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# The Unappreciated Congruity of the Second and Third Torts Restatements on Design Defects

*Michael D. Green*<sup>†</sup>

## I. INTRODUCTION

Teaching products liability for the first time in 1980, I was baffled at how the California Supreme Court could have refused to provide more elaboration on the concept of defect.<sup>1</sup> While its resistance to adopting the *Restatement (Second)*'s "defective condition unreasonably dangerous"<sup>2</sup> language was understandable, even perhaps preferable, how could the court not have appreciated that the idea of a "defect" required elaboration in order for the fact finder to determine whether a product was sufficiently safe? Of course, eventually the California Supreme Court saw the light. In *Barker v. Lull Engineering Co.*, it relented on its refusal to provide further specification for the concept of defect and provided a two-pronged test for determining if a product was defective in design.<sup>3</sup>

I think now I understand the court's reluctance to provide more, reflected in its early post-section 402A products liability jurisprudence. I also appreciate now why I failed to comprehend the court's reticence. And the explanation for that appreciation sheds light on the *Restatement (Third)*<sup>4</sup> and its treatment of design defects, a matter that has generated much controversy and significant criticism. That is the subject that I would like to pursue in this symposium's reflection on the tenth anniversary of the *Products Liability Restatement*.

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<sup>†</sup> Williams Professor of Law, Wake Forest University School of Law. The author thanks Brandon Barnes and Meredith Green for their diligent research assistance. The author is also indebted to Oscar Gray, who explained a central point in this Article in a taxicab in Philadelphia after an Advisers meeting for the *Restatement (Third) of Torts: Products Liability*. I am grateful as well for helpful comments at a faculty colloquium at Washington University School of Law and students in Professor Kim Norwood's products liability class at Washington University.

<sup>1</sup> *Cronin v. J.B.E. Olson Corp.*, 501 P.2d 1153, 1162-63 (Cal. 1972).

<sup>2</sup> RESTATEMENT (SECOND) OF TORTS § 402A (1965).

<sup>3</sup> 573 P.2d 443, 455-56 (Cal. 1978).

<sup>4</sup> I refer to the *Restatement (Third) of Torts: Products Liability* alternatively as either *Restatement (Third)* or *Products Liability Restatement* in this Article. By contrast, I use *Restatement (Third) of Torts* to refer to the compendium of individual pieces, including the *Products Liability Restatement*, that will comprise the entirety of the third iteration of the torts Restatement.

This Article is not intended as an all-encompassing defense of the *Restatement (Third)*'s treatment of design defects.<sup>5</sup> Rather its goal is more modest. What I hope to demonstrate, contrary to contending critics of the *Restatement (Third)*, is the congruity between the law adopted in the *Restatement (Third)* and the law in the *Restatement (Second)*. To do that, though, I will have to spend more time than I would have thought when I began this Article on the scope of the *Restatement (Second)* with regard to manufacturing defects and design defects.

I begin in Part II of this Article by setting forth contending and conflicting claims about the scope of section 402A and its treatment of design defects. While one of those claims was made twenty years ago, well before the *Restatement (Third)* process began, it contends that section 402A was not about design defects. The conflicting claim, one raised vociferously during the drafting of the *Restatement (Third)*, is that it fails to continue the strict liability reform of section 402A by abandoning consumer expectations as the basis for a design defect. Part III delves into the former claim, by Professor George Priest, that section 402A was meant to apply only to manufacturing defects, leaving alleged design and warnings defects to be decided under a negligence standard. I reanalyze the evidence that Professor Priest amassed in support of his claim, both in the scholarship leading up to the adoption and approval of section 402A and in the structure of that section and its comments. Having found Priest's claim wanting, Part IV proceeds to explain the consistency of the *Restatement (Second)* and *Restatement (Third)* in their treatment of design defects, a consistency that escapes critics on both sides of the claims identified in Part II.

## II. THE CRITIQUE OF DESIGN DEFECTS IN THE PRODUCTS LIABILITY RESTATEMENT

I do not attempt to address all of the criticism of the *Products Liability Restatement's* treatment of design defects, but there are two competing themes that I pursue. One was first raised by George Priest, before we even knew that Products Liability would be the first piece of the *Restatement (Third) of Torts*. In 1989, Priest claimed that courts had strayed from what the founders intended and from what section 402A

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<sup>5</sup> For example, one might reasonably have thought that the design defect standard in section 2(b) of the *Restatement (Third) of Torts: Products Liability* could have been more transparent about adopting a risk-utility standard. One might also have preferred placing the burden of proof on the foreseeability of risk on the defendant, on the grounds that it almost always exists in the case of durable goods. Actually, comment m to section 2 comes close to adopting such a placement in the burden of proof, despite black letter language that ignores the matter. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2 cmt. m (1998). And for those committed to compensation and loss spreading, there is no doubt that the *Restatement (Third)* represents a retreat from the apogee of the strict liability movement when courts struggled to define a regime for strict liability different from the reasonableness-balancing of negligence.

was intended to address.<sup>6</sup> According to Priest, section 402A was limited to manufacturing defects and in extending strict liability beyond those kinds of defects to include design and warnings, courts had strayed from the original intent.<sup>7</sup> Priest's claim has more widespread contemporary acceptance than I had appreciated. At the symposium where the papers in this issue of the *Brooklyn Law Review* were presented, both Aaron Twerski and Hildy Bowbeer, the former a co-Reporter for the *Products Liability Restatement* and the latter a prominent products liability lawyer, repeated the claim that section 402A was meant to apply only to manufacturing defects. Professor Twerski has since disavowed that claim.<sup>8</sup> In Priest's view, design and warnings issues were to be left to

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<sup>6</sup> See George L. Priest, *Strict Products Liability: The Original Intent*, 10 CARDOZO L. REV. 2301, 2301-05 (1989).

<sup>7</sup> *Id.* at 2303-04.

<sup>8</sup> See Aaron D. Twerski & James A. Henderson, Jr., *Manufacturers' Liability for Defective Product Designs: The Triumph of Risk Utility*, 74 BROOK. L. REV. 1061 (2009). Scholars who have been misled by Priest's claim over the years since his article was published include: Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683, 702 n.80 (1993); Larry E. Ribstein, *The Mandatory Nature of the ALI Code*, 61 GEO. WASH. L. REV. 984, 1016 n.173 (1993); Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEGAL STUD. 807, 808 (1994); Peter L. Strauss, *Courts or Tribunals? Federal Courts and the Common Law*, 53 ALA. L. REV. 891, 920 (2002); Peter Nash Swisher, *Products Liability Tort Reform: Why Virginia Should Adopt the Henderson-Twerski Proposed Revision of Section 402A*, Restatement (Second) of Torts, 27 U. RICH. L. REV. 857, 863 n.28 (1993) (stating that the "authors of section 402A primarily focused" on manufacturing defects); Michael J. Töke, Note, *Categorical Liability for Manifestly Unreasonable Designs: Why the Comment d Caveat Should Be Removed from the Restatement (Third)*, 81 CORNELL L. REV. 1181, 1190 & n.48 (1996) (Section 402A "was intended to apply only to latent manufacturing defects."); see also JANE STAPLETON, PRODUCT LIABILITY 25 & n.66 (1994) (citing Priest for the proposition that "the historical record suggests that the principal aim . . . was merely to make uniform and explicit the strict standard for manufacturing errors"); Mary J. Davis, *Design Defect Liability: In Search of a Standard of Responsibility*, 39 WAYNE L. REV. 1217, 1233 & n.50 (1993) ("Professor Priest argues persuasively that the mismanufactured product constituted the intended reach of strict liability under section 402A."); Victor E. Schwartz & Rochelle M. Tedesco, *The Re-emergence of "Super Strict" Liability: Slaying the Dragon Again*, 71 U. CIN. L. REV. 917, 923-24 & n.50 (2003) (lawyers who represent defendants' interests stating that "several scholars" agree that section 402A is limited to manufacturing defects and citing Priest for that proposition). The *American Law Institute's Reporters' Study* also belongs on this list. See 2 AM. LAW INST., REPORTERS' STUDY ON ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 35 & n.7 (1991) (noting that "the law explicitly authorized actions based on defects in manufacture").

Douglas Kysar claims that the consumer expectations test in section 402A was not intended to address design defect litigation and cites Priest in support. See Douglas A. Kysar, *The Expectations of Consumers*, 103 COLUM. L. REV. 1700, 1713 & n.53 (2003). I do not disagree with Kysar on that point, although his suggestion that all of the product failure cases were manufacturing defect cases is not supportable. See *id.* at 1714. By contrast, Richard Wright asserts that section 402A "clearly was meant to encompass design and warning defects," which is a tad misleading given the lack of attention by the founders to the source of the defect, a matter that Wright acknowledges and appreciates. See Richard W. Wright, *The Principles of Product Liability*, 26 REV. LITIG. 1067, 1068-69 (2007).

Rick Cupp and Bob Rabin share my view that the founders and early courts were simply not thinking in terms of specific kinds of defects. See Richard L. Cupp Jr. & Danielle Polage, *The Rhetoric of Strict Products Liability Versus Negligence: An Empirical Analysis*, 77 N.Y.U. L. REV. 874, 889-90 (2002); Robert L. Rabin, *Restating the Law: The Dilemmas of Products Liability*, 30 U. MICH. J.L. REFORM 197, 202-03 (1997); see also Gary T. Schwartz, *Considering the Proper Federal Role in American Tort Law*, 38 ARIZ. L. REV. 917, 947 & n.185 (1996).

negligence.<sup>9</sup> While Priest was not speaking to the next-generation Restatement, the implications of his critique would be an important consideration for any effort to draft the next Restatement treatment of products liability.

The second critique is of the design defect standard in section 2(b) of the *Restatement (Third)*. That subsection mandates that a reasonable alternative design be demonstrated in order to prove a design defect exists.<sup>10</sup> Once the plaintiff identifies an alternative design, the jury must compare the additional risks that the alternative design can eliminate from the existing design with the additional costs entailed in adopting the alternative design. This risk-utility standard is, frankly, one that reflects a negligence balancing.

Although many commentators have raised criticisms about the *Restatement (Third)*'s treatment of design defects, I focus here on those that decry the *Restatement (Third)* for abandoning the strict liability adopted in section 402A and its use of consumer expectations as the basis for determining defectiveness. Ellen Wertheimer, a products liability scholar, has written extensively on the failed promise of the *Restatement (Second)* in the provisions of the *Restatement (Third)*.<sup>11</sup> She has argued that requiring proof of a reasonable alternative design and that the existing design fails a risk-utility test<sup>12</sup> materially changes the standard for strict liability set out in the *Restatement (Second)*.<sup>13</sup> Similarly, Frank Vandall has charged that the reasonable alternative design requirement violates the core of what section 402A was about,<sup>14</sup> especially cases like *Greenman v. Yuba Power Products, Inc.*<sup>15</sup> Frequently, these critics have also asserted that the Reporters for the *Restatement (Third)* failed to follow the design defect jurisprudence that developed after widespread acceptance of strict products liability, which

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<sup>9</sup> See Priest, *supra* note 6, at 2303.

<sup>10</sup> See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b) (1998).

<sup>11</sup> See *infra* note 13.

<sup>12</sup> Contrary to the implications of what Wertheimer wrote, these are not two independent requirements. One cannot assess risk-utility for a given design without an alternative design by which to frame the risk-utility analysis. See Michael D. Green, *The Schizophrenia of Risk-Benefit Analysis in Design Defect Litigation*, 48 VAND. L. REV. 609, 616-17 (1995).

<sup>13</sup> See Ellen Wertheimer, *The Third Restatement of Torts: An Unreasonably Dangerous Doctrine*, 28 SUFFOLK U. L. REV. 1235, 1251-52, 1255 (1994); see also Ellen Wertheimer, *The Smoke Gets in Their Eyes: Product Category Liability and Alternative Feasible Designs in the Third Restatement*, 61 TENN. L. REV. 1429, 1431-32 (1994) ("The *Restatement (Third)*, however, materially increases the plaintiff's burden by requiring that the plaintiff show not only that the product fails a risk-utility test, but also that an alternative feasible design existed at the time of manufacture and that the manufacturer should have used that alternative design.").

<sup>14</sup> See Frank J. Vandall, *The Restatement (Third) of Torts: Products Liability Section 2(b): The Reasonable Alternative Design Requirement*, 61 TENN. L. REV. 1407, 1407, 1423 (1994) (stating that the *Restatement (Third)* proposes a "radical restructuring" of existing products liability theory).

<sup>15</sup> 377 P.2d 897 (Cal. 1963).

has not, for the most part, insisted on proof of a reasonable alternative design.<sup>16</sup>

Rather than engage now with this strain of criticism, I return to the conflicting Priest position. If Professor Priest is right, then criticism of the *Restatement (Third)* for adopting a negligence standard for design defects at least should appreciate that the *Restatement (Third)* remains true to the original reform exemplified in section 402A. Indeed, one might say that the *Restatement (Third)* returns us from a frolic and detour in which many courts engaged in the years after section 402A. During this period, courts struggled to find a form of “strict liability” to impose on products that was different from the extant negligence regime that operated before section 402A was adopted. If Priest’s hypothesis that section 402A limited strict liability to manufacturing defects is correct, then employing consumer expectations to determine how safe a product should be made, imputing knowledge of dangers that were unknown at the time of manufacture and sale, and similar steps were mistaken efforts that went beyond the more modest intentions of section 402A. In addition, the *Restatement (Third)* strays from its predecessor in permitting an inference of defect from the circumstances surrounding the product’s performance regardless of whether the source of the defect is one of design or manufacture.<sup>17</sup>

### III. THE PRIEST HYPOTHESIS

Professor Priest relies on two sources of evidence in support of his theory that section 402A was intended to be limited to manufacturing defects. The first is the academic literature leading up to the adoption of section 402A, which was published by Prosser, the Reporter for the *Restatement (Second)*,<sup>18</sup> the Advisers for the *Restatement (Second)* of

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<sup>16</sup> See Roland F. Banks & Margaret O’Connor, Commentary, *Restating the Restatement (Second), Section 402A—Design Defect*, 72 OR. L. REV. 411, 412 (1993) (observing that the “definition of design defect” in the *Restatement (Third)* is a “substantial change” from section 402A of the *Restatement (Second)*); John F. Vargo, *Caveat Emptor: Will the A.L.I. Erode Strict Liability in the Restatement (Third) for Products Liability?*, 10 Touro L. REV. 21, 21 n.1, 22 n.2, 37-38 (1993) (noting that the *Restatement (Third)* substitutes negligence for strict liability of *Restatement (Second)*); Note, *Just What You’d Expect: Professor Henderson’s Redesign of Products Liability*, 111 HARV. L. REV. 2366, 2368 (1998); Patrick Lavelle, Comment, *Crashing into Proof of a Reasonable Alternative Design: The Fallacy of the Restatement (Third) of Torts: Products Liability*, 38 DUQ. L. REV. 1059, 1064-67, 1100-01 (2000) (accusing products liability *Restatement* of partisanship in favoring defendants and turning its back on the strict liability rules and policies contained in section 402A); Matthew R. Sorenson, Comment, *A Reasonable Alternative? Should Wyoming Adopt the Restatement (Third) of Torts: Products Liability?*, 3 WYO. L. REV. 257, 283 (2003) (“By . . . requiring the plaintiff to prove a reasonable alternative design, the *Restatement (Third)* moved far from the strict liability standard set out in Section 402A of the *Restatement (Second)*.”).

<sup>17</sup> RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 3 (1998).

<sup>18</sup> Prosser subsequently resigned as Reporter shortly before his death, and John Wade took over Reporter duties. Prosser was the Reporter at the time that section 402A was proposed and approved. See Herbert W. Titus, *Restatement (Second) of Torts Section 402 and the Uniform Commercial Code*, 22 STAN. L. REV. 713, 713 (1970).

*Torts*, and a small group of fellow travelers who were writing about products liability in the 1950s and early 1960s.<sup>19</sup> The second source of evidence is the structure of section 402A and its commentary, which reflect, on Priest's account, an assumption that the strict liability being described is limited to manufacturing defects (even if that terminology was not employed at the time).

A. *The Founders' Views*

I understand Priest's claim to be about the intent of the founders with regard to section 402A and not what the state of the law was in 1964 when section 402A was approved. As is well-known, section 402A was not a "restatement" of existing law. Rather, it reflected dissatisfaction with the existing state of the law that posed so many obstacles to establishing liability for dangerous products that caused harm. Prosser and the other founders conceived of section 402A as a means to transport the strict liability of implied warranty into tort law, stripping warranty of its contract impediments in the process. Relying on the slim foundation of contaminated food and riding the wave of a couple of late-breaking cases, Prosser forged section 402A as a progressive reform rather than a statement of existing law.<sup>20</sup> Thus, the evidence relevant to Priest's hypothesis is the normative positions of the founders—not their descriptive accounts of existing law.

Let me provide a contending theory of what was behind section 402A before proceeding to critique the Priest hypothesis. The strict liability proposed by section 402A was not limited to manufacturing defects. Indeed, that section, influenced by its warranty heritage—the then-existing source of strict liability in the law—employed a conceptual framework independent of specific types of defect.<sup>21</sup> Rather than the familiar three-defect world in which we find ourselves today, section 402A contemplated a performance-based idea for defect. If a product performed in a way that revealed a defect—regardless of its source—then it was defective. Thus, if a gun went off when being held by its owner without the owner engaging its trigger, the gun was defective and we need not trace the source of that defect. It is this alternative to the Priest manufacturing-defect theory that better accounts, in my view, for the evidence relating to what was intended in section 402A.

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<sup>19</sup> In addition to William Prosser, these commentators, all academics save for Justice Roger Traynor, include Dix Noel, Page Keeton, Fleming James, John Wade, and Traynor. These were all leading torts commentators in the middle of the twentieth century.

<sup>20</sup> See, e.g., Titus, *supra* note 18, at 713-15; see also George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 514-17 (1985) (criticizing Reporter Prosser for his exaggeration in extending his draft of section 402A to all products).

<sup>21</sup> See Cupp & Polage, *supra* note 8, at 889-90; Rabin, *supra* note 8, at 202-03; Schwartz, *supra* note 8, at 947 & n.185.

Before proceeding, let me point out one aspect of agreement between my explanation and Priest's. Section 402A was not about employing strict liability to determine how safe a product should be designed, the modern version of design defect litigation that emerged after courts accepted section 402A. I should explain that we can virtually always design a durable good to be marginally safer. A guard can be added to the pinch point of an industrial machine. If the guard is removable for maintenance purposes, then an interlock could be added to prevent use of the machine without the guard. We could extend this safety-for-cost tradeoff to extremes: cars, for example, could be designed like tanks and thereby eliminate almost all of the 40,000 traffic-related deaths and over two million personal injuries suffered each year by those riding on the nation's highways.<sup>22</sup> Nobody thought that section 402A would provide the metric for deciding how much safety should be built into industrial machinery or automobiles. At the same time, I do not think that section 402A was meant to be limited to manufacturing defects.

Priest explains his theory that section 402A was to be so limited and that negligence was to remain the regime for warnings and design defect cases,<sup>23</sup> writing:

[T]he founders did not fully appreciate the distinctions among manufacturing defects, design defects, and defective warnings that would become the centerpiece of modern law. Section 402A represented only a limited change in the law because the founders intended the Section's strict liability standard, with minor exceptions, to apply only to what we now call manufacturing defect cases.<sup>24</sup>

The first notable matter about Priest's claim is the logical inconsistency between the idea that the founders did not have a clear grasp of the three different kinds of defects and the claim that they intended to apply strict liability only to manufacturing defect cases. If the founders did not clearly know what a manufacturing defect is—not a difficult concept<sup>25</sup>—or the ways in which it is different from a design or

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<sup>22</sup> The data reflect the toll during the year 2007. See NAT'L HIGHWAY TRAFFIC AND SAFETY ADMIN., NAT'L CTR. FOR STATISTICS AND ANALYSIS, TRAFFIC SAFETY FACTS 1 (2008), available at [http://www.nhtsa.dot.gov/portal/nhtsa\\_static\\_file\\_downloader.jsp?file=/staticfiles/DOT/NHTSA/NCSA/Content/RNotes/2008/811017.pdf](http://www.nhtsa.dot.gov/portal/nhtsa_static_file_downloader.jsp?file=/staticfiles/DOT/NHTSA/NCSA/Content/RNotes/2008/811017.pdf).

<sup>23</sup> See Priest, *supra* note 6, at 2303.

<sup>24</sup> *Id.* at 2303; see also *id.* at 2308 ("The cases for which the founders believed consumers deserved automatic recovery are what we now call manufacturing or production defect cases in which the injury to the consumer was caused by a deviation from the manufacturer's own standards of production or quality control. We shall see in a moment that the *Restatement* and its Comments make sole reference to manufacturing defect cases.").

Priest does not return to or explain the "minor exceptions" to which he adverts in the quoted language nor does he explain the discrepancy between the language quoted in the text and the language quoted in the prior paragraph, which is not qualified with any "exceptions."

<sup>25</sup> The *Restatement (Third)* explains a manufacturing defect as one that occurs when the product "departs from its intended design." RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(a) (1998). That definition is similar to one provided by Page Keeton in the academic literature



informational defect, how could they have intended to limit strict liability to a type of defect that they did not fully understand? A second aspect of Priest's claim that requires careful attention is the difference between a type of defect—manufacturing defects—serving as the model for strict liability and the idea that strict liability was limited to those kinds of defects. There is no doubt, as explained below, that contaminated food was the ballast on which strict products liability was developed. Whether that means it was so limited to that kind of defect is a different question, a distinction that Professor Priest tends to ignore.<sup>26</sup>

But there is not much to Priest's claim that the founders did not understand the idea of a design or warning defect—putting aside for the moment whether they intended strict liability to apply to it.<sup>27</sup> As Priest's own research revealed, academics of the day discussed liability for negligent design, so they were cognizant of the notion that defects might have different sources, including the manner in which products were designed.<sup>28</sup> Indeed, Dix Noel wrote an article, published in the *Yale Law Journal*, that assessed manufacturers' liability for design and warnings defects.<sup>29</sup> That article reveals a thriving trade in cases confronting the question under negligence law of how safe a product should be designed. The idea of liability for a manufacturer whose design is negligent is even enconced in a black letter section of the first *Restatement of Torts*.<sup>30</sup> And Prosser had already prepared a draft of the *Restatement (Second) of Torts* that contained a similar provision.<sup>31</sup> Dillard and Hart wrote an early important article on inadequate warnings as the basis for a seller's liability.<sup>32</sup> Others, who may not have used the term "manufacturing defect," nevertheless described the concept.<sup>33</sup>

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preceding the adoption of section 402A: "The product was not in all respects as it was intended to be or as the purchaser or user expected it to be." Page Keeton, *Products Liability—Liability Without Fault and the Requirement of a Defect*, 41 TEX. L. REV. 855, 859 (1963).

<sup>26</sup> Thus, for example, Priest claims that Roger Traynor believed that strict liability in section 402A was limited to manufacturing defects. Priest, *supra* note 6, at 2314. But his evidence for that proposition is that Traynor was thinking about such defects when he wrote about strict liability in a 1965 article. *Id.*; see also *infra* text accompanying notes 60-67.

<sup>27</sup> Another error concerns Priest's claim that "none of the founders at the time had focused clearly on design problems as 'defects,'" Priest, *supra* note 6, at 2315 n.60, yet John Wade did exactly that in an article that Priest discusses. *Id.* at 2313 ("Wade believes that more difficult problems [than with manufacturing defects] arise where the product . . . incorporates a dangerous design.").

<sup>28</sup> Fleming James, Jr., *Products Liability* (pt.1), 34 TEX. L. REV. 44, 50 (1955).

<sup>29</sup> Dix W. Noel, *Manufacturer's Negligence of Design or Directions for Use of a Product*, 71 YALE L.J. 816, 816-17 (1962).

<sup>30</sup> See RESTATEMENT (FIRST) OF TORTS § 398 (1934).

<sup>31</sup> Section 398 in the *Restatement (Second)* broadened the first Restatement's treatment modestly by extending its protection to all who might be expected to be endangered by the product instead of the first Restatement's limitation to those expected to be "in the vicinity." RESTATEMENT (SECOND) OF TORTS § 398 (Prelim. Draft No. 6, 1958).

<sup>32</sup> Hardy Cross Dillard & Harris Hart, II, *Product Liability: Directions for Use and the Duty to Warn*, 41 VA. L. REV. 145, 146-47 (1955).

<sup>33</sup> See Keeton, *supra* note 25, at 859 (describing a situation where the "product was different from products of like kind" and "[t]here was a miscarriage in the manufacturing process").

Yet, in a curious and oblique way, there is something to Priest's claim: one does not readily find references to the different types of design defects in the Restatement or in the writings in the run-up to its adoption. However, my interpretation of that evidence is that rather than not appreciating these concepts, the Restatement and the founders did not consider them to be of importance.

Thus, most of the normative academic attention of the day was not about the standard for strict liability, as Priest explains.<sup>34</sup> Instead, most academics were concerned with the various impediments to imposing liability—such as the privity barrier and other warranty law limitations—rather than the substantive standard by which products would be judged. Prosser, in his classic *Assault Upon the Citadel* article, in which he was working out the scope of section 402A, spent a great deal of time addressing which products and defendants would be subject to strict liability, which plaintiffs could recover, and what defenses might be available, but barely adverted to the standard by which defectiveness would be determined.<sup>35</sup>

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<sup>34</sup> Priest, *supra* note 6, at 2305-08.

<sup>35</sup> William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1110-11, 1114-20 (1960). By the time he first revised his torts treatise after the publication of section 402A (and after cases had been decided on the matter), Prosser wrote that section 402A applied as well to design defect cases. See WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS § 99, at 659 (4th ed. 1971) [hereinafter PROSSER, HANDBOOK (4th ed.)]. But *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963), one of the cases on which this statement was based, was pre-section 402A. Friedrich Kessler, another academic observer—one who Professor Priest credits as being among the three most influential scholars in the intellectual history of strict products liability—remarked two years after section 402A was published that it applied not only to manufacturing defects but to design defects as well as informational deficiencies. See Friedrich Kessler, *Products Liability*, 76 YALE L.J. 887, 900 & n.71, 901 (1967); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 492, 494-95 (1985). Priest does, however, explain that Kessler's concern was with shifting influence away from contract law rather than with the question of defectiveness. See Priest, *supra*, at 493-94.

Professors Henderson and Twerski, in their effort to justify a risk-benefit standard for design defects in the *Restatement (Third)*, accept Priest's characterization of Prosser and cite Prosser's discussion of negligent design in his 1971 treatise as support. See James A. Henderson, Jr. & Aaron D. Twerski, *Product Design Liability in Oregon and the New Restatement*, 78 OR. L. REV. 1, 11 n.32, 24 & n.94 (1999) [hereinafter Henderson & Twerski, *Product Design Liability in Oregon*]; James A. Henderson, Jr. & Aaron D. Twerski, *Arriving at Reasonable Alternative Design: The Reporters' Travelogue*, 30 U. MICH. J.L. REFORM 563, 569 & n.11, 572 & n.16 (1997) [hereinafter Henderson & Twerski, *Arriving at a Reasonable Alternative Design*]. If they had limited their claim to assert that Prosser did not address whether consumer expectations should be applied to modern design defect litigation that raises the issue of how safe a product should be designed, I think they would have been correct. However, they did not, instead asserting that Prosser "emphatically rejects" use of consumer expectations for design defect cases. See Henderson & Twerski, *Product Design Liability in Oregon*, *supra*, at 24. Prosser contributed to their reading of him with a slapdash and inconsistent revision of the third edition of his treatise, which was written before the adoption of section 402A, and the fourth edition, which was written after. Compare WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS §§ 96, 99 (3d ed. 1964) [hereinafter PROSSER, HANDBOOK (3d ed.)] with PROSSER, HANDBOOK (4th ed.), *supra*, §§ 96, 99. In the midst of the discussion of negligent design carried forward from the third edition, Prosser inserted several paragraphs about strict liability and added that "the tort is essentially a matter of negligence," before proceeding to explain the sort of balancing that would be relevant in a negligent design case. PROSSER, HANDBOOK (4th ed.), *supra*, § 96, at 644-45. A dozen pages later, Prosser inserted a new section on "Strict

To be sure, most of the cases Prosser cited and discussed involved food contaminated with impurities.<sup>36</sup> These are the edible equivalent of manufacturing defects, containing an aspect that is not intended by the preparer. Food was the first product subject to strict liability, and those cases contributed much of the precedential fodder on which Prosser and his fellow travelers relied. Yet nowhere does Prosser identify these contaminated-food cases as ones involving manufacturing defects or even as instances of deviation from the preparer's intentions.

So, the fact that the predominant cases of the day were food and involved impurities supports the idea that strict liability would include manufacturing defects but it does not mean that other kinds of defects were meant to be excluded. Page Keeton, the academic of the day who seems to have thought most deeply and published the most about the substance of what a defect might encompass, identified, in a 1963 article, two classes of cases that might be subject to strict liability: 1) products having an aspect unintended by and unknown to the manufacturer; and 2) products that pose a danger because of essential characteristics of the product.<sup>37</sup> Priest claims that Keeton's first category is manufacturing defects, and the second category is not design defects, but a class of cases that have come to be known as "unavoidably unsafe products,"<sup>38</sup> rather than design defect cases.

Priest is surely right that the second category does not reflect classic design defect cases. Yet it does involve defectiveness on a basis other than a manufacturing defect: these products are made precisely in the fashion intended by the manufacturer. Priest nevertheless finds Keeton's discussion supportive because, "according to Keeton, strict liability is only appropriate for the first category of defects (manufacturing defects)."<sup>39</sup> Instead, says Priest, Keeton contemplated that the second-category manufacturers would only be subject to liability for negligence.<sup>40</sup> This, then, would limit strict liability to the first category, manufacturing defects. The problem with Priest's claim is that Keeton did not conclude that strict liability should be inapplicable to the second category of products. Instead, he distinguished between socially valuable products, such as prescription drugs, and others, such as

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Liability in Tort," that contains the assertion above that section 402A applies to design cases. *See* PROSSER, HANDBOOK (4th ed.), *supra*, § 96, at 659. In contrast to their acceptance of Prosser's "emphatic rejection," Professors Henderson and Twerski have acknowledged that section 402A was not drafted to exclude non-manufacturing defects. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Achieving Consensus on Defective Product Design*, 83 CORNELL L. REV. 867, 879 (1998) [hereinafter Henderson & Twerski, *Achieving Consensus*]. They assert that section 402A failed, however, to confront the question of whether strict liability should be applied to the modern form of design defect litigation, which requires consideration of whether a marginally safer product should have been produced by changing its design in some fashion. *See id.* at 879-80.

<sup>36</sup> Prosser, *supra* note 35, at 1103-10.

<sup>37</sup> *See* Keeton, *supra* note 25, at 859.

<sup>38</sup> Priest, *supra* note 6, at 2310-11.

<sup>39</sup> *Id.* at 2311.

<sup>40</sup> *See id.*

cosmetics, alcohol, and cigarettes for which Keeton allowed that it “may be sound social policy”<sup>41</sup> to extend the implied warranty to those who are injured in using the product as a matter of loss distribution.<sup>42</sup> Thus, the founder who most deeply considered the standard for defectiveness contemplated extending strict liability beyond manufacturing defects, even if not in such terms nor in terms of modern-day design defects.<sup>43</sup>

Keeton was not alone. In his article on liability for design defects, Dix Noel briefly considered the notion of applying the emerging strict liability standard for foodstuffs to durable goods.<sup>44</sup> Priest writes of Noel’s work that he “presumed that the negligence standard was the most appropriate way of considering the design issue.”<sup>45</sup> Yet, Noel’s 1962 article in the *Yale Law Journal* was descriptive, not normative, and so, of course, would explain liability for design in terms of negligence, the applicable standard at the time. At the conclusion of his article, Noel addresses strict liability for design defects.<sup>46</sup> Priest finds this discussion to be dismissive of the idea: Noel is “incredulous” that a jet plane whose wing is torn off despite the best efforts of the manufacturer could be defectively designed; he “sarcastically” asks about the strict liability of cigarette manufacturers who produced cigarettes at a time no one knew of their dangers and is “incredulous” about the possibility.<sup>47</sup>

I do not read Noel in any such way. His discussion is predominantly inquisitorial rather than normative. In referring to cigarettes and state of the art jet airplanes, Noel sought to focus on the issues that would have to be confronted if strict liability were employed to address how safely products should be designed. In lawyerly fashion, Noel tested the limits that would have to be addressed if strict liability for design were employed. Far from being aghast at the possibility of

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<sup>41</sup> Keeton, *supra* note 25, at 872.

<sup>42</sup> Keeton wrote:

If the warranty does extend to each particular user that he will suffer no injury, then the position in essence seems to be that the many who benefit from the use of cigarettes, whiskey, cosmetics, and drugs are paying for the tragic injuries to the few. This may be sound social policy if it be assumed that the industry will be able to do this without impairing the normal incentive to bring out new products and without serious effect on the economic well-being of an industry that is important to the economy and to society. Whiskey, cigarettes, and cosmetics seem to be indistinguishable from the standpoint of what the courts should do. On the other hand, drugs and medicines may well be put in a different category.

*Id.*

<sup>43</sup> Even Keeton’s first category was not exclusively limited to products that did not conform with the manufacturer’s intentions. Priest quotes Keeton, “[I]n this situation the product was different from products of like kind,” but omits the first word of the sentence. Priest, *supra* note 6, at 2310 (quoting Keeton, *supra* note 25, 859) (internal quotation marks omitted). That word is “generally.” Keeton, *supra* note 25, at 859. Nowhere in the remainder of his article does Keeton explain the reason for the “generally” qualification.

<sup>44</sup> Noel, *supra* note 29, at 877.

<sup>45</sup> Priest, *supra* note 6, at 2312.

<sup>46</sup> Noel, *supra* note 29, at 877.

<sup>47</sup> Priest, *supra* note 6, at 2312.

liability in that situation, Noel identified the conflicting tensions: “Perhaps liability even in this situation would be a useful means of spreading the loss; but that holding might unduly discourage the development of useful new products.”<sup>48</sup> While Noel was cautious about the matter of strict liability for design, I do not read him as shrinking from the prospect but rather as identifying the issues that would have to be confronted if strict liability were so extended.

Priest cites two other articles by Noel.<sup>49</sup> Priest finds in them Noel’s “insist[ence] on negligence as the appropriate standard for design-related injuries.”<sup>50</sup> One of those articles reflects a presentation for lawyers sponsored by the Practising Law Institute and does not have a normative bone in its body.<sup>51</sup> Far from stating his views on the proper role for strict liability, Noel took on the task of educating his audience on the expansion of negligence-based claims to product manufacturers. Much of the content was drawn from the second publication, also stemming from a presentation to lawyers, at an event sponsored by the Southwestern Legal Foundation.<sup>52</sup> That article is a rehash of the *Yale Law Journal* article he had previously written and again has only descriptive goals. Noel presented the cases in which negligence had been applied to product design, after observing that while strict liability is the more spectacular development, the expansion of negligence in its application to products liability is worthy of attention in its own right.<sup>53</sup> Nowhere in either of these articles can one find an expression of Noel’s views about strict liability being applied to design defects, Priest’s claims notwithstanding.

Priest’s treatment of Fleming James’s work is no more illuminating of James’s views than Priest’s characterization of Noel’s. Priest writes that James’s two-part article on products liability limited treatment of design defects to negligence.<sup>54</sup> Yes, in a 1955 survey of products liability, James, in Part I, which was devoted to negligence liability, discussed manufacturers’ liability for negligent design.<sup>55</sup> No, he did not say anything there about strict liability for design defects, but then he did not say anything about strict liability for any kind of defect

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<sup>48</sup> Noel, *supra* note 29, at 877.

<sup>49</sup> Priest, *supra* note 6, at 2313.

<sup>50</sup> *Id.*

<sup>51</sup> Dix Noel, *Manufacturers’ Liability for Negligence*, 33 TENN. L. REV. 444 (1966).

<sup>52</sup> Dix Noel, *Recent Trends in Manufacturers’ Negligence as to Design, Instructions or Warnings*, 19 SW. L.J. 43 (1965). The presentation that Noel made was at what was designated a “Symposium,” at which at least three other academics spoke. Yet, based both on the content of the papers presented and the organization sponsoring the “Symposium,” this event was a continuing education program for lawyers rather than an academic event. The Southwestern Legal Foundation, a predecessor to the Center for American and International Law, had a mission of educating domestic and international lawyers.

<sup>53</sup> *Id.* at 56-60.

<sup>54</sup> Priest, *supra* note 6, at 2311.

<sup>55</sup> *See generally* James, *supra* note 28.

because that Part was about negligence liability. Yet in Part II, which addresses manufacturers' liability in implied warranty, James did consider strict liability. While he wrote that the standards for liability in implied warranty and negligence were "[b]y and large" the same,<sup>56</sup> he was, consistent with his survey mission, attempting to describe the state of the law rather than his views. And although he did not explicitly address liability for design defects under implied warranty, James did cite cases in which the basis for the alleged defect was not a manufacturing defect.<sup>57</sup> For example, when discussing a case in which the risk posed by a chemical—its air dispersal qualities, which were unknown—was not a manufacturing defect, James did not shrink from imposing liability:

This would mean that when unexpected dangers develop from the use of a valuable new product, the industry producing it (and so, ultimately, all the beneficiaries of the product) would have to compensate the innocent victims of those dangers. This is a far better solution than the alternative of making each individual victim contribute the whole of his loss to this advancement of the arts . . . .<sup>58</sup>

Thus, James reflects his longstanding preference for redistributing personal injury losses, here through the mechanism of strict liability for a (non-manufacturing) defect.

A passage in a 1957 publication contains an even more illuminating example of James's normative views about the proper scope of strict liability. In a presentation at an Association of American Law Schools program, James advocated strict liability for all products that were unreasonably dangerous at the time of sale.<sup>59</sup> Although others were not as sweeping in endorsing strict liability as James, they also contemplated its application in cases beyond pure manufacturing defects.

I do not understand how Priest could characterize Roger Traynor as believing that strict liability was limited to manufacturing defects based on Traynor's 1965 article, *The Ways and Meanings of Defective Products and Strict Liability*.<sup>60</sup> As Priest states, Traynor does suggest that a "deviation from the norm standard" may be overbroad in the case of unavoidably unsafe products, such as blood contaminated with the hepatitis virus.<sup>61</sup> Yet, in the same discussion, Traynor suggests that some

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<sup>56</sup> Fleming James, Jr., *Products Liability* (pt. 2), 34 TEX. L. REV. 192, 206 (1955).

<sup>57</sup> *Id.* at 213-15, 221-23.

<sup>58</sup> *Id.*

<sup>59</sup> Fleming James, Jr., *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 TENN. L. REV. 923, 923 (1957). Priest does cite this article in a footnote in a different and later section of his article, acknowledging that James would include design defects in his strict liability scheme. Priest, *supra* note 6, at 2321 n.77. That contrasts with his earlier statement that James' 1955 survey "discussed design questions solely in terms of negligence." *Id.* at 2311.

<sup>60</sup> Priest, *supra* note 6, at 2314. Traynor's article is Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363 (1965).

<sup>61</sup> Priest, *supra* note 6, at 2314 (citing Traynor, *supra* note 60, at 367-68) (internal quotation marks omitted).

drugs “of uniform quality” are defective under section 402A if their risks outweigh their benefits.<sup>62</sup> This is strict liability for design defects writ large—the entire product fails a cost-benefit test.<sup>63</sup> Traynor does little to disguise his approval for such a result, although he was a member of the Supreme Court of California at the time. Even Traynor’s concept of deviation from the norm is subtly different from manufacturing defects, for which the basis of comparison is the same product as intended by the manufacturer. Traynor envisions that the deviation could be from similar products made by other manufacturers.<sup>64</sup> Such a test would include defects that we understand today as design defects, although Priest fails to recognize or acknowledge this.<sup>65</sup> Going beyond deviation from the norm, Traynor proffers the idea that products can be defective because their danger is a surprise.<sup>66</sup> Thus, Traynor expresses sympathy for strict liability for products like cigarettes at a time before their dangers were understood.<sup>67</sup>

John Wade’s views on defective design are illuminating for a number of reasons. First, his thoughts in a 1965 paper belie Priest’s claim that none of the founders were thinking about strict liability for design defects. On the contrary, Wade observed that while manufacturing defects could readily be determined, the “more difficult problem[s]” were with dangerous products that were “made in the way . . . intended . . . and in the condition planned,”<sup>68</sup> namely design defects. Wade suggests that the standard should focus on the dangerousness of the product and whether it is “not reasonably safe.”<sup>69</sup> At the same time, given the familiar negligence “reasonable-person” standard, Wade claims that his product-focused standard can be converted to a conduct-based rule by asking if the manufacturer would have acted reasonably by putting the product on the market.<sup>70</sup> Priest rightly quotes Wade’s comment that this rule “is simply a test of negligence.”<sup>71</sup> What Priest

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<sup>62</sup> Traynor, *supra* note 60, at 368-69.

<sup>63</sup> One might, I suppose, claim that this is nothing more than a negligence standard applied to the product overall, but no one had thought that negligence might be so employed prior to and even in the aftermath of section 402A. The idea of categorical liability for a product whose dangers exceed its benefits was borne of the adoption of strict products liability.

<sup>64</sup> See Traynor, *supra* note 60, at 367. That Traynor was thinking about the design of similar products by other manufacturers is revealed in his comparison of the challenged product to “the average quality of like products.” *Id.* Thus, Priest ignores this nuance in claiming that Traynor describes *Greenman* as a manufacturing defect case.

<sup>65</sup> Priest asserts that “Traynor clearly has manufacturing defects in mind” in this explanation of defects. Priest, *supra* note 6, at 2314.

<sup>66</sup> Traynor, *supra* note 60, at 370.

<sup>67</sup> *Id.* at 370-71, 374 (discussing aspirin’s defectiveness before its risks were understood).

<sup>68</sup> John W. Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L.J. 5, 14 (1965).

<sup>69</sup> *Id.* at 15.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* Wade was one of the stalwarts opposed to the use of consumer expectations because he was concerned that in many cases there would not be any relevant expectations by which to determine defectiveness as well as by the test’s treatment of latent dangers. See John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 Miss. L.J. 825, 829 (1973); see also Richard

omits is that Wade had a clear idea of how his test was different from negligence, as immediately after the acknowledgment quoted above, Wade states: “In strict liability, except for the element of defendant’s *scienter*, the test is the same as that for negligence.”<sup>72</sup> In other words, rather than proving the foreseeability of risk, Wade developed his famous imputation-of-knowledge standard for strict products liability.<sup>73</sup> The issue was whether a manufacturer who knew of the dangerous condition in the product would put it on the market, thereby eliminating the matter of foreseeability, a central concept in negligence claims. Wade’s foreseeability-free standard for design defectiveness is, thus, not the same as negligence, as we dramatically discovered when products whose risks were unknowable at the time of manufacture appeared front-and-center on the products liability stage.

Wade reiterated his views eight years later in an article published in the *Mississippi Law Review* in 1973,<sup>74</sup> which is probably the “single most influential” article on how courts understand strict products liability and give content to the defectiveness concept.<sup>75</sup> In that article, he articulated a seven factor test for strict products liability.<sup>76</sup> This test, which was not limited to any specific kind of defect, largely reflected risk-utility concerns that courts have relied on since. Responding to the anticipated criticism that his seven factors were simply a negligence test, Wade argued that this was much like the strict liability of negligence *per se* in that the fault of the defendant was irrelevant and concluded that

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L. Cupp, Jr., *Defining the Boundaries of “Alternative Design” Under the Restatement (Third) of Torts: The Nature and Role of Substitute Products in Design Defect Analysis*, 63 TENN. L. REV. 329, 340 (1996).

<sup>72</sup> Wade, *supra* note 68, at 15.

<sup>73</sup> Whether Wade truly meant that knowledge of the danger would be imputed when the danger was unknowable arose later when courts confronted that question in a variety of toxic substances litigation. *See, e.g.*, *Feldman v. Lederle Labs.*, 479 A.2d 374, 376 (N.J. 1984); *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539, 542 (N.J. 1982). Ultimately, he retreated from the strongest imputation position. *See* John W. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. REV. 734, 764 (1983).

<sup>74</sup> Wade, *supra* note 71.

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The article in which Wade advocated a risk-benefit standard by which to judge design defects has been described by others as “[t]he single most influential piece of guiding scholarship’ in the period . . . when [product defect] was being defined and expanded.” LOUIS R. FRUMER & MELVIN I. FRIEDMAN, *PRODUCTS LIABILITY* § 1.02 n.26 (2008) (quoting, in part, David G. Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681, 682 (1980)).

Green, *supra* note 12, at 614 n.29; *see also* Richard A. Epstein, *Intuition, Custom, and Protocol: How to Make Sound Decisions with Limited Knowledge*, 2 N.Y.U. J. L. & LIBERTY 1, 25 (2006) (stating that the Wade factors have “exerted immense influence over judicial decisions”); Kysar, *supra* note 8, at 1712 (calling Wade’s article “highly influential”); Rabin, *supra* note 8, at 206 n.45 (describing Wade’s test as “widely noted”); Jane Stapleton, *Restatement (Third) of Torts: Products Liability, an Anglo-Australian Perspective*, 39 WASHBURN L.J. 363, 395 n.117 (2000) (calling Wade’s article “influential”); W. Kip Viscusi, *Wading Through the Muddle of Risk-Utility Analysis*, 39 AM. U. L. REV. 573, 578 (1990) (stating that “Wade’s seven factors have played . . . a dominant role in the liability literature”).

<sup>76</sup> Wade, *supra* note 71, at 837-38.



courts should be honest about what they were doing: “If by doing this it is really establishing strict liability, we might as well call it that and be accurate.”<sup>77</sup>

I had previously been critical of that test as a test for a design defect, not because it was or was not about strict liability, but because it fails to recognize the appropriate factors for a risk-benefit test for design defects. That criticism, however, stemmed from my failure to appreciate the founders’ conception of a defect—because I was so imbued with the modern model of three distinct bases for defect. Now, with a better understanding of the founders’ conception, Wade’s factors make far more sense. Let me explain.

My criticism of Wade’s factors was that they failed to recognize the trade-offs inherent in designing a product and the necessity to address, at the margin, the benefits and risks of any change.<sup>78</sup> This is the contemporary understanding of a design defect that involves a design that can be changed in some way to provide greater safety. Rather, Wade’s factors focus on the characteristics of the product itself, its social utility and dangers, instead of honing in on the risks that can be eliminated by changing the product’s design and the costs of doing so. Thus, I had claimed that social utility—Wade’s first factor—of, say, an AIDS vaccine—is irrelevant to the matter of its defective design:

[I]magine that we have identified a one hundred percent effective vaccine for AIDS. Suppose the vaccine causes a mild auto-immune reaction—a rash that lasts for a week—in one out of a million persons who take the vaccine. The side effect can be eliminated by changing one of the inert ingredients with

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<sup>77</sup> *Id.* at 835. To be fair, within a page, Wade concedes that the evidence sufficient to prove a design defect would also be sufficient to prove negligence in the design of the products and that the only basis on which strict products liability differs from negligence is with regard to manufacturing defects. *See id.* at 836.

<sup>78</sup> Those factors are:

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

Wade, *supra* note 71, at 837-38; *see also* Wade, *supra* note 68, at 17 (providing a similar list of factors to be employed in a risk-benefit balancing but that omit the loss-spreading criterion).

which the vaccine is coated to another inert ingredient, no more expensive and equally adept at serving its purpose. The vaccine is defectively designed despite its enormous social utility. Risk-benefit analysis operates at the margin—the utility of the existing design compared to the alternative—not at the level of the entire product.<sup>79</sup>

I still think that is correct, but I now appreciate Wade and the other founders' perspectives.<sup>80</sup> They were not thinking about marginal design changes in a product. Rather, their conception of strict liability was based on products whose risks in the course of the ordinary use of the product were so serious that liability was legitimately imposed on the manufacturer. This is much more like the standard imposed by implied warranty, which although under-theorized in the context of products causing physical harm, relies on the idea that a product should not cause unexpected serious harm in normal use or utterly fail in its essential purpose, causing physical injury.

*State Farm Mutual Automobile Insurance Co. v. Anderson-Weber, Inc.*<sup>81</sup> illustrates this conception of defect. It is not only instructive, but exemplifies the kinds of cases in which implied warranty was employed to impose strict liability. A car that was ten days old and had been driven 300 miles caught fire while being driven, allegedly as the result of a short circuit in the electrical system.<sup>82</sup> The plaintiff relied on implied warranty and, after surveying cases from New Jersey and Tennessee in which brakes and steering failed in new cars, the court proclaimed: "Brakes should not be defective from the beginning. Steering mechanism should not fail, nor cars burn up within 10 days. When such things happen and there is evidence as to the cause, courts should be reluctant to deny the purchaser the right to submit his claim to a jury."<sup>83</sup> Beyond *State Farm*, there are a multitude of cases prior to the *Restatement (Second)* and dating back at least to the early part of the twentieth century in which courts recognized the use of an implied warranty theory for a product that failed to perform safely in its intended use. Those courts exhibited indifference to the source of the defect; in many of them it is difficult to determine from the court's description of the facts whether the source of the defect was one of design or manufacture. The issue was whether the product performed with adequate safety—in most of the reported cases, the products failed abysmally.<sup>84</sup>

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<sup>79</sup> Green, *supra* note 75, at 619.

<sup>80</sup> Professor Priest similarly misunderstood Wade and his test for strict liability, criticizing it for failing to appreciate the need for an alternative design by which to frame the risk-utility analysis. See Priest, *supra* note 6, at 2325-26.

<sup>81</sup> 110 N.W.2d 449 (Iowa 1961).

<sup>82</sup> *Id.* at 452.

<sup>83</sup> *Id.* at 456. The court was concerned with proof of the fire's cause because the defendant presented a theory that the fire was caused by events unrelated to a defect in the car. *Id.*

<sup>84</sup> See, e.g., *Chapman v. Brown*, 198 F. Supp. 78, 81 (D. Haw. 1961) (hula skirt that burst into flames and burned 75% of plaintiff's body); *McBurnette v. Playground Equip. Corp.*, 137

In summary, the academics interested in products liability in the run-up to section 402A were most concerned with the contractual impediments to liability that they sought to sweep away. Priest is right about that. There was less attention to the standard of liability that any strict liability theory might impose. Generally, the focus was on the extent of danger posed by the product and when it exceeded some threshold—"unreasonable," for instance, or "extrahazardous"—a defect (whether in negligence or warranty) existed that would subject the seller to liability. Although courts were confronted with design defect cases and at least some academics were writing about them, the source of the defect—whether manufacturing, informational, or design—was not a significant concern, regardless of the theory of liability being asserted.<sup>85</sup> Thus, Priest's thesis, which relies on a clear dichotomy between manufacturing defect and design defect cases, does not fit well with the evidence that exists. And because the focus was on the dangerousness of the product, the founders, by and large, did not address the question of how to apply this new strict products liability to a claim that a product should have employed an alternative and marginally safer design.<sup>86</sup>

This appreciation for the early conception of defect explains why the California Supreme Court, in *Cronin v. J.B.E. Olson Corp.*,<sup>87</sup> felt no need to elaborate about what constituted a defect, even if the defect may have stemmed from the product's design. In *Cronin*, bread trays secured in racks in the back of a truck came loose in an accident and due to sudden deceleration of the truck were driven forward, struck the plaintiff-driver, and propelled him through the windshield.<sup>88</sup> The trays were released because the safety hasp designed to hold the trays in place was defective.<sup>89</sup> In the course of holding that a jury should not be

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So. 2d 563, 564 (Fla. 1962) (sharp piece on playground equipment amputated three-year-old's finger); *McCabe v. L. K. Liggett Drug Co.*, 112 N.E.2d 254, 257 (Mass. 1953) (coffee maker exploded in plaintiff's face); *Bruns v. Jordan Marsh Co.*, 26 N.E.2d 368, 373 (Mass. 1940) (heel separated from plaintiff's shoe as she descended staircase); *Souden v. Fore River Shipbuilding Co.*, 112 N.E. 82, 84 (Mass. 1916) ("The fact that the explosion occurred while the boiler was subject to the use for which it was designed is of itself evidence of a defective condition."); *DiVello v. Gardner Mach. Co.*, 102 N.E.2d 289, 293 (Ohio C.P. 1951) (grinder disintegrated in hands of Plaintiff during normal use).

<sup>85</sup> See, e.g., *Vandermark v. Ford Motor Co.*, 33 Cal. Rptr. 175, 180-81 (Ct. App. 1963) (braking system permitted inadvertent activation of brakes), *rev'd in part*, 391 P.2d 168 (Cal. 1964); *Mathews v. Lawnlite Co.*, 88 So. 2d 299, 300-01 (Fla. 1956) (rocking lounge-chair had piece underneath armrest that amputated portion of user's finger); see also David G. Owen, *The Puzzle of Comment j*, 55 HASTINGS L.J. 1377, 1378 (2004).

<sup>86</sup> My reading of the negligent design cases of the day is that they did not employ a rigorous risk-utility test to claims that a safer alternative design should have been employed. Courts took a host of avenues that short-circuited such claims rather than permitting a jury determination. See Noel, *supra* note 29, at 866-77.

<sup>87</sup> 501 P.2d 1153 (Cal. 1972).

<sup>88</sup> *Id.* at 1155.

<sup>89</sup> The metal in the safety hasp was porous and pitted, suggesting a manufacturing defect. *Id.* at 1156. Yet the court never described the case as one involving a manufacturing defect, and, in the course of declining to distinguish between the two sources of defects, recognized that the safety hasp defect could have been either a design or manufacturing defect, depending on what the

instructed in terms of section 402A's "unreasonably dangerous" language, the Court stated that all the jury need decide and be instructed about is whether a defect existed.<sup>90</sup> No further elaboration of the concept of a defect was required. That was true either for manufacturing or design defects. But the reason the court could conclude that is because its conception of defect was the same one on which the founders were operating as well: Did the product fail to perform as would be expected? Whether the source of this failure was design or manufacture was not important.

The idea that defectiveness was based on the product containing an unacceptable level of (latent)<sup>91</sup> risk when used in its intended fashion, regardless of the source of the risk, provides a better explanation of *Greenman v. Yuba Power Products, Inc.*<sup>92</sup> than Priest's treatment. *Greenman*, of course, is the case in which Justice Traynor persuaded the remainder of the California Supreme Court to adopt the strict products liability for which he had advocated in *Escola v. Coca Cola Bottling Co.*<sup>93</sup> There were two defects alleged by the plaintiff in *Greenman*. One was that inadequate set screws were employed to hold parts of a lathe together, enabling stock on which the plaintiff was working to be thrown from the machine, injuring him.<sup>94</sup> The other was that there were better ways of fastening the parts together than using set screws.<sup>95</sup> Inadequate set screws, of course, could stem either from a manufacturing defect or a design defect and is thus ambiguous. But a better way to hold the machine parts together could only be a design defect. Perhaps that is why Justice Traynor, in his opinion, described the strict liability being adopted as encompassing "a defect in design and manufacture."<sup>96</sup>

Priest claims, as a result of Justice Traynor's 1965 article, that *Greenman* was a manufacturing defect case.<sup>97</sup> Priest also asserts that Traynor's view was that section 402A was limited to manufacturing

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manufacturer's specifications for the metal were. *Id.* at 1163. The court quoted testimony of an expert, which suggests that this was a manufacturing defect not a design defect. *See id.* at 1157 ("[I]t was just a very, very bad piece of metal. Simply would not stand any force—reasonable forces at all.") (internal quotation marks omitted).

<sup>90</sup> *See id.* at 1157.

<sup>91</sup> I employ the parenthetical here because it is plain that hidden danger was an important component of these early conceptions of defectiveness, especially ones informed by implied warranty. Yet that view was by no means unanimous and inroads on the "open and obvious" defense began early in the strict products liability day. *See, e.g., Pike v. Frank G. Hough Co.*, 467 P.2d 229, 234-35 (Cal. 1970).

<sup>92</sup> 377 P.2d 897 (Cal. 1963).

<sup>93</sup> 150 P.2d 436 (Cal. 1944).

<sup>94</sup> *Greenman*, 377 P.2d at 899.

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 901. Moreover, *Greenman* was understood as applying strict liability to manufacturing defects and design defects. BAJI 218-A (currently BAJI 9.00), the strict-liability approved instruction that was drafted to reflect *Greenman*, provides for liability for defects in the manufacture or design of a product. Cal. Civil Jury Instructions § 9.00 (2008).

<sup>97</sup> *See Priest, supra* note 6, at 2315, 2321-22 & n.79.

defect cases.<sup>98</sup> Priest concludes that the disjunction between Traynor's view and his description in *Greenman* of the lathe containing defects "in design and manufacture" results from the failure of those like Traynor to focus on design deficiencies as a source of defect.<sup>99</sup> I do not disagree that the founders had not thought deeply about the appropriate standard for a design defect—as I explained above, *Cronin* is evidence that that was true of at least one leading court. Yet, Priest infers that the intent was to limit strict liability to manufacturing defects. I think a better inference from the evidence is that at this stage in the strict products liability reform, sorting out the source of the defect did not matter. Commercial products implicitly are safe for the jobs for which they are intended, and when they are not and cause harm to a consumer, strict liability should ensue.<sup>100</sup>

*Henningsen v. Bloomfield Motors, Inc.*<sup>101</sup> is the other classic pre-section 402A strict liability case.<sup>102</sup> Based on a theory of implied warranty rather than strict tort, the New Jersey Supreme Court focused on stripping away the impediments that most commentators had been writing about, including privity and disclaimers. In *Henningsen*, an almost brand-new car, with less than five-hundred miles on its odometer, suddenly made a ninety degree turn and crashed into a wall.<sup>103</sup> *Henningsen* appears clearly to involve a manufacturing defect. Yet there is nothing explicit nor indeed any indication in the case that the court thought its decision was so limited. At no point does the court use the term "manufacturing defect." In responding to the defendant's claim that there was insufficient proof of breach of the implied warranty, the court revealed its conception of a defect by explaining that the circumstances of the accident justified a finding of the "unsuitability for ordinary use" of the product.<sup>104</sup> In a case that was explicitly one about implied warranty, upon which section 402A's standard for strict liability was based, the concern that emerges is the extent of danger of a product in ordinary use, rather than a deviation from the norm established by other products of the manufacturer in the same line.

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<sup>98</sup> *Id.* at 2315.

<sup>99</sup> *Id.* at 2315 n.60 (quoting *Greenman*, 377 P.2d at 901) (internal quotation marks omitted).

<sup>100</sup> *Greenman*, 377 P.2d at 901.

<sup>101</sup> 161 A.2d 69 (N.J. 1960).

<sup>102</sup> Professor Priest identifies *Greenman* and *Henningsen* as the two critical cases leading to the advent of strict products liability. See Priest, *supra* note 20, at 507.

<sup>103</sup> *Henningsen*, 161 A.2d at 75.

<sup>104</sup> *Id.* at 98. The court wrote:

The facts, detailed above, show that on the day of the accident, ten days after delivery, Mrs. Henningsen was driving in a normal fashion, on a smooth highway, when unexpectedly the steering wheel and the front wheels of the car went into the bizarre action described. Can it reasonably be said that the circumstances do not warrant an inference of unsuitability for ordinary use against the manufacturer and the dealer?

*Id.*

B. *The Structure of Section 402A*

Professor Priest's structural argument proceeds quickly past the black letter language of section 402A, acknowledges that the two most salient comments are ambiguous about which kinds of defects are included,<sup>105</sup> finds supportive evidence in two other comments, and ultimately relies on the numerous examples contained in the comments.<sup>106</sup> Of the fifty-four examples in which the fact or possibility of a product defect is adverted to, Priest finds that thirty-seven involved manufacturing defects, eleven were about unavoidably unsafe products and therefore did not implicate a type of defect, and six were of uncertain source as to the defect.<sup>107</sup>

However, before examining Professor Priest's evidence, let us tarry on the black letter of section 402A, which requires that a product be in a "defective condition unreasonably dangerous" for strict liability to be imposed.<sup>108</sup> Early drafts of section 402A imposed strict liability when food was in a "condition dangerous to the consumer."<sup>109</sup> Dean Prosser explained the evolution of this language to the final "defective condition unreasonably dangerous" language at the ALI annual meeting in 1961, when a motion was made to delete the "defective condition" language. In the ensuing debate, Prosser added that the original language, employing "dangerous," had been modified to add "defective condition" to ward off concerns that what are now known as unavoidably unsafe products would be subject to strict liability merely because they posed some significant, yet irremediable, risk.<sup>110</sup>

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<sup>105</sup> Priest, *supra* note 6, at 2318.

<sup>106</sup> *Id.* at 2319 ("The strongest evidence that the founders focused exclusively on strict liability for manufacturing defects is that they did not present a single example in the Comments of an alternative strict liability application.")

<sup>107</sup> *Id.* I do not find this enumeration of types of defects contained in the discussion in the comments persuasive. First, the point of the discussion is not, contrary to Priest, to explain the "types of cases to which the strict liability standard was meant to apply," in the sense of the types of defects to which section 402A applied. *Id.* Nothing in the commentary addresses the types of defects to which section 402A "applied." Second, many of the examples are of non-defective products, as in comment h, which refers to a "bottled beverage knocked against a radiator to remove the cap," food to which too much salt has been added by the user, or over-consumption of candy by a child, or in comment f, which uses the example of a neighbor who sells a jar of jam to explain who is in the "business of selling," as required by the black letter. RESTATEMENT (SECOND) OF TORTS § 402A cmts. f, h (1965). Counting those examples as suggesting that section 402A is limited to manufacturing defects is silly. Third, there are, as Professor Priest acknowledges, several examples in which the defect is of uncertain origin. *Id.* Fourth, Professor Priest's count is at least modestly padded in his favor. He counts a reference, in comment f, to the owner of an automobile who resells it as reflecting a manufacturing defect, when the text is insufficient to draw any conclusion about the source of the defect. Priest, *supra* note 6, at 2320. Finally, whatever slim evidence this provides is overwhelmed by the other language and structure of section 402A discussed in the text.

<sup>108</sup> RESTATEMENT (SECOND) OF TORTS § 402A (1965).

<sup>109</sup> RESTATEMENT (SECOND) OF TORTS § 402A (Prelim. Draft No. 6, 1958).

<sup>110</sup> The following colloquy took place:

DEAN PROSSER: Mr. Dickerson has stated an original point of view which I first brought into the Council of The American Law Institute in connection with this section.

Thus, the key operative language in section 402A is the word “dangerous,” rather than the “defective condition” language, which showed up only to address a narrow class of cases, such as knives, butter, and whiskey, that have dangers built in that cannot be removed. That the focus was on danger reveals that Prosser was focused not on the condition or source of the risk in the product. Thus, section 402A’s premise was that products that, in the ordinary course of their use, caused harm to users because of the extent of danger they posed were subject to strict liability. “Defective” *might* have been a reference to a deviation from the norm meant by the manufacturer—a manufacturing defect—but its inclusion later in the ALI process reveals that it had both a narrower and more stylized purpose than adverting to manufacturing defects.

Moreover, the adoption of consumer expectations as the standard for determining when a product was subject to strict liability reflects the contract heritage of section 402A and the contribution of implied warranty as the basis for strict liability. The parties’ intent and expectations are a contract concept and displace fault as the basis for determining the content of a contract and whether it was breached. And, as suggested above, the implied warranty cases involving personal injury are concerned with unexpected and unacceptable danger in a product,

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“[F]ood in a condition unreasonably\* dangerous to the consumer” was my language. The Council then proceeded to raise the question of a number of products which, even though not defective, are in fact dangerous to the consumer—whiskey, for example [laughter]; cigarettes, which cause lung cancer; various types of drugs which can be administered with safety up to a point but may be dangerous if carried beyond that—and they raised the question whether “unreasonably dangerous” was sufficient to protect the defendant against possible liability in such cases.

Therefore, they suggested that there must be something wrong with the product itself, and hence the word “defective” was put in; but the fact that the product is dangerous, or even unreasonably dangerous to people who consume it is not enough. There has to be something wrong with the product.

Now, I was rather indifferent to that. I thought “unreasonably dangerous,” on the other hand, carried every meaning that was necessary, as Mr. Dickerson does; but I could see the point, so I accepted the change. “Defective” was put in to head off liability on the part of the seller of whiskey . . . .

...

PRESIDENT TWEED: The motion is to eliminate “defective” in the black letter . . . .

...

PRESIDENT TWEED: The noes seem to me to have it.

38 ALI Proceedings 86-89 (1961), *reprinted in* W. PAGE KEETON ET AL., PRODUCTS LIABILITY AND SAFETY: CASES AND MATERIALS 223-25 (2d ed. 1989). Prosser’s statement that the “unreasonably” language was in his original draft is incorrect. The first draft, in 1958, subjected food “in a condition dangerous to the consumer” to strict liability. RESTATEMENT (SECOND) OF TORTS § 402A (Prelim. Draft No. 6, 1958). “Dangerous” was first modified with “unreasonably” at the same time as “defective condition” was added and contained in the Tentative Draft that was the subject of the discussion set out above. RESTATEMENT (SECOND) OF TORTS § 402A (Tentative Draft No. 6, 1961). Richard Wright thus gets it backward in his claim that the “unreasonably dangerous” language was included to address unavoidably unsafe products. Wright, *supra* note 8, at 1069.

regardless of whether it stems from a manufacturing, design, or informational deficiency.

If strict liability were limited to manufacturing defects, there would have been no need for consumer expectations to be employed in section 402A. Manufacturing defects can readily be determined by reference to other identical products and whether the questioned product deviated from all of those others. If so, it is subject to strict liability. That is precisely the way in which the *Restatement (Third)* imposes strict liability for manufacturing defects, eschewing any reference to consumer expectations in the definition or description of a manufacturing defect.<sup>111</sup> Consumer expectations are a warranty and product-performance standard, not a standard designed to assess a specific kind of defect.

Aspects of the commentary to section 402A beyond the black letter and consumer-expectations standard for determining defect also contradict the idea that manufacturing defects were the exclusive subject for strict liability. Comment k, addressing unavoidably unsafe products, belies that section 402A was limited to manufacturing defects. If it were, there would have been no need for comment k to address unavoidably unsafe products—those products are by definition ones in which the danger exists in all such products as an inherent quality of the product.<sup>112</sup> The same is true of comment j, which covers the requirement of warning for products such as those in comment k that pose generic dangers to users.<sup>113</sup> Comment k also reveals that the American Law Institute had no difficulty communicating that a class of products posing danger were not subject to section 402A's strict liability.<sup>114</sup> Yet, there is no comparable comment excluding design or informational inadequacies from the strict liability of section 402A.<sup>115</sup>

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<sup>111</sup> RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(a) (1998); *see also* Page Keeton, *Product Liability and the Meaning of Defect*, 5 ST. MARY'S L.J. 30, 38-39 (1973) (observing that “virtually any fabrication or construction defect” would be “unreasonably dangerous as a matter of law”).

<sup>112</sup> Professor Priest does not address comment k in his structural analysis of section 402A. Priest, *supra* note 6, at 2317-24. He does, however, state at the outset that there are several passages “susceptible to more expansive interpretations of strict liability,” but none of the ones he subsequently discusses includes the language in comment k. *Id.* at 2318; *see also* Schwartz, *supra* note 8, at 947 n.185 (“If the Restatement had no intention of applying to design issues, there would have been no need for comment k, on ‘unavoidably unsafe products.’”); Ellen Wertheimer, *Calabresi's Razor: A Short Cut to Responsibility*, 28 STETSON L. REV. 105, 116 n.35 (1998) (“Finally, sections such as comments j and k, which deal with defects other than those in manufacture, would have been unnecessary . . .”).

<sup>113</sup> Comment i, as well, speaks to everyday products and the universal risks that are posed by their use in the course of explaining that they are not unreasonably dangerous. *See* Henderson & Twerski, *Achieving Consensus*, *supra* note 35, at 879-80.

<sup>114</sup> *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965).

<sup>115</sup> Priest makes the complementary point that the comments do not contain a “single example . . . of an alternative [to manufacturing defects] strict liability application.” Priest, *supra* note 6, at 2319. The reason is that, as already observed, Prosser and the other founders were not thinking in terms of subcategorizing defects. The fact that, by Priest's count, there are six examples of product defects that were of uncertain source is additional evidence of the lack of attention to and concern about the defects' sources. *Id.*



Professor Priest finds language in comment h supportive. Comment h states that the defective condition of a product “may arise not only from harmful ingredients, not characteristic of the product itself, either as to presence or quantity, but also from foreign objects contained in the product, from decay or deterioration before sale, or from the way the product is prepared or packed.”<sup>116</sup> This language, Priest explains, is exemplary of different ways that a manufacturing defect may exist, with only the possible exception of the “quantity” idea.<sup>117</sup> That is true, but it is also insignificant when one considers the source of this language. It first appeared in the earliest Preliminary Draft of section 402A, which applied only to food products.<sup>118</sup> The source of defects in food surely was classical manufacturing defects. But food is not “designed” in the way that durable goods are, and so we would not have expected a strict liability provision applicable only to food to advert to the way that a product—say, a lawn chair that rocks—might be defective because a metal piece, sharp as a guillotine blade, is underneath the arm rest and slices off a user’s finger.<sup>119</sup>

Another indication that there was no conscious decision to limit section 402A to manufacturing defects is that it contains references to the necessity of providing warnings. Failure to provide these warnings, when required, renders the seller subject to liability under section 402A. Thus, section 402A suggests that informational inadequacies can, in themselves, constitute a defective condition unreasonably dangerous.<sup>120</sup> Comment j, titled “Directions or warning,” states flat out that “[i]n order to prevent the product from being unreasonably dangerous, the seller may be required to give directions or warning . . . .” To be sure, liability for these informational inadequacies does not look very strict—there is no mention of dispensing with the negligence requirement of foreseeability, the context is often one in which the manufacturer would have knowledge, and, in one instance, the warning obligation is explicitly conditioned on seller anticipation of the danger. Professor Priest only refers to comment j, calling it “peculiar” and dismissing it because all of the examples it discusses involve unavoidably unsafe products.<sup>121</sup> Yes, but comment j is not *about* only unavoidably unsafe products, and its first sentence, quoted above, is not qualified in that respect. Comment k is *about* unavoidably unsafe products and has its own reference to the requirement that that class of products be accompanied with proper warnings.

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<sup>116</sup> RESTATEMENT (SECOND) OF TORTS § 402A, cmt. h (1965).

<sup>117</sup> Priest, *supra* note 6, at 2318.

<sup>118</sup> RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (Prelim. Draft No. 6, 1958).

<sup>119</sup> See *Matthews v. Lawnlite Co.*, 88 So. 2d 299, 300 (Fla. 1956).

<sup>120</sup> See RESTATEMENT (SECOND) OF TORTS § 402A cmts. h, j, & k (1965).

<sup>121</sup> Priest, *supra* note 6, 2323.

Professor Priest's final argument based on structure stems from the treatment of contributory negligence in comment n, which denies any defense based on certain negligent conduct of the plaintiff.<sup>122</sup> Professor Priest finds this denial "peculiar" because from the perspective of the modern law and economics movement, contributory negligence is an important adjunct to obtaining the efficiency provided by strict liability so that consumers have adequate incentives to avoid injuries for which they are the cheaper cost avoiders.<sup>123</sup> Yet, Priest reasons, if strict liability under section 402A is limited to manufacturing defects, then there is little need for consumer incentives since there is little that a consumer can do to avoid harm from a latent manufacturing defect that is unknown.<sup>124</sup> Denying contributory negligence in section 402A, thus, can be squared with economic efficiency.

That the law and economics movement developed well after section 402A had been drafted, debated, and published<sup>125</sup> goes unappreciated and unmentioned by Professor Priest. That tort law might not be cast purely in terms of economic efficiency, even after those ideas moved from the academy to the courts, similarly escapes Professor Priest's argument. That, in fact, contributory negligence was not a defense to other strict liability claims when section 402A was adopted also goes unrecognized in Priest's treatment.<sup>126</sup> Finally, Professor Priest's claims about comment n ignore a critical flaw in the economics' claim for the need for contributory negligence to insure victim care.<sup>127</sup>

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<sup>122</sup> We need not tarry on the scope of conduct encompassed by comment n, which is not as broad as the holdings in cases cited by Professor Priest, because the breadth of comment n is unimportant to the issue raised by Priest's treatment.

<sup>123</sup> Priest, *supra* note 6, at 2322-23.

<sup>124</sup> *See id.*

<sup>125</sup> Richard Posner's first crack at explaining the Hand test in terms of economic efficiency was in 1972. *See* Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972). The following year was his first treatment of strict liability. *See* Richard A. Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205 (1973). Calabresi's *The Cost of Accidents* was published in 1970, five years after section 402A. *See* GUIDO CALABRESI, *THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

<sup>126</sup> *See* RESTATEMENT (SECOND) OF TORTS §§ 515, 524 (1977) (paralleling comment n denying a claim for unreasonable conduct but providing a defense based on knowingly and unreasonably assuming the risk).

<sup>127</sup> The flaw is that there are other, more powerful incentives for protection of self against personal injury than liability incentives, predominantly the risk of pain, suffering, and even death. *See* Gary T. Schwartz, *Contributory and Comparative Negligence: A Reappraisal*, 87 YALE L.J. 697, 704-27 (1978) (explaining the non-financial incentives for taking care to avoid physical injury to oneself). In 1986, in the third edition of his book, Judge Posner nodded in the direction of this criticism, acknowledging that damages may not provide full compensation for personal injuries and that potential victims may therefore have an unspecified "incentive" to take care even if tort law does not sanction their unreasonable behavior. RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 154 (3d ed. 1986). Similarly, Steve Shavell recognizes that if victims "would not or could not be fully compensated for . . . serious personal injury or death," they would "have an incentive to take care" independent of tort law. STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 11 n.9 (1987).

#### IV. THE *RESTATEMENT (THIRD)*'S TREATMENT OF DESIGN DEFECTS RECONSIDERED

I had not intended to spend so much of this paper attending to Professor Priest's manufacturing defect hypothesis. The more I read, however, the more intriguing his claim and evidence became. The more I explored, the more convinced I became that the founders and section 402A were concerned not about specific kinds of defects and their amenability to strict liability, but about products that were excessively dangerous. As I have attempted to show, the evidence in support of that proposition is quite overwhelming, and there is almost nothing, upon careful examination, supporting the idea that section 402A was meant to be limited to manufacturing defects.

However, the fact that section 402A was not limited to design defects does not mean, as stated earlier, that it adopted a consumer expectations test for design defects, as others have suggested.<sup>128</sup> Returning to where we began and where I found common ground with Professor Priest, the founders, with their focus on products that performed in an excessively dangerous manner, just were not thinking about marginal safety improvements or that failure to employ an alternative design might be the basis for strict liability. Nor did they consider the propriety of consumer expectations in deciding such cases. Almost a decade after section 402A was approved and after early real design defect cases were emerging, John Wade remained concerned with defects of the implied warranty variety—products that contained excessive or unreasonable danger, regardless of the source of the danger.<sup>129</sup>

Yet the difficulties of a consumer expectations test for designs at the margin have been well documented. Once the strict products liability movement got going after section 402A was published, cases that presented the issue of "how safe is enough?" began emerging. And courts began expressing concerns about the use of consumer expectations when consumer expectations about the matter were indeterminate or non-existent, leaving resolution of the matter of defect entirely to the unencumbered judgment of the jury.<sup>130</sup>

Once again, the California experience is revealing. Six years after *Cronin*, the California Supreme Court was confronted with a case,

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<sup>128</sup> See *supra* text accompanying notes 12-15. Bill Powers explains the difficulties and waning influence of the consumer expectations test as more difficult design defect cases became a staple of products liability litigation. See William Powers, Jr., *A Modest Proposal to Abandon Strict Products Liability*, 1991 U. ILL. L. REV. 639, 646, 653-54. Although he focuses more on complex designs than on difficult determinations about whether the safety performance of the product was deficient, his analysis and explanation of why courts have moved away from it is illuminating.

<sup>129</sup> See *supra* text accompanying notes 78-80.

<sup>130</sup> See, e.g., *Heaton v. Ford Motor Co.*, 435 P.2d 806, 807-09 (Or. 1967) (pickup truck that had wheel come apart after hitting a rock five or six inches in diameter).

*Barker v. Lull Engineering Inc.*,<sup>131</sup> in which the plaintiff explicitly asserted that a high-lift loader, used at a construction site, should have had several improvements to its design to make it safer.<sup>132</sup> The context was not a routine construction-site environment, but one where the loader would be used on sloping ground and was therefore more susceptible to tipping.<sup>133</sup> The plaintiff was injured when, in the course of lifting a load of lumber, the loader tipped over.<sup>134</sup> Reaffirming its decision in *Cronin* that section 402A's "unreasonably dangerous" language should not be used in charging a jury on strict products liability, the court nevertheless recognized the need for some guidance to be provided to the jury on the matter of how safe a product need be designed. The court provided a dual-disjunctive standard for determining defectiveness in a design case.<sup>135</sup> The first adopted the *Greenman* performance-based consumer expectations standard.<sup>136</sup> As the court recognized, this standard for defectiveness will often be proved by circumstantial evidence bearing on the accident that occurred, rather than proof of the specific defect.<sup>137</sup> The second test for defectiveness entailed proof, based on a balancing of the risks of the existing design compared to the greater safety of an alternative design with the utility or benefits of the existing design compared to the alternative design.<sup>138</sup>

By 1994, however, the court appreciated the indeterminacy of consumer expectations for marginal design defect claims. In *Soule v. General Motors Corp.*,<sup>139</sup> the plaintiff was hurt in an automobile accident when the toepan beneath her feet was crushed rapidly backwards in the collision.<sup>140</sup> Among the defects alleged by plaintiff was the design of the frame, which permitted the toepan to be rapidly deflected toward the driver.<sup>141</sup> But a collision with a closing speed between thirty and seventy miles per hour just does not afford any basis for determining how well an automobile should protect a driver against rapidly deflecting parts. The circumstances of *this* accident just did not permit an inference of a defect in the car. The court declared that consumer expectations, in this

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<sup>131</sup> 573 P.2d 443 (Cal. 1978).

<sup>132</sup> Plaintiff's expert identified several improvements in the loader's design whose absence allegedly made it defective: (1) equipping it with outriggers so that it would be steadier, especially on sloping ground; (2) providing a roll bar and seat belt for the operator; (3) improving the leveling control provided for the operator; and (4) including a "park" position on the loader's transmission. *Id.* at 447-48.

<sup>133</sup> *Id.* at 447.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.* at 452.

<sup>136</sup> *Id.* at 454.

<sup>137</sup> *Id.* Yet it seemed to be inapplicable in *Barker*. The regular operator of the loader called in sick on the day that plaintiff was injured because he thought the sloping ground and narrow base of the loader were incompatible, creating a dangerous situation. *Id.* at 448 n.2.

<sup>138</sup> *Id.* at 454-55.

<sup>139</sup> 882 P.2d 298 (Cal. 1994).

<sup>140</sup> *Id.* at 301.

<sup>141</sup> *Id.* at 302.

situation, could not be used to determine if the car was defective.<sup>142</sup> Use of consumer expectations had to be limited. Although the court's explanation referred to complex designs as being beyond the ken of a jury,<sup>143</sup> it was not the complexity of the automobile's design that presented the problem. Rather, it was that the performance of the automobile, under the circumstances, was not such that an inference of defect was possible.<sup>144</sup> On the other hand, if the same automobile with the same complexity of design exploded while idling at a traffic light, the court acknowledged that consumer expectations would permit a finding of defect.<sup>145</sup> Thus, the court left difficult marginal design defect claims to be resolved by the risk-benefit prong of *Barker*, while preserving consumer expectations for the performance-based failure to provide a floor of safety that all products should provide and that were, in my assessment, the focus of section 402A.<sup>146</sup>

The *Restatement (Third)* reflects these lessons learned with the emergence of marginal design defect claims and yet, in my judgment, remains true to section 402A's conception of defect, contrary to some critics. In section 2(b), the Restatement provides a risk-utility standard for design defects. This is a negligence standard, pure and simple, given its requirement that the risks be foreseeable.<sup>147</sup> At the same time, section 3 contains an alternative formulation for finding a defect—an alternative that is roughly congruent with the “excessively dangerous” conception of defect contained in section 402A.<sup>148</sup> Although couched as the strict liability analog to *res ipsa loquitur* and often referred to as the “malfunction theory” of defect, this section encompasses the kinds of cases that were the model for section 402A: a brand-new car that takes an uncommanded right turn and crashes into an obstacle; a rocking lounge chair that cuts off a user's finger; or a power tool that fails adequately to hold stock in place. Interestingly, two of these examples appear as Illustrations to section 3 in the *Restatement (Third)*, yet are drawn from the facts of the two classic cases supporting section 402A.<sup>149</sup>

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<sup>142</sup> *Id.* at 301.

<sup>143</sup> *Id.* at 308.

<sup>144</sup> See Powers, *supra* note 128, at 646 (noting that “it is difficult to ascertain consumer expectations in all but the simplest cases”).

<sup>145</sup> *Soule*, 882 P.2d at 308 n.3.

<sup>146</sup> *Id.* at 308-09.

<sup>147</sup> RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b) (1998). The balancing of risks and benefits is obscured because it is not explicitly stated in the black letter of section 2(b). Comment f clarifies the essential inquiry, a balancing of the safety benefits of the alternative design with its costs and other disadvantages compared to the actual design.

<sup>148</sup> *Id.* § 3 (1998). I do not want to overstate the equivalence of section 3 of the *Restatement (Third)* and section 402's concept of defect that I have explained in this Article. I have not, at this point, thought through all of the issues that are implicated. We will also need more opportunity to see how courts interpret and apply section 3 before a final judgment is appropriate.

<sup>149</sup> RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 3 illus. 5, 7 (1998). That Illustration 7 does not result in liability does not diminish the point, as the reason for non-liability is that the source of the defect was equally probably the result of someone other than the seller.

To the Reporters' credit, in the midst of their drafting and facing heavy criticism over their adoption of a risk-utility test for design defects, they modified section 3 in an important respect. In Council Draft No. 1, the predecessor to section 3 provided that an inference could be drawn when the circumstances were such that the malfunction "was caused by a manufacturing defect."<sup>150</sup> This section remained limited to manufacturing defects through Tentative Draft No. 1, but in subsequent drafts and the final version was extended to design defects as well.<sup>151</sup> Notably, one version of this section revealed its kinship with the performance-based standard for dangerous product defects in section 402A by explaining that it was available when a product failed "to function as a reasonable person would expect" and caused harm in a manner justifying an inference that a defect was responsible.<sup>152</sup> Although discarding the warranty "consumer" from the consumer expectations test and substituting the tort "reasonable person," the relationship between section 402A in the *Restatement (Second)* and section 3 in the *Restatement (Third)* is plain.<sup>153</sup>

Just as section 402A was indifferent to the source of the defect, section 3 is indifferent to whether the misperformance is due to design or manufacturing. Indeed, I take it that, even if we know the source of the defect, a plaintiff may rely on section 3 if the circumstances of the accident justify the inference of defect contemplated by that section. Thus, to return to *Matthews v. Lawnlite Co.*,<sup>154</sup> the case in which a lounge chair amputated the user's finger, even if we knew that the source of the defect was one of design, a plaintiff would be able to pursue a section 3 claim and would not be required to prove a reasonable alternative design under section 2(b).<sup>155</sup>

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<sup>150</sup> RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 102 (Council Draft No. 1, 1993).

<sup>151</sup> See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 3 (Tentative Draft No. 2, 1995); RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 3 (1998).

<sup>152</sup> RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 3 (Tentative Draft No. 1, 1994).

<sup>153</sup> The final version of section 3 became the product liability analog of *res ipsa loquitur*, eliminating any perspective and relying on the circumstances of the harm-causing incident for an inference that a product defect, rather than some other cause, was responsible. See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 3 (1998).

<sup>154</sup> 88 So. 2d 299 (Fla. 1956).

<sup>155</sup> See RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 3 cmt. b (1998). Comment b is muddled in its treatment of this issue. It states that a plaintiff injured by a plane whose wings suddenly fall off may know that it was due to design, but when the circumstances justify an inference of defect under section 3, "it should not be necessary for the plaintiff to incur the cost of proving whether the failure resulted from a manufacturing defect or from a defect in the design of the product." *Id.* But the issue in the plane crash case is not whether the plaintiff should incur the cost of identifying the source of the defect; the issue is whether the plaintiff, when the source of the defect is known to be one of design, is limited to section 2(b), the design defect standard. However, comment b to section 2 of the *Restatement (Third)* makes clear that section 3 is an alternative method of proving a design defect. See also Henderson & Twerski, *Achieving Consensus*, *supra* note 35, at 906 ("Inferences of defect based on product malfunction obviate the need to apply the general design standard, thereby rendering that subset of design cases relatively easy to decide.").

This brings me to my conclusion: the *Products Liability Restatement* does not contract the scope of liability for design defects from that provided in section 402A. When section 402A was developed, there already existed a negligent design cause of action.<sup>156</sup> Section 402A, without a great deal of consideration of the precise boundaries, added a basis for liability for defects that made a product unreasonably dangerous.

## V. CONCLUSION

Section 402A and the scholars and courts that crafted it were concerned about easy cases in which products failed in performing at a minimal level of safety. Impediments to establishing liability on an implied warranty theory were the primary concern. Relevant also were difficulties of proof of the elements of negligence, as negligence matured into a broad-based theory that could be applied by injured purchasers, users, and bystanders against those involved in the manufacture and sale of a product. In this era, the type of defect was not important, and the founders, although aware of the different ways in which a product might be defective, paid little attention to the matter as section 402A was being developed. Thus, I do not think that George Priest's now twenty-year-old claim that section 402A was intended to be limited to manufacturing defects squares with the available evidence.

At the same time, the performance-oriented standard adopted from the warranty of merchantability proved inadequate to address the new kinds of cases that plaintiffs' lawyers began bringing in the heady early days of strict products liability. Cars that crashed were alleged to be inadequately designed to provide adequate protection to the occupants. Industrial machinery should have been provided with additional safeguards to prevent momentary carelessness by an operator from resulting in an amputation, even if the employer did not choose to purchase such guards. Brakes and steering mechanisms on earth movers should have been more effective, permitting the operator to manipulate the machinery more nimbly.<sup>157</sup> Consumer expectations, which could be so readily employed in the classic cases of misperformance that led to the adoption of strict products liability, proved inadequate to its task. Confronted with the inevitability of tradeoffs in determining how safe a product should be designed, a movement toward a risk-utility standard began to take hold and was accelerated and confirmed by the *Restatement (Third) of Torts*.

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<sup>156</sup> See RESTATEMENT (SECOND) OF TORTS § 398 (1965). To be sure, that negligent design cause of action did not require proof of an alternative design, which the *Restatement (Third)* does. Yet, if the design defect is egregious enough (and I do not suspect that there are many products in which this is the case), section 3 provides for liability without the need for proof of an alternative design.

<sup>157</sup> See, e.g., *Garst v. Gen. Motors Corp.* 484 P.2d 47, 62-63 (Kan. 1971).

Yet in fashioning a risk-utility test for design defects while adopting a separate provision for products whose misperformance is sufficiently egregious for liability to be imposed, the *Restatement (Third)* brings us very close to where we were when section 402A was adopted. Section 3 of the *Restatement (Third)* imposes strict liability when a product just does not meet minimum standards of safety, and the risk-utility test of section 2(b) provides a negligent design standard to be employed when the issue is how safe products must be designed. Critics on both sides of the debate on strict liability and the *Restatement (Third)*'s role have missed its essential role in this return to basics.