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Article

A MODEL OF PRODUCTS LIABILITY REFORM

ANITA BERNSTEIN*

I. INTRODUCTION

First, consider strict products liability. According to the familiar creation myth,¹ products liability reform began in the United States when Roger Traynor gazed at the products liability law of his time—negligence and warranty—and realized that it failed to recognize the problem of social cost. He announced his insights in 1944;² the California Supreme Court followed along in 1962;³

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1. The myth is retold in American casebooks on torts. Like all creation myths, the story emphasizes genesis over continuity. The creation of strict products liability was, however, a point within an evolution. See George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985) [hereinafter Priest, *Enterprise Liability*]. Products liability scholarship focuses closely on Traynor as visionary and Prosser as architect, and attributes doctrines to creators. Even though I use the word myth, I rely on the story. And even Professor Priest, who wants to diffuse the gaze aimed at Traynor, does so by substituting alternative creators, Friedrich Kessler and Fleming James. *Id.* at 470-84.

Stephen Jay Gould has alluded to "our social and psychic attraction to creation myths in preference to evolutionary stories." On the durable legend crediting Abner Doubleday with the invention of baseball:

Baseball evolved and people grow; both are continual without definable points of origin. Probe too far back and you reach absurdity, for you will see Nolan Ryan on the hill when the first ape hit a bird with a stone; or you will define both masturbation and menstruation as murder—and who will then cast the first stone? Look for something in the middle, and you will find nothing but continuity—always a meaningful "before," and always a more modern "after."

Stephen Jay Gould, *The Creation Myths of Cooperstown*, NAT. HIST., Nov. 1989, at 24.

2. See *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).

3. See *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1962). See also *Vandermark v. Ford Motor Co.*, 391 P.2d 168, 171 (Cal. 1964) (Traynor, J.) (holding that a defendant who is "an integral part of the overall producing and marketing enterprise" should "bear the cost of injuries resulting from defective products").

thereafter his co-creator⁴ wrought Section 402A of the *Restatement of Torts*⁵ and the Citadel articles.⁶ As envisioned by its creators, strict products liability rested on the idea that defective products cause social loss, and that loss ought to be spread among those who benefit from the product. Loss spreading would distribute the cost of injury to manufacturers, insurers, other consumers, and ultimately all of society.⁷ Strict liability also held out the promises of incentives for safety,⁸ respect for a manufacturer's implied assurance of safety and a consumer's related expectation,⁹ an easing of plaintiffs' difficulties of proof,¹⁰ and compensation for injured persons.¹¹ The creation was a success: it became the law in the United States.

Second, consider tort reform. This project, a major conjunction of theory and ordinary hard work, has involved many different goals and individuals: the

4. I refer to William Prosser, whose thoughts on strict products liability actually preceded *Escola*. See WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 689 (1941). Which of the two men was more important to the doctrine is debated. Compare JAMES A. HENDERSON, JR. & AARON D. TWERSKI, *PRODUCTS LIABILITY: PROBLEMS AND PROCESS* 137 (1987) (contributions of Prosser) with John W. Wade, *Chief Justice Traynor and Strict Tort Liability for Products*, 2 *HOFSTRA L. REV.* 455, 462 (1974) (Traynor "entitled to full credit" for the doctrine). On the relationship between the two men, see G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 197-200 (1980).

5. *RESTATEMENT (SECOND) OF TORTS* § 402A (1965). This section of the Restatement is cited more frequently than any other.

6. William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 *YALE L.J.* 1099 (1960); William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*; 50 *MINN. L. REV.* 791 (1966) [hereinafter Prosser, *The Fall of the Citadel*].

7. The seminal insights of Calabresi on this subject are first set forth in Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 *YALE L.J.* 499 (1961), and refined in GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

In "loss spreading" I conflate several terms that some other writers keep distinct: risk spreading, risk shifting, cost internalization, occasionally "compensation." I use loss spreading generically to refer to an approach in accident law that regards injury in terms of aggregates, or classes of defendants and plaintiffs. Although "risk spreading" more precisely identifies the desire to allocate future harms, I have chosen to refer to loss rather than risk in light of a belief that tort law is remedial and retrospective.

8. See John W. Wade, *On The Nature of Strict Tort Liability for Products*, 44 *MISS. L.J.* 825, 826 (1973).

9. See Guido Calabresi & Jon T. Hirschoff, *Towards a Test for Strict Liability in Torts*, 81 *YALE L.J.* 1055 (1972); Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 *VA. L. REV.* 1109 (1974).

10. See William C. Powers, Jr., *Distinguishing Between Products and Services in Strict Liability*, 62 *N.C. L. REV.* 415, 425-27 (1984); see also Thomas A. Cowan, *Some Policy Bases of Strict Products Liability*, 17 *STAN. L. REV.* 1077, 1092-93 (1965) (stating that the shift in the burden of proof benefits corporate defendants as well as plaintiffs).

11. See David G. Owen, *Rethinking the Policies of Strict Products Liability*, 33 *VAND. L. REV.* 681 (1980).

part of tort reform of interest here is its focus on products liability.¹² Adversaries of strict products liability in its present state seek to reduce the effect of the doctrine through, among other devices, national or uniform legislation. Citing anomalies in the different products liability laws of more than fifty American jurisdictions, they have drafted a federal statute¹³ and a model Uniform Product Liability Act (UPLA),¹⁴ as well as other proposed laws for consideration by state legislatures.¹⁵

Tort reform proposals related to products liability have two declared goals. The first is to rein in a liability system deemed too expansive. Few tort-reform measures seek to abolish strict products liability outright, but their sponsors frequently have mentioned strict products liability as a source of excessive and unmanageable litigation.¹⁶ The second goal is to make products liability law in the United States more uniform and predictable.¹⁷

The strict products liability and tort reform movements appear antithetical. In this Article, I argue that they are similar, and from these similarities educe a model of products liability reform. Strict products liability and tort reform have concerned themselves with collective distribution and allocation. These are public goals, and the concept of public goals unites the two movements.

Strict products liability sought to create one law of product-caused injuries for the United States: it augured loss spreading and, to a degree, an obligation of the courts to protect weaker parties in lawsuits. Tort reform began mainly as a cure for instabilities of insurance pricing and supply, as well as other collective concerns: the loss of services and products, difficulties of business planning, and a posited effect of the liability system on competitiveness in

12. In discussing products liability reform, I rely when appropriate on more general sources that cover all of tort reform. Medical malpractice is the main subject that is present in tort reform, but not products liability reform, proposals.

13. See S. 640, 102d Cong., 1st Sess. (1991). Formerly known as the Product Liability Reform Act, it is now called the Product Liability Fairness Act.

14. *Reprinted in* 44 Fed. Reg. 62,714 (1979). The Model Act was preceded by a Draft Uniform Product Liability Act. See 44 Fed. Reg. 2996 (1979).

15. See AMERICAN INSURANCE ASSOCIATION, *PRODUCT LIABILITY PACKAGE* (1977). For a summary of state proposals and changes in state laws, see *State Tort Reform*, 16 PROD. SAFETY & LIAB. REP. (BNA) 108 (Jan. 22, 1988).

16. See REPORT OF THE TORT POLICY WORKING GROUP ON THE CAUSES, EXTENT AND POLICY IMPLICATIONS OF THE CURRENT CRISIS IN INSURANCE AVAILABILITY AND AFFORDABILITY 30-33 (1986); PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* (1988).

17. SEN. COMM. ON COMMERCE, SCIENCE & TRANSPORTATION, *PRODUCT LIABILITY REFORM ACT*, S. REP. No. 356, 101st Cong., 2d Sess. 6-7 (1990) [hereinafter SENATE REPORT]; E. PATRICK MCGUIRE, *THE IMPACT OF PRODUCT LIABILITY 1* (Conference Board Rep. No. 908, 1988) ("atmosphere of uncertainty"); Kenneth S. Abraham, *Making Sense of the Liability Insurance Crisis*, 48 OHIO ST. L.J. 399, 404-09 (1987) (stating that uncertainty explains the insurance crisis).

international trade. Supporters of both reforms first identified a social need, and then made products liability law their instrument. As I explain below, both reforms attempted to change private law into public law.

The terms 'public law' and 'private law' require definition for present purposes. A conventional dichotomy between private law and public law separates, for example, torts and contracts from constitutional, administrative, criminal, and international law.¹⁸ In this view, all of products liability falls within the private law category. As I use the terms here, however, the law of products liability, which is private, has been reconceived to address goals beyond dispute resolution between two private parties. When advocates of strict products liability and tort reform began to shape their plans for change, they were imagining the *polis* in which they wanted to live, just as public law expresses a vision of the state that the law ought to support. Fundamentally political, this collectivist approach brings the concerns of public law to the law of dispute resolution.¹⁹

What can be meant by 'political'? People cannot write law in a vacuum; any doctrine or legal system managed by the state, with enforcement powers, expresses collective or political needs. A simple example is the law of restitution, which chooses to respect holdings of property; enforcement of a restitutionary judgment between *A* and *B* sends a communal message beyond those two parties. Very well. My distinction between private law and public law turns on what I hope is an uncontroversial claim about consciousness: some theorists and decisionmakers try to make private law fit a social need; others attempt to address disputes at an individual level. Private law, I believe, moves toward public law when it is understood as a system that achieves collective effects.²⁰ This understanding—a kind of consciousness—brings public law into

18. See BLACK'S LAW DICTIONARY 1196, 1230 (6th ed. 1990).

19. Some reformers are proud to be identified with the effort of making private law more like public law. See ROBERT E. KEETON, *VENTURING TO DO JUSTICE: REFORMING PUBLIC LAW* (1969); Leon Green, *Tort Law Public Law in Disguise*, 38 TEX. L. REV. 1 (1959). But some members of the tort reform movement would resist the designation. Peter Huber, for instance, contends that "private law" before the expansion of liability was as inviolate as a cathedral, HUBER, *supra* note 16, at 25, and his prescriptions in *Liability* invoke the tradition of private law. Both he and Professor Epstein wish to reform tort law through a revived understanding of contract principles; they say little about the sorts of reforms that prevail in state legislatures. See RICHARD A. EPSTEIN, *MODERN PRODUCTS LIABILITY LAW* 49-56 (1980) [hereinafter EPSTEIN, *LIABILITY LAW*]. I stand by my label, however, impressed by these and other writers' overwhelming theme of synthesis, or what I call improvement and reconciliation.

20. See Cowan, *supra* note 10, at 1094 (declaring that creation of strict products liability was "a move toward an equilibrium system"); Green, *supra* note 19, at 1 (stating that "We the People" are the most important party to a lawsuit). For a recent reassessment of collective and individualist themes in product liability, see David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427 (1993).

the domain of private law.

To see this distinction, recall a famous theory: the "subsidy" explanation of nineteenth-century accident law. Proponents of the subsidy theory argue that in the nineteenth century, American courts imposed on plaintiffs new burdens of proving fault, and that the purpose of this shift was to subsidize fledgling industrial companies, which needed exemption from having to pay for much of the injury they caused.²¹ Subsidy theorists rely on *Brown v. Kendall*²² more than any other case in support of their argument;²³ but *Brown v. Kendall* is "really about" two men and two dogs.²⁴ The opinion mentions no corporations, and no evidence suggests that Lemuel Shaw, the author of the opinion, had industry in mind.²⁵ To Justice Shaw, *Brown v. Kendall* raised questions of private law; to subsidy theorists, who do not much care about the conscious intent of Shaw, the case raised questions about the reallocation of benefits and hardships in a changing economy. This difference in consciousness separates the private-law adjudication of the Massachusetts Supreme Court from public-law interpretation.

Consciousness matters because it has consequences. The movement from private law to public law starts from the insight that the resolution of disputes is actually a system, an organism with recurring and interconnected functions. With the awareness that product liability is a system comes a desire to make that system work better in achieving its goals. Reform efforts follow.

The ancestor of products liability reform is legal realism. The legal realists, who brought skepticism, revisionism, and metaphors from the physical sciences to law, shifted interest from specific doctrines to a cosmic overview. During the period when this approach to law reached its height, the middle of the twentieth century, products liability emerged as an idea that united sales law and negligence. Once products liability was seen as a system, scholars could study and challenge its purpose.²⁶

21. See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* (1977); LAWRENCE M. FRIEDMAN, *A HISTORY OF AMERICAN LAW* (2d ed. 1986).

22. 60 Mass. 292 (1850) (holding that plaintiff must prove fault in trespass action).

23. See Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 VA. L. REV. 359, 368 (1951).

24. See Gary T. Schwartz, *The Character of Early American Tort Law*, 36 UCLA L. REV. 641, 668 (1989).

25. *Id.* at 669-70.

26. Noteworthy writings of this period include Calabresi, *supra* note 7; Green, *supra* note 19, at 9-10 (applying "public law in disguise" argument to products liability); Friedrich Kessler, *Products Liability*, 76 YALE L.J. 887 (1967); Friedrich Kessler, *The Protection of the Consumer Under Modern Sales Law, Part I: A Comparative Study*, 74 YALE L.J. 262 (1964); William L. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1943) (arguing in

Consistent with the tradition of legal realism, products liability reform takes on two basic projects: improvement and reconciliation. Improvement comes with the study of the purposes of products liability law. Once desirable ends are identified, the reformer seeks to bring products liability law more closely in line with these goals. Reconciliation addresses the need to make the products liability system more uniform. Reformers favor order, integration, coherence. They want to treat like situations alike. They hope to eliminate the regional disparities, quibbling, and conflicts that disrupt uniformity. Because products liability law involves industry, products liability reformers balance their support of a free market for enterprise with a desire to protect the social-welfare needs of individuals.

The improvement goal presses for change; the reconciliation goal urges accommodation. Consider the two efforts. The significance of *Greenman*, for instance, lies as much in Traynor's attempt to reconcile negligence and implied warranty as in his change of the law to consider social cost.²⁷ Tort reformers have struggled to balance political acceptability against substantive change. To achieve change in the law, they agree to blunt their reform.²⁸ Public-law reform begins with two simultaneous ambitions, and mediates between them.

Having identified the basic goals of products liability reform, I describe a model that explains the origins, development, and failures of both tort reform and strict products liability. In Part II, elaborating on the schematic categories of improvement and reconciliation, I outline what products liability reform seeks to achieve. In Part III, I describe the results of public-law reform, with specific references to the tort reform and strict products liability experiences. This evaluation is mixed, and in large part condemnatory: in products liability reform I find what the political theorist Albert Hirschman calls perversity, futility, and jeopardy,²⁹ but also a small amount of success.

Several common pitfalls appear in the endeavors studied. In a democracy, which is the only place in which the kind of reform I describe can take place,

favor of cost internalization); Fleming James, Jr., *Products Liability* (pt. 2), 34 TEX. L. REV. 192 (1955) [hereinafter James, *Products Liability*]; Fleming James, Jr., *Accident Liability Reconsidered: The Impact of Liability Insurance*, 57 YALE L.J. 549, 550-51 (1948) (arguing in favor of shifting cost of injuries to large enterprises); see also FOWLER V. HARPER & FLEMING JAMES, JR., 2 THE LAW OF TORTS 763 (2d ed. 1956) (arguing in favor of redistribution of risk between victims and actors engaged in risky activity).

27. See *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1962).

28. See *infra* part III.A.2.

29. See ALBERT O. HIRSCHMAN, *THE RHETORIC OF REACTION: PERVERSITY, FUTILITY, JEOPARDY* (1991). I should add that Hirschman uses this label pejoratively, as a description of what anti-reformers say about all attempts to achieve progress.

proponents of a reform must win over skeptics and opponents.³⁰ This promotion of the reform proposal dilutes and distorts it. By the time the products liability reform is in some way implemented, it has betrayed most of the wishes of its proponents. Again, because the reform takes place in a democracy, a question of legitimacy nags the reform movement: Who has authority to change private law, and what goals are proper? The lack of a clear answer contributes to the decay of the reform.

In Part IV, I return to the concept of private law, and argue in favor of an injury law that does not explicitly seek social and political desiderata. I do not mean to invoke a lost Eden when the law rose above politics—that time never was. Nor do I go so far as Ernest Weinrib, whose influence permeates this Article, in believing that private law, at least before public-law intruders besmirch it, is the unique domain of immanent and coherent forms of justice.³¹ Instead, I propose an alternative approach to products liability reform that avoids the pitfalls detailed in Parts II and III.

Public-law reformers try to change products liability law because the prior law does not contribute to, or perhaps even obstructs, collective well-being. Critics of public-law influences on private law, therefore, are vulnerable to the charge of indifference to social problems.³² I wish to pay attention to these problems, and in Part IV, I begin with some concrete suggestions aimed at achieving the benefits that reformers say they want. Then, accepting the fact that private law has collective effects and consequences, I attempt nonetheless to isolate a private law of products liability. This law, which could be called “strict products liability,” would reduce plaintiffs’ burdens of proof on the showing of a defect in the product, while maintaining some obligation to prove producer fault. Loss or risk spreading, questions of insurance, the competitiveness of businesses, increasing or decreasing the magnitude of litigation, and other goals relating to the aggregate of all products liability

30. Cf. Linda Lipsen, *The Evolution of Products Liability as a Federal Policy Issue*, in *TORT LAW AND THE PUBLIC INTEREST: COMPETITION, INNOVATION AND CONSUMER WELFARE* 247, 249 (Peter H. Schuck ed., 1991) [hereinafter *TORT LAW AND THE PUBLIC INTEREST*] (stating that the tort reform movement succeeds most where groups other than manufacturers and insurers are involved in effort).

31. See Ernest J. Weinrib, *Legal Formalism: On the Immanent Rationality of Law*, 97 *YALE L.J.* 949, 972 (1988).

32. See generally Symposium, *Corrective Justice and Formalism: The Care One Owes One's Neighbors*, 77 *IOWA L. REV.* 403 (1992) (colloquy between Weinrib and his critics); Jules L. Coleman, *Moral Theories of Torts: Their Scope and Limits* (pts. 1 & 2), 1 *LAW & PHIL.* 371 (1982), 2 *LAW & PHIL.* 5 (1983).

litigation ought to be kept separate from doctrine.³³

Consistent with my interest in the practical consequences of a theory of products liability reform, I conclude with a brief look at a place that has achieved a private law of products liability: Europe. This inquiry helps to test the theoretical model. Selective attention to the products liability law of Western Europe provides some examples of how a private law might work in an industrialized democracy.³⁴

In articulating the model of products liability reform, I rely on and extend a body of literature. The academic case against products liability reform has been made piecemeal in separate attacks on strict products liability³⁵ and tort reform.³⁶ Formalist critics of instrumentalist tort law have condemned the encroachment of public-law reformers into private law.³⁷ This Article seeks to connect various misgivings that some who write about products liability have expressed—their unease about the extraordinary ambitions expressed in products liability reform—with jurisprudential insights.

By focusing on what tort reform and strict products liability have in common, I am also attempting to fill a void in contemporary writing about personal injury law. Disinterested analysis of reform efforts has been scarce.

33. As Patrick Glenn has pointed out, the center of this thesis—that cases should not be made to fit together for collective benefit, but should remain separate and unreconciled—has analogies in contemporary thought: chaos theory, interactive logical structures, and feminist legal theory, with its notion of multiple voices. See H. Patrick Glenn, *Harmonization of Private Law Rules Between Civil and Common Law Jurisdictions*, in XIII CONG. ON COMP. L. (1991).

34. See Anita Bernstein, *Looking at Europe for the Difference Between Strict and Fault-Based Liability*, 14 J. PROD. LIAB. 207 (1992) [hereinafter Bernstein, *Looking at Europe*].

35. Tort reformers have argued against strict products liability. See HUBER, *supra* note 16, at 34-40; WALTER K. OLSON, *THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT* 143-44 (1991); EPSTEIN, *LIABILITY LAW*, *supra* note 19; Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353 (1988); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987) [hereinafter Priest, *Insurance Crisis*].

36. An especially concise attack on the tort reform movement is Joan Claybrook, *The Consumer Stake in Product Liability*, 5 TOXICS L. REP. (BNA) No. 37, at 1178 (Feb. 20, 1991); see also Steven Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1 (1990); Mark M. Hager, *Civil Compensation and Its Discontents: A Response to Huber*, 42 STAN. L. REV. 539 (1990); Ralph Nader, *The Assault on Injured Victims' Rights*, 64 DENV. U. L. REV. 625 (1988); Eliot M. Blake, Comment, *Rumors of Crisis: Considering the Insurance Crisis and Tort Reform in an Information Vacuum*, 37 EMORY L.J. 401 (1988).

37. See Weinrib, *supra* note 31; Ernest J. Weinrib, *The Insurance Justification and Private Law*, 14 J. LEGAL STUD. 681, 687 (1985); see also Richard W. Wright, *Actual Causation vs. Probabilistic Linkage: The Bane of Economic Analysis*, 14 J. LEGAL STUD. 435 (1985) (attacking instrumentalism); cf. Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785 (1990) (stating that tort law as an instrument of ideals is a failure).

Frankness about the business origins of tort reform labels a writer as hostile to the movement, while acknowledgement that a liability system may warrant change, or that scholarship sympathetic to tort reform makes good points, also classifies the writer. Even the presence, or absence, of quotation marks around the word 'crisis' can give the reader a clue. The result is a kind of segregation, and sharp prejudice between the pro- and anti-reform groups. I do not want to mediate between the two: divisions in and of themselves do not indicate that the truth falls in the middle or that tolerance is always a virtue. Rather I work with the assumption that the tort reform movement does not occupy a different moral plane than the more clearly consumerist creation of strict products liability. This posture may be naive, but it helps to fix the concept of a public law of products liability. I urge readers who believe otherwise to join me temporarily.

II. THE PROMISE OF PRODUCTS LIABILITY REFORM

As mentioned above, advocates of a public law of strict products liability understand products liability as a system. Participants in the system include those persons who use products or who are subject to product risk and those who sell them, as well as intermediaries, such as retailers and employers who buy workplace machinery. More remotely, insurance companies, customers of those companies, lawyers, all consumers, all manufacturers, and all members of society are players. Injuries have social implications. The promise of a public law of products liability is that legal doctrine will recognize not only the rights and obligations of individuals but the effect these rights and obligations have on society. Four stated goals are common to the two types of public products liability law: increased uniformity, adjusted costs of marketing products, enhanced consumer welfare, and freer flow of goods.

Whether stated goals camouflage actual goals has been the source of debate. Some critics of the tort reform movement contend that the entire project has only one goal: to reduce the costs of doing business and thereby increase profits. Put another way, there is no reform here, at least in the sense of change for the sake of improvement: only an exercise of power in favor of the powerful. Conceding, *arguendo*, that tort reform may have just one real goal, I reject this contention for two reasons. First, it disregards as uninteresting the rhetoric of tort reform, and how this rhetoric contends with skeptics and persuades nonmembers of the movement. Stated goals reveal the strategy of reformers; they are more than windowdressing. Second, a cynical dismissal of tort reform reasoning denies any similarity between consumerist and business-driven reform. This denial can preclude consumerists from understanding the nature of their own work. To build a tentative model of products liability reform requires a modicum of deference to what reformers say they are doing.

A. Increased Uniformity

From the premise that individual events involving the manufacturer and users of products have collective consequences, a public law of products liability seeks to reduce the collective effect that any single event may have. Systems benefit from stability. Even though individual variation can produce the correct or just outcome in a particular case—and indeed may point the way toward an improved public law—the system necessarily pays a price for this variation.

Although complaints about the unpredictability of a private law of products liability have more recently been heard from members of the tort reform movement,³⁸ advocates of strict products liability grounded their reform in part on the need to increase predictability. Harper and James, for instance, defended their idea of a public law of personal injury by arguing that individuals are better off under a system that blunts their risk of “ruinous loss” or “great financial shock;” both actors who are engaged in risky activity and victims benefit from the redistribution of risk.³⁹ The contention that redistribution of risk is good even for those to whom detriment is redistributed can rest only on an idea that predictability is desirable, perhaps even advantageous, to actors who engage in risk-creating activity.

In *Greenman*, Traynor made a secondary but important argument about predictability: it should not matter, he wrote, whether an injured consumer complied with the notice requirement of the California sales law.⁴⁰ Notice, of course, is a device aimed at enhancing the knowledge of the seller. But where sellers market their products nationwide, a notice requirement adds little to their knowledge of the cost of injuries that their products cause. Strict products liability has been accused of creating chaos and unpredictability so often that it is hard to envision Traynor as a friend of predictability. But so he thought he was. As *Greenman* and the *Escola* concurrence indicate,⁴¹ Traynor intended

38. See *supra* note 35 (regarding predictability); see also RICHARD NEELY, *THE PRODUCT LIABILITY MESS* 46 (1988) (“lack of uniformity, lack of predictability, and lack of consistency”); Schwartz, *supra* note 35 (describing crisis attributable in part to uncertainty). But see George L. Priest, *Puzzles of the Tort Crisis*, 48 OHIO ST. L.J. 497, 498-99 (1987) (downplaying importance of uncertainty).

39. See HARPER & JAMES, *supra* note 26, at 763.

40. See *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1962).

41. See *id.* In *Escola*, Traynor rejected the majority view offered by Justice Gibson, who, relying on *res ipsa loquitur*, declined to generalize about the relative capacities of the parties. Instead Traynor viewed the hazard of injury as “a constant risk and a general one.” It might appear that product-caused accidents occur “haphazardly” and “intermittently,” Traynor wrote, but a pattern exists. *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring). Without a unifying doctrine of strict products liability, accidents appear random. But once they are charged to the manufacturer, their predictability emerges.

to create order through uniform doctrine. He offered manufacturers the boon of predictability, even while increasing the amounts that they would have to pay for accidents.

Tort reform advocates have made increased predictability their preeminent goal. The insurance industry has summed up its explanation for what it calls the liability crisis by reference to its inability to predict the frequency and severity of losses.⁴² An empirical researcher has found that corporate officials cite unpredictability as the major source of their discontent about the American civil liability system.⁴³ Business-based supporters of tort reform focus most closely on predictability because the burden of unpredictability hurts them directly.

But the appeal of order goes beyond this group. To advocates of a public law of products liability, predictability is both an end in itself and a means of making the reshaping of injury law more attractive. The tort reform movement can enlist an array of Americans in its struggle against an inconsistent, haphazard, chaotic liability system: the movement toward lowering business costs includes fewer natural members. This reality does not mean, as some critics charge, that 'predictability' is a corporate euphemism for profits; nor does it mean that American legislators and citizens who support tort reform have been duped by propaganda. The desire for order in a system comes from human nature as well as from the perception that such order would be remunerative.

B. Adjusted Costs of Marketing Products

Once liability rules reflect the insight that civil liability functions in a system, public-law proponents maintain, the price of every product marketed in the system will reflect its true cost. True cost includes a prorated share of risk. Each product, even if it does not happen to cause injury, represents a share of this aggregate. For Calabresi, an important figure in the creation of American strict products liability, no injury law could make sense without this simple acknowledgment of true cost.⁴⁴

42. See *Liability Insurance Crisis: Hearings Before the Subcomm. on Economic Stabilization of the House Comm. on Economic Stabilization*, 99th Cong., 2d Sess. 57 (1987) (statement of Michael D. Martin, assistant counsel, American Insurance Assoc.).

43. See McGuire, *supra* note 17, at vii, 1-2; see also GEORGE EADS & PETER REUTER, DESIGNING SAFER PRODUCTS: CORPORATE RESPONSES TO PRODUCT LIABILITY LAW AND REGULATION iii-ix, 107 (1987) (stating that unpredictability is one of several problems). But see Nathan Weber, PRODUCT LIABILITY: THE CORPORATE RESPONSE (Conference Board Rep. No. 893, 1987) (stating that risk managers of Fortune 500 companies are "adapting" successfully to liability system).

44. See CALABRESI, *supra* note 7, at 198.

Although this adjustment is most identified with Calabresi and other American theorists of the mid-twentieth century,⁴⁵ it is characteristic of all products liability reform. A corollary to the proffered benefit of predictability, cost adjustment makes a similar appeal to logic among listeners not yet converted. Reform of products liability requires this added appeal.

Strict products liability began with the premise that the price of products was kept deceptively low by liability rules that obstructed plaintiffs from lawsuits and compensation.⁴⁶ The theorists who led this movement saw an industrialized United States filled with products, a fraction of which were defective because of the fault of the manufacturer, causing injury everywhere. A conniving civil liability system obscured these harms. Unaccountable for the injuries they caused, manufacturers were unaware (or could price their products as though they were unaware) of their true cost.⁴⁷ Liability rules had to confront the truth. The advocates of this kind of public products liability knew that this confrontation would cost all Americans money—despite their arguments about safety incentives and how these incentives would reduce the number of accidents, they understood that the adjustment they had in mind would be an upward one. The truth has its price, but it must be told.

Tort reformers had the same project of adjusting the cost of marketing products; they too united to change the liability system to reflect the truth. According to tort reform theorists, the true cost of marketing products is lower than the cost known at present. Every product marketed in the United States comes with what Huber calls a “tax,”⁴⁸ a parallel to the adjustment Traynor had in mind in *Escola*.

How much of this increment ought to be reduced by reform is debated within the reform movement. Some of the increment must be too much, though, because the liability system now imposes charges that doctrine does not justify. Manufacturers pay out more than they would under a properly applied fault-based liability rule, argue the reformers; and most agree that manufacturers pay out more than they would in a principled Traynor-Prosser universe, because juries and some judges interpret expansively the doctrine of strict products liability. In the view of tort reform theorists, reasonable and conscientious manufacturers are charged an excess share of costs because the liability system makes the class of manufacturers pay for injuries for which their products are not responsible. Because of the unjustified verdicts for plaintiffs and transaction

45. See HARPER & JAMES, *supra* note 26; Green, *supra* note 19.

46. See *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring).

47. See James, *Products Liability*, *supra* note 26, at 227-28.

48. See HUBER, *supra* note 16, at 11.

costs that the present system imposes, an adjustment would save money, according to the tort reformers.

Adjustment of costs is thus an ideal that does not specify whether the present cost of marketing products is too high or too low. Like predictability, this goal contains both a neutral element—accuracy, truth—and a partisan ambition to shift costs from one sector to another. The familiar tension between making the law more coherent and changing it to redistribute assets continues in the problem of cost adjustment. Products liability reform seeks to price products at a socially optimal level. The optimal price corresponds to true cost. But what is the true cost? The answer depends on individual visions of which costs ought to be charged to a product, and these individual visions are determined in part by the interest of the reformer. The goal, therefore, is chimerical.

C. Enhanced Consumer Welfare

Tort reformers identify their movement as consumerist: a cure for several ills, including inflated prices,⁴⁹ diminished services in medical care and public recreation,⁵⁰ withdrawn insurance coverage,⁵¹ American disadvantage in international trade,⁵² and a general loss in alternatives or options for consumers. Traynor and Prosser announced the new solicitude for consumers that would accompany legal reasoning in products liability cases.⁵³ Their portrait of a product user—uninformed, manipulable, swayed by advertising, lulled by trademarks—continues to both convince and enrage contemporary

49. See HUBER, *supra* note 16.

50. See Priest, *Insurance Crisis*, *supra* note 35.

51. See John G. Fleming, *The Insurance Crisis*, 24 U. BRIT. COLUM. L. REV. 1 (1990).

52. See Office of the Vice President, Fact Sheet on Product Liability Reform (undated document, ca. 1989, on file with author) (advocating "fault based liability" as essential to "U.S. international competitiveness"); *Why reforming our liability system is essential if America is to succeed in overseas markets*, insurer advertisement, TIME, NOV. 27, 1989, p. 1 ("One positive step would be to base liability suits on fault."); *Product Liability: Hearings Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce*, 100th Cong., 1st Sess. 46 (1988) (statement of Robert H. Malott, member, Product Liability Coordinating Committee). See also Douglas J. Besharov, *Forum Shopping, Forum Skipping, and the Problem of International Competitiveness*, in NEW DIRECTIONS IN LIABILITY LAW 139 (Walter Olson ed., 1988) (stating that American liability rules handicap American producers in world trade). *But see* PETER REUTER, THE ECONOMIC CONSEQUENCES OF EXPANDED CORPORATE LIABILITY: AN EXPLORATORY STUDY 34-42 (1988) (stating that there is little evidence of the liability effect on competitiveness); Robert E. Litan, *The Liability Explosion and American Trade Performance: Myths and Realities*, in TORT LAW AND THE PUBLIC INTEREST, *supra* note 30, at 127 (describing a macroeconomic critique of contention). The international-trade contention may fit also in the category of adjusted costs of marketing products.

53. See *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1962); Prosser, *The Fall of the Citadel*, *supra* note 6.

writers.⁵⁴ The consumer is present at all attempts to create a public law of products liability.

Strict products liability posits a dichotomy between the consumer and industry, and, to those who accept this dichotomy, the consumerist justification of tort reformers must be disingenuous. Tort reform does have a business origin, whereas strict products liability began with attention to the consumer.⁵⁵ It appears fair to say that the tort reform movement is the less consumerist of the two. This conclusion is beside the point offered here: that every kind of public products liability law has in mind a peculiar vision of the individual product user. The uniformity of this vision means that this person is not an individual at all.

Advocates of public products law make their case for improved consumer welfare with third person singular pronouns. Because they are making the most general assertions about what a consumer wants, or thinks, or needs, a reader might have expected the plural usage. But public law advocacy apparently needs to exploit this appearance of attention to individuals.⁵⁶

To the tort reform movement, the consumer suffers most from high prices and constraints on his choices. The consumer can read warranties and other cautionary advice. Comfortable with bargaining,⁵⁷ clear-eyed amid the vast amount of information surrounding a product,⁵⁸ and better off in a market where a number of manufacturers compete to sell a product,⁵⁹ the consumer wants his options preserved. Even if this generalization does not represent every consumer, goes the argument, the law ought not to deny that this type exists.

54. The Traynor/Prosser view of the consumer is reflected in Stanley Preiser, *Don't Fix What Isn't Broken: The System Works*, in *PRODUCT LIABILITY REFORM: DEBATING THE ISSUES* 35 (Kenneth L. Chilton ed., Center for the Study of Formal Publication No. 98, 1990) [hereinafter *PRODUCT LIABILITY REFORM*] (anecdotal discussion of product users as victims); Shapo, *supra* note 9 (consumer relies on representations of manufacturer). Richard Epstein and Alan Schwartz see the consumer as more empowered and alert. See EPSTEIN, *LIABILITY LAW*, *supra* note 19, at 129-30; Richard A. Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C. L. REV. 643, 654 (1978) [hereinafter Epstein, *Products Liability*]; Schwartz, *supra* note 35, at 392-96.

55. See Joseph A. Page, *Deforming Tort Reform*, 78 GEO. L.J. 649, 652-55 (1990) (book review).

56. See Richard W. Wright, *Allocating Liability 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, 1154 n.45 (1988) (describing municipalities involved in attempts to obtain tort reform).

57. See Richard A. Epstein, *Medical Malpractice: The Case for Contract*, 1976 AM. B. FOUND. RES. J. 87, 106-07.

58. See David M. Grether et al., *The Irrelevance of Information Overload: An Analysis of Search and Disclosure*, 59 S. CAL. L. REV. 277, 300 (1986).

59. See HUBER, *supra* note 16, at 155.

The Traynor-Prosser perspective descends to a low common denominator and does not consider this more sophisticated fraction of the consumer population.

The recommendation that the tort reformers make—raise the average, consider that the individual may be tough and smart—does not necessarily follow from their identification of the problem. Their public law of products liability adds new traits to, and subtracts others from, the Traynor-Prosser composite. The term ‘consumer’, like the phrase ‘true cost of a product’, has no definition that can be separated from the agenda of the definers.

Although their solution amounts to a variation on the problem they have identified, tort reformers have grasped an important characteristic of public products liability law. The individual is mentioned, but never regarded as a true individual. In discussing their reform, advocates of a public law of products liability identify the classes of manufacturers and consumers, corresponding to defendants and plaintiffs. Tort reformers have added subtlety to these poles,⁶⁰ attributing to the latter traits that had been applied to producers: power, knowledge, and especially responsiveness to economic incentives. But tort reformers refuse to go beyond aggregate descriptions of human nature, and thus their reform remains in the bounds of public law proposals.

Public-law proposals could, in theory, have gone beyond simplistic ideas of a consumer. One way to begin the task of isolating the consumer in public products liability law could have been to sort out the classes of people injured by defective products. Workplace injury does not happen to a consumer, for example, in the same sense that injury happens to one who has chosen a product for personal use.⁶¹ Some consumers have contributed to their own injury. Some have a contractual connection to the defendant. Most public-law advocates resist even this level of individual delineation. Instead, they keep in mind one type, and multiply this type into a public.

D. Freer Flow of Goods

Last and decidedly least, products liability reformers argue that unreconciled doctrine obstructs the free flow of goods from region to region. This claim is very difficult to substantiate; reformers seem half-hearted when

60. See, e.g., Aaron Twerski, *National Product Liability Legislation: In Search for the Best of All Possible Worlds*, 18 IDAHO L. REV. 411, 417 (1982) (rejecting the distinction between consumer and manufacturer interests).

61. For a discussion of the American problem of workplace injury caused by defective machinery, where the plaintiff sues a manufacturer instead of her employer who is protected by workers' compensation, see Paul C. Weiler, *Workers' Compensation and Product Liability: The Interaction of a Tort and Non-Tort Regime*, 50 OHIO ST. L.J. 825 (1989).

they argue that divergence in the law means obstruction to the flow of goods.⁶² But the appeal of free trade and access to consumer items, like the appeal of predictability, is too useful a rhetorical goal to ignore.

Some members of the tort reform movement level a charge of regional self-dealing and undesirable divergences against the American federal system wherein states determine liability rules. In his tort reform polemic, *The Product Liability Mess*,⁶³ Judge Richard Neely of the West Virginia Supreme Court argues that separate products liability laws in the American system distort competition. The typical expensive products liability lawsuit is filed in a court located in the state where the plaintiff, not the defendant, resides. In pursuit of local popularity, the judge—Neely does not exempt himself—will feel pressure to favor the plaintiff and her attorney, who may be a crony or campaign contributor.⁶⁴ State courts, and to some degree federal courts located in a particular state, distort competition by engaging in parochial self-dealing. A comprehensive national products liability law, to Neely, would end this perversity and enhance economic growth.⁶⁵

Despite shifts in the makeup of state supreme courts since the days when California and New Jersey were deemed liberal, tort reform writers still identify plaintiffs' havens.⁶⁶ The Supreme Court has shown some willingness to approve the dismissal of products liability lawsuits brought in state courts against manufacturers, agreeing with defendants that the forum state lacks jurisdiction.⁶⁷ Assuming a link between a pro-plaintiff tradition or doctrine and

62. A free-flow-of-goods argument appears in Victor E. Schwartz & Liberty Mahshagian, *A Permanent Solution for Product Liability Crises: Uniform Federal Tort Law Standards*, 64 DENV. U. L. REV. 685, 694-95 (1988).

In Europe, proponents of a Community-wide reform of products liability law contended that varying liability rules in the member nations distorted competition and therefore, under the Treaty of Rome, these rules had to be reconciled. As a European Community report noted, no evidence of this claim was ever brought forth. See *Report of the Legal Affairs Committee*, 1978-1979 EUR. PARL. DOC. (No. 246) 7 (1978) [hereinafter *Legal Affairs*]. One observer described the claim as a "cant." See Frank A. Orban III, *Product Liability: A Comparative Legal Restatement—Foreign National Law and the EEC Directive*, 8 GA. J. INT'L & COMP. L. 342, 379 (1978).

63. NEELY, *supra* note 38.

64. *Id.* at 62-63, 71-72. "What do I care about the Ford Motor Company?" Neely writes. "To my knowledge Ford employs no one in West Virginia in its manufacturing processes, and except for selling cars in West Virginia, it is not a West Virginia taxpayer." *Id.* at 71.

65. *Id.* at 78.

66. Walter Olson finds several plaintiffs' havens in the United States, including California, Philadelphia, the Texas Gulf Coast, and New Jersey. See OLSON, *supra* note 35, at 85, 171.

67. See *Asahi Metal Indus. v. Superior Court*, 480 U.S. 102 (1987); *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980); *cf. In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff'd in part and rev'd in part*, 809 F.2d 195 (2d Cir. 1987) (dismissing a products liability action against an American defendant on the ground of forum non conveniens).

the cost of doing business, it may be worthwhile for a supplier to identify states sympathetic to plaintiffs and avoid significant activity in those states. This decision would reduce the flow of goods to consumers residing in pro-plaintiff states. A contrary decision, which apparently has been made, means that residents of pro-defendant states pay for the expansive doctrine they dislike through nationally-rated insurance premiums and uniform pricing. National legislation offers a way out of this dilemma. A public law of products liability, sensitive to business decisionmaking, would unify diverse American laws so that the residents of all states might enjoy an equivalent market.

A similar public-law impulse is evident in the creation of strict products liability, which sought to bring together two overlapping doctrines. Between the acceptance of *MacPherson v. Buick Motor Co.*⁶⁸ and the ascendancy of strict liability in tort, products liability cases were governed by the law of both negligence and implied warranty. The law of implied warranty posed conceptual difficulties: when courts required privity between the plaintiff and the defendant, they were regarding implied warranty as contractual. Yet implied warranty law has origins in tort,⁶⁹ and several courts in the first half of this century treated implied warranty as though it were a tort cause of action.⁷⁰ The applicability of contract-based rules such as those expressed in the Uniform Commercial Code become less clear.⁷¹

Traynor faced this problem in *Greenman*,⁷² where the manufacturer argued that Greenman could not bring a warranty action because he had not complied with a statutory requirement of timely notice. Privity did exist between Greenman and Yuba Power Products, Traynor noted, and therefore the plaintiff and the defendant were subject to the law of implied warranty: but the better rule would be to put aside warranty in favor of strict liability in tort. Recovery should not hinge on the fortuity of whether the victim and the manufacturer had a contract. Warranties "were developed to meet the needs of commercial transactions,"⁷³ and the remedies of "injured consumers ought not to be made to depend upon the intricacies of the law of sales."⁷⁴

For Traynor and others, strict products liability offered the hope of

68. 111 N.E. 1050 (N.Y. 1916).

69. See F.B. Ames, *The History of Assumpsit*, 2 HARV. L. REV. 1, 8 (1888).

70. See, e.g., *Despatch Oven Co. v. Rauenhorst*, 40 N.W.2d 73 (Minn. 1949) (holding a liberal tort rule for recovery of damages); *Gosling v. Nichols*, 442, 139 P.2d 86 (Cal. App. 2d 1943) (holding a tort rule on survival of actions).

71. See U.C.C. § 2-314 (1978) (stating an implied warranty of merchantability); see also *id.* § 2-315 (stating an implied warranty of fitness for a particular purpose).

72. See *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1962).

73. *Id.* at 901.

74. *Id.*

resolving both contract-law complications and the confusion of a mixed tort-contract regime for deciding products cases. As the Restatement notes, strict products liability sweeps over many issues relevant to warranty analysis. Reliance, notice, disclaimers, the validity of the original contract, and the labels of 'buyer' and 'seller', for examples, are all summarily rejected in Section 402A.⁷⁵

Although Traynor appeared dismissive of the Uniform Commercial Code, the Code probably inspired him toward expansive reform. The UCC, a triumph of harmonization, had enhanced interstate commerce by creating an integrated commercial law.⁷⁶ A public law of product injury could go even further. The creators of strict products liability boldly declared that strict liability in tort superseded the UCC. In effect, they were saying that what the Code could do, strict products liability could do better. Thus they made, by implication, a claim about the flow of goods.⁷⁷

E. Summary

The four major goals of products liability reform are used to connect the reform to people who are not yet convinced that the movement should flourish. Proponents link their reform to unassailable improvements. Of the four goals, predictability stands up best to examination. This goal is so attractive that even strict products liability advocates relied on it, and tort reformers emphasize predictability as their primary goal. Under scrutiny, the other goals appear slogan-like. Visions of a true cost or price of products, as well as the concept of a consumer and the goal of liberating trade, prove to be dependent on what the reformer plans to achieve. But perhaps reform adds up to more than the sum of its goals: reformers remind their audience that "We the People," in Leon Green's phrase,⁷⁸ ought to think about the aggregate effects of product-caused injury.

75. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. m (1965).

76. The UCC, though a reform of private law for aggregate benefit, does not raise the dangers I discuss when it is interpreted mainly as a rule book for voluntary players. Collectivist commercial law is a sound idea. It is more modest than Traynor/Prosser strict products liability, affecting fewer people directly. And whereas goals such as the freer flow of goods or increased predictability are merely attractive for personal injury law, they are essential for commerce.

77. The rivalry between advocates of strict liability in tort and UCC partisans over products liability territory has ebbed. Reed Dickerson argued in favor of the UCC in Reed Dickerson, *The ABCs of Products Liability—With a Close Look at Section 402A and the Code*, 36 TENN. L. REV. 439, 452 (1969) [hereinafter Dickerson, *ABCs*]. Such arguments are seldom seen in law reviews today.

78. See Green, *supra* note 19, at 1.

III. WHAT REFORM DELIVERS

Public-law reformers of products liability doctrine promise that beneficial social change will result from their proposals. In practice this change does not occur as predicted. First, for reasons discussed in section A below, the reform is unstable. It cannot be implemented as its proponents wish. Opposition and dilution reduce the effect of the public-law proposal. Second, once implemented, the reform is blocked by new obstacles which are described in section B. Doctrine and results are never completely integrated; between implementation and social change lie conditions that make the reform unable to deliver the promised changes. Some of these conditions common to reform are analyzed below.

Reform movements do not, in fact, follow my subheadings and divide into readily observable stages of "before implementation" and "after implementation." Especially when the reformer profits financially from the state of reform, but even where financial benefit does not affect the movement, the public-law advocate seldom pauses to declare that a job is well done. More work always remains. For analysis, however, it is useful to note the points where reformers have reached a major achievement.

By implementation of public law, then, I refer to the point of significant acceptance. Strict products liability reached implementation when a large majority of state courts adopted Section 402A,⁷⁹ although synthesis of the theory was achieved several years earlier.⁸⁰ Implementation of tort reform is marked by the agreement in virtually every state government, during the 1980s, that liability was too expansive and needed to be curbed by reform.⁸¹ Further implementation may arrive either with the passage of a uniform or national law, or with widespread gain in persuasion.⁸²

79. Section 402A has been accepted by the supreme courts of 37 states. See 2 AMERICAN LAW OF PRODUCTS LIABILITY § 16.9 (Timothy E. Travers et al. eds., 3d ed. 1987 & Supp. 1993). Of the remaining states, only four do not accept the doctrine of strict products liability. *Id.* at §§ 16.18-16.23.

80. See Priest, *Enterprise Liability*, *supra* note 1, at 505.

81. See Lipsen, *supra* note 30, at 266-71 (containing an appendix that summarizes state tort reform).

82. Henderson and Eisenberg report evidence of such gain. See James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990). The episodic achievements of the tort reform movement may be seen in casebooks attempting to explain tort reform patterns. See W. PAGE KEETON ET AL., PRODUCTS LIABILITY AND SAFETY: CASES AND MATERIALS 1036 (2d ed. 1989). Professor Epstein, who is affiliated with tort reform, began the 1987 supplement to his Torts casebook with a passage about the overwhelming importance of tort reform; the passage does not appear in the 1990 edition. Compare RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS (5th ed. 1990) with RICHARD A. EPSTEIN ET AL., CASES AND MATERIALS ON TORT LAW (4th ed. Supp. 1987).

Like Part II, this Part is descriptive. Using examples of the opposition and dilution that take place before the reform is implemented, the discussion in Section A seeks to show the inevitability of these encroachments on a reform proposal. Similarly, the examples examined in Section B are offered to support the broader idea of obstacles that diminish reform once it is implemented.

A. Before Implementation

1. Opposition

The public law theorist first faces the problem of convincing opponents. A vision for change of the status quo will necessarily encounter skepticism and resistance. Opposition always occurs despite the reformer's belief—which, again, is assumed in this Article to be sincere—that reform will produce wide collective benefit.

Opposition appears most clearly in pointed opprobrium. After reading the *Escola* concurrence, Roscoe Pound accused Traynor of authoritarianism and bringing American law closer to socialism;⁸³ plaintiffs' lawyers denounce the "tort deform" movement;⁸⁴ opponents impugn the goals of reformers.

When critics oppose tort reform, they say that this movement is best understood as a kind of interested advocacy, like lobbying, created to enhance the prosperity of wealthy institutions and individuals.⁸⁵ Groups that have joined the opposition to nationwide products liability reform include consumer, environmental, and women's groups; the American Bar Association (ABA); the American Trial Lawyers Association (ATLA); and several associations of state government officials;⁸⁶ these groups, with the exception of ATLA, are not necessarily opposed to tort reform in general. Individual opponents of tort reform have argued that the movement relies on dubious premises.⁸⁷

83. See ROSCOE POUND, *NEW PATHS OF THE LAW* 39-47 (1950); Roscoe Pound, *Law in the Service State: Freedom versus Equality*, 36 A.B.A. J. 977, 981 (1950).

84. See Andrew Blum, *Women Starting to Get to Top of Bar Groups*, NAT'L L.J., Feb. 11, 1991, at 22, 24 (statement of Roxanne Conlin, vice president, American Trial Lawyers Association); *Big Damage Awards May Be in Decline*, CHI. TRIB., Feb. 11, 1990, Business Section, p. 7 (statement of Russ Herman, President, Trial Lawyers Association of America). See also Page, *supra* note 54 ("deforming tort law").

85. At a speech I attended in Chicago on December 4, 1990, Ralph Nader said that the emotion behind tort reform is not so much avarice but distaste for pretrial discovery. Individuals almost never pay large judgments directly, and so an expansive liability system does not threaten their own holdings. But the prospect of a long, inconveniently-timed deposition, or exposure of their personal documents, affronts the business-affiliated spokespersons for tort reform.

86. See Lipsen, *supra* note 30, at 254.

87. See *supra* note 36.

Tort reformers respond to this opposition by contending that their proposals would benefit consumers as well as producers,⁸⁸ and that unreformed tort law enriches the plaintiffs' bar more than consumers.⁸⁹ Thus, tort reformers represent both a reform that suffers attack and a source of attack on another reform. But the symmetry is inexact, because while some advocates of tort reform blame Traynor and Prosser (and thus represent both a reform and an attack on a reform),⁹⁰ other tort reformers focus on the notion of loss spreading that strict products liability pioneered,⁹¹ while still others address generally the size and scope of the civil liability system.⁹²

The most basic example of opposition in products liability reform is the simple mistrust described above, with opponents aligning themselves into the dichotomies of rich versus poor, defendant versus plaintiff, manufacturer versus consumer; this line of division is of keen importance to the public law theorist. The dichotomy is based on the criterion of wealth. Opponents of tort reform can readily use this dichotomy. It is easy to say that tort reformers are wrong because their movement is tainted, perhaps controlled, by wealth, but harder to apply this type of opposition to the originators of strict products liability, who had no financial stake in their fate.⁹³

Although these originators cannot be accused of avarice, they have been scrutinized by critics who attribute their public law proposal to an idiosyncratic or distorted view of the world. According to George Priest, "enterprise liability" arose after the influential advocacy of James and Kessler.⁹⁴ Fleming James dreamed of a day when social welfare systems would supersede tort law;

88. See *supra* text accompanying notes 49-52.

89. See HUBER, *supra* note 16, at 223-24; NEELY, *supra* note 38, at 49; see also Peter Brimelow & Leslie Spencer, *The Best Paid Lawyers in America*, FORBES, Oct. 16, 1989, at 197 (describing the wealth of plaintiffs' lawyers). This complaint is not limited to the current tort reform movement. See, e.g., JEFFREY O'CONNELL, *THE LAWSUIT LOTTERY: ONLY THE LAWYERS WIN* (1979) (stating that a no-fault system is better for injured persons).

90. Peter Huber opposes the civil liability system created by "the Founders," who include Traynor and Prosser. See HUBER, *supra* note 16, at 6. He also disapproves of *Vandermark v. Ford Motor Co.*, a major Traynor opinion. See HUBER, *supra* note 16, at 19-20; see also *supra* note 3 (quoting *Vandermark*). Richard Epstein criticizes *Greenman* and the *Escola* concurrence, see EPSTEIN, *LIABILITY LAW*, *supra* note 19, at 36-48, but saves his wrath for *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69 (1960). See EPSTEIN, *LIABILITY LAW*, *supra* note 19, at 50-56.

91. See Priest, *Insurance Crisis*, *supra* note 35.

92. This concern is expressed most often by nonacademic members of the tort reform movement, but the tort reform scholars cited allude to it as well.

93. See Page, *supra* note 55, at 654-55. Here I distinguish between originators and defenders of strict products liability. The latter group may have a financial interest at stake. See also *infra* text accompanying notes 203-05.

94. Priest, *Enterprise Liability*, *supra* note 1, *passim*.

Friedrich Kessler worried about coercion, and regarded all transactions between unequals with suspicion.⁹⁵ These two personalities came together to support an expansive public law of products liability. For James in torts and Kessler in contracts, private law was inferior to a collective vision. According to Priest, their individual penchants lay behind American enterprise liability.

Before the formation of political symmetry, whereby defenders of strict products liability opposed and were opposed by tort reformers, opposition could have been expressed without identifying the critic as a member of a camp. One dissent from strict products liability as envisioned by Traynor and Prosser appears in a 1974 law review tribute to Roger Traynor.⁹⁶ Praising Justice Traynor as "one of our finest judges," Reed Dickerson objected to Traynor's elevation of strict liability in tort over the provisions of the Uniform Commercial Code, which, as legislation, ought to outrank judicial lawmaking.⁹⁷ To Dickerson, the UCC could have been used for almost all of the consumer protection that Traynor had in mind, with the added virtues of clarity and consistency with past rules.⁹⁸ Skepticism about strict products liability in favor of the UCC has faded; once it was a vital source of opposition. Opposition now usually takes place on public-law terms: critic and reformer alike have a political vision of the state and seek to promote that vision by changing the law.

2. Dilution

Faced with opposition, the public law theorist dilutes the proposed reform to reduce its threat. Compromise is of course part of any change in the laws of democratic countries: but the compromises necessary to change private law to public law follow a pattern unique to themselves. To make their reform acceptable, those who would change private law to be more public offer their opponents concessions that point up what is most valued about private law.

A private law of products liability permits variation from case to case. In the struggle between individual circumstances of the litigants and the collective need for consistency within products liability litigation, private-law concerns militate in favor of greater emphasis on individual circumstances. Public-law reformers begin by disparaging this force in products liability law, and in the end give in to it. Dilution therefore consists of the recognition of private-law pressures within the public-law reform.

95. *Id.* at 465-83, 484-89.

96. Reed Dickerson, *Was Prosser's Folly Also Traynor's? or Should the Judge's Monument Be Moved to a Firmer Site?*, 2 HOFSTRA L. REV. 469 (1974) [hereinafter Dickerson, *Prosser's Folly*].

97. *Id.* at 486-87.

98. *See id.*; *see also* Dickerson, *ABCs*, *supra* note 77 (containing an earlier expression of this argument).

a. Strict Products Liability Diluted

Gary Schwartz's classic summary of strict products liability⁹⁹ shows that American case law has diluted the doctrine. Strict products liability could have meant liability for all injuries caused or occasioned by products, Professor Schwartz wrote, regardless of whether they were defective.¹⁰⁰ "Strict" could have meant something close to absolute. This hypothetical version of the law, which Schwartz called "genuine strict liability,"¹⁰¹ has no respectable support as a matter of policy, and it is apparent from the *Greenman* opinion that Traynor was not recommending "genuine" strict liability.¹⁰² But the justification of loss spreading in theory does not depend on the existence of a defect.¹⁰³ If the creators of strict products liability valued loss spreading more than the need to protect manufacturers from greatly expanded liability, then Traynor may be said to have diluted his original reform.

Dilution can also be seen in the question of the state-of-the-art defense. Strict products liability began with proposals that were silent on this question, because a state-of-the-art defense, which takes details and individual products into account, is generally absent in visions of a public law of products liability. Dilution of the proposal includes the recognition of individual circumstances.

The outcome of *Beshada v. Johns-Manville*¹⁰⁴ made clear the dilution of strict products liability. In *Beshada*, the New Jersey Supreme Court held that a manufacturer who could not have known of a risk at the time of marketing can be liable for failure to warn.¹⁰⁵ The repudiating case, *Feldman v. Lederle Laboratories*,¹⁰⁶ in turn diluted the *Beshada* rule by limiting it to asbestos cases. Today the state-of-the-art defense is the law in the United States.¹⁰⁷ A manufacturer who acted reasonably at the time of marketing, who knew what was known about relevant technology, and who made the product as safely as anyone could is entitled to prevail in a design-defect action. *Beshada* and *Feldman* are synecdoches, of course: they stand for the expression, and then the

99. Gary T. Schwartz, *Understanding Products Liability*, 67 CAL. L. REV. 435 (1979).

100. *Id.* at 441.

101. *Id.*

102. In dicta Traynor noted that a plaintiff bringing an action in strict products liability would have to prove that he was using the product as intended and that he was unaware of the danger. *Greenman*, 377 P.2d at 901. At a minimum this standard would entitle the manufacturer to defenses based on misuse, or the obviousness of a danger:

103. See Powers, *supra* note 10, at 425.

104. 447 A.2d 539 (N.J. 1982).

105. *Id.* at 549.

106. 479 A.2d 374, 387-88 (N.J. 1984).

107. For a reaffirmation, see *Anderson v. Owens-Corning Fiberglass Co.*, 810 P.2d 549 (Cal. 1991).

rejection, of liability without fault on the part of the manufacturer.

b. Tort Reform Diluted

The Model Uniform Product Liability Act (UPLA),¹⁰⁸ drafted under the leadership of a tort reform scholar,¹⁰⁹ concedes several issues important to the movement in favor of making the statute attractive to legislatures. Although the impetus for a uniform act came from the tort-reformist Department of Commerce and sponsors from industry, as a cure for open-ended doctrine and unpredictability, the UPLA follows a balancing approach.¹¹⁰ Both strict liability and negligence appear in the UPLA.¹¹¹ This deviation from uniformity follows the existing conflicts in state laws. It dilutes the force that uniformity would have provided.

More specific examples of dilution are numerous. In the final version of the UPLA, the drafters diluted an industry-standards compliance defense for design and warning cases that had been included in an earlier draft: the statute, like the unreformed law of most states, now provides that compliance with industry standards is just one factor to be considered in determining liability.¹¹² The UPLA also failed to include a statute of repose, even though insurers had stressed its importance; the drafters substituted a rebuttable presumption that after ten years a product is beyond its useful safe life.¹¹³ This presumption is weakened with several exceptions.¹¹⁴ Attempting to modify the collateral source rule, the UPLA provides that only compensation traceable to tax revenues, such as Medicaid or Medicare, can reduce the amount of an award—a dilution that reflects the drafters' decision to spare middle-income plaintiffs from the brunt of the statute. The drafters' need to reduce the burden of reform, limiting it to poorer plaintiffs, shows the phenomenon of dilution.

The first proposed federal products liability law that the Senate considered

108. UNIFORM PRODUCT LIABILITY ACT, *reprinted in* 44 Fed. Reg. 62,714 (1979) [hereinafter UPLA].

109. See Victor E. Schwartz, *The Uniform Product Liability Act—A Brief Overview*, 33 VAND. L. REV. 579 (1980).

110. See Terry M. Dworkin, *Product Liability Reform and the Model Uniform Product Liability Act*, 60 NEB. L. REV. 50, 61 (1981) [hereinafter Dworkin, *Model Product Liability Act*].

111. See, e.g., UPLA § 104 (A), (D), 44 Fed. Reg. at 62,721 (stating the strict liability for mismanufactured products); UPLA § 104 (A), (C), *id.* (stating a fault standard for design and warnings).

112. See Draft Uniform Product Liability Law, *reprinted in* 44 Fed. Reg. 2996 (1979); UPLA § 107 (B), (C), 44 Fed. Reg. at 62,728.

113. UPLA § 110 (B), 44 Fed. Reg. at 62,732.

114. See Dworkin, *Model Product Liability Act*, *supra* note 110, at 69-70.

followed closely the final Uniform Product Liability Act.¹¹⁵ Offered by Senator Robert Kasten, this bill replaced strict products liability with a negligence standard for design and warning claims, established a state of the art defense, and strengthened the defenses of contributory negligence, assumption of risk, and product misuse.¹¹⁶ The bill also abolished joint and several liability, required judges rather than jurors to determine the amount of punitive damages, and, following the lead of comment *k* of the Restatement, provided for an absolute defense for injuries resulting from unavoidably unsafe products.¹¹⁷ The bill was reported out of committee, but died in committee in the following Congress.

Dilution of the first Senate bill is evident in the efforts of Senator John Danforth to enact a federal products liability law. In 1985, he introduced a bill similar to the Kasten predecessor.¹¹⁸ Although it preserved much of the change that Kasten had included, the Danforth bill included additional provisions, mostly procedural changes to encourage settlements and deter frivolous claims and defenses.¹¹⁹ The additional provisions, included in an attempt to widen support, diminished the focus on tort reform goals. Danforth's 1985 bill did not attract a majority, and the Senator later proposed what one commentator called "a less controversial scaled down core bill."¹²⁰ This second version emphasized expedited settlements almost to the exclusion of changes in substantive law.¹²¹ Among other dilutions, the revision replaced the abolition of joint and several liability with the abolition of joint and several liability for noneconomic losses.¹²²

Legislation current as of this writing, S. 640, which resembles the revised Danforth bill, has been described as less "draconian" and "severe" than its predecessors.¹²³ Its new title, the Product Liability Fairness Act (Act), indicates its sponsors' desire to move beyond a reformist constituency by

115. S. 2631, 97th Cong., 2d Sess. (1982). Other bills also modeled on the UPLA were introduced in the House before the introduction of S. 2631. See H.R. 5626, 96th Cong., 1st Sess. (1979); H.R. 7000, 96th Cong., 2d Sess. (1980).

116. See S. 2631, 97th Cong., 2d Sess. (1982).

117. *Id.*; see also RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (stating that a product is not unreasonably dangerous if it is unavoidably unsafe). Liability for failure to warn, however, might remain.

118. See S. 999, 99th Cong., 1st Sess. (1985).

119. See, e.g., *id.* secs. 111 (review panel); 201-11 (expedited procedures).

120. Lipsen, *supra* note 30, at 258. The bill was S. 2760, 99th Cong., 2d Sess. (1986).

121. See HENDERSON & TWERSKI, *supra* note 4, at 752-53.

122. The Danforth bill reached the floor of the Senate, but went no further. See Lipsen, *supra* note 30, at 258-59.

123. See SENATE REPORT, *supra* note 17, at 54 (remarks of Senator Hollings).

appealing to a loftier principle. Dilution continues.¹²⁴

This thesis-antithesis-synthesis pattern of a public law proposal may look like a triumph of reasoned compromise over two extremes. But this benign conclusion evades the question of whether the law has improved more with a diluted reform than with the status quo ante. What might be called synthesis or compromise is better understood as dilution, because proposals for public law are not born of conflicts between groups but rather come from a particular vision.

B. After Implementation

Despite obstacles, strict products liability and the tort reform movement have achieved some degree of implementation. At this point in its development, the proposal for a public law of products liability has been altered by conflict, but regardless of the form of the proposal, it cannot fulfill the ambitions of its creators. The infirmity of all public law changes in private-law doctrine is that they assume the existence of responsive institutions and individuals, who will execute the reform. Weak links, however, separate the reform as implemented from results planned.

1. Judicial Cooperation

Reform of legal doctrine cannot change the law without some cooperation from judges, who both preside over each individual lawsuit and say what the law is. Although each judge will have a duty to follow the reform as implemented, in practice the reform cannot withstand large-scale failure or refusal to cooperate. In the United States, limitations, traditions, and obligations constrain federal and state judges as they work within the reformed law. These constraints may conflict with the newly-implemented public law.

a. Ambiguities

Public-law reform must leave the management of individual cases—and

124. A newer bill, introduced by Representative Avery in late 1991, demonstrates a phenomenon similar to dilution: The more "draconian" or "severe" a proposed statute appears, the more accommodation must be made to soften its appearance. Representative Avery and his cosponsors named their bill the "Consumer Price Reduction Act," even though its sole stated purpose was to impose "certain restrictions on product liability actions." See H.R. 3375, 102d Cong., 1st Sess. (1991). Going much further than S. 640, 102d Cong., 1st Sess. (1991), the bill takes punitive damages from plaintiffs and puts them into a crime victims' fund, and requires losing parties to pay their opponents' costs and attorneys' fees. *Id.*, secs. 3 & 4. How this bill, if enacted, would reduce prices is not explained, yet sponsors of this restrictive legislation wish their measure to be identified as consumerist.

some additional flexibility to interpret the reform—to the individual judge. Some level of ambiguity is built into the public law. Because different judges will choose different interpretations in similar cases, the public law of products liability becomes more diffuse. Although this ambiguity exists in all of law, it is unwelcome in public-law reform, which seeks uniformity as a major goal.

Tort reform statutes leave room for much judicial influence. The UPLA and the current version of the federal Act purport to move products liability law more toward negligence.¹²⁵ Whether this standard dictates a retreat from the present law of products liability or merely reaffirms the persistence of fault in what is called strict products liability is a question that different judges could answer differently. Both the Act and the UPLA insist that plaintiffs retain the burden of proof in claims of defective product design, but retain traces of a stricter liability in other kinds of product claims. The details of these standards can be illuminated only by judicial interpretation.¹²⁶

Other reform proposals, found both in comprehensive measures like the Act and the UPLA and in piecemeal state-level change, also depend on judicial construction. What, for instance, is a “product liability action” that warrants unique treatment in courts? Definitions offered in the Act, the UPLA, and state reform laws are not in all situations self-applying.¹²⁷ Caps on pain and suffering damages, abolition or reduction of joint liability, modification of the common-law evidentiary rule about compensation received from a collateral source, and indeed virtually all changes commanded by state law have raised bona fide controversy as to their application.

Similar questions vex traditional strict products liability. What does ‘strict’ mean? Fault has pervaded application of the Traynor-Prosser reform. Defenses have always been condoned, even in the *Greenman* opinion, but courts have differed on the question of their weight. The ambiguity that may be of most

125. See UPLA § 104 (A), (C), 44 Fed. Reg. at 62,721; S. 640, 102d Cong., 1st Sess., sec. 302 (a)(1)(b) (1991) (stating that a plaintiff must prove that a “product seller failed to exercise reasonable care with respect to the product”).

126. See Dworkin, *Model Product Liability Act*, *supra* note 110, at 79 (1981) (stating that courts and juries free to act flexibly despite formal allocation of proof).

During the revisions of federal products liability legislation, where reformist members of Congress struggled to create a comprehensive law that would be both meaningful and feasible, one reformer acknowledged the impossibility of the task: Even if a reform bill were passed, “there would be nothing to stop the 50 states from interpreting whatever we did from scratch.” Lipsen, *supra* note 30, at 258 (quoting Senator John Danforth).

127. The pending federal bill leaves part of the definition of “product” to state law, see S. 640, 102d Cong., 1st Sess., sec. 102 (13) (1991). These definitions vary from state to state. See Malcolm Wheeler, *The Need for Narrow Tort Reform: Abolishing Strict Product Liability*, in *PRODUCT LIABILITY REFORM*, *supra* note 53, at 23, 24-29.

practical significance pertains to the roles of judge and jury. Can any questions of products liability be answered as a matter of law?¹²⁸ A major topic in traditional strict products liability, application of the risk-utility test for design defect,¹²⁹ is the proper responsibility of judges according to some courts, and of the jury according to others.¹³⁰

b. Private Agendas

Empowered to reshape public law, the judge will bring to each case her own life experiences, knowledge of and regard for prior private law, and personal goals. This set of traits will move outcomes toward more idiosyncratic, and less collectivist, directions; public law will become more private even when judges cooperate with the reform. Legal Realist writers have canvassed this subject thoroughly.¹³¹ In products liability litigation, the judge is affected not only by her own disposition and character, but also by the fact that the plaintiff and the defendant usually come from different places. Mass manufacture and distribution enable users to live far from producers. Proximity to one party may affect the judge, who probably lives in the same region as one, but not both, of the parties.¹³²

Public-law theorists might respond that if private agendas are a problem, their proposal is a solution. By making the law more uniform, they combat parochialism and the backscratching that Neely has identified.¹³³ The first problem with this response is that private agendas are not necessarily an ill to be cured. Although custom, procedural rights, and legal ethics entitle a litigant to impartial adjudication, individual bias can be addressed without the drastic response of public law. A private agenda may be superior to a public one. Private agendas are not problems unless one has a collectivist agenda. The second problem is that private agendas persist even after reform, so that the problems they contribute remain.

c. Lack of Coordination Among Courts

In any system amenable to public law reform, courts have a degree of

128. See Aaron D. Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. REV. 521 (1982).

129. See Wade, *supra* note 8, at 837-38.

130. Compare *Prentis v. Yale Mfg. Co.*, 365 N.W.2d 176 (Mich. 1984) with *O'Brien v. Muskin Corp.*, 463 A.2d 298 (N.J. 1983).

131. See JEROME FRANK, *LAW AND THE MODERN MIND* 136-39 (1930); KARL N. LLEWELLYN, *THE COMMON LAW TRADITION* 46-50 (1960).

132. See NEELY, *supra* note 38, at 71-72.

133. See *id.* at 78. For a similar public-law argument, see *infra* note 152.

freedom to diverge from one another. Thus even if private agendas can be suppressed, judges will be cooperating with the public law reform to different extents and at different times. Whether a reform will be applied retrospectively or prospectively cannot be answered with precise detail in advance. Different cases are ready for decision at different times. The reform, then, cannot begin at any exact moment, and cases will affect the outcomes of their successors.

Again, the state-of-the-art controversy provides an example. This problem appears eternally provocative. The same court that decided *Beshada* came back a year later with *Feldman*. Courts continue to disagree about its meaning. State-of-the-art can be invoked in several situations, each conceptually different from the others.¹³⁴ And whether it is truly a defense to be pleaded and proved by defendant—a potentially difficult burden, tantamount to proving a negative—still plagues the courts.

Judges will disagree about the current state-of-the-art for a particular technology. Information, in general, moves fitfully into the courts: Henderson and Eisenberg, for instance, used the phrase “quiet revolution” in the title of their article to describe a little-noticed trend away from pro-plaintiff court decisions.¹³⁵ The article argued that judges themselves were unaware of their being part of a trend.¹³⁶ Courts cannot keep up uniformly with tendencies in other courts, or product innovation, or a need to change the law.

d. Conflicting Duties and Principles

Counterforces pull the judge away from cooperation with the reform. Opponents to the reform, as was argued above, decry and then dilute the reform. Their existence is known to the judge, who cannot ignore them completely. Ideological or political opposition aside, the judge lives within general norms of comity and judicial restraint, and specific limits on her power.¹³⁷

Specific limits on judicial and legislative power are of more direct force than external politics or general norms. State and federal constitutional law interfere with the tort reform agenda. Compulsory arbitration or summary jury trials, provisions for expedited settlements that punish parties who insist on

134. See James A. Henderson, Jr., *Coping with the Time Dimension in Products Liability*, 69 CAL. L. REV. 919, 921 (1981).

135. See Henderson & Eisenberg, *supra* note 82.

136. *Id.* at 514-15.

137. Most judges would accept this constraint on their ability to comply with public-law reform. *But see* Dickerson, *Prosser's Folly*, *supra* note 96, at 486-87 (describing that judges have held that strict liability in tort supersedes the UCC, in defiance of legislative supremacy).

going to trial, and alternative compensation schemes have been challenged as violative of the right to a jury trial.¹³⁸ Courts have said that statutes of repose infringe rights guaranteed by state constitutions,¹³⁹ and have struck down caps on pain and suffering damages.¹⁴⁰ The Supreme Court has refused to interpret constitutional provisions as constraints on punitive damages,¹⁴¹ despite strenuous tort reform efforts.¹⁴² Judicial noncooperation had an apparently lesser effect on strict products liability, but this appearance is at odds with the reality of the ten years or so after the adoption of Section 402A. Tort reform writers did not deem many decisions excessive or unprincipled until around the mid-1970s. Thus if Traynor, Prosser, and their colleagues really did intend to foment litigation and thereby redistribute wealth—a doubtful notion—then they may have been stymied by courts that did not play along. Because the strict products liability movement sought to change the law by persuasion, the record shows few outright rebuffs like the rejection of the federal statute and the UPLA. Explicit rejections have appeared,¹⁴³ but more often judicial noncompliance has taken the form of retaining pre-*Greenman* fault and warranty or creeping away from expansive pro-plaintiff doctrine.

138. See *Strandell v. Jackson County*, 838 F.2d 884, 887 (7th Cir. 1987) (holding that a court cannot compel participation in a summary jury trial); *Mattos v. Thompson*, 421 A.2d 190, 196 (Pa. 1980) (holding that mandatory arbitration for medical malpractice violates the right to a jury trial); *Wright v. Central DuPage Hospital Association*, 347 N.E.2d 736, 739-40 (Ill. 1976) (same). Cf. Christopher J. Trombetta, Note, *The Unconstitutionality of Medical Malpractice Statutes of Repose: Judicial Conscience versus Legislative Will*, 34 VILL. L. REV. 397 (1989) (arguing that statutes restricting litigants' opportunities are often struck down because of their "manifest unfairness").

139. Citing state analogues to the Equal Protection and Due Process Clauses of the Fourteenth Amendment, state supreme courts have struck down several statutes of repose. See, e.g., *Heath v. Sears, Roebuck & Co.*, 464 A.2d 288 (N.H. 1983) (holding that the statute denies equal protection and equal access to courts); *Lankford v. Sullivan, Long & Haggerty*, 416 So. 2d 996 (Ala. 1982) (holding that the statute is arbitrary); *Kallas Millwork Corp. v. Square D Co.*, 225 N.W.2d 454 (Wis. 1975) (holding that the statute violates right to equal protection).

140. See *Sofie v. Fibreboard Corp.*, 771 P.2d 711 (Wash. 1989); *Carson v. Maurer*, 424 A.2d 825 (N.H. 1980). But see *Fein v. Permanente Medical Group*, 695 P.2d 665 (Cal. 1985) (upholding cap).

141. See *TXO Production Corp. v. Alliance Resources Corp.*, 61 U.S.L.W. 4766 (U.S. June 25, 1993) (stating that a \$10 million punitive damage award—where the actual damage award was \$19,000—was not so "grossly excessive" as to violate the Due Process Clause); *Pacific Mutual Insurance Co. v. Haslip*, 499 U.S. 1 (1991) (holding that jury discretion to award punitive damages does not violate due process protection); *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989) (holding that the Eighth Amendment Excessive-Fines Clause does not constrain punitive damages).

142. Institutions affiliated with the tort reform movement filed numerous amicus briefs in *Haslip* and *Browning-Ferris*.

143. For instance, North Carolina does not accept the doctrine of strict products liability.

2. For Expansionists: Patterned Inequities

All public-law reform purports to create new collective allocations through changes in the law. Expansive law reform, a category that includes strict products liability, strives to redistribute wealth from the class of defendants to plaintiffs.¹⁴⁴ Discrimination, however, makes the transfer of wealth more complex.¹⁴⁵ Within the class of intended beneficiaries, discrimination skews allocation in patterns unintended by the reformer.

The effect of discrimination, moreover, expands under a reform scheme. To the extent that the reform works—contrary to my overall contention that it can have little real effect—discrimination becomes more important. This effect is more modest in a legal system that focuses on disputes between individuals, and avoids adding collective aspirations.

Because of antecedent inequities, the civil liability system delivers unequal benefits to groups of plaintiffs. The data are familiar, and virtually undisputed. The Rand Corporation found that black plaintiffs in personal injury cases receive awards twenty-five percent lower than those of white plaintiffs for the same injury. Black plaintiffs suing black defendants receive sixty percent of what white plaintiffs receive from white defendants. Black plaintiffs receive significantly less in cases involving very severe workplace injuries.¹⁴⁶ Wisconsin researchers found that accident victims who were black were less likely than white victims to assert tort claims.¹⁴⁷ Black litigants, whether plaintiffs or defendants, were more likely than white litigants to lose at trial.¹⁴⁸

Economic-loss principles explain much of the difference: because of discrimination, white plaintiffs earn higher wages than African-American plaintiffs. This gap pertains to women, although the data are less clear that women receive lower pay awards than men for the same injuries.¹⁴⁹

144. Or, at a minimum, at least to deliver fairly the benefits of the legal system. For a statement of this liberal position, see RONALD DWORKIN, *LAW'S EMPIRE* 176-85 (1986) (declaring that "integrity" mandates treating like cases alike).

145. By "discrimination" I refer to unequal treatment of members of groups, such as African-Americans or women, that exists generally in society; I am not referring to specific instances of bias against individuals.

146. See AUDREY CHIN & MARK A. PETERSON, *RAND CORPORATION, DEEP POCKETS, EMPTY POCKETS: WHO WINS IN COOK COUNTY JURY TRIALS* 29, 32, 36-41 (1984). I use the term "black" for racial designation when citing published work that does so, and "African-American" for my own assertions.

147. See Richard E. Muller & Austin Serat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 *LAW & SOC'Y REV.* 525, 552-54 (1981).

148. *Id.*

149. See CHIN & PETERSON, *supra* note 146.

Discrimination burdens women more at the pretrial levels. Injuries to women are more likely to take place at home, where the victim is less likely to have the benefit of a witness or an easily named defendant.¹⁵⁰ Thus, strict products liability works within a system that treats plaintiffs or potential plaintiffs unequally. Its dichotomy (traceable to Traynor and beyond) between victims and responsible agents conceals distinctions in the victim category. The results are regressive, as George Priest has written, because costs of liability in market economies are passed to all customers.¹⁵¹ Cross subsidies of women to men, black to white, and poor to rich must follow. This result defeats the progressive aims of reformers.¹⁵²

3. For Narrowers: Unintended Public Effects

The Priest thesis, a critique of strict products liability, sheds light on tort reform. Priest views expansive liability as paradoxically harmful to the class that it is intended to benefit. Easy recovery seems to be good for consumers; in practice, however, expanded liability has caused insurance companies to refuse coverage, suppliers to withdraw desirable products and services, and the poor to subsidize the rich through regressive surcharges added to the prices of goods.¹⁵³ Even successful plaintiffs, the winners of civil liability, lose a big fraction of their recovery in attorneys' fees and other transaction costs. Though undermined somewhat by criticism,¹⁵⁴ its dependence on an uncertain premise,¹⁵⁵ the waxing fortunes of the American insurance industry (right now there is no talk of crisis in the media), and overstatement by some who repeat the idea,¹⁵⁶ this argument remains important. It points out the danger of

150. See Abel, *supra* note 37, at 799.

151. See Priest, *Insurance Crisis*, *supra* note 35, at 1585-87.

152. The point of patterned inequities might appear to be an argument against private law rather than public law, because the latter seeks to mitigate distinctions between individuals. To at least some public-law reformers, discrimination is one of the many drawbacks of keeping private law private, rather than a fixed fact that justifies resistance to reform. Until patterned inequities are cured, however, expansion of private legal remedies will benefit litigants unequally.

Some objections to this conclusion, which are not compelling to me, might be made. Expansionist reformers may value the transfer from defendants to plaintiffs so highly that they would sacrifice equity between the races, genders or classes to this cause. (Intimate relationships may permit women, although generally not persons of different races or classes, to benefit from the advantageous position of white upper-class men.) Others may have chosen to reform liability rules first and intend thereafter to turn their attention to bias. Still others may believe that the cross-subsidy problem has been overstated.

153. See Priest, *Insurance Crisis*, *supra* note 35, at 1585-87.

154. See, e.g., Claybrook, *supra* note 36 (blaming high transaction costs on defendants).

155. As I have suggested elsewhere, part of the Priest argument relies on the assumption that the insurance industry acted in good faith when it refused to renew policies or extend coverage. See Anita Bernstein, *A Duty to Warn: One American View of the EC Products Liability Directive*, 20 ANGLO-AM. L. REV. 224 (1991) [hereinafter Bernstein, *A Duty to Warn*].

156. See HUBER, *supra* note 16; OLSON, *supra* note 35.

unintended effects that is posed by public law reform.

If, as I have argued, tort reform has important traits in common with its predecessor, strict products liability, then it too may be vulnerable to the problem of unintended public effects. Like expansionists, narrowers cannot control the effects of their reform. The instrument is always too blunt. The narrowers' counterpart to the expansionist problem of unequal distribution¹⁵⁷ is an excess of reform. By clamping down on adjudication, making it less available, tort reform achieves its goal of reducing the cost of civil liability; but tort reform can have collateral effects on its sponsors.

The most important of these effects is the institutionalization of tort reform. Expanded liability has created a class of service employees with incentives to maintain their own livelihood. While the tort reform effort made excessive verdicts and settlements both public relations devices¹⁵⁸—media attacks emphasized the magnitude of jury verdicts¹⁵⁹—and the target of reform,¹⁶⁰ it is generally acknowledged that plaintiffs are not the main beneficiaries of these payments. They receive less than half of the amount paid by defendants.¹⁶¹ The liability system supports people who work in law firms, insurance companies, academia, the government (including court employees and legislative staffers), and litigation-related enterprises, such as expert-witness suppliers. Among those who work in the system, defense lawyers and insurers, as important players, have the opportunity to protect their source of income by adjusting to a reformed world with less products liability litigation. They do not participate in tort reform with the goal of harming themselves. Thus the reform effort itself has become a source of employment and income.¹⁶² In perpetual motion, it extracts funds from its beneficiaries as steadily as does the civil liability system. Whether I am right in calling this effect unintended is not

157. See *supra* part III.B.2.

158. Fred Strasser has chronicled the use by tort reformers of anecdotes about awards recovered by undeserving plaintiffs. See Fred Strasser, *Tort Tales: Old Stories Never Die*, Nat'l L.J., Feb. 16, 1987, at 39; Fred Strasser, *Have Anecdotes, Not Facts, Fueled Tort Crisis?*, Nat'l L.J., Feb. 24, 1986, at 15.

159. *Id.*

160. Tort reformers have focused on the noneconomic elements of recovery, without which no award is shockingly high.

161. See 1 AMERICAN LAW INSTITUTE, REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: THE INSTITUTIONAL FRAMEWORK 30 (1991) [hereinafter INSTITUTIONAL FRAMEWORK].

162. For example, the combined annual budget of the Product Liability Alliance, the Products Liability Coordinating Council, and the Coalition for Uniform Product Liability Law—a small fraction of trade associations lobbying for the federal reform act—is \$1.5 million. See Sheila Kaplan, *Lobbying: The Business of Washington. These Perennials are Lobbyists' Cash Cows*, LEGAL TIMES, Feb. 5, 1990, at 53. The amount, of course, is a fraction of the cost of the liability system.

clear, but it contravenes one stated bottom-line purpose of tort reform—to reduce costs to business.

Other perverse results follow successful tort reform. Anecdotes and simple economic theory suggest that reduced opportunities to recover tort damages tend to discourage skillful plaintiffs' attorneys from contingency-fee work. The main effect of this reduction in supply has been on injured persons, who have more trouble finding capable lawyers. But members of the defense bar have complained about this change as well, saying that some of their new adversaries waste money and time, and that they are disorganized and untrustworthy. Even though a botched plaintiff's case will increase the defendant's chance of prevailing at trial, the additional cost of pretrial litigation may nullify this gain.¹⁶³

Discouraged from personal-injury work, attorneys can find or create new paths to the corporate treasury. The rise of ERISA litigation, for example, developed quickly and has benefitted many plaintiffs and their counsel. Sources of future litigation may include environmental torts, if public opinion continues in the present direction, or action for damages in sex discrimination cases, consistent with current civil rights law.¹⁶⁴ Lawsuits between corporations may flourish. What will replace personal injury litigation is hard to predict, but there is no reason to suppose that the lucrative and stimulating work of using the legal process to achieve financial gain will go unreplaced.¹⁶⁵

Tort reform does not stanch completely the sentiment that when businesses err, they ought to be deterred, and perhaps punished to achieve aims other than deterrence. Unless that belief or feeling ebbs, it will press other channels when civil litigation is blocked. Part of the tort reform effort consisted of an attempt to ease this sentiment, most conspicuously in the insurers' magazine advertisements urging readers that "we all pay the price" for jury verdicts.¹⁶⁶ Some members of the tort reform movement have noted success in the

163. The conclusions of the foregoing paragraph are based on informal conversations with products liability defense lawyers associated with New York firms.

164. See Civil Rights Act of 1991, Pub. L. No. 102-166, §102, 1991 U.S.C.C.A.N. (105 Stat.) 1071, 1072-1074 (codified at 42 U.S.C. 1981A); Marian C. Haney, *Litigation of a Sexual Harassment Case after the Civil Rights Act of 1991*, 68 NOTRE DAME L. REV. 1037 (1993).

165. Cf. Richard Pierce, *Institutional Aspects of Tort Reform*, 73 CAL. L. REV. 917, 918 (1985) (describing institutions that resist change).

166. The phrase appears in promotional material prepared by the Insurance Information Institute. See INSURANCE INFORMATION INSTITUTE, *THE LAWSUIT CRISIS 2* (n.d.). See also *supra* note 52.

endeavor.¹⁶⁷ It is a task that is never finished, however, and occasional reactions (such as the furor over the Exxon oil spill, for example) indicate a public desire to punish, deter, and correct corporate wrongdoing. This impulse can be overstated. All other things being equal, beneficiaries of the tort reform movement are in a better position with restricted opportunities for plaintiffs. But some danger remains that the public may turn on tort reform, based on a belief that the endeavor has gone too far.

The occasional tort reform anomaly reminds observers of unintended effects. In *Nogueiro v. Kaiser Foundation Hospitals*,¹⁶⁸ for example, the plaintiff had agreed to arbitrate all medical malpractice claims, pursuant to a contract prepared by the defendant. When arbitrators awarded the plaintiff \$310,000 in "general damages" and \$40,000 in "special damages" for breach of contract, the California Court of Appeal permitted the award to stand despite a state law limiting noneconomic damages in medical malpractice cases to \$250,000.¹⁶⁹ Here, two devices aimed at reducing the costs of liability to defendants failed to prevent a large award.

Unintended effects thus range from important patterns to flukes—from virtual certainties to farfetched possibilities. Overall this phenomenon is significant. The connection that tort reform has made to financial interests means that the movement cannot stop without threatening the income of some players. When reformism reaches the point of diminishing returns, a conflict must develop between those who finance tort reform advocates—namely, business entities—and those who earn a living by keeping reform alive. Intramovement conflicts have already begun to appear.¹⁷⁰ These natural divisions, coupled with the risk of *Nogueiro*-like reversals, suggest that tort reform can be—although rarely is—as perverse as its expansionist counterpart.

4. Access to Courts

Strict products liability sought to improve the law by making litigation easier for plaintiffs. Victims, who otherwise would falter under the conventional burden of proof, would have the benefit of explicit strict liability. Defendants who ought to be found liable under negligence, but who would escape blame under the traditional burden of proof, would properly bear the cost of their

167. See Ted Gest, *Why the Injured Lose Suits*, U.S. NEWS & WORLD REP., Apr. 8, 1991, at 52 (statements by Thomas Watkins of the Product Liability Advisory Council, and tort reform advocate Victor Schwartz).

168. 203 Cal. App. 3d 1192 (1988).

169. *Id.* The court specifically refused to scrutinize the basis for this award.

170. See Lipsen, *supra* note 30, at 250-53 (describing conflicts between insurance companies and manufacturers, and among different manufacturers with conflicting priorities).

culpability. Heartened by this recognition of their plight, knowing that they have less to prove, victims would be more likely to sue.

The tort reform movement, by contrast, seeks to improve the law by making litigation more difficult for plaintiffs. The world that the reformer seeks to create would include fewer claims, fewer victorious plaintiffs, lower awards, more use of alternative dispute resolution devices, more screening of claims before trial, and greater use of contractual alternatives to tort litigation. Discouraged by these barriers to the courthouse, potential initiators of lawsuits would be less likely to sue.

Access to courts is the one area where public-law reform makes a real difference and where reformers actually are likely to achieve their goals. An empirical study of the effect of state tort reform statutes passed in 1986 supports this contention.¹⁷¹ This study found that certain types of reform legislation caused a reduction in insurer losses.¹⁷² The researchers did not find a decline in the number of injuries or an effective shift in incentives to safety that might have explained the benefit to insurers.¹⁷³ Instead, consumers "now bear more of the risk of injuries, and manufacturers and physicians bear less."¹⁷⁴ What made the liability system cheaper for insurers, the researchers concluded, were reforms that made the liability system less attractive for plaintiffs and their attorneys. Restrictions on joint and several liability, restrictions on pain and suffering damages, and restrictions on punitive damages discouraged plaintiffs from suing.¹⁷⁵

These findings support the common sense hypothesis that injured persons will bring fewer lawsuits when the amounts that may be recovered are reduced. Although public-law reform cannot address individual cases, it can effect a change that makes the liability system more or less hospitable to an aggregate. By reducing the amount that plaintiffs could recover for noneconomic loss, for punishment of culpable defendants, or from wealthier defendants deemed responsible for only a percentage of harm, state tort reform suppressed the flow of claims to the courts.

171. See Glenn Blackmon & Richard Zeckhauser, *State Tort Reform Legislation: Assessing Our Control of Risks*, in TORT LAW AND THE PUBLIC INTEREST, *supra* note 30, at 272.

172. *Id.*

173. The authors found that the benefits to insurers were passed along to consumers in the form of smaller premium increases. Although premiums became more expensive after tort reform, these premiums would have increased even more without the reform statutes. *Id.* at 283.

174. *Id.* at 275.

175. *Id.* Other reforms that the authors studied, of less significance to insurer losses, included regulation of insurance rates, modification of the collateral source rule, modification of dram shop laws, and shorter statutes of limitations. *Id.* at 274.

The contrary phenomenon occurred when strict products liability began to encourage more injured persons to sue. Products liability actions by most accounts increased dramatically in the late 1960s and 1970s, when theories of enterprise responsibility conjoined with a flourishing consumer movement. Large verdicts in federal courts grew in this period. Although these increases did not deserve the inflammatory label of explosion,¹⁷⁶ and although the data about all products liability actions are distorted if they include the enormous number of filings involving one product—*asbestos*¹⁷⁷—that did not emerge until the mid-1970s, the conclusion remains inescapable that for a period of some years, American courts became more attractive to plaintiffs alleging product injury. The phenomenon cannot be described more exactly than increased access.¹⁷⁸

Expanded or diminished access to courts, the great success of public-law reform movements, is a crude kind of triumph. Modifying access is a major goal of reformers, but not their only goal. Assuming that reformers want more from their reform than hardship to their identified enemies—corporate defendants or consumer plaintiffs and their attorneys—altered access to courts does not fulfill their wishes. Altered access, moreover, is an unstable condition. Reformers do not control it directly, and cannot know whether the change will endure. Neither improvement nor reconciliation results from changing access to courts.

C. *The Recurring Question of Legitimacy*

Each of the public-law reforms reached products liability doctrine in a different way. Strict products liability percolated through the academy, notably Yale,¹⁷⁹ then the American Law Institute and state supreme courts. Tort reform, a movement led by manufacturers and insurers, developed in scholarship, journalism, and the media, but mostly it has focused on legislation.

176. See U.S. GENERAL ACCOUNTING OFFICE, *PRODUCT LIABILITY: EXTENT OF "LITIGATION EXPLOSION" IN FEDERAL COURTS QUESTIONED* (1988); Marc Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986).

177. See Henderson & Eisenberg, *supra* note 82, at 521-22.

178. Doctrine was not overhauled in this era of increasing access to courts. See George L. Priest, *Products Liability and the Accident Rate*, in *LIABILITY: PERSPECTIVES AND POLICY* 184, 202-07 (Robert E. Litan & Clifford Winston eds., 1988) (summarizing cases). Gary Schwartz describes the change as an increase in "aggressiveness"; courts used expansively the powers they had all along. See Gary T. Schwartz, *Product Liability and Medical Malpractice in Comparative Context*, in *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* 28, 31, 32-33 (Peter W. Huber & Robert E. Litan eds., 1991).

179. See *supra* note 26; see also Priest, *Enterprise Liability*, *supra* note 1 (identifying Kessler and James of Yale as originators of enterprise liability).

Along with acceptance, however, has come the complaint that the reform violates a jurisdictional norm. No movement, according to the critics, is sufficiently representative of the affected population to be allowed to create public law. Jurisdictional opposition rejects public-law reform because of its excessive scope.

The tort reform results—failure at the uniform-law and congressional levels, success in the state legislatures—highlight this position. Focused constituencies were able to identify an area or two of products liability law and spur lawmaking to change that area; thus they achieved change in most states. When, however, reformers proposed a federal law, critics opposed the legislation not only for what it said, but on grounds of federalism.¹⁸⁰ Easier to reject, the UPLA simply was not adopted as a whole, or even in large part, by any state.¹⁸¹

Like the tort reform movement, strict products liability survived part, but not all, of a jurisdictional challenge. Most American courts accepted the new expression of products liability written in the major Traynor opinions and Section 402A of the Restatement. They were willing to focus on the product, inferring responsibility from the existence of a defect. Generally they have refused, however, to deem a product defective when reasonable conduct by the defendant could not have averted the harm. The downfall of *Beshada*¹⁸² shows where courts have drawn the line; even where strict liability appears strict indeed (manufacturing defects, express warranty), the doctrine accords with the notion of a reasonable manufacturer. Courts, in sum, have been willing to accept shifts in the burden of proof and also to create an intangible sense of expansion, but they have stopped short of accepting pure loss spreading.

The jurisdictional claim now can be seen in some light. It questions reform of private law to fulfill collective goals. This claim is at its most persuasive when the public-law goal appears to be reallocation of the distribution of assets in society. The objection is vulnerable to abuse. A reactionary critic could no doubt find jurisdictional fault with any change in the law because the change will have distributional effects. Taking the jurisdictional objection seriously does not require endorsement of reaction, however. The magnitude of the distributional effect can separate mere reaction from a complaint worth noting. A reform of

180. See Harvey S. Perlman, *Products Liability Reform in Congress: An Issue of Federalism*, 48 OHIO ST. L.J. 503 (1987); SENATE REPORT, *supra* note 17, at 54 (statement of Senator Hollings); Marshall S. Shapo, *Product Liability, Plain and Simple; Tort Law "Reform," Baroque and Messy*, in *PRODUCT LIABILITY REFORM*, *supra* note 53, at 15.

181. See Lipsen, *supra* note 30, at 250 (stating that only two states passed bills modeled on the UPLA, and both were vetoed by governors).

182. See *supra* notes 104-06 and accompanying text.

private law that generates widespread jurisdictional complaint is public law, and goes too far.

I am not, I believe, retreating from analysis into polltaking. Arguing that private law deserves a degree of isolation from public reform, I have relied on the premise that most citizens in democracies prefer this separation. Where they do not decry change in private law—for instances, a wrongful death statute, the Uniform Commercial Code—as exceeding jurisdictional bounds, it is reasonable to infer that the reform is corrective of private law rather than an attempt to create public law.

IV. TOWARD A PRIVATE LAW OF PRODUCTS LIABILITY

Having presented some of the shortcomings of a public law of products liability, I would turn now to the task of explaining what a private law might look like, how it would function, and why it is superior to its public-law counterpart. In its simplest description, a private law of products liability would mediate differences concerning a contendedly defective product without attention to the effects of this case on policy objectives or collective wealth. As I have tried to show, all types of public products liability law tend to disappoint their advocates. Private products liability law can be viewed in negative terms. It does not announce objectives, it cannot be bent or handicapped to produce some optimal result, and, in its modesty, it does not generally let its adherents down.¹⁸³

But it is impossible to devise a personal injury law for a democracy without commenting on the kind of extrinsic policies to which I have alluded. No society can adjudicate disputes without making choices about what matters in that society.¹⁸⁴ A pure private law of products liability, unaffected by policy, consequentialism, or tradeoffs, exists nowhere.¹⁸⁵ Thus some work of description remains.

First, one must look at the array of hopes grouped together as public goals. When stated specifically, the controversial goals of products liability reformers are loss spreading and reduced costs to business. The categories of

183. Cf. GRANT GILMORE, *THE AGES OF AMERICAN LAW* 109 (1977) (“As lawyers we will do well to be on our guard against any suggestion that, through law, our society can be reformed, purified, or saved.”).

184. The examples are numerous. Only “tortious conduct” can be the basis of a tort action; contracts made by minors are voidable.

185. See Symposium, *supra* note 32. My colleagues Steven Heyman and Richard Wright have thought carefully about this point while writing about the jurisprudence of Aristotle, and I have benefitted from exchanges with them.

improvement and reconciliation, though accurate, describe those hopes in a more euphemistic way, as do my prior categories: increased predictability, adjusted costs of doing business, enhanced consumer welfare, and freer flow of goods. These descriptions promote the goals to an unconverted audience. As I suggested in my brief discussion of the jurisdiction question, controversy is a useful measuring device. The point where reform proposals create conflict is a good place to begin skepticism about the reform. But the blander goals of improvement and reconciliation deserve some deference. Reform of products liability doctrine is not the means to those ends. The basic ways to achieve social benefits are spending and sanction.

Thinking about the option of spending and sanction to achieve public ends clarifies for the reforming society what it wishes to express in doctrine. The woolly "goals" detailed in Part II disappear. In the sections below, with the help of references to the products liability law of Europe, I explore the path toward a mature private law.

A. Regulation and Social Insurance

A private law of products liability cannot be indifferent to goals. It requires, as a backdrop, commitment to the objectives of personal injury law. Those objectives are reducing the likelihood of future harm and compensating injured persons. These two collective benefits help to justify a social apparatus, paid for by the state, to resolve disputes; they assert a state interest in questions of individual harm.¹⁸⁶

Arguments in favor of more regulation and social insurance to accomplish the goals now served by tort law are so familiar as to warrant only the briefest summary.¹⁸⁷ Liability cannot reduce risk, nor deter harm, so effectively as

186. Steven Smith has argued that the objective of tort law is dispute resolution, and that "compensation, deterrence, or punishment are merely means which the system employs as appropriate to achieve its primary end." Steven D. Smith, *The Critics and the "Crisis": A Reassessment of Current Conceptions of Tort Law*, 72 CORNELL L. REV. 765, 767 (1987). The point is attractive, but it requires elaboration (which Professor Smith does offer) to say why the state must provide a forum for dispute resolution. Some view of justice is needed. Following Aristotle, several writers connect dispute resolution with corrective justice. Corrective justice alone would mandate the existence of civil law, courts, and enforcement of judgments, but not (necessarily) published opinions, open tribunals, or scholarly literature about injury law, among other things. It would also not require the state to impose fines or administrative constraints, nor the payment of welfare allotments.

187. See, e.g., W. Kip Viscusi, *Toward a Diminished Role for Tort Liability: Social Insurance, Government Regulation, and Contemporary Risks to Health and Safety*, 6 YALE J. REG. 65 (1989) (containing economics arguments); Stephen D. Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 555 (1985) (asserting the failure of the liability system).

regulation; nor can it compensate so effectively as social insurance.¹⁸⁸ Few would dispute the theoretical appeal of the argument in favor of regulation and social insurance.¹⁸⁹

To move toward the specific—and to elaborate my premise that regulation and social insurance do not exist, in any serious way, in the United States—I define my terms. Arguing in favor of “regulation,” I have in mind an agency with broad authority over product safety: either a revitalized and better-funded Consumer Product Safety Commission, or a successor.¹⁹⁰ By “social insurance” I refer to an acceptance of responsibility by government to protect individuals when certain harms—illness, temporary total unemployment, permanent total disability, partial disability, or a lack of minimal income—befall them.¹⁹¹

These ideas are not hopelessly utopian: some elements of this world have been established in Europe, although fitfully. Social insurance varies among European countries. For several years the trend has been toward retrenchment.¹⁹² But the European commitment to the well-being of citizens generally exceeds that of the United States, and national governments manage to afford this level of support without impoverishing themselves. Collective prosperity can be enhanced through reform, as public-law advocates maintain, but the reform measure that has demonstrated achievement is social insurance, not changes in liability rules.

In regulation, too, Europe provides some guidance. A federal safety law, adopted by the European Community, has the potential to demonstrate the

188. See Viscusi, *supra* note 187, at 66.

189. See generally CASS R. SUNSTEIN, *AFTER THE RIGHTS REVOLUTION: RECONCEIVING THE REGULATORY STATE* 74-110 (1990) (describing the promise of regulation and how it fails).

190. Product safety regulation in the United States today is the task of the underfunded and disengaged Consumer Product Safety Commission, with ancillary involvement by other agencies: the Environmental Protection Agency (jurisdiction over certain products, such as asbestos), the National Highway and Traffic Safety Administration (automobiles and related products), the Food and Drug Administration (drugs, cosmetics, medical devices and food), and the Occupational Safety and Health Administration (products in the workplace), among others. State and local governments play a very small role. Most observers of product safety regulation agree that the CPSC has a meager record of accomplishment, and that the other agencies, which have achieved some success, could do better with more funding and a greater commitment to regulation in the national administration. For a rare defense of the CPSC record—although hardly a paean—see DAVID BOLLINGER & JOAN CLAYBROOK, *FREEDOM FROM HARM: THE CIVILIZING EFFECT OF HEALTH, SAFETY AND ENVIRONMENTAL REGULATION* 163-87 (1986).

191. I derive my list from an American Law Institute report. See 2 *AMERICAN LAW INSTITUTE, REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY: APPROACHES TO LEGAL AND INSTITUTIONAL CHANGE* 559-74 (1991).

192. See Bernstein, *A Duty to Warn*, *supra* note 155.

promise of regulation.¹⁹³ Although internal politics in the Community produced a safety directive much weaker than the original Commission proposal¹⁹⁴ (another instance of dilution), the measure retains some importance. It affirms a general safety obligation and a requirement for producers to provide some information about risks.¹⁹⁵ It imposes on the nations of Europe an obligation to empower authorities at the national level; these authorities in turn report to the European Commission.¹⁹⁶ Although the Safety Directive has lost the bold language of its earlier incarnation, it provides a blueprint for the mission that was expressed by the unit head who monitors it: the Safety Directive can "improve consumer confidence in the safety of products in the internal market."¹⁹⁷

The European experience offers realistic support for regulation and social insurance. On a conceptual level, regulation and social insurance are superior to liability in that they address their goals directly. To achieve market deterrence and compensation through liability in the aggregate requires cooperation from several individuals and institutions, even if the perils I have described are put to one side. A notion of competence—that is, institutional ability to attain a goal—mandates regulation and social insurance to achieve compensation and deterrence.

I want to make the more controversial claim, however, that products liability reform cannot exist without an explicit and meaningful commitment to these two institutions. Advocates of tort reform or defenders of strict products liability cannot contend that their measure is better than a combination of regulation and social insurance as an instrument of collective ends on which the entire *polis* can agree. Private-law adherents may disagree with these advocates about their proposal, but until the two sources of real collective benefit are acknowledged, the debate cannot even begin.

This requirement would help separate genuine public-law reformers from opportunists. The business wing of the tort reform movement in particular has on occasion endorsed regulation as a theoretical alternative to liability, but resisted actual rules. Social insurance is financed by taxes, and at least one tort reform writer has conveyed his low opinion of the American liability system

193. 1992 O.J. (L 228) 35 [hereinafter Safety Directive].

194. See 1989 O.J. (C 193) 32. The draft proposal mandated the creation of a well-funded regulatory sector in each country, data collection to determine potential hazards to safety, and centralized reporting.

195. Safety Directive, *supra* note 193, art. 3 (2).

196. *Id.*, art. 5.

197. Interview, Gérard Zählen, Chef d'Unité 3, Sécurité Générale des Produits et Services, Commission of the European Communities, Brussels, Oct. 29, 1992.

with the metaphor of tax.¹⁹⁸ The adversaries of business defendants in the plaintiffs' bar who equate strict products liability, as it has developed, with fairness and access to justice must likewise confront a possible conflict between what is good for them and what would serve their clients.

Arguments against regulation and social insurance warrant only a short response. A recurring complaint is that they are expensive: and both regulation and social insurance ultimately collide with cost-effectiveness.¹⁹⁹ Because neither measure is justified beyond a point, both regulation and social insurance must stop somewhere. From the view of products liability law, the right amount is reached when changes in the law no longer look attractive or plausible as a source of public benefit. An advanced society must continue to enhance safety and compensation for its members. Affluent countries can pay for a higher level of these goods.

Critics have observed that regulation has had a poor record in the United States.²⁰⁰ Its major problem is inadequate enforcement,²⁰¹ although more intractable problems of perverse adaptation to regulation (what economists call offsetting behavior²⁰²) may exist; and regulation is always limited by the ability of regulators in the design and scope they choose. Serious enforcement, however, is still untried. It ought to come before doctrinal reform.

There remains a valid argument against emphasizing regulation and social insurance at the expense of liability. American adversaries of tort reform have defended strict products liability as a source, albeit not an ideal one, of compensation and deterrence.²⁰³ Because increases in regulation and social insurance are unlikely to occur—in part due to the efforts of some constituents of the tort reform movement—these advocates view expansive liability as a necessary, if blunt, instrument for desired ends. When weakly stated, the contention has some merit. It requires one qualification, however: Acknowledgement of the benefits of expansive liability is not a public law reform at all. By defending the status quo, it looks backward rather than forward, and proposes no change. Thus what Traynor, Prosser, and other innovators created in decades past is crucially different from the posture now staked out by adversaries of reform.

198. See HUBER, *supra* note 16, at 11.

199. See SUNSTEIN, *supra* note 189, at 90-91. *But see* BOLLINGER & CLAYBROOK, *supra* note 190, at 199-203 (containing a critique of cost-benefit analysis).

200. See INSTITUTIONAL FRAMEWORK, *supra* note 161, at 243-49 (containing a summary by Kip Viscusi of his and others' studies of American regulation).

201. See *id.*; Teresa M. Schwartz, *A Product Safety Agenda for the 1990s*, 45 WASH. & LEE L. REV. 1355, 1368 (1988); SUNSTEIN, *supra* note 189, at 74-110.

202. See INSTITUTIONAL FRAMEWORK, *supra* note 161, at 247-49 and sources cited therein.

203. See Claybrook, *supra* note 36; Preiser, *supra* note 54.

The defense of expansive strict products liability properly challenges all products liability reform proposals now current in the United States, from measures reducing the liability exposure of business to more arcane ideas such as "neo no fault"²⁰⁴ and contract theories.²⁰⁵ It establishes the merits of the status quo. It helps to set a baseline of deterrence and compensation: if reformers respect these goals, then they are obliged not to advocate a reform that will lower the aggregate of these benefits. The posture has its virtues.

But much energy is needed to maintain it, and advocates may not be expanding their energy wisely when they work to protect a circuitous and flawed source of social benefit. The strategic choice to defend expansive liability rather than work for regulation and social insurance is easier in the short run: it favors the status quo rather than attempts real change. Over time, however, the task of creating meaningful compensation and deterrence will require more effort toward affirmative change. Public-law defenders of expansive liability such as Joan Claybrook and Ralph Nader reflect this dilemma in their careers, and it is worth noting that they have chosen to expend more of their reform efforts on regulation than liability law.

Regulation and social insurance, should they become serious projects, might acquire an interested constituency like the plaintiffs' bar and tort reform professionals, but right now the class of occupation that will profit from them is unassembled. Thus these two methods of achieving public benefit are not only more direct than expanded liability but also less vulnerable to the charge of venality described above. Separating private questions of liability from instrumental purpose avoids an appearance as well as a reality of conflict between product users and their advocates.

B. A Private Law

Once a social policy of regulation and social insurance is accepted as the source of collective benefit, a private law of products liability can take shape. This private law applies to disputes between individuals. It acknowledges the collective status of plaintiff and defendant, however, by adjusting the burden of proof. As a group, products users are generally at a disadvantage with respect to information: it is fairer to require manufacturers to explain, after an injury has been caused by their product, why the product was not defective. As several writers have noted, this simple approach best explains products liability law.²⁰⁶

204. See Jeffrey O'Connell, *A "Neo No-Fault" Contract in Lieu of Tort: Preaccident Guarantees of Postaccident Settlement Offers*, 73 CAL. L. REV. 898 (1985).

205. See *id.*; Epstein, *Products Liability*, *supra* note 54.

206. See Powers, *supra* note 10; Schwartz, *supra* note 99.

A second look at European law helps illuminate this subject. Whereas labels like "strict products liability" or "fault principle" mislead, the dichotomy between private and public laws of products liability indicates a real difference in approach.²⁰⁷ Tort reform and strict products liability view the participants in products liability as members of classes who need either more or less advantage in the system. A private law approach notes only the least controversial of the class differences—that those who market a product know more about it than those who have no control or knowledge of its manufacture—and thereafter leaves the dispute up to the litigants.

For many years, European law has been able to develop a private law of products liability by revising old doctrines rather than proclaiming innovations.²⁰⁸ The civil law tradition lacks a formal articulation of strict liability, and the civil law of defective products derives from obligations grounded in tort and contract. Thus far the idea of strict products liability, whereby the plaintiff can recover though unable to prove fault or the existence of a contract, appears alien to the civil law tradition. But a private law can work around these principles.

French law, in particular, benefitted from a tradition of broadly stated laws that allowed for judicial creativity. French jurists were thus able to fashion a rule of strict liability for defective products. One French Civil Code statute provides that a seller warrants a chattel to be free of latent defects that make the item unfit for its intended use.²⁰⁹ Following a long tradition dating back to Celsius, French courts have interpreted this law to impose liability even on sellers who are ignorant of a defect and act in good faith.²¹⁰ French courts also worked around the privity rule,²¹¹ as Cardozo was later to do in *MacPherson v. Buick Motor Co.*²¹²

The French principle of *fait de la chose*²¹³ recognized that things in one's charge could "act." Like traditional strict liability in Anglo-American law, *fait*

207. See *supra* note 178.

208. For a further discussion, see Anita Bernstein, L'Harmonie Dissonante: *Strict Products Liability Attempted in the European Community*, 31 VA. J. INT'L L. 673, 697-700 (1991) [hereinafter Bernstein, L'Harmonie Dissonante].

209. Code Civil [C. Civ.], art. 1643 [Fr.].

210. See H. DUINTJER TEBBENS, INTERNATIONAL PRODUCT LIABILITY 84-85 (1979) (citations omitted).

211. *Id.* at 87.

212. 111 N.E. 1050 (N.Y. 1916).

213. See Hessel E. Yntema, *The Law of Obligations*, in CIVIL LAW IN THE MODERN WORLD 69-70 (Athanasios N. Yiannopoulos ed., 1965); see also André Tunc, *Introduction* to 11 INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW 28 (André Tunc ed., 1974).

de la chose linked harm to the lapse of an individual.²¹⁴ French courts have also held that the same condition of a product that would give rise to liability by a seller to a buyer constitutes fault in regard to third persons.²¹⁵ They achieved this advance in doctrine by reinterpreting *fait de la chose*, which imposes liability on the keeper of a thing. The keeper became the manufacturer with the help of *garde de la structure*, a concept that focused on control of the internal dynamism.²¹⁶ These new interpretations created a doctrine that required a plaintiff to prove only a defect causally linked to injury. In virtually all cases, this proof can constitute an irrebuttable presumption of fault.²¹⁷

Consistent with this description of private law, European courts have also manipulated the burden of proof. Of the countries that are members of the European Community, France has altered the burden of proof most in favor of plaintiffs, with Luxembourg following closely and Belgium accepting a slightly moderated form of French innovation.²¹⁸ These countries have achieved strict liability while refraining from the attempt to create public law.

V. CONCLUSION

This theory of products liability reform describes identifiable stages that take place during attempts to change products liability law. The theory is confined to reform of the law of industrialized democracies.²¹⁹ Industrialization is a necessary condition for well-developed products liability law; the existence of a democratic government means that reformers cannot

214. Both traditional and modern strict liability refer to liability for accidental harm based on the unusual nature of a hazard rather than negligent conduct. See RESTATEMENT (SECOND) OF TORTS § 519 cmt. d (1977); *Rylands v. Fletcher*, 3 H. & C. 774 (1865), L.R. 1 Ex. 265 (1866), L.R. 3 H.L. 330 (1868). Under strict liability, an actor who has created a risk in excess of what her community tolerates is held responsible for resultant harm. See George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972) (describing a paradigm of reciprocal risks). Although strict liability relaxes the fault requirement, activity by an individual is still the basis of liability. See *Golden v. Amory*, 329 Mass. 484, 109 N.E.2d 131 (Mass. 1952) (stating that there is no strict liability for an unforeseeable act of God). Compare *Noble v. Yorke*, 490 So. 2d 29 (Fla. 1986) (stating that strict liability is based on an owner's knowledge of vicious propensity of dog) with *Rolen v. Maryland Casualty Co.*, 240 So. 2d 42 (La. App. 1970) (stating there was no strict liability because owner's knowledge of vicious propensity not shown).

215. See Malinvaud, *Responsabilité du Fabricant*, in GAZETTE DU PALAIS II, 463 No. 20 (1973).

216. See Berthold Goldman, *Garde de la Structure et Garde du Comportement*, II MELANGES ROUBIER, 51 Tunc. (1957).

217. See Michael Whincup, *Product Liability Laws in Common Market Countries*, 19 COMMON MKT. L. REV. 521, 530-31 (1982).

218. See Orban, *supra* note 62, at 350.

219. The theory addresses attempts to manipulate doctrine rather than to preempt it: hence a major preemption of accident law such as the New Zealand compensation scheme, which covers most product-caused injuries, has not been of concern here.

change the law by command; they depend on persuasion and cooperation.

Reform begins with the observation that products liability law is a system. With that observation comes an almost simultaneous desire for improvement. In addition to improvement, reformers attempt reconciliation of doctrine. Eager to promote their reform, proponents declare goals that they hope will appear attractive to those who are not members of the reform effort. A need to promote the reform is the first difficulty that advocates encounter: they find that opposition and dilution undermine their measure. Although reform can achieve some success, this gain is accompanied by perverse results.

In the Introduction, I referred to the need for analysts of products liability reform to suspend temporarily their partisanship for or against "tort reform" or traditional "strict products liability," which are battle cries as well as names of reforms. Some distance is necessary to grasp the general characteristics of all reform movements. An opportunity for this kind of nonpartisanship came my way in my study of products liability reform in the European Community.²²⁰ Leaving the American conflict behind, I saw in the European Community products liability directive²²¹ all of the elements of public-law reform.

Advocates of products liability reform in the Community sought to improve and reconcile the various laws of the member nations. Their vision of improvement focused on consumer protection and risk shifting.²²² The improvement and reconciliation of divergences in the Community, a process known as "harmonization," is aimed at the advancement of economic and social progress²²³—public-law goals reminiscent of the American efforts studied here. Proponents of reform via directive stated their goals of increased predictability, adjusted costs of marketing products, enhanced consumer welfare, and freer flow of goods.²²⁴

Opposition and dilution promptly followed. A draft products liability directive was blocked by industry, as well as representatives from member

220. See Bernstein, *Looking at Europe*, *supra* note 32; Bernstein, *A Duty to Warn*, *supra* note 155; Bernstein, *L'Harmonie Dissonante*, *supra* note 208.

221. Council Directive 85/374 of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, 1985 O.J. (L 210) 29 [hereinafter Directive].

222. See Commission Proposal of 14 October 1976 for a Council Directive Relating to the Approximation of the Laws, Regulations, and Administrative Provisions of the Member States Concerning Liability for Defective Products, 1976 O.J. (C 241) 9 [hereinafter Proposal].

223. See TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY, art. 100.

224. See Proposal, *supra* note 222, Preamble.

nations with important concentrations of manufacturers.²²⁵ Even though the European Community does not have a tradition of federalism, limited national powers, narrow construction of measures contrary to a common law, or incrementalism,²²⁶ the attempt to create a Community law of products liability faced the recurring question of jurisdiction.²²⁷ After dilution, the proposed directive did not require member states to impose caps on damages, and, as in American strict liability, a state-of-the-art defense emerged; moreover, the most controversial provisions of the new law—its true changes in the law—became optional to each member nation.²²⁸

Even in its diluted form, the revised directive faced opposition in most member nations. Only one out of the twelve countries implemented the directive in a manner both timely and satisfactory to the European Commission.²²⁹ But as of this writing, ten of the twelve nations have obeyed the directive, and implemented an opposed-and-diluted reform measure. Its effects remain to be seen.

The European Community is a laboratory in which to test my theory of products liability reform. The directive is almost in place. Will perversity, futility, and jeopardy follow?²³⁰ Can expansionist reform conquer patterned inequities?²³¹ Will judges cooperate? My dour predictions are on record.²³²

225. See Kathleen M. Nilles, Note, *Defining the Limits of Liability: A Legal and Political Analysis of the European Community Products Liability Directive*, 25 VA. J. INT'L L. 729, 753 (1985).

226. See John T. Lang, *Development of European Community Constitutional Law*, 25 INT'L LAW 455 (1991).

227. See *Legal Affairs*, *supra* note 62, at 7.

228. See Directive, *supra* note 221, art. 15(1)(b) (state-of-the-art defense may be suppressed by national law); *id.*, art. 16(1) (optional cap on damages).

229. See Bernstein, *L'Harmonie Dissonante*, *supra* note 208.

230. See *supra* note 29.

231. The general rule in Europe is that the poor do not sue: unless that tradition changes, the expansive law reform of the Directive will expand the law only to favor advantaged victims. See *supra* part III.B.2. Little information is available about the importance to plaintiffs of their race and sex in European litigation, mainly because civil liability awards in Europe have not been the subject of alarmed inquiry. In the Directive, however, Europe has reversed its traditional distaste for litigation. The Directive opens the courthouse doors. This change suggests a new need for empirical investigation of how race, sex or another immutable characteristic—nationality, perhaps—affects the fate of a litigant in a European court.

For descriptions of the limited access to courts in Europe, see Erhard Blankenburg & Ulrike Schultz, *German Advocates: A Highly Regulated Profession*, in 2 *LAWYERS IN SOCIETY: THE CIVIL LAW WORLD* 124, 144 (Richard L. Abel & Philip S.C. Lewis eds., 1988) [hereinafter 2 *LAWYERS IN SOCIETY*]; Kees Schuyt, *The Rise of Lawyers in the Dutch Welfare State*, in 2 *LAWYERS IN SOCIETY*, 200, 209, 212; Anne Boigeol, *The French Bar: The Difficulties of Unifying a Divided Profession*, in 2 *LAWYERS IN SOCIETY*, 258, 280-81.

According to Richard Abel, who has surveyed the available material on barriers to litigation

In the future, new laboratories will emerge, as other democracies attempt to advance their products liability doctrine. The perpetual tension between private law rules and the impulse toward synthesis will test this hypothesis about public law reform.

in Europe (he focuses on England), plaintiffs who are members of certain groups are disadvantaged. See Richard L. Abel, *£s of Cure, Ounces of Prevention*, 73 CAL. L. REV. 1003 (1985) (book review). See also Abel, *supra* note 37, at 796-802 (combining European and American data).

232. See Bernstein, *A Duty to Warn*, *supra* note 155; Bernstein, *L'Harmonie Dissonante*, *supra* note 208; see also Jane Stapleton, *Products Liability Reform—Real or Illusory?*, 6 OXFORD J. LEGAL STUD. 392 (1986) (discussing skepticism about Directive); cf. Robert C. Weber, *Japanese Law Edges Westward*, Nat'l L.J., Apr. 6, 1992, at 13 (discussing skepticism about nascent products liability reform in Japan).

