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RENEWING PRODUCTS LIABILITY WITH SEMEN

Anita Bernstein*

INTRODUCTION

A couple of decades ago I wrote an article about new torts that lightly challenged the phrase, contending that an emergent tort is never all new.¹ Law reformers associated with the successful creation of new twentieth-century causes of action, I found, reliably denied or minimized the novelty of what they identified. Historical instances of tort-innovation have fared best when their proponents deployed what I called conservative “formalist themes” that include analogy and evolution in small increments.²

Contributions that this Article joins affirm this view of new torts by attesting to the power of Old.³ Faulkner could have had tort in mind when he famously wrote that “[t]he past is never dead. It’s not even past.”⁴ Change in tort law always accepts the authority of tradition, precedent, established doctrines, and familiar beliefs about which institutional actors should have powers to do what.

Here I return to my 1997 thesis that developments in tort coexist with durability by adding a modification: This Article speaks of renewing as distinct from new. Law journal articles with the word “renewing” in their title confirm that, in legal scholarship, the gerund combines

* Anita and Stuart Subotnick Professor of Law, Brooklyn Law School. For their contributions to this Article, a project written concurrently with my book in progress *Making the Best of Semen* (NYU Press), I thank Benjamin Smith, Kathleen Darvil, Steve Landsman, and participants at a Temple Law School workshop. Brooklyn Law School faculty research fund provided financial support.

1. Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539 (1997) [hereinafter Bernstein, *New Tort*].

2. *Id.* at 1545.

3. Symposium, *Twenty-Ninth Annual Clifford Symposium on Tort Law & Social Policy: New Torts?*, 73 DEPAUL L. REV. (2024).

4. WILLIAM FAULKNER, *REQUIEM FOR A NUN* 92 (1950). As I noted when I last quoted this line, the speaker-character for whom Faulkner wrote it was a lawyer. ANITA BERNSTEIN, *THE COMMON LAW INSIDE THE FEMALE BODY* 96 (2019).

change and continuity. The “re-” in renewing connects progress to roots in the past.⁵

In contrast to earlier writings of mine on the formation of new torts, which sought to generalize about this development independent of any single specific risk, injury, or theory of law-based responsibility,⁶ this Article applies the lens of “renewing” to one particular source of danger. Semen as an object of attention from the law—and from me: I’m working on a book about it—fits with the new-tort theme explored in this Symposium.⁷ It also aligns with my contention that newness in tort builds on oldness.

Regulation of sperm banks, deprivations of surgical-procedure abortion and medical abortion and contraceptives, restrictions on availability of the HIV preventative PrEP, and legal definitions of fatherhood, inter *many* alia, become legal treatments of semen when one wishes to perceive them that way. The shift in perception does demand some effort. A convention that lower-torso emissions seep from our bodies without mention in polite company obscures this operation of law. Once we look, however, we can see and then speak about an example of what’s new in tort.

I ground this exercise in my understanding of tort as (again, inter *many* alia) an application of force by the government. Though always more than a means to some larger end, tort is an instrument that law applies to the task of anticipating dangers and mitigating their consequences. The renewing that centers this Article examines a narrow topic within tort, semen products liability, as a source of improvement in two senses. One improvement addresses semen: Products liability causes a substance to become safer and more conducive to human well-being. The other improvement applies to products liability as doctrine: I assemble reasons to agree that products liability is a good thing in itself.

Aware that readers may be puzzled by praise for products liability—what’s next in a law review, being pro-weather or esteeming the law of gravity?—I pause to note analogues to this attention in contemporary writing. In recent works, legal scholars have both questioned and defended fixtures once taken for granted. Reading without expertise in these specialist fields, I have been challenged to reconsider, again inter

5. See David A. Wallace, *Renewing Our Cities*, 103 U. PA. L. REV. 462 (1954); Julie Macfarlane, *ADR and the Courts: Renewing Our Commitment to Innovation*, 95 MARQ. L. REV. 927, 929 (2012) (identifying an imperative to “keep assessing and evaluating”); Robert Osburn, *Jaded No More: Renewing Moral Idealism in Nation-Building and Global Affairs*, 1 U. ST. THOMAS J. L. & PUB. POL’Y 154, 162 (2007) (finding dynamism in evangelical Christianity).

6. See generally Bernstein, *New Tort*, *supra* note 1; Anita Bernstein, *The New-Tort Centrifuge*, 49 DEPAUL L. REV. 413 (1999).

7. In this Article, most semen is the human variety; products liability case law includes cattle ejaculate too. See *infra* Part II.A.

alia, punishment, policing, and progressive taxation. Products liability is another P-term in that list. Joining this larger turn that reexamines fundamentals, I advert in this Article to decades of attack on the use of tort as an instrument of redress.

The attack has done damage to products liability as a legal category. Although personal injury litigation makes individuals and their society better off,⁸ well-funded resistance casts it as bad for the public,⁹ bad even for injured people.¹⁰ Tort reform takes a stand against the accountability that law delivers. Accountability as an endeavor could benefit from invigorated support, I think, from theory-producers like me. This Article contributes to an agenda of improvement through renewing.

The renewing project unites what may look like an unlikely couple: products liability and semen. Part I of this Article argues that, for reasons that are interconnected as well as divergent, both constituents of this pairing ought to receive more attention. Here, as a longtime writer and reader of contentions offered in law review articles, I share the instinct to smell special pleading. The construct of a marketplace of ideas might be understood to say I must be wrong: Maybe all subjects receive the engagement they deserve; maybe partisans who want more talk about what interests them ought to hone their appeal in this *souk* rather than whine for more scarce time from other people.

In response, I note characteristics of semen first and products liability second that function to diminish attention levels to the point of too much neglect. Semen, it seems to me, has a problem of mentionability. Norms about what may be spoken push this substance out of public reckoning. Products liability also languishes in an under-mentioned state. Twentieth-century case law and scholarship created the field by establishing the centrality of tort to product-caused injury. As a famed opinion of this founding era observed, rules associated with contracts and commercial law had done this job “fitfully at best.”¹¹ By recognizing a negligence-ish duty of care that attends the sale of products in commerce, mixed with fresh liberality on negligence’s demands, products liability as a cause of action marked an extraordinarily successful

8. See ALEXANDRA D. LAHAV, IN PRAISE OF LITIGATION 87 (2017) (noting that “individuals and corporations make decisions with the background knowledge that rights can be enforced in court and they may be held to account for any wrongdoing.”); Paul Stancil, *Discovery and the Social Benefits of Private Litigation*, 71 VAND. L. REV. 2171, 2173 (2018) (stating that litigation advances both dispute resolution and social welfare).

9. Roland Christensen, *Behind the Curtain of Tort Reform*, 2016 BYU L. REV. 261, 266 (2016); see generally STEPHEN DANIELS & JOANNE MARTIN, TORT REFORM, PLAINTIFFS’ LAWYERS, AND ACCESS TO JUSTICE (2015) (reporting on evidence from Texas about the impact of tort reform).

10. Anita Bernstein, *Privity 2.0 May Be Even Better for Tort Defendants*, 49 FLA. ST. U. L. REV. 765, 769–70 (2021) [hereinafter Bernstein, *Privity 2.0*].

11. *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1963).

new-tort development.¹² But products liability deserves celebration as more than just a tort landmark.

The name for a cause of action that judges started to accept in the 1970s signaled a rise of tort-think for a category of injury that used to repose, at least partially, in the narrower and more technical law of sales. When products liability ascended, concepts associated with contract fell. Decisional law today contains scant reference to privity, disclaimers, implied and express warranty, and even less technical terms like “sale” and “buyer.” Contract remains central to products liability at multiple levels, however.

Courts for the most part allow businesses that expect to become defendants to deploy waivers and alternative dispute resolution provisions to undo the obligations and protections that twentieth-century products liability established.¹³ Which burdens ought to be imposed on prospective defendants in a way they can’t evade is a reopened question for contemporary law. Property law and theory also inform products liability.¹⁴ To renew products liability is thus to renew three great common law fields, individually and in combination.

Beyond doctrine, and moving to distributive justice, the imposition of particular legal obligations and standards only on entities engaged in the business of selling makes products liability one of the few domains of American law that take overt notice of parties’ identity or status in the political economy. For a rule to be pro-defendant or pro-plaintiff is to be forthrightly pro-wealthy or pro-vulnerable. Useful debate and awareness can emerge from this foundation.

Semen, I next contend, can make this success even stronger. Following the “paradoxes” pattern of *How to Make a New Tort* that marked my entry into this jurisprudence,¹⁵ wherein old material is also new and new material also old, Part II of this Article shows what is familiar, unremarkable, and uncontroversial about the innovation present in semen products liability. For starters, case law agrees. The small corpus of judicial decisions on products liability for semen injury—I think I found everything findable on Westlaw, and the task of retrieval was not strenuous—is entirely consistent with the pro-liability stance of this Article. Next comes the leading secondary source. The Products Liability Restatement, in my view, aligns with this acceptance. I find more

12. See Bernstein, *New Tort*, *supra* note 1, at 1541 (identifying strict products liability as one of the four twentieth-century new torts that emerged in the United States).

13. See generally Bernstein, *Privity 2.0*, *supra* note 10 (arguing that this development amounts to a revival of privity as a source of immunity for prospective defendants).

14. See *infra* notes 31–32 and accompanying text.

15. See Bernstein, *New Tort*, *supra* note 1.

support in the name of the only semen products liability multidistrict litigation.¹⁶

This foundation of what is old in semen products liability provides a base for what is new in Part III, which turns to the renewing this Article identifies and pursues. We know from the evidence gathered in Part II that, when sold by a commercial provider and alleged to be the source of injury, semen (emitting from any species) qualifies for a products liability label. Now, what follows?

Liability, a word that American law links with products, reminds onlookers that semen causes injury.¹⁷ Expansions that originate in awareness of liability can enlarge this public consciousness I want to ensue. Pertinent-to-semen legal conclusions of “defective” and “unreasonably dangerous,” along with the related safety-regulation category of “hazardous substance,” are well-established and informative concepts rooted in a field of law that deserves renewing.

I. WHY BOTH SEMEN AND PRODUCTS LIABILITY SHOULD RECEIVE MORE ATTENTION

Two subjects of interest to me occupy this Part, each of them under-discussed in relation to its importance for what I think are different reasons. Semen seems taboo, too provocative to mention. Products liability is almost the opposite of taboo, its dynamism taken for granted.

A. Semen Mentionability

For anything to gain more attention, mentioning it needs to be acceptable. Social cues influence what individuals notice and remember. Whenever people are discouraged from expressing their awareness of a thing or condition, that object recedes from social life. Having recently offered work about semen in publishing markets, I have reason to believe in a mentionability problem. Semen is not spoken about enough.

16. See *infra* Part II.C (discussing *In re Xytex Corp. Sperm Donor Prods. Liab. Litig.*, 223 F. Supp. 3d 1351, 1352 (J.P.M.L. 2016)).

17. Commending the application of products liability to human sperm, a student author coined a clever phrase that pertains to my thesis: “putting the ‘product’ in ‘reproduction.’” Jennifer M. Vagle, Comment, *Putting the “Product” in Reproduction: The Viability of a Products Liability Action for Genetically Defective Sperm*, 38 PEPP. L. REV. 1175, 1213 (2011). I almost want to say that the second word of the title of this Article should be pronounced “pro-DUCTS” and that its syllables divide at pro/ducts rather than prod/ucts.

It is notoriously hard to prove a negative, of course. Elsewhere I have engaged with the related difficulty of knowing how much is much.¹⁸ Starting with a premise that semen is important, I sought proof of a necessary negative: that it is under-mentioned. On the question of where to look for evidence, I presumed that semen is inherently extrinsic to most discourses. Omission of semen in the many settings where it does not belong says nothing about its mentionability.

Where semen *must* belong, my premise continued, is in texts about pertinent medical fields. Semen ought to be present in those books without shame or evasion; public health requires this communication of knowledge. Were I to find semen not spoken of openly in this setting, I would infer a mentionability gap.

And so in the summer of 2023 I obtained permission to browse the physical shelves of an esteemed medical school library. Walking through “miles of aisles,”¹⁹ I pulled from the shelf tomes with titles that sounded semen-inclusive. Urology, epidemiology, public health, immunology, infectious diseases, and reproductive medicine seemed to fit this bill. I opened books in those categories and turned to the indexes, using my phone to take a picture of the “S” page.

Semen had an astoundingly scant presence in these indexes. Textbooks titled *Pathologies of the Testis*; *Hormonal Regulation of Spermatogenesis*; *Infectious Diseases*; *Textbook of Erectile Dysfunction*; *Basic Medical Microbiology*; *Health Promotion and Disease Prevention in Clinical Practice*; *Retroviruses*; *Introductory Immunobiology*; *Fundamental Immunology*; *Generations at Risk: Reproductive Health and the Environment*, along with other books that seemed on point, had zero index entries of the noun semen (or the adjective seminal). On its S-page the index of a book called *Immunology of Reproduction* omitted semen, but did have an entry for “shrew.”

Other texts included semen but only as an adjective, often in a solitary entry. Semen analysis, semen samples. “Seminal” showed up occasionally, too. In some texts that had an entry for semen, I would find nothing about human semen when I turned to the page.

In short, my sampling of reference texts on the shelves of a medical school library demonstrated, at least to me, that semen is not entirely mentionable there. If it were mentionable, I would have found more of it in the setting where one would expect forthright content on matters

18. Anita Bernstein, *Civil Rights Violations = Broken Windows: De Minimis Curet Lex*, 62 FLA. L. REV. 895, 898 (2010).

19. Hat tip to Joni Mitchell. I can't be sure about literal miles, but I did pass through the same shelves repeatedly.

of biology applied to human anatomy. Next, I turned to machine learning as provisioned for free on the platform named ChatGPT.

At the time of my search, this chatbot was in bad odor: I had heard nothing good about it from friends, colleagues, and my online reading. Complaints about bias, untrustworthiness, and support for dishonest writing by students and lawyers filled the conversation. As this Article goes to press, lawyers and researchers know the shortfalls of this technology related to the truth of what it contains. If pulling books, several of which were published decades ago, from a shelf as a method to learn what medical authorities say about anything calls for a grain of salt, ChatGPT might need a full teaspoon.

But I was not looking for factual accuracy on ChatGPT. Instead, as with my examination of medical texts, I wanted to learn whether and how semen gets mentioned in the materials that machine learning reaches. And so I typed:

Can you help me find popular writing about semen?

ChatGPT replied:

Certainly! When it comes to popular writing about semen, there are various topics and perspectives you might be interested in exploring. However, it's important to note that explicit or adult content is not appropriate for this platform. So, if you're looking for more general information or discussions about semen in a scientific or educational context, I'd be happy to help. If you have a specific aspect or question in mind, please let me know, and I'll do my best to assist you.

Getting scolded for engaging the machine toward an agenda presumed to be lubricious supports my claim about unmentionability, I think. Whatever the antonym of lubricious might be—scholarly, serious, ChatGPT's “scientific or educational”—this contrary descriptor must not dominate the database. We can infer that most references to semen available online, both searches and the material searched, focus on prurient destinations rather than the buttoned-down goals I pursue in this Article.

The reproach I drew from ChatGPT for typing the name of a fluid produced by all mammal species provides an insight into the mentionability problem. At the same time that semen remains coyly unspoken in reputable sources where it's necessary, notably medical texts, the extensive verbiage that my chatbot search reached must include plenty of smut. Two decades after a parody of a Sesame Street song announced that “the internet is for porn,”²⁰ sexually explicit material now occupies

20. Avenue Q, *The Internet Is for Porn*, on AVENUE Q: THE MUSICAL, ORIGINAL BROADWAY CAST RECORDING (RCA Victor 2003).

a dwindling share of online content but it's still copious.²¹ Variations on sex that take up space online obscure the urgent scarcity in public discourse that occupies this Part.

B. Products Liability: Spread the Good News

Amplly mentionable in the sense of not shocking or offending anyone when spoken about, products liability, like semen, is under-mentioned in relation to its importance. Its contributions to both law and human life warrant more appreciation than they receive. Renewing products liability can draw on and also enlarge a base of well-founded esteem.

Here I support my renewing agenda by focusing on positive conditions rather than seeking to prove a negative (other than the negative that products liability is underappreciated). To start, I review reasons that products liability holds together to make a unique contribution. Its focus on a defective object is not arbitrary; its doctrinal boundaries are defended and defensible. Esteem for products liability continues in expressions I gather from judges and scholars. The consensus that this legal field coheres and achieves desirable ends is solid. Good news that accomplishes good effects deserves to be heard.

1. Products Liability Makes Sense (It's Not "The Law of the Horse")

"A few years ago, at a conference on the 'Law of Cyberspace' held at the University of Chicago," mused Larry Lessig in 1999, "Judge Frank Easterbrook told the assembled listeners, a room packed with 'cyber-law' devotees (and worse), that there was no more a 'Law of Cyberspace' than there was a 'Law of the Horse.'" ²² Proceeding as if such a law existed "would just muddle rather than clarify," and so "legal academics ('dilettantes') should just stand aside as judges and lawyers and technologists worked through the quotidian problems that this souped-up telephone would present. 'Go home,' in effect, was Judge Easterbrook's welcome." ²³

Acknowledging that Easterbrook had a point when he favored general rules over focusing on particulars when those particulars do not aid legal analysis, Lessig expressed esteem for the law of cyberspace

21. See Katharina Buchholz, *How Much of the Internet Consists of Porn?*, STATISTA (Feb. 11, 2019), <https://www.statista.com/chart/16959/share-of-the-internet-that-is-porn/#:~:text=Only%204%20percent%20of%20websites,might%20bring%20about%20new%20insights> [https://perma.cc/UE9Y-HMM3] (reviewing estimates of 2005–2014).

22. Lawrence Lessig, *The Law of the Horse: What Cyberlaw Might Teach*, 113 HARV. L. REV. 501, 501 (1999).

23. *Id.*

undaunted by Easterbrook's ridicule. "I am not defending the law of the horse," wrote Lessig in an article with this phrase in its title. "My claim is specific to cyberspace. We see something when we think about the regulation of cyberspace that other areas would not show us."²⁴

My claim about products liability, like Lessig's about the regulation of cyberspace, is what Lessig called specific. The phrase "products liability" has meaning that is absent in other areas that pertain to product-caused injury. For risks and harms associated with objects sold in commerce, those "other areas" are conventionally understood to be tort and contract. Rules from those fields pertain to products liability, but do not cover all it includes. And so, I, too, am defending something more valuable than the law of the horse.

An early law review article of mine endeavored to explain and defend the existence of this doctrinal field. What the phrase "products liability" means is not obvious from how it combines two familiar nouns in an adjective-noun sequence. Examined next to other tort terminology, products liability is not opaque like "special damages" or "proximate cause;"²⁵ not maladroit like the old tort label "false imprisonment" or the semi-stillborn newer one "flagrant trespasser;"²⁶ and not misleading like "exemplary damages" or "actual malice" as used in the constitutionalized American law of defamation.²⁷ Internally, within the words of its own name, products liability instead presents a puzzle.

"We say 'products liability' rather than manufacturer's liability, seller's liability, commercial seller's liability, business supplier's liability, producer's liability, or any other alternative phrase referring to persons," I wrote, "even though inanimate objects are unable to pay money judgments."²⁸ Apparently we ascribe responsibility to a thing. "This vernacular oddity provokes the argument that products liability is a phrase

24. *Id.* at 502.

25. See Jessie Allen, *The Persistence of Proximate Cause: How Legal Doctrine Thrives on Skepticism*, 90 DENV. L. REV. 77, 89 (2012); J. Lyn Entrikin, *The Right to Be Let Alone: The Kansas Right of Privacy*, 53 WASHBURN L. J. 207, 246 n.356 (2014) (observing that the phrase "special damages" has left "common legal parlance," its meaning "elusive").

26. See Anita Bernstein, *Rape is Trespass*, 10 J. TORT L. 1, 1 (2017) (noting the alternative term "wrongful confinement"); Victor E. Schwartz & Christopher E. Appel, *Reshaping the Traditional Limits of Affirmative Duties Under the Third Restatement of Torts*, 44 J. MARSHALL L. REV. 319, 345 (2011) (objecting to the coinage of "flagrant trespasser" in a Restatement on the ground that it does not appear in case law).

27. See Anthony J. Sebok, *What Did Punitive Damages Do? Why Misunderstanding the History of Punitive Damages Matters Today*, 78 CHI.-KENT L. REV. 163, 200–01 (2003) (reviewing divergences in meaning between punitive damages, exemplary damages, and the nineteenth-century term "vindictive damages"); Entrikin, *supra* note 25, at 247 ("Just how the meaning of 'punitive damages malice' compared with 'common law malice' and 'actual malice' was difficult to discern.").

28. Anita Bernstein, *How Can A Product Be Liable?*, 45 DUKE L. J. 1, 2–3 (1995) [hereinafter Bernstein, *How Can A Product Be Liable?*].

without sense,” *How Can a Product Be Liable?* continued. “From there one can readily say that it ought not to exist.”²⁹ In response to that challenge, I argued for ascribing responsibility to inanimate objects. Questions of how to manage this responsibility, especially the pointed ones about which persons are entitled to collect damages for product-caused harm and who has to pay them, are severable from recognition of a phenomenon I labeled product dynamism.³⁰

When we think of products liability as something like “detrimental objects law,” we see the error of insisting that this area is just contract and tort applied to “the horse” of commercial settings. Objects are a focus of a separate field, property, and while the law of property occupies itself with the non-detrimental kind of object, foundations of property in philosophy and political theory hold a deep interest in what products liability law cares about: manufacture, acquisition, sale, and use.³¹ This sociocultural view deems products stimuli to behavior, not just inert instruments that users can take or leave, and incidentally defends as coherent the French doctrine of *fait de la chose*, “act of the thing.”³²

Readers can decide for themselves if this thesis of mine is convincing, but the need for an explanation of products liability as a legal category or field is obligatory. We find this obligation noted in the extraordinary Restatement (Third) of Torts: Products Liability, published in 1998 to launch the American Law Institute’s third pass through the subject of torts. The authors of this work, reporters James A. Henderson Jr. and Aaron D. Twerski, undertook the project to improve on a famed predecessor, the single-section Restatement (Second) § 402A. Henderson and Twerski had started their writing on products liability law soon after the concept took shape in American courts, law review writing, and a small set of statutes. By the early 1990s, the two scholars had identified a need for new blackletter on the subject.

In a long comment placed near the top of their Restatement, Henderson and Twerski defended products liability as coherent and correct. Comment a to § 1 of the Restatement purports to do something different from defending products liability.³³ The Reporters said they are explaining what it means for this liability to be “strict.” But it turns out that what they explain, and implicitly defend, is not strict liability in general, but the special judicial treatment of product-caused injury.

They found a cluster of exceptional stances: all these exceptions favor plaintiffs over defendants. Comment a reports that, when a product

29. *Id.* at 3 (citations omitted).

30. *Id.* at 9.

31. *Id.* at 6–7 (adverting to Locke, Hegel, and Marx).

32. *Id.* at 40.

33. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 1 cmt. a (AM. L. INST. 1998).

causes injury “while being put to a reasonably foreseeable use,” courts will conclude that the seller knew of the relevant risks. Courts limit the effect of comparative and contributory negligence when plaintiffs are injured by defective products. Some courts, Henderson and Twerski continue, favor an injured plaintiff over “a small manufacturer.” Lastly, nonmanufacturing sellers can be liable even when they could have done nothing to cure or ameliorate what was wrong with the product. Henderson and Twerski have no quarrel with what they review. Both the pro-plaintiff tilt in products cases and the exceptional nature of this favoritism are fine with them. Call it strict liability if you like, but the more precise name for what comment a celebrates is products liability. As Henderson and Twerski go on to say, “‘strict products liability’ is a term of art that reflects the judgment that products liability is a discrete area of tort law. . . .”³⁴

A law review article published last year expands the reasoning of comment a to furnish more support for products liability as “a discrete area.” Like the Reporters, authors Paul Rothstein and Ronald Coleman focus on the space between negligence and strict liability. Cost-benefit analysis, they argue, is flexible enough to fit into a midpoint stricter than negligence, on one hand, but not amounting to absolute liability on the other.³⁵ To this reader, the variations on cost-benefit analysis that Rothstein and Coleman offer fit this Article’s agenda of Products Liability: Spread the Good News. Refining cost-benefit analysis for one discrete purpose showcases an imperative. Product-specific doctrine found nowhere else supports my simple, yet attention-worthy, conclusion that products liability is defensible and desirable.

2. *Judicial Approval*

Eight decades after Roger Traynor made the first move in *Escola v. Coca Cola Bottling Co. of Fresno*,³⁶ judges still go out of their way to praise products liability in the decisional law they write. Their steadfast enthusiasm encourages the project of renewing that I undertake in this Article. It is noteworthy that a corner of law that seems settled to the point of torpor—a fixture of the curriculum established before almost every practitioner now alive entered this profession—continues to stir judge-authors into expressions of appreciation. What does this praise praise?

34. *Id.*

35. Paul F. Rothstein & Ronald J. Coleman, *Differentiating Strict Products Liability’s Cost-Benefit Analysis from Negligence*, 56 LOY. L.A. L. REV. 637, 665 (2023).

36. 150 P.2d 436, 440 (Cal. 1944).

Quite a lot. One judge-author has expressed esteem for making life a little easier for plaintiffs by shifting the burden of production or proof.³⁷ Other judges—more of them—deem products liability a source of fairness.³⁸ To yet another court, products liability enhances quality control.³⁹ In *Cassidy v. China Vitamins, LLC*, praise for products liability looks like dicta at best, given that the plaintiff lost; yet the Illinois Supreme Court went out of its way to celebrate products liability. After noting that state statutory law permits nonmanufacturers to escape strict liability when they can identify and bring in the manufacturer, the court added: “Nothing about that drafting decision, however, diminishes the import of the fundamental policy interests underlying this state’s strict product liability laws. The resounding drumbeat of those policies remains the same . . .”⁴⁰ *Resounding drumbeat!* Indeed.

3. *Scholars Concur*

In a much-read contemporary academic expression of esteem for products liability, John Goldberg and Benjamin Zipursky carry out the mission announced in this Article of spreading good news. Products liability, they observe,

holds manufacturers accountable to persons victimized by their wrongful conduct. It empowers certain injury victims to invoke the law and the apparatus of government to vindicate important interests of theirs. It instantiates notions of equality before the law and articulates and reinforces norms of responsibility. And in doing all these things, it contributes in direct and indirect ways to deterrence and provides welfare-enhancing compensation. For all these reasons and others, it is extremely valuable that courts, at the behest of victims, have the authority to order commercial sellers of defective products that cause injury to compensate their victims.⁴¹

37. *Dubas v. Clark Equip. Co.*, 532 F. Supp. 3d 819, 826 (D. Neb. 2021) (citing *Rahmig v. Mosley Mach. Co.*, 412 N.W.2d 56, 78 (1987)).

38. *Schmidt v. Int'l Playthings LLC*, 503 F. Supp. 3d 1060, 1109 (D.N.M. 2020) (citing *Brooks v. Beech Aircraft Corp.*, 120 N.M. 372, 375 (D.N.M. 1995)); *Whelan v. Armstrong Int'l Inc.*, 231 A.3d 640, 659 (N.J. 2020) (“It is only fair that the defendant manufacturers, who profit because the replacement components extend the life of their products, bear and spread the cost of the harm they caused.”). For an older pass through this same consideration of fairness, see *Green v. Smith & Nephew AHP, Inc.*, 629 N.W.2d 727, 750 (Wis. 2001) (“[T]he primary ‘rationale underlying the imposition of strict liability on manufacturers and sellers is that the risk of the loss associated with the use of defective products should be borne by those who have created the risk and who have reaped the profit by placing a defective product in the stream of commerce.’”) (citations omitted).

39. *Auto. Ins. Co. of Hartford Conn. v. Murray, Inc.*, 571 F. Supp. 2d 408, 429 (W.D.N.Y. 2008) (citing *Harrison v. ITT Corp.*, 198 A.D.2d 50, 603 N.Y.S.2d 826 (1993)).

40. *Cassidy v. China Vitamins, LLC*, 120 N.E.3d 959, 968 (Ill. 2018).

41. John C.P. Goldberg & Benjamin C. Zipursky, *The Easy Case for Products Liability Law: A Response to Professors Polinsky and Shavell*, 123 HARV. L. REV. 1919, 1948 (2010).

In support of this conclusion, Goldberg and Zipursky delve into specifics. They find particular virtues in products liability, including accountability,⁴² consumer protection,⁴³ and socially useful costs for settlements.⁴⁴ They report on the study that, relying on interviews with executives of manufacturing firms, identified products liability as a stronger spur to design-decision improvements than both regulation and concerns about reputation.⁴⁵ Improvements to safety have ensued.

Although Goldberg and Zipursky's defense says in its subtitle that it replies to two prominent Ph.D. economists known for their work in law and economics, the Good News of products liability continues to be spread and expounded in economic analyses of the subject. Volume 30, Issue 4 of the *Journal of Law, Economics, and Organization* contains two such contributions. One endorses strict liability, rather than products liability in "product markets," which, like Henderson's and Twerski's use of strict liability in their Restatement comment a, means products liability.⁴⁶ Another article in this journal opposes the enforcement of waivers and expresses skepticism about the rational-actor model in products liability actions.⁴⁷ Both papers judge products liability necessary and desirable in its consumer-protective post-*MacPherson* state.

One economist committed to empiricism looked at products liability in operation by examining particular impacts of tort reform constraints. Although Joanna Shepherd characterized her conclusions as mixed, in function they defend products liability by weakening attacks on it. Tort reform maneuvers aimed at hobbling products liability to achieve social ends, Shepherd found, did not achieve the gains that their proponents pushed.⁴⁸

Readers can find a fuller-throated celebration of products liability in the careful, sparing defense of enterprise liability by Gregory Keating.⁴⁹ Keating observes that the academic characterization of products

42. *Id.* at 1944.

43. *Id.* at 1947.

44. *Id.* at 1940.

45. *Id.* at 1932 (citation omitted).

46. See generally Andrew F. Daughety & Jennifer F. Reinganum, *Cumulative Harm and Resilient Liability Rules for Product Markets*, 30 J. L. ECON. & ORG. 371 (2014).

47. Albert H. Choi & Kathryn E. Spier, *Should Consumers Be Permitted to Waive Products Liability? Product Safety, Private Contracts, and Adverse Selection*, 30 J. L. ECON. & ORG. 734, 735 (2014).

48. Joanna M. Shepherd, *Products Liability and Economic Activity: An Empirical Analysis of Tort Reform's Impact on Businesses, Employment, and Production*, 66 VAND. L. REV. 257, 262 (2013).

49. See generally Gregory C. Keating, *Products Liability As Enterprise Liability*, 10 J. TORT L. 41 (2017) [hereinafter Keating, *Products Liability As Enterprise Liability*]. This application to products liability builds on Keating's more general defense of enterprise liability. Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266 (1997).

liability as enterprise liability has been pejorative, a condemnation of what looks to critics like incoherence or lawlessness. While Keating does not go so far as to call enterprise liability coherent,⁵⁰ *Products Liability as Enterprise Liability* finds virtues in it as a base for products liability, including a commitment to fairness, diligent attention to what “fault” and “strict liability” can mean, and “deep roots” in the common law of torts.⁵¹

To mark our place in the renewing project of this Article, I note my next move. Part II puts together the two constituents that stayed separate in this one toward a similar end: We will find agreement that, for products liability purposes, semen is a product. Case law features non-human and human semen. Although semen extracted from non-human animals belongs in this discussion because it shows judicial recognition of this substance as a products-liability product, the renewing I have in mind focuses on risks and benefits to people.

II. AGREED: SEMEN IS A PRODUCT FOR PRODUCTS LIABILITY PURPOSES

A. *The Judicial Consensus*

Courts have found the question of whether semen is a product eligible for products liability easy. The answer is yes. When defendants resist this characterization, judges rule against them. The products liability label has not been necessary for plaintiffs to prevail when they attribute injury to an impact from semen and it does not always lead to a judgment of liability, but when it has been sought it has been applied without judicial struggle.

The semen products liability data set: I used Westlaw to search state and federal cases for instance of the word semen in the same paragraph as “injury,” “defect,” and “products liability.”⁵² Reviewing the dozen cases yielded by this search, I took a risk-rule approach to the substance, meaning I insisted that the plaintiff’s injury have resulted from a characteristic particular to semen, i.e., either a genetic impact or sexually transmitted disease, rather than mere foreign-matter contamination of something benign. This criterion for inclusion removed two Florida cases alleging emotional injury from a single encounter with semen, inside a condom, in a soft drink.⁵³ The remaining ten cases

50. Keating, *Products Liability As Enterprise Liability*, *supra* note 49, at 55.

51. *Id.*

52. I chose not to add “sperm.”

53. *Hagan v. Coca-Cola Bottling Co.*, 804 So. 2d 1234, 1235 (Fla. 2001); *Coca-Cola Bottling Co. v. Hagan*, 750 So. 2d 83, 84 (Fla. Dist. Ct. App. 1999).

divided evenly between human and cattle semen; both human and cattle semen include paradigmatic cases.

The leading products liability case on cattle semen is a 1980 decision by the Fifth Circuit. *Two Rivers Co. v. Curtiss Breeding Service* presented a products liability claim against a breeding service that had sold semen from a bull named Farro. “Of the [sixty-four] heifers that were artificially inseminated with Farro semen,” wrote the court, “[twenty-two] calves were born alive. Four of the Farro calves were stillborn and exhibited the genetic abnormality known as syndactylism.”⁵⁴ Syndactylism causes the digits of a cow’s foot to fuse. Farro, who bore this genetic defect, could not have been tested for it, the court explained: “It is virtually impossible to detect the existence of a recessive genetic trait such as syndactylism until it is manifested by the union of two carriers of this recessive gene.”⁵⁵ Strict liability or no liability, in other words.

Expressing some discomfort with the application of strict products liability to this claim,⁵⁶ the court went ahead with analysis before ruling against the plaintiff. It applied the consumer expectations test for product defect, finding that “all bull semen has the possibility of carrying recessive genes” and that the cattle breeder knew about that possibility. “But most importantly,” continued the court, “the evidence indicates that the ‘ordinary’ cattle breeder with the ordinary knowledge common to the community of cattle breeders expects that the bull semen will carry some recessive genes.”⁵⁷

Key takeaway for my purposes: the Fifth Circuit identified semen as a product before rejecting the plaintiff’s claim.

As for the human semen share of this small products liability data set, scholarship and activism by the authorial team of Yaniv Heled, Hillel Levin, Tim Lytton, and Liza Vertinsky have put one case at the forefront of commentary on what occupies this Article.⁵⁸ Heled and his co-authors, all of whom were at Georgia law schools when they started this work⁵⁹—I will call them “the Georgia scholars”—have focused on litigation filed by a Georgia couple, Wendy and Janet Norman, against the sperm bank called Xytex, based in Atlanta. Georgia courts issued

54. *Two Rivers Co. v. Curtiss Breeding Serv.*, 624 F.2d 1242, 1244 (5th Cir. 1980).

55. *Id.* at 1244–45.

56. *Id.* at 1248–49.

57. *Id.* at 1249.

58. See Yaniv Heled et al., *Righting a Reproductive Wrong: A Statutory Tort Solution to Misrepresentation by Reproductive Tissue Providers*, 60 HOUS. L. REV. 1 (2022) [hereinafter Heled et al., *Righting a Reproductive Wrong*]; Yaniv Heled et al., *A Wrong Without a Remedy: Leaving Parents and Children with A Hollow Victory in Lawsuits Against Unscrupulous Sperm Banks*, 96 CHI.-KENT L. REV. 115 (2021) [hereinafter: Heled, *A Wrong*].

59. For Heled and Lytton, Georgia State; for Levin, the University of Georgia. Vertinsky, as of this writing a member of the Maryland law faculty, began her participation while at Emory.

multiple decisions in the case these scholars have focused on, *Norman v. Xytex*.⁶⁰ Having signed an amicus brief that the Georgia scholars filed with the Georgia Supreme Court in one of the *Norman* appeals, I share their view about the importance of this action. Xytex Corporation, as the sole defendant in the only MDL decision that considers sperm-bank liability,⁶¹ is even more important to academic analysis than these precedent-setting plaintiff parents.

The centrality of *Norman v. Xytex* noted, my preoccupation with the products liability nature of this category makes another personal injury action, *Donovan v. Idant Laboratories*,⁶² a better fit for my argument than the *Norman* litigation. *Donovan* addressed semen as a product sold in commerce. Donna Donovan, the buyer of this product, brought a claim against a sperm bank defendant after giving birth to a child diagnosed with a genetic condition, Fragile X or Martin-Bell syndrome, that had come from the child's biological father, a donor whose emission Donovan had bought from the sperm bank. Naming herself and her child as plaintiffs, Donovan alleged "negligence, breach of contract, third-party beneficiary breach of contract, breach of the express warranty of merchantability, breach of implied warranty of merchantability, third-party beneficiary breach of express and implied warranties of merchantability, negligent misrepresentation, strict products liability and negligent infliction of emotional distress for selling defective sperm."⁶³

Of these nine legal wrongs that Donovan asserted, I focus here on the eighth. There, the court sided with the plaintiff: it concluded that, under New York law, which governed, "the sale of sperm is considered a product and is subject to strict liability."⁶⁴ (The court went on to dismiss all claims by both plaintiffs, mother and daughter, but for reasons that do not diminish its conclusion about semen products liability.)⁶⁵

Although the court called the product in this products liability case sperm and "defective sperm,"⁶⁶ it also used semen as the name for what Donovan chose to buy,⁶⁷ and semen is in some respects the more accurate term. A customer of this business wants semen for its gametes but

60. Heled et al., *Righting a Reproductive Wrong*, supra note 58, at 8 nn.34–36. (providing citations to Georgia case law labeled *Norman I*, *Norman II*, *Norman III*, and *Norman IV*).

61. See *In re Xytex Corp. Sperm Donor Prod. Liab. Litig.*, 223 F. Supp. 3d 1351, 1352 (J.P.M.L. 2016).

62. See *Donovan v. Idant Lab'ys*, 625 F. Supp. 2d 256 (E.D. Pa. 2009), *aff'd sub nom. D.D. v. Idant Lab'ys*, 374 F. App'x 319 (3d Cir. 2010).

63. *Id.*

64. *Id.* at 273.

65. These reasons were the statute of limitations for Donna's claim; the label of "wrongful life" was fatal for that of the child. *Id.* at 268, 271.

66. *Id.* at 274.

67. *Id.* at 262 (noting that the plaintiff had "selected Idant to provide her with semen for artificial insemination"). See also *id.* at 270–71.

cannot perceive them in what she acquires. Sperm cells cannot be seen, felt, or otherwise perceived in a unit of ejaculate away from a microscope, which Donna Donovan did not use. Idant put both spermatozoa and semen into containers and packaging, but of these two inclusions, Donovan could know for sure that only one had been delivered. In both her perspective and that of the defendant, Idant Laboratories sold semen. Human semen is at the center of this products liability decision.

B. How to Interpret § 19 of the Products Liability Restatement

The treatment of semen in Restatement (Third) of Torts: Products Liability aligns with what this Article has set out to propose and encourage. In its first subsection, § 19 defines “product” to mean “tangible personal property distributed commercially for use or consumption.”⁶⁸ In its second subsection, it declares that services are not products. The third subsection approaches semen: “Human blood and human tissue, even when provided commercially, are not subject to the rules of this [products liability] restatement.” The reason for this exclusion from rules about products liability is that “legislatures and courts alike have concluded that public policy concerns behind the availability of both human blood and tissue outweigh the risks inherent in their supply.”⁶⁹

Though it moves on to exclude human tissue—that is the Restatement category into which semen falls—from products liability, this analysis agrees that semen is a product. We can tell from the contrary choice made about the other contrast in § 19. When the Restatement classifies something as not a product, it says so: “Services, even when provided commercially, are not products.”⁷⁰ The exclusion that the Restatement asserts is not semen among products but semen-related injury among legal claims covered by products liability rules.

Because neither legislatures nor courts “have concluded that the public policy concerns behind the availability” of semen “outweigh the risks inherent” in its supply, the Restatement’s generalization about “both human blood and tissue” ought to be read with this absence in mind. Legislatures have indeed codified blood shield laws to express a concern that making liability too easy to get would threaten the supply of blood. Their desire to protect tissue suppliers, in contrast to blood suppliers, from too much liability is less manifest in state laws, but it too exists. Courts both uphold these laws and have used statements in

68. Vagle quotes Black’s Law Dictionary, a tighter fit. *See Vagle, supra* note 17, at 1213–14 n.318.

69. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 19 cmt. c (AM. L. INST. 1998).

70. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 19(b) (AM. L. INST. 1998).

judicial opinions to express approval of the same sentiment that spurred statutory protection.

Reaching a different result, *Donovan v. Idant Laboratories*, the semen products liability case we just considered, provides guidance on how to interpret § 19. The court quoted the section in full,⁷¹ observing that it made strict products liability unavailable to the plaintiff. Same outcome if Pennsylvania statutory law, which like § 19 exempts both blood and tissue from products liability, governed. But the court's choice of law analysis led it to apply the New York statutory exemption, which "includes only blood and its derivatives," not tissue.⁷² The claim thus fell under no exemption from strict products liability. So understood, *Donovan* did exactly what § 19 encourages courts to do with semen products liability claims.

In sequence: Start by noting that the substance is a product. Then, ask whether it qualifies for the human-blood-and-tissue exemption noted in Restatement § 19(c). Because the justification for this exemption falls under "public policy concerns" as identified by "legislatures and courts," the next and last step is to consider what the relevant legislatures and courts have decided about semen. Pennsylvania chose broad protection, covering injury that follows "the lawful transfusion of blood, blood components or plasma derivatives, or from the lawful transplantation or insertion of tissue, bone or organs;"⁷³ New York codified an exemption for "only blood and its derivatives." This choice rejects public-policy rationales for protecting semen sellers. When this rejection is codified in governing law, the Restatement supports regarding semen as a product eligible for products liability.

C. *Support from the Judicial Panel on Multidistrict Litigation*

As we have seen, the concept of products liability demands an approximate working definition of the term "product." This challenge, in which I've happened to hold an interest for decades,⁷⁴ matters to litigants and judges. Summaries of decisional law gather products liability's "edge cases." The shifting list has included mass-produced houses, live

71. *Donovan v. Idant Lab'ys*, 625 F. Supp. 2d 256, 273 n.6 (E.D. Pa. 2009).

72. *Id.* at 271.

73. *Id.* at 270–71 n.3 (quoting 42 Pa. C.S.A. § 8333).

74. See Bernstein, *How Can a Product Be Liable?*, *supra* note 28; Anita Bernstein, *Restatement Redux*, 48 VAND. L. REV. 1663, 1681 (1995); Anita Bernstein, *Products Liability in the United States Supreme Court: A Venture in Memory of Gary Schwartz*, 53 S.C. L. REV. 1193, 1198 (2002); Anita Bernstein, *The Torts Scholar as Disaggregator*, in *TORTS ON THREE CONTINENTS: HONOURING JANE STAPLETON* (forthcoming 2024).

animals, textual material like books and maps, electricity, and x-rays.⁷⁵ A recurring disagreement arrays plaintiffs who seek products liability as the label for their claim against defendants who prefer another doctrinal category—the more fault or negligence needed the merrier. In these disputes about the core and periphery of products liability, defendants typically want courts to call what they did the furnishing of a service rather than the sale of a product.

When attorneys for Xytex Corporation, a sperm bank, sought to fold claims against it into a multidistrict litigation, the action went on to be called *In re Xytex Corporation Sperm Donor Products Liability Litigation*. Accepted by the Judicial Panel (which went on to deny the MDL), the name of the action is telling. Its movants typically say what they want the court to call their MDL.⁷⁶ Especially because the Xytex plaintiffs did not limit the counts in their complaints to products liability, Xytex had other options.

This defendant could have named the MDL “Xytex Corporation Sperm Donor Litigation,” implicitly declining to agree that what James Ageles had donated in October 2000 was a product (and perhaps also implicitly sharing with him some blame for the genetic defects of his biological children). A terser “Xytex Corporation Sperm Litigation” would also have worked. That the defendant had no difficulty giving its MDL the label of products liability suggests that even the party with a stake in a contrary outcome thought sperm was a product for products liability purposes. Because sperm and semen are not separated for purposes of commercially provisioned insemination, the same conclusion extends to semen.

III. RENEWING IN ACTION

Enter the theme of renewing as defended and pursued in this Article, where new directions build on established fundamentals. If both products liability and semen ought to receive more attention, then it is time for a proponent of change to make suggestions. Here are mine.

Decisions like the two reviewed in the last Part, *Norman* and *Donovan*, where judge-authors readily applied products liability to human semen sold in commerce, ought to be mentioned more in both litigation memoranda and scholarship. These “easy cases” on the applicability of products liability encourage readers to mention a substance that

75. See JOHN C.P. GOLDBERG ET AL., *TORT LAW: RESPONSIBILITIES AND REDRESS* 1000–01 (5th ed. 2021).

76. Jack Scarola, one of the plaintiffs’ attorneys, and I spoke by telephone on February 27, 2023. Scarola confirmed his recollection that Xytex chose to put Products Liability Litigation into the MDL name.

has lain too far out of view. We will all hear more about semen as a product—a designation that offers benefit even when a products liability cannot succeed.

Speaking about semen as a product eligible for products liability complements other diction choices now applied to claims about injuries attributed to this substance. This existing discourse offers different virtues in need of augmentation; putting semen into the mix adds material substance to rhetoric we can admire for its high principle. For example, identifying what they care about, the authorial team I have called the Georgia scholars decried a “reproductive wrong,”⁷⁷ identified a wrong “without a remedy,”⁷⁸ and apparently prefer to call the source of harm they want to alleviate “reproductive tissue” rather than semen or sperm.⁷⁹ Their perspective resembles that of the health law scholar Dov Fox, who also turns away from sperm and semen to condemn “birth rights and wrongs,”⁸⁰ “reproductive negligence,”⁸¹ and threats to “reproductive freedom.”⁸²

Clarion abstractions like these emphasize high principle; semen classified as a product supports this commitment to principle and benefits from these ideals when it adds specificity. Semen sites a quest for justice through law in what might be called raw material. By making an imperative tangible and visible, semen understood as eligible for products liability reminds human beings of rights, wrongs, and freedom present in sex and reproduction.

A. *Human Semen Improves Products Liability*

What I want to defend in this sub-Part is the work of strengthening products liability in its second century. My own decades of writing on the subject have run concurrently with what looks to me like an anxious age for the field. Because products liability covers an especially costly-to-defendants fraction of all personal injury actions—think asbestos, drugs and medical devices, and automobiles in contrast to assault or battery—it has always been in the sights of tort reform, the rightwing seventies push against redress that judicial ideologues and ample cash are keeping evergreen. Resisters of this effort have had to put time into

77. See Heled et al., *Righting a Reproductive Wrong*, *supra* note 58.

78. Heled, *A Wrong*, *supra* note 58, at 118. Hillel Levin is not an author of this Article.

79. Heled et al., *Righting a Reproductive Wrong*, *supra* note 58 (including this phrase in an article title); Heled, *A Wrong*, *supra* note 58, at 119.

80. See DOV FOX, *BIRTH RIGHTS AND WRONGS: HOW MEDICINE AND TECHNOLOGY ARE REMAKING REPRODUCTION AND THE LAW* (2019).

81. Dov Fox, *Reproductive Negligence*, 117 COLUM. L. REV. 149, 153 (2017).

82. Dov Fox, *Birth Rights and Wrongs: Reply to Critics*, 100 B.U. L. REV. ONLINE 159, 159 (2020).

opposition at the expense of initiative.⁸³ In this defensive-crouch era that continues, relatively few judges and scholars have been saying in print that they want products liability to spread further, think bigger, and take on new tasks.

In an exception to this generalization about retreat of the field, law reviews continue to publish commentary arguing that products liability should extend to a wider set of putative products. This literature, though small, implicitly showcases progressive potential in the field. In the aggregate, writers of these articles are looking at our twenty-first century sociopolitical world attentive to objects whose risks and detrimental consequences may call for more of the accountability and cost internalization that stricter liability delivers.

Their catalogue includes autonomous vehicles,⁸⁴ sometimes written about with attention to the software or algorithms inside these machines;⁸⁵ spyware;⁸⁶ 3D printing technology;⁸⁷ social media providers; artificial intelligence;⁸⁸ and online platforms that offer consumer products for sale.⁸⁹ Decisional law has already applied products liability to some of these categories, which makes semen, also a winner in the courts,⁹⁰ a good candidate to join the list. The group includes items or objects that deliver both utility and risk to human beings. I have called them putative products rather than products because their fit in this category for products liability purposes is subject to reasonable disagreement: yes, they are items that plaintiffs bought from sellers in the business of selling, but they differ in some way from the objects that fill most decisional law. In these respects they resemble semen.

Continuing the theme of newness that occupies this Article, we may note that these putative products are novel objects. Most of them

83. See Stephen D. Sugarman, *United States Tort Reform Wars*, 25 U. NEW S. WALES L.J. 849, 853 (2002) (referencing the scarce energies of “consumer groups”).

84. Alexander B. Lemann, *Autonomous Vehicles, Technological Progress, and the Scope Problem in Products Liability*, 12 J. TORT L. 157 (2019).

85. Varun Bhatnagar, Note, *The Evidentiary Implications of Interpreting Black-Box Algorithms*, 20 NW. J. TECH. & INTELL. PROP. 433, 450 (2023); Michael L. Rustad, *Products Liability for Software Defects in Driverless Cars*, 32 S. CAL. INTERDISC. L.J. 171, 171 (2022).

86. Jacob Kreutzer, *Somebody Has to Pay: Products Liability for Spyware*, 45 AM. BUS. L.J. 61, 69 (2008).

87. Connor Mannion, Note, *Showdown at High Noon: Whether A Person Injured by A “Liberator” 3D-Printed Firearm Can Recover on A Product Liability Claim Under the Third Restatement*, 72 RUTGERS U. L. REV. 543, 557 (2020) (arguing that products liability should apply to a plastic firearm manufacturable with computer-assisted design).

88. See John Villasenor, *Product liability as a Way to Address AI Harms*, BROOKINGS (Oct. 31, 2019), <https://www.brookings.edu/research/products-liability-law-as-a-way-to-address-ai-harms/> [https://perma.cc/3QRX-9FCN].

89. Catherine M. Sharkey, *Products Liability in the Digital Age: Online Platforms As “Cheapest Cost Avoiders”*, 73 HASTINGS L.J. 1327 (2022).

90. See *supra* Part II.A.

incorporate evolving or recently created technology into a machine. Also new and in transition are the ways they inflict injury and interpretations of their harm.⁹¹ At this point we encounter a divergence between these putative products and the one occupying this Article. Say what one will about semen, it is not new.

In a sociological sense, semen is even older than the sperm it contains and delivers. As evidenced by the story of Onan in the biblical book Genesis,⁹² our species knew thousands of years ago that semen is a changer of people's lives. During most of these centuries sperm, always invisible to the human eye, either didn't exist in human consciousness or lived in a realm of conjecture. The first real-time observation of sperm-meets-egg fertilization did not occur until 1875.⁹³

Similar to renewing as undertaken in this Article, semen understood as a product melds the new and the old. Some of its risks have endangered people for centuries in the same way; others have changed. Unwanted pregnancy is a semen-related injury that at one time could not be reliably prevented or undone. Technology and social change made this injury more avoidable and undoable. Later in the United States and other countries, actions by courts and legislatures increased this danger. Or consider sexually transmitted infection. Diseases found in semen have evolved, as has contact tracing technology to make this injury more easily followed and more enduring in electronic records, on the one hand. On the other hand, some treatments and preventatives became more effective.

And so, even though semen played a role in a story published thousands of years ago, for products liability renewing purposes it is a good peer of 3D printing and Level Five self-driving cars.⁹⁴ Semen products liability relates to the lives of people who are now young adults. Current issues that press harder on younger adults than old—climate change and the environment, newer restrictions on abortion, portable and durable information technology, and gender identity decoupled from

91. Take for example the putative product of spyware. *See supra* note 86 and accompanying text. The harm of spyware is invasion of privacy; beliefs about which of these invasions matter have been subject to change. *See* Erin Husi, *No Means No: Why A Bright-Line Rule Against Data Sharing Is the Best Way Forward for Privacy Legislation*, 2021 U. ILL. J.L. TECH. & POL'Y 519, 520 (2021) ("At times, the term 'privacy' has been used to mean several different things: secrecy, surveillance, solitude, transparency, or limited access are just a few examples of privacy's diverse interpretations.").

92. *See* *Gerber v. Hickman*, 291 F.3d 617, 629 (9th Cir. 2002) (Kozinski, J., dissenting) (making reference to "Onan's transgression" of ejaculating outside a vagina).

93. EDWARD DOLNICK, *THE SEEDS OF LIFE* 262 (2017).

94. *See supra* note 92 and accompanying text (noting the biblical story of Onan, who practiced coitus interruptus to avoid impregnating a woman); Tracy Hresko Pearl, *Fast & Furious: The Misregulation of Driverless Cars*, 73 N.Y.U. ANN. SURV. AM. L. 19, 29 (2017) (defining Level 5 as expressing maximal autonomy of autonomous vehicles, a far-off goal).

anatomy—resemble the intersection of semen and products liability in their focus on reckoning and responsibility.

B. Products Liability Improves Human Semen

The “product” label for this substance compactly delivers multiple imperatives and teachings. As an adjective that modifies liability, the word signifies gains for injured persons that negligence and contract doctrines like warranty do not provide.⁹⁵ Courts use “strict products liability” and “products liability” close to interchangeably, further emphasizing advantage for plaintiffs. Strict(er) liability makes compensation for injury more likely to occur.

Applying products liability to semen would increase accountability of an underregulated sector that now gets away with imposing risks on the public.⁹⁶ Customers who buy semen need more protection from the law than they receive; courts that consider claims about genetic harm attributable to semen sold in commerce have rarely sided with plaintiffs who have suffered from carelessness and untrustworthy assurances by sellers.

1. A Nudge Toward More Regulation

One model statute to make semen-caused injury more amenable to judicial reckoning offers a good example of what looking forward can add to the backward-facing stance of liability. The Georgia scholars set out overtly to encourage more litigation as an impetus to more regulation of semen providers.⁹⁷ Products liability litigation joins what John Goldberg and Ben Zipursky have called “synergies” with regulation and public information; it “focuses consumer attention on alleged product dangers and attracts regulatory attention.”⁹⁸ Not only consumer attention gets focused: liability as a prospect influences the product design choices of manufacturers.⁹⁹

Because regulatory compliance functions so effectively to protect defendants in the semen-adjacent territory of drug and medical-device

95. See *supra* notes 32–33 and accompanying text.

96. Barbara Pfeffer Billauer, *The Sperminator as a Public Nuisance: Redressing Wrongful Birth and Life Claims in New Ways (A.K.A. New Tricks for Old Torts)*, 42 U. ARK. LITTLE ROCK L. REV. 1, 6, 11 (2019) (condemning the sperm bank sector for “a panoply of problems” caused by its operations, uncontrolled by current “weak, uneven, and almost impossible to enforce” regulation).

97. Heled et al., *Righting a Reproductive Wrong*, *supra* note 58, at 24.

98. Goldberg & Zipursky, *supra* note 41, at 1930–31.

99. See *supra* note 44 and accompanying text.

liability,¹⁰⁰ it is plausible to suppose that whenever products liability becomes a more robust threat to their bottom line, sellers of semen will cooperate with a desirable uptick in regulation. At present they have little incentive to accept a different way of doing business. Commentators have identified numerous omissions in the current regulatory landscape. For example, neither governments nor private organizations maintain a registry of donors.¹⁰¹ Medical histories of children formed by commercially provisioned semen are incomplete and hard to learn,¹⁰² as are privacy rules and norms that can both support and thwart public health.

2. *Strength Through Weaker Plaintiffs' Conduct Defenses*

Recall the observation of Henderson and Twerski that strict liability, the characterization of products liability that they defend in their Restatement, lessens the strength of plaintiffs' conduct defenses. This doctrinal stance points to enhanced safety. When a manufacturer can blame victims of product-caused injury by pointing to their failures of reasonable care or apparent assumption of the risk the product presented, this maneuver undermines claims.

3. *Strength Through Weaker Waivers*

Stricter liability also stands up to the prerogative to impose limits on liability that sellers enjoy. While courts continue to approve defendant-focused maneuvers like mandatory arbitration, prohibitions of class actions, and total waiver of recourse in court¹⁰³—they indulge prospective defendants to the point that a federal judge remarked in an interview that “opting out of the legal system altogether and misbehaving without reproach” was now on the repeat-player menu¹⁰⁴—waivers of the stricter stripe of liability used in products liability actions remain,

100. Carl Tobias, *FDA Regulatory Compliance Reconsidered*, 93 CORNELL L. REV. 1003, 1004 (2008) (identifying a trend where “a growing number of states” understand regulatory compliance to defeat products liability claims).

101. Rene Almeling, *The Unregulated Sperm Industry*, N.Y. TIMES (Dec. 1, 2013), <https://www.nytimes.com/2013/12/01/opinion/sunday/the-unregulated-sperm-industry.html>; Ashley Rogers, Comment, *Swimming Free of Regulation: The Need for A National Regulatory System for Sperm Donation*, 35 J. AM. ACAD. MATRIM. L. 757, 759 (2023).

102. Vanessa L. Pi, Note, *Regulating Sperm Donation: Why Requiring Exposed Donation Is Not the Answer*, 16 DUKE J. GENDER L. & POL'Y 379, 379 (2009).

103. See generally Bernstein, *Privity 2.0*, *supra* note 10 (reviewing decisional law).

104. *Id.* at 771 (quoting Judge William Young).

for the most part, unenforceable.¹⁰⁵ In a single sentence of blackletter, the Products Liability Restatement says ixnay to aivers-way.¹⁰⁶

4. *Reflections on, and Lessons from, the Products Liability Duty to Warn*

Of the three types of product defect identified in modern products liability law, warning defect stands at the greatest distance from strict liability. More than design or manufacture, warning is a thing that human beings do or fail to do. Warning always takes form in communication, and communication requires human consciousness. Yes, people also design products and put them together; they do not just warn or fail to warn. But the work of design or manufacture concludes when the product is made, whereas warnings necessarily travel separately from the manufactured object. Courts accordingly have understood warning defect as the least ‘strict’ defect that strict products liability recognizes, the defect that fits best with fault and negligence.

From here, one might sense a disconnect between our last topic, strict liability as a source of safety, and warning defect. I have just praised strict liability as a source of semen safety; my praise might be read as hostile to the most negligence-y corner of products liability doctrine. If liability for defective semen ought to be strict rather than fault-based, or defeasible by contract, then fault and human agency recede. Maybe the duty to warn, which in application relies on a negligence analysis, is contrary to what makes semen products liability desirable. Can I have it both ways? Is the duty to warn, not just strict liability, pertinent to semen products liability? Yes.

Consider the role of warning provisioned in the Restatement of Products Liability, which I will use here to stand for warning law generally; courts and scholars have accepted it. To be good enough, or free from defect, a product must first clear the risk-utility hurdle. The duty to warn follows after the demands of design law have been met. Sellers must warn when the rendering of information reduces the level of risk that remains in a product after its design has met what the risk-utility standard demands.

Scholarship on this category of product defect has identified two descriptors of the information rendered in a product warning. The duty to warn has two goals, which, like design followed by warning, ensue successively, that we can think of from the perspective of the user, the

105. Richard C. Ausness, “Waive” Goodbye to Tort Liability: A Proposal to Remove Paternalism from Product Sales Transactions, 37 SAN DIEGO L. REV. 293, 294 (2000).

106. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 18 (AM. L. INST. 1998).

person entitled to be warned. Users first need to know whether they ought to avoid the product altogether. Only a minority of users will fall into this Stay Away category because, following the Products Liability Restatement sequence, the product's design is good enough—more useful than risky—before we reach the warning question. But “more useful than risky” recognizes exceptional users. Allergens in a product are a good example of a condition that can require a warning.¹⁰⁷ The message of that kind of warning: avoid.

Onward to the second descriptor, the warning as instruction. Unlike a warning to avoid the product, this type of warning enhances safety for majorities rather than minorities. It informs the user of a risk and gives advice on how to use the product with mitigation of that risk in mind. Warnings about the risk of corrosive splash into human eyes steer users to engage with the product protected by barriers like goggles. “Do not induce vomiting” provides another type of instructional advice.

The two species of warning: first “this product isn't safe for you; avoid it”; and second “here's how to use this product safely,” speak to a person who is simultaneously an agent and an object of agency. Both messages understand the user as someone who seeks a good life. This person makes choices about how that life will proceed—or at least thinks she does; I will leave free will versus determinism alone in this Article, except to say that American law presumes that people make choices and can be held responsible for what they choose—and she wants the products she encounters to make that life better. Product warnings communicate with her as an object (“This item can make an impact on you; we, its seller, act and then you experience the impact of our action”) and an agent (“Consider these choices”) who brings a personal risk-utility analysis to her dealings with products. Applied to design defect, risk-utility analysis judges a product with reference to users in the aggregate. So too does warning, but the counterpart version of risk-utility I am applying to warning here, which is not present overtly in a legal standard the way it is for design, invites individuals to consider how to proceed in their own interests after a product seller has introduced both utility and risk to their world.

Semen aligns with this combination of avoidance and instruction as options. Similar in this respect to users of products, people whom semen can touch benefit from information about the characteristics of this substance. Products liability case law about the duty to warn features judicial declarations about information as a deliverable to which users are entitled. Knowing, or being told in an adequate warning, what a product

107. Congress put this duty into a statute called the Allergen Labeling Act of 2004, 150 Pub. L. No. 108–282, 118 Stat. 905–11 (codified in various sections of 21 U.S.C. and 42 U.S.C.).

contains and how to use it safely enhances what I will call consumer choice, mindful that both words of that phrase are fraught all the time, and especially when applied to semen. Products liability arises only under conditions of commerce; most transfers of semen onto mucosa occur away from sales. I do not suggest here that sexual transactions are commercial. Entitlements recognized by the duty to warn, however, can be extended by analogy to the receipt of semen inside one's body. Judicial decisions about the duty to warn teach: *Should I avoid* [this thing]? *When I engage with* [this thing], *what do I need to know about the balance of risk and utility it presents to make good decisions?* These are questions so reasonable to broach that the law ought to write them into an objective standard of care.

5. *Products Liability as a Bridge to Regarding Semen as a Hazardous Substance*

Elsewhere I have argued that semen fits the definition of a hazardous substance provisioned in governing statutory law, the Federal Hazardous Substances Act (FHSA).¹⁰⁸ This law “regulates material that ‘may cause substantial personal injury or substantial illness during or as a proximate result of any customary or reasonably foreseeable handling or use,’” I noted, adding that semen’s “capacity to produce personal injury or illness to man through ingestion, inhalation, or absorption through any body surface” aligns with the definition of “toxic” in the statute.¹⁰⁹

Dozens of viruses have been located in semen, and the substance also delivers bacterial pathogens including the sexually transmitted Big Three of syphilis, gonorrhea, and chlamydia. Not all pathogens found in semen get relayed by ejaculation onto mucosa but the receipt of one disease, Ebola, as a consequence of being ejaculated into is well documented.¹¹⁰ This much risk suffices to make semen a hazardous substance even if we put aside the hazard of causing pregnancy, a condition that is sometimes unwanted and always physically dangerous to the pregnant person.

The two key traits of semen—that it can make people and make people sick—render it unique, but also familiar, in its alignment with the definition of a hazardous substance. American law and policy know this combination well. That semen is intensely desired and desirable

108. Anita Bernstein, *Are You There, Law? It's Me, Semen*, 41 COLUM. J. GENDER & L. 1, 9 (2021).

109. *Id.* at 1.

110. Interview with Pragna Patel, M.D., M.P.H., Acting Chief Med. Officer, Centers for Disease Control (Aug. 18, 2023).

is consistent with its hazardous-substance status. Hazardous does not mean dreadful or plague-like with no upside because when a substance fits that bill, the law can ban it. Semen joins an array of fellow hazardous substances in offering extraordinary benefits.

As for this Article's adventure in renewing, what I want to pursue with the hazardous substance label relates to the connection between the FHSA and products liability. Scholars who take an interest in product regulation as it intersects with liability tend to focus on preemption—a claim-squelching, recourse-denying doctrine. Semen products liability reminds us that there's more to the statute than orders to injured people to shut up and defer to regulators: Several courts have ruled that, although FHSA does not explicitly provide a private right of action, injured persons may seek redress under state law for the negligent failure to comply with the statute.¹¹¹ These decisions come close to saying that human beings hold entitlements with respect to hazardous substances and when a violation of these rights hurts them, that injury is of interest to the law.

In a 1995 hazardous-substance precedent on point, a court extended lenity to a semen-injured plaintiff with respect to the negligence statute of limitations. My home state notoriously resists a national preference for “time of discovery” as starting the limitation clock,¹¹² insisting, for the most part, that limitation periods begin at the (never later, sometimes significantly earlier) time of impact. *Plaza v. Estate of Wisser* held that exposure to the defendant's HIV-infected semen qualified as a toxic tort and thus entitled plaintiff to the generous reasonable-discovery limitation timing period provided in a statute.¹¹³ The toxic tort exception “applies to latent injuries suffered from exposure to *any substance* or combination of substances, in any form,” wrote the court, explicitly including semen in its statement.¹¹⁴

111. See *Wallace v. Parks Corp.*, 629 N.Y.S.2d 570, 576 (N.Y. App. Div. 1995) (gathering citations to federal cases that support and oppose this stance). For post-*Wallace* approval of this right of action, see *Milanese v. Rust-Oleum Corp.*, 244 F.3d 104, 109–10 (2d Cir. 2001); *Comeaux v. Nat'l Tea Co.*, 81 F.3d 42, 44 (5th Cir. 1996) (deeming the claim preempted).

112. Jay C. Carlisle II, *Recent Statute of Limitations Developments in the New York Court of Appeals*, 30 PACE L. REV. 1158, 1173 (2010) (“It is common knowledge that New York's application of statutes of limitations is defendant-oriented.”) (citation omitted); Steven L. White, Note, *Toward a Time-of-Discovery Rule for the Statute of Limitations in Latent Injury Cases in New York State*, 13 FORDHAM URB. L.J. 113, 118 (1985) (noting New York's severity on this issue).

113. *Plaza v. Est. of Wisser*, 626 N.Y.S.2d 446, 451 (N.Y. App. Div. 1995).

114. *Id.* (emphasis in original).

CONCLUSION

The very small law review literature that seeks to apply products liability to claims that semen caused injury to human bodies includes an insightful student-authored paper that deserves a shoutout here. In it Jennifer M. Vagle makes a concession: “Sperm is not a typical product,” Vagle observes. “Although one might argue that it is mass-produced and that it satisfies the definition of chattel, sperm is unlikely to come to mind when thinking about products.”¹¹⁵ I can’t speak for my fellow contributor to this literature, but I’ve chosen to feel inspired by this silence in the discourse. It feels like an opportunity for products liability to grow. Adding a friendly amendment that substitutes semen for sperm, this Article has agreed that the substance examined here has not won enough attention among the products of products liability.

Even when it is located away from commerce and thus outside the reach of products liability law in court, human semen belongs in this discourse. It ought to be talked and thought of as a product in the sense of an entity or a thing. Semen should receive policy-minded attention in proportion to how much upending of human life it can do, especially now that the Supreme Court has killed the American constitutional right not to be pregnant.¹¹⁶ As long as adverting to its existence in public is considered too impolite or eccentric to attempt, people will continue to suffer.

The unmentionability of this substance needs to dwindle. Products liability as doctrine, my other object of attention in this Article, similarly deserves more prominence and visibility. Discussion of products liability litigation that features semen will start conversations and publicity that expand an urgently needed renewing.

115. Vagle, *supra* note 17, at 1213.

116. *Dobbs v. Jackson Women’s Health Org.*, 597 U.S. 215 (2022).

