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Book Review: Deforming Tort Reform

Joseph A. Page
Georgetown University Law Center, page@law.georgetown.edu

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Deforming Tort Reform


Reviewed by Joseph A. Page*

I. THE MANY MEANINGS OF “TORT REFORM”

The storms buffeting the tort system over the past two decades have come in three distinct waves. In the late 1960s, steep increases in the insurance costs incurred by health care providers protecting against negligence claims by patients triggered what came to be known as the “medical malpractice crisis.”1 In the mid-1970s, manufacturers whose liability insurance premiums suddenly soared raised obstreperous complaints that called public attention to the existence of a “product liability crisis.”2 Finally, other groups whose activities created risks exposing them to lawsuits found that their lia-

† Senior Fellow, Manhattan Institute.
* Professor of Law, Georgetown University Law Center. The author wishes to thank his colleagues Bill Vukowich and Mike Gottesman, and Victor E. Schwartz, Esq., for their helpful suggestions, and Karin L. Stein, Class of 1990, Georgetown University Law Center, for her diligent research assistance.

Some of the ideas in this essay were first put forward by the author in a debate with Dr. Peter W. Huber at the Federalist Society’s Annual National Symposium on Law and Public Policy at the University of Michigan Law School on March 10, 1989. A transcript of the debate will be published in 13 HARV. J.L. & PUB. POL’Y (forthcoming 1990).


2. For a detailed federal task force study of the problem, see U.S. DEP’T OF COMMERCE, INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, FINAL REPORT (1978).

bility insurance rates had also risen precipitously. A full-blown "torts crisis" was at hand.\(^3\)

The common law of torts attracted a major share of the blame for each of the three "crises." Observers blamed the medical malpractice crisis on judicial decisions that expanded the doctrine of \textit{res ipsa loquitur} by permitting juries to infer negligence from the mere occurrence of an untoward result following medical treatment, and that recognized a duty of due care by physicians to disclose the risk of treatment to patients.\(^4\) Members of Congress, among others, blamed the product liability crisis on state-by-state variations in rules governing the obligations of manufacturers and sellers.\(^5\) Working groups formed to study the issue found the across-the-board torts crisis attributable to the erosion of fault as the basis for liability and the adoption of rules and practices that were allegedly responsible for "undue" increases in compensatory as well as punitive damage awards.\(^6\)

As a consequence, those adversely affected by rising insurance costs demanded, and often achieved, what they called "tort reform." Responding to pressure, states enacted pro-defendant legislative adjustments to common law rules of medical malpractice,\(^7\) products liability,\(^8\) and general tort law.\(^9\)


3. For reports of an executive branch task force formed to study the problem, see \textit{TORT POLICY WORKING GROUP: REPORT ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY} (1986) [hereinafter \textit{TORT POLICY WORKING GROUP REPORT}]; \textit{TORT POLICY WORKING GROUP: AN UPDATE ON THE LIABILITY CRISIS} (1987) [hereinafter \textit{TORT POLICY WORK GROUP UPDATE}].


By equating tort reform with unidirectional statutory modification of the common law, its advocates succeeded in investing the term with a politically useful, if skewed, meaning.\(^{10}\)

Until the dawn of the present age of tort-related “crises,” the notion of tort reform was likely to evoke images of a movement to change pro-defendant common law rules\(^ {11}\) so that injured plaintiffs could more easily win judgments or recover full damages.\(^ {12}\) Indeed, through the first half of the twentieth century, the tort system tended to protect the interests of defendants in general\(^ {13}\) as well as particular categories of defendants.\(^ {14}\) What might be called the “old tort reform” was partly an effort to rectify these imbalances.


10. Opponents of the new tort reform find themselves in the uncomfortable position of being against “reform,” a word that conveys a sense of progress, improvement, and the correction of abuse or imperfection. Proponents have made full use of the term. For example, an organization founded and funded by groups whose economic interests would benefit from pro-defendant tort-rule modifications calls itself the American Tort Reform Association (ATRA). On the founding of ATRA, see Strasser, New Group Enters Tort-Reform Arena, Nat'l L.J., Feb. 3, 1986, at 3, col. 1.

11. The extent to which these rules had crystallized in the nineteenth century and the forces that motivated them are matters of academic controversy. For the view that nineteenth-century tort law promoted the interests of industry, making it difficult for plaintiffs to recover, see L. Friedman, A HISTORY OF AMERICAN LAW 467-87 (2d ed. 1985); M. Horowitz, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860, at 67-108 (1973); see also G. White, TORT LAW IN AMERICA 61-62 (1980) (nineteenth century tort doctrine narrowed compensation). Professor Lawrence M. Friedman has noted that tort law in the nineteenth century became a “noncompensation system.” Friedman, Civil Wrongs: Personal Injury Law in the Late 19th Century, 1987 AM. B. FOUND. RES. J. 351, 369 (1987). Friedman points out that accident victims were not only prejudiced by tort doctrine, but also were confronted with social and legal obstacles that dampened their expectations of compensation. Id. at 369-73.


12. There are, of course, instances in which pre-crises alterations of tort law benefitted defendants. For example, during the first four decades of this century many states enacted “guest statutes” reducing the duty automobile drivers owed to guest passengers. See W. Prosser & W. Keeton, THE LAW OF TORTS § 34, at 215-17 (5th ed. 1984). Over the past two decades, however, many legislatures have repealed or modified their guest statutes and a number of courts have held them unconstitutional on equal protection grounds. See id.

13. Many states at one time maintained statutory limits on the amount of damages that could be recovered against a defendant who tortiously caused the death of another, regardless of the actual economic loss to the survivors. For a chart listing these states and the caps on their wrongful-death statutes in 1935, 1955, and 1965, see S. Speiser, RECOVERY FOR WRONGFUL DEATH 490 (1st ed. 1966).

Until 1946, courts would not hold a defendant who negligently injured a pregnant woman and caused her child to be born with injuries liable for the harm to the child. See W. Prosser & W. Keeton, supra note 12, § 55, at 367.

14. On the limited duties that possessors of land owe to entrants upon the land, and that landlords owe to tenants, see generally J. Page, THE LAW OF PREMISES LIABILITY (2d ed. 1988).
One common law rule that protected all defendants was the doctrine of contributory negligence, which completely barred plaintiffs from recovery whenever their negligence helped to cause the injuries they sustained. The legislative abolition of this doctrine and the enactment of comparative negligence statutes, which enabled plaintiffs to recover but reduced their recoveries in proportion to their degree of fault, exemplify the spirit of the old tort reform.15

In addition to legislative enactments, the far more usual method for reforming tort law in the pre-crises period was through the courts. Appellate judges exercising the creative powers at the core of the common law system rewrote a good deal of the law of torts.16 Although the stirrings of the old tort reform can be traced through judicial decisions during the first half of this century,17 the pace did not quicken until the 1950s and 1960s.18 With an extraordinary outburst of energy, the courts recognized their new duties,19 abolished immunities,20 and adopted expansive rules for measuring dam-

15. For a discussion of comparative negligence, see generally V. SCHWARTZ, COMPARATIVE NEGLIGENCE (2d ed. 1986); White, Tort Reform in the Twentieth Century: An Historical Perspective, 32 VILL. L. REV. 1265, 1284-88 (1987).

Another example of statutory tort reform is the Federal Employers' Liability Act (FELA), which governs suits by railroad employees against their employers. 45 U.S.C. §§ 51-60 (1988). FELA, which was enacted in 1908, abolishes the defense of assumption of risk, adopts comparative negligence, and has been construed as liberalizing the plaintiff's burden to establish causation. See generally Phillips, An Evaluation of the Federal Employers' Liability Act, 25 SAN DIEGO L. REV. 49 (1988).


17. For a notable early example, see MacPherson v. Buick Motor Co., 217 N.Y. 382, 390-91, 111 N.E. 1050, 1053 (1916) (despite lack of privity assembler of product owed duty of reasonable care to ultimate consumer); see also President & Directors of Georgetown College v. Hughes, 130 F.2d 810, 827 (D.C. Cir. 1942) (charitable immunity abrogated); Bonbrest v. Kotz, 65 F. Supp. 138, 141-42 (D.D.C. 1946) (duty to refrain from negligently inflicting prenatal injuries owed to viable fetus subsequently born alive); Summers v. Tice, 33 Cal. 2d 80, 86-87, 199 P.2d 1, 5 (1948) (burden to prove causation shifted to defendants when two defendants negligently discharged firearms and one bullet struck plaintiff).

18. For a detailed treatment of the judicial pro-plaintiff tort-reform movement between 1958 and 1967, see R. KEETON, VENTURING TO DO JUSTICE: REFORMING PRIVATE LAW 25-77 (1969); see also Ursin, Judicial Creativity and Tort Law, 49 GEO. WASH. L. REV. 229, 301 (1981) (modifications of tort law in 1960s and 1970s, especially in California, considered "exemplary illustration of desirable judicial creativity").


20. See Hargrove v. Town of Cocoa Beach, 96 So. 2d 130, 133 (Fla. 1957) (municipal corporation held liable under doctrine of respondeat superior).
Perhaps the most dramatic development was the judicial adoption of a rule of strict tort for harm caused by defective, unreasonably dangerous products. Assigning any single cause to this judicial activism would be an oversimplification. The courts were responding to arguments that existing rules were illogical, unfair to plaintiffs, or inconsistent with tort law’s goals of deterrence and compensation. Enterprise liability, which posits that a business or activity should bear the costs of the harm it causes, provided the major impetus for the shift from a negligence theory to a strict liability theory in products liability.

Yet there were other important contributors as well. The work of legal scholars provided much of the theoretical framework for the old tort re-

21. See Beaulieu v. Elliott, 434 P.2d 665, 671, 676 (Alaska 1967) (damages for impaired future earning capacity not reduced to present value because inflation offsets power of lump sum award to earn interest during plaintiff’s period of disability); Wycko v. Gnodtke, 361 Mich. 331, 333-35, 105 N.W.2d 118, 121-22 (1960) (pecuniary value of deceased child’s life measured by child’s worth as part of family, including cost of child’s upbringing).


23. Partly because they have recognized the illogic of the argument that personal tort actions between husbands and wives would disrupt the harmony of the home, courts have eroded interspousal immunity. See W. PROSSER, THE LAW OF TORTS 863-64 (4th ed. 1971).


25. See, e.g., Molitor v. Kaneland Community Unit Dist. No. 302, 18 Ill. 2d 11, 24, 163 N.E.2d 89, 95 (1959), cert. denied, 362 U.S. 968 (1960) (abolition of school district’s immunity would encourage school districts to exercise greater care in selection and supervision of employees); Parker v. Port Huron Hosp., 361 Mich. 1, 33, 105 N.W.2d 1, 15 (1960) (maintaining rule of charitable immunity would foster neglect, whereas abolishing immunity would induce greater caution); Rappaport v. Nichols, 31 N.J. 188, 205, 156 A.2d 1, 10 (1959) (imposing liability upon liquor licensees for negligently serving alcoholic beverages to minors and intoxicated persons would substantially increase diligence of licensees not to serve such persons); DeNike v. Mowery, 69 Wash. 2d 357, 368-69, 418 P.2d 1010, 1017-18, amended by 422 P.2d 328 (1966) (judgment for plaintiff against original tortfeasor for injuries sustained in car accident did not relieve plastic surgeon of liability for subsequent negligent treatment of those injuries).

26. The rationale for this theory of strict liability is that enterprises control risks and therefore are in a superior position to minimize them. Additionally, they have a superior capacity to spread and bear the costs of these risks. On enterprise liability, see generally Klemme, The Enterprise Liability Theory of Torts, 47 U. COLO. L. REV. 153 (1976). For an analysis of difficulties that are likely to arise in translating the theory into practice, see generally Henderson, The Boundary Problems of Enterprise Liability, 41 MD. L. REV. 659 (1982).

form." These scholars created the intellectual climate for what occurred in the 1950s and 1960s and gave courts rationales for rejecting pro-defendant rules and doctrines. The growth of a bar association of trial attorneys representing injured plaintiffs in the years following World War II resulted not only in aggressive front-line pressure for the judicial adoption of doctrines that favored plaintiffs, but also in the development of tactical skills enabling plaintiffs to win substantial jury verdicts.

As history suggests, the old tort reform constituted but one swing of a pendulum that later began to reverse itself in the wake of the crises of the 1970s and 1980s. Thus, construed most favorably, the "new tort reform" has become an effort to eliminate alleged excesses perpetrated by the old tort reform and to restore equilibrium to the system.

Despite their apparent similarities, there is an important difference between the old and the new tort reform. The former derived inspiration and major impetus from the ideas of scholars and had its primary influence on the courts. The latter is fueled by the economic self-interest of those who perceive themselves as adversely affected by the tort system. In essence, the


There were, of course, occasional professorial voices raised against rules favoring plaintiffs. See Henderson, Expanding the Negligence Concept: Retreat from the Rule of Law, 51 Ind. L.J. 467 (1976) (criticizing developments of tort system that focus upon substantive objectives without factoring in realities and limitations of adjudication); Jaffe, Damages for Personal Injury: The Impact of Insurance, 18 L. & Cocontemp. Probs. 219 (1953) (arguing against awarding damages for pain and suffering).

29. See generally G. White, supra note 11.

30. The National Association of Claimants' Compensation Attorneys (NACCA), founded in 1946, was originally an organization of attorneys who represented injured workers. It subsequently broadened its membership to include all tort lawyers who represented injured plaintiffs. The group has changed its name several times. In 1960, it became the National Association of Claimants' Counsel of America; in 1964, the American Trial Lawyers Association (ATLA); and in 1972, the Association of Trial Lawyers of America (ATLA). On the Association's history, see Jameson, ATLA, Trial, July 1980, at 56.

31. See Green, The Thrust of Tort Law, Part I: The Influence of Environment, 64 W. Va. L. Rev. 1, 19 (1961). Professor Green comments: "The balance of power between the respective advocates [in personal-injury litigation] has been more nearly restored, and the doctrines so excessively overweighted in defendant's favor during the 1800's in most instances are being more fairly stated and employed." Id.

32. On the educational mission of the plaintiffs' bar, see Lambert, NACCA—Rumor and Reflection, 18 NACCA L.J. 25, 30-31 (1956); Jameson, supra note 30, at 60-62.

33. See supra note 28.
new tort reform is a political attack on tort law in the legislative arena.34

This has important implications. Politicians tend by nature to be much more pragmatic than theoretical. To convince them of the real need for legislation, contemporary tort reformers stress the most dramatic argument for their case—skyrocketing liability insurance rates. Yet there is no guarantee that making tort rules more favorable to defendants will decrease premiums.35 Moreover, the political process inevitably involves the sort of compromise that can blunt the efforts of the new tort reformers36 and open the door to legislative counterattacks.37

34. Some scholars have testified in favor of aspects of the new tort reform before legislative committees. See Product Liability: Legislative Hearings, Hearings Before the Subcomm. on Consumer Protection and Finance of the House Comm. on Interstate and Foreign Commerce, 96th Cong., 2d Sess. 90, 351 (1980) (testimony of Professors James A. Henderson, Jr., representing the National Product Liability Council, and Richard A. Epstein, representing the American Insurance Association). However, the contributions of academics to new tort reform have been supportive rather than seminal. See Twerski, The Joint Tortfeasor Legislative Revolt: A Rational Response to the Critics, 22 U.C. Davis L. Rev. 1125, 1125 (1989) ("The legislative reform movement has been successful beyond the hopes of its most ardent advocates. Academia was caught napping.").

35. For arguments that factors other than tort suits triggered the malpractice crisis, see generally J. GuintHER, THE MAlPRACTITIONER (1978); S. LAW & S. POLAN, PAIN AND PROFIT: THE POLITICS OF MAlPRACTICE (1978); see also P. Danzon, supra note 1, at 225 (arguing that the malpractice crisis of 1975 was caused by rising costs of claims that resulted in part from increased health care use of the late 1960s and in part by a shift to pro-plaintiff tort doctrines); Henrique, Just What the Doctors Ordered: The Crisis in Medical Malpractice is Ending, Barron's, Oct. 2, 1989, at 8 (positing that malpractice suits have contributed to improvements in the quality of health care, thereby easing the malpractice crisis).

For arguments that the product liability insurance crisis was unrelated to changes in tort rules governing product liability suits, see Page & Stephens, The Product Liability Insurance "Crisis:" Causes, Nostrums and Cures, 13 CAP. U.L. Rev. 387, 399-404 (1984) (arguing that increase in insurance premiums was not caused by substantive law of products liability, but rather by factors internal to the insurance industry). But see Priest, The Current Insurance Crisis and Modern Tort Law, 96 Yale L.J. 1521, 1526-32 (1987) (explaining and criticizing collusion theories, insurance cycle theories, and Justice Department's tort law theory as an explanation of drastic changes in insurance industry).

For a thoughtful analysis of the insurance aspects of the torts crisis, see Abraham, Making Sense of the Liability Insurance Crisis, 48 Ohio St. L.J. 399 (1987). For a good description of the cyclical nature of the commercial property and casualty insurance businesses, see Crenshaw, For Insurers, a 'Slippery Slide' Into a Slump, Wash. Post, June 11, 1989, at H1, col. 1. The author writes: "A number of factors explain the vulnerability of insurance to these powerful cycles, among them a herd instinct that governs pricing policy, intense pressure on companies to maintain market share, and the fluctuations of interest rates." Id. at H5, col. 1.

36. See Pierce, Institutional Aspects of Tort Reform, 73 Calif. L. Rev. 917, 919-22 (1985) (arguing that legislatures are incapable of resolving controversial issues because they are paralyzed by an agenda filled with complicated issues, lack of expertise to resolve difficult questions, and an inability to foresee problems caused by a new legal regime).

37. See H.R. 129, 101st Cong., 1st Sess. (1989) (bill making information secured by discovery in product liability suits available to other claimants or government in certain instances; would nullify effects of protective orders obtained by defendants to prevent disclosure of information adversely affecting them in litigation involving other injured claimants); S. 2497, 99th Cong., 2d Sess. (1986) (bill imposing upon companies who issue commercial property or casualty insurance policies reporting requirements about premiums collected, claims paid, and legal and administrative costs); see
Consumer advocates and the plaintiffs' trial bar have been vigorously resisting the political thrust of the new tort reform. They argue that the sharp increases in liability insurance premiums that created the crisis atmosphere resulted from economic factors having nothing to do with the tort system, and that reducing the potential liability of the providers of goods and services will also diminish safety incentives that the tort system creates.

Although the expression “tort reform” characterizes changes in rules governing liability or damages, it also applies to efforts to develop alternative mechanisms for compensation and deterrence. In this sense, tort reform has a history that dates to the beginning of this century. The legal barriers confronting suits on behalf of workers killed in job-related accidents derived not only from tort rules that provided employers with a formidable set of defenses tilted in their favor, but also from the nature of the tort system. The legal process made it virtually impossible for people with limited financial resources to vindicate their common law rights with any realistic hope of success, and failed to address the more general problem of how society should deal with the inevitable toll of industrial accidents and illnesses. Political reformers provided the impetus for state workers' compensation statutes that abolished common law defenses and the need to prove the em-


40. For a similar categorization of approaches to tort reform, see Stewart, Crisis in Tort Law? The Institutional Perspective, 54 U. CHI. L. REV. 184 (1987). Professor Stewart's analysis centers upon current reactions to the crises. He finds three discrete classes of definitions, diagnoses, and cures: (1) those that derive from the belief that the problem is in fact an “insurance crisis,” to be solved by reforms in the insurance industry; (2) those that assign blame to tort law and seek pro-defendant modifications in tort doctrine and practices; and (3) those that find fault with the tort system as a whole and advocate alternative institutions to perform all or many of the functions of tort law. Id. at 190-95.


42. See J. PAGE & M. O'BRIEN, BITTER WAGES 51-53 (1972). Even after the enactment of worker's compensation statutes, the tort system continued to evidence an incapacity to deal equitably with work-related disabilities not covered by the new laws. For a dramatic example of how inadequacies in the law and disparities in the economic and social positions of employees and their employers produced a major injustice, see J. PAGE & M. O'BRIEN, supra, at 63-67 (describing tort litigation arising from contraction of silicosis by nearly 2,000 workers digging a tunnel near the Gauley Bridge, West Virginia in 1930 and 1931).

ployer's negligence, limited the compensation to work-connected accidents, and set up administrative boards to resolve claims expeditiously.44

Another alternative method of compensation arose after the evolution of the automobile as the primary method of transportation.45 This emphasis on automobiles converted accidents into major societal problems. Critics of the tort system's approach to automobile accident cases sought alternative mechanisms that would guarantee swift and certain benefits to the victims of highway mishaps.46 They eventually succeeded by gaining legislative approval in some states for no-fault auto accident compensation plans.47

The various crises of the past two decades have provoked relatively little in the way of alternative compensatory mechanisms. To date, the most notable federal initiative has been the National Childhood Vaccine Injury Act,48 which created an optional system of no-fault compensation for vaccine-related adverse reactions.49 Perhaps the most interesting experiment in radical change at the state level is Virginia's Birth-Related Neurological Injury Compensation Act.50 This Act created a no-fault compensation fund for in-
nants with a defined class of severe birth-related injuries.51

One particular category of suit is provoking insistent calls for radical reform. A relatively recent phenomenon, the mass tort, is placing enormous strains on the tort system. The mass tort is a byproduct of the use of modern technological products that have the capacity to inflict serious harm upon large numbers of people—harm which may manifest itself gradually over an extended period of time. Mass tort litigation has wrestled, and continues to wrestle, with perplexing problems of causal relations, defining compensable injury, and identifying the responsible source.52 Some critics have been inspired to suggest alternative approaches both to compensating victims and deterring those responsible for creating widespread exposures to insidious hazards.53

Meanwhile, some academic commentators have responded to concerns that run deeper than insurance-related crises. They offer not only systemic criticisms of what they perceive to be tort law’s failure to fulfill its functions in a cost-effective way, but also proposals for structural change or alternative institutions that would greatly reduce or even abolish the role of the tort system in deterring accidents and compensating accident victims.54


52. See Rabin, Tort Law in Transition, 23 Val. U.L. Rev. 1, 15-24 (1988) (heightened sensitivity to unseen dangers heralded mass tort era, leaving judiciary struggling to formulate doctrinal response that properly compensates victims); see generally Rubin, Mass Torts and Litigation Disasters, 20 Ga. L. Rev. 429, 445-46 (1986) (suggesting that mass tort litigation makes our two-party adversary system obsolete and should be replaced by uniform federal tort law enabling filing of mass tort suits in one forum); Weinstein, Preliminary Reflections on the Law’s Reaction to Disasters, 11 Colum. J. Envtl. L. 1, 43-44 (1986) (suggesting that when dealing with mass tort disaster, national system of health and disability insurance is necessary for compensating victims and minimizing costs); Williams, Mass Tort Class Actions: Going, Going, Gone?, 98 F.R.D. 323, 325-29 (1986) (suggesting that class actions are best device to accommodate problems of mass tort suits).

53. See, e.g., P. Schuck, Agent Orange on Trial: Mass Toxic Disasters in the Courts (1986) (case study of litigation by Vietnam veterans against companies that manufactured Agent Orange, an herbicide linked to cancer, birth defects, and other health problems). For an argument that the Agent Orange litigation demonstrates the value of the tort system, see Marcus, Apocalypse Now? (Book Review), 85 Mich. L. Rev. 1267 (1987) (reviewing P. Schuck, supra).

II. HUBER'S CONTRIBUTION

This is the setting into which Peter W. Huber has injected Liability: The Legal Revolution and Its Consequences. 55 His book sets out to convince the general reader that tort law has become mired in a "poisonous swamp," 56 explain how it arrived there, and suggest ways to salvage it. Huber, who holds both a doctorate in mechanical engineering and a law degree, 57 is a senior fellow at the Manhattan Institute, a "think tank" devoted to free market oriented policy research. 58

Although Huber has previously authored thoughtful critiques of public risk regulation through administrative action 59 and private tort suits, 60 Liability makes no pretense at being scholarly. 61 Indeed, the many inaccuracies and distortions sprinkled throughout the book lend it a certain perverse charm. The book targets the lay reader and sets out to savage the current tort system in no uncertain terms. With a voice that ranges from brisk to acerbic to mean-spirited, 62 Huber is of a mind to take no prisoners as he heaps scorn upon the "naive" academics and judges whom he accuses of creating the intellectual framework of contemporary tort law 63 and upon the trial lawyers who have translated theory into practice. 64

Within the context of the current debates over tort reform, Liability serves...
the immediate political interests of those who favor pro-defendant changes in the law of torts. The book passes harsh, though not always original, judgments upon the old tort reform, which Huber refers to as the “great revolution,” and upon the current tort system in general. His criticisms lend support to efforts to bring about changes in pro-plaintiff doctrines and procedures.

Yet the book advocates much more than tinkering with the common law. Huber believes that the great revolution has brought no less than catastrophic consequences to those it was meant to benefit. His prescription is not only the doctrinal rollback urged by the new tort reformers but also a return to contract as the primary mechanism by which individuals adjust their rights and responsibilities.

The high praise the book has garnered in some quarters and Huber’s prominence as an outspoken critic of the torts process make Liability an appropriate subject for extended commentary. In a highly readable format, Huber has compressed virtually every negative assessment that has ever been rendered against modern tort law in an effort to persuade the public of the need for drastic change. The validity of some of these animadversions, however, does not necessarily require throwing out the baby with the bathwater.

This review takes issue with Liability’s version of the great revolution and its aftereffects. The book offers solutions that seem to aim at restoring imbal-

65. For excerpts from the book used in an advertisement by an insurance company attacking the tort system, see The Liability Lottery: We All Lose (advertisement), Wash. Post, Apr. 20, 1989, at A14-15, June 15, 1989, at A22-23.

66. P. HUBER, supra note 55, at ix.

67. He fulminates that “open-ended tort law serves only as an engine of social destruction.” Id. at 221. Not to be outdone in matters rhetorical, economist George Gilder calls the “ever-spreading crisis of liability and legal overreach . . . the cancer of capitalism.” Id. jacket cover.


Tort law luminaries Richard Epstein, Jeffrey O’Connell, and George Priest offer high praise on the book jacket. See P. HUBER, supra note 54, jacket cover.

69. Huber speaks frequently on the shortcomings of the liability system. See, e.g., BUS. INS., Nov. 14, 1988, at 75 (report of Huber’s briefing to Chicago area business leaders); BUS. WIRE, Nov. 30, 1988 (wire service report of Huber speech to executives of Royal Insurance); Executive Speaker, July 1, 1988, at 9 (NEXIS, BWIRE file) (report of Huber’s speech at Shavano Institute seminar).

ances. Its solutions, however, will merely force another swing of the pendulum and produce yet another movement for reform.

III. THE REACH OF ENTERPRISE LIABILITY

The great revolution that incites Huber’s wrath exploded in the 1960s when a shadowy group of academics and judges he christens the “Founders”\(^70\) began to convince courts to abandon traditional rules of tort and contract law. According to Huber, they urged the creation of a broad regime of liability that ignored notions of both personal responsibility, the core of negligence doctrine, and free choice, as expressed by agreements between purchasers and providers of goods and services.\(^71\) Reducing legal history to caricature, Huber claims that the cabal broadened over the next two decades as a group of legal economists joined forces with the Founders to justify the new tort theory as necessary to remedy market failures.\(^72\) The Founders and

\(^70\). The only “Founders” he identifies by name are the late William L. Prosser, John W. Wade, and the late Roger J. Traynor. P. HUBER, supra note 55, at 6.

William Prosser was for many years the Dean of the University of California School of Law at Berkeley and a professor at the Hastings College of the Law. He was also Reporter for the Second Edition of the Restatement of Torts and the author of the authoritative HANDBOOK OF THE LAW OF TORTS (5th ed. 1984). He wrote influential law review articles that predicted and then celebrated judicial adoption of strict liability for defective products. See generally Prosser, The Assault upon the Citadel (Strict Liability to the Consumer), 69 YALE L.J. 1099 (1960); Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 MINN. L. REV. 791 (1966). For an analysis of Prosser’s influence on the development of tort law, see G. WHITE, supra note 11, at 139-79.

John Wade, Dean Emeritus of the Vanderbilt University School of Law and a curious choice as a “Founder,” succeeded Prosser as Reporter for the Restatement of Torts. He presumably owes his nomination as a “revolutionary” to a much-cited article in which he developed a seven factor test for determining whether a product is unreasonably dangerous and hence subject to strict liability. See Wade, On the Nature of Strict Tort Liability for Products, 44 MISS. L.J. 825, 837-38 (1973). For Wade’s own modest assessment of his contributions and those of Traynor and Prosser, see Wade, An Evaluation of the “Insurance Crisis” And Existing Tort Law, 24 HOUS. L. REV. 81, 83 (1987) (referring to Traynor and Prosser as “generals” and himself as a “PFC,” or private first class).


Even though Huber concedes that his nominations were selective rather than inclusive, it is surprising that he omits Fleming James, Jr., from his “Hall of Shame.” For an analysis of James’ profound impact on the evolution of tort theory, see Priest, supra note 27, at 465-83.

\(^71\). See P. HUBER, supra note 55, at 6-7.

\(^72\). Id. at 6. Huber pours considerable scorn upon law and economics scholarship generally, and upon its “dense prose, arcane jargon, and elaborate methodology” in particular. Id. (Ironically, throughout the book he draws heavily upon the writings of George L. Priest, a professor of law and economics at Yale Law School.) The only individuals he actually fingers are Dean Guido Calabresi of the Yale Law School and Judge Richard Posner of the United States Court of Appeals for the Seventh Circuit and formerly a professor at the University of Chicago Law School. In his relentless
their allies sought to force on those who furnish goods and services the cost of all accidents associated with what they sell or do. They argued that cost internalization would help achieve the twin goals of accident deterrence and victim compensation. The result would be a regime of enterprise liability.

While conceding that their intentions may have been noble, Huber argues that the Founders inflicted upon society disastrous short-term repercussions. These include the dramatic increases in the costs of goods and services and the decline in their availability, which he dubs the "tort tax." Moreover, the new rules discourage scientific and technological innovation that in the long run would produce a net social gain. The new rules either overlook or fail to take sufficient account of safety trade-offs. As a result, liability imposed on one type of conduct has encouraged alternative conduct that is even riskier or more detrimental to the public welfare.

If Huber's agenda had been more modest and had confined itself to the field of products liability, characterizing the developments of the 1960s and 1970s as a great revolution would be defensible. But he is clearly on the spoor of bigger game. Although most of his examples relate to the strict liability rules governing the duties of manufacturers and suppliers of goods, he insists that he is writing about the tort system, an assertion fortified by occasional references to liability problems faced by the suppliers of services and others. Thus, to those unfamiliar with tort law, Huber creates the impression that strict tort liability, which he also refers to as "ultra-stringent producer liability" and "no-fault," applies to all tort cases.

pursuit of oversimplification, he lumps the work of all "legal economists" together despite significant differences among them. For a concise analysis of some of these differences, see G. WHITE, supra note 11, at 219-24 (Posner argues negligence theory is more compatible with the efficient use of society's resources than strict liability because it creates incentives for all to improve safety, while Calabresi argues that strict liability achieves a higher degree of efficiency because it is based on injury rather than the arbitrariness of fault). Cf. Donohue, The Law and Economics of Tort Law: The Profound Revolution (Book Review), 102 HARV. L. REV. 1047, 1051 (1989) (reviewing W. LANDES & R. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987) and S. SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW (1987)) (criticizing Huber's criticisms of Calabresi and Posner).

73. P. HUBER, supra note 55, at 7.
74. Id. at 4, 11. The tort tax represents the increase in the price of goods and services, which reflects the risk of liability associated with each good or service. Id. at 4.
75. See infra PART IV.
76. P. HUBER, supra note 55, at 14-15 (arguing that because the new tort rules place technology in the "liability dock," older, proven technologies are less subject to liability). For an earlier article in which Huber blames both the tort system and government regulators for stifling innovation, see Huber, Who Will Protect Us From Our Protectors?, FORBES, July 13, 1987, at 56.
77. See infra notes 166-94 and accompanying text.
78. See P. HUBER, supra note 55, at 55 (building owner liable to burglar who fell through skylight), 68-69 (companies liable for use and dumping of toxic chemicals), 77 (psychologist liable for failing to warn murder victim of psychotic patient's intent to kill her), 163 (physician liable for treating accident victim who is stranger).
79. Id. at 27.
The perception that the revolution in tort law has created a regime of strict liability owes its existence to those, like Huber, who link the recent expansion of tort liability (here called the old tort reform) to judicial acceptance of the theory of enterprise liability. They are thus able to assign the theory credit (or blame) not only for the actual shift to strict tort as a basis for holding manufacturers and sellers liable for defects in their products, but also for the adoption of other common law rules favoring plaintiff recoveries against business enterprises.

The difficulty with this expansive interpretation of the role of enterprise liability lies in the paucity of evidence to support the view that the courts carrying out the old tort reform had as their primary motivation an urge to impose enterprise liability. When one ventures beyond the spacious confines of the products liability field, the number of decisions employing enterprise liability even as part of their ratio decidendi is sparse indeed. Thus, from

80. Id. at 132.

81. One example of the sleight of hand that Huber practices in intertwining strict liability and negligence occurs in a section entitled “The Climate for Change.” Id. at 25. He first describes the inception of strict liability for breach of the implied warranty of fitness in cases involving the human consumption of food and drugs during the first decades of the twentieth century. Id. He then describes the consumer movement of the 1950s and 1960s, and the “unprecedented intellectual assault” by the Founders (presumably resulting in the adoption of strict liability for all defective products). Id. at 26. He makes passing reference to a patient’s right to sue a doctor in malpractice actions, which require proof of negligence. Id. He then returns to discussing the Founders and summarizes their theory of sizing liability not upon fault, but upon the identification of the party best able to prevent an accident at the cheapest cost. Id. at 27. Finally he points to hospitals, city governments, and universities as exemplary cheaper-cost avoiders, a reference that strongly suggests they would be subject to the new strict tort liability when in fact they are not. Id.

82. The theory of enterprise liability postulates that providers of goods and services should bear the losses associated with their goods and services without regard to negligence. Professor Priest is perhaps the foremost advocate of the proposition that strict liability owes its existence to the judicial acceptance of enterprise liability theory. See Priest, The Current Insurance Crisis and Modern Tort Law, 96 YALE L.J. 1521, 1534-36 (1987); see also Ursin, supra note 18, at 299-303 (espousing theories of enterprise liability).

83. The rule of strict liability for abnormally dangerous activity is a form of enterprise liability that requires those engaged in highly risky operations to bear losses occasioned by the ultra-hazardous aspects of their enterprises. See Siegler v. Kuhlman, 81 Wash. 2d 448, 459-60, 502 P.2d 1181, 1187 (1972) (en banc) (defendant strictly liable for death caused by explosion resulting from spill of gasoline on road), cert. denied, 411 U.S. 983 (1973); see generally RESTATEMENT (SECOND) OF TORTS §§ 519, 520 (1977) [hereinafter REsTATEMENT]. The rule first appeared in the nineteenth-century decision of Rylands v. Fletcher, 3 L.R.-E. & I. App. 330, 340 (1868) (defendant held liable without fault when water from defendant’s land filled plaintiff’s mines). Thus, it hardly merits inclusion in the old tort reform. For arguments that the rule should be interpreted more broadly to extend the reach of enterprise liability, see Nolan & Ursin, The Revitalization of Hazardous Activity Strict Liability, 65 N.C.L. REV. 257, 286-93, 310-14 (1987).

84. Virtually all the cases cited in Priest, supra note 82, involved products liability. One of the decisions, Rowland v. Christian, 69 Cal. 2d 108, 443 P.2d 561, 70 Cal. Rptr. 97 (1968) (en banc), cited in Priest, supra note 82, at 1536, did not impose liability upon a business enterprise but rather upon a private individual who was a social host. Priest, supra note 82, at 1536 n.81. The court’s rationale was not enterprise liability but negligence. In listing factors that judges should consider in
the perspective of tort law in general and with the exception of products liability, the theory of enterprise liability is more a gleam in the eyes of scholars than a reflection of actual case law.

One important reason for this is the difficulty courts encountered in establishing standards for imposing liability. To postulate that producers of goods and services should bear losses occasioned by those goods and services is not enough; the court must further specify which losses, or what kinds of goods and services, will trigger a finding of liability.85

Contrary to Huber's assertions, the so-called great revolution produced by the theoretical work of Huber's Founders has imposed enterprise liability only to the extent that courts have adopted a rule of strict tort liability for the sale of defective and unreasonably dangerous goods.86 Although the cases occasionally suggest that this strict products liability might appropriately extend to cover classes of defendants other than manufacturers and retailers,87 this simply has not occurred. The courts' failure to agree upon

determining whether a duty of reasonable care exists, the court mentioned the prevalence and availability of insurance that the defendants might have purchased. Rowland, 69 Cal. 2d at 113, 443 P.2d at 564, 70 Cal. Rptr. at 100. However, there is nothing in the opinion to suggest that this was the critical factor.

 Likewise, virtually every decision cited in Ursin, supra note 18, falls within the area of products liability. One exception, Haft v. Lone Palm Hotel, 3 Cal. 3d 756, 478 P.2d 465, 91 Cal. Rptr. 745 (1970), cited in Ursin, supra note 18, at 302 n.470, shifted the burden to defendant of proving that the absence of a statutorily required lifeguard at a motel swimming pool did not cause plaintiff's drowning. 3 Cal. 3d at 772, 478 P.2d at 475, 91 Cal. Rptr. at 755. The court reasoned that to maintain the traditional rule and require the plaintiff to prove that the deaths would not have occurred in the presence of a lifeguard would be tantamount to negating the duty imposed by the statute. Id. at 772-75, 478 P.2d at 475-77, 91 Cal. Rptr. at 755-57. Only in a footnote did the court add that its holding was consistent with "the emerging tort policy of assigning liability to a party who is in the best position to distribute losses over a group which should reasonably bear them." Id. at 775 n.20, 478 P.2d at 477 n.20, 91 Cal. Rptr. at 757 n.20. Thus, the notion of enterprise liability plays only a minor supporting role in Haft.

85. If the only test were whether the harm could be attributed to a good or a service (causal relation), serious difficulties would result in cases in which multiple causative factors contributed to the plaintiff's injuries. See G. Schwartz, Foreword: Understanding Products Liability, 67 CALIF. L. REV. 435, 445-47 (1979) (in multiple causation accidents, uncertainty about which enterprise is actually liable requires courts either to charge the party most at fault, or charge the parties proportionately to their fault); see generally Henderson, supra note 26, at 662-76 (assessing problem of determining which enterprises and which injuries should give rise to liability).

86. That courts have agreed upon a liability trigger in products cases does not mean that the "defective-and-unreasonably-dangerous" test has not created difficulties. See Page, Generic Product Risks: The Case Against Comment k and/or Strict Tort Liability, 58 N.Y.U. L. REV. 853, 860-64 (1983) (discussing difficulties drafters of Restatement (Second) of Torts had in defining "defective" and "unreasonably dangerous"); see generally J. BEASLEY, PRODUCTS LIABILITY AND THE UNREASONABLY DANGEROUS REQUIREMENT (1981) (surveying all U.S. jurisdictions and relying on unreasonably dangerous standard to distinguish between strict liability and negligence).

the circumstances that should trigger enterprise liability has deterred its more expansive use.

Moreover, even in products liability, the predominance of strict liability is not nearly as absolute as Huber would have us believe. In cases of mismanufacture, when a product departs from its own specifications as set by the manufacturer,\(^88\) the theory applies clearly and cleanly: a plaintiff must prove merely the existence of the defect and the resulting harm.\(^89\) Proof of negligence or fault is not required. Nevertheless, no undue burdens appear to have been placed upon producers, who can generally predict with some degree of accuracy the rate of defects associated with varying levels of quality control.\(^90\) Initiatives for products liability reform at the federal level have not sought to rescind the rule of strict liability for manufacturing defects.\(^91\)

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\(^89\) See Restatement, supra note 83, § 402A. But see Priest, Products Liability Law and the Accident Rate, in Liability: Perspectives and Policy 84, 208-09 (R. Litan & C. Winston ed. 1988) (arguing against strict liability for manufacturing defects when manufacturers have taken all necessary steps to prevent deviations).

\(^90\) See U.S. Dep't of Commerce, Model Uniform Products Liability Act, reprinted in 44 Fed. Reg. 62,714 (Oct. 31, 1979) (analyzing § 104 of the Model Act, concerning construction defects). The report states: "There is a degree of predictability with regard to these defective products that is not found with respect to products that are defective in design or to [sic] failure to warn." Id., reprinted in 44 Fed. Reg. at 62,722.


The National Childhood Vaccine Injury Act of 1986 does not seem to modify the rule of strict liability when a vaccine contains a manufacturing defect. The law states that a vaccine manufacturer will not be liable for unavoidable side effects from a properly prepared vaccine. 42 U.S.C. § 300aa-22(b)(1) (1988). The implication is that a manufacturer would be liable for harm caused by a vaccine that was defective due to improper preparation. The law also provides that, except as provided in the Act, state law will govern suits seeking recovery for vaccine-related injuries. Id. § 300aa-22(a). State law provides that drug manufacturers will be strictly liable in tort for harm resulting from drugs that depart from the maker's design or formulation. See 2 M. Madden, supra note 88, § 23.3, at 353-56 (reviewing liability for defective drugs); see also Merrill, Compensation for Prescription Drug Injuries, 59 Va. L. Rev. 1, 32-35 (1973) (describing leading cases that apply strict liability to production defects in drugs).
When the injured party claims that the design of a product or the inadequacy of warnings or instructions resulted in harm, the implications of strict liability are less clear. In these cases involving warnings or instructions for use, the courts have generally made little secret that they are applying a negligence test. While paying lip service to the applicability of strict liability in design cases, many courts require plaintiffs to prove what amounts to a negligence case. They do this either by adopting a risk-utility test or by

92. See Hauenstein v. Loctite Corp., 347 N.W.2d 272, 274 (Minn. 1984) (essentially no difference between strict liability and negligence if claim is based on failure to warn); see also W. PROSSER & W. KEETON, supra note 12, § 99, at 697 (claimant who seeks recovery for failure to warn or failure to warn adequately must prove that manufacturer-designer was negligent). Contra Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 204-05, 447 A.2d 539, 546-49 (1982) (manufacturer strictly liable in tort for failing to warn of risk that was unknowable at time product was marketed).

93. Indeed, as a strategic matter, plaintiffs’ attorneys generally prefer to establish culpability by the manufacturer. See Rheingold, The Expanding Liability of the Product Supplier: A Primer, 2 Hofstra L. Rev. 521, 531-32 (1974) (easier to prevail when plaintiff can show manufacturer did something wrong than when trying to convince jury of technical defect).

94. See Troja v. Black & Decker Mfg. Co., 62 Md. App. 101, 488 A.2d 516 (1985). In Troja, the court adopted a seven-factor test to determine whether a product is “reasonably safe” for purposes of strict liability. Id. at 108, 488 A.2d at 519. The test, which Dean John Wade originally devised in his article On the Nature of Strict Tort Liability for Products, supra note 70, at 837-38, provides that the jury should consider:

(1) The usefulness and desirability of the product—its utility to the user and to the public as a whole;
(2) The safety aspects of the product—the likelihood that it will cause injury, and the probable seriousness of the injury;
(3) The availability of a substitute product which would meet the same need and not be as unsafe;
(4) The manufacturer’s ability to eliminate the unsafe character of the product without impairing its usefulness or making it too expensive to maintain its utility;
(5) The user’s ability to avoid danger by the exercise of care in the use of the product;
(6) The user’s anticipated awareness of the dangers inherent in the product and their avoidability, because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions;
(7) The feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.

Id.

The traditional negligence formula requires a balancing of the costs of avoiding harm (which might include prevention costs and the lost utility of any foreclosed activity) against the foreseeable accident costs (the extent of likely harm discounted by the probability of its occurrence). See United States v. Carroll Towing Co., 159 F.2d 169, 173 (stating negligence formula in algebraic terms so that if the possibility of harm is P, the gravity of resulting injury is L, and the burden of taking precautions is B, liability depends on whether B is less than P times L); see also W. PROSSER & W. KEETON, supra note 12, § 31, at 169-73 (discussing degree of care required by risk-utility analysis); Posner, A Theory of Negligence, 1 J. Legal Stud. 29, 32-33 (1972) (supporting Judge Learned Hand’s opinion in Carroll Towing as a way to bring about “efficient” rules of safety).

The Wade test elaborates considerations that are relevant to the traditional negligence formula. See Birnbaum, Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence, 33 Vand. L. Rev. 593, 618-22 (1980) (examining use of Wade’s “reasonably prudent manufacturer test” and concluding it is “substantially coordinate with liability on negligence principles”); Powers, The Persistence of Fault in Products Liability, 61 Tex. L. Rev. 777,
using a consumer-expectations test.\textsuperscript{95}

Huber makes much of the shift from negligence to strict liability in design cases,\textsuperscript{96} and of the shift in focus from the manufacturer's conduct to the

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783-94 (1983) (arguing that the only differences between negligence and strict liability are the role of foreseeability and the latter's focus on product rather than manufacturer).

The author of a recent treatise on products liability has noted: "Read together, the decisional law interpreting the manufacturer's design obligation in both negligence and strict liability reflects imposition of a standard of reasonable care . . . ." 1 M. MADDEN, supra note 88, § 8.1, at 291-92 (citations omitted).

For a decision holding that liability for design defects must be based upon negligence, see Prentis v. Yale Mfg. Co., 421 Mich. 670, 688-91, 365 N.W.2d 176, 184-86 (1984); cf. Brown v. Superior Court, 44 Cal. 3d 1049, 1069, 751 P.2d 470, 481-82, 245 Cal. Rptr. 412, 424 (1988) (manufacturers of prescription drugs that are allegedly defective in design will be liable only under a negligence test); Note, Products Liability — Negligence Presumed: An Evolution, 67 Tex. L. Rev. 851 passim (1989) (by D. Griffith) (arguing that courts in products liability cases have actually been applying rebuttable presumption of negligence).

95. The consumer-expectation test in effect posits that consumers expect manufacturers to exercise reasonable care. \textit{See} Leichtamer v. American Motors Corp., 67 Ohio St. 2d 456, 467, 424 N.E.2d 568, 576 (1981) (strict liability instruction appropriate when "plaintiff demonstrates that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner").

96. P. HUBER, supra note 55, at 38. Huber illustrates this shift by reference to Evans v. General Motors Corp., 359 F.2d 822 (7th Cir.), cert. denied, 385 U.S. 836 (1966), and Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968). In the text, Huber leaves the impression that these were strict liability cases. Only after tracking down the endnote to Larsen does the reader discover that Larsen was a negligence case and that on retrial, plaintiff lost. P. HUBER, supra note 55, at 235 (notes to p.38). This must surely have puzzled those readers who took with them the impression that plaintiffs are supposed to win "ultra-stringent producer liability" cases. \textit{Id.} at 79.

With respect to \textit{Evans}, Huber also claims that "in 1966 the courts were not yet ready to examine product design and declare it defective." \textit{Id.} at 38. The fact is that long before \textit{Evans} the courts had been recognizing a duty on the part of the manufacturers of consumer goods to design their products with reasonable care. \textit{See} Noel, Manufacturers' Negligence of Design or Directions for Use of a Product, 71 Yale L.J. 816, 820-29 (1962) (discussing types of design defects including concealed dangers, failure to provide safety devices, and defective material composition); Noel, Recent Trends in Manufacturers' Negligence as to Design, Instructions or Warnings, 19 S.L.J. 43 passim (1965) (examining cases and articles discussing manufacturer's duty). The court in \textit{Evans} was not asked to impose strict liability for defective design.

The real significance of \textit{Evans} and \textit{Larsen} is that in the former the court refused to impose a duty upon an automobile manufacturer to use reasonable care to protect occupants from a "second collision" (impacts with the interior of the vehicle), but in the latter the court recognized the duty to design a crashworthy car. \textit{See} Comment, Automobile Design Liability: Larsen v. General Motors and Its Aftermath, 118 U. Pa. L. Rev. 299, 301-12 (1969) (praising Larsen court's refusal to adopt Evans' holding that manufacturers need not make crashproof cars).

product’s condition. But he does not explain how one can prove a product is unreasonably dangerous without proving that the manufacturer acted unreasonably in putting the product on the market. Granted, pockets of genuine strict liability can be found in decisions holding a manufacturer liable for failing to warn of an unknowable risk, and in two jurisdictions that ease traditional requirements of negligence by shifting the burden to the manufacturer to prove that a product’s design, warnings, or instructions are reasonably safe. These approaches to strict liability have bestirred negative reactions from various commentators and remain very much experimental probings rather than widely accepted principles.

announcement creates the misimpression that the court in Larsen pulled the crashworthiness theory out of thin air.

97. Courts have often defined the difference between negligence and strict liability in these terms. See Barker v. Lull Eng’g Co., 20 Cal. 3d 413, 418, 573 P.2d 443, 447, 143 Cal. Rptr. 225, 229 (1978) (in products liability action, trier of fact must focus on product and not on manufacturer’s conduct).

98. One academic commentator has called the distinction “nothing more than semantic artifice.” Birnbaum, supra note 94, at 648 (arguing test is reasonable care in design choices); see also Powers, supra note 94, at 791 (“The analytical distinction between evaluating a product and evaluating a manufacturer’s conduct is itself tenuous.”).


100. See Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 885-86 (Alaska 1979) (after plaintiff showed injury was proximately caused by design, burden of proof shifted to defendant); Barker, 20 Cal. 3d at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237 (same).


102. The New Jersey Supreme Court has limited its holding in Beshada to asbestos cases and has refused to apply it to the pharmaceutical industry. See Feldman v. Lederle Laboratories, 97 N.J. 429, 455, 479 A.2d 374, 388 (1984). Moreover, even the significance of Beshada in asbestos cases may be minimal. In Beshada, the court accepted as true, for the purpose of ruling upon plaintiff’s motion to strike the defense of unknowability, defendant’s allegation that the dangers of asbestos were both unknown and unknowable at the time of the marketing of the product that harmed plaintiff. Beshada, 90 N.J. at 197, 447 A.2d at 543. In suits litigated in other jurisdictions, plaintiffs had introduced evidence that asbestos suppliers not only knew of the risks but also struggled to keep
Although Huber attributes the great revolution to judicial adoption of a broad regime of enterprise liability, he does not ignore other aspects of the pro-plaintiff tort reform that began in the late 1950s and carried over into the 1970s. He casts a disapproving eye at developments such as comparative negligence, joint and several liability, the discovery rule postponing the statute of limitations in some cases, and the recognition of liability for them unpublicized. For an account of the litigation against the asbestos industry, see P. Brodeur, Outrageous Misconduct: The Asbestos Industry on Trial (1985).

103. P. Huber, supra note 55, at 78. Huber's treatment of contributory negligence in the products liability context distorts beyond recognition the actual application of the rule. He claims that because the manufacturer's negligence was irrelevant under the new regime of strict liability, the need for "symmetry" made the negligence of the consumer or user similarly irrelevant, and therefore "the once broad defense of 'contributory negligence' was abandoned too." Id. at 40; see id. at 39-40 (citing Larsen v. General Motors Corp., 391 F.2d 495 (8th Cir. 1968), as an example of a case in which the issue was not the negligence of corporate employees in designing a product, but rather the defectiveness of an inanimate product). For a discussion pointing out that Larsen was a negligence case, see supra note 96.

Huber's assertion is highly misleading at best. A plaintiff's knowing, voluntary, and unreasonable exposure to risks created by a product defect—a particular form of contributory fault—was from the very beginning recognized as a defense to strict tort liability. See Restatement, supra note 83, § 402A comment n; 2 M. Madden, supra note 88, § 13.7, at 12. Moreover, although plaintiff's fault today is not a complete bar to recovery, a number of courts have applied the defense of comparative negligence to strict liability products cases and have held that plaintiff's fault may be a very relevant limitation on recovery. See Daly v. General Motors Corp., 20 Cal. 3d 725, 736-37, 575 P.2d 1162, 1168-69, 144 Cal. Rptr. 380, 386-87 (1978) (driver's alleged intoxication and failure to use safety devices cannot be considered complete bar to recovery, but may be evidence of contributory fault and reduce plaintiff's recovery proportionately); V. Schwartz, supra note 15, at 195-99 (discussing products liability revolution and development of comparative fault in strict liability actions).

104. P. Huber, supra note 55, at 79-80. Huber neglects to inform his readers that it was the doctrine of comparative negligence, of which he disapproves, that provided the theoretical basis for the attack upon the rule of joint and several liability. For an explanation of how the legislative adoption of comparative negligence in the State of Washington paved the way for a substantial statutory alteration of the rule of joint and several liability, see Peck, Washington's Partial Rejection and Modification of the Common Law Rule of Joint and Several Liability, 62 Wash. L. Rev. 233, 237-39 (1987).

105. P. Huber, supra note 55, at 89-93. Courts created the discovery rule by interpreting statutes of limitations to start running when plaintiff discovered or should have discovered the injury and the causal relationship between the harm and defendant's conduct or product. See 2 M. Madden, supra note 88, § 18.6, at 196-98; W. Prosser & W. Keeton, supra note 12, § 30, at 166-67.

Huber's penchant for misleading overstatement billows forth when he tries to demonstrate the unfairness of the discovery rule:

You are the defendant. To win in the pretrial maneuvering on timeliness, you must demonstrate that [plaintiff's] injury and its link to your conduct were obvious and plainly discoverable years ago. To win in the trial proper, you must demonstrate that no such injury or linkage ever existed or could possibly be claimed even today. . . . [T]he plaintiff, must first boldly insist that the injury was subtle, hidden, and quite undiscoverable, and then swear high and low that the injury was clear, definite, and quite obviously caused by your misconduct. Lawyers love this kind of game, because in the fullness of time they always will be paid generously to play both sides.
negligently inflicting emotional distress.\textsuperscript{106} Huber is also critical of new approaches that have led to increased recoveries for pain and suffering\textsuperscript{107} and higher awards of punitive damages.\textsuperscript{108} He seems undisturbed that some of these changes predated the great revolution\textsuperscript{109} and were motivated by considerations other than loss distribution.\textsuperscript{110}

P. Huber, \textit{supra} note 55, at 92.

He does not explain why defendants should be allowed to make arguments on causation that are plainly inconsistent. Moreover, the arguments he puts forward for the plaintiff are not inconsistent at all; the existence of an injury and its cause might have been undiscoverable by plaintiff for a period of time, but once plaintiff realized what had happened and why, defendant's culpability might well have become "clear" and "definite."


\textsuperscript{107} P. Huber, \textit{supra} note 55, at 121-22. In his discussion of damages for pain and suffering, Huber puts forward yet another misstatement of the law: "A trick of the trade known as the golden rule or job offer is highly effective. Jurors are urged to consider how much they would demand in exchange for having to suffer plaintiff's pain, either gratuitously or as part of a job that required them to endure it." \textit{Id.} at 121 (emphasis omitted). In fact, no jurisdiction has ever endorsed the use of the golden-rule argument. Most courts have held it to be improper per se, although some courts have held that an assessment of such an argument's prejudicial impact must be made on a case-by-case basis. See 1 M. Minzer, J. Nates, C. Kimball, D. Axelrod & R. Goldstein, \textit{Damages in Tort Actions} § 4.72(1), at 4-294 (1989).

\textsuperscript{108} P. Huber, \textit{supra} note 55, at 115-16, 119-20, 127-32. Huber's lack of concern for factual accuracy carries over to his discussion of exemplary damages in which he includes in a paragraph listing substantial jury verdicts for exemplary damages singer Connie Francis' recovery of $1.5 million from the motel where she was sexually assaulted. \textit{Id.} at 129. The jury actually gave her $2.5 million in compensatory damages and made no award of punitive damages. See Garzilli v. Howard Johnson's Motor Lodges, Inc., 419 F. Supp. 1210, 1213 (E.D.N.Y. 1976) (verdict of $2.5 million held not excessive as matter of law; evidence supported finding of a minimum of $2,585,000 for loss of earnings alone, plus substantial damages for pain, suffering, and psychological problems related to the sexual assault).

\textsuperscript{109} For example, the doctrine of joint and several liability is deeply rooted in the common law. See W. Prosser & W. Keeton, \textit{supra} note 12, §§ 46-47, at 322-30. The trend toward increased protection for emotional well-being began long before the "great revolution." See \textit{Id.} § 54, at 359-67.

\textsuperscript{110} The development of trial techniques that brought to the attention of jurors the full dimensions of plaintiffs' harm, including pain and suffering, dates back to the 1940s. At that time, Melvin M. Belli began to make creative use of demonstrative evidence and other methods to dramatize the extent of his clients' injuries and secure what Belli termed an "adequate award" of money damages. See Belli, \textit{The Adequate Award}, 39 Calif. L. Rev. 1, 37 (1951) (criticizing low verdicts in personal injury cases for not adequately compensating a person denied the right "to live out his life free from
Huber is particularly critical of the judicial imposition of duties upon parties not directly and immediately linked to injured plaintiffs—a phenomenon he dubs the “socialized defense” or “group guilt.” He recalls with evident nostalgia the bedrock notions of proximate cause and privity of contract from a time when the “old tort law” knew exactly where to draw limits of liability. But this meant that injuries went uncompensated when a judgment-proof defendant stood on the near side of the line while the “deep-pocket” defendant stood on the far side. The “solution,” which the courts adopted and Huber decries, was to redraw the line. The New Jersey Supreme Court led the way by tossing the privity of contract defense into the dustbin of history. The court permitted a plaintiff with no direct contractual link to a manufacturer to recover for breach of an implied warranty of merchantability. According to Huber, this step emboldened the Founders to “trace out causal chains much further than was then permitted by traditionally crabbed rules of proximate cause.” They accomplished this by using the infinitely malleable concept of reasonable foreseeability. To one who rejects Huber’s flights of fancy involving Founders in a conspiracy to make a revolution, a cause-and-effect relationship between the collapse of the privity barrier and the expanded notions of foreseeability and pain and suffering, with his mind and body intact); see generally M. Belli, READY FOR THE PLAINTIFF (1956). For an early biography of Belli, see R. Wallace, LIFE AND LIMB (1955). It is ironic that Belli represented the plaintiff in Escola v. Coca Cola Bottling Co., 24 Cal. 2d 453, 150 P.2d 436 (1944) (en banc), in which Justice Roger Traynor authored a concurring opinion that relied upon enterprise-liability concepts and helped set the stage for the eventual adoption of strict tort liability for defective products. See supra note 70. The lasting significance of Escola seems to have escaped Belli; for him, the import of the decision lay in the majority opinion’s adoption of the doctrine of res ipsa loquitur to prove negligence in exploding-bottle cases. See M. Belli, supra, at 28.

111. P. Huber, supra note 55, at 73-83.

112. See id. at 71-72. Huber astonishingly misstates the holding in Palsgraf v. Long Island R.R., 248 N.Y. 339, 162 N.E. 99 (1928), by claiming: “Perhaps the [railroad] guards had been negligent, Justice Benjamin Cardozo ruled. But their error was just too remote from Palsgraf’s injury for her suit to survive.” Id. at 72 (emphasis in original). Cardozo actually emphasized that “[t]he law of causation, remote or proximate, is . . . foreign to the case before us.” Palsgraf; 248 N.Y. at 346, 162 N.E. at 101. Cardozo noted that the guard had not been negligent toward Palsgraf because he could not have reasonably foreseen a risk to her when he pushed onto the train a man with a package that turned out to contain fireworks. Id. at 344-45, 162 N.E. at 100-01.

113. Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 413, 161 A.2d 69, 99-100 (1960) (automobile steering failure caused car to crash into wall). Because the plaintiff in Henningsen had a good cause of action for breach of the implied warranty of merchantability against the retailer who sold him the car, the successful assault upon the citadel of privity in Henningsen would have loss distribution implications only in cases in which the retailer was not amenable to suit or could not satisfy an adverse judgment.

114. P. Huber, supra note 55, at 74.

115. “The legal academics who put forward the new foreseeability test were proud of their idea and announced it with pomp, as if exulting in the powers of an extraordinary new telescope. Nothing grew the least bit more precise. But more people could now be sued more often, and that, of course, was the whole idea.” Id.
duty is not immediately apparent. The former reflected the strong influence of the theory of enterprise liability; the latter merely extended the reach of negligence doctrine to new classes of defendants and new categories of risk.

Huber heaps particular sarcasm upon the way courts have used reasonable foreseeability—in his view, a meaningless verbal formulation scholars and judges invoke as they carry out their not-so-hidden agenda of enlarging the ambit of liability. According to Huber, courts have used the expanded concepts of duty and reasonable foreseeability as a means of rounding up guests for a “tort law charity barbecue.” He is particularly critical that courts have imposed on defendants duties to protect certain classes of plaintiffs from the criminal acts of third parties. He cites as examples the liability imposed on the manufacturer of a “Saturday Night Special” handgun that a criminal used in an armed robbery, on landlords and occupiers of business

116. See supra note 26 and accompanying text.

117. See, e.g., Hanberry v. Hearst Corp., 276 Cal. App. 2d 680, 81 Cal. Rptr. 519 (1969) (product endorser owes purchasers duty to use due care in selecting products for endorsement); Rappaport v. Nichols, 31 N.J. 188, 202, 156 A.2d 1, 9 (1959) (dramshop owner may be liable under ordinary negligence principles for harm caused by minor to whom defendant had served liquor and who thereafter drove his automobile into vehicle operated by decedent); Erickson v. Christenson, 99 Or. App. 104, 781 P.2d 383 (1989) (church might be liable for negligent supervision of pastor who seduced parishioner if it knew or should have known that pastor was inadequately trained as counselor and had taken advantage of parishioners and counseled persons).

118. See, e.g., Weirum v. RKO Gen., Inc., 15 Cal. 3d 40, 47, 539 P.2d 36, 40, 123 Cal. Rptr. 468, 492 (1975) (radio station sponsoring contest that urged teenage drivers to speed from one location to another may be held liable for creating foreseeable risks of injury to others using highways); Ricci v. American Airlines, 226 N.J. Super. 377, 544 A.2d 428 (1988) (carrier should have foreseen “flareup” between intransigent smoker and militant nonsmoker forced to sit in smoking section because of overbooking; carrier might be liable for failing to use due care to prevent fight which resulted in injury to smoker); Strunk v. Zoltanski, 62 N.Y.2d 572, 468 N.E.2d 13 (1984) (landlord who knew prior to leasing that tenant intended to keep dangerous dog on premises had duty to use due care to protect third persons from risk of injury from dog).

119. “In the end, the difference between the foreseeable and the unforeseeable in the courts turned out to be very much like the difference (as defined by legendary National League umpire Bill Klem) between a ball and a strike. There wasn’t any until the umpire had called it.” P. HUBER, supra note 55, at 77.

120. Id. at 70.

121. Id. at 75. The case to which he refers is Kelley v. R.G. Indus., 304 Md. 124, 157, 497 A.2d 1143, 1159 (1985); see infra note 198. What he fails to tell his readers is that every other court faced with the identical issue has refused to hold the manufacturer liable. See, e.g., Armijo v. Ex Cam, Inc., 843 F.2d 406, 407 (10th Cir. 1988) (applying New Mexico law, court held manufacturer not liable for death or personal injury from criminal use of “Saturday Night Special” handgun); Shipman v. Jennings Firearms, Inc., 791 F.2d 1532, 1534 (11th Cir. 1986) (applying Florida law, court held manufacturer not liable for death from criminal use of “Saturday Night Special” handgun when gun had no design defects and performed exactly as intended); Richardson v. Holland, 741 S.W.2d 751, 755-56 (Mo. App. 1987) (manufacturer not liable for injuries from criminal use of “Saturday Night Special” handgun); Knott v. Liberty Jewelry & Loan, Inc., 50 Wash. App. 267, 275-76, 748 P.2d 661, 665 (1988) (manufacturer not liable for injuries from criminal use of handgun when “Saturday Night Special” was not shown to be defective); cf. Martin v. Harrington & Rich-
premises for failing to protect tenants or customers from intruders’ criminal attacks,122 on tavern owners for serving drinks to minors or obviously intoxicated persons whose subsequent drunk driving injures plaintiffs,123 and on psychotherapists for failing to warn third persons whom their patients threatened and then harmed.124 But Huber greatly oversimplifies both the function served by foreseeability and the difficulties courts have had in applying the foreseeability factor to cases involving harm caused by third party criminals.

Foreseeability of harm is a starting point for the creation of legal duties, whereby courts determine whether to impose certain broad obligations upon society as a whole or upon specified groups within society. At this preliminary stage, however, foreseeability comes into play only in a very general

ardson, Inc., 743 F.2d 1200, 1204 (7th Cir. 1984) (applying Illinois law, court held manufacturer not liable for death from criminal use of handgun when gun was nondefective and presented danger that average consumer would recognize).

122. P. HUBER, supra note 55, at 76; see J. PAGE, supra note 14, § 11, at 291-314 (discussing the liability of landlords and occupiers for harm caused by criminal acts of third persons).

Huber also mentions, with apparent distaste, what he calls the “novel theory of negligent hiring,” under which an occupier of business premises or a landlord might be liable to an employee or a tenant who was the victim of a criminal assault at the hands of a person engaged to work on the premises, if a reasonable background check would have revealed that hiring the individual might create an unreasonable risk of harm. P. HUBER, supra note 55, at 76 (emphasis omitted). The case to which he alludes is Ponticas v. K.M.S. Invs., 331 N.W.2d 907, 914 (Minn. 1983), in which the court upheld a jury verdict finding the owner of an apartment complex liable for failing to perform a reasonable investigation which would have revealed that the man being hired to manage the complex had a history of committing violent crimes over the prior four years. Huber states that the manager raped one of defendant’s tenants but does not add that the manager had learned in the course of his work that the tenant’s husband was out of town for the weekend, and that the assault occurred in the tenant’s apartment, to which the manager had a passkey. See Ponticas, 331 N.W. 2d at 909.

Huber creates the impression that the theory of negligent hiring was another of the Founders’ recent inventions. But this theory dates back at least to the 1920s. See Davis v. Merrill, 133 Va. 69, 80, 112 S.E. 628, 631 (1922) (railroad liable for assault committed by gatekeeper; character investigation would have revealed his police record as a drunkard and his tendency to become dangerously infuriated on slight provocation); see also Henderson v. Nolting First Mortgage Corp., 184 Ga. 724, 736-37, 193 S.E. 347, 353-54 (1937) (mortgagee in control of premises liable for negligent retention of employee who shot tenant when mortgagee knew that employee had vicious character); Zerder v. Friman Holding Co., 153 Misc. 225, 226, 274 N.Y.S. 588, 589 (1934) (landlord liable when employee stole tenant’s property).

123. P. HUBER, supra note 55, at 76; see J. PAGE, supra note 14, §§ 12.1-12.20, at 315-38 (discussing liability of dramshop owners for harm caused by intoxicated persons). Huber also mentions a recent case in which the court imposed liability upon a social host for negligently serving alcohol to intoxicated guests who then drove carelessly and injured plaintiffs. P. HUBER, supra note 55, at 76 (citing Kelly v. Gwinnell, 96 N.J. 538, 476 A.2d 1219 (1984)). He notes that courts made similar initiatives in other states but were overruled by statute. Id. He fails to note, however, the inconsistency between these decisions and enterprise liability theory: social hosts are in no better position than their guests to bear and distribute losses from highway accidents due to drunk driving.

124. P. HUBER, supra note 55, at 77. The case he discusses is Tarasoff v. Regents of Univ. of California, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976) (en banc); see infra note 195 and accompanying text.
way. When it is foreseeable that one person might cause harm to another, then a duty to act reasonably toward that individual may arise.\textsuperscript{125} Courts often weigh other considerations, such as moral blame, deterrence, the convenience of administering the specific legal rule, and the capacity of the parties to bear loss.\textsuperscript{126} Thus, if the burdens of imposing or extending an obligation to prevent foreseeable harm outweigh the benefits, the courts may be justified in not recognizing the duty.\textsuperscript{127}

Second, foreseeability is a major component of the negligence formula. At trial, the jury sets the defendant's standard of care\textsuperscript{128} by calculating the gravity of harm that might have been expected to occur if the defendant had failed to take reasonable precautions and then discounting it by the likelihood that the harm would occur.\textsuperscript{129} If there is no foreseeable harm, then the defendant cannot be faulted for failing to meet what the plaintiff claims should have been the standard of care, and the defendant must not be found negligent.\textsuperscript{130}

Third-party assault cases provide an illustration. In these cases, a court must determine whether occupiers of business premises have any legal obligation to use due care to protect invitees from foreseeable criminal assaults. If occupiers fail to take reasonable precautions to prevent assaults, harm could result to invitees. Yet this alone should not suffice to justify a legal

\textsuperscript{125} See W. Prosser & W. Keeton, supra note 12, \S 53, at 358.

\textsuperscript{126} See id. at 359. For an illuminating analysis of the duty element, see generally Green, The Duty Problem in Negligence Cases, 28 COLUM. L. REV. 1014 (1928) [hereinafter Green, The Duty Problem I] (defining test for duty and outlining five factors as being significant in influencing determination of duties: administrative, moral, economic, prophylactic or preventive, and justice); Green, The Duty Problem in Negligence Cases: II, 29 COLUM. L. REV. 255 (1929) [hereinafter Green, The Duty Problem II] (concluding discussion of above factors and exploring scope of duty in the following categories of cases: master and servant, landowners and intruders, and railroad crossings and automobiles).

\textsuperscript{127} For example, even though it may be foreseeable that defendant's failure to use reasonable care to aid a stranger in peril might cause harm to the stranger, courts have routinely refused to impose an affirmative obligation in such cases unless there is a "special relationship" between the parties. See W. Prosser & W. Keeton, supra note 12, \S 56, at 375-77. The difficulty of administering the duty has been identified as a major factor underlying the no-duty rule. Id. at 376; see also Henderson, Process Constraints in Tort, 67 CORNELL L. REV. 901, 928-43 (1982) (duty to rescue stranger in peril would be too difficult to administer judicially). For a thorough economic study concluding that the no-duty rule promotes economic efficiency, see Landes & Posner, Salvors, Finders, Good Samaritans, and Other Rescuers: An Economic Study of Law and Altruism, 7 J. LEGAL STUD. 83 (1978).

\textsuperscript{128} Reasonable foreseeability is a question of fact to be decided by the jury as part of its function to determine whether or not a defendant was negligent. In the absence of credible evidence upon which the factfinders can base a finding of reasonable foreseeability, the trial judge should conclude that there was no negligence as a matter of law and direct a verdict for the defendant.

\textsuperscript{129} For a discussion of the negligence formula, see supra note 94 and accompanying text.

\textsuperscript{130} For criticism of how some courts have erroneously used foreseeability to determine whether defendant owed a duty to plaintiff rather than whether defendant breached a duty, see Green, The Duty Problem I, supra note 126, at 1029-33.
duty, because the critical question is whether the benefits from imposing such
a legal obligation would outweigh the burdens upon society. The courts
must weigh carefully\(^{131}\) considerations such as the capacity of the torts process to administer the rule fairly\(^{132}\) and the financial hardships the rule might impose upon enterprises, especially in high crime areas.\(^{133}\)

Once the court recognizes a general duty, it must decide whether the duty has been breached in an individual case. Plaintiff has the burden of showing a reasonably foreseeable risk of a criminal assault on the premises,\(^{134}\) as well as the amount of care that the defendant should have exercised to prevent the harm.\(^{135}\) The level of precaution will vary, in part, according to the degree of foreseeable risk.\(^{136}\)

It is, however, off the mark to equate the imposition of a duty of due care with enterprise liability, which does not require finding a breach of the duty of reasonable care. In third-party assault cases, claimants gain a chance to recover from solvent defendants in situations in which they might otherwise bear the full costs of their own injuries, but only if they can prove that defendants were negligent. Perhaps Huber is suggesting that courts have somehow crossed the line separating negligence from strict liability; but with his

\(^{131}\) The courts do not always give careful consideration to all factors in the negligence formula. For an example of a recent decision recognizing the duty without weighing the benefits and burdens of the rule, see Madden v. C & K Barbecue Carryout, Inc., 758 S.W.2d 59 (Mo. 1988) (en banc). The majority stated that: “The touchstone for the creation of a duty is foreseeability. A duty of care arises out of circumstances in which there is a foreseeable likelihood that particular acts or omissions will cause harm or injury.” Id. at 62.

\(^{132}\) See Williams v. Cunningham Drug Stores, 429 Mich. 495, 502-03, 418 N.W.2d 381, 384-85 (1988) (merchant’s duty to protect invitees against criminal attacks would necessarily be so vague that defendants would be unable to determine how to comply); see also Taco Bell, Inc. v. Lannon, 744 P.2d 43, 51 (Colo. 1987) (Erickson, J., dissenting) (“[G]iven the unpredictability of criminal behavior it is unfair to impose a duty to provide armed guards upon business owners because businesses would not know whether the duty is theirs or whether they have performed it.”).

\(^{133}\) See J. PAGE, supra note 14, at 300 (weighing the desirability of imposing the costs of crime prevention on occupants from the perspectives of fairness, efficiency, and social policy). For a recent case holding that a motel owner had no duty to protect patrons of an adjacent dinner theater from risks of assaults in the motel parking lot because, among other factors, the cost of imposing such a duty would be prohibitive, see Wright v. Webb, 234 Va. 527, 362 S.E.2d 919, 921 (1987); cf. Taco Bell, Inc., 744 P.2d at 49 (reasonable measures to protect patrons of fast-food restaurant from foreseeable criminal assaults would be relatively inexpensive). But see Sharpe v. Peter Pan Bus Lines, Inc., 401 Mass. 788, 519 N.E.2d 1341, 1347 (1988) (Lynch, J., dissenting) (holding bus company liable for failing to protect patron from unprovoked knife attack would increase transportation costs to onerous levels for working-class people).

\(^{134}\) See Galloway v. Bankers Trust Co., 420 N.W.2d 437 (Iowa 1988) (evidence of prior history of shoplifting, trespass, vandalism, robbery, and assault on young boy sufficient to raise jury question whether homosexual rape in mall restroom was reasonably foreseeable).

\(^{135}\) On the standard of care in third-party assault cases involving business premises, see J. PAGE, supra note 14, § 11.8, at 301-02.

\(^{136}\) See Toscano Lopez v. McDonald’s, 193 Cal. App. 3d 495, 238 Cal. Rptr. 436, 444 (1987) (fast-food restaurant not liable for failing to prevent mass murder by heavily armed, suicidal gunman; when burden of deterring harm is great, high degree of foreseeability is required).
facile analysis, he has failed to substantiate the claim.\textsuperscript{137}

Huber's trip-hammer criticism of pro-plaintiff tort rules and the way courts have applied them creates the impression of a tort system out of control. He parades what he calls the "have-you-heard-the-latest stories"\textsuperscript{138} to argue that tort law has now become the object of derision. Yet many of his "stories" turn out not to be absurd when one is informed of facts that Huber conveniently omits.\textsuperscript{139} Indeed, several examples that Huber cites as judicial

\textsuperscript{137} For an argument that the definition of foreseeability in premises liability cases involving third-party assaults "often has the effect of blurring the edges between negligence and strict liability," see Hanson & Thomas, Third Party Tort Remedies for Crime Victims—Searching for the "Deep Pocket" and a Risk Free Society, \textit{18} \textit{Stetson L. Rev.} 1, 33 (1988).

A distinction that would support the rejection of strict enterprise liability in third-party assault claims might rest upon the notion that defendants in these cases do not exercise the same degree of risk control that the manufacturers of products enjoy. The latter have exclusive authority over the production, design, and marketing of the goods they sell, while the former have limited power to control the activities of third-party criminals. On control of risk as a key element of enterprise liability, see \textit{supra} note 26.

\textsuperscript{138} P. Huber, \textit{supra} note 55, at 220. Among the cases he mentions (without citation) is the jury award of $986,000 to the woman who claimed to have lost her psychic powers as a result of a CAT scan, and the judgment against a telephone booth manufacturer in favor of a man injured in a booth that a drunk driver leveled. \textit{Id.} He had previously mentioned the "prankster" who recovered against a building owner for injuries sustained in the course of a burglary when the prankster fell through a painted skylight about which the owner had not warned, \textit{id.} at 55, and the holding that an automobile manufacturer might be liable for not designing a car roof strong enough to withstand the impact of a runaway horse that landed on the roof after a frontal collision, \textit{id.} at 39.

\textsuperscript{139} Long before the publication of Huber's \textit{Liability}, serious doubts were raised about the validity of these "horror stories." The phone booth case gained widespread publicity when President Ronald Reagan recounted it in a speech to the American Tort Reform Association. \textit{See Reagan Hits Jury Awards, Wash. Post, May 31, 1986, at A9, col. 1}.

Charles Bigbee, the man who lost his leg in the phone booth incident, subsequently appeared before a congressional committee to express his dismay that the President of the United States had distorted and trivialized his tragedy. He described how he had been unable to open the jammed door of the booth when he saw a car coming at him off a busy intersection where there had been prior similar accidents. \textit{The Liability Insurance Crisis, Pt. I: Hearings Before the Subcomm. on Economic Stabilization of the House Comm. on Banking, Finance and Urban Affairs, 99th Cong., 2d Sess. 14, 45-47 (1986)} (statement of Charles Bigbee) [hereinafter \textit{The Liability Insurance Crisis}]. Moreover, the evidence at trial was inconclusive on whether the driver was actually drunk. \textit{See Bigbee v. Pacific Tel. & Tel. Co., 34 Cal. 3d 49, 58 n.13, 665 P.2d 947, 952 n.13, 192 Cal. Rptr. 857, 862 n.13 (1983)} (investigating police officer opined that driver's blood-alcohol level exceeded legal limit but no blood-alcohol or other chemical sobriety test was performed). For further criticism of the anecdotal use of \textit{Bigbee}, see Brill & Lyons, \textit{The Not-So-Simple Crisis, AM. L.}, May 1986, at 1, 16.

At the same congressional hearing, the plaintiff in the "horse-on-the-roof" case described how his wife was crushed to death when a horse crashed through the roof of the car he was driving. \textit{The Liability Insurance Crisis, supra, at 14-16, 48-50} (statement of Steven Green). He claimed that in Oregon, where the accident occurred, about 120 auto accidents a year involve horses. \textit{Id.} For comments by the trial judge in the case, see \textit{60 Minutes: Insurance Crisis} (CBS television broadcast, Jan. 10, 1988), transcript at 11 (transcript on file at \textit{The Georgetown Law Journal}) ("Out here in the West, horse and automobile collisions are not terribly unusual. . . . If this case had been a simple rollover, where the Ford had rolled over and exactly the same thing occurred, the roof crushed, killed the passenger, with exactly the same degree of force placed on the roof that occurred when
The horse hit the roof, you probably would never have heard of this case.

For supplemental facts from the “burglar-and-the-skylight” case, see The Liability Insurance Crisis, supra, at 7-8, 31-33 (statement of Joan Claybrook, President, Public Citizen). In this case, the plaintiff was a recent high school graduate who had climbed onto the high school roof in search of a floodlight to illuminate a nearby basketball court. The skylight he stepped through was covered with tar and indistinguishable from the roof. Moreover, not only did school officials know workers and students occasionally walked on the roof, but a similar accident had occurred in the same school district eight months earlier.

The trial judge in the “psychic-and-the-CAT-scan” case overturned the jury’s verdict and ordered a new trial because of a lack of evidence on the causation issue. For a statement by the judge describing the case, see 60 Minutes: Insurance Crisis, supra, transcript at 13; see also Power, An Essay on Tort Litigation and the Media, 40 OKLA. L. REV. 35, 36 (1987) (criticizing newspaper accounts which left impression that plaintiff in CAT-scan case had recovered large amount on post-termer claim). A careful reading of Huber’s endnotes is necessary to figure out the result reached in this case. See P. HUBER, supra note 54, at 251 (citing Judge Rejects Damage Award to Psychic, Wash. Post, Aug. 9, 1986, at A7, col. 1).

The use of factually misleading anecdotes by critics of the tort system is at least a change of pace from the prior practice of inventing cases out of whole cloth. See Product Liability Insurance, supra note 2, at 2 (statement of John J. LaFalce, Chairperson of the Subcommittee on Economic Stabilization) (describing repeated reports during the 1970s of case in which man who used his lawnmower to trim hedges injured his arm and won substantial jury verdict; investigation revealed that no such case existed).

140. He mentions a decision by a California intermediate appellate court reversing a trial court’s dismissal of a claim for negligent counseling against a church and its pastors by the parents of a young man who committed suicide. P. HUBER, supra note 54, at 77, 183 (citing Nally v. Grace Community Church of the Valley, 157 Cal. App. 3d 912, 204 Cal. Rptr. 303 (1984)). Huber does not add that the California Supreme Court ordered that the opinion not be officially published. Id. On retrial, the court again granted defendants’ motion for nonsuit and the intermediate appellate court again reversed. 194 Cal. App. 3d 1147, 240 Cal. Rptr. 215, 229-30 (1987). The California Supreme Court reversed, holding that pastoral nontherapeutic counselors had no duty to refer a potentially suicidal person to a professional therapist, and therefore could not be held liable for negligently failing to prevent a suicide. 47 Cal. 3d 218, 299-300, 763 P.2d 948, 960-61, 253 Cal. Rptr. 97, 109-10 (1988), cert. denied, 109 S. Ct. 1644 (1989).

Huber also mentions lower court decisions in California and New Jersey permitting plaintiffs to recover for loss of consortium against defendants who negligently injured plaintiffs’ nonmarital cohabitating partners. P. HUBER, supra note 54, at 126 (citing Butcher v. Superior Court of Orange County, 139 Cal. App. 3d 58, 188 Cal. Rptr. 503 (1983), and Bulloch v. United States, 487 F. Supp. 1078 (D.N.J. 1980) (applying New Jersey law)). The California Supreme Court, however, citing the overwhelming weight of authority both in other jurisdictions and in the California lower courts, has recently held that even parties to a stable and significant relationship do not have a cause of action for loss of consortium resulting from injuries to a nonmarital cohabitating partner. Elden v. Sheldon, 46 Cal. 3d 267, 277-79 758 P.2d 582, 589-90, 250 Cal. Rptr. 254, 261-62 (1988). The Bulloch court, relying upon Butcher, has proved to be off the mark in its prediction that New Jersey courts would recognize the action. See Sykes v. Zook Enters., Inc., 215 N.J. Super. 461, 467, 521 A.2d 1380, 1383 (Law Div. 1987) (plaintiff who admitted absence of marriage with decedent and who styled herself only as decedent’s “purported wife” had no right of recovery for loss of consortium), aff’d sub nom. Sykes v. Propane Power Corp., 224 N.J. 686, 541 A.2d 271 (1988); Leonardis v. Morton Chem. Co., 184 N.J. Super. 10, 11, 445 A.2d 45, 46 (App. Div. 1982) (wife’s right to recover for loss of consortium resulting from husband’s injury is founded on marriage and absent such relationship, the right does not exist).
IV. TORT LAW AND DETERRENCE

Huber takes particular aim at the deterrence function of tort law. He argues that the tort system delivers less safety than it might for two reasons: first, because it discourages socially useful scientific and technological innovation; and second, because it either disregards or fails to give adequate weight to the negative effects that tort liability can produce.

As Huber admits, the extent to which tort law actually deters safety innovation is difficult to establish. Nonetheless, he presses the point that on balance tort law has had a negative effect on safety. Resting his case on a number of specific examples, he lays blame at the door of the tort system for the decrease in research in contraception, vaccines, so-called "orphan drugs," and aviation technology.

The extent to which tort law should bear responsibility for corporate decisions to reduce expenditures for research and development is not nearly so clear-cut as Huber would have readers believe. He refers to statements by company officials claiming that their companies are not spending money to develop new products because they fear liability suits. But these assertions

141. "As the tort system expanded, innovation was suppressed, not encouraged. Safety was set back, not advanced. And the consumer ended worse off, even in his personal security, than he would have been had the legal system been slower to rush to his rescue." P. Huber, supra note 55, at 154.

142. "A drug maker can always make a product less risky by making it less potent; a vaccine manufacturer can always further weaken a weakened virus at the cost of weakening the immune response it triggers. But in case after case, the product's efficacy goes hand in hand with its risks, and less efficacy means more danger of a different sort—from the disease the medicine is supposed to cure or prevent." Id. at 162.

143. "Counting the bodies that have fallen because of things that might have been done better but weren't will always remain an exercise in speculation ...." Id. at 161. The dimensions of the problem have been termed "unknown and probably unknowable." Broad, Does the Fear of Litigation Dampen the Drive to Innovate?, N.Y. Times, May 12, 1987, at C1, col. 1.

144. "One surely cannot say that every single time the tort system slows down or cuts off innovation it thereby impedes safety. But by all indications that is the result more often than not." P. Huber, supra note 55, at 161.

Whether Huber still holds to this view is questionable. According to Robert E. Litan, Director of the Economic Studies Program at the Brookings Institution, he and Huber are the coleaders of a study project designed to explore whether the tort system has a positive or negative effect on the safety of consumers and workers. See Letter from Robert E. Litan to Joseph A. Page (May 6, 1989) (copy on file at The Georgetown Law Journal) (letter with attached project proposal). A fair assumption is that one would not accept the leadership of a study project designed to explore an issue that one has already prejudged. However, Huber has yet to recant the certitude he expressed in Liability.

145. P. Huber, supra note 55, at 155. For a discussion of the factors inhibiting innovation in the field of contraception, see infra note 152.

146. P. Huber, supra note 55, at 156. For a discussion of the unique nature of the vaccine-liability problem, see infra note 155.

147. P. Huber, supra note 55, at 158-59. For a discussion of orphan drugs, see infra note 151.

148. P. Huber, supra note 55, at 156.

149. See id. at 155-56.
could be self-serving, promoting the corporation's interest in creating a climate for pro-defendant modifications of product liability law.\textsuperscript{150} Or such statements could conceal other factors that motivated the decision not to innovate. For example, profits from the sale of a particular product might not be high enough to justify further research expenditures.\textsuperscript{151} Political pressures emanating from groups that oppose birth control or abortion might have contributed to cutbacks in research and development in the contraceptive industry.\textsuperscript{152} The possibility that concerns about the liability system are

\textsuperscript{150} See supra notes 6-10 and accompanying text. For a corporate executive's call for such reform, see Mahoney, \textit{The Courts Are Curbing Creativity}. N.Y. Times, Dec. 11, 1988, at F3, col. 1 (corporate executive, claiming development of new products abandoned because of liability fears, urged federal limits on punitive damages and other changes to punitive damages rules).

\textsuperscript{151} Huber cites orphan drugs as an example of products kept from the market because the threat of tort suits makes them uninsurable. P. \textit{HUBER}, supra note 55, at 159. He fails to explain to his readers, however, the principal barrier to the marketing of these products. Orphan drugs are pharmaceuticals designed to treat rare diseases found in small populations. The modest size of the market and high costs of development mean low profitability for manufacturers of these drugs. See Lasagna, \textit{Who Will Adopt the Orphan Drugs?}, 3 \textit{REGULATION} 27, 31 (1979). Congress addressed the problem several years ago by enacting the Orphan Drug Act, Pub. L. No. 97-414, 96 Stat. 2049 (1983) (codified at 21 U.S.C. § 360aa-dd (1982 & Supp. V 1987)), designed to accelerate the approval process for new orphan drugs, provide tax credit incentives for companies willing to develop these drugs, and offer exclusive marketing rights on unpatentable orphan drugs for a period of seven years. See H.R. REP. No. 840, 97th Cong., 2d Sess. pt. 1, at 5 (1982).

A witness at congressional hearings on amendments to the Orphan Drug Act cited tort liability as a continuing barrier to the development of certain orphan drugs in addition to the importation of orphan drugs currently available overseas. \textit{See Drug Issues: Hearings Before the Subcomm. on Health and the Environment of the House Comm. on Energy and Commerce, 100th Cong., 1st Sess. 41-42, 51-52 (1987) (testimony of Abbey S. Meyers, Executive Director, National Organization for Rare Disorders) (liability insurance is a "major issue of concern" inhibiting development of orphan drugs).}

Huber offers the example of thalidomide as an orphan drug useful in the treatment of leprosy but kept from the U.S. market by a German manufacturer concerned about potential tort liability. P. \textit{HUBER}, supra note 55, at 159. Thalidomide is notorious for having caused serious birth defects in the children of mothers who took the drug as a tranquilizer during the 1950s, but has been found to be efficacious in the experimental treatment of leukemia victims who have had bone-marrow transplants and in treatment of victims of rare diseases. \textit{See} Squires, \textit{The Other Side of Thalidomide}, Wash. Post, June 20, 1989, Health at 9, col. 1. Despite its effectiveness, one medical researcher has stated that drug companies are not interested in the drug because of a fear of lawsuits. \textit{Id.} at 10, col. 3.

Blaming the tort system for the limited availability of thalidomide seems rather lame. It is difficult to imagine how liability might flow from the use of the drug if it were fully and adequately labeled and marketed to a small population suffering from rare diseases. The use of a properly worded informed-consent form might obviate the possibility of tort litigation. \textit{See infra} notes 193-94 and accompanying text.

\textsuperscript{152} Huber stresses the effect that tort law has had in deterring innovation in the development of contraceptives. P. \textit{HUBER}, supra note 55, at 155; \textit{see also} Djerassi, \textit{The Future of Birth Control}, Wash. Post, Sept. 10, 1989, at C1, col. 1 (industry virtually abandoned research on contraception because of liability litigation); Sanger, \textit{Birth Control: New Options But Old Ideas; Contraceptives in Demand Amid Swelling Liability and Shrinking Research}, Newsday, Mar. 27, 1988, at 78, col. 1 (fear of large settlements inhibits development of male pill and other breakthroughs); \textit{cf.} Dulles,
irrational\textsuperscript{153} or exaggerated\textsuperscript{154} cannot be discounted. Furthermore, it is conceivable that some of the examples cited in Liability are really atypical situations rather than symptoms of the general failure of the tort system. If this is so, ad hoc remedies might be more appropriate than systemic reform.\textsuperscript{155}

Huber asserts that the tort system discriminates against innovation by overestimating the new risks associated with new technologies.\textsuperscript{156} He cites neither authority nor facts to substantiate this claim. The shift from negligence to strict liability in design cases did, in theory, require juries in product design cases to pass judgment upon the defectiveness of products rather than the conduct of manufacturers.\textsuperscript{157} But there is no evidence to suggest that the courts apply this standard differently in products liability suits involving new technologies than in those implicating familiar products. Even if the courts treat new risks more stringently than old risks, Huber has elsewhere offered

\begin{quotation}
Liability Crisis Complicates Contraception, N.Y. Times, May 19, 1986, at B8, col. 2 (litigation over IUD has caused manufacturers to pull product from market, limiting birth control options).

A recent article on developments in the birth control industry reports that political and business concerns, in addition to worry over potential liability, have contributed to a worldwide decrease of nearly 25\% in contraceptive research spending in the past 15 years (a trend that can hardly be blamed upon tort suits, at least with respect to foreign research and development). Freudenheim, Birth Control Industry Is Taking a New Shape, N.Y. Times, Feb. 22, 1989, at D1, col. 4; see Gladwell, Birth Control Makers Weary of Controversy: Liability Problems Limit Contraception Choices as Drug Firms Leave Field, L.A. Times, May 3, 1988, pt. IV, at 15, col. 1 (low profits and negative publicity stemming from right-to-life and women's groups have hindered research and development of contraceptives).


\textsuperscript{153} The failure to market thalidomide to a carefully delineated group of victims of rare diseases provides a good example.

\textsuperscript{154} Physicians' fears that Good Samaritan acts will result in malpractice suits are but one example. See infra notes 179-84 and accompanying text.

\textsuperscript{155} The treatment of liability for adverse reactions to vaccines is an example. Because certain childhood vac-cines are required by law and are known to cause a relatively low incidence of adverse reactions, it makes sense to have a mechanism by which victims of these reactions may be compensated, rather than to rely exclusively upon the tort system. See V. Schwartz & L. Mahshigian, supra note 49, at 393-94.

On the other hand, the public demand for vaccines against diseases such as AIDS raises the possibility that manufacturers will take advantage of the situation and claim they are reluctant to develop such products because of liability fears, when their real objective is to persuade Congress to pass legislation that will limit their potential liability. For a discussion of the liability issue as it relates to the development of an AIDS vaccine, see Gladwell, supra note 69.

\textsuperscript{156} See P. Huber, supra note 55, at 157-58.

\textsuperscript{157} This distinction may be more theoretical than real. See supra notes 97-98 and accompanying text.
persuasive reasons why, apart from tort liability, society might be justified in regulating new risks more stringently than old.\footnote{158}

Huber criticizes recent decisions abandoning the "repairs doctrine"\footnote{159} by permitting plaintiffs to introduce into evidence post-accident changes in the design of a product or in the warnings or instructions accompanying it.\footnote{160} His criticism creates the misleading impression that there is a decisional trend toward discarding the repairs doctrine. In fact, the repairs doctrine is alive and quite well.\footnote{161} In his haste to buttress the charge that tort law discourages safety innovation, Huber couples his expression of dismay at the rejection of the repairs doctrine with the suggestion that under strict liability, courts measure the design of the product in question against products currently being marketed. He claims that a court may find a product manufactured many years ago to be defective for not meeting the technological standards of today.\footnote{162} This proposition is flatly erroneous. Courts routinely judge the design of products according to the state of the art at the time the product was marketed, not according to the state of the art at the time of the trial.\footnote{163}

Huber faults the tort system for ignoring safety disincentives that might

\footnote{158. \textit{See} Huber, \textit{Risk Regulation}, \textit{supra} note 59, at 1027-28 (old risks are associated with settled production and consumption choices and established technologies; regulation of old risks often involves substantial economic, social, and political obstacles, and high transaction costs; regulation of new risks involves lost opportunity costs to be borne by those who may be neither identifiable nor aware of what is at stake). I am indebted to Professor Gary T. Schwartz of the UCLA School of Law for this insight regarding Huber’s argument.}

\footnote{159. P. \textit{Huber}, \textit{supra} note 55, at 159. The repairs doctrine, which excludes evidence of post-accident repairs, rests upon the conviction that admitting evidence of these repairs would discourage manufacturers from making safety-enhancing improvements because jurors might view them as an admission of liability. Even if the evidence is admitted for a purpose other than to prove negligence or defectiveness, proponents of the repairs doctrine are concerned that jurors will not be able to make such fine distinctions and the defendant will inevitably be prejudiced. \textit{See} 1 M. \textit{Madden}, \textit{supra} note 88, \textit{§} 12.11, at 518-24.}

\footnote{160. P. \textit{Huber}, \textit{supra} note 55, at 159-60.}

\footnote{161. \textit{See} 1 M. \textit{Madden}, \textit{supra} note 88, \textit{§} 12.11, at 518-24 (citing cases).}

\footnote{162. \textit{See} P. \textit{Huber}, \textit{supra} note 55, at 160 ("When the sun never sets on the possibility of litigation, each improvement in method, material, or design can establish a new standard against which all of your earlier undertakings, of no matter what vintage, will then be judged.").}

\footnote{163. \textit{See}, e.g., Bruce v. Martin-Marietta Corp., 544 F.2d 442, 447 (10th Cir. 1976) (airplane judged by state of the art when manufactured in 1952 and not as technology existed in 1970); Boatland of Houston, Inc. v. Bailey, 609 S.W.2d 743, 746-48 (Tex. 1980) (fishing boat judged by state of the art when sold in 1973 and not at time of trial); M. \textit{Shapo}, \textit{THE LAW OF PRODUCTS LIABILITY} \textit{§} 8.07[6][b], at 8-40 (1987) ("new advances in safety technology [do] not necessarily mean that products previously manufactured are defective"); Spradley, \textit{Defensive Use of State of the Art Evidence in Strict Products Liability}, 67 MINN. L. REV. 343, 430-33 (1982) ("In negligence cases, courts have long held that a defendant’s product is judged by the state of the art as it existed at the time of manufacture or sale.").}
flow from the imposition of liability. He argues that tort law's unpredictability, its assessment of foresight through the lens of hindsight,\textsuperscript{164} and its embrace of rules such as joint and several liability\textsuperscript{165} fail to make adequate distinctions between those who have been careless and those who have been careful. Thus, the risk of tort liability may deter the latter from engaging in socially useful activity that is also dangerous. In addition, the risk of tort liability may encourage alternative conduct that turns out to be riskier than conduct already deemed negligent, or it may provide incentives for the manufacture of alternative products that turn out to be more dangerous than products already found defective.

Tort law, of course, does not intend these consequences. It permits courts to consider safety trade-offs to determine whether a defendant is negligent or whether a product design is defective.\textsuperscript{166} Both applications of the test are flexible enough to include, within the scope of the cost-of-avoidance factor, a balancing of any adverse effects that might flow from a finding of liability.\textsuperscript{167} How well the torts process performs this balancing is a matter of some dispute.\textsuperscript{168}

\begin{itemize}
\item \textsuperscript{164} Huber asserts that “[d]ecisions made on the fly, in rescue situations, or amid ignorance, when truly new products are being designed, can be second-guessed in an inquest on negligence or defectiveness that will be held with the benefit of calm, eagle-eyed hindsight.” P. Huber, supra note 55, at 164. He offers no evidence of results wrongly reached as a result of this process of “second-guessing.” For a contrary perspective on cases involving rescue situations, see Recent Legislation, 75 Harv. L. Rev. 641, 642 (1962) (courts seem to consider emergency circumstances and do not treat the Good Samaritan unfairly).
\item \textsuperscript{165} The rule of joint and several liability does not impose liability upon a non-negligent party, but rather exposes a defendant to the risk of full liability for harm tortiously caused even though other parties might also have contributed to that harm. See W. Prosser & W. Keeton, supra note 12, § 47, at 328-30. In comparative fault jurisdictions, the rule creates a possibility that a wealthy tortfeasor might pay a greater share of a verdict than the percentage of fault for which he has been found responsible if other tortfeasors turn out to be judgment-proof. See generally Pressler & Schieffer, Joint and Several Liability: A Case for Reform, 64 Den. U.L. Rev. 651 (1988). For a defense of joint and several liability, see Wright, Allocating Responsibility Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure, 21 U.C. Davis L. Rev. 1141 (1988); see also Twerski, The Joint Tortfeasor Legislative Revolt: A Rational Response to the Critics, 22 U.C. Davis L. Rev. 1125 (1989); Wright, Throwing out the Baby with the Bathwater: A Reply to Professor Twerski, 22 U.C. Davis L. Rev. 1147 (1989).
\item \textsuperscript{166} See supra note 94.
\item \textsuperscript{167} See Olson v. Arctic Enter., Inc., 349 F. Supp. 761 (D.N.D. 1972). In Olson, the plaintiff caught his foot in an unguarded metal track and sprocket drive mechanism in the rear of a snowmobile, causing permanent injury to his foot. Id. at 763. Ruling for the defendant on the negligent design claim, the court noted the dangers that would have been created by adoption of rubber tracks. Id. at 765.
\item \textsuperscript{168} Of the controversies surrounding product design litigation derives from the charge that trade-offs involving technological feasibility and safety are so multifaceted that the tort system cannot resolve them in a principled way. Compare R. Epstein, supra note 88, at 84-88 (judge cannot make the “multiple, delicate, marginal determinations” necessary to evaluate the cost-benefit trade-off (emphasis in original)) and Henderson, Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication, 73 Colum. L. Rev. 1531, 1571-78 (1973) (establishing prod-
Huber entertains no doubts on this score. He insists that despite its good intentions, modern tort law either fails to pay any heed to risk trade-offs or evaluates trade-offs in a way that diminishes net safety.\textsuperscript{169} But his evidence is sketchy and does not bear the weight of his overstated argument.

Huber argues that by raising the costs of goods and services or by making them unavailable, tort law could decrease safety levels by forcing some consumers to use risky alternatives or by forcing society to do without the benefits of safety-enhancing goods and services.\textsuperscript{170} For example, if dealers of used products are held strictly liable in tort for defects in the goods they sell, the price of these goods might rise to the point that some consumers could not afford to buy from used goods dealers. These people might seek out private individuals selling used goods on an occasional basis because such individuals would not be considered "sellers" for liability purposes and would sell used goods at a lower price.\textsuperscript{171} The goods that private individuals sold might be more defective, and hence more dangerous, than used goods that dealers sold.\textsuperscript{172} Huber makes this point,\textsuperscript{173} but the problem is more complex than Huber leads his readers to believe. First, not every jurisdiction imposes strict

\textsuperscript{169} P. HUBER, supra note 55, at 11-15.

\textsuperscript{170} Id.

\textsuperscript{171} Strict liability in tort is limited to those engaged in the business of selling products. See RESTATEMENT, supra note 83, § 402A(1)(a).

Huber refers, without citation, to recent cases attempting to extend strict liability to "ordinary citizens selling cars through the classified ads" and calls this a "seemingly logical step." P. HUBER, supra note 55, at 39. In his haste to cast every negative aspersion possible upon tort law, he fails to mention the "logical" reasons that cut against imposing strict liability upon occasional sellers not in the business of selling products. For example, the common law has traditionally deemed those who have entered into the business of selling products to have undertaken a special responsibility for the safety of the public. See RESTATEMENT, supra note 83, § 402A comment f. In addition, enterprise liability has been advanced as a reason for imposing strict liability upon those in the business of selling used products to the public. See Note, Sales of Defective Used Products: Should Strict Liability Apply?, 52 S. Cal. L. Rev. 805, 811-14 (1979) (by G. Highland). This rationale is inapplicable to occasional sellers not in the used product business.

\textsuperscript{172} This argument is developed in detail in Henderson, The Boundaries of Strict Products Liability: Implications of the Theory of the Second Best, 128 U. Pa. L. Rev. 1036 passim (1980) (extending strict liability to sellers will result in net safety loss if other sellers exist who are not subject to strict liability).

\textsuperscript{173} "Providers who are illegal, anonymous, or too small to bother with also gain a competitive edge over established and reputable providers every time the liability vise is tightened. A second-hand sale through the classified ads is promoted over a sale through more customary sales channels." P. HUBER, supra note 55, at 165.
liability upon dealers of used products. Those that hold dealers strictly liable in tort limit the rule to situations in which dealers perform defective work or repairs, or install defective replacement parts. Because dealers owe a duty of reasonable care when they recondition used products or install replacement parts, it is not clear how much the switch to strict liability causes the price of used products to increase, nor is it clear the extent to which this switch forces some consumers to buy allegedly more dangerous products from occasional private sellers rather than from dealers.

A specific instance that Huber cites to illustrate tort law's capacity to encourage more dangerous products is the controversy over the Bic disposable cigarette lighter, which allegedly may ignite without warning while in the pockets of users. He claims that holding the manufacturer of these products liable for the harm they have caused might force their removal from the market, with the resulting substitution of refillable lighters that could cause more burn injuries in the long run. The highly dubious assumption here is that industry will be unable to develop a disposable lighter that does not explode into flames at inappropriate moments.

Huber finds yet another safety disincentive of the tort system in physicians' unwillingness to play the "Good Samaritan" by stopping to aid accident victims who are strangers. Presumably, the rule that physicians have a duty to use reasonable care when they furnish emergency assistance fails to

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174. See, e.g., Peterson v. Lou Bachrodt Chevrolet Co., 61 Ill. 2d 17, 21, 329 N.E.2d 785, 787 (1975) (used car dealer not strictly liable for defects not existing when car left manufacturer and not created by used car dealer); Grimes v. Axtell Ford Lincoln-Mercury, 403 N.W.2d 781, 785 (Iowa 1987) (dealers of used goods not strictly liable for latent defects not arising from design or manufacture but caused by previous owner); Tillman v. Vance Equip. Co., 286 Or. 747, 757, 596 P.2d 1299, 1304 (1979) (dealers in used goods not strictly liable when no representation of quality made beyond sale itself and no special relationship with manufacturer exists).

175. See 1 M. MADDEN, supra note 88, § 3.26, at 95; see also M. SHAPO, supra note 163, § 18.04[2][a], at 18-13 to -14 (although strongest case for imposing strict liability exists when seller rebuilds or reconditions products, some jurisdictions have extended the rule to cover those who have merely made "some inputs" into products).

176. For a report on the defects associated with Bic lighters and the product liability suits these defects have engendered, see Lewin, Lawsuits, and Worry, Mount Over Bic Lighter, N.Y. Times, Apr. 10, 1987, at A1, col. 4.

177. P. HUBER, supra note 55, at 66.

178. Indeed, the claim has been made that the problem of inflammability is peculiar to the Bic lighter, and that other lighters on the market are designed in such a way as to minimize the risk of accidental ignitions. See Lewin, supra note 176, at D3, col. 2.

For the use of the Bic litigation as an argument for "tort reform," see McConnell, Bic is Tort Plague's Latest Victim, Wall St. J., May 5, 1987, at 37, col. 1 (letter to the editor from Senator Mitch McConnell) (making the highly dubious assertion that liability will not depend upon who was at fault or responsible for the harm but will be imposed even though the manufacturer "designed the safest product possible").

179. P. HUBER, supra note 55, at 163. His hypothetical victim has been struck by a drunk driver and his hypothetical doctor is driving his "hard-won Cadillac." Fearing a malpractice suit if he stops to help, the doctor keeps driving.
take adequate (or any) notice of the risk averseness of physicians. Physicians faced with a duty of due care will be deterred from voluntary rescues because they fear being sued for negligence.\textsuperscript{180}

The insight Huber offers here is that when individuals have no economic incentive to perform an act (as opposed to disposable-lighter manufacturers, who have economic incentives to develop pocket lighters that do not explode), they may refrain from acting because of a reluctance to incur the risk of tort liability. However, in the case of physicians unwilling to aid strangers in peril, there is more than meets the eye. Some years ago physicians vigorously lobbied state legislatures to secure enactment of Good Samaritan laws limiting the liability of health care professionals who stop to render first aid to strangers.\textsuperscript{181} The physicians' principal argument was that they feared they might be sued if they volunteered to help strangers in peril. Yet no one was able to cite a single instance of a physician being sued under these circumstances.\textsuperscript{182} Therefore, no court had the opportunity to consider the possible adverse consequences of imposing a duty of reasonable care upon physicians who stop to render emergency assistance. Moreover, even after the enactment of Good Samaritan laws that considerably narrowed the grounds upon which a doctor might be held liable, opinion surveys found that about half of the physicians polled would still not stop to render aid.\textsuperscript{183} Thus, other reasons besides an exaggerated fear of tort liability may have motivated physicians' refusal to treat strangers in need.\textsuperscript{184}

Huber identifies the intrauterine device (IUD) as one of a handful of products that have fallen victim to litigation which on balance has achieved so-

\begin{itemize}
  \item \textsuperscript{180} Physicians may be concerned not only with the adverse psychological effects of being sued and the burden of having to defend, but also with unfair treatment by the judicial system. These fears may be ill-founded, however. In Good Samaritan cases not involving physicians, the courts have not imposed unduly strict standards of care and have fully considered the emergency nature of the circumstances. See \textit{Recent Legislation}, 75 \textit{Harv. L. Rev.} 641, 642 (1962).
  \item \textsuperscript{181} See \textit{Malpractice Report}, supra note 1, at 15-16; see \textit{generally} Note, \textit{Good Samaritans and Liability for Medical Malpractice}, 64 \textit{Colum. L. Rev.} 1301 (1964).
  \item \textsuperscript{182} See A. Holder, \textit{Medical Malpractice Law} 9 (1975) ("surveys by the American Medical Association and others . . . reveal that no such claims have been reported by physicians"); S. Law & S. Polan, supra note 35, at 117 (as of 1978, "there is not one single reported case, in any state, in the entire history of the country, in which a doctor has been held liable" for inadequate care provided to strangers in peril (emphasis in original)); \textit{Malpractice Report}, supra note 1, at 15 n.7 (no officially reported decisions as of 1973, but in one malpractice suit doctor pleaded the Hawaii Good Samaritan statute as a complete defense). For the first reported decision involving a malpractice suit against a physician who volunteered medical assistance, see Rodriguez v. New York City Health & Hosp. Corp., 132 Misc. 2d 705, 707-08, 505 N.Y.S.2d 345, 347 (1986) (Good Samaritan statute provided complete defense because complaint failed to allege gross negligence).
  \item \textsuperscript{183} \textit{Malpractice Report}, supra note 1, at 16.
  \item \textsuperscript{184} On the other hand, a belief that the Good Samaritan laws did not go far enough (perhaps even to the extent of providing complete immunity) in protecting physicians from lawsuits might also explain the results of the poll. For a detailed analysis of Good Samaritan laws, see \textit{generally} 2 M. Bender, \textit{Medical Malpractice} ch. 21 (1989).
\end{itemize}
cially undesirable results. He asserts that an avalanche of lawsuits forced from the market not only the infamous Dalkon Shield,185 but also two other IUDs, the Copper-7 and the Lippes Loop. Huber suggests that although the Dalkon Shield deserved its fate,186 the Copper-7 and Lippes Loop did not, because they were the safest effective options available to many women.187 He argues that because no alternatives are available, a number of unwanted pregnancies may occur.188 In addition, he avers that no IUD-maker could possibly provide the type of warnings that must accompany such products, and hence “the new law of warning further sharpens the anti-innovation bias of the new tort system.”189

The Copper-7, manufactured by G.D. Searle & Co., was withdrawn from the market in the wake of a barrage of lawsuits brought by women who suffered pelvic inflammatory disorders and infertility allegedly as a result of using the device.190 A major thrust of the plaintiffs’ argument in what has been regarded as the breakthrough victory against Searle191 was that the Copper-7 could be used safely only by women who had already borne children and had stable sexual relationships. Yet Searle had targeted a much larger (and more profitable) market—all women who might opt to use an IUD.192 Thus, liability would properly flow from the negligent marketing of a product which caused harm that might have been avoided if the defendant had exercised due care. Instead of searching for an appropriate market and then labeling and promoting its product accordingly, the manufacturer chose to cease production altogether. Why this should cast a shadow upon the tort system rather than upon the manufacturer is not readily apparent.

Huber’s characterization that the court-imposed duty to warn is so onerous that it discourages innovation in the development of IUDs is without

185. For a detailed account of the sorry saga of the Dalkon Shield, see M. Mintz, AT ANY COST: CORPORATE GREED, WOMEN, AND THE DALKON SHIELD (1985).
186. P. Huber, supra note 55, at 162. This seems to be a backhanded admission by Huber that occasionally the tort system does some good.
187. Id. at 41-42.
188. Id. at 41-42, 162; see also Fox, Withdrawal from Market Seen Limiting Options, U.S. MED., Sept. 1986, at 2, 25 (estimating an increase of 123,000 unwanted pregnancies per year).
189. P. Huber, supra note 55, at 158.
192. See Mintz, supra note 190, at 13 (quoting from a 1970 Searle memo claiming that the Copper-7 was also suitable for women who had not yet borne any children).
factual foundation. The one company that remained in the field has pioneered the development of an informed consent brochure, which seeks to ensure that only those women for whom the device is appropriate will use it and that any woman considering use of the product will be able to make an intelligent choice about her method of contraception. Another manufacturer that has entered the field has adopted a similar informed consent form. Products liability suits brought against IUD-makers on a failure-to-warn or intentional misrepresentation theory may have contributed to the development of these innovative consent forms.

This is not the first time that the tort system has played a role in bringing about a salutary result. Yet in any assessment of the deterrent function of tort law, the pluses are as difficult to measure as the minuses. One can point to specific examples of litigation that, at the very least, helped remove from the market or encourage the redesign of such unsafe products as the Dalkon Shield and tip-over hot water vaporizers. Tort suits have also un-

193. See Mintz, IUD Maker Gambles on the Informed Consumer, Wash. Post, Mar. 15, 1987, at H6, col. 1 (interview with Peter F. Carpenter, Executive Vice President of Alza Corporation). The process for ensuring that consumers are informed requires each patient to certify that she has read the entire leaflet provided by Alza and that the doctor has “answered all my questions and advised me of the risks and benefits associated with [the Alza IUD], with other forms of contraception, and with no forms of contraception.” Id. The patient then declares: “I have considered all factors and voluntarily chosen to have [the Alza IUD] inserted by Dr. ——.” Id.


195. For example, Huber concedes that some violence may have been averted by the decision of the California Supreme Court in Tarasoff v. Regents of the Univ. of California, 17 Cal. 3d 425, 431, 551 P.2d 334, 340, 131 Cal. Rptr. 14, 20 (1976) (imposing a duty upon therapists to use reasonable care to protect potential victims from their patients whom they know or should know to be violent). P. HUBER, supra note 55, at 167. Yet without empirical evidence, he maintains that the costs of the rule, which may require interfering with the therapist-patient relationship and may deter therapists from treating violent patients, outweigh its benefits. Id.

Huber's dismissal of the positive aspects of Tarasoff may be overly glib. In a recent article, a Washington, D.C., psychiatrist described how she was confronted with the predicament of treating a patient who had AIDS but continued to lead a hyperactive sex life of one-night and group encounters, despite his knowledge of AIDS' contagiousness and its dread consequences. The psychiatrist concluded that her patient was purposefully handing out death sentences to his partners. In wrestling with her dilemma, the psychiatrist considered the rule of Tarasoff. Although it was not the determining factor in her decision to notify the appropriate authorities (indeed, as she realized, the courts of the District of Columbia, Maryland, and Virginia have not yet recognized Tarasoff's duty to warn), she stated that Tarasoff "helped me make up my mind." Van Susteren, Doctor's Horror: Death on The Loose, Wash. Post, Feb. 26, 1989, at C1, col. 1.

Unfortunately, the psychiatrist's decision did not keep her patient from his deadly game because the hospital to which he was committed released him. But shortcomings in the law of involuntary commitment should not cloud the point that a tort decision pushed a psychiatrist toward a decision that may have saved numerous lives.

196. See G. Schwartz, supra note 85, at 451 n.107 (quoting a newspaper article describing the redesign of the vaporizer found to be defectively designed in McCormack v. Hanksraft Co., 278 Minn. 322, 333, 154 N.W.2d 488, 497 (1967)).
covered corporate misconduct that might otherwise have gone undetected.\textsuperscript{197} Moreover, tort decisions have provoked legislative reaction that has promoted public safety or health.\textsuperscript{198}

The business community provides some support for the argument that tort law has deterrent effects that encourage safe products. A survey by a management consulting firm that polled 101 high level corporate executives found that the principal effect of products liability lawsuits was to compel firms to be more attentive to the safety aspects of their products.\textsuperscript{199} A 1987 report by the Conference Board, a business research group, found that:

Where product liability has had a notable impact—where it has most significantly affected management decision making—has been in the quality of the products themselves. Managers say products have become safer, manufacturing procedures have been improved, and labels and use instructions have become more explicit.\textsuperscript{200}

In the debate over the deterrence function of tort law, much depends on

\textsuperscript{197} The classic example is the asbestos litigation that exposed suppliers’ efforts to conceal information about the harmful effects of their product. See generally P. BRODEUR, supra note 102.

\textsuperscript{198} An excellent example is the enactment of a handgun-control law in the State of Maryland. The Maryland Court of Appeals became the first high court in the country to rule that a victim injured by a handgun might have a cause of action against the manufacturer and marketer. See Kelley v. R.G. Indus., Inc., 304 Md. 124, 497 A.2d 1143 (1985). A legislative effort was made to overturn the decision. See Barnes, Md. Senate Votes to End Gun Liability: Bill Attacks Ruling on Cheap Weapons, Wash. Post, Mar. 17, 1987, at B1, col. 1. However, the state House of Delegates killed the measure. See Barnes, Advocates of Gun Control Score Bull’s-Eye in Maryland Assembly, Wash. Post, Apr. 2, 1987, at D1, col. 2. A year later, however, the Maryland legislature approved a handgun-control law, effectively overruling Kelley. See Barnes, Bill Advocates Beat NRA at Its Own Game, Wash. Post, Apr. 12, 1988, at A1, col. 6. For an analysis of the political effects of tort decisions, see generally Zacharias, The Politics of Torts, 95 YALE L.J. 698 (1986).

\textsuperscript{199} See The Litigious Society: Is It Hampering Creativity, Innovation, and Our Ability to Compete?, 2 Corporate Issues Monitor (Egon Zehnder International), No. 3 (1987) [hereinafter 2 Corporate Issues Monitor No. 3]; see also Executives Say Lawsuits Have Forced Firms to Manufacture Safer Products, Daily Report for Executives (BNA), Jan. 7, 1988, at A3, col. 2; Study Says Safer Products Result from Fear of Suits, L.A. Times, Jan. 5, 1988, Home Ed. at 20, col. 4. Respondents to the survey also claimed that tort suits have stifled innovation and that lawyer avarice was the principal cause of the liability crisis. 2 Corporate Issues Monitor No. 3, supra, at 2.

\textsuperscript{200} N. WEBER, PRODUCT LIABILITY: THE CORPORATE RESPONSE 2 (Conf. Board 1987). A later report by The Conference Board took a much more negative view of the impact of product liability and concluded that it has had a significantly detrimental effect upon the business community. This effect includes cancellations of acquisitions, research, and products; creating an atmosphere of uncertainty; heavy demands on CEOs’ time; high expense; and creating another obstacle to competitiveness. See E. MCGUIRE, THE IMPACT OF PRODUCT LIABILITY 17-20 (Conf. Board 1988). The first report surveyed top managers of major companies and the second queried chief executive officers. Corporate contributors to The Conference Board were reportedly unhappy with the first report. See Walsh, Conference Board Hardens Stance on Liability Issue, Wash. Post, Apr. 27, 1988, at F1, col. 3.

A recent article published by The Conference Board and written by the author of the second report cites improvement in product safety design as one example of corporate progress in the product liability “game.” See McGuire, Product Liability: Evolution and Reform, in PERSPECTIVES 12 (The Conference Board, Inc.) No. 17 (May 1989) (other advances include resisting pressures to
the assignment of the burden of persuasion. A leading critic has averred that those who defend tort law on deterrence grounds lack convincing empirical evidence for their position.201 Yet in the political context of the controversy, it seems fair to suggest that those who, like Huber, wish to change the existing tort system, should carry the burden of proof. These reformers claim that tort law undermines more than it contributes to public safety and health. Liability fails to establish that the harm tort law causes by either removing useful products from the market or failing to discover beneficial products outweighs the benefits, which include removing unsafe products from the market, discouraging the introduction of dangerous products into the stream of commerce, and encouraging the manufacture of safe products.202

V. THE CONTRACT AS "KING"

Huber contrasts his version of a contemporary tort system dominated by the Founders' pernicious enterprise liability philosophy203 with a regime of contract law that he asserts at one time governed accident cases involving parties who had a preaccident relationship.204 If one party had promised to act with a certain level of skill or competence but performed below that level, the early English courts recognized a tort action in trespass for deceit. By the fifteenth century, however, they held that the new writ of assumpsit—from which contract law evolved—would govern these kinds of cases.205 The parties could make explicit deals with respect to the obligations they owed to one another and the legal system would uphold these arrangements. This meant that one party might disclaim any responsibilities relating to the transaction and if the other party assented, the agreement was binding. According to Huber, the law could imply certain obligations, such as the employer's duty to provide reasonably safe tools, on the basis of common consent. "But the general rule was that contract was king,"206 and tort law was "a backwa-

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201. See Sugarman, supra note 54, at 587.
202. At least one commentator has argued that tort law falls short of fulfilling its deterrence mission because for certain classes of plaintiffs, it underestimates the true costs of accidents; it also creates an inadequate threat of liability to defendants calculating their accident-prevention expenditures by measuring their potential liability exposure. See Pierce, supra note 54, at 1290-95 (measure of damages for wrongful deaths of children undervalues worth that society places upon children's lives). This argument, of course, could be used in support of reforming damages law in a way that would increase jury verdicts in certain categories of cases.
203. See supra notes 70-77 and accompanying text.
204. See P. Huber, supra note 55, at 20-21.
205. Id. at 21-22; see also T. Plucknett, A Concise History of the Common Law 405-06 (1929) (actions of assumpsit lay for "malfeasance" as early as 1348).
206. P. Huber, supra note 55, at 23. To illustrate how this worked in the product liability context, Huber describes the 1937 elixir-of-sulfanilamide disaster, in which an untested drug caused widespread consumer fatalities. Id. at 24; see also C. Jackson, Food and Drug Legislation in
ter of the legal system”—a state of affairs that, by Huber’s account, did not change until the 1960s and 1970s when the courts undertook “to rewrite the common law of accidents from beginning to end.”

The problem with this interpretation of legal history is that it states as the exception what is the rule. Judicial imposition of a duty of due care began earlier and became far more widespread than Huber allows. Long before the great revolution, courts routinely imposed tort liability for the negligent performance of contracts. The “common consent” Huber mentions might have formed the basis for an action for breach of an implied promise, but the basis for the tort action was a breach of duty imposed by the common law.

One might expect that Huber would lament the development of negligence law as the remedy of choice for physical harm or property damage claims arising from substandard performance by a party to a contractual relationship. However, he vaults neatly over this phase of legal history and alights upon the recognition of the implied warranty of fitness for human consumption arising from the sale of food and drugs in the early part of the twentieth century, a step he views as the beginning of the end for “the primacy of contracts.” He claims that the courts took this step to complement congressional passage of the federal “Pure Food Act in 1905” because they found a “shared understanding between buyer and seller . . . that food or

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207. P. HUBER, supra note 55, at 24. He does not appear to register any discomfort with such harsh results.
208. Id. at 28.
209. See W. PROSSER & W. KEETON, supra note 12, § 92, at 660-61 (documenting cases imposing tort liability for contract misperformance as early as 1851). The authors explain:

"The American courts have extended the tort liability for misfeasance to virtually every type of contract where a defective performance may injure the promisee. . . . The principle which seems to have emerged from the decisions in the United States is that there will be liability in tort for misperformance of a contract whenever there would be liability for gratuitous performance without the contract—which is to say, whenever such misperformance involves a foreseeable, unreasonable risk of harm to the interests of the plaintiff.

Id.
210. See P. HUBER, supra note 55, at 23.
211. See W. PROSSER & W. KEETON, supra note 12, § 92, at 656-57.
212. On the advantages of tort actions, see id. at 665-66 (in addition to permitting recovery of greater damages, tort actions, unlike contract actions, permit recovery for wrongful death; they may be available when the contract fails; and tort claims may avoid some defenses, some counterclaims, and some instances in which joining several defendants might otherwise be necessary).
213. P. HUBER, supra note 55, at 25.
drugs sold for human use were fit for that purpose."\textsuperscript{215}

Huber's treatment is a somewhat dubious reading of the history of warranty actions involving products for human consumption. Long before the turn of the century, an implied warranty applied to retailers of food and rested upon public safety concerns apart from any mutual understanding between sellers and buyers.\textsuperscript{216} The interesting development in the early decades of the twentieth century was the judicial recognition of a cause of action in tort. The injured food consumers could sue manufacturers or suppliers with whom they were not in privity of contract for breach of an implied warranty that the food in question be reasonably fit for human consumption.\textsuperscript{217} This extension of liability was not contractually based, but rested upon considerations of consumer protection.\textsuperscript{218}

Huber goes on to claim that when the Founders took hold of this "new" judicial theory of implied warranty, they used it to overthrow "traditional contract theory." The first giant step was taken in \textit{Henningsen v. Bloomfield Motors, Inc.},\textsuperscript{219} in which the New Jersey Supreme Court permitted the wife of the purchaser of a new automobile to recover for breach of an implied warranty of merchantability against both the retailer and the manufacturer.\textsuperscript{220} The court allowed her to sue despite a lack of privity of contract between herself and the manufacturer and despite language in the sales contract that specifically precluded such recovery.\textsuperscript{221}

Huber's treatment of \textit{Henningsen} is characteristically fast and loose: he makes the astonishing claim that the court invented the implied warranty of merchantability that it applied;\textsuperscript{222} he dubiously asserts that the plaintiff could

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\item (1988)). It was called the Food and Drugs Act. See U.S. DEPT OF AGRICULTURE, FOOD AND DRUGS ACT (C. Gwinn ed. 1914).
\item 215. P. HUBER, supra note 54, at 25.
\item 216. See R. DICKERSON, \textit{PRODUCTS LIABILITY AND THE FOOD CONSUMER} 19-31, 36-37 (1951) (special food warranty probably had roots in medieval English common law, beginning in 1266 with criminal penalties for trafficking in "corrupt" food and drink; American courts historically appear to assess liability in light of public policy, rather than tortious representation, broken promises, or local food laws).
\item 217. See id. at 99-103 ("privity gap" bridged in Mazetti v. Armour & Co., 75 Wash. 622, 135 P. 633 (1913), and in Kennedy v. F.W. Woolworth Co., 205 A.D. 648, 200 N.Y.S. 121 (App. Div. 1923), through actions in tort for breach of warranty.)
\item 218. See Mazetti, 75 Wash. at 630, 135 P. at 636 (food manufacturers impliedly warrant their packaged product to be fit for consumption to consumers as well as to distributors and retailers). \textit{Mazetti} is discussed in Shapo, \textit{A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment}, 60 VA. L. REV. 1109, 1135-37 (1974).
\item 219. 32 N.J. 358, 161 A.2d 69 (1960).
\item 220. Id. at 413, 161 A.2d at 99.
\item 221. Id. at 404, 161 A.2d at 95.
\item 222. He states that "the New Jersey Supreme Court in that case discovered an implied warranty under which Bloomfield had promised [plaintiff's] husband . . . (without ever actually saying so), a certain degree of safety in the car." P. HUBER, supra note 55, at 73. In fact, the New Jersey
not show that any vehicle parts were defective;\textsuperscript{223} he fails to mention that the plaintiff in the case suffered personal injuries;\textsuperscript{224} and he states that the sales contract “promised only to replace any defective parts.”\textsuperscript{225} What he does not add is that although the contract warranted the vehicle free from defective parts, it limited the manufacturer’s obligation to replace only those defective parts that the purchaser returned to the factory and that the manufacturer determined to its satisfaction to be defective.\textsuperscript{226} In addition, the contract disclaimed all other express or implied warranties.\textsuperscript{227}

The \textit{Henningsen} court decided that this broad disclaimer was void because the manufacturer’s warranty was inimical to the public good and in conflict with legislative and judicial policies of New Jersey relating to the compensation of personal injuries.\textsuperscript{228} It found that the warranty \textit{cum} disclaimer was a standard form contract used by almost all domestic automobile manufacturers and a classic contract of adhesion to which the plaintiff had no meaningful alternative.\textsuperscript{229}

Huber finds this judicial overreaching. Yet under the Uniform Commercial Code, drafted by those whose views were very different from those of the Founders and enacted in every jurisdiction except Louisiana, a court confronted by facts identical to those in \textit{Henningsen} would reach the same result.\textsuperscript{230}

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\item \textsuperscript{223} P. HUBER, \textit{supra} note 55, at 28. The undisputed testimony of the insurance company’s inspector and appraiser, who examined the car after the accident, was “that something definitely went ‘wrong from the steering wheel down to the front wheels . . . something down there had to drop off or break loose’ . . .” \textit{Henningsen}, 32 N.J. at 369, 161 A.2d at 75.
\item \textsuperscript{224} On the significance of the fact that plaintiff suffered personal injuries, see infra note 228 and accompanying text.
\item \textsuperscript{225} P. HUBER, \textit{supra} note 55, at 28.
\item \textsuperscript{226} \textit{Henningsen}, 32 N.J. at 367, 161 A.2d at 74.
\item \textsuperscript{227} \textit{Id.}
\item \textsuperscript{228} \textit{Id.} at 403-04, 161 A.2d at 94-95.
\item \textsuperscript{229} \textit{Id.} at 393, 403-04, 161 A.2d at 88, 94-95.
\item \textsuperscript{230} Under U.C.C. § 2-316(a) (1987), to exclude an implied warranty of merchantability, the contract “language must mention merchantability and . . . must be conspicuous.” The warranty disclaimer in \textit{Henningsen} did not mention merchantability and included the seventh of the ten “conditions” on the back of the purchase order, in the midst of eight and one-half inches of fine print.
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After *Henningsen*, Huber claims that the Founders and their followers were able to convince courts\(^{231}\) to void not only disclaimers or limitations of liability in sales contracts, but also what might better be characterized as express assumptions of the risk of tort liability.\(^{232}\) He could have added that under the new doctrine of strict tort liability for harm caused by defective, unreasonably dangerous products, implied assumption of risk would be a defense only if the plaintiff’s conduct had been unreasonable.\(^{233}\)

Huber’s unhappiness with the courts’ sweeping rejections of disclaimers and express assumptions of risk stems from the fact that he deplores the demise of contract as a factor in lawsuits seeking recovery for personal injury or death. Indeed, his solution for the torts crisis is to reinvigorate contract law as a basis for resolving personal injury and property damage disputes, but with “a more human face.”\(^{234}\) Following trails blazed by Professors Richard A. Epstein\(^{235}\) and Jeffrey O’Connell,\(^{236}\) he advocates using pre-accident arrangements between parties as the primary mechanism for allocating losses. Individuals can bargain for and mutually agree upon the kind of compensation coverage best suited to them. The law would then uphold the commitments that they reached. This new order would be stable, predict-

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88 Stat. 2189 (1975) (codified at 15 U.S.C. § 2308(a) (1982)). The purpose of this provision was “to eliminate the practice of giving an express warranty while at the same time disclaiming implied warranties. This practice often has the effect of limiting the rights of the consumer rather than expanding them as he might otherwise be led to believe.” H.R. REP. No. 1107, 93d Cong., 2d Sess. 40 (1974), *reprinted in* 1974 U.S. CODE CONG. & ADMIN. NEWS 7702, 7722. Thus, the Act seeks to prevent a seller from doing exactly what the defendant tried to do in *Henningsen*—give a warranty that all parts are free from defects and then take away the consumer’s other state-created rights that would make that warranty meaningful.

231. Huber asserts that by this time, the Founders had “captured” the courts. P. HUBER, *supra* note 55, at 29.

232. One example is the disclaimer sometimes found on a ski-lift ticket. *See id.* at 31. An injured skier might bring an action in tort for negligence against the operator of a ski area. A defense could be express assumption of risk, as evidenced by language limiting liability and printed on the ticket. On express assumption of risk, see generally W. PROSSER & W. KEETON, *supra* note 12, § 482-84.

233. *See Restatement, supra* note 83, § 402A comment n.


236. Professor O’Connell was a pioneer in the development of automobile no-fault liability. *See* R. KEETON & J. O’CONNELL, *supra* note 46. He has since become a leading advocate for elective no-fault liability through contracts offered by providers of goods and services. *See, e.g.*, O’Connell, *supra* note 54 (proposing that current tort system be replaced with method for compensating accident victims through pre-accident no-fault agreements); O’Connell, *Elective No-Fault Liability by Contract With or Without an Enabling Statute*, 1975 U. ILL. L.F. 59 (proposing that existing tort system be replaced with business/customer contracts incorporating no-fault liability for personal injury); O’Connell, *No-Fault Liability by Contract for Doctors, Manufacturers, Retailers and Others*, 1975 INS. L.J. 531 (encouraging voluntary corporate experimentation with elective no-fault insurance systems).
able, and much less costly to operate than the current tort system. It would also encourage greater use of health and disability insurance, which could be extended to injuries and illnesses that currently are not covered at all. Tort law would be confined within narrow boundaries. Public risk regulation, as a supplement to bargained-for levels of safety, would be left to legislatures and administrative agencies staffed by experts.

State courts could reach this state of affairs by rejecting strict liability in tort for defective, unreasonably dangerous products. They would have to cut back on negligence by requiring defendants to conform only to contractual norms, customary standards of conduct (unless altered or nullified by agreement of the parties), or applicable standards set by regulatory agencies. And they would have to reinvigorate the defenses of contributory fault and assumption of risk. Finally, the courts would be forced to give effect to contractual arrangements, including disclaimers, entered into by parties to a wide range of relationships. Presumably, the market would then provide levels of economic protection that suited the joint interests of the parties. For example, if a consumer wanted compensation for all or certain specified injuries caused by a product, she could bargain for the appropriate insurance coverage, which would then be included in the product’s price. Patients could bargain with their physicians for compensation from adverse effects of medical treatment. One advantage of this system would be that individuals seeking compensation through contract could obtain the amount they desire and pay for it accordingly. This would be an improvement over the current tort system, which requires all purchasers of products to pay the same price—a price that includes the cost of insuring for liability payments that will vary according to the economic worth of the plaintiff.

The system proposed by Huber would carry with it staggering transaction costs. The burden of acquiring information would fall heavily upon individual consumers of goods and services. The time spent bargaining for and agreeing upon liability-triggering conditions and levels of compensation

237. "Tort law in some measure will always be needed, so that we may not be used in certain ways by others merely as means or tools or material resources. But a boundary to tort liability is needed . . . ." P. HUBER, supra note 55, at 231.

238. This is a major point put forward in Huber, supra note 60. See also Henderson, supra note 168, at 1555, 1574-76 (safety trade-off problems are so complicated that courts should not second-guess agencies).

239. For similar recommendations put forward by a research and education organization comprised of business executives, see COMMITTEE FOR ECONOMIC DEVELOPMENT, WHO SHOULD BE LIABLE? A GUIDE TO POLICY FOR DEALING WITH RISK (1989).

On the desirability of judicial rather than legislative tort reform, see Barrett, supra note 68, at B1, col. 4.

240. For criticism of this aspect of the tort system, see Priest, supra note 35, at 1557-59 (third-party liability insurance works disadvantage to poor consumers, who must pay as much for products as wealthy consumers although the latter will recover higher damage awards).
would be substantial. Insurers would find it difficult to calculate premiums because they could not know in advance the terms of the various particularized deals negotiated by their insureds. This would inevitably lead to the use of standard form contracts by parties with superior bargaining power, and to the sorts of abuses that led to intervention by courts and legislatures in the past.241

The gains the new system would achieve would be slight. Consider the production and sale of small airplanes, one of the problem areas that Huber discusses.242 Even if some plaintiffs could willingly and knowledgeably bargain for less safety in return for a cheaper product, and if they should be allowed to do so, the doctrine of express assumption of risk limiting the liability of manufacturers would affect only these purchasers. The pre-accident agreements to assume certain risks would bar recovery only by the plane's owner and would not bind third parties who might pilot the plane, fly as guests, or suffer ground damage from crashes. Thus, the degree of relief that assumption of risk would afford manufacturers would be relatively slight, given the small numbers of consumers who might be affected and the modest size of the risk that would be limited.243

Huber's exclusive reliance upon administrative agencies for public regulation of risk244 presupposes that the executive branch will adopt the necessary policies to ensure levels of regulation that will adequately protect consumers and the general public; that able and committed individuals will be appointed to the relevant agencies; and that lawmakers will appropriate funds sufficient to enable the agencies to carry out their increased responsibilities. The efforts made by the Reagan Administration to restrict the tort system245 while attempting to weaken the federal regulatory system246 suggest that this as-

241. See generally Kessler, Contracts of Adhesion—Some Thoughts about Freedom of Contract, 43 Colum. L. Rev. 629 (1943) (development of modern free enterprise system required freedom of contract, which has ironically led to widespread use of efficient but inequitable adhesion contracts).

242. See P. Huber, supra note 55, at 45-46, 140, 161. Huber notes the small airplane industry paid $210 million in liability claims in 1985 alone, requiring new model planes to carry a 50% surcharge for liability insurance. Id. at 161. Nevertheless, Huber's choice of this example is curious, inasmuch as it involves a particularly atypical category of consumers—people wealthy enough to buy airplanes and qualified to fly them.

243. On the growing use of waivers to limit liability for sports injuries and the tendency of courts to uphold them, see Barrett, Liability Waivers Hold Up in More Sports-Injury Suits, Wall St. J., Nov. 11, 1988, at B1, col. 3.

244. The legislative branch certainly has the power to regulate public risks directly. One example is the Refrigerator Safety Act, 15 U.S.C. § 1211 (1982), requiring that household refrigerators be equipped with a device enabling the door to be opened from the inside.

245. For the recommendations of a federal interagency task force calling for modifications that would make it more difficult for plaintiffs to recover damages in tort cases, see Tort Policy Working Group Report, supra note 3, at 6.

246. On the impact of the deregulation policy upon the Consumer Product Safety Commission, see Tobias, Consumer Agency Falling Down on Job, Legal Times, Mar. 20, 1989, at 19, col. 1; see also Retreat from Safety: Reagan's Attack on America's Health 41-70 (J. Claybrook ed.
umption may not be valid. 247

Finally, the practical difficulties that confront Huber’s formula for radical change are formidable. To envision that every state court will fall into line requires a great deal of imagination. The new order could result from legislative action, either state or federal, but political opposition would reach massive proportions. Such opposition would invite the sort of compromises that form an inherent part of the legislative process and could undercut the “counterrevolution” Huber advocates. 248 Moreover, the current content of federal safety standards may well reflect an understanding by regulators that the rules they promulgated are not meant to be the exclusive mechanisms for public risk regulation. 249 Therefore, the Huber counterrevolution would have to include a grace period during which agencies would review, update, and if necessary, extend their regulations in light of the enhanced role they would be required to play under the new regime. Creating such a grace period and determining how long it should run would seem to require the type of legislative decision that courts have traditionally been loathe to make, thus impeding judicial implementation of the counterrevolution.

VI. CONCLUSION

What Huber proposes is a giant leap backward. 250 He would roll back a significant number of pro-plaintiff common law doctrines adopted not only during the great revolution but also earlier in the century. He does not explain why he thinks potential defendants and their insurers will behave any


247. As one writer has observed, commenting upon a similar tort reform proposal: “[T]o supplant the social conscience of a jury with socialized medicine and stronger regulatory standards[ ] require[s] a faith in the incorruptibility of government that should make even Pollyanna blush . . . .” Van Strum, How the Agent Orange Case Poisoned the Courts (Book Review), USA Today, Jan. 30, 1987, at 6D, col. 2 (reviewing P. Schuck, Agent Orange on Trial: Mass Toxic Disasters in the Courts (1986)).


248. For the difficulties inherent in legislative tort reform, see supra notes 36-37 and accompanying text; see also Pierce, Institutional Aspects of Tort Reform, 73 Calif. L. Rev. 917, 919-22 (1985) (unwillingness of legislatures to implement comprehensive statutory changes makes them ineffective as instruments of tort reform).


250. Professor Richard A. Epstein freely admits that his proposal to use contract as a means of addressing the problem of medical injuries is a “determined step backwards.” Epstein, supra note 235, at 149.
differently than they did when tort law was a "backwater" and contract was "king." He fails to explain why the political and economic realities that previously left workers, consumers, and others at the mercy of those with whom they did business will somehow produce more just and humane relationships under the sort of libertarian regime he espouses, rather than replicate the conditions that initially gave rise to the old tort reform. In effect, his radical reform is an invitation for history to repeat itself.

Those who argue that the tort system cries out for drastic overhaul bear the responsibility to show that what they propose to set up in its place will not only work but will work better. *Liability*, with its "slash-and-burn" approach and cavalier regard for accuracy, vastly overstates the case against tort law. Huber offers yesterday as a blueprint for tomorrow, without regard for the fact that it was yesterday that produced today.