

# PROSSER’S BAIT-AND-SWITCH: HOW FOOD SAFETY WAS SACRIFICED IN THE BATTLE FOR TORT’S EMPIRE

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*While this battle was still in its inception, and the attackers had as yet made little progress, writers here and there began to direct their shafts at other parts of the wall, and to cry for an extension of the strict liability to products other than food. For a long time the battlements held firm against all the raiding parties; and until the nineteen fifties no major breach occurred. The wall is still stoutly defended . . . Of late, however, there has been here and there a breach; the assault goes on apace, and as the nineteen sixties are upon us, it becomes evident that we are to witness a new onslaught, which may lead to the most desperate struggle of all.<sup>1</sup>*

## INTRODUCTION

The extension of strict liability to products other than food was, for William Prosser, a battle to be described in epic terms, a battle fought by “writers

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<sup>1</sup> William L. Prosser, *The Assault upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1110–11 (1960) [hereinafter Prosser, *The Assault*].

here and there”<sup>2</sup> to expand tort’s empire into the far reaches of what had for long been under the control of his nemesis, contract law. But to Prosser there was much more at stake than control over the increasingly important realm of products liability law and the rules that would govern for decades the means and extent of recovery for injured consumers. The fact of contract law’s control had resulted from what Prosser presented as both a kind of treason and a failure of logic, both of which required redress. As Prosser thus emphasized, an action for breach of warranty had not only originally sounded in tort, its “old tort character ha[d] continued to color the substantive law of warranty itself, by perpetuating the idea . . . of a liability arising and imposed by operation of law, which is quite independent of any intention to agree upon terms as a matter of fact.”<sup>3</sup> Because to Prosser (and others) it was illogical for a warranty to be imposed by operation of law, in the absence of agreement, there was only one solution: “[L]et there be strict liability in tort, declared outright, without an illusory contract mask.”<sup>4</sup>

To state that products liability law remains of central importance to tort law is merely to repeat a truism.<sup>5</sup> But the importance of this law—and the concept of strict liability that sits at its core—has long overshadowed its origin in food cases, where courts first worked out rules that allowed those injured by unsafe food to recover damages. Although the importance of these early food cases has been recognized by a few,<sup>6</sup> commenters have so far missed that these early cases clearly reflected an acceptance of the unique importance of food safety. Because of a consumer’s complete vulnerability to the invisible danger of adulteration, the need for a rule of strict liability for food was not only justifiable on legal grounds; it was also necessary on practical grounds.

What happened next, though, shifted the focus from the importance of food safety as something arguably unique to the asserted importance of all consumers to have a remedy at law when injured by a defective product. Seekers of a rule of strict liability in tort to govern all products took to lobbying rhetorical questions as if brickbats. Why allow only those injured by food to recover? Why not a rule that applied to all product-sellers for any product-related injury? As Fleming James observed, “[s]urely greater danger lurks in a defective auto-

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<sup>2</sup> *Id.* at 1110.

<sup>3</sup> *Id.* at 1126–27.

<sup>4</sup> *Id.* at 1134.

<sup>5</sup> See, e.g., JOHN C.P. GOLDBERG ET AL., TORT LAW: RESPONSIBILITIES AND REDRESS 887 (3d ed. 2012) (“Products liability claims stand at the center of modern tort law.”).

<sup>6</sup> *Id.* at 896 (querying in a note following Justice Roger Traynor’s concurring opinion in *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944), “Is there any reason why food-stuffs—and in *Escola*, a soft drink bottle—should have been among the first sorts of products in which strict liability would apply? Did it aid Traynor’s cause that he was able to write his opinion in a case in which the defective ‘product’ was a bottled beverage?”). Goldberg also points out that Traynor cited to “a well-known New York decision authored by Judge Cardozo. *Ryan v. Progressive Grocery Stores*, 175 N.E. 105 (N.Y. 1931)”. *Id.* For a further discussion of Traynor and the *Escola* concurrence, see *infra*, Part I.D.

mobile wheel than in a pebble in a can of beans.”<sup>7</sup> The grand plan was thus hatched by Prosser to execute a kind of bait-and-switch, using the food cases to first gain acceptance of a rule of strict liability in torts, and then by analogy extend the rule to all products.<sup>8</sup> And so would be born tort’s new and expanded empire.

This article critiques the decision of the American Law Institute (“ALI”)<sup>9</sup> to abandon the first-adopted version of Section 402A of the Restatement (Second) of Torts, a version that applied the rule of strict liability to food only.<sup>10</sup> The first-adopted version read as follows:

One engaged in the business of selling food for human consumption who sells such food in a defective condition unreasonably dangerous to the consumer is subject to liability for bodily harm thereby caused to one who consumes it, even though

(a) the seller has exercised all possible care in the preparation and sale of food, and

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<sup>7</sup> Fleming James, Jr., *General Products—Should Manufacturers Be Liable Without Negligence?* 24 TENN. L. REV. 923, 926 (1957), see also Denis W. Stearns, *A Continuing Plague: Faceless Transactions and the Coincident Rise of Food Adulteration and Legal Regulation of Quality*, 2014 WIS. L. REV. 421, 423–24 (2014) (noting that Fleming James and others, including Prosser, thought food cases too trivial, reinforcing their eagerness to have strict liability apply to all products, not just food).

<sup>8</sup> Stearns, *supra* note 7, at 427–29 (arguing that, for reasons both ontological and sociological, food is a category unto itself and, as a result, any analogy to it must be false).

<sup>9</sup> The American Law Institute was formed on February 23, 1923 during a meeting held in Washington D.C., where those gathered unanimously resolved as follows:

That we approve the formation of the American Law Institute, the object of which shall be to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work.

William Draper Lewis, *The First Restatement of the Law and How We Did It*, 25 NEB. L. REV. 206, 206 (1946) (offering a plainly congratulatory depiction of the ALI’s founding and first Restatement). Assessing the results of the project, Draper writes:

We started with the belief that out of the mass of case authority and legal literature could be made clear statements of the rules of the common law today operative in the great majority of our states, expressed as simply as the character of our complex civilization admits. The result shows that this belief was justified.

*Id.* at 215. It perhaps goes without saying that there are many who view the ALI and its Restatement project differently than those that had conceived and controlled and, thus, been quite proud of the project. See, e.g., Jack Van Doren, *A Restatement of Jurisprudence: Why Not?* 44 GONZ. L. REV. 159, 163 (2009) (describing the origins of the ALI and its project, and pointing out that “the Restatement Movement was controversial both within the ALI, which produced it, and by others outside the ALI”); G. Edward White, *The American Law Institute and the Triumph of Modernist Jurisprudence*, 15 LAW & HIST. REV. 1, 3 (1997) (“[T]he formation of the American Law Institute can be thought of as an effort to resist as well as to embrace perceived changes in early twentieth-century American life.”).

<sup>10</sup> RESTATEMENT (SECOND) OF TORTS § 402A (Tentative Draft No. 6, 1961) [hereinafter Tentative Draft No. 6]. Among the three caveats that were included with this draft was one stating that the ALI “express[ed] no opinion as to whether the rule stated in this Section may not apply . . . to articles other than food.” *Id.*

(b) the consumer has not bought the food from or entered into any contractual relation with the seller.<sup>11</sup>

At the time, no one questioned that the rationale for a rule of strict liability for food was compelling. As noted in comment b, “[s]ince the early days of the common law those engaged in the business of selling food intended for human consumption have been held to a high degree of responsibility for their products.”<sup>12</sup> As this comment further explained:

[T]he justification for the strict liability has been said to be that the seller, by marketing his food for consumption, has undertaken and assumed a *special responsibility* toward any member of the consuming public who may be injured by it; that the public has the right to and does expect, in the case of a product so vitally important to human existence and welfare as food, that reputable sellers will stand behind their goods; that public policy demands that the burden of accidental injuries caused by products vital to the life and health of the community be placed upon those who market them, . . . and that the consumer of food is entitled to the maximum of protection at the hands of some one, and the people to afford it are those who market the food.<sup>13</sup>

In sum, because food is vital to human existence, and to the life and health of the community, all agreed that the “special responsibility” of those making food necessarily provided reason to a rule of strict liability for food.<sup>14</sup>

Despite this agreement, there remained a dispute as to whether the rationale in support of strict liability for food manufacturers could also be extended to distributors and other non-manufacturing sellers. In a “Note to the Institute,” members were informed that “a large majority” approved the application of this rule to food manufacturers, but the “Council are [sic] about evenly divided as to whether it should apply to retailers and wholesalers.”<sup>15</sup> The twin rationales offered for imposing strict liability against all those in the chain of distribution were consumer-friendly and pragmatic: “obtaining jurisdiction over [retailers] where the manufacturer is at a distance, and the theory that not the plaintiff, but the merchant, should fight it out with manufacturer by seeking indemnity from him.”<sup>16</sup> These rationales, however, best applied to food retailers—specifically, those selling direct-to-the-public and not to wholesalers or distributors.<sup>17</sup> Once

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<sup>11</sup> *Id.*

<sup>12</sup> *Id.* § 402A cmt. b.

<sup>13</sup> *Id.* (emphasis added).

<sup>14</sup> *Id.* The basis for this special rule is noted later in the draft as being “the ancient one of the special responsibility for the safety of the public undertaken by one who enters into the business of supplying human beings with products for internal consumption.” *Id.* § 402A cmt. d.

<sup>15</sup> *Id.* § 402A note to Institute. All twelve of the “advisers”—one of whom was Roger Traynor—were said to have agreed, “that both retailers and wholesalers should be included.” *Id.*

<sup>16</sup> *Id.* It is true, of course, that chain-of-distribution liability is more convenient for plaintiffs—that is, “a shortcut which makes any supplier in the chain liable directly to the user.” William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 MINN. L. REV. 791, 799–800 (1966) [hereinafter Prosser, *The Fall*].

<sup>17</sup> Indeed, Prosser’s depiction of how food is manufactured, distributed, and sold is both oversimplified and inconsistent, assuming most food products have one manufacturer and

the rule is applied to non-food products, and extended along the entire chain of distribution, the sufficiency (or even applicability) of the rationales becomes much less clear. As such, it is hardly surprising that there was disagreement over the rule's extension.

Notwithstanding the disagreement, Prosser pushed forward with the efforts to extend the rule further still, beyond food itself. And in so doing, he ignored the inevitability of even bigger disagreements in the future. He no doubt had confidence in his ability to address such disagreements if and when they arose. Much more important was the need to take the next step in the extension of the rule, which occurred on May 23–26, 1962, at the thirty-ninth annual meeting of the ALI.<sup>18</sup> The new version of the rule expanded the category of products to which strict liability applied, pivoting from a definition restricted to “all products intended for internal human consumption”—that is, food—to a definition that included “products for intimate bodily use.”<sup>19</sup> The newly included products were those for so-called “external consumption,” such as clothing, hair dye, cosmetics, and soap, all of which had been explicitly excluded from the prior version of the rule.<sup>20</sup> Prosser justified this extension by pointing to: [r]ecent decisions, since 1950, [that] have extended this special rule of strict liability . . . to the *closely analogous* cases of other products intended for intimate bodily use, where, for example as in the case of cosmetics, the application to the body of the consumer is external rather than internal.<sup>21</sup>

In justifying the extension of the “special rule,” Prosser cites only ten cases, with the products being hair dye, soap, laundry detergent, permanent wave

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then a number of non-manufacturing sellers in the chain-of-distribution. See Prosser, *The Assault*, *supra* note 1, at 1117 (describing the “wholesaler, the jobber, and the retailer” as doing nothing to a product that would normally subject them to negligence liability). For a much more nuanced and accurate description of how food products are manufactured and distributed, from a contemporary of Prosser, see REED DICKERSON, *PRODUCTS LIABILITY AND THE FOOD CONSUMER* 148–56 (1951) (explaining how the “presumed . . . sharp dichotomy between the concepts of ‘maker’ and ‘distributor’” is for the ease of categorization, but not an accurate depiction of how food is in fact products are made and distributed, and that “[b]etween the extremes of all-manufacturer and all-distributor is every combination of making and distributing”). See also Cornelius W. Gillam, *Products Liability in a Nutshell*, 37 OR. L. REV. 119, 129 (1958) (“Direct dealing between consumers and manufacturers is not typical of the distribution of goods in modern society, but it does occur frequently, especially in the food industry.”).

<sup>18</sup> RESTATEMENT (SECOND) OF TORTS § 402A (Tentative Draft No. 7, 1962) [hereinafter Tentative Draft No. 7]. See also Elizabeth Laposata et al., *Tobacco Industry Influence on the American Law Institute’s Restatements of Torts and Implications for Its Conflict of Interest Policies*, 98 IOWA L. REV. 1, 9–17, 26–30 (2012) (providing a detailed summary of the early drafts of Section 402A, while arguing somewhat unconvincingly that cigarettes would have “easily” fit the definition of food as then proposed).

<sup>19</sup> Tentative Draft No. 7, *supra* note 18, § 402A.

<sup>20</sup> Tentative Draft No. 6, *supra* note 10, § 402A cmt. c.

<sup>21</sup> Tentative Draft No. 7, *supra* note 18 § 402A cmt. b (emphasis added).

solution, clothing (a grass hula skirt), cigarettes, a surgical pin, and a polio vaccine.<sup>22</sup>

But was the analogy as close as Prosser claimed? Was unwholesome sausage (something you ate) really analogous to a “permanent waves” solution (a foul-smelling chemical product that you applied to your scalp and hair)?<sup>23</sup> In what way is food “closely analogous” to a grass hula skirt that caught fire, severely burning a child?<sup>24</sup> In addition, is it even possible to speak coherently about consumption being external, unless consumption means nothing other than use or application, with no meaningful difference between putting on a skirt and eating a sandwich? Yet, regardless of whether the expanded product category made sense, the revised rule was still adopted. More importantly (at least for purposes of the extension that happened next), the version adopted was now sufficiently disconnected from its original food-safety rationale that applicability to all products was now more likely to occur. If strict liability could apply to food, a hula skirt, and a chemical hair product, there was no obvious limit to the rule’s application. In essence, the special rule for food was forgotten.

Approximately two years after having extended the special rule of strict liability for food to products applied externally to the body, the ALI adopted one last version of Section 402A, which applied to products of all kinds, with only a few specific exemptions.<sup>25</sup> Although the “good tobacco” exemption has recently been criticized as evidence of the tobacco industry’s influence over the drafting process, such criticism misses a crucial point. If the goal was, as I argue, to adopt a rule that applied as broadly as possible, it made no sense for Prosser to risk having any particular industry scuttle the rule of strict liability overall.<sup>26</sup>

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<sup>22</sup> *Id.* § 402A list of supporting cases. Of these varied cases, one is noted to have been “reversed on other grounds,” and two others are noted to have involved express warranty claims. *Id.*

<sup>23</sup> Compare *Jacob E. Decker & Sons, Inc. v. Capps*, 164 S.W.2d 828, 831–32, 834 (Tex. 1942) (holding, in a case that involved “contaminated and poisonous” sausage that killed a child, that “the liability of the manufacturer and vendor is imposed by operation of law as a matter of public policy for the protection of the public, and is not dependent on any provision of the contract, either expressed or implied.”), with *Markovich v. McKesson & Robbins, Inc.*, 149 N.E.2d 181, 182, 188 (Ohio Ct. App. 1958) (allowing recovery despite lack of privity for a plaintiff who “suffered injury to her face and scalp and hair (her hair almost completely falling out)” from the application of a “chemical product known as ‘Prom Home Permanent’”).

<sup>24</sup> *Chapman v. Brown*, 198 F. Supp. 78 (D. Haw. 1961) (affirming the jury verdict favoring the minor and her parents in her action alleging breach of warranty of fitness of a grass skirt sold by the store owners to the minor’s aunt).

<sup>25</sup> RESTATEMENT (SECOND) OF TORTS § 402A (Tentative Draft No. 10, 1964) [hereinafter Tentative Draft No. 10] (“One who sells *any product* in a defective condition unreasonably dangerous to the user or consumer or to his property, is subject to liability . . .” (emphasis added)).

<sup>26</sup> See Laposata, *supra* note 18, at 67–68 (arguing that courts should stop applying Restatement rules in tobacco lawsuits because “the ALI was so skillfully manipulated by the tobacco industry in its creation of the Second and Third Restatements” of Torts); see also Van

The assault upon the citadel had begun with a battle “directed against a narrow segment of the wall, defended only by the sellers of food and drink.”<sup>27</sup> Having vanquished these product sellers, and then successfully expanded the battlefield to nearly all other products, it would have made no sense at all to pick a fight that might lead to greater losses just as near-total victory was so close at hand.

The final version of Section 402A was promulgated the following year, along with the other sections in the second volume of the Restatement (Second) of Torts.<sup>28</sup> Once adopted by courts, Section 402A would “(1) do away with the privity requirement at all levels of manufacturing and distribution, and (2) impose on each seller coming within its terms the responsibility of strict liability.”<sup>29</sup> It was this imposition of strict liability to all products that most now characterize as the product liability revolution.<sup>30</sup> As one tort scholar has summarized:

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Doren, *supra* note 9, at 160–61 & nn.6–7 (arguing that the lobbying of special interest groups “destabiliz[ed] the original Restatement objectives”).

<sup>27</sup> Prosser, *The Assault*, *supra* note 1, at 1103.

<sup>28</sup> 2 RESTATEMENT (SECOND) OF TORTS (1965).

<sup>29</sup> Reed Dickerson, *The Basis of Strict Products Liability*, 16 FOOD DRUG COSM. L.J. 585, 587 (1961). Dickerson goes on to ask whether, “[i]n doing away with privity, would the proposed section reflect the preponderance of existing law, or would it pull itself up by its own bootstraps by purporting to reflect law that it was only creating?” *Id.* (agreeing that only for food could “a good case . . . be made for calling this a true restatement”). White makes a similar indictment about Prosser’s overall enterprise, accusing him of “claiming, on less than fulsome evidence, the existence of a ‘trend’ toward acceptance of the strict liability principle,” calling this “a good example of how to impress by sleight-of-hand techniques.” G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 173 (expanded ed. 2000).

<sup>30</sup> See Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683, 687 (1993) (providing an exhaustively researched and clearly written overview of “both the evolution of products liability and the ongoing debates over the efficiency of modern products liability”). This article is especially noteworthy for being of a period in which product liability law was coming under sustained attack from multiple fronts, a fact it concisely summarizes. *Id.* at 684–87 & nn.1–14. See also James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479, 480 (1990) (“Most revolutions are noisy, tumultuous affairs. This is as true of significant shifts in legal doctrine as it is of shifts of political power through force of arms.”); George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 461 (1985) (“Since 1960, our modern civil liability regime has experienced a conceptual revolution that is among the most dramatic ever witnessed in the Anglo-American legal system.”). But see David G. Owen, *The Intellectual Development of Modern Products Liability Law: A Comment on Priest’s View of the Cathedral’s Foundations*, 14 J. LEGAL STUD. 529, 531 (1985) (criticizing Priest for his focus on the contributions of James and Kessler, which is said to have left “crucial gaps in the intellectual genealogy of products liability law”). See generally HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 1 (1983) (introducing the stories “[t]his book tells,” including “that the Western legal tradition was born of a ‘revolution’ and thereafter, during the course of many centuries, has been periodically interrupted and transformed by revolutions”).

This doctrinal revolution was remarkably swift. What began in 1958 as a modest proposal for strict tort liability for the sale of food “in a condition dangerous to the consumer,” was extended three years later to cover “other products for intimate bodily use” in a “defective condition unreasonably dangerous to the consumer.” By 1964, the final form of section 402A applied to “any product.” This expansion of the strict liability rule, however, was not accompanied by a thorough analysis of the implications of bringing new classes of products within the sweep of section 402A.<sup>31</sup>

Thorough analysis or not, such a revolutionary expansion could not, it seems, have occurred without “a great Master of Torts”<sup>32</sup> to boldly lead the way forward into battle, restoring warranty principles to the law of torts and claiming products liability law for the tort patriots. Nonetheless, the second-guessing and disputes began almost immediately.<sup>33</sup> What was not disputed, then or now,

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<sup>31</sup> Joseph A. Page, *Generic Product Risks: The Case Against Comment k and for Strict Tort Liability*, 58 N.Y.U. L. REV. 853, 860 (1983) (footnotes omitted) (examining the debates surrounding the adoption of Section 402A and Comment k while arguing in favor of strict liability for design defects involving generic product risks unknown at the time of sale); see also Richard L. Cupp Jr. & Danielle Polage, *The Rhetoric of Strict Products Liability Versus Negligence: An Empirical Analysis*, 77 N.Y.U. L. REV. 874, 888–89 (2002) (questioning whether the adoption of Section 402A, coupled with the *Henningsen* and *Greenman* decisions that preceded it, “precipitated—or perhaps anticipated—a storm of litigation that grew with unparalleled speed”). I mostly agree with the proposed answer to this question:

Perhaps these decisions by influential courts and the adoption of strict products liability by the American Law Institute (ALI) generated the rapid expansion of products liability litigation. Or maybe they were merely at the cutting edge of a change that would have taken hold in the courts regardless. The answer is, of course, elusive and subject to debate. Perhaps the safest speculation is that the prestige of the California and New Jersey courts and the ALI, and the general societal trend toward increased concern for the safety of individual consumers, both played important roles in products liability’s explosive growth.

*Id.* at 888 n.55.

<sup>32</sup> Christopher J. Robinette, *The Prosser Notebook: Classroom as Biography and Intellectual History*, 2010 U. ILL. L. REV. 577, 578–79 (summarizing the life of William Prosser, in near-hagiographic terms, as an introduction to a consideration of the detailed notes that a first-year law student took during Prosser’s 1938 fall semester Torts class at the University of Minnesota).

<sup>33</sup> For example, a “petition for rehearing” was made shortly after Section 402A was adopted in final form. See Jay M. Smyser, *Products Liability and the American Law Institute: A Petition for Rehearing*, 42 U. DET. L.J. 343 (1965). Smyser presciently stated that “[i]t is a distinct possibility that the respect the *Restatement* has attained will be undermined to the extent the new version, by departing from the purposes of the original, becomes simply another forum from which various interests can argue for changes in the legal framework of society.” *Id.* at 345. Of course, Smyser plainly assumes that the ALI’s efforts were not an argument for change, as driven by Prosser, all along. The “Petition” does not appear to have had much in the way of impact, with a total of forty-one law review articles citing to it, mostly in the 1960s. George Priest cited the article in 1985, noting “Smyser does indicate some suspicion of Prosser’s evidence [that strict liability for all products was doubtlessly “the rule of the near future”], but he does not comprehensively evaluate the case law support of Prosser’s claim.” See Priest, *supra* note 30, at 517 n.361. For the most recent citation, see David A. Logan, *When the Restatement Is Not a Restatement: The Curious Case of the “Flagrant Trespasser”*, 37 WM. MITCHELL L. REV. 1448, 1457 and n.46 (2011) (citing Smyser as an example of the “sharp criticism” that the adoption of Section 402A had engendered, and go-

is that a revolution did in fact occur, and that the *story* of the revolution has become as important as what the revolution is said to have achieved.

Set against the backdrop of this story of revolution, this article will make two main assertions. First, Prosser's prodigious efforts on behalf of a rule of strict liability were largely imperial, an aggressive battle to wrest governance of product liability from contract, so that a newly expanded tort regime could alone govern the right to recover damages for product-related injuries. Second, the battle was ultimately won as a result of the decision to sacrifice food as a special product category, borrowing the rules worked out in food cases, but leaving behind food safety concerns like a battering ram no longer needed once the door to the citadel had been knocked open. Once the contract doctrines, like the rule of privity, no longer barred the way to the recovery of damages, the warranty of quality could be dispatched so a rule of strict liability in tort could ascend to throne. Food was too associated with the logic of warranty to have not been sacrificed, which made the idea of special rules for food a necessary sacrifice, too. Instead of allowing focus to remain on food and its safety, and for rules to develop more organically, case by case, the extension of special rules for food was extended by fiat and false analogy. It was a kind of *coup d'état* conceived by Fleming James, Roger Traynor, and others intent on the establishment of enterprise liability, but executed in the end by William Prosser and his bold bait-and-switch.

#### I. THE MOST DESPERATE STRUGGLE: CREATING TORT'S NEW EMPIRE

The classic story of strict liability's emergence notably begins with the assault on a citadel,<sup>34</sup> followed by its epic fall.<sup>35</sup> To say that this story has been told near-countless times would be an understatement.<sup>36</sup> But no one has told the

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ing on to assert that "Section 402A was built on scant doctrinal foundation, as Dean Prosser could point to virtually no case authority and relatively little scholarship to tease out the application of the core concept of strict liability in tort to the variety of contexts in which products could harm consumers").

<sup>34</sup> Prosser, *The Assault*, *supra* note 1.

<sup>35</sup> Prosser, *The Fall*, *supra* note 16, at 791.

<sup>36</sup> For perhaps the best overall and neutral telling, see DAVID G. OWEN, PRODUCTS LIABILITY LAW 256–65 & nn.1–68 (2d ed. 2008). Owen also helpfully collects the early commentary. *Id.* at 256 n.2. See also RICHARD A. EPSTEIN, MODERN PRODUCTS LIABILITY LAW 25–48 (1980) (providing a historical overview with a helpful identification of the different strands of arguments present in the key judicial decisions); PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 33–44 (1988) (offering a somewhat polemical overview of the rise of strict liability and its damaging displacement of more science-based governmental regulation of product safety); MARSHALL S. SHAPO, PRODUCTS LIABILITY AND THE SEARCH FOR JUSTICE 19–24 (1993) [hereinafter SHAPO, PRODUCTS LIABILITY] (providing brief summaries of "landmark decisions"); MARSHALL S. SHAPO, TORT LAW AND CULTURE 87–95 (2003) (summarizing the "legal evolution leading to strict liability"); FRANK J. VANDALL, STRICT LIABILITY: LEGAL AND ECONOMIC ANALYSIS 1–10 (1989) (offering a historical perspective that begins with "primordial law"—that before 1850—and proceeds through Traynor's majority opinion in *Greenman*).

story as memorably, and to such consequential effect, as William Prosser.<sup>37</sup> The citadel was, of course, the rule of privity,<sup>38</sup> and its fall was, according to Prosser, a “dramatic moment.”<sup>39</sup> And certainly if a moment is dramatic, the style of its telling should be dramatic too, trumpeting the bold victories of “great men,”<sup>40</sup> men whose greatness would lead to their being called “founding fathers”: Cardozo, Traynor, and Prosser.<sup>41</sup> Indeed, the whole point of telling a

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<sup>37</sup> In 1988, Prosser’s *Assault* was described as “[t]he most cited products liability article ever.” John B. Clutterbuck, Note, *Karl Llewellyn and the Intellectual Foundations of Enterprise Liability Theory*, 97 YALE L.J. 1131, 1131 n.3 (1988). See also Fred R. Shapiro & Michelle Pearse, *The Most-Cited Law Review Articles of All Time*, 110 MICH. L. REV. 1483, 1489 tbl.1 (2012) (identifying Prosser’s *Assault* as number thirteen on the list of most cited law review articles). For its part, Prosser’s *Fall* is number thirty on the list of most cited law review articles. *Id.* at 1490.

<sup>38</sup> Prosser borrowed the metaphor of the citadel, and assault upon it, from Benjamin Cardozo. See Prosser, *The Assault*, *supra* note 1, at 1099 (citing *Ultramares Corp. v. Touche, Niven & Co.*, 174 N.E. 441, 445 (N.Y. 1931)). I am not certain whether Prosser missed Cardozo’s irony, or chose to ignore it, in his haste to borrow a metaphor that fit so well with the battle story he wanted to tell. Although the *Ultramares* decision can be read in many ways, one way that it cannot be read is as evidence that Cardozo was eager to expand the scope of negligence liability made possible by the removal of the bar of privity. Indeed, Cardozo was clearly concerned about the risk of potentially indeterminate liability.

If liability for negligence exists, a thoughtless slip or blunder, the failure to detect a theft or forgery beneath the cover of deceptive entries, may expose accountants to a liability in an indeterminate amount for an indeterminate time to an indeterminate class. The hazards of a business conducted on these terms are so extreme as to enkindle doubt whether a flaw may not exist in the implication of a duty that exposes to these consequences.

*Ultramares*, 174 N.E. at 444. Prosser plainly had no such concern.

<sup>39</sup> Prosser, *The Fall*, *supra* note 16, at 791. The hyperbole employed to describe *The Fall* of the citadel was plainly infectious. See Morton R. Covitz, Comment, *Products Liability: The Rise and Fall of Privity*, 3 B.C. INDUS. & COM. L. REV. 259, 269 (1962) (“With the abandonment of privity, products liability is embarking on a new era. The courts now will succeed where the regulatory agencies have failed.” (emphasis added)). For those fully in support of expanding the domains that tort ruled, one consistent theme is like that expressed here by Covitz, that of the failure of government regulation and the courts riding to the rescue.

<sup>40</sup> Cf. THOMAS CARLYLE, ON HEROES, HERO-WORSHIP, AND THE HEROIC IN HISTORY 34 (1840) (“The History of the world is but the Biography of great men.”); see also C.H.S. FIFOOT, JUDGE AND JURIST IN THE REIGN OF VICTORIA 12 (1959) (“Law, no more than any other human creation, is the automatic result of natural forces or intellectual movements. It is made by men. Whatever the pitfalls, it is less misleading to adopt or adapt Carlyle’s creed and approach legal history through biography.”) For an example of the application of the “great man” theory to legal history, see ROSCOE POUND, INTERPRETATIONS OF LEGAL HISTORY 124–40 (1923) (asking rhetorically whether it is “possible to make a great-lawyer interpretation of legal history”). Arguing that the “revolt of men is one cause of legal development,” Pound goes on to assert that “[w]e cannot think of lawyers and judges and legislators merely as the passive instruments of ideas. We must recognize that great minds and masterful personalities will at least help to explain many things in legal history.” *Id.* at 124–25.

<sup>41</sup> See Richard L. Cupp, Jr., *Believing in Products Liability: Reflections on Daubert, Doctrinal Evolution, and David Owen’s Products Liability Law*, 40 U.C. DAVIS L. REV. 511, 512 (2006) (identifying Cardozo, Traynor, and Prosser as the “founding fathers” while noting that they “did not take products liability to maturity as a functionally distinct body of law”);

story so dramatically is not only to ensure the widest possible audience, but to ensure that the story establishes the facts, as told by the victors. This was not just a story; it was a history.

As Prosser himself predicted, his role was not to write an objective report, to “cover a war from afar, discussing the moves of both sides.”<sup>42</sup> Instead, he was to report “as a war correspondent attached to one army only.”<sup>43</sup> His reporting was to be a decidedly partisan effort, the effort of one seeking to drive the battle to a successful end. “By clever exhortation built on a blurred interpretation of then-current legal developments, Prosser convinced the American Law Institute to accept and enact James’s and Kessler’s theory of enterprise liability, contributing to the rapid success of modern products liability law as we now know it.”<sup>44</sup> He was, in the words of one scholar, an *agent provocateur*.<sup>45</sup> And why not? For Prosser, there was too much at stake to not fight aggressively to expand the boundaries of tort law. As one must remember, the “boundaries only stabilize when they cease to be stakes in the game.”<sup>46</sup> In the game that

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see also HUBER, *supra* note 36, at 6 (1988) (referring to Prosser, Traynor, and John Wade as the “founders of modern tort law”); Michael Rustad, *The Jurisprudence of Hope: Preserving Humanism in Tort Law*, 28 SUFFOLK U. L. REV. 1099, 1119 (1994) (referring to Traynor, as well as John Wade and Thomas Lambert, as the “founding fathers of products liability”). *But see* James J. White, *Reverberations from the Collision of Tort and Warranty*, 53 S.C. L. REV. 1067, 1069 (2002) (describing the “ancient history” of how strict tort liability came to “collide” with warranty, and referring to the Cardozo, Traynor, and Prosser as “our brightest activist judges and law professors of the early and mid-twentieth century [who] set tort in motion towards the collision that now seems to have been inevitable”). Interestingly, White refers consistently to the period after the adoption of Section 402A as a “regime,” thus echoing my point that the changes Prosser fought for represented an attempt at regime-change. *Id.* at 1068, 1072.

<sup>42</sup> Robinette, *supra* note 32, at 596 (discussing Prosser’s favorable review of Harper Fowler’s *A Treatise on the Law of Torts* (1933) as the kind of book needed if “we shall improve the law” (quoting William L. Prosser, Book Review, 19 MINN. L. REV. 257, 259 (1935))).

<sup>43</sup> *Id.* Prosser was to later use this metaphor to similar effect in *The Assault upon the Citadel*, in which he wrote “War correspondents with the beleaguering army are issuing daily bulletins, proclaiming that the siege is all but over.” Prosser, *The Assault*, *supra* note 1, at 1099 (footnote omitted). For the first edition of Prosser’s treatise, see WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS (1941).

<sup>44</sup> Priest, *supra* note 30, at 465.

<sup>45</sup> David J. Jung, *Commentary on William Lloyd Prosser*, Strict Liability to the Consumer in California, 50 HASTINGS L.J. 861, 862 (1999) (“While Prosser cast himself as the correspondent in these articles [tracing the evolution of the law of strict liability], *agent provocateur* might more aptly capture his role . . . .”); see also SHAPO, PRODUCTS LIABILITY, *supra* note 36, at 25 (“Prosser carried two portfolios that generated still more publication in favor of his thesis.”); George L. Priest, *Commentary, Riding the Tide Toward Modern Tort Law: William Prosser’s “The Assault upon the Citadel (Strict Liability to the Consumer)”*, 100 YALE L.J. 1470, 1471 (1991) (“Prosser exploited Henningsen and Greenman, his commanding authority in the field, and his position as Reporter for the ALI Restatement of Torts to cement the achievement and channel products law toward modern strict liability.”).

<sup>46</sup> JEAN-FRANÇOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE 17 (Geoff Bennington & Brian Massumi trans., 1984). Among Lyotard’s many contributions to modern thought is his borrowing of Wittgenstein’s idea of “language games” to describe the

Prosser was playing, there could hardly have been more at stake for the law of torts.

A. *A Boy's Adventure Story: The Lure of Martial Rhetoric and Thrilling Tales of Empire*

One reason why Prosser succeeded in crafting a story that was both compelling and resonant was because he adopted the narrative structure and style of adventure stories for boys, stories of danger and heroism, stories of hard-fought battles and thrilling victories. Although it cannot be shown which specific adventure stories Prosser read as a child and young man, he was said to possess “a prodigious memory for stories and texts.”<sup>47</sup> Similarly, after his death, Prosser was recalled as:

[T]he legendary character who could absorb the content of a written page almost as fast as he could turn it over; who when scarcely a teenager, would graze in the meadows of history and literature munching contentedly upon such pasturage as Gibbon's *Decline and Fall of the Roman Empire* and other fare intended only for adult consumption.<sup>48</sup>

Given that Prosser had enjoyed military history and dramatic tales of empire when he was young, it is hardly surprising that his own rhetoric echoed storytelling notable for being imperialistic and one-sided, emphasizing the rightness of the battles, the well-deserved spoils of war, and the wickedness of the vanquished. If his goal was to “rally the troops,” so to speak, building consensus among his compatriots for the battle to expand tort's empire, then no rhetoric was better designed. Indeed, as early as 1938, while still working on the first edition of his torts treatise, he told students that the law of torts was a “battleground of social theories.”<sup>49</sup> Such was the model of strategy that Prosser appears to have taken from the example of Fowler Harper, the treatise writer as “war correspondent,” and Francis Bohlen who had become the “commander-in-chief” after being appointed to be Reporter for the *Restatement of Torts*.<sup>50</sup> As

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battles for legitimation that competing assertions about knowledge must fight out. It is in this regard Lyotard argues that “to speak is to fight.” *Id.* at 10. Prosser's project was to create a narrative that depicted the extension of strict liability to all products as inevitable.

<sup>47</sup> THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW 440 (Roger K. Newman ed., 2009).

<sup>48</sup> Wex S. Malone, *More in Sorrow than in Anger*, 60 CAL. L. REV. 1252, 1252–53 (1972) (recalling also Prosser's “insistence upon the center of the stage at all times”). See also David W. Louisell, *William Lloyd Prosser—The Myth and the Man*, 51 CALIF. L. REV. 263, 263 (1963) (ascribing to the “Myth” of Prosser his “know[ing] all of Shakespeare and Dickens by heart” and the ability to “give you in sequence all of the crowned heads of Europe since Charlemagne, but he prefers to list them backwards”).

<sup>49</sup> Robinette, *supra* note 32, at 597 (quoting from a student's class notebook). Not surprisingly, “Prosser found all of the torts treatises lacking. Even the best American text was ‘not good.’ . . . Prosser had seen a need in the market, and he was working to fill it.” *Id.* at 598.

<sup>50</sup> *Id.* at 601. Bohlen started work in June 1923. See RESTATEMENT (FIRST) OF TORTS intro. (1934). The eminent judges Benjamin Cardozo and Learned Hand were both involved with this project. *Id.*

Prosser wrote, foreshadowing his own later approach: “The army to which Mr. Harper has attached himself is the group primarily responsible for the American Law Institute Restatement of the Law of Torts . . . . There is a commander-in-chief, and his name is Bohlen.”<sup>51</sup> Prosser could not, of course, have known that he would later be both war-correspondent *and* commander-in-chief, both rabble-rousing and leading the army too. But once he had gained these roles, he certainly made the best of them.

As masterful battleground strategist and master storyteller, Prosser gave his reports from the frontline a heady verve unlike other legal prose of the time. “Prosser’s practice in describing an area of Torts was to produce a textual narrative, succinct and vividly written, setting forth central features of the area.”<sup>52</sup> Such a practice seeks to suppress difference as a means of constructing not only consensus, but narrative coherence. That which does not advance the story in the desired way is simply left out. It was imperative that the thrust of narrative be kept aimed at its ultimate goal—depicting the triumph of his army as a *fait accompli*. To acknowledge that he argued for what the law should be, instead of stating what the law already was, would have been to concede away his most important source of authority: his footnotes. Viewed as a legitimation strategy, the apparent thoroughness of Prosser’s research built consensus by claiming that a consensus already existed. That was the strategy of Prosser’s “compendious footnotes, which, if examined, revealed his classifications [were] far more preliminary than they seemed.”<sup>53</sup> The footnotes in both number and variety were the equivalent of a fusillade unleashed to overwhelm resistance before the final onslaught.

In addition to the apparent authority provided by footnotes, the tone of triumphalism in Prosser’s narrative is just as important. By offering up his legal research and analysis as military history, he could not only depict the progress as the result of battles won, with each court decision a kind of victory, he could depict jurists as conquering generals, leading a fight on behalf of consumers seeking justice. This depiction of the fight was, as a result, essentially propaganda, much like the stories of heroic battles fought to victory that Prosser must have read as a child, all casting empire-building as both inevitable and justified.

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<sup>51</sup> Robinette, *supra* note 32, at 601 (quoting William L. Prosser, Book Review, 19 MINN. L. REV. 257, 257). Robinette questions whether there is irony in what he supposed might have been Prosser’s criticism of an attempt to use the writing of a “treatise [as] ‘an exposition of a theory, rather than a disquisition on the law as it stands,’” and the parallel use of the *Restatement of Torts* “to shape the law, rather than ‘restate’ it.” *Id.* (quoting William L. Prosser, Book Review, 19 MINN. L. REV. 257, 259). I do not believe that there is any irony to be found here. Prosser was probably voicing a criticism of the substance of Harper and Bohlen’s rethinking of the law of torts, but not the technique, which he plainly went on to use himself, and use much more successfully.

<sup>52</sup> WHITE, *supra* note 29, at 161. White also points to Prosser’s use of a multitude of footnotes and citations to “supporting” cases to add credence to his synthesis of rules and categories “that *purported* to summarize the ‘state of the law.’” *Id.* (emphasis added).

<sup>53</sup> *Id.* at 177.

Victory was itself the proof of rightness, making any needed sacrifice both noble and necessary.

To achieve victory, however, there must be an enemy to overcome. And here the enemy was contract law, with tort law to act as liberating army. When victory came, Prosser depicted it as a violent, bloody adventure.

There is a final heavy bombardment; the assault goes forward against the main breach, and the storming party ascends over the corpses of the slain. There is a desperate hour of hand-to-hand combat, and then the moment when the defense falters. The line wavers; the break becomes a retreat, the retreat a rout. The rest is the story of sack and slaughter, of riot, rape and rapine, that has added an evil luster to the names of Magdeburg and Badajoz, along with ancient Troy.<sup>54</sup>

Not only has the citadel fallen, victors “sack and slaughter” and commit acts of “riot, rape and rapine”—all metaphorically, of course. But what purpose do such violent metaphors serve except as conscious echoes of the historic battles upon which Prosser bases his own telling? There are Prosser’s references to Magdeburg, a Protestant city that fell to the Holy Roman Empire and Catholic League during the Thirty Years War,<sup>55</sup> and the Siege of Badajoz, one of the bloodiest of the Napoleonic Wars.<sup>56</sup> And then there is mention of Troy, the ten-year siege that ended only when the city fell after allowing in the “gift” of the Trojan Horse.<sup>57</sup> All of these battles involved a protected enclave, an area held

<sup>54</sup> Prosser, *The Fall*, *supra* note 16, at 791.

<sup>55</sup> GEORGE PAGÈS, *THE THIRTY YEARS WAR, 1618–1648*, at 128 (David Maland & John Hooper trans., 1970). The sack of Magdeburg caused a breakdown in peace talks between the warring Catholics and Protestants. *Id.* (“In no time the news of the sack of Magdeburg had spread, and the reaction of horror which it caused now rendered impossible the . . . attempts to mediate between the Catholics and Protestants.”). For a contemporaneous (and self-serving) letter that describes the sack, see GERHARD BENECKE, *GERMANY IN THE THIRTY YEARS WAR* 34–36 (1979) (“The enemy made several attempts to take the smaller defences and lost many people before finally succeeding.”). There is pointed irony, maybe unintended, in Prosser’s use of the Sack of Magdeburg as a metaphor. The laws of Magdeburg—the Magdeburger Recht—became the predominant basis of written law for central and eastern Europe between the twelfth and fourteenth centuries, spreading from city to city in the form of a kind of model law. See BERMAN, *supra* note 30, at 376. It is thus no stretch to say that such law operated much like the Restatements did centuries later.

<sup>56</sup> See generally CHARLES ESDAILE, *THE PENINSULAR WAR: A NEW HISTORY* 369–98 (2003). For a description of the turning-point in which Wellington’s troops finally took the castle at Badajoz, vanquishing Napoleon’s troops, and the “riot, rape and rapine” that followed, see *id.* at 383–87.

<sup>57</sup> One can also easily detect the echoes of Virgil’s classic telling of the sack of Troy in the language that Prosser uses to describe the assault on the citadel. Here is a translation that would have been available to Prosser in his youth and early adulthood:

Who could unfold in speech that night’s havoc? Who its carnage? or who could match our toils with tears? The ancient city falls, for many years a queen; in heaps lifeless corpses lie scattered amid the streets, amid the homes and hallowed portals of the gods. Nor do Teucrians alone pay penalty with their lifeblood; at times valour returns to the hearts of the vanquished also and the Danaan victors fall. Everywhere is cruel grief, everywhere panic, and full many a shape of death!

VIRGIL, *THE AENEID*, Bk. II, ll. 361–69 (H. Rushton Fairclough trans., 1916).

by an enemy into which the armies of the other side fought for entry and control. Wellington at Badajoz sought to defeat the empire-building of Napoleon, while the Catholic League sought to stem the growth of Protestantism, thus protecting the dominance of the Catholic Church. And of course, in the Trojan War, they fought for the return of one stolen—Helen, spirited away from the King of Sparta by Paris of Troy.

Not all of the dramatic battles that echo through Prosser's history involved the clash of ideology per se; however, there was in each an empire to defend or expand, or a competing empire to vanquish. Having no doubt grown up reading adventure stories that depicted these historic battles,<sup>58</sup> Prosser knowingly chose to employ martial rhetoric that rang loudly with a kind of jingoistic self-assurance that claims empire-building as its own justification, a kind of might that makes right. In describing the assault on the citadel, its fall was what justified its assault; the citadel stood *to be* conquered, waiting for someone like Prosser to summon the muses to help cheer the troops, plot strategy with the gods, and prod his generals on to victory. And then, when the victory was achieved and the citadel had fallen, Prosser could tell the story, creating a master-narrative that still is in at least partial control to this day. As has been noted, "[t]he pro-plaintiff revolution in products liability in the early 1960s will forever be associated with heroic, martial images, epitomized in Prosser's description of the assault upon, and fall of, the fortified citadel of privity."<sup>59</sup> Such is the way of a master-narrative; it has imperialistic tendencies all its own.

#### B. *The Battle of Mazetti: The Bait and Switch Begins*

With the publication of *Assault upon the Citadel* in 1960, Prosser heralded the increasing number of judicial decisions in which consumers were allowed

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<sup>58</sup> Although there is no direct confirmation, Prosser likely read the books of George Alfred Henty, an exceedingly popular English writer who wrote over a hundred works of historical fiction that "reflected and reinforced imperial sentiments." Patrick A. Dunae, *Boys' Literature and the Idea of Empire, 1870–1914*, 24 VICTORIAN STUD. 105, 109 (1980) (arguing Henty was as interested in the economic aspects of imperialism as the militarily-advanced missionary aspects). Among the books published in the U.S. and popular during Prosser's youth were two Henty novels that depicted the Thirty Years War—*The Lion of the North* and *Won By the Sword*, the latter of which includes the chapter, *The Relief of the Citadel*. See generally G.A. HENTY, *THE LION OF THE NORTH* (1886); G.A. HENTY, *WON BY THE SWORD* 85–102 (1900). The Henty novel that depicted the Siege of Badajoz in the Peninsular War was called *Under Wellington's Command*, which includes the following passage describing the aftermath of the siege's success: "Here a terrible scene took place, and the British troops sullied their victory by the wildest and most horrible excesses. . . . Now this long-pent-up feeling burst out, and murder, rapine, and violence of all sorts raged for some hours wholly without check." G.A. HENTY, *UNDER WELLINGTON'S COMMAND* 312–13 (1899). The similarity with Prosser's prose is too notable to be the result of mere coincidence. That said, Prosser wrote the story clearly as he saw it, as battle for control of an enclave protected by an opposing army. It thus makes sense that the stories of his youth, all so similar in adventurous terms, would saturate the telling here.

<sup>59</sup> Henderson & Eisenberg, *supra* note 30.

to recover damages despite a lack of privity. To Prosser, this increase evidenced a kind of battle on behalf of consumers injured by defective products, allowing consumers to hold sellers strictly liable for product-related injury, which is to say, without the need to prove negligence. In telling the story of the battle, Prosser prominently featured food cases, discussing at length the consumer-protective rationales of these cases. Yet, six years later, when he announced the dawn of the strict liability era in a follow-up article, *The Fall of the Citadel*, Prosser seemed intent on deemphasizing the import of not only the food cases, but food safety as well. Suddenly, the cases that had been progenitors of consumer protection were mere footnotes—literally. The Washington Supreme Court's historic decision in *Mazetti v. Armour*<sup>60</sup> is an excellent example of Prosser's strategic de-emphasis of food, with food safety sacrificed to the needs of the battle and to obtain victory.

In Prosser's narration of the citadel's fall, *Mazetti v. Armour* is briefly described as the "very first case which threw overboard the bar of privity."<sup>61</sup> This case had been cast as a different character in the narration of the citadel's assault, where it was described as the case that "led off" in making "a change in the law of food liability."<sup>62</sup> At another point in *The Assault*, without identifying the case by name (except in a footnote lacking parenthetical explanation), Prosser cites to *Mazetti* in support of his assertion that "[s]trict liability also has been applied to permit the retailer to recover from the manufacturer for his pecuniary loss when indignant customers return the goods and spread the word."<sup>63</sup> The only other citation to *Mazetti* appears in a lengthy footnote that borrows "with appreciation" from another law review article, allowing Prosser to trum-

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<sup>60</sup> *Mazetti v. Armour & Co.*, 135 P. 633 (Wash. 1913).

<sup>61</sup> Prosser, *The Fall*, *supra* note 16, at 821–22 & n.165 (noting further that, as a result of overthrowing the bar of privity, the case "allowed recovery to the owner of a restaurant for his loss of business when he served bad food to his customers"). The case name is not mentioned in the text, only in the accompanying footnote. *Id.* at 822 n.165.

<sup>62</sup> Prosser, *The Assault*, *supra* note 1, at 1106 & n.42.

<sup>63</sup> *Id.* at 1142–43 & n.262. In the same note, Prosser also cited *Southwest Ice & Dairy Prods. Co. v. Faulkenberry*, 220 P.2d 257 (Okla. 1950) (affirming judgment in favor of grocers who lost money after a customer found a mouse in a bottle of milk). For purpose of the story he was telling, this particular issue—whether damages for economic loss were recoverable in tort—was not too important, and it was not mentioned again. This lack of mention is perhaps not surprising in that the facts of *Mazetti* provide an example of how a plaintiff might recover from a restaurant for serving bad food and, in turn, the restaurant could sue the distributor and manufacturer for its own damages. Far from being a "circuitry of action" that delayed the plaintiff's recovery and interfered with a redistribution of costs, *Mazetti* could stand for the efficiency of a warranty approach to the problem. *Cf.* K.N. Llewellyn, *On Warranty of Quality, and Society*, 36 COLUM. L. REV. 699, 717 & n.56 (1936) (citing *Mazetti* as one of two examples where a court allowed recovery for loss of customers and reputation based on a middleman having provided the seller with unsound wares). Llewellyn quite rightly points out that, unless courts recognize and enforce the "responsibility of a middleman for *hidden defects* in goods," then "what pressure the law exerts is all in the direction of encouraging sales of unsound wares to those middlemen who were becoming daily more numerous." *Id.*

pet the twenty-nine “triumphs of juridical technique” where courts had cleverly come up with a way to allow the plaintiffs to recover under an implied warranty theory, despite the lack of privity.<sup>64</sup>

In the text of Prosser’s footnote, *Mazetti* is said to stand for the proposition that “[f]ood cases are a special exception to the privity rule, and a law unto themselves.”<sup>65</sup> Interestingly, the article from which Prosser borrows states only that “[f]ood cases are a special exception to the privity rule.”<sup>66</sup> Prosser added the “law unto themselves” part, and did so appropriately, given that the rules were very much food-specific. The addition was likely more tactical, though, because it occurred during the run-up to the adoption of the first version of Section 402A, which was, at that point, specific to the sellers of defective food. It thus makes sense that he decided to add this gloss on *Mazetti* to better support his need to assert “that the law of the future is that of strict liability for food.”<sup>67</sup> By the time of the publication of *The Fall*, however, Prosser had already set his sights higher—on strict liability for all products. There was, as a result, no more reason to depict food cases as “a law unto themselves.” Instead, food is now to be switched out, having served successfully as bait. We can see this switch begin to take place when, in *The Fall of the Citadel*, Prosser announces that “strict liability in tort divorced from any contract rules . . . is the law of the immediate and the distant future.”<sup>68</sup> Thus, according to Prosser, food no longer merited a law unto itself, despite his earlier comment; the future was about strict liability for all products, not just food. The switch was well underway, with no need any more for a special rule for food.

Notice, for example, the dismissive tone used when Prosser speaks of the “prolonged and violent national agitation over defective food, which at times almost reached a pitch of hysteria.”<sup>69</sup> Although Prosser begrudgingly concedes that the “upshot” of the widespread concern for food quality was the passage of the Federal Food and Drug Act, he plainly is unimpressed by regulation as a possible response to the problem of product safety.<sup>70</sup> Still, as a master storytell-

<sup>64</sup> Prosser, *The Assault*, *supra* note 1, at 1124 & n.153 (borrowing all of the examples “with appreciation” from Gillam, *supra* note 17, at 153–55).

<sup>65</sup> *Id.* at 1125 n.153.

<sup>66</sup> Gillam, *supra* note 17, at 154.

<sup>67</sup> Prosser, *The Assault*, *supra* note 1, at 1110.

<sup>68</sup> Prosser, *The Fall*, *supra* note 16, at 804; *see also* Tentative Draft No. 10, *supra* note 25, § 402A note to Institute (“[I]t has become quite evident that this is the law of the immediate future.”).

<sup>69</sup> Prosser, *The Assault*, *supra* note 1, at 1104–05 (footnote omitted). In contrast, others at the time argued in favor of both regulation and litigation to improve food safety. *See, e.g.*, Dickerson, *supra* note 29, at 590 (arguing that lawsuits combined with government regulation was the best approach).

<sup>70</sup> *See* Prosser, *The Assault*, *supra* note 1, at 1106. He was similarly unimpressed with *The Jungle* as literature. *See generally* UPTON SINCLAIR, *THE JUNGLE* (1906). I have always loved the fact that, in *The Assault upon the Citadel*, Prosser could not resist the urge to include a brief review in which he expresses his full-throated dislike of Sinclair’s novel by calling it “trash.” Prosser, *The Assault*, *supra* note 1, at 1105 n.40 (“After rereading *The Jungle*, the

er, he knew the importance of stage-setting, and he was more than happy to note that the “time and public sentiment were ripe for a change in the law of food liability.”<sup>71</sup> It was just that the change in the law that he envisioned was a change in tort law, not regulation, and a change that would make it easier for consumers to sue and recover damages.<sup>72</sup>

The other likely reason that Prosser downplayed the significance of *Mazetti* and the other food cases that preceded and followed it is that these cases moved the battle line forward, but not dramatically enough. In one of the more oft-quoted passages, the court states, “[r]emedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales. The obligation of the manufacturer should not be based alone on privity of contract. It should rest, as was once said, upon the demands of social justice.”<sup>73</sup> But rather than reject a contract-based remedy entirely, in favor of a remedy solely in tort, *Mazetti* adopted the idea that food carries the warranty with it such that it “is available to all who may be damaged by reason of their use in the legitimate channels of trade.”<sup>74</sup> Instead of tossing warranty overboard along with privity, the *Mazetti* court refashioned the law of warranty to better address the special importance of food.

The idea that there could be a warranty that somehow tagged along with the product was an idea that Prosser begrudgingly described as ingenious. For

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writer cannot refrain from expressing his opinion as to how bad a piece of literature it is.”). Not satisfied with this broadside, he also quotes a highly amusing summary in which Sinclair’s writing style is parodied. *Id.* (citing FINLEY PETER DUNNE, MR. DOOLEY: NOW AND FOREVER 236 (Academic Reprints 1954)). Prosser also refers to *The Jungle* as “a minor *Uncle Tom’s Cabin* of the war against bad food.” Prosser, *The Assault*, *supra* note 1, at 1106. The author Jack London is reportedly the first to have compared Sinclair’s novel with the (in)famous work by Harriet Beecher Stowe. See Roger Roots, *A Muckraker’s Aftermath: The Jungle of Meat-Packing Regulation After a Century*, 27 WM. MITCHELL L. REV. 2413, 2413 n.2 (2001). If focused solely on the impact of *The Jungle* in prompting and focusing public reaction, then I would say that the comparison is defensible. Comparing practices of the meat industry at the turn of the century to slavery is not defensible. For other articles that use *The Jungle* as a convenient touchstone for a discussion of food safety, see Denis Stearns, *Preempting Food Safety: An Examination of USDA Rulemaking and Its E. coli O157:H7 Policy in Light of Estate of Kriefall ex rel. Kriefall v. Excel Corporation*, 1 J. FOOD L. & POL’Y 375, 388 n.66 (2005).

<sup>71</sup> Prosser, *The Assault*, *supra* note 1, at 1106.

<sup>72</sup> *But see* Dickerson, *supra* note 29, at 590 (arguing that lawsuits combined with government regulation was the best approach). Of course, research since Prosser’s time has demonstrated that lawsuits are an extremely weak incentive for food safety. JEAN C. BUZBY, ET AL., U.S. DEP’T OF AGRIC., AGRIC. ECON. REP. NO. 799, PRODUCT LIABILITY AND MICROBIAL FOODBORNE ILLNESS 24 (2001) (“[H]igh transaction and information costs combined with the structure of the legal system limit the effectiveness of the litigation for compensating ill consumers and providing firms with signals to produce safer food.”). In addition, one only needs a lawsuit after having eaten food that was, in fact, not safe. Advocating for lawsuits over regulation is, by definition, a position that accepts the continued prevalence of adulteration and turns consumers into involuntary test-subjects.

<sup>73</sup> *Mazetti v. Armour & Co.*, 135 P. 633, 635 (Wash. 1913) (internal quotation marks omitted).

<sup>74</sup> *Id.* at 636.

him, however, it was tactical ingenuity for having managed to open a break in the citadel's wall. The tone Prosser uses in describing the state of the battle at that point is hardly more than one of strained patience.

None of the three decisions [*Mazetti* and two that followed it] gave much in the way of reasons for the strict liability to the consumer without privity, *other than* the protection of the public interest, and an "implied representation" that the food was safe. As other jurisdictions followed suit, and the cases began to multiply, there was a period in the twenties in which the courts labored hard to evolve a great many highly ingenious theories to justify the rule, such as fictitious agencies or third-party-beneficiary contracts. In 1927 the Mississippi court came up with the idea of a "warranty" running with the goods from the manufacturer to the consumer, by analogy to a covenant running with the land. This found general, *although perhaps undeserved*, acceptance, and nearly all of the later cases have adopted some theory of "warranty."<sup>75</sup>

Prosser does not explain why the acceptance is undeserved, but his point is clear. Any theory based on a warranty did not deserve acceptance. Still, it was a means to an end, convincing Prosser to hold his nose and bear for a little longer the law of warranty being in power.

Ultimately, what was most important to Prosser was that *Mazetti* can be called a strict liability case (as he was then defining it), and that liability was imposed without the need to prove negligence, and in the absence of any privity between the parties. This was the *form* of the action that Prosser championed; it was just that it was still in the hands of the wrong army, with the wrong regime still in control.<sup>76</sup> You can almost hear Prosser emit a melancholy sigh when he writes "the theory which finally emerged and won the day was that of an implied 'warranty,' either running with the goods to the consumer or made directly to him; and in the last decade warranty is virtually the only theory which has appeared in the decisions."<sup>77</sup> Courts had, in Prosser's view, made a category-mistake, relying on "a freak hybrid born of the illicit intercourse of tort and contract."<sup>78</sup> Until the remedy was solely in tort, the assault must continue apace.

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<sup>75</sup> Prosser, *The Assault*, *supra* note 1, at 1106 (emphasis added) (footnotes omitted).

<sup>76</sup> Owen is the only tort scholar I found who is somewhat critical of Prosser's use of the *Mazetti* case. See, e.g., OWEN, *supra* note 36, at 190 n.10 ("The breakdown of the privity defense is recounted in Prosser, *The Assault upon the Citadel*."). For example, he rightly questions whether *Mazetti* is the first case to have allowed a third-party to recover in the absence of privity. See *id.* at 258 n.18 ("[Y]et *Mazetti* relies on earlier cases which suggests an even earlier origin of this principle."). The *Mazetti* court cites a number of "recent cases holding that the ultimate consumer may bring his action direct against the manufacturer" of an unsafe food product. *Mazetti*, 135 P. at 634. What *Mazetti* actually was the first to do was "allowing a retailer of the goods to sue direct and recover for injury to his business and loss of reputation," despite lacking privity. *Id.*

<sup>77</sup> Prosser, *The Assault*, *supra* note 1, at 1126.

<sup>78</sup> Prosser, *The Fall*, *supra* note 16, at 800. Prosser first used this phrase in *Assault upon the Citadel*, followed by the quotation that appears to have inspired the phrase. See Prosser, *The Assault*, *supra* note 1, at 1126.

C. *Vanquishing Warranty: The Bait and Switch Completed*

The story that Prosser tells of how Cardozo finally vanquished, once and for all, the rule of privity, has been recounted so many times that the most industrious of scribes would have difficulty cataloguing them all.<sup>79</sup> In Prosser's "tale of the storming of the heights of negligence," Cardozo is said to be "wielding a mighty axe," when he "burst over the ramparts, and buried the general rule under the exception."<sup>80</sup> This depiction of Cardozo is almost certainly modeled on Pyrrhus busting open the door to Priam's inner citadel in the sack of Troy, given that Prosser later makes explicit reference to Troy in *The Fall of the Citadel*.<sup>81</sup> But Pyrrhus was there to exact bloody revenge, an act that does not at first glance (or second or third) seem to pair with what Cardozo is said to have accomplished in *MacPherson v. Buick Motor Co.*—the definitive overthrow of the rule of privity in product-related negligence claims—even if all agree that accomplishment was historic.<sup>82</sup> The metaphoric pairing of Cardozo

<sup>79</sup> Even Prosser, certainly one the most industrious of scribes, thought the story had, over fifty years ago, "been told too often for any need to repeat it." Prosser, *The Assault*, *supra* note 1, at 1099. Of course, Prosser could not help himself and, thus, still gifted us with the following one-sentence summary—more like a movie-pitch, really—of the case of *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916): "In 1916 there came the phenomenon of the improvident Scot who squandered his gold upon a Buick, and so left his name forever imprinted upon the law of products liability." *Id.* at 1100. For a detailed and painstakingly researched factual account of the facts of the case, including an account of the lawsuit, see generally Sally H. Clarke, *Unmanageable Risks: MacPherson v. Buick and the Emergence of a Mass Consumer Market*, 23 LAW & HIST. REV. 1 (2005). Although not disproving that he was an "improvident Scot," Clarke does share the interesting detail that MacPherson was "a stone cutter who specialized in making grave stones" and his injuries left him unable to "perform his work . . . as he lacked the strength to grip his tools." *Id.* at 2. For the best explication of Cardozo's reasoning in the case (and a favorite recent article of mine), see generally Brian Leiter, *In Praise of Realism (and Against "Nonsense" Jurisprudence)*, 100 GEO. L.J. 865 (2012) (providing a persuasive and beautifully written critique of Dworkin's use of *MacPherson* as an example of "judges writ[ing] their opinions as if they are discovering the right answer as a matter of law"). See also EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 9–21 (1949) (using the *MacPherson* case as an example of how legal concepts arise, evolve, and are displaced).

<sup>80</sup> Prosser, *The Assault*, *supra* note 1, at 1099–100. See also Croley & Hanson, *supra* note 30, at 697 ("In 1916, Judge Cardozo mounted a landmark assault upon the privity rule.").

<sup>81</sup> Prosser, *The Fall*, *supra* note 16, at 791. In Aeneid's telling of the Sack of Troy, Pyrrhus is described as breaking into the inner citadel in pursuit of Priam, the King of Troy, who Pyrrhus has come to slay to revenge the death of his own father, Achilles. The scene with Pyrrhus (who should not be confused with the later Pyrrhus of Epirus, he of the "pyrrhic victory") is described as follows in a translation of Prosser's time:

Pyrrhus himself among the foremost grasps a battle-axe, bursts through the stubborn gateway, and from their hinge tears the brass-bound doors; and now, heaving out a panel, he has breached the solid oak and made a huge wide-mouthed gap. Open to view is the house within, and the long halls are bared; open to view are the inner chambers of Priam and the kings of old, and armed men are seen standing at the very threshold.

VIRGIL, *supra* note 57, at ll. 479–85.

<sup>82</sup> See generally John C.P. Goldberg & Benjamin C. Zipursky, *The Moral of MacPherson*, 146 U. PA. L. REV. 1733 (1998) (arguing that tort scholars, Prosser especially, have treated

and Pyrrhus makes sense, though, to Prosser, a tort partisan keen to depict the overruling of the rule of privity as not only a defeat for the law of warranty, but also as an act of revenge.

For Prosser, *MacPherson* not only provided a place from which to launch new battles, it also provided a rallying cry that would spur jurists on to successfully expand the frontlines of battle. Thus, according to Prosser, “[d]uring the succeeding [sic] years this decision swept the country” and its rule “extended by degrees.”<sup>83</sup> It was precisely this extension that Prosser must have had in mind for strict liability in tort, which he and his compatriots also hoped would sweep the country. First, though, the battle to have strict liability apply to food sales needed to be won.

According to Prosser, while the “battle over negligence . . . was still hanging in the balance, the assault began upon another wing, against the fortress of strict liability. In the beginning, it was directed against a narrow segment of the wall, defended only by the sellers of food and drink.”<sup>84</sup> Such sellers might not have seemed like adversaries worthy of respect or fear, but “[f]or a long time the battlements held firm against all the raiding parties,” and this forced “writers here and there . . . to direct their shafts at other parts of the wall, and to cry for an extension of the strict liability to products other than food.”<sup>85</sup> In sum, the overthrow of privity was not enough, and neither was the application of strict liability to unsafe food. For victory to be total, and for tort’s empire to achieve its manifest destiny, tort must control all products, not just food. To get there, however, there was still the law of warranty to be fully surmounted, something that did not occur even when the citadel was said to have fallen.

Prosser begins the second part of his battle history by announcing the fall of the citadel and the date: May 9, 1960.<sup>86</sup> It was on this date that the New Jersey Supreme Court issued *Henningsen v. Bloomfield Motors*, a decision in which the rule of strict liability—liability without the need for a proof of negligence—was said to have been born.<sup>87</sup> As Prosser’s compatriot Keeton later put it, *Henningsen* “render[ed] an almost mortal blow to the notion that fault is a prerequisite to recovery for physical harm to users and consumers who are not parties to any contract.”<sup>88</sup> And the weapon used to render this blow was once

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*MacPherson* as the overruling of *Winterbottom v. Wright*—the precedent formerly requiring privity for recovery—to advance a view of tort liability that is not governed by duty as an autonomous or determinative basis for the imposition of liability).

<sup>83</sup> Prosser, *The Assault*, *supra* note 1, at 1100.

<sup>84</sup> *Id.* at 1103.

<sup>85</sup> *Id.* at 1110.

<sup>86</sup> Prosser, *The Fall*, *supra* note 16, at 791.

<sup>87</sup> *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960).

<sup>88</sup> Page Keeton, *Manufacturer’s Liability: The Meaning of “Defect” in the Manufacture and Design of Products*, 20 SYRACUSE L. REV. 559, 560 (1969) (pointing out that under *MacPherson* the plaintiff who lacked privity still had to prove negligence). This point is stated quite differently in *Prosser and Keeton on the Law of Torts*, the edition published after Prosser’s death, and under the general editorship of Keeton. There it was stated that:

again food. Or as Prosser explains, with *Henningsen*, “Now the special rule as to food and drink was expanded to engulf the rest.”<sup>89</sup> He then quotes one of the most famous passages from *Henningsen* decision.

We see no rational doctrinal basis for differentiating between a fly in a bottle of beverage and a defective automobile. The unwholesome beverage may bring illness to one person, the defective car, with its great potentiality for harm to the driver, occupants, and others, demands even less adherence to the narrow barrier of privity.<sup>90</sup>

Yet, in rejecting the legal significance of any difference between food and an automobile, the court concludes by quoting from a case that is likely to be familiar to the reader of this article. “Under modern conditions . . . remedies . . . should not depend upon the intricacies of the law of sales. The obligation of the manufacturer should not be based alone on privity of contract. It should rest, as was once said, upon ‘the demands of social justice.’”<sup>91</sup>

Thus did a case that involved canned tongue gone bad—*Mazetti v. Armour & Co.*—provide the rationale for applying strict liability to an automobile.<sup>92</sup>

Despite all of their successes, especially in battling back a resurgent contract army and its new weapon, the warranty disclaimer, the tort armies did not seem that joyous. Perhaps the dampened mood came from the top. The trouble was still warranty, that treasonous bastard that got its start in tort but then had defected to contract.<sup>93</sup> Or as Prosser had put it in one of his earlier reports from the battlefield, quoting an unknown author, “A more notable example of legal miscegenation could hardly be cited than that which produced the modern action for breach of warranty.”<sup>94</sup> Prosser quotes this observation with obvious ap-

In the celebrated case of *Henningsen v. Bloomfield Motors, Inc.*, the only evidence required for recovery . . . was the testimony of the driver . . . This was regarded as sufficient evidence from which to infer that a “flaw” was present and attributable to a miscarriage in the construction process, albeit it was regarded as insufficient to infer negligence.

W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS* 695 (5th ed. 1984) (footnote omitted).

<sup>89</sup> Prosser, *The Fall*, *supra* note 16, at 793.

<sup>90</sup> *Henningsen*, 161 A.2d at 83.

<sup>91</sup> *Id.* (internal quotation marks omitted)

<sup>92</sup> *See supra* Part I.B.

<sup>93</sup> Prosser, *The Assault*, *supra* note 1, at 1126 (“Originally sounding in tort, yet arising out of the warrantor’s consent to be bound, [warranty] later ceased necessarily to be consensual, and at the same time came to lie mainly in contract.” (quoting Note, *Necessity for Privity of Contract in Warranties by Representation*, 42 HARV. L. REV. 414, 414–15 (1929)) (footnotes omitted)).

<sup>94</sup> *Id.* (quoting Note, *Necessity for Privity of Contract in Warranties by Representation*, 42 HARV. L. REV. 414, 414 (1929)). After concisely surveying the development and recent application of “modern” warranty actions, the author of this note strongly defends the imposition of liability based on a theory of “warranty by representation.” Note, *Necessity for Privity of Contract in Warranties by Representation*, 42 HARV. L. REV. 414, 417 (1929) (“in a practical world there should be no magic in the metaphysics of privity of contract”). Not surprisingly (to me), the author’s defense is then based primarily on the example of food-selling. *Id.* at 416. The author writes as follows:

proval, echoing his own characterization of warranty as “a freak hybrid born of the illicit intercourse of tort and contract.”<sup>95</sup> And, of course, it is no surprise that the solution that Prosser proposed was to vanquish that “freak” warranty once and for all, achieving a kind of revenge that he had long championed. For example, in the second edition of his torts treatise, Prosser wrote:

[I]t seems better to discard the troublesome sales concept of “warranty,” and impose strict liability outright in tort, as a pure matter of social policy. It is “only by some violent pounding and twisting” that warranty can be made to yield the desired result. . . . “The remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales.” If the producer is to be required to guarantee his product, no further justification will be needed than that public opinion will have arrived at the point where it places full responsibility for the injury upon him.<sup>96</sup>

For Prosser, “social policy” demanded that it be left for tort alone to govern anything product-related where a “consumer” was involved, and that the sooner this government gained power, the better.

What stood in the way of such a government gaining power was not a lack of judicial support for a form of strict liability; it was that the support remained agnostic about the role of warranty. There was wide acceptance still of a rule of strict liability specific to food, which Llewellyn had early recognized as the “point from which the whole line of civil protection of the uninformed consum-

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Where a vendor, for example a dealer in foodstuffs, makes a sale directly to a consumer, there is ordinarily an implied warranty of quality. To hold to a less strict accounting a restaurant-keeper, who prepares and serves food on the premises, is patently inconsistent, whether or not such service constitutes a sale. Privity of contract exists, if not privity of sale.

*Id.* (footnotes omitted). The logic here plainly echoes that of the *Mazetti* decision.

<sup>95</sup> Prosser, *The Assault*, *supra* note 1, at 1126. Although Karl Llewellyn had used somewhat similar language, he did so in making a point that is significantly more nuanced and insightful. In particular, Llewellyn was plainly less bothered by the overlap in contract and tort, and more focused on how each area of the law might best be suited for the protection of consumers.

What needs to be insisted upon is that “contract” is in this a bastard by accounting out of tort, and, like each of its parents, needs dealing with according to its social uses. Accounting drives toward making deals mean deals, to keep books straight. Tort drives toward making losses rest where they can best be first reduced, and then spread. Total exemption or too great cutting down of remedy by “contracting,” without regard for the tort phases of the risks in hand, is overdomination by an illegitimate father.

K.N. Llewellyn, *On Warranty of Quality, and Society: II*, 37 COLUM. L. REV. 341, 402 (1937). While here Llewellyn *criticizes* the over-dominance of contract law—the army on whose side he nominally fought—Prosser sought the domination of tort law to the exclusion of all contract concerns. That such an approach would inevitably create a counter-revolt in favor of commercial concerns could only have been ignored by one in the fog of war.

<sup>96</sup> WILLIAM L. PROSSER, *HANDBOOK OF THE LAW OF TORTS* 510–11 (2d ed. 1955) (footnotes omitted). For those paying close attention, it was likely noted that the language in quotation marks was that also quoted by the court in *Mazetti v. Armour & Co.*, 135 P. 633, 635 (Wash. 1913).

er branches out.”<sup>97</sup> Courts had located the source of liability in a *promise* that food was suitable for consumption, a promise that food was capable of making on its own *as* food—that being the nature of food.<sup>98</sup> Unlike any other manufactured product, food demands of the eater a level of trust that traces back to the assumption of its safe-making and the unquestioned existence of a safe-maker.<sup>99</sup> As the court in *Mazetti* pointed out, food is not “susceptible to practical test, except the test of eating.”<sup>100</sup> Nothing demonstrates reliance more than eating.

But the fact of this reliance inherent in the nature of food and its marketing is something that Prosser not only tried to ignore, but sought to actively discount. Given his goals for strict liability in tort, as applied to *all* products, he had no choice. Otherwise, a warranty specific to food was likely to have continued appeal and, thus, risk gaining consensus-support. In seeking to discount the validity of a warranty of quality for food, Prosser launched two separate attacks. The first attack was based on the stated need for the consumer to possess actual knowledge of the entity that made and sold the food product. Accordingly, Prosser points out that a “husband or guest who eats a plate of beans seldom asks the housewife whose product they are, and still less often at what store she bought them.”<sup>101</sup> According to Prosser, the reliance has nothing to do with the

<sup>97</sup> Llewellyn, *supra* note 63, at 704 n.14; *see also* Clutterbuck, *supra* note 37, at 1136 (quoting this same passage, as well as pointing out that Llewellyn had, in a comment written while he was a law student, “argued for the extension of protection to all consumers of food-stuffs and not just to commercial buyers, but hedged somewhat, only hinting that imposition of ‘the liability of an insurer’ upon sellers might be the preferred policy”) (citing Comment, *Tort and Contract in the Marketing of Food*, 27 YALE L.J. 1068, 1073 & n.21 (1918)). Clutterbuck makes a persuasive argument that Llewellyn’s contributions to the developing theories of enterprise liability had “too frequently been overlooked.” *Id.* at 1131.

<sup>98</sup> *See* Stearns, *supra* note 7, at 434 (arguing that because food always carries with it a trace of the face-to-face relationship that first introduced food as that which can be trusted, all food “promises—or appears to promise—that the food was made with care sufficient to provide me with something to eat that will sustain me, not kill me.”).

<sup>99</sup> *Id.*

<sup>100</sup> *Mazetti*, 135 P. at 635–36 (observing also that there is, for the same reasons, no basis for applying the doctrine of *caveat emptor*).

<sup>101</sup> Prosser, *The Assault*, *supra* note 1, at 1128. Notice how it is, of course, the housewife who both purchased and prepared the beans for the husband and the guest. But Prosser then continues his point, pushing it well past the point of ridiculousness, asserting that “[e]ven the purchaser at retail who eats the beans himself may be ignorant of the brand he buys, or utterly indifferent to it.” *Id.* Despite my inability to imagine any set of facts that would satisfy Prosser’s hypothetical here, it is once again the legerdemain of his footnotes and citations there that is truly astounding. The footnote is as follows:

Thus in *Randall v. Goodrich-Gamble Co.*, 238 Minn. 10, 54 N.W.2d 769 (1952), the buyer of a bottle of linament [sic] with an express warranty on the label was denied recovery against the manufacturer, because he paid no attention to it at the time of purchase. *Accord*, *Dobbin v. Pacific Coast Coal Co.*, 25 Wash. 2d 190, 170 P.2d 642 (1946); *Sears, Roebuck & Co. v. Marhenke*, 121 F.2d 598 (9th Cir. 1941); *Torpey v. Red Owl Stores, Inc.*, 228 F. 2d 117 (8th Cir. 1955). Compare *Senter v. B. F. Goodrich Co.*, 127 F. Supp. 705 (D. Colo. 1954).

*Id.* at 1128 n.169. In *Randall*, there is no food at issue, and the court says that the “plaintiffs withdrew as an issue in the case any question of liability arising out of or under an implied

food really, and everything to do with knowing the identity of the manufacturer. Why this must be so, Prosser never explains. But then, no one ever really asked him either, because the success of his argument here went largely unquestioned.<sup>102</sup>

The second attack on warranty was launched from a point similar to that of the unknown manufacturer. In this attack, the manufacturer is known but beyond the reach of a lawsuit, which means that the retailer must be held strictly

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warranty.” *Randall v. Goodrich-Gamble Co.*, 54 N.W.2d 769, 770 (Minn. 1952). Moreover, the court reversed the judgment for the defendant and granted the plaintiffs a new trial “in the interests of justice . . . [in order] that a determination may be had on some theory free from the ambiguities existing in the instructions under consideration.” *Id.* at 771. Had Prosser wanted to cite to a case that fit the facts of his hypothetical, there was certainly one available. *See generally* *Davis v. Van Camp Packing Co.*, 176 N.W. 382 (Iowa 1920) (reversing directed verdict for the defendant and allowing the plaintiffs to proceed to trial for breach of express and implied warranty and negligence claims for personal injury and death caused by adulterated beans purchased from retailer). In fact, citing *Davis* elsewhere in the article, Prosser describes the court’s holding as follows: “The manufacturer’s marketing of the goods is in itself a representation to the consumer that they are fit to buy.” Prosser, *The Assault*, *supra* note 1, at 1124 n.153; *see also id.* at 1107 n.51, 1142 n.258 (citing *Davis* in support of there being strict liability for food).

The cases that Prosser cites as being in “accord” are no better, being neither in accord with the hypothetical in the text, nor with the decision in *Randall*. *See* *Torpey v. Red Owl Stores, Inc.*, 228 F.2d 117, 117–19, 121 (8th Cir. 1955) (sustaining a directed verdict dismissing implied warranty claims, solely on the grounds of lack of privity where sister of the purchaser at a self-serve retailer was injured by a jar of applesauce that broke when she attempted to reseal it); *Sears, Roebuck & Co. v. Marhenke*, 121 F.2d 598, 600–01 (9th Cir. 1941) (holding that the plaintiffs had failed to properly plead an implied warranty claim, and that the evidence presented was insufficient to prove that retailer should have known that hot water bottle would leak); *Dobbin v. Pac. Coast Coal Co.*, 170 P.2d 642, 647, 651 (Wash. 1946) (holding that there was insufficient evidence that a furnace system was of such “faulty design” that the defendant “has been guilty of fraud or deceit in passing off the article”). Finally, the case that is preceded by the *compare* signal is comparable in only the most ambiguous sense of that word. *See* *Senter v. B.F. Goodrich Co.*, 127 F. Supp. 705, 708, 710 (D. Colo. 1954) (reversing recovery under negligence theory based on insufficient evidence, while allowing one of the two plaintiffs to recover for breach of express warranty where privity of contract existed; the plaintiff lacking privity could have no recovery). In short, Prosser’s footnotes are also examples of a kind of repeated bait-and-switch, where the authority cited in support of one thing is swapped out so that it can support something entirely different.

<sup>102</sup> Despite what I see as a complete lack of evidence for an “unknown manufacturer” problem, subsequent commentators have been remarkably uncritical in accepting Prosser’s assertions here as true, even when displaying considerable skepticism to other aspects of Prosser’s project. *See, e.g.,* WHITE, *supra* note 29, at 171 (“Where negligence theory proved most inadequate was in insuring that an injured plaintiff would be able to identify the defendant accountable for his injuries.”). Yet, that which was identified as a serious fault with a negligence-based approach disappears when it comes time to assess the efficacy of strict liability in insuring compensation. *See id.* (“A shift to strict liability in defective products cases meant that consumers could identify manufacturers as prospective defendants and that manufacturers could assume that anytime their products were defective and used in an ordinary manner, they would have to pay for the injuries the products caused.”). Apparently it is only under a negligence regime that manufacturers are impossibly difficult to identify, but under strict liability that difficulty disappears entirely.

liable if the consumer is to recover. And, of course, if your goal is to make sure that an injured consumer is compensated, this concern cannot be ignored. On the other hand, is such a concern actually real? Prosser baldly asserts that “[t]here are *enough* cases in which the manufacturer is beyond the jurisdiction . . . to justify requiring the dealer to assume the responsibility, and argue out with the manufacturer any questions as to their respective liability.”<sup>103</sup> But this assertion is not only bald, it is untenable.<sup>104</sup> Prosser offers no evidence that, in the typical product case, a plaintiff would be unable to recover from a manufacturer so long as there was no bar of privity. To Prosser, this seemed to be beside the point; to apply strict liability in tort to the entire chain of distribution—which is what he proposed—contract law needed to be displaced in its entirety in favor of tort.<sup>105</sup> Fortunately for the war effort, which had been going on for a long time now, Prosser’s very best general, Roger Traynor, was about to lead the army to its final victory at last.

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<sup>103</sup> Prosser, *The Fall*, *supra* note 16, at 816 (emphasis added).

<sup>104</sup> For the “beyond the jurisdiction” assertion, Prosser cites to the same case he relied upon in *The Assault upon the Citadel*. Compare *id.* at 816 n.131 (citing *Burkhardt v. Armour & Co.*, 115 Conn. 249, 161 Atl. 385 (1932)), with Prosser, *The Assault*, *supra* note 1, at 1116 n.125 (also citing *Burkhardt*). Both citations include but a brief description of the case-facts, which involved “the actual packer of corned beef” and “the first buyer a subsidiary corporation” being in Argentina, while “the primary distributor who put his name on the can [was] in Illinois, and the retailer, the purchaser, and the consumer [were] in Connecticut.” Prosser, *The Fall*, *supra* note 16, at 816 n.131. The description in *The Assault* is identical except that it calls the purchaser “the retail buyer” and the consumer “the injured consumer.” Prosser, *The Assault*, *supra* note 1, at 1116 n.125. Prosser’s assertion and its “supporting” citation seems like nothing more than further sleight-of-hand. As Prosser must have understood, under these facts the defendant Armour would have been treated as the manufacturer of the product by virtue of its putting its name on the label, according to the “apparent manufacturer doctrine.” See RESTATEMENT (SECOND) OF TORTS § 400 (1965) (“One who puts out as his own product a chattel manufactured by another is subject to the same liability as though he were its manufacturer.”). As for the two cases cited as examples of plaintiffs not knowing the identity of the manufacturer, one is ambiguous and the other is inapposite. In *Comarow v. Levy*, a per curiam judgment against defendant-bottlers is reversed for there being “no proof that the particular bottle which exploded was bottled by the said defendants.” 115 N.Y.S.2d 873, 873 (N.Y. App. Term 1952). Nonetheless, the plaintiffs still recovered as against another defendant, but the grounds are not explained. *Id.* at 874. Finally, in *Baum v. Murray*, the plaintiffs recovered as against the “manufacturer-retailer” for the sale of cooked sausages that contained trichinosis. *Baum v. Murray*, 162 P.2d 801, 802, 805 (Wash. 1945). In short, the cases cited do not provide Prosser any support for the broad assertions that he is making.

<sup>105</sup> This displacement of contract law, especially as set forth in Article 2 of the Uniform Commercial Code to govern the sale of goods among merchants, comes in for particularly pointed criticism in an excellent law review article by Reed Dickerson. See generally Reed Dickerson, *Was Prosser’s Folly Also Traynor’s? or Should the Judge’s Monument Be Moved to a Firmer Site?*, 2 HOFSTRA L. REV. 469 (1974). When it comes to food and the law, in my view, Dickerson was right as much as Prosser was wrong, and I am thus puzzled that Dickerson does not seem to be much discussed these days.

*D. Charges of the Traynor Brigade: On to the Final Victory*

It seems that generals deemed great by history, which is to say those deemed so in the telling of their stories, all suffered early in their careers a significant defeat, or at least an interesting setback that can provide the base for later fame. If we imagine Roger Traynor as the general who led one of the main brigades attacking the citadel, then *Escola v. Coca Cola Bottling Company*<sup>106</sup> could be imagined as his first loss on the battlefield (or at least a non-win), a case in which he had attempted, but failed, to convince his fellow justices to adopt a rule of strict liability for defective products.

The *Escola* decision issued a little less than four years from the day of Traynor's appointment to the California Supreme Court.<sup>107</sup> In his famous concurring opinion, Traynor stated his belief that:

[T]he manufacturer's negligence should no longer be singled out as the basis of a plaintiff's right to recover in cases like the present one. In my opinion it should now be recognized that a manufacturer incurs an absolute liability when an article that he has placed on the market, knowing that it is to be used without inspection, proves to have a defect that causes injury to human beings.<sup>108</sup>

By way of justification, Traynor argued that "[t]he consumer no longer has means or skill enough to investigate for himself the soundness of a product . . . and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing devices such as trademarks."<sup>109</sup> As social policy goes, it is certainly difficult to disagree with Traynor's argument, except perhaps for the issue of whether it was appropriately the province of the courts to institute such a policy.

Years later, his defense of strict liability appears to change focus somewhat. Explaining his concurrence, Traynor criticized the *means* by which the majority reached what he considered the right result, stating that he "thought the court was manipulating the doctrine of *res ipsa loquitur* to get a result that could be more forthrightly obtained by imposing strict liability."<sup>110</sup> Such criticism is not difficult to defend. If the "very fact that the accident happened" can be deemed proof of a defect, then surely that would be the better question to go to the jury—Did the product contain a defect?—instead of the question of negligence—Did the manufacturer act in a negligent way? But what Traynor says by way of further explanation is something very different indeed:

<sup>106</sup> *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436 (Cal. 1944) (holding that a waitress injured by an exploding bottle of Coca Cola had produced sufficient evidence at trial to support an inference of negligence using the doctrine of *res ipsa loquitur*).

<sup>107</sup> J. EDWARD JOHNSON, HISTORY OF THE SUPREME COURT JUSTICES OF CALIFORNIA: VOLUME II, 1900–1950, at 191–92 (1966). Justice Traynor was appointed on August 13, 1940 and the *Escola* decision issued on July 5, 1944.

<sup>108</sup> *Escola*, 150 P.2d at 440 (Traynor, J., concurring).

<sup>109</sup> *Id.* at 443.

<sup>110</sup> Rustad, *supra* note 41, at 1120.

As I viewed the doctrine of *res ipsa loquitur*, it simply presented a question of circumstantial evidence, and the jury was free to draw an inference of negligence from the very fact that the accident happened; *but the jury was also free not to draw the inference*. . . . When the defendant made a case that couldn't rationally be disbelieved and he completely demonstrated that there was no negligence, we were nevertheless affirming judgments for the plaintiff. I was convinced that those judgments should be affirmed, but it was not in the interest of the integrity of the judicial process to affirm them by manipulating rules. It would be much better to do it forthrightly and that's what prompted my concurring opinion in the *Escola* case, which I am told helped to get this products liability concept on the road.<sup>111</sup>

There are two unstated premises in Traynor's argument here, and both are difficult to defend. These two premises, which are corollaries of each other, are as follows: (1) manufacturers can "completely demonstrat[e] that there was no negligence" even if the plaintiff can prove that the product so manufactured contained a defect; and (2) the existence of a defect is not, by itself, sufficient to prove negligence. These two premises demonstrate that Traynor, despite protestations to the contrary, remained faithful to a conception of strict liability without fault—that is, absolute liability. In order to defend this conception, but to do so without admitting to it, Traynor had to remain committed to the idea that a defect is not—and cannot be—proof of negligence per se. But here is the problem: in the food cases on which strict liability's rationales depend, the defect is, in fact, proof of negligence—that is, a lack of care in the making of the food. For Traynor and Prosser (and others too), this was the missed lesson of food. To admit that, for certain kinds of products and defects, a defect necessarily is proof of negligence, would be to admit that for other kinds of products or defects, there is no such sufficient proof. In short, neither Prosser nor Traynor were willing to admit that the kind of defect and the kind of product mattered. To do so would have been to admit that there was not one rule of strict liability at all, and that the origin of the rule in food has supplied a rationale that could not be extended by analogy to all products.

By skipping over the significance of the defect's existence, Traynor dismissed out of hand the potential need for a fault-based approach to strict liability.<sup>112</sup> Such a dismissal was largely on theoretical grounds, driven by the desire of tort theorists that strict liability be a fault-free concept.<sup>113</sup> But strict liability

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<sup>111</sup> *Id.* (emphasis added).

<sup>112</sup> For example, many were to find the language of Section 402A "troubling, insofar as it seemed to reintroduce an element of negligence to the law of strict liability." Jung, *supra* note 45, at 864 (calling Section 402A's language "unfortunate in one respect" and pointing to phrases, such as "defective condition" and "unreasonably dangerous").

<sup>113</sup> See William C. Powers, Jr., *The Persistence of Fault in Products Liability*, 61 TEX. L. REV. 777, 778–79 (1983) (summarizing the "reasons why the effort to purge fault from strict products liability has not been entirely successful," including the fact that the primary concern has been to distinguish strict products liability from warranty law). Powers goes on to conclude to conclude that "[f]ault is deeply embedded in the doctrinal structure of strict products liability itself, specifically in the concept of defectiveness." *Id.* at 815. This is a

as a fault-free concept looks a lot like insurance, something that Traynor insists that it is not.

For example, in an article published a little over two years after the decision that first adopted the rule of strict product liability, *Greenman v. Yuba Power Products, Inc.*,<sup>114</sup> Traynor wrote, “It should be clear that the manufacturer is not an insurer for all injuries caused by his products. . . . When the injury is in no way attributable to a defect there is no basis for strict liability.”<sup>115</sup> Therefore, according to Traynor (and Prosser), it is the defect that provides the basis of liability, which means the challenge is then how to define the defect in a way that justifies the imposition of liability. Traynor admitted at the time that “as yet no definition has been formulated that would resolve all cases.”<sup>116</sup> I am not sure why this was not troubling to Traynor, given that launching the rule of strict liability without having yet worked out a theoretical framework by which to define defectiveness is akin to Buick selling cars without having yet worked out how to keep the wheels on. Like a wheel falling off, the definitional confusion surrounding issues of defectiveness is itself proof of a kind of doctrinal negligence.

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conclusion with which I wholeheartedly agree, although Powers seems to believe that this is a bad thing, and I do not. Indeed, experienced trial attorneys will always seek to present a case in a way that best explains who is most blameworthy for the existence of a defect. And although a plaintiff is not permitted a double-recovery, and the special-verdict form submitted to the jury will almost certainly contain only questions regarding the strict liability claim, evidence of negligence is an important means of buttressing proof of defectiveness and causation, and in “encouraging” the jury toward the higher end of the requested damage-award. As well, it would certainly appear that this tactic is not a new one. As far back as the fourteenth century, negligence has been alleged even when not needed for recovery. See Morris S. Arnold, *Accident, Mistake, and Rules of Liability in the Fourteenth-Century Law of Torts*, 128 U. PA. L. REV. 361, 367 (1979) (“[O]ne possible explanation [for proving negligence when it was not necessary to recovery] is that these plaintiffs thought that by emphasizing the negligent aspect of the defendants’ behavior, they could aggravate the wrong and increase their recovery.”). It also appears that, because of “a prevailing ethic in favor of compensation,” trespass actions in the fourteenth century imposed “civil liability [that] was strict.” *Id.* at 377–78.

<sup>114</sup> *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1963) (holding that a manufacturer could be held liable based upon proof that the plaintiff was injured “as a result of a defect in design and manufacture . . . that made the [product] unsafe for its intended use”).

<sup>115</sup> Roger J. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 366–67 (1965).

<sup>116</sup> *Id.* at 367, see also OWEN, *supra* note 36, at 344–45 (explaining how, after adoption of 402A, courts were forced to make “fundamental distinctions” as to “different forms of product defect”); Charles E. Cantu, *A Continuing Whimsical Search for the True Meaning of the Term “Product” in Products Liability Litigation*, 35 ST. MARY’S L.J. 341, 341–42 & n.3 (2004) (noting that “what had at first seemed so simple subsequently proved to be somewhat complex,” while also providing examples of where “courts have attempted to distinguish between who is or is not a ‘seller’” and have “struggled over what characteristics make a product ‘defective’”); David G. Owen, *Defectiveness Restated: Exploding the “Strict” Products Liability Myth*, 1996 U. ILL. L. REV. 743, 745 (1996) (“[B]eginning about the mid-1980s, the foundations of the ‘strict’ products liability cathedral began to fracture, revealing large cracks in the doctrine’s underlying theoretical structure.” (footnotes omitted)).

Strict liability worked consistently well with food cases because the defects were always proof of fault. Moreover, whether a product contains a manufacturing defect (as defective food always does), versus some other kind of a defect, will determine what rationales are potentially available to justify the imposition of liability, strict or not. But *Greenman* quickly drives by the problem, lumping manufacturing and design defects together as if the difference did not matter, thus adding further to the confusion.<sup>117</sup> In contrast, with claims involving allegations of defective food, the defect is by definition a manufacturing one—that is, the food is not reasonably safe in construction. Consequently, the fact of the defect proves the fact of the manufacturer's fault.

If the *Escola* case got “this products liability concept on the road,” as Traynor observed, then in *Greenman* he took the car out for quite the joyride. But that mattered not one bit to Prosser, who was adept at glossing over differences in the service of creating new legal doctrines. As such, he was once more predictably single-minded in his use of *Greenman* to advance his war-strategy. Unusually, however, Prosser seemed to underplay the import of Traynor's decision in advancing the rule of strict liability. There was certainly no mention of Traynor astride a steed with sword raised in the air, charging toward contract's last defenses. Even though it seemed that *Greenman* was the battle that won Prosser the war, Traynor is denied center-stage in *The Fall of the Citadel*.<sup>118</sup> No—this time, it was Prosser who “insist[ed] upon the center of the stage.”<sup>119</sup>

As Prosser was quick to remind, he had been “perhaps the first to voice” the need to overthrow the warranty regime.<sup>120</sup> There was also the need to men-

<sup>117</sup> Although the decision refers to a “defect in design and manufacture,” there is no evidence described that the lathe contained a manufacturing defect—that is, some mistake that made it depart from others in that same product-line.

Plaintiff introduced substantial evidence that his injuries were caused by defective design and construction of the Shopsmith. His expert witnesses testified that inadequate set screws were used to hold parts of the machine together so that normal vibration caused the tailstock of the lathe to move away from the piece of wood being turned permitting it to fly out of the lathe. They also testified that there were other more positive ways of fastening the parts of the machine together, the use of which would have prevented the accident. The jury could therefore reasonably have concluded that the manufacturer negligently constructed the Shopsmith.

*Greenman*, 377 P.2d at 899.

<sup>118</sup> There are seven or eight references to *Greenman*, depending on how you count them. The first two references are in footnotes with a few words of parenthetical information. Prosser, *The Fall*, *supra* note 16, at 794 nn.10–11. One paragraph is devoted to a discussion of the case itself. *Id.* at 803–04 & nn.75 & 77–79. There is a brief textual reference at page 830 with an accompanying footnote, this being the references that could be counted as one or two. *Id.* at 830 & n.211. The final three references are each citations in footnotes, only one of which has an accompanying explanation. *Id.* at 834 n.232 (including one sentence of explanatory text); *id.* at 835 n.238 (included in string citation); *id.* at 837 n.241 (citation only).

<sup>119</sup> Malone, *supra* note 48, at 1253 (“He needed attention; he seized it and, what's more, he successfully held it. There are those who objected to this, or who found it painful, and not always without reason. But for me, Bill was a star beneficiary of that old adage, Nobody minds a prima donna—if she can sing! and Bill could sing.”).

<sup>120</sup> Prosser, *The Fall*, *supra* note 16, at 802. Inclusion of the word “perhaps” seems more false modesty than anything else.

tion—before getting to any discussion of *Greenman*—the adoption of Section 402A in the Restatement (Second) of Torts, a section for which he was the creator and could also take credit.<sup>121</sup> It was only after these two announcements had been taken care of that Prosser finally turned his attention to Traynor’s decision in *Greenman*, announcing:

The effect of this decision was immediate. Other courts at once agreed that the proper theory was not one of warranty at all, but simply of strict liability in tort divorced from any contract rules. The number of them is already sufficient to make it reasonably certain that this is the law of the immediate and the distant future. There are still courts which have continued to talk the language of “warranty”; but the forty-year reign of the word is ending, and it is passing quietly down the drain.<sup>122</sup>

In other words, with the reign of that “freak” warranty having finally come to an end, slayed by Traynor and his Brigade of California justices, the Empire of Tort could now take control, with Prosser as Emperor for life, and the initial emphasis on food safety a quickly fading memory.

## II. THE ADOPTION OF SECTION 402A: FROM FOOD TO EMPIRE

When Prosser succeeded in convincing the ALI to extend the special rule for food products intended for “external consumption,” his strategy was to find a “bridge” product from which to extend the rule even further. And for this he plainly had a plan. The Foreword to Tentative Draft Number 10 is telling in how it explains that “the Reporter and the Council are . . . satisfied that [the prior version of] § 402A states the scope of liability of sellers of defective products *far too narrowly*, in light of numerous, recent decisions on the subject. A revision of this Section is, accordingly, proposed.”<sup>123</sup> By way of further explanation, Prosser in a “Note to Institute” argued as follows:

This Section was approved, in Tentative Draft No. 7, at the meeting in 1962. . . . Since 1962 there have been so many decisions extending the strict liability beyond products “for intimate bodily use,” that it has become quite evident that this is the law of the immediate future. If this Section is to be published this summer, . . . it will already be on the point of becoming dated. . . . [T]his is the most radical and spectacular development in tort law during this century.<sup>124</sup>

<sup>121</sup> See *id.* (quoting § 402A as adopted). Of course, this mention messes up the chronology considerably, and definitely seems designed as another sleight-of-hand. Not only was the *Greenman* decision issued prior to the ALI’s consideration of the third draft of Section 402A, but Prosser touts *Greenman* in the ALI draft materials as evidence of an ongoing change in the law requiring quick action. See RESTATEMENT (SECOND) OF TORTS § 402A note to Institute (Council Draft No. 16, Nov. 1, 1963). Thus, *Greenman* is, in *The Fall of the Citadel*, presented as both a cause and effect, whereas Section 402A (and Prosser) are allowed center stage as the real reason for the triumph.

<sup>122</sup> Prosser, *The Fall*, *supra* note 16, at 804 (footnote omitted).

<sup>123</sup> Tentative Draft No. 10, *supra* note 25, § 402A foreword.

<sup>124</sup> *Id.* note to Institute.

But this argument was more “propaganda in favor of reform,” and little else.<sup>125</sup> Prosser was warning his compatriots to not be left behind.

To make sure that the propaganda had its desired effect, Prosser did what he always did; he offered up a shotgun blast of case-citations. The Reporter (Prosser) cites thirty-eight decisions to demonstrate the “so many decisions” extending strict liability, eleven of which involve automobiles and six of which involve airplanes.<sup>126</sup> Of these, only ten of the decisions were issued in 1963—that is, since the adoption of the prior version of the rule in 1962.<sup>127</sup> A full eleven of the decisions cited are from before 1960, predating the first version of the rule, with the earliest being from 1951.<sup>128</sup> Yet despite there being nothing even

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<sup>125</sup> Priest, *supra* note 45.

<sup>126</sup> Tentative Draft No. 10, *supra* note 25, § 402A note to Institute.

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* (citing “*Di Vello v. Hardner Machine Co.*, (1951) 46 Ohio Op. 161, 102 N.E. 2d 285 [sic] (possibly overruled, possibly not)”). One cannot help but think that, if guileless and non-strategic, for the “law of the immediate future” an effort would be made to build a foundation firmer than one that includes a case described as “possibly overruled, possibly not.” Also, the correct parallel citation is 102 N.E.2d 289. Far from being a strict liability case, *Di Vello* is a trial court ruling in which the defendant’s motion to strike a breach of warranty claim was denied on the grounds that the lack of privity was not a barrier to the decedent’s recovery. *Di Vello v. Gardner Mach. Co.*, 102 N.E.2d 289, 293 (Ohio Ct. Com. Pl. 1951). Shepardizing this case reveals that no appeal was taken from the trial court’s ruling, a fact that calls into question the description of the case as “possibly overturned, possibly not.” In *The Assault upon the Citadel* (the source of most of the supporting material for the drafts of 402A), Prosser describes *Di Vello* as a decision from a “lower court in Ohio [that] was the first to go beyond such articles for bodily use, and to hold the seller of a grinding wheel strictly liable to the user, without negligence or privity.” Prosser, *The Assault*, *supra* note 1, at 1112 & n.103. Although there was unquestionably no privity—the decedent was an employee, and the grinder’s buyer had been the employer—negligence had been alleged, and was not put at issue by the motion to strike. *Di Vello*, 102 N.E.2d at 291. Moreover, the supreme court case that “apparently . . . overruled” *Di Vello* was nothing more than an unrelated case that held privity was required to recover on a breach of implied warranty claim. Prosser, *The Assault*, *supra* note 1, at 1112 & n.104 (citing *Wood v. General Elec. Co.*, 112 N.E.2d 8, 11 (Ohio 1953)).

To say that Prosser’s summary explication of the case law is misleading is, to put it mildly, an understatement. As already noted, White called into question to the accuracy (if not good faith) of Prosser’s research. See *supra* notes 52–53 and accompanying text. Priest has more specifically challenged Prosser’s case-citations in support of the claim that there had been an “explosion in the law toward strict liability.” See Priest, *supra* note 30, at 514 & nn. 340–43 (noting, for example, that “[s]ix of the forty cases constitute blatant padding by Prosser”). Ultimately, Priest is relatively forgiving of the inaccuracy of the citations, allowing that “Prosser was a scholar who possessed an acute sensitivity to budding legal trends” and that the “actual case law did not always develop with sufficient swiftness to verify his predictions.” *Id.* at 516. Personally, I am not so forgiving, especially when you consider how many actual courts cited Prosser in support of a proposition that did not, in fact, have the support that his citations misrepresented. Cf. Philip P. Frickey, *Transcending Transcendental Nonsense: Toward a New Realism in Federal Indian Law*, 38 CONN. L. REV. 649, 653–54 (2006) (repeating an “account (or legend)” about how Prosser’s first edition of his treatise on torts contained cases cited in footnotes that did not support “a variety of interesting, debatable, progressive propositions about tort law,” but that the second edition changed the foot-

approaching a groundswell of judicial support, the ALI members followed Prosser's lead in adopting Section 402A. As the entry about Prosser in the *Yale Biographical Dictionary of American Law* so appropriately summarizes:

Prosser took advantage of his multiple scholarly hats, in this case by drafting and pushing through the ALI a provision—Section 402A—with no counterpart in the First Restatement. Whether in the form specified by that provision or otherwise, the idea of strict products liability soon took hold, thanks again in part to Prosser's unofficial collaboration with Justice Traynor, who led the charge for it on his own influential court.<sup>129</sup>

The explanation took hold, uncritically accepted as fact, that the final version of Section 402A was adopted after the first version had shown itself to be “clearly too narrow,” and that the second version proved to be “quickly obsolete.”<sup>130</sup> Neither of these assertions is true, nor did any one seem to care. Food was sacrificed in favor of the broadest rule possible.

The final draft of Section 402A was adopted on May 25, 1963, and promulgated almost a year later on May 22, 1964.<sup>131</sup> Born of a “desire for an orderly statement of our common law,”<sup>132</sup> the ALI begat a tort law insurrection instead, one led by William Prosser, who was plainly intent on expanding the territory to explore and govern on behalf of tort scholars everywhere. He was not alone, of course, for other great scholars had long campaigned for strict liability, doing so in a way that seems to have inspired more admiration and less criticism than Prosser's efforts.<sup>133</sup> But what seems to have also informed the battle on behalf of strict liability was the view that food was simply not worthy of so grand of a legal theory. Priest provides a perfect example of this view when he describes Fleming James presenting at the AALS Tort Roundtable, a presentation later published as an article.<sup>134</sup> According to Priest, James argued that:

All limitations on recovery on the grounds of privity of contract, he declares, should be eliminated. There are no reasons to limit strict liability to food products or to products for intimate bodily use. The most extraordinary feature of the food cases (to that point, the area of furthest success of James's ideas) is how

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notes to cases “that actually supported the assertions made in the text—cases that themselves had cited the first edition of the hornbook as the authority relied upon.”).

<sup>129</sup> THE YALE BIOGRAPHICAL DICTIONARY OF AMERICAN LAW, *supra* note 47.

<sup>130</sup> Cantu, *supra* note 116, at 341 & n.2, 377 (referring, by way of introduction, to the “brief history of events leading up to the adoption of Section 402A,” before going on to offer a somewhat confusing critique of the failure of courts to employ a “primary dictionary meaning approach” to deciding whether a “product” was involved).

<sup>131</sup> 2 RESTATEMENT (SECOND) OF TORTS (1965).

<sup>132</sup> Lewis, *supra* note 9.

<sup>133</sup> See Priest, *supra* note 30, at 464–65 (arguing that the work of Friedrich Kessler and Fleming James laid the intellectual foundation for enterprise liability, and that Prosser's work was derivative of Kessler and James, while giving Prosser credit for the art of his synthesis).

<sup>134</sup> James, *supra* note 7.

trivial they are. “Surely greater danger lurks in a defective automobile wheel than in a pebble in a can of beans.”<sup>135</sup>

Thus, food cases are trivial, amounting to little more than a pebble in a can, while the renewed industrial revolution of the post-war era filled the market with automobiles, airplanes, and power tools—products much more worthy of governance by a modern strict liability regime. To disagree would have most certainly (as Priest suggests) been seen at the time as an embrace of obsolescence and a rejection of modernity.<sup>136</sup>

Providing a counter-narrative of his own, but one that is revisionist history, Priest has argued that the “original intent” all along was for “the Section’s strict liability standard, with minor exceptions, to apply *only* to what we now call manufacturing defect cases.”<sup>137</sup> In the next sentence, Priest goes on to explain that “Section 402A and its Comments were drafted with little more than manufacturing defect cases in mind.”<sup>138</sup> But Priest’s explanation is misleading, even if in some respects true. Although the only cogent explanation for the comments and the rule is to see both as only applying to manufacturing defects, that is only because unsafe food is, by definition, unsafe as the result of a manufacturing defect. In other words, Priest should have asserted that Section 402A and its Comments were drafted with little more than food in mind.

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<sup>135</sup> Priest, *supra* note 30, at 503. To suppose that food is trivial is to mistake its ubiquity for its lack of significance. As one cultural historian has aptly stated in offering a corrective to this notion,

[f]ood is “everyday”—it has to be, or we would not survive for long. But food is never just something to eat. It is something to find or hunt or cultivate first of all; for most of human history we have spent a much longer portion of our lives worrying about food, and plotting, working, and fighting to obtain it, than we have in any other pursuit.

MARGARET VISSER, MUCH DEPENDS ON DINNER: THE EXTRAORDINARY HISTORY AND MYTHOLOGY, ALLURE AND OBSESSIONS, PERILS AND TABOOS, OF AN ORDINARY MEAL 12 (1986). See also Stearns, *supra* note 7, at 425 (“Food is unique not only because of the intrinsic qualities that set food apart from anything else to which food can be compared; it is unique for the start of an ontology that food suggests. It is also unique for the interrelatedness of being that only food best reveals and defines. Food reminds us that, as living beings, we were born into a vulnerability of hunger and dependence.”).

<sup>136</sup> Priest, *supra* note 30, at 519 (“[E]mboldened by the wide academic consensus, judges embraced enterprise liability as an affirmation of their modernity and a denial of their obsolescence.”).

<sup>137</sup> George L. Priest, *Strict Products Liability: The Original Intent*, 10 CARDOZO L. REV. 2301, 2303 (1989).

<sup>138</sup> *Id.* For his part, and along these same lines, Owen uses all of this “legislative history” in a different way—namely to argue that the origin of Section 402A as a special rule for food, means that comments i, j, and k (as carried over to the final draft that applied to all types of products) “were directed exclusively to a narrow set of issues pertinent to a limited class of products, to wit, . . . food, whiskey, cigarettes, drugs, and similar products that carry unavoidable dangers.” David G. Owen, *The Puzzle of Comment j*, 55 HASTINGS L.J. 1377, 1382 (2004).

## CONCLUSION: A VICTORY LIKE PYRRHUS

The two armies separated; and we are told that Pyrrhus said to one who was congratulating him on his victory, "If we are victorious in one more battle with the Romans, we shall be utterly ruined."<sup>139</sup>

If the true uniqueness of food had been sufficiently noted, the lure of analogy might have been resisted. Had Prosser and Traynor and their band of tort warriors filled their ears with wax so as to not hear siren's song, then the law of product liability might have been allowed to evolve in ways more organic, coherent, and well-founded. In particular, if Section 402A had been allowed to remain a special rule for food, albeit at the cost of depriving Prosser of his crowning glory, focus might have remained on the unique importance of food safety. Moreover, the idea of a hybrid warranty of quality might have grown to be accepted, and not been banished to the hinterlands as a legal "freak." Perhaps most of all, the urge to totalize—to find a tort theory of everything—might have given way to a more careful evaluation of the foundations of products liability, and the starkly differing rationales for imposing liability for making and selling different kinds of products, which are defective in different kinds of way. But instead, the counter-revolution occurred, in the "tort reform" and other movements that sought to counter what was seen as a pro-plaintiff bias in the law.<sup>140</sup> Instead of peace, the "tort wars" continued, as did the partisan reports from the battlefields.<sup>141</sup> And perhaps worst of all, as I have argued elsewhere, the plague of foodborne illness continues.<sup>142</sup>

As one who has practiced in the area of products liability law for over twenty years, I think that Anita Bernstein has put the matter perfectly:

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<sup>139</sup> PLUTARCH, *Life of Pyrrhus*, in 9 PLUTARCH'S LIVES 417 (Bernadotte Perrin, trans. 1920). As previously noted, it is from Pyrrhus of Epirus that we get the meaning for the term pyrrhic victory, a victory won at a cost seemingly too high.

<sup>140</sup> Rustad, *supra* note 41, at 1127–28 ("[I]n the past few decades a counter-revolution has arisen which is reversing the expansion of victim's [sic]. Spearheaded by representatives of powerful corporations and the medical establishment, this movement has had considerable success in its efforts to reverse the liberalization of tort remedies in the areas of products liability and medical malpractice." (footnotes omitted)); see also WHITE, *supra* note 29, at 254–80 (depicting the resurgence of negligence law and its displacement of strict liability through an appraisal of tort casebook and treatises in the 1980s and 1990s); Jung, *supra* note 45, at 870 ("Not only did Prosser miss the legal issues that would define strict product liability in the 1970's and 80's, he also failed to anticipate the political dispute it would generate.").

<sup>141</sup> Cf. Anthony J. Sebok, *Dispatches from the Tort Wars*, 85 TEX. L. REV. 1465, 1468–69 (2007) (book review) (arguing that the tort reform movement was partly motivated "by an accurate understanding that, since the late 1950s, many defenders of the tort system have sought to challenge the principle that tort liability ought to be based on individual fault").

<sup>142</sup> Stearns, *supra* note 7, at 442 (arguing, among other things, "that the law continues to fail in achieving its mission is proven simply by looking at the continuing plague of foodborne illness, a plague first made apparent during the 1993 Jack in the Box E. coli outbreak. The law provides its stamp of approval but never really does its job of making the food it regulates consistently safe to buy and eat").

Coexisting with contract and tort, true products liability becomes a flexible doctrine that uses the approaches of both traditions. Wrongful imposition of risk, betrayed expectations, a breached bargain, careless design, and other concepts of products liability, which partake of both tort and contract, are concepts that illuminate cases. . . . True products liability, then, is a concept stripped not only of inapposite case paradigms but also political baggage.<sup>143</sup>

To this I would add that true products liability is not merely a concept either; it is something that plays out in real life, where each of the dramatic moments constitutes more than words on page, more than a story in a book. And, in real life, when I have filed a lawsuit on behalf of someone injured by eating unsafe food—for example, cookie dough that contained *E. coli* O157:H7, or orange juice that contained *Salmonella*—the complaint never once failed to set forth both negligence and strict liability claims, and sometimes warranty claims as well. Believe it or not, no chaos ensued, and a kind of justice always managed to be achieved. For those who practice law on behalf of clients, it never really matters whether tort or contract provides a remedy or a defense. That is not the battle that matters in practice. Just as when you raise that fork to your mouth to take a bite, what matters is the safety of the food you are about to consume. In that moment, a special rule for food makes a lot of sense, and is not trivial at all. Odd that Prosser thought otherwise.

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<sup>143</sup> Anita Bernstein, *How Can a Product Be Liable?*, 45 DUKE L.J. 1, 80–81 (1995). As White correctly points out, “virtually every buyer who has a strict tort claim for an injury caused by a defective product also has a potential claim in warranty for the same injury.” White, *supra* note 41, at 1067.