s and 1970s. For example, the American Law Institute’s *Restatement (Second) of Torts*, § 402A broadened tort law to allow for strict liability and many state courts cited it when expanding products liability law. However, the *Restatement* section was restricted to injuries caused by “defective” products, not all product-related injuries. The *Restatement* defined “defective” using two different standards, or tests: a consumer expectations test and an unreasonable

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<sup>673</sup> George L. Priest, “The Invention of Enterprise Liability: A Critical History of the Intellectual Foundation of Modern Tort Law,” *Journal of Legal Studies* 14 (Dec., 1985), pp. 461-528 (on impact of intellectuals and their published arguments).

<sup>674</sup> Martin Shapiro, “Decentralized Decision-Making in the Law of Torts,” in S. Sidney Ulmer, ed., *Political Decision-Making* (New York: Van Nostrand Reinhold Co., 1970), p. 47; Herbert Jacob, “Courts as Organizations,” in Keith O. Boyum and Lynn Mather, eds., *Empirical Theories About Courts* (New York: Longman, 1983); Lawrence B. Mohr, “Organizations, Decisions and Courts,” *Law and Society Rev.*, Vol. 10 (1976), p. 621; Shapiro, “Stability and Change in Judicial Decision-Making: Incrementalism or Stare Decisis?” *Law in Transition Quarterly*, Vol. 2 (1964), p. 134.

dangerousness test.<sup>675</sup> State courts, even those willing to adopt strict liability to replace negligence, adopted one of these definitions or fashioned their own. For example, some courts thought the consumer expectations standard, which provided that a product was “defective” if it was “in a condition not contemplated by the ultimate user, which will be unreasonably dangerous to him,” produced unjust results.<sup>676</sup> Different cases, the facts of which a court cannot control, would produce results that some courts refused to tolerate. This pattern of adoption of standards – after the switch to strict liability – shows that state courts were not hierarchically organized, following one another in lock step. Rather they held a general dedication in common to expand products liability but they did so idiosyncratically, using their own standards of justice.

Rather than evaluating the mass adoption of strict liability in terms of organizational models, it might be more informative to understand these changes in the historical terms of opportunities, confluence, and ideology. The answer to the question of *why* so many other states’ supreme courts quickly followed New Jersey and California’s decisions is found in a confluence of factors, with one factor predominating. The factors include (1) the channels of communication among lawyers, scholars, and judges, (2) the frequency of litigation regarding defective products (*i.e.*, the opportunities for courts to take action and adopt a doctrine), (3) the specialization of the tort bar, and (4) the unique ideological view held many judges of the twentieth century that law “must be flexible and responsive to social needs.”<sup>677</sup> This last factor is the most important.

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<sup>675</sup> *Restatement (Second) of Torts*, § 402A (Philadelphia: ALI, 1965).

<sup>676</sup> David A. Fisher, “The Role of the Judge in Tort Law: Tort Law – Expanding the Scope of Recovery Without Loss of Jury Control,” *Hofstra L. Rev.*, Vol. 11 (1983), pp. 968-69.

<sup>677</sup> Canon and Baum, “Patterns of Adoption of Tort Law Innovations,” p. 985.

### *(1) Channels of Communication*

As scholars have noted, courts learn of sister jurisdictions' case law developments through law review articles, judicial law clerks' research, in parties' briefs and oral arguments, and judges' own legal research.<sup>678</sup> For state supreme courts, it appears that their willingness to adopt new doctrines has been greatly shaped by trends in other states' courts.<sup>679</sup> Some studies of citation patterns have suggested that courts have been inclined to adopt the decisions of sister states in their geographical regions and whose courts are included in their regional case reporters.<sup>680</sup> However, other studies specifically of tort innovation have shown that regionalism was not a factor in adoption. Instead, there seems to be a national "market" for ideas in policy innovation. But such innovations, of course, are dependent on there being the cases brought to the court to provide the opportunity to innovate. That is, the frequency of litigation, which is reviewed below.<sup>681</sup> In the case of products liability, the willingness of courts to adopt was obviously present. The pattern of adoption was national in scale, not regional in context. The justifications contained in opinions that abrogated privity and/or adopted strict liability were not restricted to regional concerns or even particular manufacturing industries. If there was any geographical context, it was usually national inasmuch as the "modern" economy to

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<sup>678</sup> Baum, "Courts and Policy Innovation," p. 421.

<sup>679</sup> Shapiro, "Decentralized Decision-Making in the Law of Torts," pp. 50-51.

<sup>680</sup> Peter Harris, "Difficult Cases and the Display of Authority," *J. L. Econ. & Org.*, Vol. 1 (Fall, 1985), pp. 215-16; Gregory A. Caldeira, "The Transmission of Legal Precedent: A Study of State Supreme Courts," *American Political Science Review*, Vol. 79 (1985), pp. 178-93.

<sup>681</sup> Bradley C. Canon and Lawrence Baum, "Patterns of Adoption of Tort Law Innovations: An Application of Diffusion Theory to Judicial Doctrines," *American Political Science Review*, Vol. 75, (1981), pp. 975-987 (identifying and tracing the patterns of adoption of 23 plaintiff-oriented tort doctrines between 1876 and 1975); Baum, "Courts and Policy Innovation," pp. 423-24.



which justices referred was a “complex” national economy, with manufacturers who were geographically remote from consumers.

Another possible element in the channels of communication is the commonality of educational backgrounds among state supreme court judges. Some scholars have noted that lawyers and judges have a common “legal culture,” which encourages and produces shared political views and especially shared views on what law can and should achieve.<sup>682</sup> Where was this common culture formed? The most likely answer is at the beginning of judges’ and lawyers’ careers in law school and during subsequent legal practice.<sup>683</sup> Some studies have suggested that judges from elite undergraduate and law school backgrounds have been more willing than those from non-elite schools to innovate while on the bench.<sup>684</sup> Similarly, a study of United States Supreme Court justices suggested the same.<sup>685</sup> However, most state supreme court justices of the 1960s and 1970s were, in the words of scholars of the period, “closely connected to the states in which they serve[d], for most [were] native sons by birth or rearing, and many attended the state law school.”<sup>686</sup> This latter fact contrasts with federal district and appellate court judges who often have gone to law school outside their district’s state or, much more in

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<sup>682</sup> Martin Shapiro, “Decentralized Decision-Making in the Law of Torts,” p. 51; Robert A. Kagan, “Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry” *Law & Social Inquiry*, Vol. 19, No. 1 (Winter, 1994), pp. 1-62.

<sup>683</sup> G. Alan Tarr and Mary Cornelia Aldis Porter, *State Supreme Courts in State and Nation* (New Haven: Yale, 1988), p. 58.

<sup>684</sup> John T. Wold, “Political Orientations, Social Backgrounds, and Role Perceptions of State Supreme Court Judges,” *The Western Political Quarterly*, Vol. 27, No. 2 (June, 1974), pp. 244-45.

<sup>685</sup> John R. Schmidhauser, “The Background Characteristics of United States Supreme Court Justices,” in Glendon Schubert, ed., *Judicial Behavior: A Reader in Theory and Research* (Chicago: Rand McNally, 1964), p. 221.

<sup>686</sup> Mary Cornelia Porter and G. Alan Tarr, eds., *State Supreme Courts: Policymakers in the Federal System* (Westport, CT: Greenwood Press, 1982), p. xiv.

the case of federal appellate judges, outside of their circuit. Both groups of federal judges form more of an educated elite than state court judges.<sup>687</sup> In the case of the state supreme court justices considered in this study, most of them attended their states' law schools. California's Roger Traynor went to law school at the University of California at Berkeley (Boalt Hall) and graduated in 1927. New Jersey's John Francis went to law school at Rutgers from 1922 to 1925. North Carolina's Susie Sharp went to law school at the University of North Carolina at Chapel Hill from 1926 to 1929.<sup>688</sup> Accordingly, the willingness of state court justices to support the expansion of tort law does not seem highly correlated with whether the justice went to an elite school.

The law schools formed part of the bridge between the intellectual founders of the Tort Revolution and its later judicial implementers. On its most basic level, the uniform law curriculum inculcated experience as a teacher for lawyers and judges in what the law *should* be. This was the era of Brandeis and legal reform movements, the Holmesian appeal to experience, and the Cardozoan endorsement of judicial policy-making in modern industrial society. As a 1921 Carnegie Foundation report on American legal education put it, lawyers were being thought of not only as members of a "public profession," but also as "part of the governing mechanism of the state."<sup>689</sup> Thus, the

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<sup>687</sup> Elliot E. Slotnick, "Federal Trial and Appellate Judges: How Do They Differ?" *The Western Political Quarterly*, Vol. 36, No. 4 (Dec., 1983), pp. 573-74; Charles L. Zelden, "Roles, Functions, and Powers," in *The Judicial Branch of the Federal Government: People, Process, and Politics*, Charles L. Zelden, ed., (Santa Barbara, CA: ABC-CLIO, Inc., 2007), p. 48; Sheldon Goldman, "Characteristics of Eisenhower and Kennedy Appointees to the Lower Federal Courts," *The Western Political Quarterly*, Vol. 18, No. 4 (Dec., 1965), pp. 756-57; Sheldon Goldman, "Johnson and Nixon Appointees to the Lower Federal Courts: Some Socio-Political Perspectives," *The Journal of Politics*, Vol. 34, No. 3 (Aug., 1972), p. 935.

<sup>688</sup> Anna R. Hayes, *Without Precedent: The Life of Susie Marshall Sharp* (Chapel Hill: UNC Press, 2008), pp. 31, 56, 448 n. 64.

<sup>689</sup> Kermit L. Hall, *The Magic Mirror: Law in American History* (New York: OUP, 1989), p. 258 (quoting Alfred Z. Reed of the Carnegie Foundation's 1921 report on legal education in America).

regard for the profession, the uniformity of legal education, and the pedagogy that emphasized experience as a teacher and guide for judges all combined to instruct the young law students of Traynor, Francis, and Sharp's generation in the need for periodic reform in the law and the power of judges to implement reform.

## ***(2) The Frequency of Litigation***

The opportunity for courts to make policy innovations depended upon the frequency of litigation, or what one scholar has aptly termed the “supply side” of the litigation equation.<sup>690</sup> The supply of lawsuits in America has never been low, but the willingness to sue can be effected by factors beyond the likelihood of success. For example, scholar David M. Engel examined rural “Sander County” in Illinois in the mid-to late-1970s. He concluded that there was a social stigma against filing tort suits in the county, which resulted in reluctance among local tort lawyers, juries, and trial judges to entertain such suits. As Engel noted, the reluctance of Sander County's rural residents to engage in tort suits was rooted in their individualism, which emphasized “self-sufficiency and personal responsibility rather than rights.”<sup>691</sup> Such views undoubtedly existed in other places – particularly rural areas – throughout the United States, thereby limiting suits and opportunities for state appellate courts to review product liability cases.

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<sup>690</sup> Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton: PUP, 2008), p. 13. Teles was describing the litigation before the U.S. Supreme Court and federal courts, but the description is apt for all courts, state and federal.

<sup>691</sup> David M. Engel, “The Oven Bird's Song: Insiders, Outsiders, and Personal Injuries in an American Community,” *Law & Society Review*, Vol. 18, No. 4 (1984), p. 558. Richard E. Miller and Austin Sarat, “Grievances, Claims, and Disputes: Assessing the Adversary Culture,” *Law & Society Review*, Vol. 15 (1980-81), p. 525 et seq.

However, throughout the post-World War II period, lawyers, and scholars noted escalations case filings in tort litigation. In the 1940s, Fleming James identified the “‘quest’ by some courts ‘of a financially responsible defendant.’”<sup>692</sup> By the late 1950s both plaintiffs and defense lawyers noted increases in general tort litigation.<sup>693</sup> The evidence demonstrates that by the 1960s and 1970s the frequency of filing product liability lawsuits was high. A majority of states had (and took) opportunities for abrogating privity and/or adopting strict liability in the 1960s. This was likely a reflection of the general willingness of Americans – probably in more urban and suburban areas – to engage in tort litigation. Scholars have debated how enthusiastic Americans are to engage in litigation. Yet, the evidence that Americans have (and perhaps always have had) little reluctance to sue one another, especially in the twentieth century, is substantial.<sup>694</sup> As the quick adoption of a no-privity rule and/or strict liability

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<sup>692</sup> Fleming James, “Significant Developments in the Law During the War Years – Torts,” (Practicing Law Inst., 1946) quoted in Stanley C. Morris, “Of Torts Today,” *Ins. Counsel J.*, Vol. 28, No. 3 (July, 1961), p. 382.

<sup>693</sup> E. A. Cowie, “The Growing Cost of Tort Litigation and Its Significance to the Public and the Profession,” *Ins. Counsel J.*, Vol. 26, No. 4 (Oct., 1959), p. 590. The author argued that “exaggerated and phony claims” were the “greatest single cause” of the rise in tort litigation costs. *Ibid.* at 591. J. Harry LaBrum, “Time for Action: The Problem of Motorists’ Insurance,” *A.B.A. J.*, Vol. 45, No. 7 (July, 1959), p. 692.

<sup>694</sup> Robert A. Kagan, “Do Lawyers Cause Adversarial Legalism? A Preliminary Inquiry” *Law & Social Inquiry*, Vol. 19, No. 1 (Winter, 1994), pp. 1-62. Maurice Rosenberg, “Contemporary Litigation in the United States,” in Harry W. Jones, ed., *Legal Institutions Today: English and American Approaches Compared* (Chicago: American Bar Assn, 1977), p. 153. Ruggero J. Aldisert, “An American View of the Judicial Function,” in Jones, ed., *Legal Institutions Today*, p. 57 (federal caseload increases between 1960 and 1974). Aldisert was then serving as a federal judge on the Third Circuit Court of Appeals. Kermit L. Hall, *The Magic Mirror: Law in American History* (New York: OUP, 1989), pp. 287-88. The insurance bar of the 1950s perceived a problem with tort suits. S. Burns Weston, “Justice or Appeasement for Tort Claimants,” *Ins. Counsel J.*, Vol. 24, No. 3 (July, 1957), p. 210; Marlin M. Volz, “A Proposal for a Tort Law Institute,” *Ins. Counsel J.*, Vol. 24, No. 3 (July, 1957), p. 263. By the 1980s, the expansion of tort suits had produced books presuming the existence of a litigious society. See Marlene Adler Marks, *The Suing of America: Why and How We Take Each Other to Court* (New York: Seaview, 1981); Jethro K. Lieberman, *The Litigious Society* (New York: Basic, 1981). However, for contrary views, see Marc Galanter, “An Oil Strike in Hell: Contemporary Legends About the Civil Justice System,” *Arizona L. Rev.*, Vol. 40, No. 3 (1998), pp. 717-52; Thomas F. Burke, *Lawyers, Lawsuits, and Legal Rights: The Battle Over Litigation in American Society* (Berkeley: Univ. of Calif. Press, 2002); and William Haltom and

by almost thirty states within a few years of *Henningsen* (1960) and *Greenman* (1963) suggests, the courts did not need to wait long for opportunities to change the law.<sup>695</sup> The gradual move toward expansive liability in the 1950s may have encouraged more litigation and the shift to strict liability in many states in the 1960s probably provided additional incentive to file product liability lawsuits.

Until relatively recently, data regarding the numbers and kinds of tort cases filed in state courts has been rare and usually insufficient for identifying trends regarding specific types of tort suits. This occurred because few legal historians have accumulated longitudinal information regarding the types of claims asserted in court actions and the method and reason for resolution of such suits.<sup>696</sup> There is some specific products liability jury award data from two urban counties, Cook County, Illinois (inclusive of Chicago) and San Francisco County, California. This data set covers a long period, from 1960-1999. There is a shorter data set for 1960-1984 available through the Inter-University Consortium for Political and Social Research (ICPSR).<sup>697</sup> The jury awards for identified products liability cases in both counties rose during the early 1970s and early 1980s.<sup>698</sup> Additionally the Carter Administration's Task Force on Product Liability's

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Michael McCann, *Distorting the Law: Politics, Media, and the Litigation Crisis* (Chicago: Univ. of Chicago Press, 2004).

<sup>695</sup> William L. Prosser, "The Fall of the Citadel (Strict Liability to the Consumer)," *Minn. L. Rev.*, Vol. 50, No. 5 (1966), p. 791.

<sup>696</sup> James Willard Hurst, "The Functions of Courts in the United States, 1950-1980," *Law and Society Review*, Vol. 15 (1980-1981), pp. 403, 418.

<sup>697</sup> Eric Helland, Jonathan Klick and Alexander Tabarrok, "Data Watch: Tort-Uring the Data," *The Journal of Economic Perspectives*, Vol. 19, No. 2 (Spring 2005), p. 207, 209 Tbl. 1, 210 Fig. 1. See Study No. 6232, available online at <http://www.icpsr.umich.edu>.

<sup>698</sup> George L. Priest, "Understanding the Liability Crisis," *Proceedings of the Academy of Political Science*, Vol. 37, No. 1, New Directions in Liability Law (1988), pp. 198-99.

research showed, as of 1978, that between 1970-1976 “pending [product liability] claims [to insurers]... increased each year.”<sup>699</sup> This suggested not only more frequent and higher jury awards across the nation, but also more products liability lawsuits in general, including those that did not end with a jury award. One state’s experience demonstrated marked increase in a short amount of time. Between 1974 and 1976 Connecticut collected detailed data on product liability lawsuits. In those two years there was a 58 percent increase in product liability cases filed. During this period the “total torts caseload increased by only 23 percent, and the total civil caseload increased by only 11 percent.” Although nation-wide conditions cannot be inferred from Connecticut’s experience, the increase was notable.<sup>700</sup> The National Center for State Courts has compiled the civil caseloads for nine states between 1997 and 2006, showing fluctuations in aggregate product liability case filings.<sup>701</sup> It has been estimated that data from the past forty years show between 95 and 96 percent of products liability insurance claims are settled “out of court,” which includes both claims that did not result in a lawsuit and those that did but which failed to reach a jury verdict.<sup>702</sup> W. Kip Viscusi used closed claim data from the ISO (1977) to determine that “roughly one-fifth of the [product liability] claims are dropped, and from two-thirds to three-quarters of the claims are

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<sup>699</sup> U.S. Department of Commerce, *Interagency Task Force on Product Liability: Final Report* (Washington, D.C.: 1978), p. I-26.

<sup>700</sup> U.S. Department of Commerce, *Interagency Task Force on Product Liability: Final Report* (Washington, D.C.: 1978), pp. II-45-46.

<sup>701</sup> National Center for State Courts, “Civil Caseloads” (2008), available at <http://contentdm.ncsconline.org>. The nine states were Florida, Mississippi, Oregon, Wisconsin, Ohio, Missouri, New Jersey, Rhode Island, and Massachusetts.

<sup>702</sup> U.S. Department of Commerce, *Interagency Task Force on Product Liability: Final Report* (Washington, D.C.: 1978), p. I-27; W. Kip Viscusi, *Reforming Products Liability* (Cambridge: Harv. U. Press, 1991), p. 6. Priest, *supra* note 125 at p. 201.

settled out of court.”<sup>703</sup> Such data evidences the fact that most claims are not pursued to final jury verdict, whether in state or federal court.

Federal data for federal cases has been erratic, just like state case data. Federal statistics specifically tracking products liability suits have been tabulated since the 1980s. The Administrative Office of U.S. Courts (USAOC) maintains statistics on all federal civil actions filed in the United States. It appears that the USAOC did not start separately classifying federal personal injury product liability cases until 1984. Prior to that date, it classified personal injury suits as “tort actions,” and subdivided such suits into “personal injury, marine” and “personal injury, motor vehicle.” Although the data is imprecise due to the varying classification methods used over time, the trends of tort actions, including product liability suits, in the federal courts can be discerned by reviewing the numbers of actions commenced in the federal courts over five-year intervals in the data below:

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<sup>703</sup> W. Kip Viscusi, “Product and Occupational Liability,” *J. of Econ. Perspectives*, Vol. 5, No. 3 (Summer 1991), pp. 71, 83-84, Table 2.

**TABLE 1: Federal Product Liability Cases**

Year	Total Federal Civil Cases Commenced (per year)	Cases where Federal Gov't is a party (tort)	Private Cases – Fed. Question (tort)	Diversity Cases (tort) <sup>704</sup>	Known Product Liability Cases	Prod. Liab. as a Percentage of Total Federal Civil Cases Commenced
1950	44,454	n/a	n/a	7,572	n/a	Unknown
1955	48,308	n/a	n/a	3,043	n/a	Unknown
1960	49,852	n/a	n/a	11,701	n/a	Unknown
1965	67,678	n/a	6,029	14,974	n/a	Unknown
1970	86,441	2,165	7,198	n/a	n/a	Unknown
1975	117,320	2,311	8,195	n/a	n/a	Unknown
1980	168,769	4,438	n/a	18,769	n/a	Unknown
1985	273,670	3,116	28,993		12,507	4.57%
1990	217,879	n/a	n/a	n/a	19,621	9%
1995	239,013	n/a	n/a	n/a	28,226	11.8%
2000	263,049	n/a	n/a	n/a	23,242	8.8%
2005	282,758	n/a	n/a	n/a	37,243	13.17%

<sup>705</sup>

As *Table 1* indicates, known federal products liability cases have increased in absolute numbers and have usually increased as a share of the total federal cases commenced. It is important to note that this table only covers *federal* data.

Since most product liability suits are based on state law and would have been filed in state courts, it is *very likely* that product liability case filing rates in the *state* courts

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<sup>704</sup> Well over half of these cases in any year are motor vehicle tort cases; however, it is unknown whether what would later be classified as product liability cases related to motor vehicles were included in this number. Therefore, out of an abundance of caution all motor vehicle tort cases have been included.

<sup>705</sup> Table designed by author based upon *Statistical Abstracts for the United States*: 1950 figures from 76<sup>th</sup> Ed., 1955 (Table No. 173); 1955 figures from 81<sup>st</sup> Ed., 1960 (Table No. 187); 1960 figures from 82<sup>nd</sup> Ed., 1961 (Table No. 193); 1965 figures from 87<sup>th</sup> Ed., 1966 (Table No. 221); 1970 figures from 92<sup>nd</sup> Ed., 1971 (Table No. 245); 1975 figures from 97<sup>th</sup> Ed., 1976 (Table No. 284); 1980 figures from 102<sup>nd</sup> Ed., 1981 (Table No. 323); 1985 figures from 107<sup>th</sup> Ed., 1987 (Table Nos. 292, 293); 1990 figures from 112<sup>th</sup> Ed., 1992 (Table No. 319) and USAOC Table 4.5; 1995 figures from 1996 Ed. (Table No. 342) and USAOC Table 4.5; 2000 and 2005 figures from 2007 Ed. (Table No. 327).

The Census Bureau (or the USAOC, which supplied the data) did not start separately identifying product liability cases until 1984. Accordingly, prior to 1984 some federal civil tort cases must have been what would later have been classified as product liability cases. Such cases could have been based on any of the following legal theories: negligence, warranty, or strict liability. At present, it is impossible to separately identify such cases based on the available data.



over the last forty years are as large and probably much larger than those filed in federal courts. This is based on the anecdotal and limited empirical knowledge of state-level product liability cases. Federal courts would only have jurisdiction over such tort issues if (1) the claims were federal claims made against the federal government under the Federal Tort Claims Act or another federal law allowing such claims against the federal government; (2) under ancillary (or pendant) jurisdiction, which is when a federal court can hear state law claims in a case that presents other federal questions; and (3) in diversity cases, which are suits brought between citizens of different states. Since state courts are courts of general jurisdiction and would have subject matter jurisdiction regarding negligence, warranty, and strict liability claims, it is *very likely* that the majority of product liability suits would be filed in state court. Finally, the foregoing data only concern suits filed. It has been estimated that two-thirds of the “problems consumers experienced with products they bought” in the post-World War II period did not result in formal lawsuits or even claims filed with liability insurers.<sup>706</sup>

Although it is difficult to determine the exact nature of the litigation “explosion” (or if there even was one), it is *very likely* that the expansion of tort liability led to an aggregate national increase in product liability litigation and/or claims made in the 1960s and 1970s, which continued in the 1980s, which in turn led to the extreme premium spikes in the 1970s and mid-1980s. Some scholars have argued that the increase in

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<sup>706</sup> James Willard Hurst, “The Functions of the Courts in the United States, 1950-1980,” 15 *Law & Soc. Rev.*, No. 3-4 (1980-81), pp. 428-29. Hurst uses the phrase “no action for redress,” which I have interpreted to mean no formal or informal claim, such as a claim filed with a third-party liability insurance carrier.

litigation has been exaggerated.<sup>707</sup> Nevertheless, when viewed in light of the original judicial goals of the expansion of manufacturer liability – increasing compensation for injured parties – the modern post-Tort Revolution system leaves much to be desired. The tort system has a large surplus of costs, of which a small percentage – estimated at approximately one-third – is allocated to compensation of tort injuries and losses. Other actors, lawyers and attendant insurance and legal investigative personnel, consume the remaining two-thirds of the costs.<sup>708</sup>

The opportunities to change from the negligence standard in manufacturing defect cases were not wanting in any state. The mere fact that the switch occurred so quickly in so many states is evidence of this. In other words, there was no need for lawyers to wait for or even attempt to engineer test cases in other states. Lawyers could have played a role in the spread of the doctrine by making arguments in their appellate briefs regarding the new doctrine. Yet, as we have seen for example in the case of North Carolina, the lawyers litigating before that state’s Supreme Court in the midst of the Tort Revolution failed to even suggest to the Court that the rule of strict liability could or should have been adopted in the state.

### ***(3) The Specialization of the Tort Bar***

An important element of tort law formation was the specialization of lawyers practicing tort law. Specialization is both a minor contributing factor to and significant

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<sup>707</sup> William Haltom and Michael McCann, *Distorting the Law: Politics, Media, and the Litigation Crisis* (Chicago: Univ. of Chicago Press, 2004); Stephen S. Meinhold and David W. Neubauer, “Exploring Attitudes About the Litigation Explosion,” *Justice Sys. J.*, Vol. 22, No. 2 (2001).

<sup>708</sup> Kenneth S. Abraham, *The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11* (Cambridge, MA: Harvard Univ. Press, 2008), p. 8.

consequence of the Tort Revolution. As a minor factor, the plaintiff's bar became an advocate for expanded means of plaintiffs recovering against manufacturers. Although the plaintiffs' lawyers did not usually base their cases on claims of strict liability, they did form a vocal group – through the medium of law review articles – in favor of expanded tort liability, in whatever form that might occur. We have seen lawyers' support for the ALI and its efforts to expand tort liability. The Tort Revolution also produced significant consequences for tort lawyers' specialization. The Revolution encouraged more lawsuits, which created further incentives for lawyers to specialize in order to remain professionally competent in representing tort plaintiffs and defendants.

Early in the twentieth century, the largest lawyers' professional association in America, the American Bar Association (ABA), was concerned with lawyers' ethics, especially in relation to lawyers who practiced in personal injury recovery on behalf of plaintiffs. In 1907, the ABA endorsed the adoption of canons of ethics by state supreme courts, state bar associations, and state bars, which had disciplinary authority over attorneys licensed in a given state.<sup>709</sup> The disrepute, even among fellow attorneys, for some plaintiffs' personal injury lawyers was reflective of the disdain for what later came to be commonly called “ambulance chasing,” but was known among lawyers as barratry.<sup>710</sup> Although this negative image has remained a fixture of tort practice, it has not stemmed the flow of tort lawsuits. Also, the increase in tort lawsuits over the course of the twentieth owes much to the self-regulatory nature of the American bar. With self-

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<sup>709</sup> Max Radin, “The Achievements of the American Bar Association: A Sixty Year Record,” *A.B.A. J.*, Vol. 26, No. 2 (Feb., 1940), p. 135.

<sup>710</sup> Henry S. Drinker, *Legal Ethics* (New York: Columbia Univ. Pr., 1953).

regulation came the intra-professional legitimization of plaintiffs' personal injury practice.

Throughout the twentieth century the bulk of plaintiffs' tort attorneys practiced alone or in small to medium-sized firms.<sup>711</sup> During much of the century there was a bifurcation among tort lawyers: usually one was either a plaintiffs' lawyer or a defendants' lawyer. The "defense bar" consisted of lawyers, also often sole practitioners and members of small firms, who were hired by insurance companies to defend their insureds once a lawsuit had been filed. (Insurance companies would often handle negotiations with plaintiffs and their counsel prior to the filing of suit.) By the 1960s, these bars were firmly established throughout the nation and both sides served as "pressure groups seeking changes in the general declarations of law and innovators who develop[ed] techniques of litigational [*sic*] combat."<sup>712</sup> There were formal organizations, such as the American Trial Lawyers Association (pro-plaintiff) and the Defense Research Institute (founded 1960) (pro-defense), which sought to train lawyers with the skills necessary to advocate for the case law and legislative policies that would benefit their clients respectively. Although plaintiff and defense bars were organized and had regional or local groups prior to World War II, in 1946 plaintiff-oriented attorneys formed a national organization, the National Association of Claimants Compensation Attorneys, which in 1973 became the Association of Trial Lawyers of America.<sup>713</sup> This group advocated for "more than adequate award" in tort litigation. By 1952, the defense bar

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<sup>711</sup> Friedman, *A History of American Law*, p. 540.

<sup>712</sup> Shapiro, "Decentralized Decision-Making in the Law of Torts," p. 54.

<sup>713</sup> "An Expanded History of the ATLA/AAJ," <http://www.justice.org/cps/rde/xchg/justice/hs.xsl/2079.htm>.

responded by organizing its own national “educational” and advocacy organization. Thereafter, both bars engaged in ongoing issue advocacy, litigation skills education for practicing lawyers, and lobbying for legislative interventions in tort law.<sup>714</sup> By the mid-1960s, both plaintiffs and defense lawyers were concerned with the shift from defendant-friendly negligence standards to plaintiff-friendly strict liability.

Although the pre-eminent lawyer’s group in the nation, the ABA, was considered a very politically conservative organization in the 1950s,<sup>715</sup> it was quite liberal in regard to supporting consumer-oriented tort law in the 1960s. There were increasing opportunities for lawyers to profit from exclusive tort practices and it was no surprise that the chief professional association supporting lawyers would support that expansion. Notwithstanding the increases over time in product liability litigation, it is important to note that the key actors in the spread of strict liability and implied warranty claims to other states over a short period of time in the early 1960s were state court judges. The adoption process seems to have been one of court action with litigants and their lawyers following behind. As one products liability attorney put it in 1975, a judge is necessary to carve out a path in common law litigation. Only then will litigants (and their attorneys) deem it worth the cost and time to pursue claims.<sup>716</sup> As we have seen, it was not an organized lawyers’ campaign that led the California Supreme Court’s *Greenman*

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<sup>714</sup> Davidson Ream, *A History of DRI: Serving the Defense Bar* (Chicago: Defense Research Inst., 2005), pp. 1-2.

<sup>715</sup> Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton: Princeton Univ. Pr., 2008), pp. 29-35. The ABA leadership of the 1950s were anti-communist and anti-socialist and feared federal regulation of the legal profession.

<sup>716</sup> Jonathan Evan Maslow, “Products Liability Comes of Age,” *Juris Doctor* (Feb., 1975), p. 23, located in Box 25, File 7, The Roger J. Traynor Collection, U.C. Hastings College of the Law, Traynor Center/Special Collections.

decision. Rather it was the well-known sentiments of Roger Traynor, first publicized in his *Escola* concurrence in 1944, which led to the *Greenman* decision of 1963. Again, the Tort Revolution was a top-down, judge-made revolution; not a bottom-up litigant-led effort. The judges who voted in favor of strict liability did so with common presumptions and in a shared spirit of progressive reform of the law.

#### ***(4) Unique Ideology: Progressivism and the Legitimacy of Courts as Policymakers***

As previously noted, some legal scholars have argued that the similarities in states' laws across the nation can be explained by the common culture in which lawyers and judges are educated, communicate, and are otherwise immersed their entire professional lives. This common legal culture appears to have reinforced the ideological agreement among many state supreme court justices that tort laws needed to be changed in the context of the contemporary commercial consumer-based economy. Although there were opponents of strict liability in the 1960s, the quick and extensive adoption of strict liability by courts and even some legislatures demonstrates that the opponents were outnumbered on states' supreme courts.

Accordingly, the predominant factor and the *sine qua non* for the Tort Revolution happening in the broad and rapid fashion it did was the ideologically Progressive view that the law must change as the needs and conditions of the economy and society change. Progressivism often adhered to a vision of government assistance to private economic actors. As Traynor himself noted in regard to public expenditures, "[P]rivate enterprise cannot permanently absorb either more capital or more men without the momentum afforded by public expenditures, which in turning the wheels of new public enterprise,

quickness the tempo of private enterprise.”<sup>717</sup> Historian G. Edward White has noted that there was an “academic-judicial symbiosis” between William Prosser and Roger Traynor, wherein the former influenced the latter’s work as a judge in the realm of tort policy creation.<sup>718</sup> One of the objectives of this chapter has been to demonstrate that such a symbiosis was evident not only with Traynor, by far the most visible,<sup>719</sup> but also with other state court judges. Courts that are concerned with the consequences of their decisions, as the courts that ruled in favor of strict liability purportedly were, always find it difficult to determine how representative the cases before them are of the wider social and economic world.<sup>720</sup> Yet, such concerns were not a deterrent to the judges who were convinced the economic world had changed and required a change in the rules citizens and businesses must follow in regard to liability for defective products.

The expansion of strict liability to cover all product defects might be placed within the framework of what historian William E. Nelson has termed the “legalist reformation” efforts of the post-war period. Nelson has described this movement as seeking “social change and the expansion of existing hierarchies to include people who had been previously made subordinate,” without “repudiat[ing] the commitment to the

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<sup>717</sup> Roger J. Traynor, “Public Spending and Recovery,” Speech given to the Berkeley Club, Sept. 13, 1939. Box T008, File 01a, p. 9. Manuscripts. Academic; 09/13/39, The Roger J. Traynor Collection, U.C. Hastings College of the Law, Traynor Center/Special Collections.

<sup>718</sup> G. Edward White, *Tort Law in America: An Intellectual History* (New York: OUP, 1980, 2003 ed.), p. xvi.

<sup>719</sup> G. Edward White has devoted two chapters in books to Traynor: *Tort Law in America: An Intellectual History* (New York: OUP, 1980, 2003 ed.), chapter six; and *The American Judicial Tradition: Profiles of Leading American Judges*, 3d ed. (New York: OUP, 2007), chapter eleven. Also, there is Ben Field’s *Activism in Pursuit of the Public Interest: The Jurisprudence of Chief Justice Roger J. Traynor* (Fresno, CA: California Supreme Court Historical Society, 2003).

<sup>720</sup> Donald L. Horowitz, *The Courts and Social Policy* (Washington, D.C.: Brookings, 1977), p. 266.

rule of law.”<sup>721</sup> The Tort Revolution was an effort at achieving social change through legal rulemaking. However, the consumer was not subordinate in as much as, after the national adoption of the *MacPherson* rule, the consumer had claim rights against negligent manufacturers. Consumers were not a “subordinate” class. Also, the rule of law was arguably undermined by the rejection of longstanding fault-based rules and their replacement with a no-fault regime that roped manufacturers into liability regardless of their fault.

As Gregory Caldeira has noted, the political and cultural reputation of a given state supreme court was a factor in the 1960s and 1970s of such courts being cited by other courts.<sup>722</sup> As noted in Chapter Two, Progressivism among judges was a “judicial disposition in search of a theory.” At its most elemental level, judicial Progressivism meant “loosen[ing] the chains of large-scale industrial society enough to allow for social growth.”<sup>723</sup> Although the Progressive period was (and by some scholars, continues to be) thought to have ended around 1920, the ideals and dispositions of the state court judges of the 1960s and 1970s demonstrate that Progressivism not only retained vitality but was key in motivating judicial willingness to innovate in tort law. As one former justice of the California Supreme Court in the 1960s, Allen E. Broussard, noted, justices like Roger

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<sup>721</sup> William E. Nelson, *The Legalist Reformation: Law, Politics, and Ideology in New York, 1920-1980* (Chapel Hill: UNC, 2001), p. 7.

<sup>722</sup> Gregory A. Caldeira, “The Transmission of Legal Precedent: A Study of State Supreme Courts,” *American Political Science Review*, Vol. 79, No. 1 (Mar., 1985), pp. 190-92.

<sup>723</sup> Bradley C. S. Watson, *Living Constitution, Dying Faith: Progressivism and the New Science of Jurisprudence* (Wilmington, DE: ISI Books, 2009), p. 153.



Traynor were known for “forg[ing] a new step in the law” and “in a few years the law [in other states’ supreme courts] caught up with them.”<sup>724</sup>

It should be noted that one important factor in whether a state supreme court will be considered a leader in policy innovation is whether the court has a reputation as a “professional” court. Such a court has created the perception among other state courts of being “hermetically sealed” from the political influences of the state’s legislature and public opinion.<sup>725</sup> One way of achieving this goal was to create standards that were thought to avoid the pluralistic clash of interests by remaining above them in terms of institutional structure. The creation of court bureaucracies, the adoption of American Bar Association standards for judicial selection and organization, and the type of retention or tenure for judges all contributed to the perception of a “professional” state supreme court. Tellingly, a 1973 study considered the California Supreme Court to have the “highest” “professional reputation” among all the states; and New Jersey was ranked second.<sup>726</sup> However, as measured by public approval, the California Supreme Court had a more mixed reputation. For example, although judicial retention elections usually resulted in a justice retaining his or her seat, there was a somewhat consistent “‘no’ vote” of an estimated “25 percent or 27 percent.”<sup>727</sup> This professional, or disinterested, reputation is in itself a product of the Progressive Era, when governmental reformers sought to create

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<sup>724</sup> Allen E. Broussard, *A California Supreme Court Justice Looks at Law and Society, 1964-1996* (Berkeley: Regents of the Univ. of CA, 1997), p. 203.

<sup>725</sup> Caldeira, “The Transmission of Legal Precedent,” p. 184.

<sup>726</sup> Henry R. Glick and Kenneth N. Vines, *State Court Systems* (Englewood Cliffs, NJ: Prentice-Hall, 1973), pp. 11-12, Table 1-1.

<sup>727</sup> Broussard, p. 106.

institutions that were immune from the purportedly nefarious and anti-democratic influences of politics and above corruption, or the appearance of corruption.<sup>728</sup>

Yet, the desire to appear (or be) disinterested has not diminished the centrality of judges in policy making in the American system. Scholars have noted the great importance of judges and their vehicles for conveying or propagating thought and arguments – legal opinions in appellate cases – as prime factors in legal change.<sup>729</sup> The role of judges such as Francis and Traynor may have been to “present a perceptual framework in which to organize social experience” and thereby increase the persuasiveness of their arguments for why tort law needed to change.<sup>730</sup> Their audience, however, turned out to be less the general public than other judges on other state supreme courts, who made their own policy choices regarding strict liability.

### ***Greenman as a Catalyst for the American Law Institute***

After *Greenman* was decided the second *Restatement*'s proposed § 402A was revised. William Prosser was convinced that *Greenman* was “the rule of the near future.” He contended that “unless the Restatement declares for it [i.e., strict liability for all general products], it is actually likely to be dated even by the time of publication.”<sup>731</sup>

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<sup>728</sup> Stephen Skowronek, *Building A New American State: The Expansion of National Administrative Capacities, 1877-1920* (Cambridge, UK: Cambridge Univ. Press, 1982, 1990 ed.); Michael E. McGerr, *A Fierce Discontent: The Rise and Fall of the Progressive Movement in America, 1870-1920* (New York: Free Press, 2003).

<sup>729</sup> G. Edward White, “The Appellate Opinion as Historical Source Material,” *J. of Interdisciplinary Hist.*, Vol. 1, No. 3 (Spring, 1971), p. 491-509; White, *The American Judicial Tradition: Profiles of Leading American Judges*, 3d ed. (New York: OUP, 2007), pp. xxv-xxvi.

<sup>730</sup> Jay M. Feinman, “The Role of Ideas in Legal History,” *Mich. L. Rev.*, Vol. 78, No. 5 (Mar., 1980), p. 726.

<sup>731</sup> Folder 69-10, ALI/Second/Torts/Drafting/CD No. 16, 1963 Nov. 1, unnumbered page, referred to as “Pink Sheet” with “Suggested Questions for the Council,” in the Second Restatement of the Law Records,

Prosser claimed such an immediate and expansive revision was needed because of “many recent decisions.”<sup>732</sup> Yet, it was obvious that the most important reason – perhaps the sole reason – for the revision was the *Greenman* case, which was published in January 1963.

In November 1963, Prosser circulated a redraft of the proposed § 402A. The original draft, as noted in Chapter Three above, had been entitled “Special Liability of Sellers of Products for Intimate Bodily Use.” The redrafted section was entitled “Special Liability of Sellers of Products for Consumption.”<sup>733</sup> The earlier proposed rule was concerned with products for “human consumption,” which meant foodstuffs and drugs, and products for “intimate bodily use,” such as creams and cosmetics. The new rule applied to “any product,” no matter what its intended purpose. The ALI committee, now staffed with the recent addition of Judge Traynor, supported the compensatory goals of strict liability and sought to aid the judicial reorientation of negligence law away from moral fault to a no-fault system.<sup>734</sup>

Prosser believed the original proposal would be dated by the time it was scheduled to be published, which was originally anticipated for the summer of 1964. He proposed “hold[ing] up the galley proof” of the entire proposed *Restatement (Second) of Torts* until

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American Law Institute Archives, ALI.04.002, Biddle Law Library, University of Pennsylvania Law School, Philadelphia, PA.

<sup>732</sup> ALI, The 120<sup>th</sup> Meeting of the Council (Dec. 12-14, 1963), p. 9.

<sup>733</sup> Folder 69-10, ALI/Second/Torts/Drafting/CD No. 16, 1963 Nov. 1, p. 1, in the Second Restatement of the Law Records, American Law Institute Archives, ALI.04.002, Biddle Law Library, University of Pennsylvania Law School, Philadelphia, PA.

<sup>734</sup> Cornelius F. Murphy, Jr., “Medieval Theory and Products Liability,” *B.C. Indus. and Comm. L. Rev.*, Vol. 3, No. 1 (Fall, 1961), p. 29. Traynor was offered committee membership in late 1963. ALI, The 119<sup>th</sup> Meeting of the Council (May 21, 1963), p. 5; ALI, The 120<sup>th</sup> Meeting of the Council (Dec. 12-14, 1963), p. 2 in Council Meeting Minutes (1923-1990), Biddle Law Library, University of Pennsylvania Law School, Philadelphia, PA, available online at <http://www.law.upenn.edu/bll/archives/ali/minutes/8019-11.pdf>.

the scheduled May 1964 meeting of the Council. He noted, with ambiguity, that “several of the [ALI Tort Group] Advisers” agreed with him on the proposed revision.<sup>735</sup> The identity of these advisors is unknown. Prosser’s fear that §402A would be outdated was predicated on decisions from only a minority of states – only ten states for certain – which had extended warranty liability (which Prosser considered essentially strict tort liability) beyond products for intimate bodily use. However, it is important to note that most of the cases cited by Prosser had occurred prior to the original draft of *Restatement (Second)* §402A.<sup>736</sup> Most of the cases, if they cited *Greenman*, did so with approval whether they referred to strict liability using warranty language or used the phrase “strict tort liability.” Even before the end of 1963, other states’ courts were looking to California’s precedent for guidance and justification for extending manufacturer liability in their state.

The ALI’s *Restatement (Second) of Torts* was finally published in 1965.<sup>737</sup> The final, published §402A read as follows:

**§ 402A. Special Liability of Seller of Product for Physical Harm to User or Consumer**

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<sup>735</sup> Ibid., pp. 1-2.

<sup>736</sup> Ibid., pp. 2-3. The following cases were cited, but only *Greenman* was based on something broader than an implied warranty of merchantability. *Connolly v. Hagi*, 24 Conn. Supp. 198; 188 A.2d 884 (Feb. 28, 1963) (automobile); *Vandermark v. Ford Motor Co.*, 33 Cal. Rptr. 175 (Aug. 12, 1963) (citing *Greenman*), *aff’d in part, rev’d in part* 61 Cal. 2d 256, 391 P.2d 168, 37 Cal. Rptr. 896 (1964); *Hart v. Goodyear Tire & Rubber Co.*, 214 F. Supp. 817 (Feb. 6, 1963) (extending privity definition to include employee of buyer-employer; assumed requirement of privity under applicable Indiana law; cited *Peterson v. Lamb Rubber Co.*, 54 Cal. 2d 339; 5 Cal. Rptr. 863; 353 P.2d 575 (1960)); *Goldberg v. Kollsman Instrument Corp.*, 12 N.Y. 2d 432; 240 N.Y.S. 2d 592 (May 9, 1963) (citing *Greenman* with approval on warranty and privity, noting “strict tort liability” was “surely a more accurate phrase”).

<sup>737</sup> Volumes 1 and 2, including §402A, were published in 1965. Volumes 3 and 4 were published in 1977 and 1979, respectively. ALI, Publications Catalog, [http://www.ali.org/index.cfm?fuseaction=publications.ppage&node\\_id=120](http://www.ali.org/index.cfm?fuseaction=publications.ppage&node_id=120).

- (1) One who sells 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 to the ultimate user or consumer, or to his property, if
  - (a) the seller is engaged in the business of selling such a product, and
  - (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
- (2) The rule state Subsection (1) applies although
  - (a) the seller has exercised all possible care in the preparation and sale of his product, and
  - (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.<sup>738</sup>

However, the section quoted above was the first time the Institute had based a restatement largely upon a single case: *Greenman*.<sup>739</sup> Although ALI's restatements of the law were only the statements of a private entity, without any binding or legal effect, courts often treated them with such deference that they were often viewed as a learned authority worthy of recognition in the form of following the statements as law. The language above was subsequently adopted, often verbatim, by state supreme courts that adopted the strict liability standard. Some state courts and legislatures construed strict liability as broad enough to include liability for wholesalers, distributors, and retailers; the only exceptions being for "occasional sellers."<sup>740</sup> The Advisory Group's comments

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<sup>738</sup> *Restatement (Second) of Torts*, quoted in Prosser et al., *Torts*, p. 718.

<sup>739</sup> Charles E. Cantu, "Distinguishing the Concept of Strict Liability for Ultra-hazardous Activities from Strict Products Liability Under Section 402A of the Restatement (Second) of Torts: Two Parallel Lines of Reasoning that Should Never Meet," *Akron L. Rev.*, Vol. 35, No. 1 (2001-02), pp. 31, 42. *Greenman*, as previously noted, was the seminal case, decided by the California Supreme Court, which established strict liability for consumer products. Many other state supreme courts soon followed it and Section 402A of the *Restatement (Second)* in creating their strict liability rules. George L. Priest, "The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law," *The Journal of Legal Studies*, Vol. 14, No. 3, Critical Issues in Tort Law Reform: A Search for Principles. (Dec., 1985).

<sup>740</sup> Folder 69-10, ALI/Second/Torts/Drafting/CD No. 16, 1963 Nov. 1, pp. 5-6 Cmt. f, in the Second Restatement of the Law Records, American Law Institute Archives, ALI.04.002, Biddle Law Library, University of Pennsylvania Law School, Philadelphia, PA. See, e.g., *Newmark v. Gimbel's Inc.*, 54 N.J.

to the redrafted section made clear that, “The liability stated is one in tort, and does not require any contractual relation . . . between the plaintiff and defendant.”<sup>741</sup> In fact, Prosser and the Tort Advisers expressly rejected the idea that “warranty” was an analytically appropriate term. They thought it too confusing to courts and it hindered the application of strict liability as a tort rule. “In short,” they wrote, “‘warranty’ must be given a new and different meaning if it is to be used in connection with” §402A.<sup>742</sup> As will be seen below, such a construction by state courts invited the pluralistic politicization of products liability law by these affected interests.

### ***A Note on the Consumer Protection Movement and Mass Tort Actions***

It is important to note that the consumer protection movement, which was (and often continues to be) most popularly associated with federal consumer protection legislation and notable advocacy groups such as Ralph Nader and his Public Interest Research Group, did not propel, nor was it connected with, the academic-judicial efforts regarding strict liability. The Tort Revolution was not a “bottom-up” consumers’ movement; rather it was a “top-down” movement led by judges and legal academics.

The point at which advocacy for consumer rights began has several different candidates. An early date would be the late nineteenth century. One might argue that

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585, 600, 258 A.2d 697, 704-05 (N.J., 1969) (citing Restatement of Torts 2d, § 402A in holding retailer liable under strict liability; also noting action for indemnity by retailer against manufacturer); Mississippi Products Liability Act of 1993, Miss. Code Ann. § 11-1-63 (2008) (statute allowing strict liability against manufacturers and sellers). This statute effectively superceded a state supreme court holding that wholesalers and retailers were not liable under strict liability for “latent defects” that they could not have discovered. *Sam Shainberg Co. v. Barlow*, 258 So. 2d 242, 1972 Miss. LEXIS 1491 (Miss. 1972).

<sup>741</sup> Folder 69-10, ALI/Second/Torts/Drafting/CD No. 16, 1963 Nov. 1, p. 8 Cmt. 1, in the Second Restatement of the Law Records, American Law Institute Archives, ALI.04.002, Biddle Law Library, University of Pennsylvania Law School, Philadelphia, PA.

<sup>742</sup> *Ibid.* at pp. 9-10 Cmt. m.

consumers (or the consuming public of America) were the ultimate beneficiaries of the earliest federal regulatory efforts, such as the Interstate Commerce Commission (1887) and Sherman Antitrust Act (1890).<sup>743</sup> Yet, as a *political* phenomenon, “the consumer” – that individual who is a member of a discernable group of Americans who played a part in pluralist politics – seems to be a late-nineteenth century (at the earliest) and (chiefly) twentieth-century phenomenon.<sup>744</sup> For example, the earliest organized efforts at consumer protection were in the form of chemists, physicians, and pharmacists’ “anti-adulteration” arguments regarding food and drug regulations in the 1880s.<sup>745</sup>

The popular literature supporting what came to be known as “consumers’ rights” was not developed until well into the twentieth century. Consumers’ rights organizations were not oriented toward litigation but rather educating the consuming public and advocating for legislation. One example is the Consumers’ Research, Inc., which tested products and published the results for purchase by the public. Consumers’ Research also lobbied federal and state legislators in favor of protective legislation.<sup>746</sup> Another example is Consumers’ Union and its magazine, *Consumer Reports*, both began in 1936. The magazine was a comparative-testing publication, presenting the results of performance

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<sup>743</sup> Michael J. Sandel, *Democracy’s Discontent: America in Search of a Public Philosophy* (Cambridge: Harv. Univ. Pr., 1996), pp. 221-38; Thomas K. McCraw, *Prophets of Regulation: Charles Francis Adams, Louis D. Brandeis, James M. Landis, Alfred E. Kahn* (Cambridge: Harv. Univ. Pr., 1984), pp. 102-08.

<sup>744</sup> Kathryn Kish Sklar, “The Consumers’ White Label Campaign of the National Consumers’ League, 1898-1918,” and Charles McGovern, “Consumption and Citizenship in the United States, 1900-1940,” in Susan Strasser, Charles McGovern, and Matthias Judt (eds.), *Getting and Spending: European and American Consumer Societies in the Twentieth Century* (Cambridge: Cambridge Univ. Pr., 1998); David P. Thelen, *The New Citizenship: Origins of Progressivism in Wisconsin, 1885-1900* (Columbia, MO: Univ. of Missouri Pr., 1972).

<sup>745</sup> Mitchell Okun, *Fair Play in the Marketplace: The First Battle for Pure Food and Drugs* (Dekalb, Ill.: Northern Illinois Univ. Press, 1986), p. xii.

<sup>746</sup> James F. Corbett, “The Activities of Consumers’ Organizations,” *Law & Contemp. Probs.*, Vol. 1, No. 1 (Dec., 1933), pp. 61-66.

tests conducted on various consumer goods.<sup>747</sup> Popular, widespread participation in the consumer protection “movement” is not thought to have occurred prior to the 1960s.<sup>748</sup> Consumer protection litigation has often been associated with large-scale class action lawsuits, which filed *en masse* in the 1970s. Litigation as a vehicle to consumer protection has been considered by scholars to be of relatively minor importance to the movement, especially in comparison with the advocacy efforts in favor of federal laws and regulatory entities.<sup>749</sup>

Depending on how broadly “consumer protection litigation” is defined,<sup>750</sup> the litigation-oriented consumer activists did not play their roles in what became known as the consumers’ rights movement until the late 1960s and 1970s, well after the legal community’s academics and judges began advocating for tort law reform. For example, Ralph Nader’s well-known group of lawyers, Nader’s Raiders, was a 1970s phenomenon. Nader’s famous book regarding automobile safety, *Unsafe at Any Speed*, was originally published in 1965.<sup>751</sup> His first article on auto safety design was published in 1959.<sup>752</sup> Additional articles were not published until 1963, 1965 and 1967, the last two being after

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<sup>747</sup> Matthew Hilton, *Prosperity for All: Consumer Activism in an Era of Globalization* (Ithaca, NY: Cornell, 2009), pp. 25-26.

<sup>748</sup> Laurence P. Feldman, *Consumer Protection: Problems and Prospects* (St. Paul, MN: West Publishing Co., 1976), pp. 25-26.

<sup>749</sup> Ardith Maney and Loree Bykerk, *Consumer Politics: Protecting Public Interests on Capitol Hill* (Westport, CN: Greenwood Press, 1994), pp. 13-24.

<sup>750</sup> Defined broadly, antitrust enforcement litigation from the nineteenth century might be considered consumer protection litigation. However, if defined as civil litigation that sought to protect consumers per se, such litigation is a post-World War II development.

<sup>751</sup> Ralph Nader, *Unsafe at Any Speed: The Designed-In Dangers of the American Automobile* (New York: Grossman, 1965).

<sup>752</sup> Ralph Nader, “The Safe Car You Can’t Buy,” *The Nation* (Apr. 11, 1959).



the *Greenman* decision.<sup>753</sup> Also, Nader was not involved with the litigation against General Motors (GM) regarding its *Corvair* model automobile in the mid-1960s.<sup>754</sup> Rather what made Nader a popular figure was his participation in congressional hearings in the mid- to late-1960s and the admission by GM's executives that they had hired private investigators to follow Nader. He later sued GM for the tort of invasion of privacy.<sup>755</sup> Nader did not form Public Citizen, Inc. until 1971 and its litigation subgroup, the Litigation Group, was formed thereafter. The cases handled by the Litigation Group were diffuse, ranging from a breach of contract claim against an airline after Nader was bumped from a flight to a constitutional challenge to the federal Gramm-Rudman-Hollings Budget Act.<sup>756</sup>

Automobile safety design had been a priority of some federal senators and representatives since the 1950s, long pre-dating Ralph Nader's public role. For example, the first federal auto safety design law, the so-called Roberts Bill, named after Rep. Kenneth Allison Roberts (D-AL), required "reasonable safety devices" on new autos. The federal safety design bill was originally introduced in 1958 and enacted in 1964.<sup>757</sup>

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<sup>753</sup> Ralph Nader, "Fashion or Safety," *The Nation* (Oct. 12, 1963); Ralph Nader, "The Corvair Story," *The Nation* (Nov. 1, 1965); Ralph Nader, "Automobile Design: Evidence Catching Up With the Law," *Denv. L. Ctr. J.*, Vol. 42, No. 1 (Winter, 1965), p. 32; Ralph Nader and Joseph A. Page, "Automobile Design and the Judicial Process," *Cal. L. Rev.*, Vol. 55, No. 3 (Aug., 1967), p. 645, 649, n. 25 (citing *Greenman*).

<sup>754</sup> Elinor Langer, "Auto Safety: Nader vs. General Motors," *Science*, New Series, Vol. 152, No. 3718 (Apr. 1, 1966), p. 47.

<sup>755</sup> Lester Sobel, ed., *Consumer Protection* (New York: Facts on File, Inc., 1976), pp. 26-27. GM settled with Nader in August 1970 in the amount of \$425,000. *Ibid.*

<sup>756</sup> Robert N. Mayer, *The Consumer Movement: Guardians of the Marketplace* (Boston: Twayne Publishers, 1989), p. 46.

<sup>757</sup> Richard F. Weingroff, "President Dwight D. Eisenhower and the Federal Role in Highway Safety," U.S. Department of Transportation, Federal Highway Administration, Ch's 3 & 5, available online at <http://www.fhwa.dot.gov/infrastructure/safety.cfm>. The federal law was P.L. 88-515, signed into law on Aug. 30, 1964.

The Tort Revolution certainly dovetailed with the concerns of consumer protection activists in the 1960s. The drafters of the *Restatement (Second) of Torts*, including William Prosser, suggested that the trend in court decisions was the result of “social pressure.” They did not specify from where or whom such purported “social pressure” was brought to bear.<sup>758</sup> As has been demonstrated, the Tort Revolution was not the product of a mass consumers’ movement, a plaintiffs’ litigation campaign, or any other kind of “social pressure”; unless academic esteem for state judges’ performance was a kind of social pressure exerted on judges.

The Progressives on state supreme courts, who were considerably older than the young lawyers of the consumer protection movement, no doubt shared many of the opinions of the younger reformers. Scholar Gary Schwartz has argued that “public thinking” in the 1960s displayed a “distrust” of corporations, a belief that corporations were “economic colossi” that should “bear whatever burdens might be imposed on them by way of regulation and liability.”<sup>759</sup> Although the consumer movement was gaining popularity at this time, it is fair to say that such skepticism and cynicism regarding corporations did not originate with the consumer movement. Rather it was a view that was popularized with the Progressives.

Also, it was only *after* the switch to strict liability that mass torts litigation began. The mass torts area saw an explosion of litigation regarding hazardous materials, including asbestos, and Agent Orange in the 1970s and 1980s; and, in the 1990s,

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<sup>758</sup> Folder 69-10, ALI/Second/Torts/Drafting/CD No. 16, 1963 Nov. 1, p. 10 Cmt. n, in the Second Restatement of the Law Records, American Law Institute Archives, ALI.04.002, Biddle Law Library, University of Pennsylvania Law School, Philadelphia, PA.

<sup>759</sup> Gary T. Schwartz, “The Beginning and the Possible End of the Rise of Modern American Tort Law,” *Ga. L. Rev.*, Vol. 26, No. 3 (Spring, 1992).

tobacco.<sup>760</sup> Other areas of litigation in the 1970s and 1980s were medical devices and drugs, including Thalidomide and Benedictin.<sup>761</sup> Class actions have been a facet of American law from the nineteenth century. States often had their own rules of equity, which allowed parties holding a common interest sufficient to designate them as a class to sue in one suit. Class actions became part of federal civil procedural law in 1938, when the federal rules were enacted.<sup>762</sup> The increase in frequency of class actions and their applications to tort actions was partly due to the amendments to federal procedural rules in 1966 and partly to the willingness of plaintiffs' attorneys to encourage and plaintiffs to embark upon large-scale class action suits.<sup>763</sup> The advent of strict products liability enabled easier roads to recovery for mass tort plaintiffs; it no doubt made such suits easier and therefore more likely. Although such actions are important developments in their own right in American tort practice, they are not part of this study because they were derived from the strict liability developments chronicled here and are of secondary importance in the Tort Revolution of the 1960s.

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<sup>760</sup> Peter H. Schuck, *Agent Orange on Trial: Mass Toxic Disasters in the Courts (Enlarged Edition)* (Cambridge, MA: Belknap Press, 1988).

<sup>761</sup> Michael D. Green, *Bendectin and Birth Defects: The Challenges of Mass Toxic Substances Litigation* (Philadelphia: Univ. of Penn. Press, 1998).

<sup>762</sup> Federal Rules of Civil Procedure, Rule 23 Notes of Advisory Committee on Rules, Note to Subdivision (a) (1998), available online <http://www.law.cornell.edu/rules/frcp/ACRule23.htm>.

<sup>763</sup> Arthur R. Miller, "Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the 'Class Action Problem'," *Harv. L. Rev.*, Vol. 92, No. 3 (Jan., 1979), p. 664.

## Who Reigns Supreme?

### *The Conflict Between Courts and Legislatures Over Tort Law*

As legal scholars John Neil Story and Lynn Ward have argued, the *Greenman* case represents more than just application of a new tort doctrine and the expansion of liability. It can be construed “as a confrontation between legislative authority and judicial supremacy.” As Story and Ward note, almost all states have passed a version of a model act called the UCC, which, among other things, regulates the sales of goods. The UCC statutes provide rules for notice and disclaimers. For example, UCC § 2-607(3)(a) requires that a buyer who discovers (or should have discovered) a breach of contract must notify the seller of the breach “or be barred from any remedy.” Yet, the strict liability doctrine was a creation of judges to get “beyond the [state] commercial statutes.”<sup>764</sup>

The tort theory created by the *Greenman* case does not require any notice; therefore, the California Supreme Court and any other state courts that have adopted the same strict liability rules “have bypassed the legislative determination” that sellers should be given notice or the buyer loses his claim rights. Similarly, UCC § 2-719(3) provides that damages can be limited by a contractual disclaimer unless such a limitation would be “unconscionable.” Limits for personal injuries is deemed “prima facie unconscionable” unless the loss is commercial. Losses (with a personal injury) incurred in dealings between businesses may be limited through disclaimers. Yet, a tort theory of strict liability would appear to prevent any such effective disclaimer. As Story and Ward suggest, the foregoing is “a struggle between the legislative and judicial branches.”

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<sup>764</sup> Jethro K. Lieberman and George J. Siedel, *Business Law and the Legal Environment* (San Diego: Harcourt Brace Jovanovich, 1985), p. 435.

Nevertheless, almost all states have enacted UCC § 2-715(2)(b), which provides that in a breach of contract case, the buyer can recover not only for loss of economic value of the good but also for “injury to person or property proximately resulting from any breach of warranty.” This demonstrates how the court’s “independent bases” for applying tort law in cases that appear to clearly be governed by the UCC have been acquiesced in by the legislatures of all states and the District of Columbia, except Louisiana, which have included this tort-like remedy in their commercial sale of goods laws.<sup>765</sup>

By the time the New Deal had resulted in a court system (from the U.S. Supreme Court downward) that deferred to the legislature on economic matters, the courts retreated to their traditional “province” of tort law and “one can read into the refusal of many courts to acknowledge the relevance of UCC provisions to a product liability case, the desire to prevent legislative encroachment upon a judicial domain.”<sup>766</sup> Both Alabama and North Carolina’s examples demonstrate how some states’ legislatures have responded to the Tort Revolution: taking a firm legislative stand. States like these have allowed product liability law to remain a fault-based system but to expand the ability of plaintiffs to sue regardless of a contractual relationship. This simultaneously broadened the common law and retained its principle purposes.

However, we have seen how state courts have found “independent” common law grounds for avoiding the consequences of their states’ Sales Act or the UCC. This

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<sup>765</sup> Uniform Commercial Code Locator, <http://www.law.cornell.edu/uniform/ucc.html> (Cornell University Law School, Mar. 15, 2004).

<sup>766</sup> John Neil Story and Lynn M. Ward, *Perspectives of American Law: Cases on Law and Society* (St. Paul, Minn.: West Publ. Co., 1974), pp. 289-291.

practice warrants the conclusion that the Tort Revolution is a form of an anti-majoritarian “rule of courts.” Although courts, at both federal and state levels, have conceded legislative supremacy, they have been diligent in protecting their territory in common law matters, especially tort law. Thus, the Tort Revolution was more than the creation and expansion of liability theories. It was an institutional struggle with the enlarged, post-New Deal state. The *Greenman* decision and its progeny in other states that allowed for warranty claims that were ostensibly circumscribed by state legislation to survive on independent common law grounds demonstrate the ability of state courts to exercise political influence separate from and in direct challenge to legislative bodies. This is the role that some scholars have posited for the U.S. Supreme Court.<sup>767</sup> Yet, the Tort Revolution shows that state supreme courts have also engaged in this institutional battle.<sup>768</sup>

The Tort Revolution is also an example of what might best be termed judicial activism in the common law realm.<sup>769</sup> Some scholars have defined judicial activism broadly, describing it as when a court renders a decision that “conflicts with [the policies] of other political policy-makers”<sup>770</sup> or when a decision contradicts the deciding court’s

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<sup>767</sup> Jonathan D. Casper, “The Supreme Court and National Policy Making,” *A.P.S.R.*, Vol. 70, No. 1 (Mar., 1976), pp. 60-63.

<sup>768</sup> Morris G. Shanker, “Strict Tort Theory of Products Liability and the Uniform Commercial Code: A Commentary on Jurisprudential Eclipses, Pigeonholes and Communication Barriers,” *W. Res. L. Rev.*, Vol. 17, No. 1 (Oct., 1965), p. 5.

<sup>769</sup> Grant Gilmore, *The Ages of American Law* (New Haven: Yale Univ. Press, 1977), p. 142 n. 48. Gilmore expressly identifies *Greenman* and the adoption of strict liability as the “most dramatic example of activism on the state court level.” *Ibid.*

<sup>770</sup> Glendon Schubert, “Judicial Policy-Making” in David F. Forte, ed., *The Supreme Court in American Politics: Judicial Activism v. Judicial Restraint* (Lexington, MA: D.C. Heath and Co., 1972), p. 17, as cited in Lopeman, p. 3.

own precedents.<sup>771</sup> In regards to statutory and constitutional construction, these definitions are far too broad. Statutes and constitutions are texts with meanings that must be given effect in the context of cases. Thus, an interpretation of a statutory or constitutional provision will always “conflict” with the policy preferences of some policy makers. In the case of judicial review under a written constitution, the conflict will be between the meaning of a constitutional provision and the will of a majority of the duly elected legislature or Congress.

Yet, in the common law setting the definition of activism as the breaching of the deciding court’s precedents is an appealing formulation. The traditional understanding of the common law is that it is the gradual development of the law through many court decisions that apply a general rule to variations on similar fact patterns. A break with precedent would need to be justified by an unusual fact pattern that represents a fact pattern with which courts have been increasingly confronted or will be confronted in the future, rather than merely creating a new rule for an old, well-known fact pattern. The latter can justly be classified as activism because the common law court would be creating a new rule and subverting an old rule. *Greenman* was an example of common law judicial activism because the California Supreme Court was confronted with standard warranty and negligence claims on a fact pattern that was anticipated (and wholly common) under the existing statutory and common law. *Greenman* was not a case of first impression and could have been decided based upon existing precedents. Instead, Traynor and the Court simply eradicated old rules and created a new rule. The same can be said of New Jersey’s *Henningsen* case.

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<sup>771</sup> Lopeman, *The Activist Advocate*, p. 3.

Were the state courts that abrogated the negligence standard and replaced it with a strict liability standard playing a majoritarian or countermajoritarian institutional role? This returns to the question raised by Robert Dahl, who was concerned with the role played by the U.S. Supreme Court.<sup>772</sup> On the one hand, the new strict liability doctrine arguably favored the interests of not only injured consumers but *all* consumers. The expansion of liability created strong incentives for manufacturers to pay close and careful attention to the design and manufacturing of their products. Theoretically, the expanded liability manufacturers faced would incentivize the production of safer products.

On the other hand, the expansion of liability held the potential for harming consumers by inhibiting product innovation and raising the costs of compliance with various states' laws and their case decisions' standards regarding defective designs and manufacturing processes. Most consumers would no doubt desire a sense of increased safety regarding products. The *Henningsen* and *Greenman* courts may have reflected a view of corporations and the modern consumer goods markets of a majority of Americans. It is questionable whether a court's decision that accords with majority opinion makes the court a "majoritarian institution." Some scholars have argued this thesis.<sup>773</sup> However, another view is that majoritarianism in an institutional context is best thought of as being in accord with the legislative majorities' policies as reflected in statutes.

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<sup>772</sup> Robert A. Dahl, "Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker," *J. Pub. L.*, Vol. 6 (1957), p. 279.

<sup>773</sup> Thomas Marshall, *Public Opinion and the Supreme Court* (New York: Longman Press, 1989).



Anti-majoritarianism, in contrast, is the protection of minorities or the rejection of legislatively-determined policies.<sup>774</sup> This was Dahl's view and it is probably the best standard by which to judge. In the case of product liability law, the state courts that abrogated privity and/or adopted strict liability were not only engaged in policy innovation and overcoming their own precedents, but they were also battling rules created by their states' legislatures.

As we have seen, the Sales Act and its successor, the UCC, were laws that provided rules regarding warranties and personal injuries in the context of the sale of goods. Yet, many reformist courts did not favor the consequences of these rules for injured plaintiffs. Therefore, the courts avoided the legislatures' express intentions and found "independent" grounds for alternative rules. While it is conceded that state legislatures may not always truly reflect majority viewpoints, in the Dahlian sense these courts were engaging in anti-majoritarian policy making because they were thwarting, or at least avoiding, the rules created by the legislatures. Also, the UCC was not strongly pro-business; the notice requirement provided only a minor defense.

The Tort Revolution spread quickly between 1960 and the mid-1970s. By 1976, 41 states had adopted some form of strict liability for product defects.<sup>775</sup> The Tort Revolution's proponents contended that the twentieth-century economy was incompatible with tort doctrines formed in the nineteenth century. The consumer was alleged to have been at the mercy of the industrial economy's chains of distribution, the complexity of

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<sup>774</sup> Dahl, "Decision-Making in a Democracy," (using the concept of "law-making majorities"), p. 284.

<sup>775</sup> Mark Geistfeld, "*Escola v. Coca Cola Bottling Co.*: Strict Products Liability Unbound," in Robert L. Rabin and Stephen D. Sugarman, eds., *Tort Stories* (New York: Foundation Pr., 2003), p. 241.

products, and the relative sophistication of manufacturers. Some historians writing of this period have agreed with the reformers.<sup>776</sup> This view can be challenged, especially in relation to the issue of defective products.

The ignorant consumer was a case that was presumed rather than proven by state court judges. The remedy seemed to obviate the need to prove the consumer was oppressed by the conditions of the contemporary market. Once access to compensation was increased, the ignorance of the consumer no longer seemed to matter. One reaction to the academic community by libertarian legal scholars was to fight what seemed to be a rearguard action against the emergent strict liability doctrine. Scholars such as Richard Posner, who by the early 1970s was well known for his contributions to the law and economics school of jurisprudence, contended that negligence made tort law “adversar[ial], decentralized, and nonpolitical.” The fault-based negligence system provided the parties with financial incentives and an apolitical dispute resolution mechanism that obviated the need for an “elaborate governmental apparatus” to allocate the burdens of loss.<sup>777</sup> Yet, other libertarian scholars argued that strict liability was a politically preferable system because it protected and maximized “individual liberty” by penalizing one who “harms” another.<sup>778</sup> Also, liberal scholars – notably Guido Calabresi – made strict liability a key demand in all areas of “accidents” and argued for a compensatory system.<sup>779</sup> Although these debates occurred after the Tort Revolution and

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<sup>776</sup> For example, see G. Edward White, *The American Judicial Tradition*, wherein he argues that “judicial decisions ... needed to be modernized.” (p. 246).

<sup>777</sup> Richard A. Posner, “A Theory of Negligence,” *J. Legal Stud.*, Vol. 1, No. 1 (Jan., 1972), p. 48.

<sup>778</sup> Richard A. Epstein, “A Theory of Strict Liability,” *J. Legal Stud.*, Vol. 2, No. 1 (Jan., 1973), pp. 203-04.

<sup>779</sup> Guido Calabresi, *The Costs of Accidents: A Legal and Economic Analysis* (New Haven: Yale U. Pr., 1970).

did not play a role in the state courts' decisions to adopt strict liability, they were the kinds of arguments that influenced scholars in the 1970s in their arguments about the virtues of the new system created by the state courts and whether strict liability really provided greater protection for consumers.

The Tort Revolution raises the issue of whether courts worked in cooperation with or adverse to the state legislatures. Stephen Skowronek has famously argued that the nineteenth century was a period of "state courts and parties," meaning that political parties rewarded supporters in order to retain power, while courts made substantive policies.<sup>780</sup> Yet, the Tort Revolution demonstrates that the courts were contending with states legislatures in the making of policy.

There is a scholarly debate about whether the change to strict liability ultimately meant much in the way of changes for manufacturers and consumers. Some scholars have argued that strict product liability laws have altered manufacturer practices for the worse, even to the point of harming product innovation.<sup>781</sup> Others have contended that such changes in manufacturer practices did occur, but were beneficial to consumers because they resulted in safer design methods and products.<sup>782</sup> Other scholars claim that such business changes have had no negative outcome, with "little evidence of any

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<sup>780</sup> Stephen Skowronek, *Building A New American State: The Expansion of National Administrative Capacities, 1877-1920* (Cambridge, UK: Cambridge Univ. Press, 1982, 1990 ed.), pp. 24-31, 39-42.

<sup>781</sup> Peter W. Huber and Robert E. Litan, eds., *The Liability Maze: The Impact of Liability Law on Safety and Innovation* (Washington, DC: Brookings, 1991); Robert E. Litan, "The Liability Explosion and American Trade Performance: Myths and Realities," in *Tort Law and the Public Interest: Competition, Innovation, and Consumer Welfare*, Peter H. Schuck, ed. (New York: W.W. Norton, 1991).

<sup>782</sup> Deborah Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* (Santa Monica, CA: RAND Corp., 2001), pp. 8-9, 20.

significant effect on America's prosperity or competitiveness."<sup>783</sup> Yet, the concerns of firms exposed to strict liability in the 1960s were made manifest in the increased rates of liability insurance and in their complaints to legislators to alter the court-created liability rules. During the 1970s and 1980s, the interests of consumers and producers would collide not only on the state level but at the national level, as well. We now turn to the battles at the federal level regarding what would become known as "tort reform".

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<sup>783</sup> Marc Galanter, "An Oil Strike in Hell: Contemporary Legends About the Civil Justice System," *Arizona L. Rev.*, Vol. 40, No. 3 (1998), p. 738.

## **Chapter 5: The First Federal Efforts at “Tort Reform”**

In the 1970s, in the midst of the ongoing efforts of various state supreme courts to adopt the strict liability standard for product liability law within their respective states, the federal government began taking an interest in states’ tort laws. The initial federal presence took the form of investigatory efforts, but these were soon followed by legislative proposals. Although the fifty states might present fifty variations on a theme, the possibilities for federal intervention in the area of products liability, insurance, and the general common law of torts within the states held the promise of an altogether new tune. The federal foray into products liability law – an area previously left largely to the states in American law – was ultimately labeled “tort reform” and was an unsuccessful endeavor, no matter what one’s political perspective. This chapter will examine the initial federal proposals and the political interests and actors involved. As will be seen, the state courts’ changes in product liability law made an area of law that had not theretofore been a matter of political debate into a matter that was subject to pluralist politics of the post-New Deal state at both the state and national levels.

During the Progressive period, workers’ compensation was the “original tort reform” since it was an effort by interested parties and governments to completely reshape the (judge-made) fault-based common law system governing workplace injuries into a no-fault compensatory system.<sup>784</sup> As we have seen, over the course of the twentieth century, many American state courts sought to make products liability law a similarly functioning no-fault system. In the 1970s, most products liability law remained

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<sup>784</sup> Kenneth S. Abraham, *The Liability Century: Insurance and Tort Law from the Progressive Era to 9/11* (Cambridge, MA: Harvard Univ. Press, 2008), p. 39.

in the purview of the states.<sup>785</sup> There were federal requirements regarding products pursuant to regulations issued by the Consumer Products Safety Commission.<sup>786</sup> Yet, the relatively new broad application of strict liability in the manufacturing of goods was a state-based law, created by state courts, which affected companies that conducted business in multiple states. Such companies were subject to compliance with different legal standards in different states. The trend in the states toward strict liability in products liability might have suggested to some manufacturers that a uniform national standard regarding products liability would favor their economic interests. Such manufacturers were the proponents of federal legislation on products liability. The “federalization” of tort law was appealing because the U.S. Constitution’s Supremacy Clause would likely allow any federal tort law to preempt state common law tort doctrines.<sup>787</sup>

The proposals for federal intervention in state tort law are an example of the pluralistic post-New Deal state at work. Specifically, capital goods manufacturers – manufacturers who make large machines for production of consumer goods – were the key private interests that spurred the original federal efforts at tort reform in the 1970s. Without these specialized manufacturers the federal proposals for “tort reform” would likely have never happened. Such industrial complainants were unexpected, since the

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<sup>785</sup> The one large exception was the federal role in food and drugs. Under the Food and Drug Administration, the federal government regulated the manufacture, sale, and distribution of food and drugs in the nation. Without such federal regulation, food and drugs would have been subject to the various states’ common laws and state legislation. Food and drugs had also been the areas where the states had applied strict liability via common decisions.

<sup>786</sup> Public Law 92-573; 86 Stat. 1207, Oct. 27, 1972. The CPSC develops “voluntary standards for industry,” issues regulations, and issues recalls and bans of products. CPSC website, <http://www.cpsc.gov/about/faq.html#wha>.

<sup>787</sup> Thomas H. Koenig and Michael L. Rustad, *In Defense of Tort Law* (New York: NYU Press, 2001), p. 4.

kinds of goods about which state courts had voiced such concern in the 1950s and 1960s were *consumer* goods. The kinds of defective goods that spurred the Tort Revolution were consumer goods – foods, cosmetics, cars, home appliances, etc. But the goods that spurred pleas for federal intervention in state tort laws were the big machines that were used solely in workplaces to make other kinds of goods. This is not a facile point. The deeper meaning is that the Tort Revolution’s purpose was to alter state tort law in order to protect innocent injured consumers. Yet, upon achieving this result, the unintended consequence was to create an incentive for capital goods manufacturers to seek state *and* federal legislative intervention in state tort law. This provides an example of pluralism in the post-New Deal state: a competition of interests for public policy preferences.

### ***Capital Goods Manufacturers – The Interests That Spurred Federal Action***

Capital goods are used in workplaces to make other goods. The machines are very specialized, and require high levels of instruction for users and frequent supervision and, depending on the complexity of the machine, frequent maintenance. When such machines are defective and cause an injury that person is usually an employee. That is, defective capital goods cause injuries on the job, which means such incidents are handled by workers’ compensation programs. These are programs run under state law and they are meant to provide the chief recourse for injured workers. Yet, as we shall see, the alteration of state tort law by state courts created a conflict between the workers’ compensation system and the common law tort system in the states.

The receipt of workers’ compensation benefits had been a right accorded to workers injured on the job since the Progressive Era. In the first couple of decades of the

twentieth century workplace reformers persuaded state legislatures to reduce the financial hardships injured workers experienced after injuries on the job.

Prior to the development of workers' compensation laws, workplace injuries were subject to the common law rules, which allowed an injured employee to recover only for injuries that their employer was negligent in causing. However, most injuries on the job resulted not from the acts of employers, but from the negligent acts of fellow employees or co-workers. The common law of the nineteenth century provided that employees were the agents of their employers and, therefore, the acts of employees were construed as being performed for the benefit of their employers. Thus, generally, if an employee negligently injured another while performing their job duties, not only was the negligent employee liable, so too was the non-negligent employer vicariously liable for the negligence of his employee. However, if the injured party was a fellow employee, then nineteenth-century state courts had developed a rule that prevented the injured party from recovering from the employer: the fellow-servant rule. Under this rule, an employee was deemed to have assumed a "risk to his safety in the service of his master" from fellow servant, or from the inherently dangerous nature of the work involved, by virtue of his employment.<sup>788</sup> Thus, if an employee assumed the risk of dangerous work or was injured

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<sup>788</sup> This language comes from the English case that established the fellow servant rule, *Priestly v. Fowler*, 3 M. & W. 1 (1837), quoted in "Comment: The Creation of a Common Law Rule: The Fellow-Servant Rule, 1837-1860," 132 *U. Pa. L. Rev.* 579, 586-87 (1984). The comment's author concedes that the fellow-servant rule was created for the purpose of protecting businesses in the industrial era, but argues it was adopted in different American jurisdictions haphazardly, without clarity, and with exceptions that demonstrated the resistance of many jurisdictions to the rule. The assumption of the risk in employment was recognized in the first American case to establish the fellow-servant rule, *Farwell v. Boston & Worcester Rail Road Corp.*, 45 Mass. (4 Metc.) 49 (1842), wherein Massachusetts Chief Justice Lemuel Shaw noted that an employee "takes upon himself the natural and ordinary risks and perils incident to the performance of" his job. *Ibid.* at 57.



by a co-worker, then no recovery was possible against the employer.<sup>789</sup> The reformers of the Progressive Era sought to give injured employees a right to recover in such situations.

During the first couple of decades of the twentieth century state legislatures were persuaded to enact workers' compensation acts, which by-passed the common law doctrines by providing no-fault protection to employees injured on the job. The fellow-servant rule was practically extinguished by the workers' compensation statutes because workers' compensation's no-fault provision eliminated the need to determine who was at fault, whether it was the co-worker, employer, or even the injured employee.<sup>790</sup> The old fellow-servant rule has been considered by many legal historians to be a protectionist rule benefiting industry developed by nineteenth-century courts during that rapidly industrializing century.<sup>791</sup> Similarly, workers' compensation laws have been seen as protectionist legislation for workers in the early twentieth century.<sup>792</sup>

Yet, there were additional factors that led to the development of workers' compensation systems. In the late nineteenth century the development of lawyers' contingent fee systems and increasing society-wide sympathy for poor workers who were injured on the job resulted in more lawsuits by workers and actual victories at the trial court level (notwithstanding the general fellow-servant rule) due to the aforementioned

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<sup>789</sup> The employee had a claim right against his negligent co-worker, but usually such suits would be in vain because the co-workers often had few, if any, assets. See Lawrence M. Friedman, *A History of American Law* 3d ed. (New York: Touchstone, 2001, 2005 ed.), p. 225 n. 57.

<sup>790</sup> The fellow-servant rule also had been weakened in the nineteenth century by court-created doctrines, such as a duty to create a safe workplace and an exclusion of supervisors from the fellow-servant rule. Over two dozen states passed employers' liability acts, which expanded corporations' liability to their employees and weakened the fellow-servant rule. Abraham, *The Liability Century*, pp. 27-28.

<sup>791</sup> Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge: Harvard, 1977), pp. 209-10 (United States); J. H. Baker, *An Introduction to English Legal History* 3d Ed. (London: Butterworths, 1990), p. 471 (United Kingdom).

<sup>792</sup> Friedman, *A History of American Law*, p. 517.

sympathy on the parts of juries *and* judges for injured workers. Additionally, state legislatures and the Interstate Commerce Commission started abrogating the fellow-servant rule for railroads, which was a salient example of the weakening of the rule. The weakening of the employer-friendly fellow-servant rule, the increased costs of litigation and liability insurance, the public arguments of lawyers, judges, and legal academics for workers' compensation legislation, and the desire on the part of employers for a more predictable and less costly compensation system combined to create an impetus for state legislative intervention in the form of workers' compensation systems.<sup>793</sup> Workers' compensation is a system that often has been praised for accomplishing two objectives – the compensation of injured parties and the deterrence of “unsafe conduct.”<sup>794</sup> By the mid-1970s, workers' compensation was an entrenched remedy, guaranteeing workers some degree of financial compensation for their on-the-job injuries, including all of their medical treatment.

An example of the situation in which manufacturers, consumers, and political actors found themselves after the states had started adopting the strict liability standard can be found in the case of Ossie Stanfield against Medalist Industries. On April 18, 1969, Ossie Stanfield, an employee of General Electric Cabinet Company in Rockford, Illinois, was injured in the operation of a boring and cutting machine. As a result of the accident, “the three middle fingers on her left hand were amputated to the knuckle.”<sup>795</sup>

The machine had been made by Medalist Industries, Inc., a manufacturer of capital

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<sup>793</sup> Lawrence Friedman and Jack Ladinsky, “Social Change and the Law of Industrial Accidents,” *Colum. L. Rev.*, Vol. 67, No. 1 (1967), pp. 60-69.

<sup>794</sup> Abraham, *The Liability Century*, p. 11.

<sup>795</sup> *Stanfield v. Medalist Industries, Inc.*, Complaint, p. 1, para. 3 (filed Oct. 6, 1970), No. G-23773, Clerk of Court of 17<sup>th</sup> Judicial Circuit, Winnebago County, Rockford, Illinois.

goods. Stanfield sought recovery through two avenues: first, by filing a workers' compensation claim and, second, by suing the manufacturer of the machine.<sup>796</sup> By the 1970s, the latter remedy was much more recent and powerful, since it allowed recovery to Stanfield under the rule of strict liability. Even though Stanfield had recovered through her workers' compensation carrier, she filed a product liability suit against the manufacturer of the machine, asking for \$150,000.00.<sup>797</sup> Illinois's first workers' compensation law was enacted in 1911.<sup>798</sup> Illinois courts had adopted strict liability in 1965.<sup>799</sup> Thus, Ossie Stanfield was well positioned to benefit from both workers' compensation and the relatively new doctrine of strict liability.

Injured workers like Stanfield benefited from the ability to not only recover through the workers' compensation system, administered by a state-established commission, but additionally through the tort system, administered by the state courts. Stanfield was not faced with an either-or choice of remedies; rather she could use *both* systems as avenues of recovery. Although workers' compensation statutes typically prohibited negligence suits against employers or fellow employees, a suit against a third-party (a party outside the employment relationship) was typically allowed.

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<sup>796</sup> *Stanfield v. Medalist Industries, Inc.*, 17 Ill. App. 3d 996; 309 N.E.2d 104; 1974 Ill. App. LEXIS 3109 (Ill. App. 2d Dist., 1974).

<sup>797</sup> Law Docket and Fee Book, No. G-23773, Circuit Court of the 17<sup>th</sup> Judicial District, Winnebago County, Illinois. Using the CPI, \$150,000.00 in 1970 would be worth approximately \$829,000.00 in 2009 U.S. dollars. Samuel H. Williamson, "Six Ways to Compute the Relative Value of a U.S. Dollar Amount, 1790 to Present," *MeasuringWorth*, 2009. URL <http://www.measuringworth.com/uscompare/>.

<sup>798</sup> *Deibeikis v. The Link-Belt Co.*, 261 Ill. 454, 464, 104 N. E. 211, 215 (1914) (holding that the Illinois legislature had the constitutional power to abolish and modify common law torts).

<sup>799</sup> *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 210 N.E. 2d 182 (1965). The Illinois Supreme Court extended strict liability in the sale of food, which rule had existed in the state since 1897, to the sale of goods, which in *Suvada* was a "reconditioned" farming tractor.

Also, many states, including Illinois, where Stanfield's case occurred, prohibited contribution among wrongdoers, or tortfeasors. This old common law rule held that multiple tortfeasors could not profit from their wrong by recovering from other tortfeasors. That is, multiple wrongdoers were prohibited from looking to each other to offset their losses to an injured plaintiff, even if another tortfeasor had contributed more extensively to the plaintiff's injuries or damages. For example, when the Illinois appellate court considered Ossie Stanfield's case, the court determined that Medalist Industries, the manufacturer of the machine, could not sue Stanfield's employer, General Electric Cabinet Industries (GE), because of the common law prohibition on contribution. This was true even though the manufacturer argued that the employer, GE, was the truly at-fault party for its purported failure to adequately instruct and supervise Stanfield in the use of the machine.<sup>800</sup>

The liability situation in which Medalist Industries found itself in the mid-1970s was similar to that facing many other manufacturers of capital goods throughout the nation. Although states' supreme courts had started to adopt strict liability since the early 1960s,<sup>801</sup> not all states had done so by the mid-1970s.<sup>802</sup> Nevertheless, the trend in states'

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<sup>800</sup> More specifically, Illinois law allowed an exception to the rule against contribution among joint tortfeasors, called the active-passive doctrine. This doctrine applied in negligence cases and allowed a joint tortfeasor to sue another for contribution or indemnification when one of the tortfeasors was deemed merely "passively" negligent and the other tortfeasor was "actively" negligent; the "active" tortfeasor "was the actual agency through which the injury was incurred." *Stanfield*, 17 Ill. App. at 998, 309 N.E. 2d at 106. However, in *Stanfield* the court held that the active-passive doctrine only applied in negligence cases and the instant case was not based on negligence but on strict liability. Thus, the doctrine did not apply since under the strict liability theory the manufacturer was "qualitatively active." *Ibid.* at 1000, 309 N.E. 2d at 108.

<sup>801</sup> George L. Priest, "The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law," *J. Legal Stud.*, Vol. 14, No. 3 (Dec., 1985), p. 461.

<sup>802</sup> For example, the Delaware Supreme Court refused to adopt strict liability because it would disrupt the remedies available to consumers in the sales transactions under the state's version of the Uniform Commercial Code and because the state legislature had made the determination that sales warranty law

courts was clearly in favor of strict liability for manufacturers of goods. The rationale behind strict liability in the context of goods was that the manufacturer was in the best position to prevent defects in the design and production of goods. Thus, under the strict liability doctrine manufacturers would become insurers of their products. This policy was considered appropriate because “[t]he purpose of [strict] liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.”<sup>803</sup> Also, courts that adopted strict liability contended that “a primary purpose of products liability law is to encourage the design of safer products and thereby reduce the incidence of injuries.”<sup>804</sup>

Strict liability law was a trend among the states because the common law of torts traditionally has been a matter of state law in America. There is no federal common law of torts. However, the twentieth century witnessed assertions of lawmaking power by the federal government in matters that were interstate in character. For example, the Employers’ Liability Act of 1908 was a federal law that abrogated the common law fellow-servant rule and the defenses of contributory negligence and assumption of the risk for employees of common carriers across interstate lines, which were basically the railroads.<sup>805</sup> In *Mondou v. New York, N.H. & H.R. Co.*,<sup>806</sup> the United States Supreme

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would govern such matters and the legislature had not intended for any theory to compete against the sales statute. *Cline v. Prowler Indus. of Maryland, Inc.*, 418 A.2d 968 (Del., 1980).

<sup>803</sup> *Greenman*, 59 Cal.2d at 63, 377 P.2d at 901, 27 Cal. Rptr. at 701.

<sup>804</sup> *Prentis v. Yale Mfg. Co.*, 421 Mich. 670, 365 N.W.2d 176 (1984).

<sup>805</sup> 35 Stat. 65 (1908).

<sup>806</sup> 223 U.S. 1, 49, 57 (1912).

Court upheld the constitutionality of the federal abrogation of these state tort law doctrines under the Commerce Clause power. Accordingly, there was a basis for a federal role in tort law in matters of interstate commerce. Later, with the expansion of federal power during the New Deal, Congress found that the Supreme Court concurred with its views that the Constitution's Article I, Section 8 power to regulate "commerce among the several states" was a broad power, allowing federal lawmaking in intrastate matters that ultimately had some "effect" on interstate commerce.<sup>807</sup> Thus, Congress not only had a clear power to regulate commerce among the states but, under the "effects doctrine," Congress also was allowed to regulate matters that were traditionally matters of state law. The development of federal power throughout the twentieth century had set the stage for a possible federal takeover of tort law, including of course products liability law.

### ***The First Federal Steps in "Tort Reform"***

In 1977, both houses of Congress held subcommittee hearings on the possibility of regulating products liability at the federal level. From April through December of 1977, the House of Representatives Committee on Small Business, Subcommittee on Capital, Investment and Business Opportunities held hearings on product liability and related insurance issues.<sup>808</sup> Similar, briefer hearings were held in April 1977 in the Senate's Committee on Commerce, Science, and Transportation, Subcommittee for

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<sup>807</sup> *Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>808</sup> The hearings' transcripts were published in five volumes entitled *Product Liability Insurance, Parts 1-5, Hearings before the Subcommittee on Capital, Investment and Business Opportunities of the Committee on Small Business*. U.S. House of Representatives. 95<sup>th</sup> Congress, 1<sup>st</sup> Sess. (1977-1978) (hereinafter "House, Vol. #, p. #").

Consumers.<sup>809</sup> The ostensible issues presented in these hearings concerned the availability of product liability insurance at “reasonable rates” and whether the emergent tort liabilities in various states were the causes of extraordinary insurance rate increases across the nation. However, the purpose for such committee hearings – on the part of the hearings’ proponents – appears to have been to set the stage for federal legislation to regulate product liability insurance rates or enact a federal tort law, which would have pre-empted state laws (both common law and statutory) regarding the liabilities of manufacturers to injured consumers.

This was not the first time that rates had risen in response to changes in legal liability. In 1944 a natural gas storage tank at a liquefaction plant in Cleveland, Ohio exploded, causing fires and property valued at over five million dollars and killing over 100 people. After New York’s *MacPherson* (1916) case, many states subsequently adopted what became known as the “*MacPherson* rule” regarding negligence liability of manufacturers regardless of privity of contract. Ohio adopted the *MacPherson* rule in 1927.<sup>810</sup> Thereafter, lawyers in cases against manufacturers tried to push the boundaries of the doctrine in situations beyond the consumer goods claims envisioned in *MacPherson*.

In many of the lawsuits that resulted from the Cleveland tank explosion, plaintiffs sued the designer-manufacturer of the tank in addition to the gas company that owned and operated the tank at the time of the explosion. Two courts, the Pennsylvania

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<sup>809</sup> *Product Liability Insurance, Hearings before the Subcommittee for Consumers of the Committee on Commerce, Science, and Transportation*. U.S. Senate. 95<sup>th</sup> Congress, 1<sup>st</sup> Sess. on S. 403, (1977) Serial No. 95-26.

<sup>810</sup> *White Sewing Machine Co. v. Feisel*, 28 Ohio App. 152, 162 N.E. 633 (1927).

Supreme Court and the federal Third Circuit Court of Appeals, held the manufacturer could be liable for any negligence, even though the tank had been in the possession and operation of the gas company for thirteen months prior to the explosion and the tank was essentially a fixture (a permanent construction on real property) on the gas company's property.<sup>811</sup> Prior to this incident and the cases arising out of it, the *MacPherson* doctrine had only been applied to personal property. The application of liability to fixtures raised the possibility of liability of many industrial manufacturers for liability relating to capital goods that never reached individual consumers. As a result of the two cases related to this incident there was a "greatly increased demand for products liability insurance." As early as 1958, prior to the rapid expansion of strict liability in all matters of product liability cases in the early 1960s, insurers were offering explicit product liability coverage and bemoaning the "spiraling costs and increasingly large jury verdicts."<sup>812</sup>

Manufacturers of capital goods worried that the statute of limitations for tort claims would not prevent claims made against them. Insurers worried that they could not accurately rate the risks they were taking on, since claims might be made for "occurrences" during the policy period, even though the negligence that led to the incident happened before – sometimes years before – the policy's effective date.<sup>813</sup>

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<sup>811</sup> *Foley v. Pittsburgh-Des Moines Co.*, 363 Pa. 1, 68 A.2d 517 (1949) (applying Ohio law); *Moran v. Pittsburgh-Des Moines Steel Co.*, 166 F.2d 908 (3d Cir. 1948). Pennsylvania implicitly adopted the *MacPherson* rule in 1931 or 1945, but emphatically by 1949 in *Foley*, above.

<sup>812</sup> Suel O. Arnold, "Products Liability Insurance," *Ins. Counsel J.*, Vol. 25, No. 1 (Jan., 1958), p. 42; Allan P. Gowan, "Products Liability Insurance . . .," Vol. 26, No. 3 (July, 1959), p. 411.

<sup>813</sup> Lamber Turner, Jr., "Recent Trend in Liability of Manufacturers," *Ins. Counsel J.*, Vol. 18, No. 1 (Jan., 1951), pp. 44-45.



There had been earlier U.S. House and Senate bills in the 1970s that proposed the study of insurance rate increases,<sup>814</sup> changes in federal tax laws,<sup>815</sup> and laws affecting small businesses.<sup>816</sup> Additionally, there was a bill that proposed the wholesale federalization of product liability law.<sup>817</sup> The earliest federal proposals were made in 1976 during the Ninety-fourth Congress and, it is important to note, these were largely bipartisan efforts. Democrats and Republicans had constituents who complained about the “product liability problem.” What would later become popularly known as “tort reform” had not yet become an ideological issue, dividing the two major political parties.

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<sup>814</sup> Multiple bills were proposed in 1976 and 1977 by Republicans and Democrats, many of whom were from states with substantial manufacturing sectors in heavy industry. All of these bills ended in committee. *E.g.*, H. Res. 1569 (for the study of “product liability and professional liability insurance rate increases”), chiefly sponsored by Rep. Ronald M. Mottl (D-OH); referred to House Committee on Rules, 9/22/1976, Congressional Rec. – House, Vol. 122, Pt. 5, p. 32031; H. Res. 6300 (for improving “the safety of products manufactured and sold in interstate commerce, to reduce the number of death and injuries caused by such products”), sponsored by Rep. Ronald A. Sarasin (R-CT), referred to the House Committee on Interstate and Foreign Commerce, 4/19/1977, Congressional Rec. – House, Vol. 123, Pt. 9, p. 11145.

<sup>815</sup> *E.g.*, H. Res. 7711 (to amend the federal tax code to “provide that trusts established for the payment of product liability claims and related expenses shall be exempt from income tax” and allowing a deduction “for contributions to such trusts”), co-sponsored by Rep. Charles W. Whalen, Jr. (R-OH), referred to the House Committee on Ways and Means, 6/9/1977, Congressional Rec. – House, Vol. 123, Pt. 15, p. 18336; H. Res. 10196 (to amend the federal tax code to “provide a deduction for certain amount paid to a reserve for payment of product liability losses”), co-sponsored by Rep. Abner J. Mikva (D-IL), referred to the House Committee on Ways and Means, 12/1/1977, Congressional Rec. – House, Vol. 123, Pt. 29, p. 38303. Abner Mikva was later appointed by President Carter to the U.S. Court of Appeals for the District of Columbia, later serving as chief judge on that court. He later served as Counsel to President Bill Clinton in 1994-1995. Biographical Dictionary of the United States Congress, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=M000703>. S. 3489 (to “allow additional carryback of 7 years for excessive net operating losses attributable to product liability”), sponsored by Sen. John C. Culver (D-IA), referred to the Senate Committee on Finance, 9/8/1978, Congressional Rec. – Senate, Vol. 124, Pt. 21, p. 28573.

<sup>816</sup> *E.g.*, H. Res. 4200 (“to amend the Small Business Act by authorizing the Small Business Administration to furnish reinsurance for property liability insurers for small business concerns which would not otherwise be able to obtain product liability insurance on reasonable terms”), chiefly sponsored by Rep. John J. LaFalce (D-NY), referred to the House Committee on Small Business, 3/1/1977, Congressional Rec. – House, Vol. 123, Pt. 5, p. 5612.

<sup>817</sup> H. Res. 13209 (“to establish Federal product liability tort law standards”), co-sponsored by Rep. John J. LaFalce (D-NY), referred to the House Committee on Interstate and Foreign Commerce, 6/21/1978, Congressional Rec. – House, Vol. 124, Pt. 14, p. 18342; S. 1706 (to establish federal product “standards”), co-sponsored by Sen. Richard G. Lugar (R-IN), referred to the Senate Committee on Commerce, Science, and Transportation, 6/16/1977, Congressional Rec. – Senate, Vol. 124, Pt. 26, p. 35575.

However, none of these early bills became laws. They ultimately died in their respective congressional committees.

These initial congressional hearings are an example of the post-New Deal state at work. On one level, they reveal the basic functioning of the post-New Deal state, with its conflicting interest groups competing for the attention and protection of the federal government. On another level, the hearings reveal the conflicts produced by the nature of the American federal system: any new federal tort or insurance law, based on powers articulated during the New Deal would probably disturb the long-standing state workers' compensation systems, an achievement of the Progressive Era. Also, on a general public policy level, these hearings demonstrated the persistence and relevance of political concerns that have existed ever since the creation of the New Deal state. These issues include the opportunities for federal legislation created by perceptions of crises; the opportunities federal legislation creates for different interests to enact long-desired policy preferences; the potential leadership role the president can take in formulating and advocating federal legislation; and the politics inherent in the modern administrative state. Finally, as a practical, legislative process matter, the House hearings were important because the hearings occurred shortly after the post-Watergate reforms of the committee system, whereby subcommittees were "institutionalized," meaning they no longer existed "at the sufferance of the chairmen of standing committees." Thus, subcommittees were more robust and "participate[d] actively in the legislative process."<sup>818</sup> These hearings occurred during the early years of such increased subcommittee participation.

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<sup>818</sup> Ross K. Baker, *House and Senate* (New York: Norton, 1989), p. 174.

Although one might have thought that proponents of the federalization of tort law would have been manufacturers of consumer goods – since consumer goods such as foods, drugs, cosmetics, automobiles, household appliances and yard-working machinery had been the subjects of prior strict liability lawsuits – the key witnesses from the business community were capital goods manufacturers, like Ossie Stanfield’s employer, Medalist Industries. That is, manufacturers of machines used to make other machines or used in manufacturing operations were the main advocates of federal legislation. For example, the initial witnesses in the House subcommittee hearings were congressmen from districts with manufacturers of capital goods. The congressmen surveyed companies in their districts and found respondents who were self-described as a “manufacturer of polishing machinery in New York”; “a specialty manufacturer in Ohio”; “a manufacturer of custom-designed machinery in New York”; and “a manufacturer of light production machinery in Ohio.”<sup>819</sup> Although the House subcommittee was expressly concerned with matters affecting small businesses, it is striking that consumer goods manufacturers were not included among those businesses that were subject to products liability suits and insurance rate increases. Consumer goods had been the kinds of goods over which lawsuits had been brought concerning defects and such goods were the kinds that had been the subject of the earliest and key strict liability holdings of state courts. Consumer goods manufacturers would have had greater exposure to the consuming public and thereby have had more opportunities for injuries and lawsuits. By contrast, capital goods manufacturers made goods for other businesses

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<sup>819</sup> “Joint Prepared Statement presented by Hon. Charles W. Whalen, Jr. [3<sup>rd</sup> Dist., OH], Hon. Edward W. Pattison [29<sup>th</sup> Dist., NY], Hon. Donald J. Pease [13<sup>th</sup> Dist., OH], Hon. Joel Pritchard [1<sup>st</sup> Dist., WA], Hon. Newton I. Steers, Jr. [8<sup>th</sup> Dist., MD] on Product Liability Insurance – Survey Findings,” House, Vol. 1, p. 10.

and, consequently, fewer people were exposed to their goods than consumer goods. Nevertheless, both kinds of manufacturers were subject to the states' laws on products liability.

One reason the push for federal legislation came from capital goods manufacturers was because the early 1970s saw a marked increase in lawsuits against such manufacturers and many (probably most) of these suits were filed by plaintiffs who had been injured on the job and compensated under their state's workers' compensation system. For example, federal government studies in the 1970s determined that "40 percent of overall payments by product liability insurers were made to injured workers who were already entitled to" workers compensation. Of the approximately 120,000 permanently disabled workers who collected benefits averaging \$4,000 in 1974, about 30,000 also successfully recovered (either through litigation or negotiation) product liability tort claims in the average amount of \$40,000.<sup>820</sup> Accordingly, the threat as perceived by capital goods manufacturers in the mid-1970s was substantial.

It should be noted that the rationale of modern products liability laws might not have been easily applied to capital goods manufacturers. As previously stated, state supreme courts justified the application of no-fault liability to manufacturers because such businesses were thought to be best suited to prevent defects and thereby protect "the injured persons who are powerless to protect themselves."<sup>821</sup> In other words, strict liability was conceived by courts as a way of protecting the individual consumer, who

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<sup>820</sup> American Law Institute, "Reporters' Study on Enterprise Responsibility for Personal Injury, Vol. II: Approaches to Legal and Institutional Change" (Philadelphia: ALI, 1991), pp. 183-84, in the ALI/ALI-ABA Library in Philadelphia, PA.

<sup>821</sup> *Greenman*, 59 Cal.2d at 63, 377 P.2d at 901, 27 Cal.Rptr. at 701.

purportedly lacked other means for compensating his/her injuries. But Ossie Stanfield and the other workers injured by the machines made by capital goods manufacturers were already covered by workers compensation. They were hardly “powerless to protect themselves.” On the other hand, over the course of the twentieth century scholarly and popular opinion has seen the threat of liability as a way of creating incentives for better, safety-oriented behavior; or, stated in the negative, as a way of deterring dangerous, risk-oriented behavior.<sup>822</sup> Proponents expected strict liability of any manufacturer of defective products, whether in the workplace or in the home, would incentivize the creation of safer products.

The congressmen and their constituents told “horror stories” of dramatic liability insurance rate increases and products liability lawsuits. For example, congressman Joel Pritchard (R-WA) recounted an anecdote told to him by a swimming pool contractor, a constituent from his congressional district, who claimed that in the past three years<sup>823</sup> his liability insurance premiums had gone from \$5,000 to \$170,000 and during that period a claim had been made for one of their pools. The claim regarded a pool that had been installed without a diving board because the pool’s design was “not configured to take one.” After completion of the pool’s construction, the pool’s owner installed a diving board, a swimmer became a paraplegic after using the diving board, and then the owner sued the manufacturer, claiming a defective design.<sup>824</sup> Similarly, Rep. Les Aucoin (D-OR) cited a letter from a Portland, Oregon manufacturer who claimed his product liability

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<sup>822</sup> Kenneth S. Abraham, “Liability Insurance and Accident Prevention: The Evolution of an Idea,” *Md. L. Rev.*, Vol. 64, No. 1-2 (2005), pp. 573, 575-76.

<sup>823</sup> Presumably this period covered roughly 1973 to 1976.

<sup>824</sup> House, Vol. 1, p. 17.

insurance premiums increased from 1975 at \$300, to 1976 at \$9,000, to 1977 at \$55,000.<sup>825</sup>

By the late 1970s, there was empirical evidence that strict liability led to higher insurance premiums for manufacturers and those costs were passed on to consumers in the form of higher prices.<sup>826</sup> It should be noted that some defense attorneys were sanguine about their clients' prospects under the new products liability regime. For example, Roy Reardon, an attorney for General Motors, stated, "We may be losing all the precedents, but we're still winning juries and that's what counts." Similarly, Rudolph Janata, president of the Defense Research Institute, an insurance company defense-oriented non-profit, noted, "The burden of proof as to the fact of a defect in the product still rests with the plaintiff even in states where strict liability in tort has been adopted."<sup>827</sup> Nevertheless, the ability to bring a successful suit against a remote manufacturer carried costs and insurance was needed to bear them. By the mid-1970s, insurance industry analysts were advising insurers to work with their insured manufacturers to reduce the costs and likelihood of a products liability lawsuit. For example, in 1976 one journal advised insurers and manufacturers to work with trade associations to develop industry-wide guidelines and advised individual manufacturers to create written safety guidelines for employees and supervisors, keeping detailed records on enforcement and the entire

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<sup>825</sup> House, Vol. 1, p. 27.

<sup>826</sup> James L. Croyle, "An Impact Analysis of Judge-Made Products Liability Policies," *Law & Soc'y Rev.*, Vol. 13, No. 4 (Summer, 1979), p. 949-69.

<sup>827</sup> Jonathan Evan Maslow, "Products Liability Comes of Age," *Juris Doctor* (Feb., 1975), p. 24, Box 25, File 7, The Roger J. Traynor Collection, U.C. Hastings College of the Law, Traynor Center/Special Collections.

production, distribution, and sales processes.<sup>828</sup> These were the kinds of costs borne by manufacturers regardless of whether claims were ever made to their insurers or lawsuits filed against them. Additionally, insurers were experiencing greater losses because of strict tort liability. The Insurance Services Office (ISO), the statistical and rating organization of the commercial insurance industry, noted that between 1969 and 1973 product liability premiums increased 154 percent, but losses increased 279 percent. In 1973, insurers received \$216.6 million in premiums but incurred \$292 million in loss adjustments, “without even taking into account other expenses such as sales commissions, taxes and general company overhead.”<sup>829</sup>

Also, it is important to note that the common law collateral source rule would prevent the manufacturer from reducing its liability by any amount of compensation already paid to the employee under the workers’ compensation system. Added to the common law rule was the workers’ compensation majority rule among the states that prohibited manufacturers or their insurers from recovering against a negligent employer, who might often have been the most significant factor in a worker’s injury. For example, an employer is usually thoroughly instructed on the operation of a new machine but the employer bears the responsibility for training future employees on the machine’s proper, safe operation. If this link fails, then an injured employee would still have a potential claim against the original manufacturer, but the manufacturer could not recoup any loss against the at-fault employer. This problem had existed since the creation of workers’

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<sup>828</sup> “How to Control Product Liability Losses,” *J. of American Ins.*, Vol. 52, No. 2 (Summer, 1976), pp. 20-22.

<sup>829</sup> “Product Liability: A Tale Written in Red Ink,” *J. of American Ins.*, Vol. 52, No. 3 (Fall, 1976), pp. 16-17.

compensation in the early part of the century, but became pronounced with the increase in product liability suits in the 1960s and 1970s.<sup>830</sup>

As insurance premiums and lawsuits multiplied, manufacturers drew the attention of their congressmen to product liability. Representative Robert J. Cornell (D-WA) noted that he had received “a couple of letters” in the fall of 1976 from “some of the businessmen [in his district] complaining about the increase in product liability insurance rates . . . .” In response to the letters, Cornell sent out “approximately 500 letters to constituents on [his] National Federation of Independent Business mailing list.” By the time of the congressional hearings he had already received fifty responses, “largely from manufacturers and distributors of capital equipment.”<sup>831</sup> Cornell’s comments reflected why congressmen were interested in these hearings. This was pluralism in its purest form: proposing an inquiry and legislation in response to cumulative constituent demands.

Such constituent complaints suggested an emergent problem for small businesses nationwide. For example, five congressmen conducted their own joint survey of small businesses – chiefly capital goods manufacturers – in their districts in Ohio, Washington, New York, and Maryland. One-third of the respondents claimed they could not afford liability coverage or could not find a carrier that would sell such coverage. Based upon the responses, the average increase in commercial general liability insurance premiums between 1970 and 1977 was 944.6 percent, but sales volumes increased only an average

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<sup>830</sup> Arthur Larson, “Third-Party Action Over Against Workers’ Compensation Employer,” *Duke L. J.*, Vol. 1982, No. 3 (June, 1982), pp. 483, 486-88.

<sup>831</sup> House, Vol. 1, pp. 31-32.



of 162.1 percent during the same period. Thus, the premiums had increased 5.8 times higher than annual sales.<sup>832</sup>

Later investigation by the Department of Commerce's Interagency Task Force on Product Liability concluded that liability insurance premiums "increased substantially" in the mid-1970s. For example, surveys of manufacturers conducted by the federal Commerce Department's Intergovernmental Task Force on Product Liability discovered that between 1975 and 1976 premiums increased "over 200 percent." Anecdotal evidence gathered by the Task Force showed increases "over 1,000 percent." The increases were most marked for "manufacturers of industrial equipment, industrial chemicals, and metal castings."<sup>833</sup> These were the very kinds of manufacturers – privately held capital goods makers – whose complaints initiated the federal effort at tort reform in the 1970s.

Although the congressmen put their surveys to self-serving uses, they were a measure of constituent sentiment and an attempt to ascertain the nature of the liability insurance situations facing many small businesses. More broadly, these surveys also demonstrated a concern on the part of the congressmen who propounded them for the limits of the liberal state. That is, the traditional (and now cliché) manner in which the liberal state worked (and continues to do so) was for organized interests to seek preferences from the state, or to try to socialize costs through the force of law, which would otherwise be privately borne. However, the interests that were impacted by the

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<sup>832</sup> House, Vol. 1, pp. 3-4. The five congressmen were Charles W. Whalen, Jr. (3<sup>rd</sup> Dist., OH); Edward Pattison (29<sup>th</sup> Dist., NY); Donald J. Pease (13<sup>th</sup> Dist., OH); Joel Pritchard (1<sup>st</sup> Dist., WA); and Newton I. Steers (8<sup>th</sup> Dist., MD).

<sup>833</sup> U.S. Department of Commerce, *Interagency Task Force on Product Liability: Final Report*, (Washington, D.C.: 1978), pp. VI-11-27.

state-level changes in tort law presented a unique challenge to federal lawmakers due to the conflict among different interest groups. The prospective beneficiaries of any federal intervention would have been manufacturers and insurance companies. Yet, other organized interests were subject to being affected by the prospect of federal tort and insurance laws: plaintiffs' trial lawyers, consumers and non-profit organizations that purported to represent them, and businesses subject to paying contribution to manufacturers as joint tortfeasors.

This last group needs some explanation. You will recall Ossie Stanfield's case, wherein the manufacturer claimed Ossie's employer, General Electric Cabinet, was at fault because it allegedly failed to properly instruct Stanfield on how to safely use the machine. Illinois law allowed for indemnification but not in cases of strict liability. Therefore, even if the employer had been negligent in failing to properly instruct the employee, the manufacturer bore the entire tort liability burden.<sup>834</sup> If federal tort laws were enacted, negligent employers might have been subject to suits seeking indemnification.

What was the response these small manufacturers of capital goods wanted from the federal government? Although most complaints pointed to a product liability *insurance* crisis, the manufacturers' recommendations to Congress went far beyond insurance reforms. They demanded a federal takeover and wholesale reform of tort law to protect their interests.

One example of such business interests' demands is the set of recommendations devised by the group of five congressmen led by Joel Pritchard (R-WA). Pritchard and

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<sup>834</sup> *Stanfield v. Medalist Industries, Inc.*, 17 Ill. App. 3d 996; 309 N.E.2d 104; 1974 Ill. App. LEXIS 3109 (Ill. App. 2d Dist., 1974).

his associates urged a wide array of changes, including a federal reinsurance pool as a “short-term answer to the present crisis,” a national statute of limitations or statute of repose,<sup>835</sup> a national contributory negligence rule,<sup>836</sup> a “state of the art” protection standard,<sup>837</sup> and, perhaps most importantly, they urged “uniform standards” in the form of a federal products liability law. This last item was a request for the wholesale federal takeover<sup>838</sup> of products liability law. They urged such a takeover of state law expressly because they wanted to supersede state tort law and eliminate variation from state to state. They noted that the law’s constitutional basis would be the Commerce Clause, since “practically all manufactured goods are sold in interstate commerce nowadays.” In the alternative, they proposed a “readily-adopted uniform code,” which the states could adopt individually. However, they argued, “[t]he dictates of time seem to point towards the federal approach.”<sup>839</sup> This was an appeal to the perception of a crisis. Additionally, they urged some ancillary reforms, such as the awarding of federal government contracts without regard to whether firms carried product liability insurance coverage. Also, they suggested that the Small Business Administration needed to become a guarantor or lender of funds to insurers in order to cover the carriers’ reserves needs. This would not be as

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<sup>835</sup> Statutes of limitation provide “maximum time periods during which certain actions can be brought or rights enforced.” After the time period has run, “no legal action can be brought regardless of whether any cause of action ever existed.” By contrast, a statute of repose “cuts off [a] right of action after [a] specified time measured from delivery of product or completion of work, regardless of time of accrual or cause of action or of notice of invasion of legal rights.” *Black’s Law Dictionary* 6<sup>th</sup> Ed. (St. Paul: West, 1990) pp. 927, 1411.

<sup>836</sup> Contributory negligence is an affirmative defense that prevents plaintiffs who negligently contribute to their own injuries or damages from obtaining any recovery from a negligent defendant.

<sup>837</sup> This standard would provide a defense that any manufacturer who had adhered to the “state of the art” in the design and/or manufacture of a product would be found to have not been at fault.

<sup>838</sup> Often referred to as a “federal pre-emption” of tort law.

<sup>839</sup> House, Vol. 1, pp. 11-12.

costly as it might seem, they contended, because the claims filed always exceeded the claims actually paid. They wanted changes in the tax treatment of self-insurance from accumulated capital to full deduction status. Although the congressmen conceded that their study did not speak to whether contingency fee agreements were an incentive for filing product liability claims, they urged further congressional study of lawyers' fees and "wonder[ed] what role legislation would or could play" if lawyers' fees were determined to be a problem. Finally, regarding workers compensation, they wanted to explore businesses' suggestions about setting up a federal products liability program that would supersede workers' compensation. However, the congressmen thought the states' experience with workers' compensation programs suggested keeping such programs at the state level.<sup>840</sup> Such were the recommendations of small businesses through their proxy congressional representatives.

Other private interests voiced their concerns and recommendations through letters to the subcommittee and their congressional representatives. For example, H. Alexander Pendleton of the Warren Tool Corporation in Warren, Ohio, wrote to his congressman, Charles J. Carney (D-OH), to complain that federal tort *and* insurance legislation were a necessity. He stated that his company had "small plants" in seven Ohio cities, with about 750 employees, which "manufactures and sells hand tools, castings and heavy fabrications." Pendleton claimed the company was increasingly defending itself against claims for injuries resulting from the "improper use" of "products that are of very high quality." He claimed an increase in premiums of "1800% in the last five years," plus increased time allocation for his personnel. Pendleton was convinced that the chief

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<sup>840</sup> House, Vol. 1, p. 12.

factors for the premium increases were the fact the ultimate users of the machines were aware of strict liability and took advantage of it, the state courts' adoption of strict liability, the subrogation of claims "over and above" workers' compensation levels on industrial accidents, and the plaintiffs' lawyers' contingency fees, which "induce frivolous or spurious claims."<sup>841</sup>

Pendleton urged the following federal reforms: a statute of limitations or repose of five years (presumably running from the date of sale), a statutory sliding scale on allowable plaintiffs' lawyers' contingency fees, the elimination of punitive damages, the ability for manufacturers held liable for product injuries to make installment payments of verdict awards over extended periods of time, the elimination of *ad damnum* clauses,<sup>842</sup> the adoption of a "loser pays" rule,<sup>843</sup> an increase in workers' compensation benefits, the prohibition on subrogation rights to recover workers' compensation benefits, and the ability to reduce awards in suits against manufacturers by the amount of collateral benefits received by the plaintiff, which presumably meant an offset in the amount paid to the plaintiff by the workers' compensation system.<sup>844</sup>

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<sup>841</sup> House, Letter of March 11, 1977, pp. 83-84.

<sup>842</sup> *Ad damnum* clauses are statements of the amount of monetary losses or damages claimed by the plaintiff in a lawsuit, usually stated in the complaint. Under Federal Rule of Civil Procedure 8(a)(3), the plaintiff "must" make "make a demand for the relief sought," which is usually a statement of some amount of monetary damages. The various states have their own rules of pleadings.

<sup>843</sup> This type of rule is often referred to as "the English rule," reflecting the fact that under English civil rules the party that loses the lawsuit is required to pay the attorneys' fees of the party that wins, in addition to any damages and fees pursuant to the judgment. By contrast, the traditional "American rule" has been to make each party bear their own attorneys' fees regardless of the outcome of the lawsuit. See A. Mitchell Polinsky and Daniel L. Rubinfeld, "Does The English Rule Discourage Low-Probability-of-Prevailing Plaintiffs?" 27 *J. Legal Stud.* 141 (Jan., 1998).

<sup>844</sup> House, Letter of March 11, 1977, pp. 83-84.

Obviously, Mr. Pendleton was concerned with the nature of the tort and workers' compensation systems and his reform proposals were aimed at achieving the maximum benefit for capital goods manufacturers. Although the president of a company might have such knowledge of tort law, his reform proposal was so comprehensive that it is likely that he was aided by an insurance defense counsel, probably hired by his own liability insurance carrier or an in-house counsel. Nevertheless, it is noteworthy that Pendleton did not advocate the elimination of strict liability. He did not even urge greater protections for manufacturers than would be afforded under the old negligence standard.

Instead Pendleton sought peripheral changes that would reduce the burden on manufacturers held liable under strict liability. For example, a limit on the time in which a suit could be filed would limit possible claims. One of the most popular reform proposals was a statute of limitations on lawsuits. This was regarded as key to limiting the exposure of manufacturers of equipment that lasted for years. An example of manufacturers' fears regarding old products was the case of Curtis Hagans. On October 11, 1971, Hagans was at his job using a circular table saw to cut a piece of board. As he fed the board into the saw, the blade hit a knot in the wood, the board jerked, and Hagans' hand fell onto the saw blade, which severed his ring finger and severely injured his middle finger of his left hand. Hagans made a workers' compensation claim and recovered over \$11,000.00 from his employer's workers' compensation insurance carrier. As a workers' compensation claim, Hagans' case was unexceptional. Yet, from a manufacturer's standpoint it was a nightmare. The saw in question had been made thirty years before. The saw in question was a "2000 pound tilting arbor miter saw designed for industrial use," which the Oliver Machinery Company made and sold in 1942 to the

U.S. Navy. The saw was later sold to Hagans' employer in 1960. Ever since it had been made, the saw came with a safety guard attached, which was still attached when it was sold to Hagans' employer in 1960. But the guard was not attached to the machine when Hagans was injured and the parties agreed that he would not have been injured if it had been attached. Hagans won \$50,000.00 at the trial level, but the case was reversed upon appeal. The federal Circuit Court of Appeals for the Fifth Circuit, applying Texas law, held that, "unless civilization is to grind to a halt," tools like this saw were essential to the American economy and were not "unreasonably dangerous per se." The court held that the product was not defective and the manufacturer had not failed to warn, since the danger posed by a saw was obvious. Additionally, the manufacturer was not guilty of any negligence.<sup>845</sup> What made Hagans' case important for the period in which it was decided was the fact that a trial court could submit such a claim to a jury under a strict liability theory. Even though the manufacturer eventually won, it had incurred significant costs in trial and appellate litigation regarding a machine that had been used for almost thirty years with any apparent incident. Such claims were the very kinds feared by manufacturers who were complaining to their congressmen in the mid-1970s of the need for a statute of limitations on old products.

The federal government's own survey evidence substantiated the manufacturers' and insurers' fears regarding the absence of statutes of limitation. The Department of Commerce's Interagency Task Force on Product Liability conducted its own independent survey of eight selected states in order to determine the character of the product liability cases in those states' appellate courts. The states surveyed were Arizona, California,

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<sup>845</sup> *Hagans v. Oliver Machinery Company*, 576 F.2d 97 (5<sup>th</sup> COA, 1978).

Illinois, New Jersey, New York, Pennsylvania, Texas, and Wisconsin. The Task Force reviewed 655 appellate cases (both in state and federal courts in those states) that it considered as product liability cases since 1965 until 1978. Of those 655 cases, 78 percent (509 cases) were tried in state court, with the remainder in federal court. In 198 of the cases the date of manufacture of the product was provided. Of those 198 cases, thirteen percent of the cases “involved equipment more than 20 years old at the time of the injury.” Four percent involved equipment more than 25 years old. Most of the cases involving automobiles were filed within a short time after the vehicles had been made. Yet, in one-third of the cases involving various kinds of “machinery” the injury occurred more than ten years after the equipment was made; and about 15 percent involved equipment “more than 20 years old.”<sup>846</sup> Such data supported the manufacturers and insurers’ fears regarding the absence of statutes of limitations or repose.

The failure of most congressmen to advocate for the elimination of strict liability suggests that they may have thought that strict liability was sufficiently popular among the general public that completely overturning the doctrine was politically impossible.

Also, Pendleton advocated a sliding scale on attorneys’ fees, the elimination of punitive damages, the ability to pay judgments over extended periods of time, and a “loser pays” rule – all of which would have provided disincentives to plaintiffs’ attorneys’ to accept many cases, though not all. Finally, the proposal to preserve the workers’ compensation system as the chief protection for workers injured on the job would potentially meet the concerns of those who desired to maintain the states’ role in the protection of workers. Pendleton, whose letter was typical of those sent to the

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<sup>846</sup> U.S. Department of Commerce, *Interagency Task Force on Product Liability: Final Report* (Washington, D.C.: 1978), pp. II-47-53.



subcommittee, was seeking federal intervention in the state tort and workers' compensation systems and it was very doubtful such proposals, even those preserving the role of workers' compensation systems, would allay the federalism and deterrence concerns of some congressmen. After all, if all of the aforementioned protections for manufacturers were enacted, the deterrent effect of tort liability would have been greatly reduced. Manufacturers, whether of capital or consumer goods, would have been given much reduced incentives to design and build products with safety in mind.

Although the private organized interests that testified made many recommendations similar to those already mentioned, they also presented their own empirical studies. For example, the Machinery and Allied Products Institute (MAPI), represented by its president, Charles W. Stewart, claimed to be the "spokesman for the capital goods and allied equipment industries of the United States." Stewart claimed MAPI had been monitoring the products liability issue for "15 years" because they "saw it coming" long before it reached the "crisis" stage. In 1976 MAPI conducted a survey of its members, which consisted of capital goods companies, like steel mills, finishing mills, castings foundries, engine and turbine manufacturers, office, computing, and accounting machine manufacturers, and other kinds of heavy equipment manufacturers.<sup>847</sup> Of the 210 firms that responded, 156 claimed they had been sued for multiple products liability claims between 1965 and 1975. Ninety-four percent of the respondents claimed increases in their liability insurance premiums over the past five years, between 1970 and 1975.<sup>848</sup> Thirty companies had had their coverage cancelled, impliedly for claims risks they

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<sup>847</sup> House, Vol. 1, pp. 216-17.

<sup>848</sup> House, Vol. 1, p. 204.

presented.<sup>849</sup> Fifty-eight percent of respondents claimed premium increases between 100 percent and “1000 percent,” or ten times their previous premiums.<sup>850</sup> Additionally, sixteen percent of respondents claimed that their concerns over products liability had “inhibited the development of new products or contributed to the discontinuance of existing products.”<sup>851</sup>

One might conclude that this evidence suggests strict liability had the deterrent effect claimed by its proponents. However, it is uncertain whether such discontinued products were truly defective or merely presented a risk of personal injury if misused or negligently handled to which manufacturers did not want to risk exposing themselves. As one set of authors has noted, regarding studies of industries’ data from the 1980s, “[w]hatever the liability system may achieve, safety is also affected by technological innovation, market demand, and regulatory pressure.” Thus, “factors *outside* the liability system provide the more important safety impetus.” For example, regulation was the most important factor in safety in pharmaceuticals and aircraft; and self-imposed professional standards were most important for physicians. By contrast, innovation in the chemical industry was thought to have been channeled into safer products because of the uncertainties of the liability threat posed to chemical companies.<sup>852</sup>

Less than ten percent of the industries’ survey respondents thought their insurance premiums and products liability concerns could be resolved without state or federal

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<sup>849</sup> House, Vol. 1, p. 207.

<sup>850</sup> House, Vol. 1, p. 204.

<sup>851</sup> House, Vol. 1, p. 205.

<sup>852</sup> Peter W. Huber and Robert E. Litan, eds., *The Liability Maze: The Impact of Liability Law on Safety and Innovation* (Washington: The Brookings Inst., 1991), pp. 10-15 (emphasis in original).

legislation.<sup>853</sup> However, notwithstanding the respondents' concerns with premium increases, the most popular reform proposal among the respondents was the elimination of plaintiffs' lawyers' contingency fees. Although the MAPI representative noted that MAPI did not agree with all of the reforms proposed by its members,<sup>854</sup> it seems a popular perception had developed among the business community that plaintiffs' lawyers and their fee arrangements were key to producing the products liability claims and insurance premium increases facing the manufacturers. However, it was not the existence of lawyers seeking fees but the doctrines created by state supreme court justices that allowed such lawsuits. Certainly the contingency fee allowed more plaintiffs, who would not otherwise have been able to afford a lawyer, to bring suit. Yet, the suits were only going to be filed if the courts entertained them.

MAPI's spokesman argued that the availability of commercial general liability insurance had reached a crisis stage because of the increases in strict liability claims. MAPI claimed that some manufacturers would cease manufacturing certain products: "If it is a marginal product profit-wise, they will drop it so to speak." He also feared strict liability would discourage "breakthroughs" or product innovation. However, his chief point was that "an ideal solution is to make workmen's compensation the only recourse or remedy and stop there."<sup>855</sup>

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<sup>853</sup> House, Vol. 1, p. 205.

<sup>854</sup> House, Vol. 1, p. 205. The remaining reform proposals, in descending order of popularity, were: allowing employers to be responsible for work-related injury caused by employer negligence; creating a statute of limitation or repose, which would be limited to original purchaser, and barring suits when the product has been altered; limiting awards for damages other than medical expenses; making workers' compensation the sole remedy for work-related injuries; improving product quality; apportioning fault between manufacturer and employer in work-related injury situations; and limiting or eliminating the strict liability doctrine.

<sup>855</sup> House, Vol. 1, pp. 199-201.

The capital goods manufacturers wanted workers' compensation to be either the chief or sole source of compensation for injured workers. This implicitly meant that some manufacturers who sought federal intervention, such as MAPI, were seeking an end to tort liability for defective goods used in the workplace. Rather than attacking strict tort liability head-on, some manufacturers would attack it by urging that workers' compensation be the sole source of recovery. However, this goal was unlikely to be realized, since no congressman actually advocated the elimination of liability for manufacturers of defective products. Nevertheless, capital goods manufacturers had come as far as getting Congress's official attention and they might benefit by characterizing their problems in the most extreme terms and aiming as high as possible in their proposed federal solutions.

It is important to note that not all of the manufacturers who sought federal help were makers of capital goods. Consumer goods manufacturers, such as the Sporting Goods Manufacturers of America, also testified in favor of federal intervention, claiming it would be "reasonable for Congress to pass legislation to preserve jobs and not put people out of jobs" in the consumer goods industries.<sup>856</sup> Similarly, small consumer goods manufacturers generally favored federal intervention as "a long-range solution for providing statutory relief from the problems that seem to arise in the courts." However, some of these producers were uncertain about the explanations from their insurance carriers as to why premiums had increased. As one lawnmower parts manufacturer

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<sup>856</sup> Testimony of Fred Juer, chairman of Sporting Goods Manufacturers Federal Agencies Committee, Senate, p. 308.

stated, “It’s my opinion that the insurance companies have overreacted.” He based this assertion on a recent news item that had indicated “very large profits” in the products liability segment of insurance companies’ business.<sup>857</sup> The Commerce Department’s Task Force’s subsequent report substantiated the fears some consumer goods manufacturers voiced. The Task Force concluded that some insurers had engaged in “panic pricing” for insurance.<sup>858</sup> Such evidence suggests some cognitive dissonance regarding the nature of the problem facing manufacturers. On the one hand, the law of strict liability seemed to present the threat of new claims and higher risks to doing business. On the other hand, some manufacturers did not trust their insurance carriers’ explanations for increased premiums, which were purportedly raised because of the new and greater risk presented by products liability. Nevertheless, most manufacturers, whether of capital or consumer goods, desired some form of federal intervention in the states’ tort systems.

In addition to manufacturers, wholesalers and distributors sought federal intervention because strict liability had created liability for their operations, too. States that adopted the strict liability rule usually crafted it broadly enough to include not just manufacturers, but also wholesalers, distributors, and retailers. That is, all of these entities in the supply chain were made legally liable for the injuries to the ultimate

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<sup>857</sup> Testimony of Howard Bobroff, president of the Lawnmower Parts Manufacturing Company, Inc., House, Vol. 4, p. 1647.

<sup>858</sup> U.S. Department of Commerce, *Interagency Task Force on Product Liability: Final Report* (Washington, D.C.: 1978), pp. I-21-24. The industries surveyed were in industrial machinery, including product lines in “industrial grinding wheels, ferrous and non-ferrous metal castings; industrial chemicals; aircraft component parts; automotive component parts; medical devices; pharmaceuticals; and power lawnmowers.” *Ibid.*, n. 2.

consumer. This disposition of state courts invited pluralistic responses from affected interests. Again, this was the injection of products liability into the political sphere. The courts were taking what had been a non-political, non-pluralistic area of law and making it an area where pluralist politics presented solutions to the private interests affected by the changes in the legal liabilities.

Accordingly, wholesaler-distributors joined the manufacturers in calling for federal intervention. For example, William C. McCamant, the executive vice-president of the National Association of Wholesaler-Distributors (NAW) testified in favor of federal intervention. McCamant described the NAW as a federation of 102 “national commodity line associations composed of over 36,000 wholesaler-distributor businesses.” He claimed that these members employed over 4.2 million people and that most were “small, closely-held, family-owned” entities, with average sales volume of about \$2.5 million and only 25 employees.<sup>859</sup> The NAW claimed that its members’ profit margins were low and that products liability-related costs were a “substantial segment of the [members’] profit[s].” In his testimony, McCamant challenged the concept upon which strict liability had developed, arguing that “it is important that dangerous products reach the market” because of the potential benefits to consumers. McCamant used the example of the Dr. Jonas Salk’s vaccine for polio, claiming that prudent manufacturers had been predictably deterred by potential lawsuits from making the vaccine. However, Cutler Labs had bravely produced the vaccine, which yielded an historic outcome benefiting people throughout the world.<sup>860</sup> Although this example spoke to innovation, a

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<sup>859</sup> House, Vol. 1, p. 257.

<sup>860</sup> House, Vol. 1, p. 252.

concern of manufacturers rather than wholesalers or distributors, the NAW followed with some “horror stories” from actual reported cases regarding wholesaler/distributor liability.

Harold T. Halfpenny, the counsel for the NAW, claimed the average “investigation” costs and defense fees for claims made against a distributor totaled \$26,000. Also, he cited some cases regarding distributor liability, including *Morris v. Shell Oil Co.*,<sup>861</sup> where the Missouri Supreme Court held a distributor liable for failing to warn the consumer of a defect in a product, even though the manufacturer had not warned the distributor. He also cited *Dunham v. Vaughan & Bushnell Mfg. Co.*,<sup>862</sup> where the Illinois Supreme Court held a wholesaler liable under strict liability for an unopened boxed hammer that caused an injury to eye of the ultimate consumer.<sup>863</sup> The NAW noted that some wholesalers and distributors had started including disclaimers and “hold harmless” clauses in their invoices, but that some state courts had held these clauses invalid, claiming they were against public policy. The NAW argued that wholesalers and distributors were indulging in a false sense of security with such clauses.<sup>864</sup>

The NAW blamed what they termed the “sue syndrome,” which meant consumers were “much more aware of their rights and have grown to rely ... on the court system”

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<sup>861</sup> 467 S.W.2d 39; 1971 Mo. LEXIS 1077 (Mo., 1971).

<sup>862</sup> 42 Ill. 2d 339; 247 N.E.2d 401; 1969 Ill. LEXIS 358 (Ill., 1969).

<sup>863</sup> House, Vol. 1, p. 253. The Illinois Appellate Court in part based its conclusion on the liability of the wholesaler on the fact that the hammer was sold in packing that used the wholesaler’s brand name. *Dunham v. Vaughan & Bushnell Mfg. Co.*, 86 Ill. App. 2d 315; 229 N.E.2d 684 (1967). However, the Illinois Supreme Court did not rely upon this fact in affirming the appellate court. Rather, the Supreme Court noted the precedent that held retailers liable should equally apply to wholesalers. Making both of these members of the “distribution system” liable was thought to be “an additional incentive to safety.” 42 Ill. 2d 339, 247 N.E.2d 401 (Ill., 1969).

<sup>864</sup> House, Vol. 1, p. 254.

for compensation. Also, they blamed the willingness of ignorant jurors to make large awards to injured plaintiffs, and faulted insurers for encouraging litigation by settling otherwise unmerited claims prior to trial in order to avoid litigation costs. In order to characterize the crisis status of products liability claims, the NAW cited statistics produced by Jury Verdict Research, Inc., a private corporation, whose clients included both plaintiffs' and defense attorneys and insurers.<sup>865</sup> The NAW claimed that in 1963 there were 50,000 products liability cases in the United States. By 1966, there were 100,000 and by 1971, over 500,000. Juries found for plaintiffs in 43 percent of cases in 1965, with average award of \$11,644; but by 1973, juries found for plaintiffs in 54 percent of cases, with an average award of \$79,940. The NAW argued that these statistics demonstrated that the strict liability standard was originally limited but by the mid-1970s it "flaunt[ed] both equity and common sense." The NAW's chief proposal was to limit the strict liability doctrine to situations "to which it was originally intended to apply – the truly unreasonably dangerous product."<sup>866</sup> The frequency of high-dollar verdicts had increased. The first \$1 million verdict from a U.S. jury was awarded in 1962, with only one or two such high-dollar verdicts each year. By the mid-1970s, such high-level verdicts were awarded about once per week in the U.S.<sup>867</sup>

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<sup>865</sup> Jury Verdict Research is in ongoing concern, operating since 1961. Website: <http://www.juryverdictresearch.com/about.html>.

<sup>866</sup> House, Vol. 1, pp. 254-60. As with most of the witnesses, the NAW had a lengthy list of proposed federal reforms. The additional proposals, in descending order of preference, were a state-of-the-art or industry standards amendment to states' evidence laws; a one-year statute of limitations and a six-year statute of repose; a scheduling of plaintiffs' attorneys' contingency fees; subsequent remedial changes in products would limit liability; a limit on punitive damages and a "loser-pays" rule; a pre-suit "product liability review panel," which would determine the merit of a case; making workers' compensation the exclusive remedy in workplace injury cases, or giving a credit to manufacturers and wholesaler-distributors for any workers' compensation award.

<sup>867</sup> Jethro K. Lieberman, *The Litigious Society* (New York: Basic Books, 1981), p. 34.



The NAW's testimony typified that of most industry groups that favored reform. Industry complaints were directed at plaintiffs and their lawyers and their willingness and purported eagerness to sue. Industry groups also made broader arguments, blaming the "country's move toward consumerism, liberal interpretation by the courts of various legal concepts" and juries' willingness to make large awards.<sup>868</sup> Such views help explain why many businesses favored federal control of products liability law. Many businesses saw products liability as a nation-wide issue, especially in light of the national economy, where even small manufacturers would produce goods sold in multiple states. The trend toward strict liability and the possibility for varying court-created standards of liability with which a business would have to comply made a uniform federal standard appealing. Additionally, the nature of small businesses' finance structures suggested their particular support for federal legislation. James McKeivitt, the Washington, D.C. counsel for the National Federation of Independent Business (NFIB), noted that the NFIB had conducted a survey of its claimed 500,000 members regarding products liability. The NFIB noted two possible federal responses: a statute of limitations or repose and the creation of an excess self-insurance fund, created or incentivized through tax deductions or credits. However, the NFIB noted that its small-firm members were against a self-insurance fund because they lacked access to capital for such a non-productive use.<sup>869</sup> This helps to explain why small businesses would want a federal legislative solution that restricted claims, rather than one that attempted to increase companies' ability to pay for claims.

The NFIB report articulated the views of small-firm industries when its authors

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<sup>868</sup> House, Vol. 1, p. 368, Testimony of Charles McDonald, of the Council of Smaller Enterprises, of Cleveland, Ohio, representing manufacturers of consumer goods.

<sup>869</sup> House, Vol. 1, pp. 384-386.

concluded, “The unavailability and high cost of product liability insurance ... are generally the effects ... not the causes[, and] any real solution lies in rectifying the causes.”<sup>870</sup>

Access to capital was the concern Chairman LaFalce’s bill, H.R. 4200, which created an insurance availability pool that provided federal government-guaranteed reinsurance<sup>871</sup> for insurance companies for whom the cost was prohibitive on the private market.<sup>872</sup> The availability of reinsurance would presumably make primary insurance more affordable for small businesses. However, this bill received comparatively little attention or discussion during the House hearings. This was probably due to the fact that most witnesses were more interested in direct changes to the states’ strict products liability tort systems. Similarly, a bill was introduced in the Senate to respond to the problems of insurance premium increases. However, this bill was more ambitious.

The ability to pay insurance premiums was ostensibly foremost among the concerns in Senate subcommittee hearings during the same month, April 1977. The Senate, too, sought to investigate the allegations that strict liability in the states was resulting in exponential jumps in liability insurance premiums. However, the Senate Subcommittee for Consumers of the Committee on Commerce, Science, and Transportation conducted hearings for the purpose of considering Senate Bill 403, which sought to “regulate the flow of interstate commerce by establishing programs, standards,

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<sup>870</sup> *NFIB Survey Report on Product Liability*, National Federation of Independent Business, Washington, D.C. (Jan., 1977), p. 13, quoted in *NFIB Small-Business Policy Guide*, Pt. 3, Ch. 10, p. 139 (Jan. 31, 2003).

<sup>871</sup> Reinsurance is insurance purchased by insurance companies to cover the risks they have assumed under their contracts with their original insureds.

<sup>872</sup> House, Vol. 1, p. 209.

and procedures for determining responsibilities and liabilities arising out of product related injuries, and for other purposes.”<sup>873</sup>

Senator James B. Pearson (R-KA), a sponsor of the Senate bill, chaired the Senate subcommittee hearings. Pearson noted that in 1975 he began receiving complaints from “small manufacturers and retailers” in his state who complained about difficulties in getting product liability insurance and rising premiums. Pearson started the hearings noting hope that Congress would “attempt some responsible initiative to stabilize product liability insurance rates, to increase the availability of product liability insurance at [a] reasonable cost,” and for more predictable standards regarding tort recovery. Pearson claimed he viewed the issue from two perspectives: the manufacturer and the consumer. Manufacturers wanted lower premiums. Consumers were harmed by the failure of manufacturers to have insurance coverage, which resulted in uncompensated claims and the “patchwork pattern” of liability among the states that made the tort system unpredictable. Pearson voiced a wariness of “heavy-handed” federal legislation in matters “traditionally left to the states.”<sup>874</sup> It is important to note that this was the period shortly after the Nixon administration had made much of decentralization, or the returning of governmental power to the states and localities.<sup>875</sup> However, Senator

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<sup>873</sup> *Product Liability Insurance, Hearings before the Subcommittee for Consumers of the Committee on Commerce, Science, and Transportation*. U.S. Senate. 95<sup>th</sup> Congress, 1<sup>st</sup> Sess. on S. 403, (1977) Serial No. 95-26 (hereinafter “Senate, p. #”), p. 3.

<sup>874</sup> Senate, p. 1.

<sup>875</sup> Although Joan Hoff agrees that Nixon aimed at increased executive power vis-à-vis the federal bureaucracy, she argues that Nixon earnestly sought to increase executive power in order to implement a “New Federalism,” which would “restore a sense of socioeconomic community structures.” Hoff, *Nixon Reconsidered* (New York: BasicBooks, 1994), pp. 66-67. However, as Herman Belz has noted, although Nixon gave rhetorical support for a return to a decentralized state, his was actually a centralizing effort to assert a greater degree of executive control over a “policy-making [federal] bureaucracy.” Herman Belz, et al., *The American Constitution: Its Origins and Development, Vol. II* (New York: W.W. Norton & Co.,

Pearson thought the affordability and availability of product liability insurance overcame such federalism concerns. He considered S. 403 “only as a first draft” and claimed he was “not wedded to any of its provisions.”<sup>876</sup>

The Senate bill, entitled the National Product Liability Insurance Act, sought to establish “consistent” and “predictable” limits to products liability. The plans for accomplishing this included a federal Product Liability Insurance Administration, which would be staffed by officials from six pre-existing federal agencies and departments and by members of the public, such as doctors, lawyers, “consumers,” and engineers. The Administration would offer technical preventive advice to private manufacturers. The bill also established an arbitration system to handle products liability claims. The panels would consist of three arbitrators in each federal court district and would be empowered to “arbitrate all actions to recover damages for injuries.” The three arbitrators would be an attorney, a physician and a member of the general public. The failure to request a jury trial meant the right was waived for Seventh Amendment purposes. States were not required to set up arbitration plans, but the federal government provided an incentive to do so by being obligated to pay for the programs. States that enacted an arbitration system had to adopt the federal product liability standards.

The federal “standards” were actually federal product liability rules. The standards were an array of defenses available to manufacturers: a defense for manufacturers’ compliance with federal and state laws and regulations regarding labeling and manufacturing; a “state of the art” defense; a defense for any post-sale alteration of

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1991), pp. 661-664. True federalism would entail not only local officials’ policy preferences but also localities’ own funding mechanisms, rather than the localities’ reliance upon federal tax funds.

<sup>876</sup> Senate, p. 1.

products; a statute of limitations of ten years after product was “placed into the stream of commerce”; and a limitation that an action was barred after the reasonably expected “useful life of such [a] product.” Finally, the bill established a “federal product liability compensation fund” for any state or federal judgment or arbitration award that could not be paid within six months of entry without causing “undue hardship” on the defendant. The compensation fund was to be financed by the U.S. Treasury Department.<sup>877</sup> This last element can surely be classified as a corporate welfare proposal.

Regardless of whether it was a first draft, the bill proposed a monumental change in the way the federal government handled what had theretofore been largely a state law function. The proposed Insurance Administration would be a new federal bureaucracy for the purpose of managing what was a relatively new area of law. Strict liability had only been expanded to cover manufacturers of most products since the early 1960s and, regardless of whether a “lawsuit culture” was emerging because of such recent rights, the expansion of products liability to all state and territories in the nation was freighted with unintended – though not entirely unforeseeable – consequences. The law clearly provided protections to manufacturers. However, it did not provide for an express standard of liability, strict liability or otherwise, nor for any standard or defense against consumer behavior, other than post-sale alterations to products. This latter defense was obviously aimed at protecting capital goods manufacturers. But the bill applied to *all* manufacturers of *all kinds* of goods – capital, consumer, or otherwise. A plaintiff’s own negligence apparently would not be a defense or bar to recovery.

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<sup>877</sup> Senate, pp. 3-36.

What would have been the consequences of the federal compensation fund?

Although speculative, it is probable that the fund would have become an ever-increasing liability to taxpayers. As noted in Chapter Four, product liability suits steadily become a larger portion of both the state and federal share of lawsuits in America since the 1960s. The public subsidy for product liability damages provided by the “compensation fund” would have encouraged private litigants and their counsel to pursue claims notwithstanding any defenses allowed to manufacturers under the bill.

It should be noted that the bill received resistance from one of the agencies designated to staff the Insurance Administration. The Consumer Products Safety Commission (CPSC) supported the bill, except for the defense allowed to manufacturers who complied with applicable federal and state laws regarding labeling and manufacturing standards. The CPSC objected because the Consumer Products Safety Act did not allow such a defense. The CPSC wanted federal and state safety compliance to be a *minimum* standard and actual compliance not to be considered a defense. Also, the CPSC wanted manufacturers to be forced to keep records in order to prove their products complied with minimum standards.<sup>878</sup> The CPSC’s objections and attempt to play a role in the proposed legislation highlight another aspect of the modern administrative state at work. On the one hand, the CPSC was advising the Congress on how to maintain uniformity in federal standards across agencies. On the other, the CPSC represented one part of the federal administrative government helping to shape a potential new competitor against the CPSC in regulatory jurisdiction.

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<sup>878</sup> Letter of R. David Pittle, Vice Chairman of the CPSC, to Sen. Warren G. Magnuson, April 27, 1977. Senate, p. 37.

This legislation was introduced, and both the Senate and House hearings were conducted, almost simultaneous to an executive branch investigatory effort known as the Federal Interagency Task Force on Product Liability. Although formed during the Ford Administration, it was continued during the Carter Administration and its work was in the final stages at the time of the congressional hearings. Although the final report would not be issued until November 1977, a preliminary “Briefing Report” was issued in January 1977, which was available to participants at the congressional hearings.<sup>879</sup> The one element from the Briefing Report that was important for the congressional hearings was the Task Force’s conclusion that no “crisis” existed regarding the cost and availability of products liability insurance. In the House subcommittee hearings Chairman John J. LaFalce (D-NY) noted the Briefing Report declined to declare a “crisis” in part because “the total cost [of insurance] was less than one percent of the total sales of business.” In response, Charles L. McDonald, of the Council of Smaller Enterprises, an industry trade group, called the Interagency Briefing Report “stupid.” He pointed out that the Task Force had surveyed only 300 firms and only 15 percent of them were small businesses. McDonald claimed this was inadequate. He contended that some small firms had as much as ten percent of sales for products liability.<sup>880</sup>

The question of the adequacy of the Task Force’s research samples and methodology would linger throughout the hearings, especially for proponents of strong federal protection of manufacturers. Even those manufacturers who conceded that more study by pertinent private sector actors and Congress was needed before any federal

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<sup>879</sup> Senate, p. 38.

<sup>880</sup> House, Vol. 1, p. 406.

legislation was enacted, were reluctant to agree with the Briefing Report's conclusion that no crisis existed.

Since the Briefing Report was so incendiary and, more importantly, since the federal government's first and most thorough examination of the liability insurance issue had been done by the Task Force, the leaders of the Task Force testified at the Senate hearings. Homer Moyer, Jr., the acting general counsel of the Department of Commerce, the agency in charge of the Task Force, claimed the Briefing Report was only a "preliminary, tentative statement of conclusions" regarding the national liability situation. The Task Force intended to release its "Final Report" within sixty days from the date of the hearing.<sup>881</sup> Victor E. Schwartz, the chairman of the Task Force and a well-respected torts scholar and practitioner, noted that the Task Force had found it difficult to "develop a factual base" in order to make claims about product liability and its effects. The industries that had been surveyed were those about which the most anecdotes had existed.<sup>882</sup> As a result of the Task Force's investigation, Schwartz was prepared to describe the "three fundamental causes of the product liability problem" as understood by the Task Force. First, liability insurers' methods of setting rates were "too subjective." At the time, product liability coverage had not been separately rated; it was lumped into a "miscellaneous" category of covered risks. The insurers the Task Force had surveyed did not calculate losses by measuring premiums against payouts (based on court judgments and settlements). Rather insurers calculated losses using reserves<sup>883</sup> (both pending and

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<sup>881</sup> Senate, p. 38.

<sup>882</sup> Senate, p. 40.

<sup>883</sup> "Reserves" are amounts of funds designated by insurance companies to cover known possible claims losses. The fund amounts are usually based on the probable payouts that will be needed should the claim



incurred, but not reported) and actual payouts. The “cost” of products liability was difficult to measure since amounts designated by insurers as “reserves” were able to earn interest for carriers.<sup>884</sup>

Second, Schwartz contended that manufacturers were producing products that were “mismanufactured,” which means the products “have construction defects, so that the product is not in accord or in conformity with the manufacturer’s own standards.” This conclusion was based on the Task Force’s review of 655 reported appellate cases. Other cases showed products “negligently designed.” Thus, many courts appeared to be applying negligence standards regarding “testing the design of products.” Schwartz believed the tort system was acting “as a spur to manufacturers to produce safer products,” but smaller manufacturers could not “utilize or [were not] aware of product liability techniques” for managing risk.<sup>885</sup>

Finally, Schwartz contended that the “tort-litigation system itself” caused insurance companies to be “extremely conservative” in setting rates. He argued that insurance companies needed “direct assurance as to what product liability law is and what it will be” before they would reduce their rates.<sup>886</sup>

Schwartz’s description of the causes of the problem laid the blame for the sharp increases in insurance rates at the feet of multiple parties: the insurance industry, manufacturers and designers, and the courts. The insurers had simply failed to use wise

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need to be paid under the insurance contract. Thus, the funds are designated to be held “in reserve” for payout. Such amounts are only *potential* losses, not actual losses.

<sup>884</sup> Senate, p. 41.

<sup>885</sup> Senate, p. 42.

<sup>886</sup> Senate, pp. 42-43.

practices, according to Schwartz, in determining losses and therefore measuring risk. This was an important and alarming accusation. The insurance industry, which was supposedly sophisticated enough to understand trends and the risks facing it as an industry, was being accused of slipshod work in confronting an emergent problem. Schwartz's allegations against manufacturers were even more damning. He was effectively concluding that manufacturers and designers had been their own worst enemy by having defectively designed or defectively manufactured products. As a result, the manufacturers and designers' insurance carriers were being confronted with a burgeoning area of risk and were (perhaps predictably) reacting with "extreme caution" by setting their rates much higher. Finally, the courts (state and federal) had contributed to premium increases because the insurers were fearful of future liabilities and uncertain as to how courts would handle claims.

At first blush, Schwartz's comments appear to be a condemnation of the insurance industry. He and the Task Force thought the industry should have been better able to adjust to the new risks presented by strict liability in the states. He noted that "the *[R]estatement of [T]orts* section 402(a) was drafted in 1965. Cases began to follow it shortly after that. Strict liability was clearly on the horizon in 1970. You can look at a standard torts casebook, published in 1970. There is a substantial chapter on products liability. The trend toward strict liability was proceeding apace."<sup>887</sup> It was odd, to say the least, for insurance companies to claim that they lacked sufficient data about the problem because they could not see strict products liability on the horizon.

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<sup>887</sup> Senate, p. 48.

Additionally, the claim that manufacturers and designers were simply making defective products – although certainly damning of these industries – was also potentially damning of the premise of strict liability itself. Strict liability was introduced in order to make manufacturers the insurers of their products. Courts assumed that the threat of such liability would create the incentives for manufacturers to make safer products. As previously noted, the Task Force identified some evidence of products being discontinued by some manufacturers. This might be used to substantiate the claim that strict liability was, in fact, deterring the production of defective products, or it might be used to argue that manufacturers were avoiding potential claims by discontinuing dangerous (but not necessarily defective) products.

By the time the Task Force began its work in 1976 almost thirteen years had passed since states had started adopting strict liability for manufacturers. Schwartz's testimony raised the question of whether strict liability was, or even could, achieve the state courts' original policy objectives. Schwartz did not offer an explicit opinion on this point, but he did note that the Senate bill did not address whether a no-fault system should replace the common law system. He stated that products liability was "not amenable to simple solutions."<sup>888</sup> As for the proposed bill, Schwartz predicted that unless "a majority" of states adopted S. 403's program, little change would occur in insurance rates. If only a few states adopted the program of the proposed law, then it would be a waste of federal money and have no effect on rates across the country.<sup>889</sup> What Schwartz was describing was a federal incentive program rather than a federalized

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<sup>888</sup> Senate, p. 45.

<sup>889</sup> Senate, p. 43.

program. This was another example of the post-New Deal state at work: such legislative compromises were based on political and ideological support for states' rights and have been a feature of New Deal and post-New Deal systems. Schwartz was giving support for the federalization of tort law.

Schwartz's testimony about the lack of clarity regarding insurance carrier's ratemaking policies and practices was seemingly substantiated by the insurance companies' and trade groups' testimony at the hearings. The initial round of House subcommittee hearings in April 1977 consisted of proponents of federal legislation, including manufacturers, their trade groups, and congressmen from districts with small capital goods manufacturers. In June 1977, the subcommittee reconvened for additional hearings; this time they would hear from the insurance industry. Chairman LaFalce noted that since the committee had begun hearings the committee had received "voluminous correspondence from manufacturers throughout the entire Nation pleading for some type of solution that will take the sting out of their insurance premium payments." He noted the insurance industry's public claim that rates increases were due to the litigious nature of society. But he noted that some critics of the insurance industry had argued that rate increases were the result of "panic pricing" by carriers "rather than sound actuarial determinations." The question LaFalce wanted the industry to answer was: "Whether premium rate increases are commensurate with the risks of providing product liability coverage"?<sup>890</sup>

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<sup>890</sup> House, Vol. 2, pp. 483-84.

LaFalce and the rest of the subcommittee were told that the insurance companies did not maintain “comprehensive separate statistics on product liability premiums.” Products liability coverage was carried in the “miscellaneous liability” category for most companies, so the premiums reported for these coverage sections were considered only “rough indicator[s]” of the share of products liability insurance provided by the companies.<sup>891</sup> Put simply, insurance carriers had not segregated their products liability coverage in the premiums they charged their insureds, therefore, it was difficult to determine which companies wrote a great deal of products liability coverage, what percentage of the premiums charged were attributable to products liability risks versus other risks, and whether products liability was *the* reason for premium increases. As one expert for the Task Force explained to the subcommittee, premiums could not be characterized as too high or too low because the insurance was “being priced without any sure knowledge of what constitutes the costs of goods sold.”<sup>892</sup>

Nevertheless, total premiums had increased substantially in the mid-1970s, according to the Insurance Services Organization (ISO), a private trade association that collected information for the insurance industry and helped establish some types of rates. The Task Force expert testified that the rates should have increased sooner than the mid-1970s because “the average bodily injury claim cost, including reserves, rose nearly three times – from \$6,800 to \$19,500 in the period from 1972 to 1974” according to ISO. The insurers had responded in 1975 with rate increases and more coverage restrictions.<sup>893</sup>

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<sup>891</sup> Testimony of Philip H. Dutter of McKinsey & Co., Inc., New York, N.Y., an “international management consulting firm” contracted by the presidential Task Force in its study of the insurance industry. House, Vol. 2, p. 486.

<sup>892</sup> Ibid., House, Vol. 2, p. 504.

<sup>893</sup> Ibid., House, Vol. 2, p. 487.

This delay in increasing rates was seized upon by Representative Thomas A. Luken (D-OH) who contended that the significant tort law changes in eliminating privity of contract had occurred by 1965 and it was obvious strict liability had been on the horizon. Luken implied that the insurance rate changes should have occurred earlier – in the 1960s – if they were related to the changes in tort liability.<sup>894</sup>

Luken’s response typifies the doubts created in the minds of committee members who were skeptical of the need for federal intervention in the states’ tort and insurance laws. The insurance industry’s seemingly late move to increase their rates and failure to even distinguish products liability risks from other “miscellaneous” risks suggested to some that the industry simply wanted protection from the expanded claim rights the states’ supreme courts had created and federal guarantees against losses. Such suspicions were no doubt increased by the Task Force expert’s testimony that the industry needed to maintain better statistics and some individual rate increases were probably the result of “panic pricing” by carriers that feared new claims.<sup>895</sup> These suspicions hung in the air when the insurance industry representatives testified.

The most representative testimony of the insurance industry was that of Mavis A. Walters, a vice president of the ISO. As previously noted, the ISO was a non-profit, unincorporated association of insurance companies that provided “statistical, ratemaking and research services for the property-liability insurance industry” based on data filed with them by their members. Walters testified that in 1974 ISO revised its classifications of products from 120 classes to 220, which represented a “more refined breakdown” of

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<sup>894</sup> House, Vol. 2, p. 509.

<sup>895</sup> House, Vol. 2, pp. 518, 522.

the risks of products liability insurance. Although rates were not changed at ISO, the new classifications probably resulted in companies changing their rates. The first “basic limits rate level change” in twelve years occurred on August 1, 1975 in most states. After this change, companies started reporting “units of exposure” for these risks.<sup>896</sup>

Accordingly, the ISO could only start collecting and analyzing products liability premiums, losses, and numbers of claims *after* August 1975. The ISO claimed it had to frequently revise its calculations of rates based on claims experience in the 1970s because of the “extraordinary rise in the level of claim settlement costs for product liability insurance, particularly in the area of increased limits.”<sup>897</sup> This suggests that the data indicated insured manufacturers were either requesting more coverage or insurance carriers were advising the manufacturers buy more coverage. Prior to 1975, the last rate increases were in 1963. ISO was uncertain why rates had not increased since 1963, but suggested that it was closely related to the fact that products liability had never been segregated from other miscellaneous coverages and that once ISO had reclassified its rates in 1975, a better understanding of products liability’s impact on risk was able to be ascertained. However, this failed to explain why individual companies had not increased rates and reported such information to the ISO, if products liability was creating a new and greater risk for the industry.

The ISO’s and other insurers’ testimony left the congressmen confused as to what “had actually occurred in the product liability insurance market in recent years.”

Accordingly, in June 1977, the subcommittee itself created a survey and submitted it to

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<sup>896</sup> House, Vol. 2, p. 539.

<sup>897</sup> House, Vol. 2, p. 543.

what it guessed were the fifteen largest product liability insurers.<sup>898</sup> The responses indicated that the companies often used the ISO rates as guides, but many of the rates were set with the “subjective underwriter’s judgment.”<sup>899</sup> Most of the companies had experienced increases in the number and frequency of products liability claims in the early 1970s.<sup>900</sup> The insurers claimed that their rate changes of recent years were directly due to “changes in frequency and/or severity” of claims.<sup>901</sup> The actual litigation experiences of the companies were encouraging. Between 1973 and 1976, the number of cases going to trial decreased by one-third and the percentage of verdicts in favor of the defendant manufacturer ranged “between 67 and 74 percent.” The ISO-sponsored survey had found an even higher trial success rate of 79 percent.<sup>902</sup> This might have been considered generally positive news for manufacturers and insurance companies. Although claims had increased in the 1970s, juries were returning verdicts in favor of plaintiffs in between roughly one in three to one in four cases. Although a “lawsuit culture” may have been inspired among plaintiffs and their attorneys, that culture could only thrive if juries supported it. Premiums had increased substantially but the question of whether a “crisis” existed, for either insureds or insurers, was put in doubt by the responses to the subcommittee’s surveys.

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<sup>898</sup> House, Vol. 5 – Appendix, p. 1685.

<sup>899</sup> House, Vol. 5 – Appendix, pp. 1690-91.

<sup>900</sup> House, Vol. 5 – Appendix, p. 1692.

<sup>901</sup> House, Vol. 5 – Appendix, p. 1694.

<sup>902</sup> House, Vol. 5 – Appendix, p. 1693.



Those most closely tied to the litigation processes of products liability, the attorneys, were well represented at the hearings. The insurance defense bar's views were articulated in the Senate hearings by Louis A. Lehr, Jr., an insurance defense attorney employed with a firm in Chicago and a member of a defense-oriented organization called the Trial Attorneys of America. Lehr claimed seventeen years of products liability litigation experience, which made him one of the earliest products liability attorneys. Lehr noted emergent national problems due to the strict liability rule, but took a moderate position, arguing that a "tune up" was needed, "not necessarily a complete overhaul."<sup>903</sup> Lehr's reform recommendations included a statute of limitations of ten or fifteen years; a standard that allows shifting the burden of proving a defect to the plaintiff after the defendant proves that it complied with governmental regulations or other laws in the design or manufacture of the product; the elimination of punitive damages; and the elimination of the collateral source rule as a rule of evidence.<sup>904</sup> These proposals were an extensive "tune up."

In opposition to the defense-oriented approach of Lehr, Craig Spangenberg, a plaintiff's personal injury lawyer in private practice and chairman of the National Affairs Committee of the Association of Trial Lawyers of America (ATLA), stridently argued against federal intervention. He claimed product liability was no different than any other area of liability. He contended, rather dramatically, that the "law for compensating

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<sup>903</sup> Senate, pp. 57, 59.

<sup>904</sup> The collateral source rule holds that, if a third-party wholly or partially compensates an injured party, the at-fault tortfeasor is prohibited from reducing his liability by that amount. A common example would be an injured party who recovers their medical bills through their own health insurance and then sues the tortfeasor in order to recover the same medical bill amounts. In such a situation, the tortfeasor is prohibited from reducing his liability by the amount paid by the health insurer. As a rule of evidence, it means prohibiting the jury from learning that the plaintiff has already been compensated by a third-party.

innocent victims for the damages they have suffered has been developing since at least 1620.” He asked “whether you need a remedy when you do not know whether there is a disease.”<sup>905</sup>

Spangenberg blamed the insurance companies for manufacturing a “crisis.” He contended that premiums had risen because insurers were “overrating” small risks in order to recover for large risks. He argued a conspiracy theory of sorts: the insurance industry “writes insurance as a by-product. . . . The function of insurance is to create reserves so the industry can be investment bankers.” He contended “the industry became so enamored of investing in growth common stocks in the middle part of the first half of [the 1970s] that they were overcompetitive [*sic*] in underwriting risks to get large premiums to invest.” Between 1970 and 1972, the industry profited as investors. Between 1973-74, when the Dow went from 1,000 to below 600, and the industry “lost \$10 billion” then “that’s when we began to hear screams of crisis.”<sup>906</sup> Spangenberg was correct that insurance companies are investors and returns upon their investments can affect their premium pricing decisions. That is, when insurers’ investment returns increase, they face competitive pressures to reduce their premiums and compete for underwriting business.<sup>907</sup> Yet, as the federal government’s own investigations later substantiated, “rate shifts were due, in part, to the . . . increases in the frequency of claim losses reported by . . . insurers.”<sup>908</sup> This is another way of saying that the premium

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<sup>905</sup> Senate, p. 64.

<sup>906</sup> Senate, pp. 65-66.

<sup>907</sup> U.S. GAO, “Liability Insurance: Effects of Recent ‘Crisis’ on Businesses and Other Organizations,” GAO/HRD-88-64 (Washington, D.C.: July 29, 1988).

<sup>908</sup> U.S. GAO, “Product Liability: Insurance Rate Levels and Claim Payments During the 1970s and 1980s,” GAO/HRD-91-108 (Washington, D.C.: Sept. 16, 1991), p. 2.

increases of the 1970s (and later, the mid-1980s) were a result of the increase in litigation, which was a product of the expansion of tort liability.

Spangenberg conceded that products liability claims had increased but argued that this was the predictable result of an increase in consumerism: more goods meant more defective products, hence more claims. On this point, too, Spangenberg was correct. The real issue was whether any federalization of tort law would harm legitimately injured plaintiffs. Spangenberg did not directly address this question, but he implied that harm to plaintiffs would inevitably occur because of the pluralistic pressure on Congress from insurance companies.

Also, Spangenberg argued that arbitration was not a preferable alternative to the state court system.<sup>909</sup> The most likely reasons for this last position were the fear that political factors could weigh into an arbitration panel's decision process and, more to the point, the desire to preserve plaintiffs' attorneys' ability to file suits in venues that had jury pools presumably friendly to plaintiffs' personal injury claims. Arbitration panels would consist of legal, medical, technical, and/or insurance industry experts, whose views on appropriate compensation might mean less of a recovery for plaintiffs.

Finally, Spangenberg's greatest concern was whether any statute of limitations would be enacted. He contended that even a six-year statute would eliminate approximately half of the product liability claims. This suggests that the products claims were based on a substantial number of older products. Although it was expected that the ATLA representative would claim consumers were being harmed, Spangenberg's testimony raises the issue of how a product could be defective if it was only beginning to

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<sup>909</sup> Senate, p. 89.

injure people more than six years (or more) after its sale. Data compiled by the Insurance Services Office (ISO), the data collection and rating information entity of the insurance industry, showed that in 1990 “insurers were still reporting payments against policies that had expired at least 16 years ago.” Even older products were being targeted because the ISO’s data did not include “claim payments made more than 16 years” after the insurance company made them.<sup>910</sup> Thus, in the late 1970s the insurance companies and the manufacturers had good reason to fear the consequences of a lack of statutes of limitation.

Consumer advocacy groups argued that federal legislation was “premature.” More specifically, they agreed with the plaintiffs’ trial lawyers that arbitration would not be an improvement on the jury trial system. Groups such as the National Consumers League and the Consumer Federation of America opposed S. 403 by appealing to the principle of limited government and arguing that “we really do not know how the [proposed arbitration] system would work.”<sup>911</sup> Sandra Willet, of the National Consumers League, argued that her organization was not really taking a position for or against federal legislation, but that any federal legislation at that time was unwarranted because the nature and extent of the insurance problem was unknown.<sup>912</sup> The appeals to the integrity of the jury system and limited government were somewhat hypocritical since these same groups supported such federal regulatory efforts as the Consumer Products

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<sup>910</sup> U.S. GAO, “Product Liability: Insurance Rate Levels and Claim Payments During the 1970s and 1980s,” GAO/HRD-91-108 (Washington, D.C.: Sept. 16, 1991), pp. 2-3.

<sup>911</sup> Senate, pp. 198, 201.

<sup>912</sup> Senate, p. 190.

Safety Act.<sup>913</sup> Self-interest and the interests of their members and constituencies, rather than adherence to common law traditions and limited government, were likely the strongest factors in the consumer groups' positions.

Self-interest was also likely behind the strategy of manufacturers' strategies regarding consumers. For example, Howard J. Bruns, of the Multi-Association Action Committee (on Product Liability) (MAAC), contended that manufacturers were also concerned about the welfare of consumers. He implied that the costs and restrictions the emergent tort system placed on manufacturers would affect consumers' interests, too. His group had tried to "educate" businesses about the "crisis" in products liability. He had concluded that by 1977 most industries were aware of the issue. Thus, the next goal was "awakening consumer interest to the problem." Bruns argued that once "consumers and workers" had been educated, then "meaningful solutions [could] be implemented."<sup>914</sup> That is, once consumers understood their interests lay with the interests of manufacturers, they would support federal restrictions on strict products liability. The manufacturers' representative's testimony raises the issue of whether consumers really thought their interests lay with manufacturers. It is doubtful that most consumers would have believed that restrictions on the amounts of payouts to injured consumers were a net benefit to the public. Perhaps industry representatives believed that the "education" consumers needed was an understanding of how increased claims, due to liberalized manufacturer liability, led to increased insurance premiums and other associated costs, which were ultimately borne by the consumer.

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<sup>913</sup> Senate, p. 191.

<sup>914</sup> House, Vol. 1, p. 417.

In November 1977 the Interagency Task Force issued its Final Report on Product Liability.<sup>915</sup> That same month the House reconvened its hearings to review the Final Report. Sidney Harman, the Undersecretary of Commerce, contended that “myths” had been created about the nature of the product liability situation because of “horror stories,” which could not be verified by the Task Force. Harman thought the Task Force’s work had dispelled those myths by its methodical inquiry. He said the myths had hindered “the search for cures” for the real problems presented by products liability. Although products liability had not resulted in massive business failures, such “may be one of several factors that cause small companies in high-risk product lines to go out of business.” Additionally, the rising costs of products liability insurance “may reinforce trends against new product development so that some socially beneficial products may never be developed or may be discontinued. On the other hand, product liability concerns may [deter] the manufacturer [from producing] some unsafe products.”<sup>916</sup> As for the rise in insurance premiums, the Task Force was of the opinion that they were often the result of “panic pricing” by underwriters. A requirement of disclosure of ratemaking policies and data would be helpful for the industry’s pricing and probably result in lowering premiums.<sup>917</sup> Additionally, the Task Force supported some peripheral government

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<sup>915</sup> U.S. Department of Commerce, *Interagency Task Force on Product Liability: Final Report*, (Washington, D.C.: 1978).

<sup>916</sup> House, Vol. 4, pp. 1346-47.

<sup>917</sup> House, Vol. 4, p. 1348.

measures, such as the government “funneling information” to companies in support of their “loss prevention” efforts and “Government-supported reinsurance.”<sup>918</sup>

The Task Force speculated about several causes of the products liability “problem,” including the aforementioned “insurance ratemaking practices, unsafe manufacturing procedures, and uncertainties in the tort litigation system,” the last of which referred to the “constant state of change” throughout the fifty states, which created “concern” and confusion for insurance companies. However, the Task Force also noted its investigation did *not* “address” a “number of [other] causes,” including “inflation, [the] increasing number and complexity of products [in the marketplace], and consumer awareness [of their legal rights to sue].”<sup>919</sup>

In light of the more than year’s long, federally funded investigation of the issue, this equivocation on the virtues and vices of products liability was frustrating for the congressmen. Ultimately, the Task Force was somewhat ambivalent about whether federal legislation was needed. Undersecretary Harman noted that the Task Force supported “uniformity” in products liability law,” but would “not specifically endorse Federal action in this area.”<sup>920</sup> Such an express endorsement or rejection was probably exactly what the Congress wanted from the Task Force. Instead, the Task Force’s report probably created more ambivalence than had existed before its release. It confirmed the existence of a problem, but failed to prescribe a solution or even the desirability of a

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<sup>918</sup> House, Vol. 4, pp. 1348-49.

<sup>919</sup> House, Vol. 4, pp. 1347-48.

<sup>920</sup> House, Vol. 4, p. 1348.

federal approach. As subcommittee chairman LaFalce stated, “I analogize it to going before the jury and the jury says, we want more facts.”<sup>921</sup>

Notwithstanding this official ambivalence from the Task Force, Undersecretary Harman made the suggestion that federal action might be needed in the future because of looming “crises” in other matters, including “municipal liability,” “professional malpractice and automobile accident reparations,” and nuclear power plant accidents. Harman contended that Congress and the Executive branch needed “to begin to consider the larger picture of the Federal Government’s role in accident compensation.” Harman predicted that “if some concerted action is not taken,” then “accident compensation may produce a crisis in the 1980s.”<sup>922</sup> It was surprising that, while the Task Force refused to endorse a wholesale federal takeover of state tort law, the Commerce Department urged a far more expansive federal “accident compensation” role. Such a role would exceed and dwarf any of the then-existing proposed federal takeovers of products liability law. This odd juxtaposition of policy non-recommendations and aspirations may have been due to the fact that the Task Force was a (purportedly) disinterested entity, but new Carter administration appointees, who – notwithstanding the deregulatory disposition of some within the administration – supported an active federal government and oversaw the Task Force’s work.

Since the Task Force’s Final Report was so ambivalent on recommendations, all interested parties could find within it something to support their contentions that a “very

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<sup>921</sup> House, Vol. 4, p. 1356.

<sup>922</sup> House, Vol. 4, pp. 1351-52.



real crisis”<sup>923</sup> existed or that the Report “slowed down considerably the [insurance] industry’s stampede for legal insulation from injured consumers.”<sup>924</sup> None of the interested parties’ positions actually changed as a result of the Task Force’s Final Report. Manufacturers and insurance companies still wanted federal intervention and protection and plaintiffs’ attorneys and consumer advocates still wanted to preserve the prevailing state systems of strict products liability. Also, it should be noted that the witnesses remained focused on workers’ compensation and capital goods manufacturers, rather than general consumer goods.

The hearings demonstrated the conflicts between organized interests at the state level and how the prospect of federal tort and insurance laws would affect these interests, creating new winners and losers. The hearings also substantiated that federalism was a concern for legislators. Employers operated in a state-level workers’ compensation system that provided protection to employers from tort lawsuits, while providing a guarantee of some degree of compensation to injured employees, without regard to fault. This system was a bargain struck at the state level between employers and employees during the Progressive Era.<sup>925</sup> The congressional hearings demonstrated that any federal

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<sup>923</sup> Testimony of Geoffrey R. Myers, counsel for the Truck Equipment and Body Distributors Association, House, Vol. 4, p. 1429.

<sup>924</sup> Testimony of Anita Johnson, staff attorney with the Environmental Defense Fund, House, Vol. 4, p. 1439.

<sup>925</sup> Jennifer Klein argues that employers supported workers’ compensation laws because it would reduce the likelihood of a “class struggle.” *For All These Rights: Business, Labor, and the Shaping of America’s Public-Private Welfare State* (Princeton: Princeton U. Pr., 2003), p. 22. This seems a bit romantic. The better description is Lawrence Friedman’s. He notes that workers’ compensation provided a compromise that provided both employers and employees with benefits and tried to eliminate the middlemen: lawyers. This latter hope proved to be in vain when courts expanded the scope of workers’ compensation statutes and proved that the legislation created a new area of practice for lawyers. *A History of American Law*, p. 517.

intervention in tort and insurance law regarding products liability would impact this bargain, potentially obliterating the Progressive-Era arrangements of the workers' compensation system. Additionally, the workers' compensation laws were *state* laws. The New Deal had greatly altered the relationship between the federal government and the states and citizens by allowing for federal legislation in matters that had theretofore been within the sole purview of the states. However, some programs of the New Deal Era were federally mandated, but administered and funded by the states. For example, the Federal-State Unemployment Program is the product of the Social Security Act of 1935, but is administered separately in each state according to federal "guidelines." The amount of benefits, duration, and eligibility requirements are formally established under state law. Each state program is funded "solely on a tax imposed on employers."<sup>926</sup> Yet, workers' compensation, with the exception of some industry-specific (*e.g.*, maritime workers and longshoremen) and federal employee groups, had been left entirely to the states during the New Deal and succeeding decades. Similarly, tort law had been a province of the states. Federal tort legislation threatened not only the bargains struck at the state level but also the sovereignty of the states in one of the last remaining areas where the states had clearly exercised their sovereignty.

These concerns are evidenced in the testimony of two congressmen. Ronald A. Sarasin (R-CT) argued that subrogation rights for workers' compensation carriers existed in some states, but not in others. Sarasin's chief concern was the ability of a manufacturer to recover against any negligent employer or have a defense against any

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<sup>926</sup> "Unemployment Compensation: Federal-State Partnership", U.S. Department of Labor, Office of Workforce Security, Division of Legislation (July 2008), pp. 1-2.  
<http://workforcesecurity.doleta.gov/unemploy/pdf/partnership.pdf>.

contributorily negligent employee. (This was the situation in which Medalist Industries found itself in the Stanfield case.) Congressman Sarasin saw a “double dipping” issue: the employee collects once under workers’ compensation, then again through the tort system against the third-party manufacturer. Although both Sarasin and Thomas A. Luken (D-OH) were intrigued by H.R. 1902, which proposed allowing the joinder of employers in such strict liability actions against manufacturers, both noted that such a federal law would require changing states’ laws prohibiting suits against employers under the workers’ compensation statutes. Luken voiced concern that the federal government would “invade” the states’ workers’ compensation domain.<sup>927</sup>

Similarly, James R. Jones (D-OK) argued for an extensive study of the tort and insurance conditions prevailing throughout the nation before any federal laws were enacted, especially because he thought prior experience with rapid federal reactions to problems only made such problems worse. Although Jones wanted to aid his constituents, he did not want to increase federal control over the economy. He noted, “Federal help is almost always coupled with Federal control.” Rather he supported a “‘go slow’ approach” regarding federal legislation. Nevertheless, he still urged eventual passage of a law allowing for joinder of employers in suits against manufacturers and tax law changes to allow or encourage employers to establish self-insurance funds or the creation of pools of funds with other local employers.<sup>928</sup>

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<sup>927</sup> House, Vol. 1, pp. 61-62.

<sup>928</sup> House, Vol. 1, pp. 50-51.

Let's return to our example of Ms. Ossie Stanfield's case. The Illinois Appellate Court granted Ms. Stanfield a victory when it refused to allow the manufacturer of the boring and cutting machine, Medalist Industries, to obtain indemnity from Stanfield's employer, General Electric Cabinet Company. Whether the employer had been negligent in failing to instruct Stanfield on how to safely operate the machine or had inadequately supervised her would not matter, since the case was one based on the strict liability of the manufacturer. Even if the employer had been at fault, it would not be held liable. The appellate court dismissed the manufacturer's indemnification suit against Stanfield's employer and remanded the case to the trial court.<sup>929</sup>

Once the case was back in the trial court, it was dismissed by the trial judge, who agreed with Medalist Industries that no jury could find in Stanfield's favor since the machine had no defect and Stanfield's injury was solely caused by the failure of her employer to properly instruct and supervise her on the use of the machine. Stanfield then appealed. At the appellate court Medalist Industries lost for the second time. The appellate court held that questions concerning defectiveness and causation could be answered only by a jury, not a trial judge. The case was reversed and remanded to the trial court.<sup>930</sup> When Stanfield filed her original lawsuit in 1970, she demanded \$150,000.00. Six years later, after two appeals to the state's intermediate appellate court

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<sup>929</sup> *Stanfield v. Medalist Industries, Inc.*, 17 Ill. App. 3d 996; 309 N.E.2d 104; 1974 Ill. App. LEXIS 3109 (Ill. App. 2d Dist., 1974).

<sup>930</sup> *Stanfield v. Medalist Industries, Inc.*, 34 Ill. App. 3d 635; 340 N.E.2d 276; 1975 Ill. App. LEXIS 3401 (Ill. App. 2d Dist., 1975).

and on the day a jury had been empanelled to hear the trial of Ossie's case, the manufacturer agreed to settle the case for \$20,000.00.<sup>931</sup>

Was this a products liability "horror story"? From Ossie Stanfield's vantage point, this was no horror story but it is doubtful she was overjoyed with the results. The standard contingency fee contract with her attorney would have been between one-fourth and one-third of her recovery, and she was additionally responsible for her attorneys' expenses, which would have substantially reduced her net recovery.<sup>932</sup> Although she was maimed for life, she had had the good fortune to recover through the state's workers' compensation system *and* the common law tort system. On the other hand, from the manufacturer Medalist Industries' standpoint this was a never-ending nightmare. It claimed it had made a machine with no defects; Stanfield was only injured due to her employer's failure to show her how to properly work the machine. Medalist Industries had incurred the expenses of time and it or its insurance carrier, if it had liability insurance, had incurred expenses in the defense and appeals of the case. And whether it settled or went to trial, it would incur more expenses to resolve the case.

The entanglement of the emergent strict liability system and the workers' compensation system would continue through the 1980s. As one scholar has noted, "almost one-fourth of all job-related product liability claims" arose out of employers or their workers' compensation insurers sought reimbursement from manufacturers (and

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<sup>931</sup> Law Docket and Fee Book, *Stanfield v. Medalist Industries, Inc.*, No. G-23773, Circuit Court of the 17<sup>th</sup> Judicial District, Winnebago County, Illinois (June 28, 1976). Using the CPI, \$20,000.00 in 1976 would be worth approximately \$75,400.00 in 2009 U.S. dollars. Samuel H. Williamson, "Six Ways to Compute the Relative Value of a U.S. Dollar Amount, 1790 to Present," *MeasuringWorth*, 2009. URL <http://www.measuringworth.com/uscompare/>.

<sup>932</sup> On top of the attorneys' fee, Stanfield would have had to pay for her attorneys' expenses, including copies, mailings, mileage, and court fees at both the trial and appellate court levels. For a case that made two trips to the state intermediate appellate court, these would have been substantial costs.

their insurers) for payments made under the workers' compensation systems to injured employees.<sup>933</sup> These are referred to as "subrogation" claims, wherein an insurer seeks reimbursement from a responsible third party for payments made to an insured claimant.

The congressional hearings concerning products liability were not merely a response to a potentially growing national insurance problem. Rather they were a response to the complaints of congressional constituents who were seeking federal legislation to protect them from the changes occurring in some states as a result of state law changes in tort liability. The post-New Deal state encouraged and legitimated this behavior. Although tort law had almost always been a state-level concern – the purview of state courts and, to a lesser degree, state legislatures – the nation-wide trend toward the adoption of strict liability, the dramatic increases in some commercial liability insurance rates in the 1970s, the potential for rewarding organized interests through federal intervention, and the political practices of the post-New Deal state combined to make proposals for the federalization of tort law seem unexceptional and almost inevitable.<sup>934</sup>

These hearings were the post-New Deal state at work. They were what had become by the 1970s an altogether typical example of the normal functioning of the American federal government. The New Deal initiated a model for federal policymaking in several ways pertinent to the tort reform proposals of the 1970s.

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<sup>933</sup> W. Kip Viscusi, "Product and Occupational Liability," *J. of Econ. Perspectives*, Vol. 5, No. 3 (Summer 1991), pp. 71, 86.

<sup>934</sup> The notable exceptions to tort law as a state-level area of competency were the federal laws of the Progressive Era, including the Federal Employers' Liability Act of 1908, 35 Stat. 65 (effecting tort rights of railroad workers and their employers); the Jones Act of 1920, 41 Stat. 1007 (similarly effecting the tort rights of those who worked on the navigable waters); and the federal regulatory law known as Food and Drug Act of 1906, all of which played roles that had theretofore been left to state tort and contract law. Lawrence M. Friedman, *American Law in the 20<sup>th</sup> Century* (New Haven: Yale, 2002), pp. 60-61, 360.

First, as Robert Higgs has argued, the New Deal provided an opportunity for policymaking in response to perceptions of national public policy crises. Higgs contends that government has grown in America during periods popularly seen as crises. Yet, such growth is not inevitable; rather it is contingent upon the efforts of groups of people, both inside and outside of government employment, to successfully procure government action.<sup>935</sup> The failures, or incapacities, of private and public financial institutions during the Great Depression invited a firm governmental response to aid in recovery and prevention of future institutional failures. Similar arguments seemed to apply to the liability insurance situation faced by many small-firm manufacturers in the 1970s. Referring to a difficulty as a “crisis” was an attempt to legitimate the mobilization of the massive capacities of the federal government to combat a threat to the nation. Such a term invoked the memory of the New Deal and its impetus to be reactive in the service of compassion for the unfortunate and reformative in correcting the injustices that purportedly exist throughout the country.

The post-New Deal response to perceived crises applied on the state level as well as the federal. The reader will recall from Chapter Four the similar effort by wholesalers and retailers in North Carolina to obtain legislative protection from increasing insurance rates and the opposition of lawyers and consumer protection advocates. That particular fight resulted in a state law that forbade any strict liability in North Carolina, thereby giving legislative imprimatur to a policy already established in the courts.

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<sup>935</sup> Robert Higgs, *Crisis and Leviathan: Critical Episodes in the Growth of American Government* (New York: OUP, 1987), p. 13. “Political elites” combined with “interest groups” initiated the 1970s tort reform movement. Marc Galanter, “An Oil Strike in Hell: Contemporary Legends About the Civil Justice System,” *Ariz. L. Rev.*, Vol. 40, No. 3 (1998), pp. 719.

Second, as Daniel Rodgers has shown, the New Deal was an opportunity for the implementation of policy proposals that had been desired for many years, even decades.<sup>936</sup> In the case of the New Deal, the proposals were Progressive-Era ideas about the socialization of risk on a national scale, social insurance in the form of retirement provisions, and governmental control of aspects of the economy. In the case of modern tort reform, the proposals were partially in response to the difficulties some manufacturers, wholesalers/distributors, and retailers were having regarding the affordability of liability insurance. However, other proposals went to the heart of the common law tort systems that had long been in the purview of the states' courts. For example, the rules on punitive damages were among the common law rules that had been controlled by the state courts.<sup>937</sup> Defendants' objections to such damages were longstanding and the prospect of federal tort reform offered the opportunity to enact, from the federal level, policies that never have been obtained at the state level. However, it should also be noted that the business community's desire for federalizing an area of law – which threatened to create more opportunities for centralized political control of tort law that might ultimately threaten business interests – was an example of businesses seeking state action in support of their own interests.<sup>938</sup> More broadly, though, the Tort Revolution was the fruition in the 1960s of what progressive lawyers and academics had sought for decades.

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<sup>936</sup> Daniel T. Rodgers, *Atlantic Crossings: Social Politics in a Progressive Age* (Cambridge: Harvard Univ. Pr., 1998). Rodgers argues that Progressivism did not end with World War I, but went on to inspire much of the New Deal. The New Deal itself is seen as “the cosmopolitan progressives’ moment” because it was their “response” to the worldwide depression. *Ibid.*, pp. 411, 446.

<sup>937</sup> Morton J. Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Authority* (New York: OUP, 1992), pp. 113-14.

<sup>938</sup> Peter Swenson, *Capitalists Against Markets* (Oxford: OUP, 2002).



Third, as Sidney Milkis has demonstrated, the New Deal enhanced the visibility, presumptive leadership role, and power of the executive branch. Franklin Roosevelt's highly visible policymaking role was central to the passage of the New Deal and created an expectation among many in the voting public of an active executive branch in politico-economic matters. Roosevelt's "precedent-shattering re-election to a third term ... ratified the *displacement* of party politics by executive administration."<sup>939</sup> After the Tort Revolution, the Interagency Task Force on Product Liability was an executive branch effort – the first federal response to the products liability issue – begun by the Ford administration and continued into the Carter administration. It is true that, as Milkis has noted, the "administrative politics" of the 1970s saw an increase in Congress's role in the administrative state and a consequential weakening of the "energy and responsibility" of the presidency.<sup>940</sup> Nevertheless, even during the reinvigorated administrative state of the 1970s, the Task Force's very existence shows the president had the *potential* for playing a leading role in tort reform, should he have desired to do so. The New Deal presidency continued through the period of tort reform. The Carter administration's half-hearted push to seek a federal role in "accident compensation" was at odds with the preferences of interest groups that tended to support Democrats: trial lawyers and consumer protection groups. They wanted the state courts' activist role to be preserved. This pluralist approach points out the role the president might have played but was understandably dissuaded from pressing vigorously because he lacked support from key

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<sup>939</sup> Sidney M. Milkis, *The President and the Parties: The Transformation of the American Party System Since the New Deal* (New York: OUP, 1993), p. 142.

<sup>940</sup> *Ibid.*, p. 307.

constituencies. The New Deal presidency was present during the Tort Revolution; but its legislative power was greatly curtailed when key interests opposed it.

Finally, the New Deal furthered the establishment of the administrative state. Although Stephen Skowronek has convincingly evidenced the origins of the administrative state in the early Progressive Period, the New Deal's programmatic responses to the Great Depression helped establish what became a permanent administrative state at the national level.<sup>941</sup> The purported professionalism and expertise in matters offered by bureaucratic government seemed well suited to the various complex institutional problems encountered during the Great Depression. Although by the 1970s some scholars had begun to question the efficacy of the federal administrative state, the regulatory approach to handling politico-economic problems retained vitality. The early 1970s saw the enactment of a slew of federal laws attempting to protect consumers, workers, and the environment, and new federal entities to administer them. The New Deal spurred the rise of such "delegated government," which saw administrative agencies being delegated legislative power by Congress, producing "administrative legislation."<sup>942</sup> Tort reform was, for some, yet another candidate for supervision by the federal administrative state. Yet, the proposal for a new administrative agency was made at a time when the limits of the administrative were apparently being seen. Deregulation, as we shall see in the next chapter, was becoming popular even among those who

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<sup>941</sup> Stephen Skowronek, *Building A New American State: The Expansion of National Administrative Capacities, 1877-1920* (Cambridge, UK: Cambridge Univ. Press, 1982, 1990 ed.).

<sup>942</sup> Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States*, Second Edition (New York: Norton, 1979), pp. 273-74.

traditionally supported an active state. Adding yet another federal administrative entity was not a popular move in the late 1970s.

Each of these legacies of the New Deal made tort reform seem an inevitably federal concern. Yet, it was not inevitable. Tort reform failed in 1977-78. The ultimate fate of the then-pending tort reform bills – S. 403, H.R. 4200, and H.R. 1902 – was to die in their respective committees. Although lobbying methods and appeals to the Senate differ from the House,<sup>943</sup> the tort reform efforts in both chambers failed. Perhaps these federal reform efforts failed because they were *federal*. That is, perhaps the concerns of some senators and representatives that federal intervention was an intrusion into matters best left to the competencies of the states was, notwithstanding the post-New Deal approach, still powerful enough to warrant caution. As previously noted, the 1970s was a decade during which decentralization was much discussed and promoted by the Nixon administration. Although the Nixon administration did not return the federal-state relationship to a classic federalist division of sovereignty, where the states not only decided whether to have programs but actually funded their own programs, the question of the preservation or increase in state responsibility was a milieu in which federal tort legislation was debated.

Similarly, perhaps it was the federalism concerns voiced by some members that sealed the bills' fate. The workers' compensation system was well established in the states and any reform effort would intrude into this area of proven state sovereignty. Also, the House hearings left the subcommittee members confused about the nature and extent of the insurance problem, and questioning whether there was a "crisis" at all.

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<sup>943</sup> Ross K. Baker, *House and Senate* (New York: Norton, 1989), pp. 151-71.

Perhaps the lack of clarity about the tort systems' effects on the cost and availability of liability insurance gave pause to elected officials. This is an important consideration, since there was obviously no clear resolution to the issue. There was certainly an objective rise in insurance rates, but the solution to this problem was uncertain and even the pro-tort reform experts disagreed on solutions, offering a myriad of policy proposals.

Finally, perhaps Congress discovered it was being asked to do something that was far more complex than originally anticipated by the proponents of federal intervention. As the chairman of the Senate hearings, James Pearson (R-KA), stated in relation to the idea of a federal law affecting tort damages, "I have been asking myself . . . why we really didn't go into the field of damages. And the only real reason I can think of is that the complexity of what we were dealing with, and a very new subject in tort reform or change in the tort law seemed too complex to us."<sup>944</sup> Similarly, after the Interagency Task Force's Final Report was issued congressman Richard H. Ichord (D-MO), who had been on record as desiring federal legislation to "protect the small business interests," conceded "the causation factors of the problem are multitudinous, and they are very complex. The solution, I must say, is not so easy."<sup>945</sup> At least adhering to the status quo did not lead to unintended consequences.

Perhaps it would be better to substitute the words "politically unpalatable" for Pearson's use of "complex." The tort reform proposals being offered were comprehensive and they had potentially far-reaching effects, many of which might not be

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<sup>944</sup> Senate, p. 64. Similarly, Senator Pearson later made the following comment in relation to the prospect of arbitration panels deciding products liability claims: "But there is a growing consensus not only about the courts but about the Congress too, that these institutions no longer really possess the capability of deciding enormously complex economic and technological issues today, and that the trend is toward arbitration, and administrative panels." Ibid., p. 89.

<sup>945</sup> House, Vol. 4, p. 1612.

seen at the time. Such a comprehensive federalization of tort law would not only take matters away from the state courts, but it would make the national government a policymaker in a wide array of matters that it had never previously governed. The federal representatives, even those who professed enthusiasm for the federalization of tort law, may not have wanted to adopt such responsibility and power for the federal government.

That may be the most likely explanation for why tort reform failed in 1977-1978. Those seeking reform were asking for more than just minor tinkering with insurance cost issues. Most wanted a wholesale federal takeover of products liability law. The possibility for unintended consequences was great. The disruption of workers' compensation systems has been noted. Another example might be the unintended effects of federal funding for insurance losses. What kinds of risks would likely be insured if a federally funded pool or federal guarantee existed? Would carriers be discouraged from insuring high risks? Would moral hazard be increased? That is, would manufacturers be given less incentive to consider safety in the design and manufacture of products if they knew of a federal safety net? Additionally, there was the fear of a slippery slope: any federal reform would likely encourage further regulation of other areas of the civil litigation and tort systems of the states. For example, if a federal "loser pays" rule was established for products liability, why should it be limited to products cases? Why not include medical malpractice, or even *all* tort litigation? Similarly, why restrict any federal limitation on lawyers' contingency fees only to products liability cases? Why not *all* civil tort actions, or even contract actions?

Senator Pearson was right in pointing to the complexity of the problem and the proposed solutions. Congressional proponents initially thought they were being asked to

make ostensibly simple changes to state laws on insurance and torts. But these hearings demonstrated that the federalization of tort law and its consequences likely would be anything but simple. Tort reform would have to wait for another day.

## **Chapter 6: The Limits of Reform**

After the House and Senate hearings of 1977 and the failure of the products liability reform bills in both houses of Congress, manufacturers continued to grapple with finding affordable insurance and reducing risks presented by their products. The insurance industry tried one potential form of amelioration. The insurance companies established market assistance programs (MAPs) in 1977 to “assist only those few businesses who could not obtain a premium quotation for product liability insurance at any cost.” The MAPs were not designed to help manufacturers whose premiums had increased or who had received an insurance quote but considered the insurance too costly. Manufacturers who received premium quotes were ineligible for the MAPs. The MAPS were only available to businesses that had not received a quote. If a quote had been given, no matter how high, the business was ineligible for the MAP. Accordingly, “MAPs were deemed to be essentially irrelevant by product sellers as a means of solving their product liability insurance problems.” As one manufacturer trade group representative testified to Congress, their “members stopped trying to acquire coverage by the MAPs concluding it was a waste of time.”<sup>946</sup>

One apparent mystery that remained unsolved throughout this period was the way in which premiums were established. The ISO, the chief information clearinghouse for the insurance industry, claimed that only ten percent of product liability insurance premiums were based upon published rates, which in turn had been based upon “reported

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<sup>946</sup> House Reports, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Vol. 2 Misc. Reports, Report No. 96-791 of the Committee on Interstate and Foreign Commerce, p. 1 (1980) (hereinafter H. Rept. 96-791). Trade group representative statement of Anthony Schop, Executive Vice President, Machinery Dealers National Association, Hearings on Miscellaneous Tax Bills III Before Subcommittee on Taxation and Debt Management of Senate Committee on Finance, p. 98 (Aug. 25, 1978), quoted in H. Rept. 96-791 at p. 10.

claims experience.”<sup>947</sup> This appears to be an accurate reflection of most insurers’ underwriting methods. Very few premiums for product liability insurance were based upon past claims experiences of manufacturers. This meant that manufacturers with no prior claims were often subjected to greatly increased premiums based upon risk calculations not correlated to the manufacturer’s history of risks and performance. The 1977 Interagency Task Force’s report appears to have been correct in concluding that the individual reactionary responses of underwriters were partly responsible for the sharp increases in premiums, at least in the mid-1970s. It was unknown whether a market-based competition between insurers would result in more reliance by insurers upon the individual claims histories of their insureds. If so, then premiums would surely be reduced. The possibility of considering claims history was a key aspiration of proponents of federal intervention in product liability law. The Risk Retention bills of 1980 and 1981, with which this chapter is concerned, sought to reduce insurance premiums and the element of market competition was essential to reaching the bills’ goals.<sup>948</sup> However, in order to understand why the premiums were so volatile in the 1970s, it is worth considering the experience with liability insurance for employers at the beginning of the twentieth century.

As the common law rules (*i.e.*, the fellow-servant rule and the defenses of contributory negligence and assumption of the risk) that protected employers from employee personal injuries suits were being eroded by some state courts and legislatures in the late nineteenth and early twentieth centuries, insurance companies began selling

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<sup>947</sup> H. Rept. 96-791, pp. 13-14.

<sup>948</sup> H. Rept. 96-791, p. 14.



liability insurance policies to employers. The insurers had “little statistical data on which to base refined calculations” of risk and set their premiums. For example, Fidelity and Casualty Company of New York wrote the first employers’ liability policy in 1888. But it was not until 1909, when 27 companies were selling such policies, that the first manual for “assist[ing] in establishing rate classes and fixing premiums” was published.<sup>949</sup> This history of the pre-workers’ compensation liability system shows that the new legal rules can exist for some time before insurance companies are capable of adequately responding in the form of obtaining data and accurately assessing risk in order to set premiums that are well correspondent to the known risks. Any lack of knowledge can mean volatility in the premiums charged, which is what happened in the mid-1970s among product liability insurers.

The insurance industry had existed throughout most of the twentieth century and had matured in its ratemaking practices by the 1970s. But it was still subject to panics, which appears to be what happened in the 1970s regarding the capital goods industries. As one set of insurance experts has noted, uncertainty in regard to near term future losses, especially the fear that large losses would be “concentrated in a few large payoff cases,” can lead to insurance premium increases.<sup>950</sup> This was certainly the case in the mid-1970s. This otherwise mature industry had failed to adapt to the threat posed by strict liability and resorted to panic pricing.

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<sup>949</sup> Abraham, *The Liability Century*, pp. 32-33, 37.

<sup>950</sup> W. Kip Viscusi and Michael J. Moore, “An Industrial Profile of the Links between Product Liability and Innovation,” in Peter W. Huber and Robert E. Litan, eds., *The Liability Maze: The Impact of Liability Law on Safety and Innovation* (Washington: The Brookings Inst., 1991), p. 86.

The reason the insurance industry was susceptible to panic pricing was because its ratemaking mechanism lacked sufficient data about the products that were subject to lawsuits under the relatively new strict liability system. The Insurance Services Office (ISO), the private, industry entity that collected claims data from its insurance company members, classified risks into products categories and disseminated data and ratemaking recommendations to its members. By the 1960s and 1970s the ISO was the primary ratemaking entity of the casualty and property insurance industry. The ISO created classifications for thousands of consumer and capital products based on information submitted by its members. It provided rating recommendations (“manual rates”) to its members for only about one-third of its classifications. Prior to 1974, the ISO only required its members to give detailed claims data on its manually-rated classifications. Therefore, the ISO’s rate recommendations, which many underwriters used for setting premiums rates – thereby making some ISO-recommended rates standard rates across the industry – existed for only a fraction of the products in existence.<sup>951</sup> In 1978, the ISO claimed only ten percent of its members’ premiums were based on its ratings. One scholar has recently estimated that only one-third of the known consumer and capital goods were based on the ISO’s ratings recommendations by 1976.<sup>952</sup> Individual employees at underwriters set the rates on the remaining product classes, which involved a great deal of subjectivity and variation, and allowed for panic pricing.<sup>953</sup> In a federal

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<sup>951</sup> H. Rept. 96-791, pp. 13-14. Arthur Joel Levine, PhD Dissertation, “‘Mercenary, Mendacious Mythology’? Assessing the Insurance Industry’s Explanation for the Product Liability ‘Crisis’ of the 1970s,” (Claremont, CA: Claremont Graduate Univ., 2004), p. 139.

<sup>952</sup> Levine, *supra* n. 951, pp. 135-40.

<sup>953</sup> U.S. Department of Commerce, *Interagency Task Force on Product Liability: Final Report* (Washington, D.C.: 1978), pp. I-21-24 (This federal study concluded many rate increases were a product of panic pricing by individual employees at underwriters.).

General Accounting Office (GAO) study published in September 1991, it was noted that the ISO's insurance rates increased 195 percent from 1974 to 1976, remained stable from 1976 to 1983, then increased 105 percent from 1983 to 1988, and receded by 27 percent between 1988 and 1990. The GAO concluded that one of the chief factors in the rate changes was "the frequency of claim losses reported by ISO's insurers."<sup>954</sup> Thus, the claims experiences *and* fears or expectations of future claims/losses were important in the rate changes for individual insurers, especially regarding the over two-thirds of rates set by individual employees at underwriters.

While the insurance industry unsuccessfully attempted to reduce premiums, so too did a very few state legislatures. One reform approach, taken by the legislatures of Colorado and Tennessee, was to create incentives for the creation of "captive" insurance companies within their jurisdictions. For a manufacturer, a captive insurance company is a subsidiary of a parent manufacturer created solely to provide a form of self-insurance for the manufacturer. However, manufacturers in Colorado and Tennessee rarely established such captive insurance subsidiaries because of the states' regulatory requirements, such as high capitalization requirements for the captive insurer, state approval of rates, the requirement of domicile within the state and – most importantly from a federalism and interstate commerce perspective – the captive insurance subsidiaries "would still be subject to the regulatory barriers imposed by other states for

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<sup>954</sup> U.S. GAO, "Product Liability: Insurance Rate Levels and Claim Payments During the 1970s and 1980s," GAO/HRD-91-108 (Washington, D.C.: Sept., 1991), pp. 2-3.

risks situate in those states.”<sup>955</sup> As Colorado’s Insurance Commissioner testified before Congress, the captive insurance subsidiaries were “under more restrictive supervision and controls than [regular, non-captive] insurance companies.”<sup>956</sup> Many in Congress saw the state-regulated programs for captive insurers as predictably self-defeating. The captive insurer programs might have provided the incentive for insurance companies to compete for manufacturers’ business and thereby reduced their product liability rates. Yet, even without onerous regulatory hurdles, such as capitalization and rate approval by the state, the greatest barriers to such state-sponsored programs were the federal nature of the Union and the national nature of the American economy. Just as regular insurance companies found themselves dealing with the varying tort systems in different states in which they underwrote manufacturers, so too would the manufacturers and their captive subsidiaries have to comply with the regulatory requirements of each state in which the parent and subsidiary conducted business. The self-insurance model remained a viable possibility but only if it were made attractive to manufacturers by nationalizing the programs. The proposal begged for a national approach under the rubric of interstate commerce, which was the basis for the first federal law enacted to address the product liability insurance issue.<sup>957</sup>

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<sup>955</sup> H. Rept. 96-791, pp. 10-11.

<sup>956</sup> Testimony of J. Richard Barnes, Commissioner of Insurance, State of Colorado, before the Subcommittee on Consumer Protection and Finance, Nov. 15, 1979, quoted in H. Rept. 96-791, p. 11.

<sup>957</sup> Another possibility for lowering premiums was the use of reciprocal insurance exchanges, or “reciprocals.” Such entities are unincorporated and function similar to a partnership for liability purposes, except that each “member’s” liability is individual rather than joint with other members. Members could be both real individuals and other business entities. However, like the captive insurance programs, the reciprocals would encounter the same problems of varied state capitalization requirements and compliance with different states’ insurance regulations and licensing requirements. H. Rept. 96-791, p. 11.

In 1978, the Carter Administration, speaking through the Department of Commerce, argued in favor of “short-term” federal legislative measures. The administration argued for the Internal Revenue Code to be amended to allow for businesses to use pre-tax income for self-insurance. The administration rejected the idea of a taxpayer-funded insurance or reinsurance program because it feared such programs would result in “camouflaging rather than resolving the product liability problem.”<sup>958</sup> However, in regard to “long term” measures, the administration supported a federal tort law – a model law that states could enact on their own initiative – which would eliminate the “hodge-podge” of state tort laws. The administration argued that “commercial necessity requires uniformity” of tort law.<sup>959</sup> This was commensurate with the Carter Administration’s desire to ensure a federal role in accident compensation. For example, the administration also supported a federal no-fault automobile accident compensation bill, which would have eliminated fault (or negligence) as the basis for determining whether a person injured in an auto accident would be compensated.<sup>960</sup>

It is important to note the existence of a similar liability insurance affordability problem during the 1970s and how states responded to it. The problem of medical malpractice lawsuits, although increasing in frequency since the mid-1950s,<sup>961</sup> substantially increased during the 1970s and states sought to respond to the complaints of physicians, clinics, hospitals and other medical providers about dramatically increased

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<sup>958</sup> U.S. Dept. of Commerce, “Options Paper on Product Liability and Accident Compensation Issues,” *Fed. Reg.*, Vol. 43, No. 67, Thurs., April 6, 1978, pp. 14622-23.

<sup>959</sup> *Ibid.*, p. 14624.

<sup>960</sup> *Ibid.*, p. 14626.

<sup>961</sup> R. Crawford Morris, “Medical Malpractice: A Changing Picture!” *Ins. Counsel J.*, Vol. 23, No. 1 (Jan., 1956), p. 23.

malpractice insurance premiums. Federal action was deemed unnecessary because state legislatures succeeded in stimulating the creation of private self-insurance programs crafted at the state level because of key differences in the nature of medical care and products liability. First, unlike most products, medical care is often rendered only “within one state.” Most doctors do not work in multiple states so they only dealt with one regulatory system. Second, the question of which state’s law would apply was unnecessary because the tort law of the state where services were rendered was the governing law. Finally and most importantly, there existed in individual states enough physicians and hospitals willing to form a “joint risk-sharing entity.” By contrast, the interstate nature of the commercial and consumer goods economy, the “geographical dispersion” of products manufacturers, appeared to be the chief factor in convincing many congressmen that “federal action must be taken” regarding products liability insurance reform.<sup>962</sup>

By 1979, the Department of Commerce published its model product liability law, which was intended for submission to the states for adoption in the hopes that no federal law would be necessary. As of 1981, twenty-two states had enacted some form of product liability legislation “with no two laws being the same.” No state had enacted the model act in full.<sup>963</sup> Some manufacturers complained that the model act was “heavily

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<sup>962</sup> H. Rept. 96-791, p. 11. It should be noted that there have been studies that suggest that medical liability insurance carriers had rather favorable experience when claims were actually litigated. For example, the victory rate for plaintiffs averaged around 29 percent and that juries were not overly friendly toward plaintiffs. Neil Vidmar, *Medical Malpractice and the American Jury: Confronting the Myths about Jury Incompetence, Deep Pockets, and Outrageous Damage Awards* (Ann Arbor, MI: Univ. of Mich. Press, 1997), pp. 38-43; 265.

<sup>963</sup> Letter of Malcolm Baldrige, Sec. of Commerce, to Rep. James J. Florio, June 12, 1981, as quoted in H. Rept. 97-190, p. 23.

weighted in favor of retailers at the expense of manufacturers.”<sup>964</sup> Thus, the model law approach was failing to achieve a national market under a system that respected federalism. This failure served as proof in the arguments of tort reform advocates of the need for federal intervention.

### ***A Modest Effort at Reform***

The refusal of the 95<sup>th</sup> Congress in 1977 to pass a comprehensive federalization of products liability law was followed in 1980 with the 96<sup>th</sup> Congress’s attempt to pass a much more modest bill, the Product Liability Risk Retention Act of 1981. The aim of the bill was to attack one narrow element of the product liability issue: the cost of insurance. The bill allowed manufacturers to pool their money into “risk retention groups” for the purpose of self-insuring against products liability claims, and the bill allowed businesses to form “purchasing groups” that permitted collective purchasing for lower insurance premiums.<sup>965</sup> A “risk retention group” would be an aggregation of manufacturers that would pool their funds for the purpose of providing insurance to themselves to pay for product liability defense counsel, other lawsuit expenses, and payment of claims. The bill provided for the federal preemption of state insurance laws that otherwise would have hindered or prohibited the formation of private purchasing groups across state lines. Supporters hoped such groups would provide an incentive for private insurance companies to offer affordable insurance to manufacturers. The law did not affect the

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<sup>964</sup> Statement of Jack Elam, General Counsel of Cone Mills Corporation of Greensboro, North Carolina. Statement to the North Carolina Senate Committee on Manufacturing, Labor, and Commerce, and the North Carolina House Judiciary II Committee on Senate Bill 189 – Products Liability and House Bill 235 – Products Liability. Minutes of these committees, Feb. 28, 1979, p. 2 [Kyre, p. 167].

<sup>965</sup> Product Liability Risk Retention Act of 1981, 15 U.S.C. §§ 3901-3903 (PL 97-45, September 25, 1981, 95 Stat 949).

states' substantive tort law or attempt to alter any state rules of court or evidence regarding torts and products liability lawsuits. In other words, this law was not the federalization of tort law; rather it was only a federal attempt to reduce insurance premiums.

However, the original bill, which was proposed in 1979/1980 but never enacted, contained several provisions that would become problematic for its passage: a new federal agency and the (probable) expenditure of federal funds. The bill would have created a new federal bureaucracy within the Department of Commerce. Under the proposal, the federal government would have been empowered to issue charters to the risk retention groups and the Secretary of Commerce would have administered this function.<sup>966</sup> Additionally, the private companies that would have formed risk retention groups would have paid fees to the Department of Commerce to pay for the Department's administrative oversight. Congressional supporters of these provisions claimed this approach was a benefit to the taxpayers, since no federal funds would be spent to maintain the program. However, it was an unfunded mandate: a federal pay-to-play requirement, wherein private actors were required to pay federal administrative costs in order to participate in a federal program. Also, it was questionable whether the fee program would have generated sufficient revenue to maintain the administrative functions, thereby requiring federal taxpayer funding in the future.

Another problem was that the proposed law contained a considerable modification of common law doctrine. For example, one key difference between product liability law and common law torts was the ability to recover consequential economic damages in

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<sup>966</sup> Congressional Record – Senate, Remarks of Sen. Cannon, Vol. 127, Pt. 15, 97<sup>th</sup> Cong., 1<sup>st</sup> Sess., Sept. 11, 1981, p. 20358.



product liability cases. Damages could be recovered for both property and personal injuries.<sup>967</sup> By contrast, the common law of torts only allowed recovery for personal injuries.<sup>968</sup> The proposed federal bill would have allowed recovery not only for property damages but also for emotional harm without physical consequences.<sup>969</sup> This was a substantive modification of many states' tort damages laws.

The 1980 bill was initially drafted by the Department of Commerce, was favorably reported out of its House committee, and overwhelmingly passed the House during the presidential election year, in March 1980, with the support of the Carter administration.<sup>970</sup> The chartering and administrative provisions were certainly in line with the centralized state preferred by some Democrats and some in the Carter administration. However, this was seen by some Democratic supporters as a “move toward deregulation” that was “in sync with the mood of the times and the mood of this Congress.”<sup>971</sup> The Carter administration had a record of ambivalence regarding deregulation. Although the administration had endorsed deregulation in some areas, such

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<sup>967</sup> *Restatement (Second) of Torts*, section 402A (1965); see e.g., *Seely v. White Motor Co.*, 63 Cal. 2d 9, 403 P. 2d 145, 45 Cal. Rptr. 17 (1965).

<sup>968</sup> The general rule at common in the U.S. during the twentieth century was that mental disturbance standing alone was insufficient to allow recovery. *Mitchell v. Rochester Ry. Co.*, 151 N.Y. 107; 45 N.E. 354 (1896) (“[N]o recovery can be had for injuries sustained by fright . . . where there is no immediate personal injury.”). Most American courts now require an accompanying physical injury as a consequence of the mental disturbance in order to recover.

<sup>969</sup> H. Rept. 96-791, p. 16. The expansive definition of “product liability” in the 1979 amendments to the Internal Revenue Code (26 U.S.C.A., § 172(i)(2)(A)), which included damages for emotional harm and loss of use of property demonstrate the uncertainty of future extensions by state courts of the kinds of damages recoverable in product liability cases under the strict liability theory. H. Rept. 96-791, p. 16.

<sup>970</sup> House Reports, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Vol. 2 Misc. Reports, Report No. 96-791 of the Committee on Interstate and Foreign Commerce (1980) (hereinafter H. Rept. 96-791), p. 1; Congressional Record – House, Remarks of Rep. L. Richardson Preyer (D-NC), Vol. 126, Pt. 4, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Mar. 10, 1980, p. 5060.

<sup>971</sup> Congressional Record – House, Remarks of Rep. James H. Scheuer (D/Lib.-NY), Vol. 126, Pt. 4, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Mar. 10, 1980, p. 5060.

as in the airline industry,<sup>972</sup> it had fought to maintain government control in areas such as prices for natural gas.<sup>973</sup>

A report of the House Committee on Interstate and Foreign Commerce in February 1980 contended the bill would “address one of the principle causes of the product liability problem; [*sic*] questionable insurer ratemaking and reserving practices.” It was hoped that insurance companies would have to compete for manufacturers’ business by setting rates according to actual claims histories of manufacturers.<sup>974</sup> The House Committee’s report made clear the drafters’ intention was to treat any risk retention groups formed under the proposed law as much like insurance companies as possible, both for tax purposes and, most importantly, for the purpose of encouraging manufacturers to form such groups.<sup>975</sup> Additionally, the drafters envisioned cross-industry attempts at self-insurance. That is, the legislation did not proscribe businesses from different industries joining together to form risk retention groups. Nevertheless, it was expected that most groups would be formed out of trade associations in the same industry.<sup>976</sup>

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<sup>972</sup> Paul Stephen Dempsey, “Turbulence in the “Open Skies”: The Deregulation of International Air Transport,” 12 *Transp. L. J.* 305, 325-30 (1982).

<sup>973</sup> Richard L. Lyons, “House Votes Down Gas Deregulation; Victory for Carter,” *Washington Post*, First sect., A1 (Aug. 4, 1977). Carter was inconsistent in his stance on deregulation of natural gas; he initially supported deregulation, then switched to supporting price controls, then switched to supporting gradual deregulation. Richard L. Lyons, “President Takes Yet Another Turn in His View of Gas Deregulation,” *Washington Post*, First sect., A4 (Mar. 10, 1978).

<sup>974</sup> H. Rept. 96-791, pp. 9-10.

<sup>975</sup> H. Rept. 96-791, pp. 21-22. Whether risk retention groups qualified for the same treatment as mutual casualty companies would be determined on a case-by-case basis by the IRS, as are all companies involved in risk-shifting or risk-distribution. Letter of Donald C. Lubick, Asst. Sec’y, Tax Policy, Department of the Treasury, Dec. 6, 1979, H. Rept. 96-791, pp. 43-44.

<sup>976</sup> Letter of Victor E. Schwartz, Chairman of the Task Force on Product Liability and Accident Compensation, to James H. Scheuer, Chairman, Subcommittee on Consumer Protection and Finance, House Committee on Interstate and Foreign Commerce, Nov. 20, 1979, H. Rept. 96-791, pp. 41-42. As

Critics of the bill in the House made several objections. First, they argued the bill was an unwarranted intrusion into a matter theretofore the province of the states. This was an objection based upon federalist principles. They were certainly correct that insurance regulation had been a matter for the states. However, in 1944 the U.S. Supreme Court held that insurance regulation was a matter of interstate commerce and could be regulated by the federal government.<sup>977</sup> Second, the critics argued that the federal government was simply “too large” and this bill was yet another enlargement of government. Third, insurance pricing mechanisms were available at the state level. Regarding this last point, the critics cited the unique examples of Colorado and Tennessee and their “risk financing options” laws. The critics assumed the state level efforts would work in reducing premiums. Yet, at this stage it was simply too early to tell how effective the state programs were going to be. Critics claimed the federal bill would be merely duplicative. Colorado was an unusual at the time for encouraging captive insurance companies in the state. However, under most states’ corporation laws and insurance laws, captives from one state would need to be licensed or registered to do business in other states. This would often entail capitalization and other regulatory requirements be met in each state in which the captive did business. This was exactly the problem the federal approach sought to eliminate. Fourth, the critics charged that the risk retention groups were essentially the same as state-level reciprocals, which are groups formed under state law to distribute the costs of risks. The key difference, of course, was

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Schwartz noted, “composition of a [risk retention] group’s membership [was to be] left to the market-place.” Ibid.

<sup>977</sup> *United States v. South-Eastern Underwriters Association*, 322 U.S. 533 (1944). In 1945, the McCarran-Ferguson Act (15 U.S.C.A. § 1011 et seq.) was passed, which provided that the states could regulate insurance. However, the law did not prevent future federal regulation of insurance.

that the federal bill proposed allowing these entities to operate across state lines. Finally, the critics argued the “Commerce Department’s lack of expertise in insurance” was cause for concern that insolvency, fraud, and mismanagement of the risk retention groups would be likely under the proposal.<sup>978</sup> This argument could have worked against the critics, since the Commerce Department would simply have reason to hire insurance industry experts to staff the administrative functions.

Although the critics were conservatives who were primarily objecting on the federalist principle of subsidiarization, they also based their objections on the assumption that the duplicate state efforts were going to be effective. Their objections were lodged at a time when it was too soon to tell whether the state risk sharing efforts would work. Data from later, suggests that the interstate nature of products marketing and production would require an interstate solution for an industry to reduce premiums by sharing risk through self-insurance. Also, premiums increased again the mid-1980s through the U.S., indicating that state-level efforts (and, as we shall see, the federal law) were ineffective.

The Senate Committee on Commerce, Science, and Transportation reported favorably on the 1980 bill, notwithstanding that it was eventually defeated in the full Senate. Surprisingly, although the Senate committee members agreed that the objectives of the bill were the same as those contemplated by the House, they expressly conceded “the product liability market has stabilized and that [insurance] availability is no longer a problem.”<sup>979</sup> By 1980, the net annual increases in liability insurance premiums were no

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<sup>978</sup> Dissenting Views of Representatives James M. Collins (R-Tex.), Carlos John Morehead (R-Calif.), and William E. Dannemeyer (R-Calif.), H. Rept. 96-791, pp. 46-49.

<sup>979</sup> Senate Reports, 96<sup>th</sup> Congress, 2<sup>nd</sup> Session, Vol. 12 Miscellaneous Reports, Report No. 96-984 from the Committee on Commerce, Science, and Transportation (1980) (hereinafter S. Rept. 96-984), pp. 1-2. The same admission was made in the same committee’s report in 1981 in support of the successful bill, S.1096, Product Liability Risk Retention Act of 1981. S. Rept. 97-172, p. 2.

longer considered as “outrageous” as in the 1975-77 period.<sup>980</sup> Nevertheless, since manufacturers “continue[d] to believe” that insurance costs were too high, the committee recommended passage of the bill. The committee members blamed the state courts for creating an uncertainty of risk for underwriters at commercial insurance carriers.<sup>981</sup> It was hoped that the risk retention groups would increase competition amongst insurance carriers seeking the business of manufacturers. Additionally, the Senate version of the 1980 bill contained one major change: the Senate refused to create “any new Federal bureaucracy.” The Senate sponsors saw the problem as the difficulty of forming captive insurance companies that could work across state lines, not the inability to charter and regulate such captives companies in the first place. Thus, no federal oversight agency was needed. Only a federal abrogation of states’ prohibitions on out-of-state groups providing insurance in the state was deemed necessary. Instead of a federal chartering entity, the risk retention groups would simply obtain charters from state governments.<sup>982</sup> Any regulation of such groups would be left up to the states.<sup>983</sup> This caveat, however, portended its own problems. The states could regulate in fashions that would recreate the onerous conditions the original federal bill sought to avoid.

It is important to note that insurance rate regulation, an approach often supported by Congress and interest groups seeking federal intervention on their behalf, was rejected by Congress because members thought that industry-wide loss histories would be

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<sup>980</sup> Congressional Record – House, Remarks of Doug Bereuter (R-NE), Vol. 126, Pt. 4, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Mar. 10, 1980, p. 5065.

<sup>981</sup> S. Rept. 96-984, pp. 1-2.

<sup>982</sup> S. Rept. 96-984, p. 3.

<sup>983</sup> S. Rept. 96-984, p. 10.

insufficient in allowing accurate rate-setting by regulators. The loss histories were insufficient because past losses would not predict future losses under the new strict liability system, which would presumably be higher. Small firm manufacturers of the kind that complained to Congress in the first place, were not able to use past loss experience as a guide to future risk because of their smaller consumer base. Also, insurers sought to avoid the administrative costs of rating individual small firms based on experience.<sup>984</sup> Also, states lacked resources to monitor rates and, most importantly, rate regulation would fail to target what congressmen thought was the chief cause of increased rates: “the underlying [states’] tort law.”<sup>985</sup> Thus, critics of the 1980 Risk Retention bill’s approach saw the proposal as, at best, only an attempt to resolve one symptom of a larger disease – the states’ tort laws. The congressmen were correct to fear that loss histories were insufficient for future ratings, since the loss histories then existing were not predictive of the kinds of cases that might be filed against manufacturers under strict liability standards. As one scholar has described it, underwriting is akin to driving down a highway while looking in the rearview mirror for guidance. That is, insurers need to estimate future losses and costs associated with them. Past histories only illustrate the possibility of what the future may hold.<sup>986</sup> However, a tort system of seemingly continually expanding liability cannot rely chiefly upon loss histories.

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<sup>984</sup> Stephen D. Sugarman, “Doing Away With Tort Law,” *Cal. L. Rev.*, Vol. 73, No. 3 (May, 1985), p. 555, 576.

<sup>985</sup> S. Rept. 96-984, p. 3 n.1.

<sup>986</sup> Levine, *supra* n. 951, p. 134.

In order to understand the ultimate failure of the 1980 bill, we must understand the anti-regulatory context of the late 1970s and early 1980s. Congressmen who opposed the 1980 Risk Retention bill's proposed regulatory agency often referred to the "spirit of deregulation" that existed throughout the federal government in 1980. The 1970s began with an intense pro-regulatory disposition of many on the American political left. Corporations were seen as a threat to the consuming public. Government, especially the federal government, was seen as the solution. The most famous consumer protection advocate of the 1960s and 1970s, Ralph Nader, argued that corporate governance observers should be installed on corporate boards. The theme of such proposals was: "Big business must be controlled; the consumer must be protected."<sup>987</sup> This echoed the business reform efforts of Progressives from the early decades of the twentieth century. The 1970s saw the sharpest increase in the creation of the regulatory state in American history. "Between 1970 and 1979, twenty new regulatory agencies" were created at the federal level. By comparison, only eleven new agencies were created during the New Deal.<sup>988</sup>

However, notwithstanding the additional federal regulatory apparatuses, critics with various political orientations united against regulatory expansion and, in some cases, in favor of the reduction of regulatory oversight. It is, of course, well known that the late 1970s saw an interest on the part of some scholars, consumers, and federal and state officials in deregulation. Throughout the 1970s and 1980s there was a steady flow of

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<sup>987</sup> George Charles Roche, III, *The Bewildered Society* (New Rochelle, NY: Arlington House, 1972), p. 255.

<sup>988</sup> Douglas Caddy, *Legislative Trends in Insurance Regulation* (College Station: Texas A&M Univ. Press, 1986), p. 6.

books that questioned the efficacy of the regulatory state, regardless of the activity or industry regulated, and argued for its reduction or elimination. Titles like *The Bewildered Society* (1972), *The End of Liberalism* (1969, 1978), and *Instead of Regulation* (1982) all trumpeted the virtues of a reduction in the federal regulatory state and a return to some degree of producer competition. The chief criticisms of regulation were: (1) the quelling of price competition in regulated industries; (2) the inability of potential “new competitors to enter the marketplace”<sup>989</sup>; (3) the inclination of many government regulatory agencies to become advocates for the interests they were charged with regulating<sup>990</sup>; and (4) the increased costs that regulatory compliance and the lack of competitors produced for manufacturers and, ultimately, consumers.<sup>991</sup> Such problems had been noted since the earliest days of federal regulatory agencies. For example, the Interstate Commerce Commission (ICC), which was established in 1887, was charged with regulating the hauling rates charged by railroads and, later in the twentieth century, by trucking companies. The ICC was criticized for establishing artificially high rail freight rates for railroads and erecting barriers to price competition by limiting the certificates it issued for interstate trucking.<sup>992</sup> Another example – with which consumers of the 1970s were well acquainted – was the Civilian Aeronautics Board’s (CAB) regulation of routes, licenses, and prices for private passenger airlines. Scholars

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<sup>989</sup> Roche, *The Bewildered Society*; Caddy, *Legislative Trends in Insurance Regulation*, p. 5.

<sup>990</sup> Robert W. Poole, Jr., ed., *Instead of Regulation: Alternatives to Federal Regulatory Agencies* (Lexington, MA: Lexington Books, 1982), pp. vii, 201.

<sup>991</sup> Caddy, *Legislative Trends in Insurance Regulation*, p. 6.

<sup>992</sup> Thomas Gale Moore, “The Beneficiaries of Trucking Regulation,” *Journal of Law and Economics*, Vol. 21 (1978), p. 328.



criticized entities like the CAB for all of the consequences listed above<sup>993</sup>; and citizens were very attentive to such criticisms in light of the increased oil and gas prices throughout the 1970s. Another favorite target was the Federal Communications Commission, which created monopolies for communications companies through limited licensures.<sup>994</sup>

By the end of the 1970s the regulatory state had some vocal critics and appeared increasingly unpopular. As criticisms of regulatory entities by scholars increased, popular news entities started to lend editorial support to a questioning of the regulatory state. For example, as early as 1975 the *Washington Post* editorialized against the ICC, describing it as “an agency that has outlived its useful life by several decades.” Similarly, in 1982 the *Wall Street Journal* editorial page criticized the Federal Trade Commission for its zealous investigation of businesses’ advertising practices. Also, in 1983 *Business Week* “concluded that the economic benefits of deregulation outweighed any costs.”<sup>995</sup> Thus, the popular media had started to support the argument that the federal regulatory state had overreached and they urged the reduction or elimination of some regulatory powers and functions.

The federal courts also responded to issues regarding agency governance. For example, the courts required agencies to be consistent in the reasons given for particular policies and retain such consistency over time. Also, the courts required agency

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<sup>993</sup> Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States*, 2d ed. (New York: W.W. Norton, 1979), pp. 280-81.

<sup>994</sup> Roche, *The Bewildered Society*, p. 200.

<sup>995</sup> Caddy, *Legislative Trends in Insurance Regulation*, p. 13 (quoting a *Wall Street Journal* editorial of May 12, 1982, p. 26); pp. 18, 20 (quoting *Washington Post* editorial of Feb. 10, 1975, p. A-20; also citing “Deregulating America,” *Business Week*, Nov. 28, 1983, p. 80).

rulemaking processes to be more inclusive of the views of citizens.<sup>996</sup> The courts' disposition of favoring citizen interests in the 1970s in opposition to some aspects of federal agencies' procedures shows how much the federal government relied upon regulatory agencies as implementing entities of government policies and how skeptical even the courts were of the regulatory state's democratic functions.

Additionally, the 1970s saw politicians at the federal level respond to constituents' complaints about the functioning of the regulatory state. Some of the initial concerns with the regulatory state were a recrudescence of the Progressive Era's battles for clean government. At the federal level after World War II, one of the earliest campaigns for a more efficacious and activist government was in the area of military spending, particularly Defense Department contracting. Senator William Proxmire (D-WI) made his legislative reputation by investigating the wasteful expenditure of federal funds on government contracts. Such practices were a legacy of the relationships formed between the federal government and corporations during World War II. As chairman of the House-Senate Subcommittee on Economy in Government, Proxmire investigated wasteful spending by the U.S. Defense Department.<sup>997</sup> In 1975, Proxmire established the Golden Fleece Award to highlight federal agencies that wasted taxpayer dollars and engaged in "pork barrel" political arrangements. He was a fiscally moderate Democrat who sought to eliminate waste and fraud in the federal government. He advocated that the President "abolish at least one major department or agency *every year*, and one minor department *every month*." His initial candidates for elimination were the Small Business

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<sup>996</sup> James Willard Hurst, "The Functions of Courts in the United States, 1950-1980," 15 *Law & Society Rev.* No. 3-4 (1980-81), p. 468.

<sup>997</sup> Roche, *The Bewildered Society*, p. 199.

Administration (a major agency) and the National Center for Health Services (a minor department).<sup>998</sup> Proxmire's efforts harkened back to the Progressives' concerns about clean government. As some liberals of the 1970s saw it, the problem was not the size of the federal government but whether its expansive functions were conducted without graft or bribery, and whether it performed its tasks efficiently.

Although highly visible because of his books on government waste and his advocacy of reduction in federal administrative entities, Proxmire was not unusual among those on the political left who sought a better, more effective activist state in the 1960s and 1970s. A case in point is Theodore Lowi and the two editions of his book *The End of Liberalism*. When originally published in 1969, Lowi referred to a "crisis of public authority," whereby he meant the diminishment of the rule of law at the federal and state level due to the broad delegations of authority from Congress to other actors in the political system. Lowi's was a critique of the modern liberal state, especially its pluralist politics. In the latter half of the 1960s the federal government had embarked upon the Great Society programs aimed at supporting the civil rights of African-Americans, the medical care of seniors and the poor, and jobs and welfare programs aimed at uplifting the poor out of poverty. Lowi argued that the pluralism of the post-New Deal era had produced a state that favored some groups over others in the competition for the state's resources. Lowi was not a conservative, arguing for a reduction in the role of the state *per se* (after all, he had previously co-authored a book with Robert F. Kennedy<sup>999</sup>).

Rather Lowi was a liberal arguing for a return to "rule of law", by which he meant a

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<sup>998</sup> William Proxmire, *The Fleecing of America* (Boston: Houghton Mifflin, 1980), pp. 208-12 (emphasis in original).

<sup>999</sup> Robert F. Kennedy, Theodore J. Lowi (ed.), *The Pursuit of Justice* (New York: Harper & Row, 1964).

reduction in the pluralism that preferred one interest group over another. Lowi wanted an active state, but one that was disinterested in the allocation of state resources.<sup>1000</sup> It is very doubtful that an active state is capable of being disinterested, no matter who is at the helm, because the active state is one that allocates resources and all kinds of interests would be affected by it, thereby encouraging the shaping of the state by those affected interests.

In 1978, Theodore Lowi published a second, updated and revised edition of *The End of Liberalism*. This edition was published after the experiences of the new regulatory agencies created during the Nixon administration. Lowi no longer appeared to be a liberal who merely wanted a disinterested and more effective federal government. He now sought a reduction in, or elimination of, some of the regulatory functions of government in order to return to a formalist approach to federal legislation. That is, Lowi thought the regulatory state was beyond the scope of democratic governance. For example, Lowi lamented the regulatory capture effect, whereby private interests, which are supposed to be regulated by an agency, are actually able to persuade the agency to work with and for the private interests being regulated. Thus, Lowi argued the regulatory state had made the federal government enter “a state of permanent receivership,” which was a government that had abdicated its authority and autonomy to organized

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<sup>1000</sup> Theodore J. Lowi, *The End of Liberalism: Ideology, Policy, and the Crisis of Public Authority* (New York: W.W. Norton, 1969). An argument similar to Lowi’s was made by sociologist Daniel Bell, who in the early 1970s noted the politicization of business decisions and the burgeoning regulatory state. However, notwithstanding Bell’s anticipation of the preponderance of governmental (especially regulatory) power over industrial decisions, the regulatory state had immediate critics that pointed out its weaknesses, perhaps the chief of which was the failure of government to achieve its regulatory aims. Daniel Bell, *The Coming of Post-Industrial Society: A Venture in Social Forecasting* (New York: Basic Books, 1973, 1999 ed.).

interests.<sup>1001</sup> Therefore, the solution Lowi proposed was the return to the rule of law. That is, he urged a return to congressional governance, not governance by an unelected regulatory bureaucracy working in veritable isolation, secure from the voting public's scrutiny. Lowi's solution did not aim for the reduction of government *per se*, but anticipated that a reduction in the expansive activity of the federal government was necessitated in order to eradicate the evils of post-New Deal pluralism. Lowi's vision would necessitate the abolition of many regulatory agencies and a return to congressional regulatory oversight, or simply the withdrawal of government oversight over certain areas of the society altogether.

It is doubtful whether the general public fully shared Lowi's concerns about statism. In the 1970s, there was ambivalence among the general public regarding confidence in government and whether there should be an active federal government. For example, a Gallup poll in 1972 determined that 70 percent of Americans had fair to high degree of "trust and confidence" in the federal government's ability to "handle" domestic problems. By 1976, that cohort was reduced to 49 percent.<sup>1002</sup> Notwithstanding such pessimism about the integrity and abilities of government (or those within it), many in the public still wanted an active government. In 1976, a CBS News/New York Times poll found 45 percent of respondents wanted bigger government, while only 42 percent

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<sup>1001</sup> Theodore J. Lowi, *The End of Liberalism: The Second Republic of the United States*, 2d ed. (New York: W.W. Norton, 1979), p. 280.

<sup>1002</sup> "Trust in Government," Gallup (for polls from May 1972 and June 1976), <http://www.gallup.com/poll/5392/Trust-Government.aspx>.

wanted smaller government.<sup>1003</sup> Also, during the 1970s people continued to place a great deal of faith in the American courts.<sup>1004</sup>

The scholars' criticisms of how the federal government functioned during the 1970s were part of a backlash against an expansive federal government, but it was not restricted to conservatives who had always opposed the expansion of the federal government. It was born out of the experience of how the post-New Deal federal government – namely in the form of regulatory agencies – actually functioned and liberals, neo-conservatives, and conservatives alike voiced concerns about the inefficiencies, unintended consequences, and deleterious effects of government-by-agency. The theme of deregulation was begun during the Ford administration and continued through the Carter and Reagan administrations, the last of which is most closely associated with deregulation in popular memory. Scholars such as Lizabeth Cohen have argued that the deregulatory arguments of the Carter and Reagan administrations, both of which framed their deregulatory and privatization plans in terms of benefiting consumers, were only framed as such in order to “co-opt” the interest groups that consumers had formed by the late 1970s.<sup>1005</sup> However, it is more likely that the executive branch proponents of such plans really believed that reducing regulatory burdens on private manufacturers and distributors would ultimately benefit consumers, which as a practical matter included all Americans. In 1983, Senator Warren Rudman

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<sup>1003</sup> CBS News/New York Times poll, (Nov. 1976), [http://www.ropercenter.uconn.edu/cgi-bin/hsrun.exe/Roperweb/pom/StateId/DODIXA-Oxw1Brs21bwbIxnoEZZyRo-3ENy/HAHTpage/Summary\\_Link?qstn\\_id=385426](http://www.ropercenter.uconn.edu/cgi-bin/hsrun.exe/Roperweb/pom/StateId/DODIXA-Oxw1Brs21bwbIxnoEZZyRo-3ENy/HAHTpage/Summary_Link?qstn_id=385426).

<sup>1004</sup> James Willard Hurst, “The Functions of Courts in the United States, 1950-1980,” 15 *Law & Society Rev.* No. 3-4 (1980-81), p. 402.

<sup>1005</sup> Lizabeth Cohen, *A Consumers' Republic: The Politics of Mass Consumption in Postwar America* (New York: Knopf, 2003), pp. 391-94.

(R-NH) noted that legislators were “becoming more sensitive to consumer issues because they realize there is a constituency there that is not just the ‘consumer activist’ groups.”<sup>1006</sup> Perhaps it is a testament to the success of consumer activist groups’ efforts to “raise awareness” of consumer protection issues that consumers *per se* were seen as a constituency by the early 1980s.

As we have already seen in the congressional debates and testimony concerning the original 1977 push to federalize tort law, “consumers” as an abstract group were not the only – or perhaps even the main – constituency on congressmen’s minds in relation to products liability. It is important to recall that the initial push to federalize tort law was made by capital goods manufacturers, which were mostly small corporations across America. These corporations were the main complainants regarding the emergent products liability system and the proposals eventually made in the early 1980s undoubtedly were crafted with this particular constituency in mind. Thus, the unwillingness to burden manufacturers with a new regulatory agency was no doubt the product of multiple factors: the increasingly popular perception of a failed regulatory state and the pluralistic power of manufacturers and, to a lesser degree, consumers.

### ***Federalism Concerns***

In addition to the question of the imposition of new regulatory burdens on the private sector, the issue of federalism was prominent in the House debate on this bill. One aspect of federalism is the ability of states to act without federal burdens. Not only do states desire sovereignty in substantive lawmaking, but they also strive to remain free

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<sup>1006</sup> Caddy, *Legislative Trends in Insurance Regulation*, p. 22.

of federal control and burdens. James Collins (R-TX) argued against the 1980 bill, which included the federal administrative provisions, predicting that federal funds would eventually be spent. He predicted that the risk retention groups would lack the ability to cover what Collins thought would be excessively high jury verdicts. Thereafter, the federal government would feel compelled to guarantee the risk retention groups. He likened the case to the ERISA and the pension obligations of Chrysler Motor Corporation from 1979.<sup>1007</sup> However, Rep. Thomas Luken (D-OH) argued that the insurance reforms and federal oversight were avoiding the problem of federal interference with state laws on tort reform *per se*. Ostensibly, Luken was concerned with interfering with the traditional state functions of legislating in the area of tort law. He wanted to limit federal intervention to the area of insurance law, which was (and remains) allowed under the McCarran-Ferguson Act, which is a federal law passed to expressly confirm that, notwithstanding federal commerce clause power to regulate insurance, the federal government will allow the states to regulate the insurance business.<sup>1008</sup> This federal law was premised on commerce clause powers and the construal of insurance as a matter of interstate commerce.<sup>1009</sup> It seems that most House members agreed with Matthew Rinaldo (R-NJ), who noted the bill's requirement that insurers fund the measure through user fees, thereby obviating the need for federal tax funds to be used.<sup>1010</sup> However, the

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<sup>1007</sup> Congressional Record – House, Remarks of Rep. James Collins, Vol. 126, Pt. 4, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Mar. 10, 1980, pp. 5061-62.

<sup>1008</sup> 15 U.S.C. 1011 (1945); Harding de C. Williams, *Federal Banking Law and Regulations: A Handbook for Lawyers* (Chicago: ABA, 2006), pp. 150-51.

<sup>1009</sup> *U.S. v. South-Eastern Underwriters*, 322 U.S. 533, 539 (1944).

<sup>1010</sup> Congressional Record – House, Remarks of Matthew Rinaldo, Vol. 126, Pt. 4, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Mar. 10, 1980, p. 5066.



eventual failure to enact the 1980 bill was the product of multiple factors, including: resistance to user fees, the ability and expectation that the Secretary of Commerce would periodically audit the risk retention groups (and the groups would be responsible for paying for such audits), the fact the groups would be subject to antitrust laws and pay state premium taxes, and the Commerce Department's regulation of the way claims were settled under the program.<sup>1011</sup> These were seen as nettlesome federal controls, which impinged upon states' sovereignty regarding insurance regulation.

Supporters of the bill argued that federalist-oriented objections had been outweighed by "the immediate need for such legislation capable of crossing State boundaries to protect business and consumer alike." Thomas J. Corcoran (R-IL) claimed he had been "[l]ong a proponent of States rights," but the extent of the threat posed by products liability insurance rates to "business and consumer alike" overcame his concerns about federalism and state sovereignty.<sup>1012</sup> Doug Bereuter (R-NE) argued that the bill was not contrary to federalism because the bill's exemptions from state insurance laws were "narrowly drawn ... in order to protect State regulatory authority while allowing the implementation a Federal solution to this essentially multi-State insurance problem."<sup>1013</sup> That is, the proposed federal changes to insurance law were warranted by the national, interstate nature of the problem of liability premium increases.

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<sup>1011</sup> H. Rept. 96-791, pp. 12, 15, and 26. The Congressional Budget Office estimated that the fees would offset the initial net costs. Letter of James Blum, CBO, Feb. 29, 1980, cited in H. Rept. 96-791, p. 36.

<sup>1012</sup> Congressional Record – House, Remarks of Thomas J. Corcoran, Vol. 126, Pt. 4, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Mar. 10, 1980, p. 5064.

<sup>1013</sup> Congressional Record – House, Remarks of Doug Bereuter (R-NE), Vol. 126, Pt. 4, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Mar. 10, 1980, p. 5065.

Although it may seem like Representative Bereuter was trying to reconcile his desire for legislation with his federalist convictions, his argument harkens back to the traditional arguments for federal actions – an interstate problem requires national legislative solutions, but state prerogatives can be respected and perhaps accommodated. Again, however, the risk retention groups were seen as “short-term relief [for] the business community.” The bill contained a conditional four-year sunset provision.<sup>1014</sup> Other, unspecified long-term measures were needed to address the “underlying causes of the product liability insurance problem.”<sup>1015</sup> Nevertheless, there were those who thought the 1980 bill did not go far enough. Thomas Luken (D-OH) claimed that “only a comprehensive tort reform bill” would “eliminate the unnecessary and expensive” product liability lawsuits that he identified as the chief cause of high insurance rates.<sup>1016</sup>

Notwithstanding the federalism concerns of some in the House, the 1980 bill overwhelmingly passed the House by a vote of 332-17.<sup>1017</sup> However, in the Senate the bill languished after being considered by a committee.<sup>1018</sup> The main reasons for the

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<sup>1014</sup> Product Liability Risk Retention Act of 1980, § 304(b). This sunset provision would only go into effect if, four years after the implementation of the law, “there exist[ed] no approved risk retention group.” Congressional Record – House; text of bill, p. 5071. Such group would have been approved by the Commerce Department.

<sup>1015</sup> Congressional Record – House, Remarks of Doug Bereuter (R-NE), Vol. 126, Pt. 4, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Mar. 10, 1980, p. 5066.

<sup>1016</sup> Congressional Record – House, Remarks of Thomas Luken (D-OH), Vol. 126, Pt. 4, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Mar. 10, 1980, p. 5067.

<sup>1017</sup> Roll call vote No. 127, H.R. 6152 (1980), titled The Product Liability Risk Retention Act of 1980. Congressional Record – House, Vol. 126, Pt. 4, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Mar. 10, 1980, pp. 5068-5072. The House Committee on Rules, “by a nonrecord vote”, reported the resolution favorably, but without commentary in the House Report. House Reports, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Vol. 2 Misc. Reports, Report No. 96-797, by Rep. Anthony C. Beilenson (D-CA) from the House Committee on Rules.

<sup>1018</sup> After passing the House, H.R. 6152 was reported to the Senate Committee on Science, Commerce and Transportation (S. Rept. 96-984), which later reported it to the Senate on Sept. 23, 1980. This was the last action taken on the bill in the Senate.

failure of the 1980 bill in the Senate were the opposition of the insurance industry, including the larger of the industry's trade associations – the American Insurance Association, the Alliance of American Insurers, and the National Association of Independent Insurers – and the absence of broad-based public support for the legislation. The insurance groups opposed the bill because they feared the law would give the new risk retention groups a “competitive advantage” over existing onshore insurers.<sup>1019</sup> The lack of broad public support for a federal takeover of the tort insurance industry or the creation of a new federal bureaucracy also made it easier for the Senate to maintain the status quo.

### ***The First Federal Tort Reform Law***

The failure of the Congress to pass the 1980 bill was followed in 1981 with the reintroduction and revision of the Product Liability Risk Retention Act of 1981. This bill was eventually enacted into law. In the House, the original sponsor was James Florio, then a Democratic congressman from the First District of New Jersey.<sup>1020</sup> The Senate version was originally co-sponsored by Senators Robert W. Kasten, Jr. (R-WI) and Bob Packwood (R-OR).<sup>1021</sup> The bill had been recommended by the Department of Commerce under the Carter administration, and was now supported by the Department under new

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<sup>1019</sup> Larry Kramer, “Administration to Support Bill to Allow Product Liability Pool; Administration Backs Interstate Liability Pool,” *Washington Post*, Aug. 17, 1979, Business and Finance section, p. F1.

<sup>1020</sup> Congressional Record – House, Vol. 127, Pt. 3, 97<sup>th</sup> Cong., 1<sup>st</sup> Sess., Feb. 25, 1981, p. 3085, regarding H.R. 2120. From the Cmte. on Energy and Commerce. Other co-sponsors were Norman Lent (R-NY), Marc Marks (R-PA), Thomas Luken (D-OH), and Joel Pritchard (R-WA). Congressional Record – House, Vol. 127, Pt. 12, 97<sup>th</sup> Cong., 1<sup>st</sup> Sess., July 16, 1981, p. 16087. The original Senate bill was S.1096, but the Senate passed the House's companion measure, H. Res. 2120, in lieu of the Senate bill by a voice vote on Sept. 11, 1981. The Senate bill was introduced by Sen. Robert W. Kasten, Jr., and had 16 co-sponsors.

<sup>1021</sup> Congressional Record – Senate, Remarks of Sen. Kasten, Vol. 127, Pt. 15, 97<sup>th</sup> Cong., 1<sup>st</sup> Sess., Sept. 11, 1981, p. 20357. Senator Howard Cannon (D-NV) had sponsored a similar version, S. 69.

Reagan administration appointees.<sup>1022</sup> The House and Senate passed it on voice votes in September 1981.<sup>1023</sup>

The Risk Retention Act of 1981 was passed because of its changes from the failed bill from 1980. The 1981 bill provided for *only* insurance purchasing reform and the new Reagan administration supported it, at least in part, because it did not have a “Federal regulatory role.” Unlike its predecessors, the new bill did not create any new federal administrative agency or require the expenditure of federal funds. Manufacturers, distributors, and retailers were to be allowed to form self-insurance cooperatives (“risk retention groups”) and purchase insurance on a group basis. It was thought that the chief beneficiaries of the new bill would be manufacturers who were caught in the purported “crisis” of “unaffordable or unavailable” product liability insurance. It was hoped the risk pools (or cooperatives) would allow for lower premiums, which would reflect the degree of actual risk and would not be impacted by the “present inflationary trends” of the early 1980s. The program was modeled on similar state-level programs for professional malpractice insurance for doctors and lawyers.<sup>1024</sup> The new bill would allow for insurance companies that issued product liability coverage chartered in any

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<sup>1022</sup> Department of Commerce, Office of the Secretary, “Options Paper on Product Liability and Accident Compensation Issues,” 43 Fed. Reg. 14612, 14625 (April 6, 1978).

<sup>1023</sup> Congressional Record – Senate, Vol. 127, Pt. 15, 97<sup>th</sup> Cong., 1<sup>st</sup> Sess., Sept. 11, 1981, pp. 20358-59. It became Public Law 97-45, 95 Stat. 949 on Sept. 25, 1981.

<sup>1024</sup> Congressional Record – House, Remarks of Rep. Florio, Vol. 127, Pt. 13, 97<sup>th</sup> Cong., 1<sup>st</sup> Sess., July 28, 1981, pp. 17707-08. Rep. Florio specifically mentioned manufacturers of gym and medical equipment.

state to conduct business in any other state, thereby avoiding state laws on capitalization and state chartering restrictions.<sup>1025</sup>

The debates over the Risk Retention Act suggested that the protection of the consumer did not necessarily entail an active regulatory state. It was the widespread perception of a failed regulatory state of the late 1970s that allowed for consideration of an alternative initial approach by the federal government to constituent complaints about high product liability insurance prices. The Risk Retention Act would not have a new federal oversight function. Rather it would simply seek to eliminate existing state barriers to interstate self-funded insurance groups. This form of intervention was more in line with federalism than the comprehensive reforms proposed a few years earlier and even the 1980 version of the Risk Retention Act. Rather than a federalization of state law or an expansion of the federal government through creation of a new bureaucratic entity, the Act simply reduced, or eliminated, state barriers to a matter of interstate commercial activity.

The success of the 1981 bill was no doubt due to the fact that it would be administered by the states with little federal oversight. Again, the purpose of the 1981 bill was to allow private insurers to pool funds to purchase product liability insurance free of state regulatory hurdles, thereby hopefully lowering the costs of insurance, which were seen as one of the main problems resulting from the switch to strict liability by state courts. The federal chartering provision and the proposed Commerce Department sub-

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<sup>1025</sup> Congressional Record – Senate, Text of Act, § 2(a)(4); remarks of Sen. Kasten, Vol. 127, Pt. 15, 97<sup>th</sup> Cong., 1<sup>st</sup> Sess., pp. 20356-57. Groups formed in Bermuda and the Cayman Islands also qualified as long as they were chartered in those jurisdictions before 1985. Text of Act, §2(a)(4)(C).

agency were absent from the 1981 bill, thereby preserving the states' role as the public entities that charter private corporations. Importantly, the 1981 bill did not require any federal expenditure or private participant fees, since there was no federal oversight or administrative role.<sup>1026</sup> However, the Securities and Exchange Commission did retain jurisdiction to enforce antifraud statutes.<sup>1027</sup> It was relatively easy for the Reagan administration to support this federalization of torts measure because the bill did not affect an expansion of the federal governmental bureaucracy. At the same time, it sought to create incentives for private insurance carriers to reduce premiums through competition for the new risk retentions groups' business.

The House and Senate committees reported favorably on the 1981 bill. The Report of the House Committee on Energy and Commerce repeated the reasons for supporting the earlier 1980 version of the bill: reduced insurance costs through price competition among risk retention groups and existing insurance companies; protection of consumers through "prompt payment of legally valid claims"; and the reduction of the "outflow of capital and premiums" to offshore captive insurance companies.<sup>1028</sup> The "offshore" component meant a company that was incorporated outside of U.S. jurisdiction, usually somewhere like Bermuda or the Cayman Islands, which were preferred for their low regulatory oversight and very low capitalization requirements.

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<sup>1026</sup> Congressional Record – Senate, Remarks of Sen. Kasten, Vol. 127, Pt. 15, 97<sup>th</sup> Cong., 1<sup>st</sup> Sess., Sept. 11, 1981, p. 20357.

<sup>1027</sup> Product Liability Risk Retention Act of 1981, §5(a)(1) & (2) (reproduced in H. Rept. 97-190), p. 4; S. Rept. 97-172, p. 6.

<sup>1028</sup> House Reports, 97<sup>th</sup> Cong., 1<sup>st</sup> Sess., Report No. 97-190 of the Committee on Energy and Commerce (1981) (hereinafter H. Rept. 97-190), p. 4.

Again, a “captive insurance company” is a subsidiary company created by a parent manufacturer to provide a form of self-insurance for the manufacturer.

By the time the new 1981 bill was proposed a couple more states had tried to encourage corporations to create captives. As previously noted, when the 1980 bill was being debated, critics claimed the bill was unnecessary because, among other reasons, the states (Colorado and Tennessee) were beginning taking the initiative to encourage “risk financing.”<sup>1029</sup> By the time of the 1981 bill’s consideration, Virginia and Vermont also had passed laws encouraging the formation of captives. However, the states’ capitalization requirements were higher than offshore requirements, namely those found in Bermuda and the Cayman Islands.<sup>1030</sup> One aim of the 1981 bill was to reduce the flow of capital to foreign locales. Congress sought to create incentives for formation of captives onshore (in the U.S.), but allowed risk retention groups formed by U.S. companies in Bermuda and the Cayman Islands before January 1, 1985 to continue to exist. If enacted, companies would have over three years to form offshore captives. The outward flow of capital was a particular concern of Senators Goldwater (R-AZ), Howell Heflin (D-AL), and J. James Exon (D-NE), who argued that the 1981 bill was weakened by the fact that it allowed offshore captives to continue to be chartered offshore until 1985 and to continue to exist after that date. The senators wanted the bill to contain a “sunset” provision on the offshore captives because they thought the drain of capital

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<sup>1029</sup> H. Rept. 96-791, pp. 46-49 (dissenting views).

<sup>1030</sup> H. Rept. 97-190, p. 5.

problem would persist. Also, the offshore companies would not be subject to state regulation.<sup>1031</sup>

The fact that only four states had sought to encourage the spreading of risk for products manufacturers was probably discouraging to both sides in the debate. Those who supported federal intervention could point to the fact that the states were not taking any lead in policy formation to respond to the “crisis” in insurance rates. Opponents of federal legislation lacked any hopeful example for interstate cooperation regarding insurance affordability. Additionally, the attraction of offshore captives was obvious: few captives had formed within the states that sought to encourage them, while offshore captives were frequently forming. The attraction of a low-regulation, low-capitalization environment for risk distributing captives was simply too great. As the House report noted, “Federal action is necessary because experience has been shown [*sic*] that individual state legislation cannot facilitate the formation of self-insurance groups.”<sup>1032</sup> This was no doubt due to the interstate nature of the product manufacturing and distribution process. Offshore companies have been attractive to U.S. companies because firms receive a “tax credit for taxes paid to foreign governments.”<sup>1033</sup> Combined with the low capital requirements of Atlantic and Caribbean island nations, the tax advantages made offshore captives attractive to American companies.<sup>1034</sup>

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<sup>1031</sup> S. Rept. 97-172, pp. 20-21.

<sup>1032</sup> H. Rept. 97-190, p. 6.

<sup>1033</sup> Kimberly A. Clausing, “The Role of U.S. Tax Policy in Offshoring,” *Brookings Trade Forum*, Vol. 2005 (2005), p. 457, 458.

<sup>1034</sup> Offshore captives enjoyed tax deferral or tax avoidance until the federal tax reform laws of 1986.



The biggest difference between the new bill and its predecessor was the absence of a federal agency, which meant there was “no continuing federal presence” in the 1981 bill.<sup>1035</sup> This agency provision appears to have been a significant reason for the failure of the 1980 bill in the Senate. The Senate Commerce Committee, in considering the earlier 1980 bill, recommended omitting the federal chartering agency.<sup>1036</sup> Under the new bill, since no federal charter was required, the only charter needed for a risk retention group would be issued by a state, or Bermuda, or the Cayman Islands.<sup>1037</sup>

The 1981 bill was the product of political pluralism: the “business and insurance groups have resolved almost all of the remaining differences between them.”<sup>1038</sup> The supporters were diverse: manufacturer associations, including the National Association of Manufacturers, the National Association of Wholesaler-Distributors, and the National Machine Tool Builders Association; insurance associations, including the American Insurance Association; and trial lawyers and consumer protection groups.<sup>1039</sup> The House Subcommittee on Commerce, Transportation, and Tourism held hearings wherein over thirty interest groups testified regarding the risk retention groups bill.<sup>1040</sup> Although the federal law would preempt state laws regarding the “formation and regulation” of risk

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<sup>1035</sup> H. Rept. 97-190, p. 6.

<sup>1036</sup> Letter of Malcolm Baldrige, Sec. of Commerce, to Rep. James J. Florio, June 12, 1981, as reproduced in H. Rept. 97-190, p. 22.

<sup>1037</sup> Product Liability Risk Retention Act of 1981, §2(a)(4)(C), as reproduced in H. Rept. 97-190, p. 2.

<sup>1038</sup> Congressional Record – House, Remarks of Rep. Lent, Vol. 127, Pt. 13, 97<sup>th</sup> Cong., 1<sup>st</sup> Sess., July 28, 1981, p. 17708.

<sup>1039</sup> Congressional Record – Senate, Remarks of Sen. Nunn, Vol. 127, Pt. 15, 97<sup>th</sup> Cong., 1<sup>st</sup> Sess., Sept. 11, 1981, p. 20358.

<sup>1040</sup> H. Rept. 97-190, pp. 7-8.

retention groups and product liability insurance, the states were not prohibited from regulating the licensing, chartering, capital requirements of risk retention groups formed under the law or requiring actuarial opinions regarding the adequacy of compliance with state regulations. Also, the states could tax premiums and enact other taxes usually levied on insurance companies in the states.<sup>1041</sup> In short, the states retained a great deal of regulatory and taxing authority under the law. The Committee simply stated its “hopes that States will exercise regulatory restraint and not impose unnecessary regulatory burdens.”<sup>1042</sup> This state regulatory authority was important in obtaining the support of the insurance industry because it allowed states to regulate the new groups just like insurance companies, which would reduce some of the new entrants’ competitive potential.

However, there were vocal critics of the 1981 law: state insurance officials. For example, Albert B. Lewis, New York’s Superintendent of Insurance, claimed the Act was “destructive” to the “insurance consumer and the United States insurance industry” because the Act lacked specific requirements as to initial capital investments and reserves for the risk retention groups.<sup>1043</sup> However, the congressional committee reports expressed the intention that the states that licensed or chartered the groups retained the authority to require sufficient capital and reserves.<sup>1044</sup>

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<sup>1041</sup> Product Liability Risk Retention Act of 1981, §3(a)(1)(A)-(F), as reproduced in H. Rept. 97-190, pp. 2-3.

<sup>1042</sup> H. Rept. 97-190, p. 13.

<sup>1043</sup> “A Federal Law That Puts Product Liability Insurance at Risk,” Letter of Albert B. Lewis to the Editor, Oct. 15, 1981, *New York Times*, Oct. 26, 1981, Sect. A, p. 22, col. 4.

<sup>1044</sup> Product Liability Risk Retention Act of 1981, §3(a)(1)(A)-(F), as reproduced in H. Rept. 97-190, pp. 2-3; *see also* “A Safeguard in a Law on Liability Insurance,” Letter from Erich Parker, Director of Public

Yet, this successful legislation was more than the product of an alleged consensus of private interests. Legislators claimed the bill provided a “marketplace solution to the product liability problem at no cost to the Federal Treasury” and continued to preserve and protect injured consumers’ legal claims.<sup>1045</sup> It was hoped that the risk groups would encourage competition among private insurers to calculate premiums based upon “actual risks and loss experience rather than anticipated losses.”<sup>1046</sup> Additionally, the Department of Commerce provided its endorsement of the bill, claiming businesses would obtain “industrywide protection,” which would allow for greater productivity and innovation.<sup>1047</sup>

None of the comments made on the House and Senate floors indicated that the private manufacturers originally most concerned with enacting federal legislation were capital goods manufacturers. The senators and representatives’ comments on the floor in 1981 concerned manufacturers of goods *per se*. One would think that the law was needed for *all* manufacturers of consumer *and* capital goods. Yet, again, the original impetus for federal legislation did not come from consumer goods manufacturers. The capital manufacturers, whose products were sold to other manufacturers for use in their factories,

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Information, American Academy of Actuaries, to the Editor, Nov. 3, 1981, *New York Times*, Nov. 17, 1981, Sect. A, p. 30, col. 4. This letter was in response to Albert Lewis’s letter referenced *infra*.

<sup>1045</sup> Congressional Record – House, Remarks of Rep. Lent, Vol. 127, Pt. 13, 97<sup>th</sup> Cong., 1<sup>st</sup> Sess., July 28, 1981, p. 17708. The “marketplace solution” phrase was a favorite of supporters. Rep. James Collins (R-TX) used the same phrase in his statement of support at the time of the publication of the House Committee on Energy and Commerce’s report. “Additional Views of Honorable James M. Collins,” H. Rept. 97-190, p. 28. Also, Senators Barry Goldwater (R-AZ), Howell Helfin (D-AL), and James Exon (D-NE) used the same phrase in their joint statement of support for the 1981 bill. S. Rept. 97-172, p. 20.

<sup>1046</sup> Congressional Record – House, Remarks of Rep. Ed Markey (D-MA), Vol. 127, Pt. 13, 97<sup>th</sup> Cong., 1<sup>st</sup> Sess., July 28, 1981, pp. 17709-10.

<sup>1047</sup> Letter of Malcolm Baldrige, Sec. of Commerce, July 24, 1981, in Congressional Record – House, Vol. 127, Pt. 13, 97<sup>th</sup> Cong., 1<sup>st</sup> Sess., p. 17708.

were the original complainants and petitioners to Congress that spurred tort reform in the 1970s.

The Risk Retention Act of 1981 attempted to meet at least one of the goals of the House Committee on Small Business that held the initial 1977 hearings. Then the Committee had urged “improvements in the insurance ratemaking mechanism.” Proponents of the new law thought it would create the competitive environment that would allow rates to more closely correlate with actual risk posed by a company and its particular products. However, the new act did not touch the other chief concern of the Committee: “uniformity in product liability tort law in order to resolve the ambiguities and differences that exist[ed] amongst the many States.”<sup>1048</sup> Such uniformity could only be achieved by the federal government through the federalization of tort law itself.

The Carter administration favored the aforementioned Department of Commerce’s Uniform Model Product Liability Act (UPLA), which if successful, would be enacted by the states on a state-by-state basis, creating a national standard. It also favored the original 1979 version of the Risk Retention Act.<sup>1049</sup> However, John LaFalce (D-NY) wanted a uniform federal tort law because he thought it was “beyond the realm of possibility” that the states would adopt a model tort law.<sup>1050</sup> LaFalce’s prediction

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<sup>1048</sup> Congressional Record – House, Remarks of John J. LaFalce, Vol. 126, Pt. 4, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Mar. 10, 1980, p. 5063. LaFalce was chairman of the House Committee on Small Business during the 1977 hearings, which were the initial congressional hearings into proposals for federal regulation of tort law regarding products liability.

<sup>1049</sup> Larry Kramer, “Administration to Support Bill to Allow Product Liability Pool; Administration Backs Interstate Liability Pool,” *Washington Post*, Aug. 17, 1979, Business and Finance section, p. F1.

<sup>1050</sup> Congressional Record – House, Remarks of John J. LaFalce, Vol. 126, Pt. 4, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Mar. 10, 1980, p. 5063.

would come true. By 1982 almost three years after the Department of Commerce had released the UPLA for adoption by the states, “no state [had] adopted it [the model act] fully.”<sup>1051</sup> LaFalce thought the example of the Uniform Commercial Code (UCC), a model law concerning commercial transactions, including the sale of goods, was unlikely to be repeated in the realm of products liability law.

LaFalce proved prescient in understanding how the various states would handle what was becoming a contentious political issue. The UCC, by comparison, was not controversial like products liability law, nor was it a reaction to a trend initiated by state courts. At the time, several states had started enacting their own restrictive products liability laws in response to the expansion of tort liability by the state supreme courts. The North Carolina statute reviewed in Chapter Four is a good example. Yet, there was little hope of uniformity among the states.

LaFalce’s original legislative preference had been for allowing manufacturers to use pretax dollars to pay for product liability claims, which would have been a self-insurance approach encouraged through federal tax deductions. However, the Carter administration’s Treasury Department opposed such a solution because they considered it an “unacceptable form of subsidy” for manufacturers. Yet, the Commerce Department supported the proposal.<sup>1052</sup> This is an example of the different constituencies of government agencies being reflected in policy positions of the agencies. From the standpoint of small businesses, any assistance in their ability to pay for premiums and/or

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<sup>1051</sup> Statement of Hon. Norman D. Shumway, U.S. Rep. from California at Hearing before the Subcommittee for Consumers of the Committee on Commerce, Science, and Transportation on S. 2631, Serial No. 97-109, 97<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Mar. 9, 1982, p. 7.

<sup>1052</sup> Congressional Record – House, Remarks of John J. LaFalce, Vol. 126, Pt. 4, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Mar. 10, 1980, p. 5063.

claims was to be welcomed. The National Association of Wholesaler-Distributors claimed “net pre-tax profits averaged 1.7%, in a range from .5% to 4%.” Even if the “average cost of product liability insurance was less than 1% of sales”, this still significantly reduced manufacturers’ profits.<sup>1053</sup>

LaFalce, urged passage of a national tort law because he thought that insurers were setting rates based on popular myths about the number of claims being filed. He thought that popular myths had evolved to the point it was widely believed among insurers that claims per year exceeded one million in number and that jury verdicts were typically very high, such as around one million dollars. However, LaFalce – citing the insurance industry’s own warehouse of claims information, the Insurance Services Office’s report from 1977 – contended the number of claims was really only between about 60,000 and 140,000 per year and the average “actual payment for all bodily injury claims was \$3,952.”<sup>1054</sup> Thus, a uniform federal approach would correct the underwriting “errors” derived from insurers’ misunderstandings about the extent of product liability claims.

As several congressmen noted, the risk retention approach only dealt with one aspect – the availability of insurance – of what was understood as a multifaceted problem. The Interagency Task Force on Product Liability’s report’s other two culprits, the “uncertainties” in litigation caused by different states’ laws and manufacturers’

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<sup>1053</sup> Congressional Record – House, Remarks of L. Richardson Preyer, Vol. 126, Pt. 4, Mar. 10, 1980, p. 5061.

<sup>1054</sup> Congressional Record – House, Remarks of John J. LaFalce, Vol. 126, Pt. 4, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Mar. 10, 1980, p. 5064. Using the CPI, \$3,952.00 in 1980 would be worth approximately \$10,300.00 in 2009 U.S. dollars. Samuel H. Williamson, "Six Ways to Compute the Relative Value of a U.S. Dollar Amount, 1790 to Present," *MeasuringWorth*, 2009. URL <http://www.measuringworth.com/uscompare/>.

production of “unsafe” (or defective) products, were left untouched.<sup>1055</sup> Presuming the competition amongst insurers envisioned by the law’s drafters actually occurred and resulted in lowered premiums, the law did not modify any state torts laws, create federal tort law standards, or provide any incentives or mandates for “safer” products from manufacturers. Not all of those who voted for the final bill thought it went far enough. For example, Representative James M. Collins (R-TX), argued that Congress needed to enact a national statute of limitations for product liability claims, restrict liability for manufacturers whose products were subsequently modified, and enact limits on the compensatory awards allowed in courts.<sup>1056</sup> Collins had voted against the prior 1980 bill in the House.<sup>1057</sup> The reference to a statute of limitations was pertinent to any good, but was especially a concern of capital goods manufacturers. These were the makers of large, heavy, complex – and, if used improperly, dangerous – machines. These were the manufacturers who sought a limit upon the number of years that could pass before a claim for an injury from a defect could be filed. Additionally, Senator Robert Kasten of Wisconsin contended that this bill was only “the first step” in national product liability reform efforts.<sup>1058</sup> Senator Sam Nunn (D-GA) said the bill kept “in step with the times”

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<sup>1055</sup> Congressional Record – House, Remarks of Charles Grassley (R-IA), Vol. 126, Pt. 4, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Mar. 10, 1980, p. 5067.

<sup>1056</sup> Congressional Record – House, Remarks of Rep. Collins, Vol. 127, Pt. 13, 97<sup>th</sup> Cong., 1<sup>st</sup> Sess., July 28, 1981, p. 17709. The earlier 1980 bill, which contained similar group insurance purchasing and risk retention group provisions passed the House but not the Senate and was thought by co-sponsor Rep. Anthony Beilenson (D-CA) to be only an attempt to solve one part – the insurance part – of the product liability problem. Remarks of Rep. Beilenson, Vol. 126, Pt. 4, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Mar. 6, 1980, p. 4985.

<sup>1057</sup> Congressional Record – House, Remarks of Rep. Collins and record of roll call vote, Vol. 126, Pt. 4, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Mar. 10, 1980, pp. 5061-62, 5071.

<sup>1058</sup> Congressional Record – Senate, Remarks of Sen. Kasten, Vol. 127, Pt. 15, 97<sup>th</sup> Cong., 1<sup>st</sup> Sess., Sept. 11, 1981, p. 20357.

by being a “deregulatory solution.”<sup>1059</sup> Thus, for the proponents of federal intervention in the tort law “problem,” the Product Liability Risk Retention Act of 1981 was only an initial step. From the vantage point of 1981, federalization of tort law would have to happen, if at all, in a piecemeal fashion.

There were also several important constitutional issues. First, was whether state tort laws touched upon matters of interstate commerce. The post-New Deal state was one of almost unbounded federal power in matters that “affected” interstate commerce.<sup>1060</sup> Under the post-New Deal constitutional doctrines that allowed for matters of a non-commercial nature to be regulated by federal law, it was likely that state laws governing the injuries resulting from defective goods in interstate commerce would be considered to be subject to federal pre-emption.<sup>1061</sup> Another constitutional issue was whether tort laws were matters reserved to the states under the principles of federalism. Most tort law was (and remains) a matter of state competence and responsibility and was, therefore, within the states’ police powers. Nevertheless, interstate commerce powers would trump even these federalism concerns. Notwithstanding these constitutional issues, the most important unresolved issue was *political*: Would federal legislators support the federalization of tort law, an area of competency heretofore largely reserved to the states?

State insurance commissioners complained that the new law might be used as a “vehicle to avoid” more onerous state insurance regulations. In response, Congress

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<sup>1059</sup> Congressional Record – Senate, Remarks of Sen. Nunn, Vol. 127, Pt. 15, 97<sup>th</sup> Cong., 1<sup>st</sup> Sess., Sept. 11, 1981, p. 20357.

<sup>1060</sup> *Wickard v. Filburn*, 317 U.S. 111 (1942).

<sup>1061</sup> *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981) (State laws conflicting with federal laws are “without effect”). Federal and state courts will infer a congressional intent to pre-empt an area of law if a federal law, or regulatory approach, is such that it “occup[ies] the field.” *Lodge 76, Intl. Assoc. of Machinists v. Wisconsin Emp. Rel. Comm’n*, 427 U.S. 132, 146 (1976).



amended the law in 1983 to allow state substantive tort law to be the “source of rules and determining a manufacturer’s liability.”<sup>1062</sup> The states would remain the organs of tort policy formation; the federal government was only intervening to encourage interstate insurance providers to form pooling groups. Yet, the reform proponents’ major concern – varying state laws on torts and insurance – still remained and would dissuade insurers and manufacturers alike.

It may seem inconsistent that a new federal law that encouraged the construction of new kinds of economic activity could have been construed by some of its proponents as a measure in the service of “deregulatory” government. Yet, if we consider the context in which such remarks were made – the perspective of those who made them and the conditions in which such perspectives were shaped – then we can better understand the character of the 1981 law and the views of its supporters. One indication of the kind of support the 1981 law had was evinced in the support of the Reagan administration’s Secretary of Commerce, Malcolm Baldrige, who noted that the administration’s economic program was expected to lower interest rates. Although such a change would be helpful for the general economy, “tight market conditions” were expected for the small and medium-sized businesses that sought to purchase liability insurance. That is, lower interest rates would put upward price pressure on insurance premiums. Baldrige argued that the Risk Retention Act and the presumed resultant competition would alleviate the

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<sup>1062</sup> Senate Reports, 98<sup>th</sup> Congress, 1<sup>st</sup> Sess., Senate Report No. 98-172 of the Senate Commerce, Science, and Transportation Committee on S. 1046 (July 5, 1983), p. 3 fn.4. The Senate bill, S. 1046, went on to become P.L. 98-193 on Dec. 1, 1983. The anticipated future areas of expansion were for claims based on “consequential economic losses ... [and] emotional harm unaccompanied by physical harm.” *Ibid.*, p. 2.

upward price pressures for such businesses.<sup>1063</sup> Later in the early 1980s interest rates came down and during the period of 1984-86, as feared, premiums went up again. The risk pooling abilities made possible under the act did not seem to produce any premium reductions. Some scholars have concluded that the rise in premiums in the mid-1980s was not due to an increase in injuries but rather to an increase in strict liability situations to which manufacturers were subjected and the unpredictability of future claims costs such liability presented during the 1970s and 1980s. Such uncertainty not only increased costs, but also reduced the availability of insurance coverage.<sup>1064</sup>

It is important to note that the legislative process followed between 1977 and 1981 was not an example of a hasty House and reserved and refined Senate. Such a characterization is frequently given by political scientists and historians as a description of the structural differences between the two houses as envisioned by the Founders. Scholars are correct that this often does describe the differing approaches to public policy formation. For example, another perceived crisis that occurred later in the 1980s was the federal response to drug abuse. In 1986, partly in response to the death of University of Maryland basketball star Len Bias and in response to the popular media's coverage of local drug problems, the two houses of Congress quickly crafted legislation to stiffen drug law enforcement and punishment. The initial legislation passed the House but failed in the Senate, largely because of opposition to a death penalty provision. Two years later,

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<sup>1063</sup> Letter of Malcolm Baldrige, Sec. of Commerce, to Rep. James J. Florio, June 12, 1981, as reproduced in H. Rept. 97-190, p. 24.

<sup>1064</sup> George L. Priest, "Understanding the Liability Crisis," *Proceedings of the Academy of Political Science*, Vol. 37, No. 1, New Directions in Liability Law (1988), p. 203; George L. Priest, "The Current Insurance Crisis and Modern Tort Law," *Yale L.J.*, Vol. 96, No. 7 (June, 1987), p. 1521-90; Scott E. Harrington, "Tort Liability, Insurance Rates, and the Insurance Cycle," *Brookings-Wharton Papers on Financial Services 2004* (2004), p. 97, 126; Michael J. Trebilcock, "The Social Insurance-Deterrence Dilemma of Modern Tort Law," *San Diego L. Rev.*, Vol. 24, No. 4 (July-Aug., 1987), p. 929-1002.

in 1988, the Senate approved a similar death penalty provision. One of the chief reasons the later bill passed – in addition to the consensus achieved in the collegial Senate – was that the “Senate environment” had provided a degree of education to the senators, which resulted in a law that moderated the capital provisions in the House bill.<sup>1065</sup>

In contrast, in the tort reform context, as we have seen, *both* houses introduced legislation in quick response to constituent complaints in the 1970s. Neither house was content to await the completion of the Ford (and later, Carter) Administration’s Task Force. The only reason both houses postponed legislation was because the subcommittee hearings revealed the complexity and difficulty of threatening the long-lived workers’ compensation systems in the states. This provided a reason to slow down and consider the executive’s ongoing Task Force effort. In passing a much less ambitious bill in 1981, the Senate did not perform a more refined deliberative function; the “Senate environment” was not the key to a modest bill. The later, modest bill that became law did conform to the pattern moderation characteristic of other legislation proposed in response to perceived “crises.” Yet, it is important to note that passage of the later bill was more the product of seeking to balance constituent demands than any difference between the legislative methods of the House and Senate. Both houses of Congress sought to avoid disrupting the workers’ compensation systems in the states. Also, of course, both houses had become less inclined to pass a massive federal overhaul of state tort law. It was hoped that passing the limited insurance bill would reduce rates and dissuade constituents from further calls to federalize tort law.

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<sup>1065</sup> Ross K. Baker, *House and Senate* (New York: Norton, 1989), pp. 212-23.

The success of the much more modest federal effort in 1981 was chiefly the result of the pluralism of the post-New Deal state: the interests of manufacturers – and to judge from the comments of several congressmen, small-scale manufacturers – were ostensibly protected by the risk retention groups allowed under the 1981 law. Therefore, notwithstanding the apparently emergent ethos of “deregulation” that was supported by conservatives, Republicans, the new Reagan administration, and even many moderate and moderate-to-liberal critics of the national regulatory state of the late 1970s, the 1981 law should not be viewed as a “conservative” or “deregulatory” approach to the products liability issue. Rather it was the product of a longer, pluralistic process of the post-New Deal state. The 1981 Act was an attempt to overcome the pluralistic dilemma presented by the existence of strict products liability and workers’ compensation systems. The problems presented in the 1977 hearings regarding states’ workers’ compensation laws did not recur with the 1981 law. The Congress had sidestepped (or postponed, as many tort reform proponents saw it) the federalization of tort law. Would the changes made to states’ insurance laws be sufficient to reduce the problems posed by products liability claims and lawsuits? Would those who were threatened with such claims and suits (manufacturers and insurers alike) be satisfied – even if insurance was made more “affordable” – with the refusal of the federal government to step into the states’ shoes and alter tort law to provide greater protection to these would-be defendants? The answer was clearly “no”.

But what of the answer to the former question? Did the Product Liability Risk Retention Act of 1981 result in lowered premiums for products liability coverage? In

short, did it work as Congress had hoped? The answer is: in the short term, possibly; in the long term, no. As previously noted by one of the Senate subcommittees that recommended the Risk Retention Act, the “crisis” in rates had abated by 1981. The ISO has noted its advisory rates for product liability coverage “increased by about 195 percent from 1974 through 1976.” Between 1976 and 1983, the rates were “relatively stable.” At the time, it was thought that rates had stabilized during this period because of “competition in the insurance industry resulting from a four-year-old rate war and the infusion of new insurers into the market.”<sup>1066</sup> Some of those new insurers would have been the risk retention groups allowed under the Act. Some manufacturers testified before Congress in 1982 that the Risk Retention Act had resolved the ratemaking problem.<sup>1067</sup> But at that point, it was far too early to tell. However, the ISO reported that from 1983 through 1988, the rates “increased by about 105 percent.”<sup>1068</sup> The rates of carriers did level off and drop, but there was never convincing evidence that this was due to the Risk Retention Act.

It appears that the Risk Retention Act failed to reduce or even maintain the plateau in rates through the 1980s. The cause(s) of these rate fluctuations are difficult to determine and appear to be multifaceted – price competition among insurers, changes in investment returns because of interest rate fluctuations, and predicted increases in future

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<sup>1066</sup> Terry Morehead Dworkin, “Federal Reform of Product Liability Law,” *Tulane L. Rev.*, Vol. 57, No. 3 (Feb., 1983), pp. 602, 607, 619 fn. 106 (citing *Wall St. J.*, Aug. 5, 1982, at 19, col. 3).

<sup>1067</sup> Statement of Victor E. Schwartz, Counsel, Product Liability Alliance in Product Liability Reform: Hearings on S. 2631 Before the Senate Subcommittee for Consumers, Senate Committee on Science, Commerce, and Transportation, Serial No. 97-109, 97<sup>th</sup> Congress, 2<sup>nd</sup> Sess. (Mar. 9, 1982), p. 9.

<sup>1068</sup> U.S. General Accounting Office, Human Resources Division. Report to the Honorable Frank Horton, House of Representatives. “Product Liability: Insurance Rate Levels and Claim Payments During the 1970s and 1980s,” (Sept., 1991) (hereinafter GAO Rept., Sept. 1991), p. 2.

claims due to product liability lawsuits. (Product liability suits steadily increased in number throughout the 1980s.)<sup>1069</sup> The ISO contended that the “changes in the frequency and average cost of claims reported by its participating insurers” were probably the chief reasons for the fluctuation in rates. Since ISO advisory rates lag behind and are made in response to their member-insurers’ experiences, the “sharp increases ... may have resulted from earlier increases in the frequency and cost of claims reported by ISO’s insurers.”<sup>1070</sup> The early 1980s turned out to be a period of high price competition among insurers. This was enabled by the falling interest rates, which stimulated competition among insurers. However, rates increased again in 1985-86, which was considered a second period of “crisis” in the industry.<sup>1071</sup>

The Risk Retention Act of 1981 remains in effect as of this writing.<sup>1072</sup> It was a limited federal intervention in state regulation of the insurance industry that attempted to resolve the insurance rate increases without a federal takeover of state tort law. This Act was a bipartisan law and was really the last of its kind in the federal tort reform efforts. Although the remaining tort reform battles of the 1980s and later are beyond the scope of this dissertation, it is important to note a partisan political division that developed after the 1981 Risk Retention Act. Republicans would sponsor most bills in support of a federal role in state tort law. This too was a manifestation of pluralism. Business interests that sought greater protection through federal intervention generally supported

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<sup>1069</sup> See Chapter Three, fn. 129 and accompanying table and text.

<sup>1070</sup> GAO Rept., Sept. 1991, p. 3.

<sup>1071</sup> W. Kip Viscusi and Michael J. Moore, “An Industrial Profile of the Links between Product Liability and Innovation,” in Peter W. Huber and Robert E. Litan, eds., *The Liability Maze: The Impact of Liability Law on Safety and Innovation* (Washington: The Brookings Inst., 1991), p. 85.

<sup>1072</sup> 15 U.S.C. §§ 3901 *et seq.* (last amended in 1986).

Republicans, who were acting contrary to their party's increasingly conservative stance against the expansion of federal responsibilities. Whereas consumer protection groups and plaintiffs' trial attorneys, who sought protection in state control of tort law, generally supported Democrats. Although some Democrats were less enamored of the federal regulatory state in the early 1980s, most Democrats were supportive of the expansion of federal responsibilities. Thus, interests that sought actions contrary to both political parties' philosophical dispositions regarding federal responsibilities and the parties were attempting to satisfy these constituencies.

### ***Tort Reform Proposals Proceed***

In 1982, after the Risk Retention Act went into effect new bills were introduced in both houses of Congress that would entirely federalize product liability law.<sup>1073</sup> It was the most ambitious proposal to date. The premise upon which the new bills were introduced was that, although the Risk Retention Act may have contributed to reducing the insurance affordability problem, the underlying tort problem remained and could only be solved by federal legislation. For example, the sponsors of the Senate bill relied upon the 1977 federal Task Force's report's conclusions that product liability was caused by "overly-subjective ratemaking practices," "unsafe manufacturing practices," and "uncertainties" in the tort litigation system. The new bill would "solve" the products liability problem by removing these "uncertainties."<sup>1074</sup> The sponsors claimed such "uncertainties" were the result of multiple factors. First, the dual origins of product

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<sup>1073</sup> S. 2631 (1982), H. Res. 7284, and H. Res. 5214, 97<sup>th</sup> Congress, 2<sup>nd</sup> Sess. (1982).

<sup>1074</sup> Senate Reports, 97<sup>th</sup> Congress, 2<sup>nd</sup> Sess., Senate Report No. 97-670 of the Committee on Commerce, Science, and Transportation on S. 2631 (Dec. 1, 1982) (hereinafter S. Rept. 97-670), pp. 1-3.

liability in tort and contract law, which resulted in confusion among litigants and courts as to which theory should govern in a case. Second, the common law, judge-made nature of product liability law in a multi-jurisdictional nation made interstate manufacturers' performance standards uncertain. Since state courts were the primary policy makers, the variations in evidentiary standards and definitions of "defect" in different states made it very difficult for manufacturers to comply with the differing standards of the states. Finally, the sponsors claimed the competing theories of product liability produced "uncertainty" in any given state as to nature of a manufacturer's liability.

The sponsors were concerned with the difference between a manufacturing defect, wherein the manufacturer fails to adhere to its own standards when making the product, and design and warning defects, wherein manufacturers are alleged to have made products that are inherently "defective" or failed to sufficiently warn about product dangers. Strict liability (liability without regard to fault) would be the basis for manufacturing defects and breaches of express warranties. By contrast, a "negligence or fault-based standard" would be used for design and warning defects.<sup>1075</sup> Under the law at the time (and in many states to this day) design and warning defects judged under strict liability were simply provisions that made manufacturers "insurers" of their products.<sup>1076</sup> The sponsors argued that the uniformity provided by a federal law would reduce or eliminate litigation costs produced by the uncertainty of the different states' laws, further reduce insurance premiums, increase manufacturer productivity and product

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<sup>1075</sup> S. Rept. 97-670, p. 24.

<sup>1076</sup> S. Rept. 97-670, pp. 5-6.



development, and assist American-based manufacturers in international markets by lowering insurance costs.<sup>1077</sup>

The sponsors contended that the failure of the states to adopt the Department of Commerce's proposed UPLA, the variations in states' standards and laws, and the interstate nature of the contemporary manufacturing economy of the United States demonstrated the need for federal action. The sponsors clearly stated the states' products liability laws as a matter of interstate commerce under the U.S. Constitution's Commerce Clause and concluded that "the individual States cannot resolve the uncertainties" of the product liability litigation system.<sup>1078</sup> They were quite careful to cite precedents of federal laws explicitly enacted due to the "diversity" of state laws, such as federal laws regarding public utility holding companies, cotton manufacturing, and cigarette labeling and advertising.<sup>1079</sup> In other words, uniformity in commerce was a valid constitutional principle. Finally, the recently enacted Risk Retention Act of 1981 was seen as wedge that would allow for passage of this more expansive law. Sponsors saw the Risk Retention Act as a federal precedent that demonstrated product liability was "an issue warranting federal attention" and the "need to preempt state laws" in order to achieve federal goals had "already been established."<sup>1080</sup> The Republican sponsors were trying to persuade moderate Democrats, who would have been wary of adversely affecting workers' compensation systems in the states and some of whom objected on federalist

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<sup>1077</sup> S. Rept. 97-670, pp. 7-9.

<sup>1078</sup> S. Rept. 97-670, pp. 6-7.

<sup>1079</sup> S. Rept. 97-670, p. 10.

<sup>1080</sup> Statement of Hon. Norman D. Shumway, U.S. Rep. from California at Hearing before the Subcommittee for Consumers of the Committee on Commerce, Science, and Transportation on S. 2631, Serial No. 97-109, 97<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Mar. 9, 1982, p. 7.

grounds against a federal takeover of state tort law. Of course, the Republican sponsors also would have to convince members of their own party to overcome any federalist objections.

The new bills specifically addressed the concerns that propelled the original federal reform effort from 1977: whether capital goods manufacturers would be liable for the injuries workers suffered. Injured workers could recover under their state's workers' compensation system and then bring a product liability suit against a capital goods manufacturer. However, the damages obtainable would be limited by (1) any "proportion" of fault attributable to the worker, (2) any alteration or misuse of the product, and (3) the amount of any workers' compensation benefits (and future benefits) paid to the worker. Additionally, the employer and workers' compensation insurance company would not have any subrogation rights against the product seller or manufacturer. A statute of repose was created, whereby a capital good could not be the subject of an "unsafe design or failure to warn" claim if the incident occurred "more than 25 years after delivery to the first buyer or lessee" who was not also a seller of the product or used it as "a component in the manufacture of another product."<sup>1081</sup> This time limit upon claims was meant to respond to the complaints voiced by manufacturers in the 1977 congressional hearings about machines that would become the subject of a tort suit several years after they had been used without incident. However, twenty-five years was a substantial period of time and, no doubt, would not have been thought too generous a protection by many capital goods manufacturers. Also, the repose provision applied to *only* capital goods manufactures, not manufacturers of other goods, notably general

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<sup>1081</sup> S. Rept. 97-670, pp. 11-12.

consumer goods.<sup>1082</sup> At the time, some states had enacted their own statutes of repose, which gave much more protection to the manufacturers under limits of six, ten, or twelve years. The ISO's own data from the late 1970s showed that most product-related incidents occurred within six years of purchase and, for capital goods, within "ten years of manufacture." The industry concept of a "useful safe life" for a product was ignored in the proposed federal law.<sup>1083</sup>

Punitive damages would have been allowed, albeit under the slightly higher standard of proof of "clear and convincing evidence," rather than the usual tort standard of "a preponderance of the evidence." Also, manufacturers would not be penalized for taking corrective measures on their own volition.<sup>1084</sup> The drafters did not include defenses based on compliance with government contract and regulatory requirements; nor did they restrict the use of expert testimony. Manufacturers would have favored both provisions.

It is important to note that the bill would not have created "Federal question jurisdiction." That is, state courts would have retained subject matter jurisdiction but the law to be applied would have been the federal act.<sup>1085</sup> One potential problem arising out of this provision was the need for federal circuit courts and, ultimately, the United States Supreme Court to resolve conflicting interpretations of this federal law between states'

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<sup>1082</sup> S. Rept. 97-670, p. 50.

<sup>1083</sup> *Fed. Reg.*, Vol. 44, No. 212 (Oct. 31, 1979), p. 62733 (quoting ISO Closed Claims Survey, pp. 105-08). The Commerce Department's Uniform Product Liability Act, a model law proposed for the states, adopted a Minnesota state statute's concept of a "useful safe life" of a product. *Ibid.*

<sup>1084</sup> Such corrective measures are referred to by the legal term of art, "subsequent remedial measures." Court and legislatures have traditionally supported the policy of not allowing plaintiffs to prove negligence by citing post-incident corrective action taken by tort defendants to prevent future incidents. This is a policy preference for encouraging the improvement of conditions and products for the benefit of the public.

<sup>1085</sup> § 3(d), S. Rept. 97-670, p. 23.

courts. It was likely that the fifty states would provide more conflicts than the twelve federal circuit courts normally did.<sup>1086</sup>

The bill sought to aid defendant manufacturers by placing the burden of identifying a manufacturer upon the plaintiff. Under the then-existing law of some states, plaintiffs were not required to identify the manufacturer of a product but could sue those manufacturers who had substantial market share. The expansive market-share theory of liability placed the burden upon the defendant manufacturers to show they were not the manufacturers of the product that actually caused the harm to the plaintiff. When the manufacturer could not make such proof, then its liability was apportioned according to its share of the market for the product.<sup>1087</sup> In short, the market-share theory sought to compensate injured parties without proof that the defendant actually contributed to the harm of the plaintiff. The Senate bill, S. 2631, sought to weaken this rule by shifting the burden back to the plaintiff and doing so under a higher standard of proof: clear and convincing evidence. The purpose was to “ensure that manufacturers who are responsible for a product-related harm will be subject to liability for that harm.”<sup>1088</sup> This was an individualized fault-based provision.

In sum, this bill provided manufacturers – especially capital goods manufacturers – many of the defenses they sought. This bill was yet another example of specifically

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<sup>1086</sup> The federal courts’ role in providing uniformity to federal law is well established. Amanda Frost, “Overvaluing Uniformity,” *Va. L. Rev.*, Vol. 94, No. 7 (Nov. 2008), p. 1567, 1581, fn. 32-34 (citations omitted) (noting the majority of scholarly and judicial opinion regarding and supporting the function of federal court harmonization of federal law from state and lower federal courts).

<sup>1087</sup> *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 607 P.2d 924, 163 Cal. Rptr. 132, cert. denied sub nom. *E.R. Squibb & Sons, Inc. v. Sindell*, 449 U.S. 912 (1980) (holding that two manufacturers of chemical DES bore the burden of proving that they were not the manufacturers of the DES that caused the class action plaintiffs’ injuries; if they could not prove their innocence of manufacture, then they were liable based on their portion of the market share).

<sup>1088</sup> S. Rept. 97-670, p. 23.

protecting constituents through federal legislation. It was a direct response to the original complainants to the federal government: capital goods manufactures. Although the bill would have applied to all “products,” whether purchased by individuals or businesses, specific provisions were crafted to respond to the concerns of capital goods manufacturers.<sup>1089</sup> The refusal to grant defenses based on compliance with government regulations or restrict expert testimony and the long statute of repose were based upon the objections of consumer groups. Although described at the time as a “probusiness” bill, it was in fact an attempted compromise among the interested parties with little chance of passage. Like earlier efforts at federalizing tort law, these bills did not become laws.<sup>1090</sup>

The supporters of the various bills were mostly Republicans. For example, of the seventeen co-sponsors of S. 2631 (1982), only three were Democrats. Similarly, of the seventeen co-sponsors of H. Res. 5214 (1981), only five were Democrats. Five of the six co-sponsors of H. Res. 7284 (1982) were Republicans.<sup>1091</sup> Although this bill was a response to constituents’ complaints, it was also a partisan effort. The Democratic Party controlled Congress and would have been eager to respond to constituent complaints. But the paucity of Democratic sponsors demonstrates the emergent partisan divide between pro-tort reform Republicans and anti-tort reform Democrats. Republicans were standing with manufacturing interests and Democrats were supporting consumer groups

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<sup>1089</sup> “Product” was defined as “any object, substance, mixture, or raw material in a gaseous, liquid, or solid state ....” Human tissue and organs were excluded. § 2(10), S. Rept. 97-670, p. 19.

<sup>1090</sup> The Senate bill, S. 2631, was reported favorably out of the Senate Committee on Commerce, Science, and Transportation (S. Rept. 97-670), but was only listed on the Senate calendar in December 1982. Calendar No. 963. The House bills, H. Res. 7284 and H. Res. 5214, were referred to and ended in the House Subcommittee on Health and the Environment.

<sup>1091</sup> Phil Gramm, a co-sponsor of both House Resolutions, was a conservative Democrat from Texas for his first two terms in the House and switched to the Republican Party in January 1983. He was a Democrat at the time these bills were introduced.

and trial lawyers' interests.<sup>1092</sup> This stands in contrast to the successful Risk Retention Act of 1981, where the chief sponsor was James Florio (D-NJ) and the co-sponsors were three Republicans and one Democrat.<sup>1093</sup> As previously noted, the congressmen who instigated the original hearings into product liability in 1977 were a mixture of Republicans and Democrats. By the advent of the Reagan administration, the Republicans had become the party chiefly identified with federal "tort reform" efforts. This phrase usually meant the federalization of tort law, which was at odds with the rhetoric of decentralization that was popular among many Republicans. The Reagan administration supported the new federalization bill, although legal scholars rightly criticized such support as contrary to the administration's "new federalism" agenda.<sup>1094</sup>

The scholarly and professional reactions to the congressional bills to federalize tort law were mixed. Victor E. Schwartz, the chair of the Federal Interagency Task Force on Product Liability from the Ford and Carter administrations, was the most notable proponent of federalization. However, by 1983 he was no longer a disinterested witness; he represented manufacturers and their trade associations in private practice in Washington, D.C.<sup>1095</sup> The American Bar Association (ABA) was very vocal in opposition to the federalization of tort law, arguing it was a traditional prerogative of

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<sup>1092</sup> The A.B.A. was against the bill. Editorial, "Nationalizing Torts," *A.B.A. J.*, Vol. 68, No. 7 (July, 1982), p. 772.

<sup>1093</sup> Another failed proposal was H.R. 6489, which also was introduced in 1980 and supported by Republicans and Democrats. This bill would have allowed businesses to establish "tax free fund reserves against future product liability losses including defense costs." Congressional Record – House, Remarks of Willis Gradison (R-OH), Vol. 126, Pt. 4, 96<sup>th</sup> Cong., 2<sup>nd</sup> Sess., Mar. 10, 1980, p. 5065. However, the proposal would have placed limits on the amounts that could be put into such funds, so as not to create a simple tax shelter.

<sup>1094</sup> Dworkin, *Tulane L. Rev.*, Vol. 57, No. 3 at 640.

<sup>1095</sup> Dworkin, *Tulane L. Rev.*, Vol. 57, No. 3 at 619, fn. 103.

state common law, would lead to confusion and uncertainty about choice of law issues, and would disregard the “particular social and economic needs of each of each of the states.”<sup>1096</sup> Ernest Sevier, then a practitioner in San Francisco and head of the ABA’s Section on Tort and Insurance Practice, argued that tort law should be left to the states in order to “respond to the varying and different needs of the citizenry” of the states. This argument was self-serving, since premium increases were experienced on a national scale and the states’ different laws were due less to local “needs” than to the different responses of the state courts and legislatures. The ABA was responding to attorney members’ desires to have the highest possible damage awards. Similarly, Richard Gerry, then-president of the pro-plaintiff Association of Trial Lawyers of America (ATLA), correctly noted the Senate bill “restrict[ed] plaintiffs’ access to the courts” by shifting the burden of identifying the manufacturer of the actual harmful product from defendant to plaintiff.<sup>1097</sup> Gerry deplored this result. Other critics argued that the law protected business at the expense of injured consumers. Others argued a federal law needed to “comprehensively” reform the tort system, eliminating the common law suits and replacing them with a “comprehensive compensation plan” that placed primacy on paying injured claimants and reducing manufacturers’ transaction costs. This was essentially a proposal similar to the states’ workers’ compensation systems.<sup>1098</sup> However, this system was likely to experience the same unintended consequences of the workers’

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<sup>1096</sup> Editorial, “Nationalizing Torts,” *A.B.A. J.*, Vol. 68, No. 7 (July, 1982), p. 772.

<sup>1097</sup> Gail Appleson, “Products Liability Law Draws Praise, Fire,” *A.B.A. J.*, Vol. 68, No. 4 (April, 1982), p. 399.

<sup>1098</sup> Dworkin, *Tulane L. Rev.*, Vol. 57, No. 3 at 645-46.

compensation systems – more lawsuits and increased claims and costs.<sup>1099</sup> Also, this proposal failed to address the interstate nature of the product liability problem.

The late 1970s and early 1980s are best characterized as a period during which “tort reform” became a national issue and manufacturers and their Republican allies sought to use federal power to protect producers’ interests. The sponsors claimed that they would also be protecting consumers’ interests by lowering premiums, which would be reflected in lower prices for goods, and by placing liability on at-fault parties. The wholesale federalization of the states’ tort laws failed because of a combination of the interests arrayed against federalization. Plaintiffs’ tort lawyers and consumer groups were more persuasive to the Democratic majority in the House to vote against wholesale federalization. Also, moderate and liberal Democrats objected to the federal intervention in state prerogatives. In light of the usual enthusiasm of Democrats for federal resolution of problems, the federalism claims may have been self-serving, but they were nevertheless present at the beginning of the congressional hearings in the mid-1970s. This federalist-oriented objection became less frequent and less persuasive over the course of the 1980s, since it was apparent that partisan differences over tort reform were rooted in pluralist alliances rather than convictions about federalism.

The one form of federal intervention that was enacted into law – the Risk Retention Act of 1981 – was a measure limited to matters truly of an interstate commercial character and did not impinge upon the states’ workers’ compensation or tort systems. Although the Risk Retention Act failed to achieve its goals, the law was the

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<sup>1099</sup> Lawrence M. Friedman, *A History of American Law* 3d ed., (New York: Touchstone, 1973, 2005 ed.), p. 518; Friedman, *American Law in the 20<sup>th</sup> Century* (New Haven: Yale Univ. Press, 2002), pp. 361-363.



product of a pluralist democratic state. Also, the Risk Retention Act reflected the federalist and limited government concerns of conservatives and moderates by not expanding federal responsibilities but only reducing state-based obstructions to interstate commercial activity. That is, this federal intrusion into state sovereignty was arguably just the kind of intrusion envisioned by the creators of the federalist system: using the Commerce Clause for solving an interstate commercial problem extending to the entire United States.<sup>1100</sup>

The remainder of the 1980s saw repeated efforts to enact tort reform legislation at the federal and state levels. Republican elected officials, working with some conservative Democrats, were the enthusiastic supporters of tort reform. This partisan divide has characterized the debate over tort reform since the early 1980s. However, as we have seen, the original initiative to enact federal tort reform laws saw a great deal of bipartisan cooperation. Federalism concerns played a role in the defeat of initial comprehensive tort reform legislation and paved the way for much more modest laws like the 1981 law regarding insurance pools. Yet, federalism became less prominent in later efforts at comprehensive reform, especially when the Republican Party – which often proudly proclaimed its adherence to limited federal government and federalism – wholeheartedly endorsed a federal takeover of state tort law. Later divisions revolved less around federalism than around the question of whose interest needed greater protection – manufacturers or consumers.

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<sup>1100</sup> “[A] wilderness of different state tort standards impedes interstate commerce by requiring either a whole variety of a single product or a uniform standard set by the strictest state. Congress can use its power under the Commerce Clause to address this situation.” Robert H. Bork and Daniel E. Troy, “Locating the Boundaries: The Scope of Congress’s Power to Regulate Commerce,” *Harv. J.L. & Pub. Pol’y*, Vol. 25, No. 3 (Summer, 2002), pp. 849, 887.

## **Epilogue**

We began this study with the story of the mortal wound suffered by Mr. Heizer and his widow's efforts to sue the maker of the thresher that caused her husband's death. In 1888, the legal landscape confronted by the grieving widow of Missouri farmhand Mr. Heizer was one of fault-based individualistic rules intertwined with contractual concepts, which limited the liability of manufacturers of threshers and other goods. Almost a century later, the legal rules had dramatically changed. Not only might Mr. Heizer's widow have had a workers' compensation claim, she also probably would have had a strict liability claim against the thresher manufacturer. Mr. Heizer's widow would have benefited from the Tort Revolution of the 1960s. Yet, that revolution was a contested one. The 1970s and 1980s saw a reaction – tort reform: an attempted counter-revolution or restoration of the old regime – that sought to have legislatures mandate a return to fault-based liability standards or, at a minimum, reduce or eliminate some of the consequences of the strict liability system.

The mid-1980s and subsequent state and federal tort reform efforts are beyond the scope of this study. However, it is important to note that, as of this writing, there has been no comprehensive tort reform legislation that has progressed very far in the United States Congress. Throughout the 1980s and 1990s states continued to enact various protections for manufacturers. As noted in Chapter Four, in the late 1970s states began enacting specific defenses for manufacturers. For example, the state-of-the-art defense allows advances in technology to be implemented without fear that such implementation will be used against the manufacturer. If the manufacturer can show that the newer, safer technology was not possible at the time of the making of the product, then it wins.

Another defense is the manufacturer's ability to win if it can prove that the use to which the plaintiff put the product was an unforeseeable misuse of the product. By the mid-1980s, one-third of the states had enacted statutes of repose, which are limits on when a lawsuit can be brought after the making of the product.<sup>1101</sup> In the product context, such statutes ran from between six and twelve years after the making of a product. After this time period, injuries caused by the product cannot serve as the basis for a lawsuit.<sup>1102</sup>

Also, some states reintroduced the fault principle into their products liability law by enacting comparative fault statutes. These are laws that allow for a plaintiff's own fault to reduce the manufacturer's liability. A plaintiff's assumption of the risk was recognized as a defense in most states, but a plaintiff's own negligence was not recognized under strict liability. Therefore, some pro-tort reform states enacted laws that reduced the manufacturer's liability by a percentage. For example, if a judge or jury deemed a plaintiff to have been 30 percent at fault, then damages in the amount of \$100,000 would be reduced by \$30,000.<sup>1103</sup>

There were other state-level "tort reform" efforts, applying to general tort cases. One reform was originally sought in the 1970s and mentioned in the congressional hearings: limits on punitive damages. These are damages that seek to punish wrongdoers for intentional conduct and deter such future conduct. Since 1986, 32 states have enacted some form of limitation upon courts' and juries' ability to award punitive damages. The

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<sup>1101</sup> This is different from a statute of limitations, which starts running when an injury occurs or manifests itself. In the products context, a statute of repose starts running from the date a product is sold or leaves the possession of the manufacturer.

<sup>1102</sup> Jethro K. Lieberman and George J. Siedel, *Business Law and the Legal Environment* (San Diego: Harcourt Brace Jovanovich, 1985), p. 445.

<sup>1103</sup> Lieberman and Siedel, *Business Law and the Legal Environment*, p. 446.

theory of reform proponents was that such damages encourage litigation, hinder settlement negotiations, and have led to inconsistent verdicts in similarly situated fact situations.<sup>1104</sup> Another reform was the abolition or limitation of joint and several liability. This liability allows plaintiffs to recover damages from all applicable defendants in a case, or just one of them, depending on which defendants are solvent. Since 1986, 40 states have altered the joint and several liability mechanism. Some states have created proportionate allocation of damages; other states have eliminated the ability to recover non-economic damages jointly and severally. Since 1986, 23 states have placed limits upon non-economic damages. These are monetary awards for intangible injury claims such as pain and suffering and loss of consortium. Also, the collateral source rule, which prohibits the mentioning to a jury of other sources of recovery used by a plaintiff in a lawsuit, has been limited or abolished in 24 states. Nine states have enacted statutes making the prosecution of class action suits more onerous. Thirty-five states have enacted legislation allowing defendants appealing a judgment to not have to post an appeal bond equal to or in excess of the verdict. Many states' laws required appealing parties to post bonds equal to the verdict or even in amounts up to one and a half times the verdict. In large-verdict cases, such bonds can literally require a bankruptcy filing. The states that have enacted reforms have allowed appellants to obtain a waiver to limit the size of the required bond. Also, 13 states have enacted reforms seeking to encourage more diverse people to serve on juries. Many states have created exemptions for certain occupations and allowed easy "hardship" claims to excuse

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<sup>1104</sup> "Tort Reform Record," American Tort Reform Association (July 1, 2008), available online at [http://www.atra.org/files.cgi/8291\\_Record\\_07-08](http://www.atra.org/files.cgi/8291_Record_07-08). Each of the following tort reform efforts descriptions are derived from this document.

potential jurors from service. The theory behind such reforms has been that perspectives of more people, especially including employed professionals, will aid in the jury deliberation process.

After the state-based litigation against the tobacco industry in the 1990s, seven states enacted “sunshine” laws to require competitive bidding among private lawyers hired to work for states in tort cases and requiring legislative approval of large contingent fee contracts with private lawyers hired by the state.

One reform has aided plaintiffs: the allowance of pre-judgment interest. Sixteen states have allowed pre-judgment interest in tort cases. This device allows for tort claims to accrue interest running from the date of injury to the date a payment is made after a jury verdict. This right is premised upon the theory that such interest will create incentives for early resolution of valid claims. This is an expansive doctrine, which aids plaintiffs.<sup>1105</sup>

In addition to the state-level legislative tort reform efforts, there was something of a popular tort reform phenomenon: citizen resistance in the form of juries that were unwilling to hold manufacturers liable under a strict liability standard. Although the rest of the 1980s saw a continual increase in product liability lawsuits,<sup>1106</sup> the basis for recovery in those suits was more often negligence than strict liability, even in states that allowed strict liability. Many of these were related to on-the-job injuries, which produced “60 percent of products-liability claims where large sums were paid.”<sup>1107</sup> For

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<sup>1105</sup> Each of the foregoing state-level reforms were detailed in the ATRA’s “Tort Reform Record” referenced in note 4.

<sup>1106</sup> See Table 1 in Chapter 4.

<sup>1107</sup> George L. Priest, “Understanding the Liability Crisis,” *Proceedings of the Academy of Political Science*, Vol. 37, No. 1, New Directions in Liability Law (1988), p. 200.

example, one U.S. General Accounting Office study of product liability lawsuits in Massachusetts between 1983 and 1985 noted that of 66 identified product liability cases, 38 cases (or 58 percent) involved machinery and in 47 percent of the cases the injuries occurred on the job.<sup>1108</sup> Similar results occurred in Arizona, with 43 percent of product liability cases involving machinery and 46 percent of injuries occurring on the job.<sup>1109</sup> The GAO studied three other states (North Dakota, South Carolina, and Missouri).

What was surprising and noteworthy was that, although all five of the states studied allowed for claims based on strict liability, in less than a third (27 percent) of the product liability cases the recovery was based solely upon strict liability or a breach of warranty theory. In Arizona, North Dakota, and Massachusetts liability was based on negligence in 80 percent of the cases. “In South Carolina, negligence was the basis for liability in 56 percent of the cases.” Missouri was the only state studied where strict liability was the basis for recovery in a (bare) majority of the cases (56 percent).<sup>1110</sup> The pleading rules in modern jurisdictions allow for multiple theories to be advanced in order to recover. Therefore, in a state allowing strict liability a plaintiff can avail himself/herself of strict liability, breach of warranty, and negligence in the complaint. The judge or jury can decide the case upon any of the available theories. Although mixed, the evidence shows that not only does negligence remain a viable theory in many

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<sup>1108</sup> U.S. GAO, “Product Liability: Verdicts in Massachusetts for 1983-85,” GAO/HRD-91-8 (Washington, D.C.: Oct., 1990), pp. 8-9, Tables I.1 & I.3, note c.

<sup>1109</sup> U.S. GAO, “Product Liability: Verdicts in Arizona for 1983-85,” GAO/HRD-91-7 (Washington, D.C.: Oct. 1990), pp. 8-9, Tables I.1 & I.3, note b.

<sup>1110</sup> U.S. GAO, “Product Liability: Verdicts and Case Resolution in Five States,” GAO/HRD-89-99 (Washington, D.C.: Sept., 1989), p. 30. Massachusetts only allowed for breach of implied warranty claims, not strict liability. However, this claim has the same effect as strict liability, since it is not premised upon fault.

product liability cases but strict liability has varying degrees of popularity and success among juries in states where it is allowed. There is empirical evidence that juries reject plaintiffs' claims in product liability cases. One study of civil jury cases in a state trial court between 1989 and 1991, which was based on interviews with jurors in civil tort cases against businesses, concluded that jurors "expressed skepticism of plaintiff claims, described a conservative approach to determining awards, and reported expending effort to treat corporations the same as individuals." It has been speculated that this is due to the jurors' desire to find fault and place blame only upon those who are wrongdoers.<sup>1111</sup> There have been similar experiences with juries' skepticism in medical malpractice cases, where plaintiffs had victory rates at trial of less than thirty percent.<sup>1112</sup> When given the choice between holding manufacturers accused of making and distributing a defective product strictly liable versus liable only upon a finding of fault, it appears that many jurors want moral fault to be proven and wrongdoing to serve as the basis for liability. This type of jury nullification of the formal law presents a form of popular, societal resistance to the strict liability system. This tendency suggests the popular resistance to the no-fault system of strict liability. The Tort Revolution remains contested not only in the form of political pluralism but also in the broader societal form of the jury system.

In 1984-86 another insurance "crisis" was experienced, which saw a tripling of products liability insurance premiums.<sup>1113</sup> The premiums for general liability insurance

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<sup>1111</sup> Valerie P. Hans and William S. Lofquist, "Jurors' Judgments of Business Liability in Tort Cases: Implications for the Litigation Explosion Debate," *Law & Soc'y Rev.*, Vol. 26, No. 1 (1992), p. 85, 108.

<sup>1112</sup> Neil Vidmar, *Medical Malpractice and the American Jury: Confronting the Myths about Jury Incompetence, Deep Pockets, and Outrageous Damage Awards* (Ann Arbor, MI: Univ. of Mich. Press, 1997), pp. 38-43; 265.

<sup>1113</sup> W. Kip Viscusi, *Reforming Products Liability* (Cambridge: Harv. U. Press, 1991), pp. 3-4; W. Kip Viscusi and Michael J. Moore, "An Industrial Profile of the Links between Product Liability and

went from \$6.5 billion in 1984 to \$19.4 billion in 1986.<sup>1114</sup> There has been an ongoing debate about whether strict liability *per se* was the reason for premium increases throughout the 1970s and 1980s. Some scholars have concluded that dramatic premium fluctuations seen during the period and reduced availability of coverage were the products of uncertainty of future claims under the expanding tort liability system.<sup>1115</sup> Also, the rise of large class action suits (popularly called “mass torts”) in the 1980s contributed to premium hikes in that decade. Certainly the phenomena of mass tort claims arising out of asbestos and Agent Orange “overwhelmed the capacity of the courts to address [such] claims.”<sup>1116</sup> Yet, other scholars have argued that strict liability was only a significant contributing factor to premium increases. W. Kip Viscusi has argued that the periods of large surges in premiums (4.6 percent from 1958-1968; 12.6 percent from 1968-1978; and 5.3 percent from 1978-1988) are also attributable to the courts’ development of the legal concepts of “design defect” and “failure to warn” (or “inadequate warning”).<sup>1117</sup>

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Innovation,” in Peter W. Huber and Robert E. Litan, eds., *The Liability Maze: The Impact of Liability Law on Safety and Innovation* (Washington: The Brookings Inst., 1991), p. 85. U.S. Department of Justice. Report of the Tort Policy Working Group on the Causes, Extent, and Policy Implications of the Current Crisis in Insurance Availability and Affordability. (Washington, D.C.: U.S. Government Printing Office, 1986) and “An Update on the Liability Crisis,” A report of the Tort Policy Working Group (Washington, D.C.: U.S. GPO, 1987).

<sup>1114</sup> W. Kip Viscusi, “Product and Occupational Liability,” *J. of Econ. Perspectives*, Vol. 5, No. 3 (Summer 1991), p. 71.

<sup>1115</sup> George L. Priest, “Understanding the Liability Crisis,” *Proceedings of the Academy of Political Science*, Vol. 37, No. 1, New Directions in Liability Law (1988), p. 203; Priest, “The Current Insurance Crisis and Modern Tort Law,” *Yale L.J.*, Vol. 96, No. 7 (June, 1987), p. 1521-90; Scott E. Harrington, “Tort Liability, Insurance Rates, and the Insurance Cycle,” *Brookings-Wharton Papers on Financial Services 2004* (2004), p. 97, 126.

<sup>1116</sup> W. Kip Viscusi, “Product and Occupational Liability,” *J. of Econ. Perspectives*, Vol. 5, No. 3 (Summer 1991), p. 71, 73.

<sup>1117</sup> *Ibid.*, pp. 74-75.



As strict liability law was developed through further litigation in states that had adopted the defective products definition in the 1960s and 1970s, the courts expanded the kinds of situations in which a product could be deemed “defective.” For example, during the 1960s state and federal courts developed strict liability definitions of “defect” which had originated under negligence law to include defectively *designed* products and claims for *failure to warn* of dangers presented by defectively designed or otherwise non-defective but dangerous products.

Defectively designed products were goods that were deemed by courts to present an inherent threat, or risk, of injury to consumers or workers due to their design. Thus, the defectively designed product involved courts in a substantially more regulatory role in adjudging product manufacturing and design.<sup>1118</sup> The defective design theory resulted in claims that led to further premium fluctuations during the 1980s. For example, in October 1974 an Illinois high school football player, William Galindo, Jr., suffered a debilitating spinal cord injury after a tackle. He sued the maker of his helmet, Riddell Inc., claiming the helmet was defectively designed. Although losing at the trial court, Galindo won at the intermediate appellate level.<sup>1119</sup> Prior to the suit Riddell’s product liability insurance premiums had been \$40,000.00 annually. In 1985, three years after losing its appeal, the Riddell’s premiums had increased to \$1.5 million annually. This

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<sup>1118</sup> Dix W. Noel, “Manufacturer’s Negligence of Design or Directions for Use of a Product,” *Yale L.J.*, Vol. 71, No. 5 (April, 1962), p. 816; W. Kip Viscusi, *Reforming Products Liability* (Cambridge: Harv. U. Press, 1991), p. 8.

<sup>1119</sup> *Galindo v. Riddell, Inc.*, 107 Ill. App. 3d 139; 437 N.E. 2d 376 (Ill. App. 3d Dist., 1982).

was ten percent of its annual sales of \$15 million.<sup>1120</sup> Such dramatic shifts in premiums were a fixture of the 1980s.

The “failure to warn” claim was another negligence-based theory.<sup>1121</sup> Sometimes referred to as the “inadequate warning” theory, it assumes, in accord with the rationales provided by courts in the 1960s, that manufacturers are best suited to know the dangers presented by products and to prevent them. Additionally, the warning requirements presume that consumers would have read them and acted in accord with safety recommendations. This theory not only presumes consumers pay attention to warnings but that they do not use products outside prescribed instructions. As one scholar has argued, this claim theory does not achieve strict liability’s purported accident reduction goals because many accidents are caused by unusual uses of products.<sup>1122</sup>

Additionally, the failure-to-warn theory has produced a cornucopia of defensive warning efforts on the part of manufacturers. Although some warnings might appear extreme, and hence absurdly humorous, they have been revealing of the dilemmas presented by courts’ demands that consumers be given sufficient information to safely use a product. For example, a case was filed in Michigan alleging an inadequate warning for a head injury from a softball. The plaintiff argued that, although playing softball presented the generally well-known risk of being hit in the head, few consumers would be aware that the risk of brain damage from a softball “thrown at normal speed” was

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<sup>1120</sup> Jethro K. Lieberman and George J. Siedel, *Business Law and the Legal Environment* (San Diego: Harcourt Brace Jovanovich, 1985), p. 439.

<sup>1121</sup> Dix W. Noel, “Manufacturer’s Negligence of Design or Directions for Use of a Product,” *Yale L.J.*, Vol. 71, No. 5 (April, 1962), p. 816.

<sup>1122</sup> George L. Priest, “Products Liability Law and the Accident Rate,” in Robert E. Litan and Clifford Winston, eds., *Liability: Perspectives and Policy* (Washington, D.C.: Brookings, 1988), pp. 218-19.

greater than the risk presented by a baseball at “normal speed.” The Michigan case was settled for over \$1 million.<sup>1123</sup>

Firms were also subject to other forms of expanded liability during the 1980s. For example, some courts held that successor corporations inherited the tort liability of their predecessor companies. Also, in 1980 a type of liability popularly referred to as “market-share liability” was developed. In *Sindell v. Abbott Laboratories*<sup>1124</sup> the California Supreme Court held that a plaintiff who was unable to identify the actual maker of a product could sue multiple manufacturers in the product’s industry. In 1976 Judith Sindell developed cancer, which she attributed to the miscarriage-prevention drug DES. She was unable to determine which pharmaceutical company actually made the drug she ingested. The California Supreme Court put the burden upon manufacturers in the drug industry to prove that they were not the maker of the drug that actually injured Sindell. Any manufacturer that was unable to disprove its responsibility would be liable for any judgment in an amount equal to its “share of the market.”<sup>1125</sup> *Sindell* became a landmark case in the products liability sub-field of mass torts because it allowed claims against manufacturers throughout a particular industry and gave an incentive to file a lawsuit against multiple manufacturers and make the manufacturers fight amongst themselves to determine who was responsible. This new form of liability also caused

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<sup>1123</sup> W. Kip Viscusi, *Reforming Products Liability* (Cambridge: Harv. U. Press, 1991), pp. 142, 247 n. 18 (date of case unknown).

<sup>1124</sup> 607 P.2d 924 (Cal., 1980).

<sup>1125</sup> Lieberman and Siedel, p. 443.

more litigation amongst insurance carriers, since the courts had to determine “which insurer should be held liable and in what amount.”<sup>1126</sup>

What the scholars who have debated the reasons for premiums increases in the 1970s and 1980s agree on is the fact that *all* of the various forms of expanded liability – strict liability, expanded definitions of “defective” products, and the litigation consequences of expanded liability, such as the “market share” theory and mass torts – have caused the increases and fluctuations in product liability premiums over the 1970s and 1980s. As one federal government study concluded: “Because changes in the pattern of insurers’ payments can take several years to influence the [ISO’s] advisory rate[s], the sharp increases that occurred from 1974 to 1976 and 1983 to 1988 may have resulted from earlier increases in the frequency and cost of claims reported by ISO’s [member] insurers.”<sup>1127</sup> Additionally, as Kip Viscusi has noted, the consumer regulatory laws and agencies that were created in the 1970s did not reduce claims or litigation. On the contrary, the federal safety laws and agencies’ emergence coincided with expanded liability and increased premiums in the 1970s.<sup>1128</sup>

Since the Tort Revolution some scholars have questioned the utility of strict liability in the products liability area. For example, Stephen Sugarman has argued that in the products liability area “strict liability usually makes little difference because victims

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<sup>1126</sup> W. Kip Viscusi, “Liability for Occupational Accidents and Illnesses,” in Robert E. Litan and Clifford Winston, eds., *Liability: Perspectives and Policy* (Washington, D.C.: Brookings, 1988), p. 176.

<sup>1127</sup> U.S. GAO, “Product Liability: Insurance Rate Levels and Claim Payments During the 1970s and 1980s,” GAO/HRD-91-108 (Washington, D.C.: Sept. 16, 1991), p. 3.

<sup>1128</sup> W. Kip Viscusi, “Product and Occupational Liability,” *J. of Econ. Perspectives*, Vol. 5, No. 3 (Summer 1991), pp. 71, 86.

typically could win anyway under negligence law, especially since the rules of *res ipsa loquitur* would commonly apply.”<sup>1129</sup> Ironically, it was the belief that plaintiffs were often *disadvantaged* by the requirement of proving fault under a negligence standard that was partly responsible for the justification of imposing strict liability on manufacturers. Also, Roger Traynor and other state court judges who supported strict liability frequently contended that *res ipsa loquitur* was ill-suited to many product defect cases, since plaintiffs were often injured by goods that had left the sole control of the defendant prior to causing the injury.

Other scholars have argued that fault-based concepts, namely negligence, “persist” in some legal scholars’ writings, notwithstanding formal rules applying strict liability. For example, G. Edward White has reviewed legal casebooks (the textbooks used to educate law students) that emphasize the importance of negligence, or fault, over risk distribution as a principle of post-1980 tort law.<sup>1130</sup> That is, notions of justice based on fault or corrective goals still influence torts scholars’ thinking. The current reporter for the ALI’s torts series, James A. Henderson, Jr. of Cornell Law School, is one of the few academics to resist endorsing the strict liability system. There is a new *Restatement* publication from ALI specifically covering products liability, of which Henderson is the reporter. It covers the masses of cases that have been heard by state and federal courts since the 1960s and breaks the field into subparts for practitioners’ purposes.

Manufacturers can be held liable not only for defective manufacturing processes, but also

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<sup>1129</sup> Stephen D. Sugarman, “A Century of Change in Personal Injury Law,” *Calif. L. Rev.*, Vol. 88, No. 6 (Dec., 2000), p. 2403, 2407.

<sup>1130</sup> G. Edward White, *Tort Law in America: An Intellectual History* (Expanded Ed.) (New York: OUP, 1980, 2003 ed.), p. 272 (quoting a Dan B. Dobbs’s *The Law of Torts* (St. Paul, MN: West Publishing, 2000)).

for defective designs and failures to give consumers adequate warnings of dangers presented by the normal use of a product.<sup>1131</sup> Products liability has become a special field of practice for attorneys, both on the plaintiffs' and defense sides. Whole careers are spent within this relatively narrow span of tort law. However, as Henderson has noted in his own casebook, strict liability only functionally applies to manufacturing defect cases, not to design defect and failure to warn cases. The latter are mostly covered by negligence standards.<sup>1132</sup>

Nevertheless, there are plenty of current scholars who remain committed to strict liability and risk distribution through a compensatory tort system. As G. Edward White himself has noted, even the ALI's *Third Restatement of Torts* de-emphasizes the duty element of negligence.<sup>1133</sup> What has changed since the 1980s is the scholarly community has seen a division between supporters and opponents of strict liability, whereas the decades before the 1980s saw a veritable consensus among scholars in favor of strict liability, or systems that stressed compensation over deterrence and fault.

The federal political debates about tort reform continue apace, as well. The last decade has seen several federal laws enacted that provide federal protection from tort suits or grant new tort rights. For example, the Cardiac Arrest Survival Act of 2000 provides protection from lawsuits alleging negligence in the use of defibrillators.<sup>1134</sup> Also, the September 11 Victim Compensation Fund of 2001 allows victims or their

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<sup>1131</sup> *Restatement of the Law Third, Torts: Products Liability* (Philadelphia: ALI, 1998).

<sup>1132</sup> White, *Tort Law in America*, pp. 278-79 (citing James A. Henderson, Jr., et al., *The Torts Process* (Aspen Publishers, multiple editions through 1999)).

<sup>1133</sup> *Ibid.*, pp. 322-28.

<sup>1134</sup> P.L. 106-505.

estates to choose between bringing a no-fault compensation claim to the fund or filing a lawsuit in federal court for tort relief.<sup>1135</sup> Also, the Paul Coverdell Teacher Protection Act of 2001 provides federal protection to teachers for their negligence in trying “control discipline” in schools.<sup>1136</sup> Such laws demonstrate Congress’s willingness to enact legislation affecting tort rights and, even though most such laws provide for states to enact their own legislation in the subject matter, show Congress’s desire to respond to citizens’ concerns in tort matters.

Product liability suits have increased substantially in recent years and remain significant enough in volume to warrant a prediction that federal legislative concern in this area will not abate anytime soon. In 1990 there were 19,621 product liability suits filed only in *federal* court; in 2000, there were 15,318; and in 2006, there were 49,743. Many of these suit numbers fluctuated because of periodic mushrooming of particular product claims. For example, in the mid-1990s a substantial increase in federal suits was due to breast implant cases. In 2004, a 58 percent increase occurred because of thousands of cases filed in the Northern District of Ohio “regarding welding products that contained manganese.”<sup>1137</sup> Yet, the numbers of product suits – regardless of whether the claims are based on negligence or strict liability standards – are numerous enough that substantial consumer and commercial interests will be affected by the allocation of rights created in the various states’ courts. (Federal courts are required to apply the substantive law of a state when passing upon claims not based in federal law, such as tort claims.)

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<sup>1135</sup> P.L. 107-42.

<sup>1136</sup> P.L. 107-110.

<sup>1137</sup> Table 4.5, U.S. District Courts. Product Liability Cases Filed by Nature of Suit (Washington, D.C.: Administrative Office of the U.S. Courts).

The Tort Revolution began with the progressives who sought to make businesses' manufacturing practices subject to liability from ordinary consumers. The progressives saw the old regime of fault-based negligence as a failure for injured plaintiffs. The frequent inability of consumers to sue the makers of defective goods spurred legal reformers to advocate not only for the elimination of the contract-based rule requiring privity but also for the overthrow of the common law negligence standard of liability. Although the *MacPherson* case from New York was an important change in American law because it became a precedent to which other states looked in allowing plaintiffs to sue regardless of contractual relations. Yet, *MacPherson* was not a fundamental overthrow of the reigning fault standard. Even though the 1920s and 1930s saw more manufacturers being sued for their defective products, the fault-based negligence standard was not abandoned.

The Tort Revolution was a product of the state courts of the 1960s. The switch from fault-based negligence to no-fault strict liability was revolutionary because it fundamentally altered one area of American law – defective products. Manufacturers were legally deemed to be insurers of their products. Progressive state court judges attempted to eliminate the common law's emphasis on moral responsibility for one's acts in the field of defective products and replace it with a redistributionist insurance system. This change seemed to portend the replacement of rules emphasizing individual responsibility with rules mandating social, or society-wide, responsibility for injuries not just in defective products cases, but in all manner of occurrences where liability had been premised upon fault.



The Tort Revolution was not inevitable. It was the conscious policy choice of judges who were comfortable with courts as policy-making institutions. There was an alternative to the policy choice in favor of strict liability. The status quo of negligence law was the old regime and there were many defective products cases throughout the U.S. based on negligence claims. The 1960s are associated with the Warren Court's policy-making efforts in federal constitutional matters. But this decade also witnessed the efforts of progressive judges at the state level in an area of law – products liability – much closer to the daily lives of most Americans than federal constitutional law. Products liability law affects consumers and all Americans are, to some degree, consumers. When state court judges changed their states' laws from negligence to strict liability they thought they were serving the interests of consumers. Strict liability made sense to them. Modern industrial society needed it and not only would the legal community embrace it, but so too would the wider society.

Yet, the Tort Revolution was contested from its inception. Some state governments and the federal government responded to the complaints of citizens and businesses by enacting laws that curtailed or halted the state courts' efforts to implement strict liability. The tort reform movement arose at the state and federal levels in the mid-1970s and continues to this day. The Tort Revolution remains relevant not merely in a historical sense. The Tort Revolution's reformulation of American tort law standards has continued to affect current liabilities for manufacturers and the rights of consumers. Even though negligence has continued to remain a relevant framework and system for many areas of torts, products liability is still an area where the Tort Revolution remains strongest. The changes in products liability, which seemed poised to spread to other

areas of tort law in the 1960s and 1970s, remain in the products area. Although other areas of law remain governed by negligence and even significant areas of products liability remain under the fault-based standards, the Tort Revolution presented an alternative form of legal regime, one which regarded compensation as the chief purpose of tort law. This remains a goal of many legal academics and presumably many judges.

Yet, tort law is no longer just within the purview of courts. This is perhaps the most enduring legacy of the Tort Revolution. Even if strict liability fell out of favor among academics and judges, the relevance of tort law to American consumers' lives remains and was dramatically changed because of the 1960s' Tort Revolution. Tort law is seen as a fit subject for state and federal legislative action, not restricted to courts' pronouncements. In the American system of governance, as we have seen, this means tort law is subject to post-New Deal pluralist politics. Interests affected by tort liabilities have been and continue to organize in order to protect themselves. They wage their battles in courts and legislatures. The ongoing arguments over whether there should be a federalization of tort law demonstrate the importance and impact of the Tort Revolution in American law and society.

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