

10-1995

How Can a Product be Liable?

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Recommended Citation

45 Duke L. J. 1 (1995-1996)

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Duke Law Journal

VOLUME 45

OCTOBER 1995

NUMBER 1

HOW CAN A PRODUCT BE LIABLE?

ANITA BERNSTEIN†

*'Tis the day of the chattel,
Web to weave, and corn to grind;
Things are in the saddle,
And ride mankind.*

—Ralph Waldo Emerson¹

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INTRODUCTION

We say "products liability" rather than manufacturer's liability,² seller's liability,³ commercial seller's liability,⁴ business

2. This locution is favored in two states. Alabama law substitutes the "Alabama Extended Manufacturer's Liability Doctrine," frequently abbreviated "AEMLD," for products liability. See *Vines v. Beloit Corp.*, 631 So. 2d 1003, 1004 (Ala. 1994); *Volkswagen of Am. v. Marinelli*, 628 So. 2d 378, 380 (Ala. 1993); see also Edward C. Martin, *Alabama's Extended Manufacturer's Liability Doctrine (AEMLD)*, 13 AM. J. TRIAL ADVOC. 983, 990-98 (1990) (outlining Alabama approach, which seeks to meld strict liability and negligence principles). Oklahoma caselaw and jury instructions refer to "manufacturer's liability" as a cause of action. See *Slaton v. Vansickle*, 872 P.2d 929, 930 (Okla. 1994); *Dutsch v. Sea Ray Boats, Inc.*, 845 P.2d 187, 188 (Okla. 1992). Unlike other alternatives to "products liability," however, "manufacturer's liability" does not enjoy significant support in the literature.

3. Section 402A of the *Second Restatement of Torts* imposes strict liability in tort on "[o]ne who sells." See RESTATEMENT (SECOND) OF TORTS § 402A(1) (1965).

4. The phrase "commercial seller" appears in the current draft revision of § 402A of the *Restatement*. See RESTATEMENT (THIRD) OF THE LAW OF TORTS: PRODUCTS LIA-

supplier's liability,⁵ producer's liability,⁶ or any other alternative phrase referring to persons, even though inanimate objects are unable to pay money judgments. One of the very few defining criteria of a "products liability" case is a person-defendant who engages regularly in a particular business activity,⁷ but in the language Americans use, we blame the thing. This vernacular oddity provokes the argument that products liability is a phrase without sense.⁸

From there one can readily say that it ought not to exist.⁹ Only a person can be liable, critics have written, and thus the term "products liability" functions simply to obstruct well-devel-

BILITY, § 1 (Tentative Draft No. 2, 1995) [hereinafter THIRD RESTATEMENT].

5. See JERRY J. PHILLIPS ET AL., PRODUCTS LIABILITY: CASES, MATERIALS, PROBLEMS 14-15 (1994) (offering a proposed alternative to § 402A called "Special Liability of the Business Supplier of a Defective Product").

6. The term "producer" is favored in Europe. See, e.g., Council Directive 85/374 of 25 July 1985 on the Approximation of the Laws, Regulations, and Administrative Provisions of the Member States Concerning Liability for Defective Products, 1985 O.J. (L 210) 29 (introducing European law providing for "liability without fault on the part of the producer"). The dominant Italian translation of products liability is *responsabilità del produttore*. See GUIDO ALPA ET AL., LA RESPONSABILITÀ DEL PRODUTTORE 1 n.* (1989).

7. See RESTATEMENT (SECOND) OF TORTS § 402A cmt. f (1965). Elements commonly found in products liability cases that are *not* necessary in all jurisdictions for the products-liability designation include (1) a "sale," see *McKisson v. Sales Affiliates*, 416 S.W.2d 787, 792 (Tex. 1987) (free sample to prospective customer); (2) a "defect," see *Smith v. Detroit Marine Eng'g Corp.*, 712 S.W.2d 472, 475 (Tenn. Ct. App. 1988) (reversing judgment for defendant because the trial judge had instructed the jury that the product must have been *both* defective and unreasonably dangerous; according to the appellate court, either showing by plaintiff would suffice); (3) an "unreasonably dangerous" product, see *id.*; see also *Cronin v. J.B.E. Olson Corp.*, 501 P.2d 1153, 1155 (Cal. 1972) (allowing recovery after finding that product was defective but not unreasonably dangerous); (4) a harmful condition that the defendant could have prevented, see *Beshada v. Johns-Manville Prods. Corp.*, 447 A.2d 539, 549 (N.J. 1982) (imposing liability for failure to warn even though plaintiff did not allege that risks were known or knowable at the time of distribution); and (5) damage to persons or property, see *Board of Educ. of Chicago v. A, C & S, Inc.*, 546 N.E.2d 580, 596-603 (Ill. 1989) (discussing "products liability" claim for costs of asbestos abatement mandated by statute).

8. See J.A. Jolowicz, *Product Liability in the EEC*, in *COMPARATIVE AND PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOR OF JOHN HENRY MERRYMAN ON HIS SEVENTIETH BIRTHDAY* 369, 370-76 (David S. Clark ed., 1990); Grant Gilmore, *Products Liability: A Commentary*, 38 U. CHI. L. REV. 103, 115-16 (1970).

9. For expressions of this argument, see William Powers, Jr., *A Modest Proposal to Abandon Strict Products Liability*, 1991 U. ILL. L. REV. 639; Malcolm Wheeler, *The Need for Narrow Tort Reform: Abolishing Strict Product Liability*, in *PRODUCT LIABILITY REFORM: DEBATING THE ISSUES* 23 (Kenneth L. Chilton ed., 1990); see also David Griffith, *Products Liability—Negligence Presumed: An Evolution*, 12 J. PROD. LIAB. 201 (1989) (arguing that products liability restates negligence).

oped legal principles: warranty, misrepresentation, sales law, and, most important, negligence. The attempt to isolate some kind of "strict liability in tort" for the harms caused by products has resulted in confusion. Regardless of what legal claim she brings, goes this critique, the plaintiff is always alleging either tortious conduct on the part of the seller or breach of some assurance such as a warranty. Courts have drawn a line at true strict liability. Most judges say that they will refuse to impose liability without defect, liability for risks unknowable at the time of manufacture, and generic or product-category liability.¹⁰ Fault-based defenses such as comparative negligence are usually allowed in products liability actions.¹¹ Thus, products liability as a doctrine—independent of tort and contract law—is said to be without content.¹²

Other observers regard the invention of products liability as a judicial attempt to effect distributive justice and achieve the famous "policy bases" of products liability: loss spreading or compensation, risk shifting, incentives to safety, and cost internalization. These labels and others are frequently used to describe the hope that stricter liability will make products safer, and also protect consumers with insurance against the risks or harms that always inhere in mass-marketed products.¹³ A voluminous literature attacks this vision of distribution, which is generally credited to Justice Roger Traynor and two of his celebrated judicial opinions.¹⁴ A smaller literature defends it.¹⁵ Economic analysts de-

10. See James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1263-76 (1991); Gary T. Schwartz, *Foreword: Understanding Products Liability*, 67 CAL. L. REV. 435, 493-96 (1979).

11. See *infra* notes 191-95 and accompanying text.

12. A British scholar catalogues some omissions:

[A]vailable theory is unable satisfactorily to explain, let alone justify, the exclusion of pure economic loss claims, the restriction of the rule to products, and to products which have been put into commercial circulation. . . . Similarly, there is only thin and unsatisfactory treatment of why the rules contain a "defect" requirement.

JANE STAPLETON, *PRODUCT LIABILITY* 351 (1994).

13. See Mark Geistfeld, *Implementing Enterprise Liability: A Comment on Henderson and Twerski*, 67 N.Y.U. L. REV. 1157, 1160 (1992) (adding that safety and insurance functions cannot both efficiently be served by enterprise liability rule).

14. See *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897 (Cal. 1962); *Escola v. Coca Cola Bottling Co.*, 150 P.2d 436, 440 (Cal. 1944) (Traynor, J., concurring). Important attacks on the Traynor vision include PETER W. HUBER, *LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES* 36-44 (1988) [hereinafter HUBER, *LIABILITY*]; George L. Priest, *Products Liability Law and the Accident Rate*, in *LIABILITY: PERSPEC-*

bate whether stricter liability, which they now often call "enterprise liability," offers any promise.¹⁶ Regardless of the merits of Traynor's *weltanschauung*, however, products liability is generally understood on his terms.¹⁷ When the subject became overtly po-

TIVES AND POLICY 184, 222 (Robert E. Litan & Clifford L. Winston eds., 1988) (gathering empirical data to argue that little improvement in safety is attributable to products liability law); Richard A. Epstein, *Products Liability as an Insurance Market*, 14 J. LEGAL STUD. 645, 664-69 (1985) (alluding to manufacturer's difficulties in obtaining insurance); Peter W. Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277, 307-29 (1985) [hereinafter Huber, *Safety*] (arguing that expanded liability decreases safety); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1525 (1987) (arguing that insurance function of products liability is a failure) [hereinafter Priest, *Current Insurance Crisis*]. In addition to these criticisms from the right, Traynor's approach has been attacked as too conservative because it assumes that injury can be remedied by the payment of money, and because it does not aspire to change existing distributions of power between sellers and victims. See Richard L. Abel, *The Real Torts Crisis—Too Few Claims*, 48 OHIO ST. L.J. 443 (1987); Leslie Bender, *Feminist Re(Torts): Thoughts on the Liability Crisis, Mass Torts, Power and Responsibilities*, 1990 DUKE L.J. 848. Other significant criticisms include H. Patrick Glenn, *Judicial Authority and the Liability of the Manufacturer, or Jusqu'où Peut-on Aller Trop Loin?*, 38 AM. J. COMP. L. 555, 564-65 (1990) (expressing skepticism about the beneficial outcomes promised by strict products liability); Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 LAW & PHIL. 37, 59-61 (1977) (questioning whether strict liability can be consistent with corrective justice).

15. Traynor's own defense of his products liability vision is Roger W. Traynor, *The Ways and Meanings of Defective Products and Strict Liability*, 32 TENN. L. REV. 363, 366 (1965) (arguing that a manufacturer is "best able to anticipate and bear the risks of injuries from defective products"). Consumer advocates and the organized plaintiffs' bar have applauded stricter liability, arguing that its ambitions regarding safety and insurance have succeeded. See THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA, QUICK FACTS ON PRODUCTS LIABILITY: WHAT YOU NEED TO KNOW TO PROTECT CONSUMERS 2 (1994) [hereinafter QUICK FACTS]; CONSUMER FEDERATION OF AMERICA, BENEFITS OF THE MODERNIZATION OF THE TORT LAW IN THE CONTEXT OF THE SOCIAL MOVEMENT FOR IMPROVED SAFETY AND QUALITY IN THE NATIONAL ECONOMY (1987); Joan Claybrook, *The Consumer Stake in Product Liability*, 5 TOXICS L. REP. (BNA) No. 37, at 1178 (Feb. 20, 1991).

16. The range of opinion among mainstream economic analysts runs from W. Kip Viscusi, *Toward a Diminished Role for Tort Liability: Social Insurance, Government Regulation, and Contemporary Risks to Health and Safety*, 6 YALE J. ON REG. 65 (1989) (arguing that an optimal mix of risk-reduction systems requires a diminished role for the tort system) to Steven P. Croley & Jon D. Hanson, *Rescuing the Revolution: The Revived Case for Enterprise Liability*, 91 MICH. L. REV. 683 (1993) (arguing for enterprise liability as a solution to market failures). Although it is unclear whether their conclusions are driven by their models or by pragmatic deference to present doctrinal reality, most economic analysts accept a centrist position: Optimal accident reduction, they argue, exists in a legal regime of relatively strict products liability combined with vigorous plaintiff's-conduct defenses. See RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 180-82 (4th ed. 1992); WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 280 (1987); STEVEN SHAVELL, *ECONOMIC ANALYSIS OF ACCIDENT LAW* 54 (1987). See also Geistfeld, *supra* note 13, at 1172 n.41 (summarizing consensus).

17. It is now commonplace for writers to presume that products liability is a subset

liticized during the insurance-crisis era of Republican presidential administrations,¹⁸ most observers of products liability agreed (whether with pleasure or dismay) that the doctrine was an instrument of political change. Products liability became a vehicle for distribution—that is, distribution of risks, benefits, product supply, insurance, and whatever other desiderata appeared necessary.¹⁹ In his time, Traynor recognized the power of this particular new idea; so do American lawyers. The label “products liability” adds no new content to the law, but it makes for a useful slogan.

And yet a product cannot be liable, or can it?

Here I propose a new answer. In place of the failed public law vision that saw products as the instruments of policy, I offer an inquiry into the nature of products themselves. Their importance, I argue, has been overlooked in the law. Products describe societies. Names for the eras of human history—the Stone, Iron, and Bronze Ages, the Industrial Revolution, the Atomic Age—reveal that the objects people create represent entire eras.²⁰

Looking at objects fills a doctrinal void: A basic omission in the study of products liability is the concept of property. Products are objects, and objects are fundamental constituents of property. Because in practice products liability law seldom raises questions of ownership, it is easy to overlook property law while attempting to explain the doctrine. The great studies of private property, however, shed light on the subjects of manufacture and use. Theorists such as Locke, who linked labor, creation, and ownership; Hegel,

of microeconomics, and that scholars are in the mainstream of products liability only if they view this subject in economic terms. See, e.g., Croley & Hanson, *supra* note 16, at 690 n.21 (asserting that the economics-focused writers whom the authors discuss are “a representative sample” of products liability scholars, and mentioning eleven writers, mainly outside this tradition, whose work the authors decided to disregard); Alan Schwartz, *The Case Against Strict Liability*, 60 *FORDHAM L. REV.* 819 (1992) (implying that all arguments and counterarguments pertaining to strict liability are economics-based). For contrary postures, see David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 *NOTRE DAME L. REV.* 427, 429–30 (1993) (arguing that product accidents are moral events); Ernest J. Weinrib, *The Insurance Justification and Private Law*, 14 *J. LEGAL STUD.* 681 (1985).

18. See JAMES A. HENDERSON, JR. & AARON D. TWERSKI, *PRODUCTS LIABILITY: PROBLEMS AND PROCESS* 744–45 (2d ed. 1992). See also *infra* note 34 (describing reformist agendas of Ronald Reagan, George Bush, and Dan Quayle).

19. See Weinrib, *supra* note 17, at 687 (reacting negatively to this aspect of American products liability discourse).

20. MIHALY CSIKSZENTMIHALYI & EUGENE ROCHBERG-HALTON, *THE MEANING OF THINGS: DOMESTIC SYMBOLS AND THE SELF* ix (1981).

who connected property with personhood; and Marx, whose understanding of industrialization is taken for granted in modern products liability law, are all important sources of products liability. Their theories of property give rise to a concept that I label "detrimental-objects law," a counterpart to the beneficial-objects law that property law has long expounded.

Lacking attention to property-law antecedents, explanations of products liability rely on tort and contract. As a result they are not only incomplete but inaccurate. Tort law still lives in the shadow of its ancestor, the writ of trespass. Although the requirement of direct application of force has long been dropped—if it ever was observed—the tort perspective relies on a simple model of bipolar force, A upon B, wrongdoer upon victim. Products liability lies beyond that shadow. Contract law, which rightly focuses on the sale and purchase of a good as the basis for liability, suffers from its own lapse—the premise that a user chooses a product to fulfill her antecedent need.

Products, however, play an a priori role as stimuli to behavior. The one-way vectors of tort and contract theory—"A hit B,"²¹ "A chose product X,"²² "M manipulated C"²³—do not begin to describe the network that binds consumers, producers, and observers who select, display, encounter, use, and sell a product. For purposes of products liability, three entities—product, user, and maker—are interrelated agents. In this network, products function as dynamic actors, notwithstanding the conventional view that "any product is little more than an inert object until some person uses it."²⁴

21. Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 167 (1973).

22. See, e.g., *Laaperi v. Sears, Roebuck & Co.*, 787 F.2d 726, 731 (1st Cir. 1986) (attempting to reconstruct what plaintiff had in mind when he purchased smoke detector); MARSHALL S. SHAPO, *PRODUCTS LIABILITY AND THE SEARCH FOR JUSTICE* 75-79 (1993) (focusing on consumer decision to acquire product).

23. See Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974).

24. Robert E. Powell et al., *The Sophisticated User Defense and Liability for Defective Design: The Twain Must Meet*, 13 J. PROD. LIAB. 113, 115 (1991). In arguing that insights derived from property theory help to explain the dynamism and agency of products, I do not contend that property theorists would necessarily favor the argument. Jeremy Waldron, for instance, emphasizes the person-to-other-people nature of property law. In his view, property is a scheme of interests vis-à-vis other persons, and there are no legal relations between persons and things. See JEREMY WALDRON, *THE RIGHT TO*

In order to make sense, the study of products liability must include not only the missing insights of property theory, but also those of sociology,²⁵ especially the branch known as symbolic interactionism. Symbolic interactionism holds that every human being has a self, and that self is created by social life.²⁶ A person perceives the world around her and interprets that world to herself. In a post-industrial setting, material objects or products make up a large share of the world perceived. Members of a culture create, share, and interpret symbolic properties attributed to products. Because of their dynamic function, products participate in social life.²⁷ They shape identities and communicate messages to observers.²⁸

PRIVATE PROPERTY 27-28 (1988). My own reading of *The Right to Private Property* finds that Professor Waldron undercuts his posture later in the book. See *infra* note 60 and accompanying text.

25. The most celebrated influence of sociology on law is *Brown v. Board of Education*, 347 U.S. 483, 492-94 (1954), in which the Supreme Court relied on sociological evidence to declare that racial segregation violated the Equal Protection Clause of the U.S. Constitution. For other examples, see *McCleskey v. Kemp*, 481 U.S. 279 (1987) (reviewing evidence of race discrimination in the decision to impose a death penalty); *American Booksellers Assoc. v. Hudnut*, 771 F.2d 323 (7th Cir. 1985), *aff'd*, 475 U.S. 1001 (1986) (accepting evidence of harms caused by pornography). Sociology has had less direct influence on the development of private law.

26. See HERBERT BLUMER, *SYMBOLIC INTERACTIONISM: PERSPECTIVE AND METHOD* 2-4 (1969).

27. Professor Csikszentmihalyi argues that products can exploit and dominate human beings. For example, he writes, tobacco was unknown to white Europeans until the voyages from Europe to the Americas during the sixteenth century. The resultant popularity of tobacco helped to install and entrench slavery in the United States. Although tobacco has made only dubious contributions to humanity, it is clear that "humans have benefited the spread of tobacco." MIHALY CSIKSZENTMIHALYI, *THE EVOLVING SELF: A PSYCHOLOGY FOR THE THIRD MILLENNIUM* 127-28 (1993).

Like many other writers Csikszentmihalyi finds the automobile replete with dynamism:

Instead of using [the automobile] we begin to be used by it. We worry about payments, its upkeep, about the insurance, about vandals, accidents, and so forth, and soon part of our control over consciousness is gone. But all along cars keep multiplying because they find a rich medium of propagation in the human mind.

Id. at 140.

28. The association between legal doctrine and the symbolism present in consumer products has received increased attention in the legal literature. See, e.g., Malla Pollack, *Your Image is My Image: When Advertising Dedicates Trademarks to the Public Domain—With an Example from the Trademark Counterfeiting Act of 1984*, 14 CARDOZO L. REV. 1391, 1397-1446 (1993) (using symbolic communication in support of proposed reassessment of trademark law); Stephen J. Schnably, *Property and Pragmatism: A Critique of Radin's Theory of Property and Personhood*, 45 STAN. L. REV. 347, 384-97 (1993) (describing the relationship between consumer culture and property theory).

In Part II, moving from a theoretical construct into law as it is experienced, I look at specific examples of how the law views products as agents. Products became the source of strict liability by analogy to dangerous animals and other personified wrongdoers. After the growth of technology, products came to symbolize power. More recently, symbolism has become evident in the anthropomorphic writing that mourns "lost" products and argues that consumer goods depend on a kindly liability system to remain in existence. Symbolic interactionism explains the decision to regard products as dynamic.²⁹

This concept of product dynamism pervades the legal traditions that have shaped American law. Ancient and medieval legal codes provided for the prosecution of errant animals and inanimate objects. The French principle of *fait de la chose*, or act of a thing, is the basis of modern products liability in several civil law countries; and, as I will argue, *fait de la chose* has important and close analogues in Anglo-American concepts such as deodands and forfeiture, and also in modern rules of products liability and property law. The view that inanimate objects are dynamic is a traditional notion, not a radical one.

These precedents help to answer the vexing question of how tort and contract fit together in products liability. The contract-based ancestry of products liability law, often neglected in the current era of "strict liability in tort," influences several elements of current doctrine. Among them are the consumer expectations test for design defect, misrepresentation (even though this doctrine is often classified under torts), and breach of warranty as a separate cause of action. Furthermore, products liability requires a business transaction, and this aspect is more consistent with contract than tort law. Nonetheless, contract theory is slighted in most explanations of products liability.³⁰ During the last several decades, the *Restatement of Torts* has vanquished the Uniform Commercial Code (UCC) as the unifying codification of products liabil-

29. For a rare judicial expression of this point, see *Sherk v. Daisy-Heddon*, 450 A.2d 615, 633 (Pa. 1982) (Larsen, J., dissenting). Justice Larsen referred to the "invitational aspect" of a product and noted that a product "speaks to society" through that aspect. This approach "elevates to requisite prominence the pivotal interplay between product and users (society)." *Id.*

30. See, e.g., HENDERSON & TWERSKI, *supra* note 18, at xxix ("This is a book about products liability; but it would not have been inaccurate if we had titled the book 'Advanced Torts.'").

ity. In legal education, products liability is generally taught in torts courses. By contrast, this Article highlights the ongoing role of contract theory in products liability. Once the agency of a product is acknowledged, product manufacture, sale, and use all become important as *transactions*—the essence of contract.

Tort approaches to products liability retain their power and normative appeal, but in a revised way. Negligence law continues to be useful.³¹ It helps to assess decisions of product design and warning. It works well to decide cases that do not fit within what I later call “true products liability,” such as harm to employees. Its approaches also remain relevant in adjudging comparative fault. Tort theory conveys some of the flavor of wrongdoing or misconduct that I argue is chargeable to products themselves. “Strict liability in tort,” however, is an extraordinarily unhelpful and misleading way to describe responsibility for product-caused harms. Unlike “products liability,” an illuminating and revealing phrase, “strict liability in tort” and “strict products liability” are obfuscatory.³² Tort law informs products liability, therefore, in its elucidations of fault, relative fault (as in plaintiff’s-conduct defenses), intentional harm, and error that may be charged to persons. It does not explain products liability; only a reconciliation of tort and contract, influenced by property theory, can address that task.

In Part III, having established the existence of legal recognition of product dynamism, I extend this recognition by offering some preliminary answers to a fundamental question: When is a product appropriately a source of blame for an individual? For my answer, I return to the elements of product dynamism, which I identify as symbolic effect (alternatively, symbolic communication) and a triangular relationship among maker, product, and user. When these elements are strongly present, it becomes appropriate to say, *the thing is to blame*; and sometimes, *the thing is this*

31. For a sampler of cases involving defective products where courts rejected or ignored strict products liability as a descriptive label yet had no trouble finding in favor of plaintiffs using negligence reasoning, see *City of Thomasville v. Lease Inc.*, 268 S.E.2d 190, 194–96 (N.C. 1980); *H.E. Butt Grocery Co. v. Lansdown*, 567 S.W.2d 608, 610 (Tex. Civ. App. 1978); *Wright v. Creative Corp.*, 498 P.2d 1179, 1182–83 (Colo. Ct. App. 1972).

32. For this reason, I frequently set off these phrases using quotation marks. It seems to be customary for products liability writers to use this punctuation device to express skepticism or disdain. See, e.g., QUICK FACTS, *supra* note 15, at 14 (the “so-called ‘crisis’ ”).

maker's thing. With this device, I explore some practical problems of doctrine and suggest solutions.

It is important to note here what the theory of product dynamism does not aspire to answer. Product dynamism does not say prescriptively whether a defendant ought to be deemed liable: that question is to be answered in traditional fashion, with established legal principles of responsibility. Instead, the theory is descriptive. Product dynamism is present to varying degrees in all situations where persons are injured by a product. The approach described in this Article indicates a method of assessing the strength of this presence in any given case. An observer should look at the account of injury described in the lawsuit, and then inquire whether product dynamism was strongly present there. It can be helpful to break the question into three parts: is this injurious entity a product; is this plaintiff a user; and is this defendant a maker. For true products liability to be present, the answer to all three questions must be yes. The questions overlap with one another, but are not redundant; in some of the "hard cases" of products liability law, such as the problem of corporate-successor liability, the answers to the three questions may not be the same. No determination of ultimate liability emerges: That outcome depends on sources extrinsic to the theory.

Would attention to the criteria of true products liability affect the way cases are decided? Yes and no. William Prosser, an originator of modern products liability law, once wrote that the change from negligence to strict products liability would have almost no effect on case outcomes.³³ In many senses this famous assertion, or prediction, has been proved wrong;³⁴ in other senses Prosser

33. William L. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 YALE L.J. 1099, 1114 (1960).

34. The change from negligence to strict liability has been volatile. Since Prosser expressed his view, products liability as a specialty for academics, practicing lawyers, journalists, lobbyists, and many others has burgeoned. Within the last twenty years, dozens of state statutes on products liability were enacted, several casebooks written and re-issued, two crises declared, task forces formed, specialist departments in law firms created, a new *Restatement* undertaken, and hundreds of books and articles published. Ronald Reagan spoke about products liability, as did George Bush in his 1990 State of the Union address, and Dan Quayle took up the reform cause. See generally ANITA BERNSTEIN, *Preface*, in A PRODUCTS LIABILITY ANTHOLOGY xiii (1995) (describing growth in products liability law and commentary); Joe Queenan, *Birth of a Notion: How the Think Tank Industry Came Up With an Issue that Dan Quayle Could Call His Own*, WASH. POST, Sept. 20, 1992, at C1. The mushrooming of products liability has affected case outcomes, although to an unknown extent and direction. See generally RICHARD NEELY, THE

remains quite right.³⁵ Here, similarly, I have disclaimed any ambition to craft or prescribe liability rules, and the theory of product dynamism does not necessarily point to liability different in force than would be indicated by a fault- or warranty-based regime.

In particular, the theory of product dynamism does not furnish plaintiffs with a doctrinal windfall. Because product dynamism describes a triangle of communication involving product, maker, and user, it departs from other visions of products liability that emphasize the role of a powerful agent who sends manipulative messages to the consumer.³⁶ The theory of product dynamism recognizes the agency and power of the user as well as that of the maker and the product.³⁷ Thus the paradigm supports such doctrinal recognition of this user-power as comparative negligence, the patent-danger rule, and assumption of risk.³⁸ The user is more than a hapless recipient of agency. At the same time, product dynamism recognizes the discrete roles of product and maker, suggesting that the user is engaged in communication with two independent agents and therefore receives a reinforced, two-on-one message. This extra quantum of agency might militate in favor of increased liability or a presumption against certain defendants. But the precise

PRODUCT LIABILITY MESS: HOW BUSINESS CAN BE RESCUED FROM THE POLITICS OF STATE COURTS (1988) (arguing that political and social climate affects the filing, settling, and adjudication of products liability actions); James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479 (1990) (assembling data to argue that publicity accompanying large verdicts has contributed to reversing a pro-plaintiff direction in the law).

35. Other writers have noted the similarities between strict liability and negligence as these doctrines are applied to product-caused injury. See Griffith, *supra* note 9; Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 VAND. L. REV. 593, 647-48 (1980).

36. Scholarly writings that emphasize this role include HENDERSON & TWERSKI, *supra* note 18, at 104 (suggesting that "Madison Avenue" contributes significantly to products liability); SHAPO, *supra* note 22, at 73-75; Note, *Harnessing Madison Avenue: Advertising and Products Liability Theory*, 107 HARV. L. REV. 895 (1994).

37. Howard Latin's masterful attack on warning doctrine portrays a typical user who neither receives, heeds, understands, nor acts on warnings due to realities of cognition and heuristics. I agree with Professor Latin's two major points: that the question of whether product warnings work is an empirical one, and that the futility of warnings should not necessarily excuse sellers from liability. See Howard Latin, "Good" Warnings, *Bad Products, and Cognitive Limitations*, 41 UCLA L. REV. 1193 (1994). My principal difference with Latin centers around my theme of communication in contrast to his of noncommunication.

38. This conclusion happens to coincide with that of many economic analysts. See sources cited *supra* note 16.

doctrinal effect of product dynamism must await common-law development.

As reconceived here, products liability becomes coherent in a conceptual sense, whereas before it was coherent only in a nominal sense.³⁹ Due to misunderstanding, the main criterion of a products liability case has been the presence of something labeled a product, accused of doing harm. Mere assertion by litigants or observers creates "products liability"; and neither case law nor commentary can show why all liability is not classifiable under this ill-defined rubric.⁴⁰ Thus in summarizing the essential characteristics of products liability, I have helped to move the doctrine into clarity although, as I acknowledge, more of the task remains.

I. PRODUCT DYNAMISM

The answer to the question *How Can a Product Be Liable?* lies beyond the domain of law. Heuristic insights come from an examination of work in the humanities tradition—political theory, philosophy, and literature—and from the social sciences, especially social psychology. These disciplines explain the role of things in social ordering as well as in the creation and continued develop-

39. Professor Powers diagnoses the same problem of incoherence, but proposes a radically different cure:

Current products liability law is a mess. Its foundation is flawed, its content is exceedingly complex, and its effect on personal injury litigation is pernicious. The primary culprit is the very hallmark of products liability law: the decision to distinguish product cases from other personal injury cases and subject them to strict products liability as a special theory of recovery. Courts should abandon this distinction and resolve product cases within the general framework of negligence law.

Powers, *supra* note 9, at 639. Abolishing products liability and replacing it with negligence would offer a speedy remedy for various ailments within the current system. See *infra* text accompanying notes 191–95, 303–11, 322–24 (describing doctrinal dilemmas). The problem with this very practical idea is conceptual: Powers cannot explain why a separate doctrine—that is, "the decision to distinguish product cases"—is attractive to so many observers. Moreover, while my claim that products liability is part of property law will be controversial, nobody disputes the contracts-based antecedents of products liability, and yet Powers would purge this history entirely from current doctrine.

40. The question of taxonomy of liability extends beyond product-caused injury. For overviews of some of the recurring questions, see Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092–93 (1972) (exploring the intersection between property law and tort law under the rubric of entitlements); Madeline Morris, *The Structure of Entitlements*, 78 CORNELL L. REV. 822 (1993) (revising prior attempts at taxonomy to identify fourteen forms of entitlement or interest that may warrant recognition by the legal system).

ment of human beings. Things are never "mere"; they produce and receive meaning in society.

As detailed below, the work of Locke and Hegel, among others, shows the importance of objects (a larger category that includes products) in establishing a source of identity or personhood in human beings. The legal distinction between objects and products, as I go on to argue, originates in the work of Karl Marx. Modern products liability finds salient the same differences that Marx emphasized. Once the concepts of an object and product are fixed, more recent work in the tradition of symbolic interactionism demonstrates the meaning of things in society.

A. *Homo Faber*

To begin, a product may be defined as an object that has been shaped by human intentionality. A maker creates a product, and a user employs it. Thus, a product is twice dependent on intention for its existence: Its maker selects and processes information to create the object, and its user selects and processes information during the use of the product.⁴¹ *Homo faber*, the maker and user of things, has both powers of intention.

The concepts of manufacture and use, though seldom studied by products liability scholars, contribute greatly to the explanation of products liability. A dominant posture in the products liability literature regards manufacture as the economic activity of a firm to which costs can be charged.⁴² The manufacturer, who has engaged in risky conduct, may have to pay for having caused danger. In contrast to this view, I argue in this section that manufacture is different from other risk-imposing activities. Manufacture creates a thing that is let loose, severed from its maker. In its departure from the maker, a thing acquires an identity and autonomy that distinguish the object from conduct.

41. See CSIKSZENTMIHALYI & ROCHBERG-HALTON, *supra* note 20, at 14.

42. See POSNER, *supra* note 16, at 180-81; SHAVELL, *supra* note 16, at 23, 47. This view can be described as reciprocal: both the person harmed by a product and its manufacturer are engaged in activity, and "[t]he real question that has to be decided is: should A be allowed to harm B or should B be allowed to harm A?" Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2 (1960).

1. *The Object as a Source of Personhood.* As a descriptive label, *homo faber* unites the contributions of property theory to products liability. Man is the maker and user of objects, and manufacture and use are essential elements of human existence. The labor theory of property, often attributed to John Locke, emphasizes the connection between human intention and the creation of tangible property. Complementing the labor theory, Hegel's emphasis on ownership, freedom, and the satisfaction of needs suggests the legal importance of the concept of use.

The concept of *homo faber* shows that products liability belongs as much to the domain of property law as it does to the more familiar domains of tort and contract. Both contract and tort law start too late: they follow from the conduct of persons. It is property that notes the earlier human intentionality, that of the maker, and that grasps the unique influence of things on the formation of a person. Thus an appreciation of products liability law calls for study of the classic justifications of private property.

For centuries philosophers and legal theorists have labored to build a normative case for private ownership. In defending private property, these works have emphasized what is important about that property. And because property is so important, objects—that is, tangible and moveable property—can be understood to share in that importance.

In political and legal theory, the most famous defense of private property is credited to John Locke, although this defense had important predecessors.⁴³ In the *Second Treatise of Government*, Locke justified private property by reference to human labor:

[E]very Man has a *Property* in his own *Person* . . . The *Labour* of his Body, and the *Work* of his Hands, we may say, are properly his. Whatsoever then he removes out of the State that Nature hath provided, and left it in, he hath mixed his *Labour* with, and joyned to it something that is his own, and thereby makes it his *Property*.⁴⁴

43. See Floyd W. Rudmin, *Ownership as Interpersonal Dominance: A History and Three Studies of the Social Psychology of Property* 16 (March 1988) (unpublished manuscript, on file with author) (citing Overton, John of Paris, Fortesue, and Roman writings as sources for Locke).

44. JOHN LOCKE, *TWO TREATISES OF GOVERNMENT* 305–06 (Peter Laslett ed., 1960) (3d ed. 1968).

This "labor theory" rests on the premise that persons have a property right in themselves, especially their own work. When a person mixes his work with a physical thing that is not the property of another, he has a right of ownership in that thing.⁴⁵ This right derives from the earlier right, which Locke did not explicitly defend, of the right of property in one's person.

Convincing justifications of private property rely on concepts of personhood.⁴⁶ Aristotle linked private property with moral development, arguing that a man needs leisure and material resources to learn civic-mindedness and friendship.⁴⁷ Following the revival of Aristotle, the fourteenth-century Scholastics defended private property by connecting it to human nature. William of Occam argued that property is a natural human creation based on reason, and Marsilius of Padua believed that private property originated in the innate sense of free will in every human being.⁴⁸

Denunciations of private property likewise rely on the relationship between property and personhood. To those writers who refused to acknowledge private ownership of things, private property corrupts the individual,⁴⁹ usurps what is really the domain of God,⁵⁰ betrays a communal ideal,⁵¹ or oppresses those who lack

45. The right is qualified by the famous "Lockean proviso"—the individual must leave "enough, and as good" in the state of nature, so as not to defeat the opportunity of a later-arriving person to acquire property through labor. *Id.* at 306.

46. See STEPHEN R. MUNZER, A THEORY OF PROPERTY 145-47 (1990) (discussing personal character traits in relation to property as they develop in different economic systems); WALDRON, *supra* note 24, at 45, 290-91, 443-44 (comparing Lockean and Hegelian theories of the relationship between private property and individual liberty). Professor Epstein has defended private property on the modest grounds of administrative convenience, tradition, and the absence of compelling contrary visions of how property ought to be held. See Richard A. Epstein, *Possession as the Root of Title*, 13 GA. L. REV. 1221 (1979). Writers in the libertarian tradition defend private property mainly by objecting to the coercion necessary to change present allocations. See FRIEDRICH A. HAYEK, THE CONSTITUTION OF LIBERTY 87 (1960); ROBERT NOZICK, ANARCHY, STATE AND UTOPIA 155-74 (1974). Although these views are important and influential, they justify private property only as compared to an alternative regime.

47. ARISTOTLE, THE POLITICS 85-91 (H. Rackham trans., 1932).

48. See Rudmin, *supra* note 43, at 12-13 (citations omitted).

49. See, e.g., CHARLES AVILA, OWNERSHIP: EARLY CHRISTIAN TEACHING (1983) (discussing selected Christian scholars' criticisms of private ownership); PLATO, THE REPUBLIC OF PLATO 4-5 (Benjamin Jowett trans., 1901); JEAN JACQUES ROUSSEAU, *Preface to Narcissus*, in THE INDISPENSABLE ROUSSEAU 47, 48 (John H. Mason ed., 1979).

50. See AVILA, *supra* note 49, at 78, 114-15 (discussing work of St. Augustine).

51. See Rudmin, *supra* note 43, at 4 (quoting "all is common among friends," a slogan of the school of Pythagoras).

such private property.⁵² Other theorists of property such as Hobbes and Hume did not seek to abolish or defend private property but insisted that understanding property requires an understanding of human desires and impulses.⁵³ Tangible property is thus connected to personhood. The right to own property necessarily follows from the premise that persons own themselves.⁵⁴

Perhaps the most adamant insistence on the relationship between property and the individual psyche appears in the works of Hegel, especially *The Philosophy of Right*, in which Hegel declares that there can be no personhood without property: "If emphasis is placed on my needs, then the possession of property appears as a means to their satisfaction, but the true position is that, from the standpoint of freedom, property is the first embodiment of freedom and so is in itself a substantive end."⁵⁵ This stance is directly contrary to conventional views of products liability. The product-as-inert-object approach presumes that "emphasis is placed" on the needs of an individual, with products deployed to fill those needs. For Hegel this approach fails to begin at the beginning. Without a relationship to property, the individual is not a person and cannot have the needs of a person. Human will is embedded in things, and things are embedded in human will.⁵⁶

Private property conduces to selfhood in several ways. Appropriation, for Hegel, leads to understanding: A person who appropriates a material object simultaneously takes it and knows it, thereby gaining mastery of the natural world.⁵⁷ This expression requires some degree of ownership on the part of the individual (the property could conceivably be shared⁵⁸) and also requires that object be inanimate.⁵⁹ Ownership also enables the individual

52. See KARL MARX & FRIEDRICH ENGELS, *Manifesto of the Communist Party*, in MARX & ENGELS: BASIC WRITINGS IN POLITICS AND PHILOSOPHY 21 (Lewis S. Feuer ed., 1959).

53. See Rudmin, *supra* note 43, at 14-18.

54. As Floyd Rudmin has pointed out, the centrality of personhood in explanations of property means that property is an important constituent of psychology—and therefore philosophical justifications of private property contribute to the literature of psychology as well as political theory. See *id.*

55. G.W.F. HEGEL, *PHILOSOPHY OF RIGHT* § 45, at 42 (T.M. Knox trans., 1952).

56. See *id.*

57. See Peter G. Stillman, *Property, Freedom and Individuality in Hegel's and Marx's Political Thought*, in NOMOS XXII: PROPERTY 130, 137 (J. Roland Pennock & John W. Chapinan eds., 1980).

58. See MUNZER, *supra* note 46, at 81-82.

59. The evil of slavery is that it makes an object of a person; put another way, it

to have a realm of resource use that does not depend on the agreement or cooperation of other persons. A person who owns property can devise plans and assert preferences, even ones that affront other persons.⁶⁰ Mutual recognition follows: The individual can infer "myself" from "mine" and "you" from "yours" after one's will has been embedded in objects.⁶¹

For Hegel, all of personality may be explained in terms of property. Every abstract right—the right to one's own life and body, the right over inner life and conscience, and the right to social status as a free person—is a right of property and of self-ownership.⁶² Social arrangements must provide for this process of human self-actualization.⁶³ In civil society, personality-through-property has legal recognition,⁶⁴ and "to describe what people own is to say something important about them."⁶⁵

Current understandings of property law have benefited from application of the Hegelian connection between objects and personhood. One important application is a distinction that Margaret Jane Radin has proposed, between property integral to personhood and property held instrumentally or for investment.⁶⁶ For Profes-

denies that the slave is an agent with free will of her own. See HEGEL, *supra* note 55, § 57, at 48.

60. See WALDRON, *supra* note 24, at 302-03. Standard childrearing advice urges American parents to tell children that they own at least a few toys that they need never share. Ownership is thus regarded as crucial to human development. See, e.g., BENJAMIN SPOCK & MICHAEL B. ROTHENBERG, "BABY AND CHILD CARE 456-57 (1985) (recommending that parents not force young children to be generous because possessiveness is a natural state of development). For a careful association of the Hegelian view of property with the development of personality beginning in childhood, see MUNZER, *supra* note 46, at 84-86.

61. See HEGEL, *supra* note 55, § 46, at 42-43.

62. See ALLEN W. WOOD, *HEGEL'S ETHICAL THOUGHT* 22 (1990).

63. *Id.* at 107.

64. MUNZER, *supra* note 46, at 151 (citing G.W.F. HEGEL, *THE PHILOSOPHY OF RIGHT* (T.M. Knox trans., 1965)).

65. *Id.*

66. Margaret Jane Radin, *Property and Personhood*, 34 *STAN. L. REV.* 957 (1982) [hereinafter Radin, *Personhood*]. See generally Margaret Jane Radin, *Compensation and Commensurability*, 43 *DUKE L.J.* 56 (1993) (examining whether dollar compensation for personal injury and the harm incurred in the injury are commensurable); Margaret Jane Radin, *Lacking a Transformative Social Theory: A Response*, 45 *STAN. L. REV.* 409 (1993) (elaborating on arguments made in *Personhood*); Margaret Jane Radin, *Market-Inalienability*, 100 *HARV. L. REV.* 1849 (1987) (exploring the concept of market-inalienability, an expression describing a good that cannot be sold).

This distinction has applications to doctrine. For example, as Radin points out in another article, residential rent control could be defended as protecting property integral to personhood (a home) at the expense of property held instrumentally. Margaret Jane

sor Radin, property integral to personhood warrants stronger protection in the law. In contrast to Radin's prescriptions based on a normative reading of Hegel, I offer a narrower and descriptive inference: Because property is integral to personhood, the law of injurious objects has evolved and retains conceptual appeal.

The connection between property and products liability has been obscured by the importance of ownership as a property topic. Property theory connects objects with reason, morality, free will, and human labor. When a person combines her labor with an object, more occurs than a simple justification for ownership. According to Locke, the object changes.⁶⁷ The person changes too: She feels different; she is entitled to feel different. For Hegel, these changes are inevitable elements of human life.⁶⁸

As theorists have long agreed, however, chattels are not always desirable things.⁶⁹ Property theory thus pertains also to detriment. It explains deprivation of beneficial objects, corruption caused by excess, and physical injury attributable to contact with harmful objects. Understanding the importance of objects leads to understanding the evolution and endurance of detrimental-objects law. The law of beneficial property is expressed in traditional property topics such as bailment, conversion, and decedents' estates; the law of detrimental property includes products liability.⁷⁰

Radin, *Residential Rent Control*, 15 PHIL. & PUB. AFF. 350 (1986). A distinction of this kind may explain in part the defeat of constitutional challenges to rent control. See, e.g., *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Pennell v. City of San Jose*, 485 U.S. 1 (1988).

67. See LOCKE, *supra* note 44, at 306-07, 315.

68. See Radin, *Personhood*, *supra* note 66, at 977 ("[T]he notion that the will is embodied in things suggests that the entity we know as a person cannot come to exist without both differentiating itself from the physical environment and yet maintaining relationships with portions of that environment").

69. See Rudmin, *supra* note 43, *passim*; see also *supra* note 49 and accompanying text (noting corrupting effects of possessions).

70. Products liability may be viewed as a Hegelian topic in another sense. "Detrimental personality"—products that cause physical injury—is a category that requires a direct involvement between the person of an individual and the product. Other types of property, which may cause detriment to their owners, do not fall within products liability. For example, a politician might wish to avoid possessing shares of stock in a disreputable corporation for fear of career harm, yet this property does not cause physical injury and lies beyond products liability. In expanding his theory of property-as-personality, Hegel required an intimate connection between owner and owned: a kind of use that closely affects the life of the person. See WALDRON, *supra* note 24, at 366.

2. *Marx: Manufacture, Alienated Labor, and Animated Products.* As legal historians point out, modern accident law began with industrialization.⁷¹ Before nineteenth-century technology, the ways in which persons could carelessly injure one another were so few that the legal concept of negligence scarcely existed. Industrialization created new concepts, products liability among them.⁷² Before creating products liability, however, industrialization created *products*—manufactured objects—whose properties could be traced not only to a producer or seller, but to some technology. These are the objects that may be blamed for injury in a modern products liability action.

Products liability, then, has paid heed to historical events. It uses the Industrial Revolution as a divider between past law and current doctrine. It grants products a unique, individual status. It relies on the concept of manufacture, which creates a subcategory, products, out of a larger category, objects. It emphasizes the presence of human labor in a product. In all of these traits, products liability is “Marxist”—that is, consistent with observations that Karl Marx made in his early writings. Products liability implicitly recognizes proletarian labor, acknowledges that labor is embedded in products, and deems products animated.

71. See, e.g., LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 299–302 (2d ed. 1985); MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870–1960: THE CRISIS OF LEGAL ORTHODOXY 99 (1992) [hereinafter HORWITZ, CRISIS]; MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW 1780–1860, at 99–108 (1977) (offering “subsidy theory” to explain the ascendancy of no-liability-without-fault). The most influential critique of the Horwitz-Friedman thesis, Gary T. Schwartz, *Tort Law and the Economy in the Nineteenth-Century America: A Reinterpretation*, 90 YALE L.J. 1717, 1735–58 (1981), does not challenge the general assertion that industrialization affected modern accident law.

72. In maintaining that products liability is critically connected to industrialization, I am differing in part with those who trace the doctrine closely to preindustrial liability for contaminated food. *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 900 (Cal. 1963) (asserting that strict liability for manufacturers was “[r]ecognized first in the case of unwholesome food products”). See also Dix W. Noel, *Manufacturers of Products—The Drift Toward Strict Liability*, 24 TENN. L. REV. 963, 1017–18 (1957). Liability for defective food is certainly an important precursor to modern sales law. This doctrine, however, lacks many crucial defining elements of products liability. One of these elements is that the product is radically severable from its maker; another theme is that a product can comport entirely with the conscious and well-intended design of a maker yet still have that design be the source of liability. As a historical phenomenon, heightened liability for bad food developed because the consumer’s need to eat was regarded as essential and non-negotiable; in contrast, I argue here that products liability is related to the negotiable, choice-driven need to acquire and consume.

a. *Manufacture: from artisan to proletarian.* A useful starting point to note the effect of industrialization on products liability law is the landmark case of *MacPherson v. Buick Motor Co.*⁷³ Edward Levi and others celebrated the case because of its triumphant logic.⁷⁴ In what seemed to be a flash, Cardozo cut through the distinction between products “imminently dangerous to life,”⁷⁵ such as poison mislabeled as a cure, and things that appear benign. “What is true of the coffee urn is equally true of bottles of aerated water,”⁷⁶ Cardozo mused in dictum, thus joining together all products “reasonably certain to place life and limb in peril when negligently made.”⁷⁷ Whereas his predecessors had insisted on noting the nature of an item and sorting it accordingly—food or poison?—Cardozo saw objects a priori, all of them sources of potential power. Although nothing in *MacPherson* proclaims a distinctive kind of liability for the harms caused by products,⁷⁸ the opinion is rightly admired for its originality.

It is at least not surprising (I do not wish to say inevitable) that this insight about the nature and power of objects would be announced in early twentieth-century America, in an industrialized state, by a great judge attuned to historical change in the law. Intellect and learning enabled Cardozo to perceive the correct decision in *MacPherson*, but the significance of objects could be brought out only at a certain point in space and time. In 1916, most educated Americans who lived in industrial areas of the nation believed in the tenet of progress through technology.⁷⁹ Industrial production and distribution of objects had given rise to modern life.

Mass production and distribution of objects had several implications in the early twentieth century, some of them in tension with others. A new relationship between producer and user was emerging. Cardozo perceived this change and recognized in the

73. 111 N.E. 1050 (N.Y. 1916).

74. See EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 20-25 (1949); Prosser, *supra* note 33, at 1100.

75. *MacPherson*, 111 N.E. at 1052.

76. *Id.*

77. *Id.* at 1053.

78. Cardozo presumed that Donald MacPherson could prove negligence. See George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461, 468-69 (1985).

79. See Charles A. Beard, *Introduction* to JOHN BURY, *THE IDEA OF PROGRESS* ix, xxxvii (Dover Publications, Inc. 1955) (1920).

process the need to relax the old requirement of privity, because he understood that a near-substitute of privity develops when products bring disparate people together. Once established, this connection alters the concept of relational duty, the element of personal injury law that Cardozo took so seriously in his later and even more famous opinion.⁸⁰ Although products bring people together, they are also a force of separation: A product made in one place might be shipped to another and sold at a third. As early twentieth-century history shows, a man could make a fortune selling mass-produced objects.⁸¹ Less directly, the mass production and distribution of goods built nonretail fortunes.⁸² The Buick automobile complained of in *MacPherson* was a symbol of transformation, evident to Cardozo in his time and place.

What was transformed? Before industrialization, according to Karl Marx, *homo faber* was an artisan. Making a product, he deployed his energies for his own benefit in a way that was consistent with his own powers.⁸³ For Marx, this ability and need to engage in productive work was the distinguishing feature of the human species.⁸⁴ The concept of barter exemplified this view of human work. In barter, "each of the owners has produced whatever his immediate needs, his bent and the available resources dictated. . . . Labour was indeed the immediate *source of subsistence* but at the same time it meant the activation of his *individual existence*."⁸⁵

80. *Palsgraf v. Long Island R.R.*, 162 N.E. 99 (N.Y. 1928).

81. For accounts of retail-based fortunes built in the early twentieth century, see RUSSELL B. ADAMS, JR., *KING C. GILLETTE: THE MAN AND HIS WONDERFUL SHAVING DEVICE* (1978); ALFRED C. FULLER, *A FOOT IN THE DOOR: THE LIFE APPRAISAL OF THE ORIGINAL FULLER BRUSH MAN AS TOLD TO HARTZELL SPENSE* (1960).

82. See JOSEPH F. WALL, *ALFRED I. DU PONT: THE MAN AND HIS FAMILY* (1990); ALLAN NEVINS, *JOHN D. ROCKEFELLER: THE HEROIC AGE OF AMERICAN ENTERPRISE* (1940).

83. See KARL MARX, *Economic and Philosophical Manuscripts*, in KARL MARX: *EARLY WRITINGS* 279, 328-29 (Rodney Livingstone & Gregor Benton trans., Vintage Books 1975) (1932).

84. See *id.* at 328-29.

85. *Excerpts from James Mill's Elements of Political Economy*, in KARL MARX: *EARLY WRITINGS*, *supra* note 83, at 259, 268.

Industrialization always transforms the life of the worker.⁸⁶ Work, once an integral part of his life, becomes "a torment for him,"⁸⁷ a "mortification,"⁸⁸ and "a loss of his self."⁸⁹ For the proletarian, labor is a complete negation of his humanity and the powers that separate him from lower animals.⁹⁰ He is enslaved by the demands of capital. Whereas the artisan had a right and duty to work in certain means of production, the proletarian lacks both.⁹¹ Paid by another man for the use of his waking hours, the proletarian works to stay alive—to acquire money to pay for subsistence. Hence, he "feels himself only when he is not working; when he is working he does not feel himself. He is at home when he is not working, and not at home when he is working."⁹² Industrialization, by substituting money for the earlier rewards that laborers received from their work, destroys humanity.

Although products liability law does not manifest the same revolutionary inferences from this account that Marx drew, it nonetheless reveals agreement with the description. Like Marx's account, products liability law focuses on the discontinuity between individual wishes or conduct and the manufacture of a product. J.A. Jolowicz's question—does "products liability" mean liability for manufacturing or liability for selling?⁹³—is thus answered: Neither. These conduct-based grounds of liability derive from preindustrial tort and contract law, and they presume an integrity

86. *But see* G.A. COHEN, *HISTORY, LABOUR AND FREEDOM: THEMES FROM MARX* 189 (1988) (deriding as romantic the notion of the "ancestral work scene as a garden from which capitalist development expelled the producers, to deposit them in an industrial hell").

87. MARX, *supra* note 83, at 330.

88. *Id.* at 326.

89. *Id.* at 327.

90. Raymond Benton makes a pertinent point by contrasting the words for "labor" and "work." European languages distinguish the two activities with paired terms: *labor/work*, *ponein/ergazesthai*, *laborare/facere* or *fabricari*, *travailler/louvrer*, *arbeiten/werken*. The English, Greek, Latin, French, and German words for "labor" all connote toil and ungratifying activity (for example, *ponein* is related to "pain," and *travailler* to "torture"); thus the contrast to *homo faber* is *animal laborans*. See Raymond Benton, Jr., *Work, Consumption, and the Joyless Consumer*, in *PHILOSOPHICAL AND RADICAL THOUGHT IN MARKETING* 235, 237-38 (A. Fuat Firat et al. eds., 1987). As Professor Benton goes on to argue, a related linguistic contrast can be drawn between "consumption" and "use," the former connoting waste and destruction, the latter intelligent employment. See *id.* at 239 (citing HANNAH ARENDT, *THE HUMAN CONDITION* 125-26 (1958)).

91. See COHEN, *supra* note 86, at 190.

92. MARX, *supra* note 83, at 326.

93. See Jolowicz, *supra* note 8, at 370-76.

between maker and product that is now severed. Now that human activity is a commodity, alienated and acquired, individuals can no longer bear all the blame for product harm. They were merely working when the product was made.

Products liability further separates artisans from proletarians with its focus on things made by the latter group. In general, the doctrine applies to objects produced in a repetitive work process by members of the proletariat who are paid an hourly wage. According to the *Second Restatement of Torts*, strict products liability applies only to a "seller" who "is engaged in the business of selling such a product,"⁹⁴ a virtual requirement that the seller be an employer of workers. Caselaw illustrates the point.⁹⁵ The "manufacturer" of products liability doctrine has not made the product; a proletarian has. Without proletarian labor, products liability doctrine as we understand it would not have evolved.

b. Labor embedded and alienated in products. For Marx, a product was an object into which a worker's labor had "congealed."⁹⁶ Human purpose and conduct take form in an entity that the human worker can no longer control.⁹⁷ This transformation is an aspect of the famous Marxist theory of alienation, a multifaceted term that I address here only in part.⁹⁸ One of man's

94. RESTATEMENT (SECOND) OF TORTS § 402A(1)(a) (1965).

95. For example, when housewives prepared unwholesome turkey salad for a high school band event, salmonella-infected plaintiffs sued under theories of negligence, implied warranty, strict liability, and negligence per se. Although the court ultimately rejected each theory, it gave the most credence to negligence. The court rejected the implied warranty theory by distinguishing the housewives from "merchants" who have special responsibilities imposed by the law of implied warranty. See *Samson v. Riesing*, 215 N.W.2d 662, 669 (Wis. 1974). The disappointed subject of a portrait artist has a remedy only in contract, if at all. See *Gibson v. Cranage*, 39 Mich. 49 (1878).

96. BERTELL OLLMAN, *ALIENATION: MARX'S CONCEPTION OF MAN IN CAPITALIST SOCIETY* 142 (1972) (citation omitted). Another translator renders the point as follows: "The product of labour is labour embodied and made material in an object, it is the *objectification* of labour. The realization of labour is its objectification." MARX, *supra* note 83, at 324.

97. See 1 LESZEK KOLAKOWSKI, *MAIN CURRENTS OF MARXISM: ITS ORIGINS, GROWTH AND DISSOLUTION* 277 (1978).

98. Marx took the word from Hegel's *Phenomenology* and reinterpreted it. See MARX, *supra* note 83, at 379-400 (critiquing Hegel's dialectic and general philosophy). Alienation in Marx's writings refers to the state of man under capitalism—that is, a severance of the vital connections between man and four "others": man's productive activity, his product, his fellow men, and his species (a reference to the potentialities that distinguish human beings from other animals). OLLMAN, *supra* note 96, at 137 (citations omitted).

relations that is alienated under capitalism is the relation between man and his product. Before industrialization, a worker could use his products either to keep alive or to engage in further productive activity. After industrialization, he has no claim to these products, cannot use them, and does not recognize them as his own.⁹⁹ "The worker places his life in the object," Marx wrote, "but now [his life] no longer belongs to him, but to the object."¹⁰⁰

The concept of products liability captures this relation between human activity and a manufactured object. The very name of the doctrine, as was noted, reveals a literal meaning. Legal doctrine does not have a label of "objects liability": The injuring thing must have been manufactured. Human effort is a necessary element of products liability, and so is an embodiment of that effort that can be viewed as distinct from a person. Products liability, in other words, recognizes and requires the existence of labor embedded in objects.¹⁰¹

Legal doctrine further accords with Marx in deeming the product powerful, often more strikingly powerful than the individuals who labored or schemed to make it. Liability for injurious products can reach countless categories of human defendants other than manufacturers: individual employees, retailers and other intermediaries between maker and seller, municipal employees, or federal government officials, to name a few.¹⁰² This expansive liability has been labeled scornfully as a quest for "deep pockets";¹⁰³ it also indicates the centrality of a product in products

99. See OLLMAN, *supra* note 96, at 144.

100. MARX, *supra* note 83, at 324.

101. In a manuscript that was the predecessor to *Das Kapital*, Marx noted that, before industrialization, wealth was believed to reside in natural objects and not in commodities that are products of labor. See SHLOMO AVINERI, *THE SOCIAL AND POLITICAL THOUGHT OF KARL MARX* 103 (1968) (discussing Marx's *Grundrisse der Kritik der politischen Ökonomie*).

102. See *Torres v. Goodyear Tire & Rubber Co.*, 786 P.2d 939 (Ariz. 1990) (trademark authorizers); *Stein v. Southern California Edison Co.*, 8 Cal. Rptr. 2d 907 (Cal. Ct. App. 1992) (suppliers); *Amoroso v. Samuel Friedland Family Entertainment*, 604 So. 2d 827 (Fla. Dist. Ct. App. 1992) (commercial lessors); *Anderson v. Olmsted Util. Equip., Inc.*, 573 N.E.2d 626 (Ohio 1991) (remanufacturers); *Thompson v. Rockford Mach. Tool Co.*, 744 P.2d 357 (Wash. 1987) (sellers of used products), *review denied*, 110 Wash. 2d 1007 (1988); *Nelson v. Nelson Hardware, Inc.*, 467 N.W.2d 518 (Wis. 1991) (sellers).

103. See *Batts v. Tow-Motor Forklift Co.*, 978 F.2d 1386, 1398 n.24 (5th Cir. 1992) (Jolly, J., concurring) (characterizing a defendant as having been sued only for the sake of its deep pockets); *DaFonte v. Up-Right, Inc.*, 828 P.2d 140, 143 (Cal. 1992) (describing

liability litigation. One item can unite a multitude of human beings, overwhelming them. For Marx, products overpower both their makers and all individuals in society.¹⁰⁴

c. Animated products. The great power of products, according to Marx, is their ability to control human behavior. This power is most apparent in the creation of job descriptions. The work of a worker consists of the needs of the product; a product demands what must be done in a day's work, and the worker adjusts to that demand.¹⁰⁵

But Marx thought the power of products went much further. In the world of superstition or religion, Marx wrote,

[T]he productions of the human brain appear as independent beings endowed with life and entering into relation both with one another and the human race. So it is in the world of commodities with the products of men's hands. This I call the Fetishism which attaches itself to the products of labour, so soon as they are produced as commodities, and which is therefore inseparable from the production of commodities.¹⁰⁶

Commodities have power over individuals because of the desires they create. According to Marx, persons are at the mercy of what products make them want and become.¹⁰⁷ A laborer works to make products so that he can obtain the wages that enable him to buy the products that another laborer has made.

Proposition 51, an initiative avowedly aimed at limiting plaintiffs' searches for deep pockets); Judith C. Glasscock, Comment, *Emptying the Deep Pocket in Mass Tort Litigation*, 18 ST. MARY'S L.J. 977 (1987).

104. See OLLMAN, *supra* note 96, at 145 ("The product gains in power the more the worker spends his own and, Marx maintains, even acquires qualities (now suitably altered) that the worker loses.").

105. *Id.* at 146.

106. AVINERI, *supra* note 101, at 119 (quoting 1 KARL MARX, CAPITAL 72-74 (Moscow, n.d.)). For example, wood can become a table, Marx wrote, and in this "almost mythical transformation," William E. Kilbourne, *Self-Actualization and the Consumption Process: Can You Get There From Here?*, in PHILOSOPHICAL AND RADICAL THOUGHT IN MARKETING, *supra* note 90, at 217, 226, the table becomes a commodity filled with symbolic import: "To the producer, its essence is profits; to the merchant, it has exchange value; and to the owner, it might well be the essence of social status." *Id.* The table contains its own power, apart from the agency of these three persons mentioned. Products embody the labor of persons, but post-industrial society sees these objects as though value and life were inherent in them. See KOLAKOWSKI, *supra* note 97, at 276-77.

107. See OLLMAN, *supra* note 96, at 147.

Products thus enter into relations with one another and with human beings.¹⁰⁸

It is impossible for human beings to reject the power of products over their lives, to opt out of the dominion of objects. For Marx, every product carried with it a set of invariable and accepted usages.¹⁰⁹ These presumptions are part of the social world that no individual can escape. Indeed, the very idea of a product was for Marx a social construct: Only in a collective do individuals understand what things are products and what to do with them.¹¹⁰

In summary, the Marxist concept of industrialization explains the traits of products liability law. Products liability requires manufacture, alienated labor, and products with power and autonomy of their own. The last criterion calls for fuller discussion because it is the power within products that supports a literal explanation of their liability. In Sections B and C below, and later in Part III, accordingly, I expand on the theme of products as autonomous agents.

B. *Objects as Symbols*

Symbolic interactionism, a concept crystallized by George Herbert Mead¹¹¹ and labeled by Herbert Blumer,¹¹² originated in the pragmatic philosophy of William James.¹¹³ Pragmatism found a place between two extremes. For James, neither the Spencerian account of behavior as constrained by social and geographical determinism nor a contrary notion of pure autonomy explained the relationship between the individual and society. James derived an

108. See AVINERI, *supra* note 101, at 119; see also CSIKSZENTMIHALYI, *supra* note 27, at 126–30 (describing the relationship between certain products and human consciousness). According to Professor Waldron, individuals are slaves, and products are masters. See WALDRON, *supra* note 24, at 194.

109. See OLLMAN, *supra* note 96, at 147.

110. See AVINERI, *supra* note 101, at 82. In *Wage Labour and Capital* (1849), Marx gave the example of the “small house.” What is a small house? The same dwelling can be an adequately-sized house so long as the other houses in the neighborhood are of similar size. See *id.* at 80. See generally Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1 (1992) (analyzing relational preferences and their relationship to legal doctrine).

111. See LARRY T. REYNOLDS, *INTERACTIONISM: EXPOSITION AND CRITIQUE* 4 (1993).

112. *Id.* at 76.

113. *Id.* at 22.

explanation of this relationship that acknowledged the force of social order but also insisted on the active and creative nature of the individual.¹¹⁴

To the pragmatist, the destiny of a human being is not predetermined in group membership (as the Spencerians maintained) nor in an innate autonomy. Human nature is grounded in the potential of every person, and this potential can be realized only in interaction.¹¹⁵ Arriving at this position, James and the early pragmatists reflected the Hegelian disposal of dualistic definitions of the social world and the mind. To pragmatists, the mind constantly reinterprets itself as it looks at the world.¹¹⁶ Other writers built a connection between the philosophy of pragmatism and the nascent discipline of sociology, creating what became known as the Chicago School, during the first three decades of the twentieth century.¹¹⁷ The central figure of this Chicago School was George Herbert Mead, who shaped the theory of symbolic interactionism from abstract ideas of pragmatism and thus connected pragmatic philosophy to empirical reality.¹¹⁸

Society antedates the individual, Mead wrote, but individuals "possess and control the world that [they] discover and invent."¹¹⁹ Hence the notion of interaction, whereby interpretation and reflection and judgment of experience are mediated. Mediation takes place through language and symbols. Individuals act towards other individuals and physical objects on the basis of the symbolic meanings that those others have for the individual.¹²⁰

114. See WILLIAM JAMES, PRAGMATISM 254, 256-57 (1907).

115. See BERNARD N. MELTZER ET AL., SYMBOLIC INTERACTIONISM: GENESIS, VARIETIES AND CRITICISM 7 (1975) [hereinafter SYMBOLIC INTERACTIONISM]; Bernard N. Meltzer & Jerome G. Manis, *Emergence and Human Conduct*, 126 J. PSYCH. 333, 337 (1992).

116. See PAUL E. ROCK, THE MAKING OF SYMBOLIC INTERACTIONISM 60 (1979).

117. See SYMBOLIC INTERACTIONISM, *supra* note 115, at 8-27 (describing works of "Chicago School" members Charles Horton Cooley, William I. Thomas, and John Dewey). Charles Horton Cooley used the term "looking glass self" to argue that individuals attempt to imagine the impression they make on others. See *id.* at 8-9; see also CHARLES HORTON COOLEY, HUMAN NATURE AND THE SOCIAL ORDER 183-84 (2d ed. 1902).

118. See ENCYCLOPEDIC DICTIONARY OF PSYCHOLOGY 620-22 (Rom Harre & Roger Lamb eds., 1983).

119. George H. Mead, *Scientific Method and the Moral Sciences*, 33 INT'L J. ETHICS 229, 247 (1923).

120. See ENCYCLOPEDIC DICTIONARY OF PSYCHOLOGY, *supra* note 118, at 620.

Mead relied on several terms to express the process of symbolic interaction. The *self*, a "realm of continual emergence,"¹²¹ engages in perpetual interpretation of symbolic meanings. Entities interpreted are *objects*: Mead preferred to speak of objects rather than stimuli,¹²² perhaps to emphasize the contingent and varying meanings of these objects. An object may be concrete or abstract. A crucial element of interaction for Mead was *role taking*: an imaginative reconstruction of attitudes of the other person, which anticipates the behavior of the other.¹²³ For example, a young adult might attempt to imagine what a parent would think of his new lover.¹²⁴ The individual "cannot experience himself except through the eyes and gestures of others."¹²⁵

Mead labeled the socialized, interpreting, imagining aspect of the self the "Me," to indicate the sense in which individuals are the object of interaction. Having seen glimpses of her persona through the imagination of another point of view, the individual acquires an organized concept of self in relation to others.¹²⁶ Borrowing the Jamesian dichotomy of knower and known, Mead also posited the existence of the "I." This aspect of the self is the one that experiences impulses. Not fully socialized, the "I" represents the human potential for insurgency.¹²⁷

To Mead, the fundamental unit of social behavior was the *act*. Later writers broke the act into subdivisions: perception of the symbolic meaning of the object and subsequent *manipulation*—that is, some form of action taken by the individual—followed by consummation. Meltzer, Petras, and Reynolds give an example of a social act:

121. Mead, *supra* note 119, at 86.

122. See Herbert Blumer, *Society as Symbolic Interaction*, in *HUMAN BEHAVIOR AND SOCIAL PROCESSES* 182 (Arnold M. Rose ed., 1962).

123. See ROBERT H. LAUER & WARREN H. HANDEL, *SOCIAL PSYCHOLOGY: THE THEORY AND APPLICATION OF SYMBOLIC INTERACTIONISM* 104-05, 114-16 (1983).

124. *Id.* at 104.

125. CALVIN J. LARSON, *MAJOR THEMES IN SOCIOLOGICAL THEORY* 99 (1973).

126. See JOHN P. HEWITT, *DILEMMAS OF THE AMERICAN SELF* 53 (1989).

127. *Id.*; see also *SYMBOLIC INTERACTIONISM*, *supra* note 115, at 41 (describing Mead's description of the "I" as equivalent to the ego).

Gesture [or object]: A friend waves to me from across the street.

Perception: I may interpret this as a friendly greeting on his/her part. Or, since we had a violent argument only this morning, I perceive it as sarcastic.

Manipulation: I wave back. Or, if I view the wave as sarcastic, I may not wave back, but look in the other direction.

Consummation: We continue our separate ways. And the act ends. But does it? The essence of social behavior, according to Mead, is found in the fact that the meaning in any social act is not inherent in the act itself, but is governed by the response of the other person. The original gesture (a stimulus) did not determine what would happen (a response). . . . The cumulative nature of behavior means that the latter response may serve as a stimulus to the other individual and help to determine the nature of his response to me the next time we encounter one another.¹²⁸

This bidirectional movement means that individuals are both objects to others and interpreters of other objects; in Mead's view, persons both control and are controlled simultaneously by their environments.¹²⁹ In the example of the wave, whether the gesture was hostile or friendly is a question that cannot be answered by examination of the inherent nature of waves nor by the subjective intent of the greeter or the greeted. But society invests the wave with some meaning about which there is consensus: The individual greeted would recognize the wave as some kind of communicative gesture. Meanings are partly fixed and partly changing.¹³⁰

The consensus of meaning creates continuity in time. As the scholar of symbolic interactionism Paul Rock points out, a person is not the same being as he was in years past: "In a Heraclitean sense, he is not even the same person from second to second."¹³¹ Language and objects create social continuity and permit social organization to exist.¹³² Hannah Arendt explored a similar theme

128. SYMBOLIC INTERACTIONISM, *supra* note 115, at 33-34 (citation omitted).

129. *Id.* at 31.

130. Cf. CSIKSZENTMIHALYI & ROCHBERG-HALTON, *supra* note 20, at 14 (stating that objects tend to evoke consistent images over time and are more durable than other signs such as ideas).

131. ROCK, *supra* note 116, at 113.

132. See EUGENE ROCHBERG-HALTON, MEANING AND MODERNITY: SOCIAL THEORY

when she wrote that people in their differences can achieve sameness through identification with the same object.¹³³

Because they can appreciate the symbolic content of objects, human beings are able to understand the idea of the future and the past.¹³⁴ According to Mead, the symbol takes the individual out of the present.¹³⁵ Among animals, only human beings are known to have this capacity to understand symbolism. Mead contended, for example, that a wolf looking at meat in a trap lacks the concept of "bait." The wolf is trapped in the present because it cannot take the role of a baiting human being.¹³⁶ Symbolic interaction thus helps to explain survival as well as the combination of mobility and stability that permits social life to continue.

C. *Products as a Priori Stimuli*

As a simple example of symbolic interactionism in practice, Mead used a man and a gorilla simultaneously looking at a hammer. For both man and gorilla, the physical image on the retina is the same; each one sees the object. But the "hammeriness" of the hammer is visible only to the man.¹³⁷ In the view of symbolic interactionism, the individual perceives the object according to the socially created meanings that it possesses.

I mention Mead's hammer to indicate my interest in a particular aspect of symbolic interactionism. Although symbolic interactionists have contended that abstractions such as emotions or religion can be objects that the individual perceives,¹³⁸ I want to begin by focusing on concrete and tangible things—"objects" in the ordinary-knowledge sense rather than jargon. Individuals em-

IN THE PRAGMATIC ATTITUDE 170 (1986) ("Symbols provided a means through which humanity could free itself from immediate sensation and unconscious habit . . .").

133. See HANNAH ARENDT, *THE HUMAN CONDITION* 137 (1958).

134. See 1 JOHN LOCKE, *AN ESSAY CONCERNING HUMAN UNDERSTANDING* 448 (Alexander C. Fraser ed., Clarendon Press 1894) (1689) (declaring that a person is a being that "can consider itself as itself, the same thinking thing, in different times and places").

135. See David L. Miller, *Introduction* to GEORGE H. MEAD, *THE INDIVIDUAL AND THE SOCIAL SELF* 10-11 (David L. Miller ed., 1982) (paraphrasing Mead).

136. *Id.* at 11.

137. See *id.* at 133. As twentieth-century research has revealed that primates have a high degree of skill in the use of tools, a contemporary writer might have substituted another animal, such as a cat, for the gorilla.

138. See BLUMER, *supra* note 26, at 2; see also CSIKSZENTMIHALYI & ROCHBERG-HALTON, *supra* note 20, at 14-16 (comparing abstractions and tangible objects).

ploy objects or products (here I use the terms interchangeably) to communicate; products also shape their identity. Tangible things unite the disparate domains of symbolic interactionism and products liability law.

1. *Products as Communication.* People use products to communicate. One familiar form of communication is conspicuous consumption—the flaunting of expensive items. Research tends to support the widely held belief that individuals use products to announce their increased wealth.¹³⁹ Jewelry, fur coats in temperate climates, brands of automobiles known to be expensive yet unreliable,¹⁴⁰ homes or offices with more space than their occupants can use, all communicate to onlookers a similar message. There would be no market for certain products if people did not need them as media of communication. Diamonds, though known to be plentiful, are kept artificially scarce by monopolies; expensive macadamia nuts are inferior in flavor and texture to their cheaper counterparts. Expensive things announce transition to greater wealth and status.

Other transitions are marked by communicative objects. Adolescents use products such as cosmetics, cologne, hairspray, and contact lenses to announce that they have become women and men, or at least that they are no longer girls and boys. In her popular book on etiquette, the social critic Judith Martin advised recently divorced adults not to proclaim their transition with products clichés—hair dye for women and red sports cars for men—on

139. The idea of conspicuous consumption was prominently expressed almost a century ago. See THORSTEN VEBLIN, *THE THEORY OF THE LEISURE CLASS* 70 (The Modern Library, 1934) (1899). Some researchers find that status symbols have declined in number and significance. See Russell E. Belk et al., *Developmental Recognition of Consumption Symbolism*, 9 J. CONSUM. RES. 4, 5-6 (1982) (collecting sources).

140. Some Jaguar automobiles used to sport a bumper sticker: "Ah, But When It Runs. . ." And even a well-reputed make of automobile has symbolic as well as practical value to its owner or driver. Grant McCracken tells the story of an unnamed University of Chicago professor who insisted that he had bought a Volvo for purely utilitarian reasons. To test this statement, McCracken offered the professor a deal: He, McCracken, would purchase, maintain and insure another car, bringing the professor's transportation costs to zero; the car would, however, be accoutered with "fur lining for the seats and dashboard, a hood ornament that showed a rampant horse, and dice for the rear view mirror." The professor refused the offer, claiming that these decorations made the car "less useful to [him]." GRANT MCCracken, *CULTURE AND CONSUMPTION: NEW APPROACHES TO THE SYMBOLIC CHARACTER OF CONSUMER GOODS AND ACTIVITIES* 145 (1988).

the ground that these products overcommunicate the trait of sudden availability.¹⁴¹ Black or white mourning clothes communicate bereavement; a ring on the third finger of the left hand declares marriage; in some circles, a man might announce his newly open pride in being gay with an earring.

Professor Russell Belk has examined the phenomenon of products as communication with several innovative studies. His "detective study" presented subjects with the purported contents of a wallet found by the New York police department.¹⁴² Subjects were asked to draw inferences from the business cards, credit cards, matchbooks, admission tickets and ballpoint pens inside the wallet as well as the quality of the wallet itself. Belk found significant agreement on the traits that these possessions expressed.¹⁴³ In a developmental study, Belk and his colleagues found that elementary school—between the second and sixth grades—is the time when children learn to infer meanings from consumption choices.¹⁴⁴

Students in psychology classes have participated in several experiments designed to measure further the communicative function of personal possessions.¹⁴⁵ One of these studies asked college women to describe their own personalities, using adjectives, and to put on the clothes that best expressed their personalities. They were photographed in these outfits with their face and hair blacked out. The students also listed the record albums that best represented their personalities. Another group of students, the raters, used these possessions to infer the personalities of the owners. The study found significant agreement between self-ratings and observer ratings.¹⁴⁶ Other studies by the same researchers found that observers regard possessions as conveying more information about a person than behavioral cues,¹⁴⁷ and that observers who

141. See JUDITH MARTIN, *MISS MANNERS' GUIDE TO EXCRUCIATINGLY CORRECT BEHAVIOR* 559 (1982).

142. See Russell E. Belk, *Assessing the Effects of Visible Consumption on Impression Formation*, 5 *ADVANCES IN CONS. RES.* 39 (1978).

143. *Id.* at 42-44.

144. See Belk et al., *supra* note 139, at 13.

145. See W. Jeffrey Burroughs et al., *Predicting Personality From Personal Possessions: A Self-Presentational Analysis*, 6 *J. SOC. BEHAV. & PERSONALITY* 147 (1991).

146. *Id.* at 150-52. For a contrary finding, see Stuart J. McKelvie et al., *Effects of Offenders' and Victims' Characteristics on Severity of Punishment*, 72 *PSYCH. REP.* 399, 401 (1993).

147. See Burroughs et al., *supra* note 145, at 156.

relied first on products rather than behavioral cues were more likely to describe the observed person in a way that agreed with her self-description.¹⁴⁸ Thus the products chosen by these individuals said more about their personalities than their behavior.

Older empirical studies show that observers receive messages from brands of beer,¹⁴⁹ products used in grooming,¹⁵⁰ and cigarette brands,¹⁵¹ among many other products. These messages can change over time, and consensus about what the product signifies can disappear. Nonetheless, significant correlations between product and concept continue to be identified.¹⁵²

2. *Products as Shapers of Identity.* Although most individuals would admit readily that interaction with objects alters life, it is perhaps less evident that objects are a part of one's self.¹⁵³ Csikszentmihalyi and Rochberg-Halton suggest that "people are what they attend to, what they cherish and use."¹⁵⁴ They find examples in history. Paleolithic artifacts may have been a force of natural selection, favoring the survival of those who could and would use them. The invention of the stirrup enabled knights to wear full armor: an armor-wrapped knight could vanquish peasants and maintain feudalism. Contraceptives and household appliances decreased the amount of "psychic energy" needed for domestic

148. *Id.* at 157-60.

149. See James Gentry et al., *Masculinity and Femininity Factors in Product Perception and Self Image*, 5 ADVANCES IN CONSUMER RES. 326 (1978).

150. See George E. Belch & E. Laird Landon, *Discriminant Validity of a Product-Anchored Self-Concept Measure*, 14 J. MARKETING RES. 252, 253 (1977).

151. See Gentry et al., *supra* note 149.

152. Rebecca Holman pulls these studies together in her theory of product use as communication. Holman argues that there are three necessary and sufficient conditions for a product to be used as communication: visibility in use, variability in use, and "personalizability." See Rebecca H. Holman, *Product Use as Communication: A Fresh Appraisal of a Venerable Topic*, in REVIEW OF MARKETING 106, 107 (Ben M. Enis & Kenneth J. Roering eds., 1981). In other words, observers must be able to see (or otherwise perceive) the product; the product must vary slightly from user to user; and the use of the product must be attributable to an individual. *Id.* Holman gives a hospital "gown" as an example of a product that lacks variability; a product that lacks personalizability is a costume worn in a play. *Id.* When products have all three traits, they can communicate messages about their users. *Id.*

153. See CSIKSZENTMIHALYI & ROCHBERG-HALTON, *supra* note 20, at 14-15; see also Russell E. Belk, *Extending Self and Extending Paradigmatic Perspective*, 16 J. CONSUMER RES. 129, 129 (1989) ("Possessions are part of the extended self in this society."). For a related argument made in the legal literature, see Radin, *Personhood*, *supra* note 66.

154. CSIKSZENTMIHALYI & ROCHBERG-HALTON, *supra* note 20, at 16.

tasks, leaving women free to seek new things that would help them define who they are.¹⁵⁵

Intellectual ancestry can be traced to William James, who wrote that "*a man's Self is the sum total of all that he CAN call his*, not only his body and his psychic powers, but his clothes and his house, his wife and children, his ancestors and friends, his reputation and works, his lands and horses, and yacht and bank-account."¹⁵⁶ Owners of possessions attach meanings to those things. Later writers have elaborated on James' statement and have measured, through empirical research, the degree of "self" invested in possessions.

Investment of self in objects may be seen in cultural taboos (in addition to laws) against forgery of art and plagiarism, as well as the phenomenon of symbolic contamination: Chewed food and used combs are considered disgusting, and there is virtually no market for secondhand clothes worn close to their former owners, such as underwear and socks.¹⁵⁷ Religious practices unite selves with objects: the most famous of these rituals is Christian communion. Virtually every division of the humanities and social sciences—literature,¹⁵⁸ anthropology,¹⁵⁹ psychology,¹⁶⁰ criminology,¹⁶¹

155. *Id.* at 45–46, 93. The association of industrialization and technology with freedom for women is debatable. See, e.g., JULIET B. SCHOR, *THE OVERWORKED AMERICAN: THE UNEXPECTED DECLINE OF LEISURE* 87–88 (1991) (reporting findings that time spent on housework has increased since the introduction of household appliances); BARBARA EHRENREICH & DEIRDRE ENGLISH, *FOR HER OWN GOOD* 5–13 (1978) (arguing that industrialization and antifeminist ideology are related phenomena); NAOMI WOLF, *THE BEAUTY MYTH: HOW IMAGES OF BEAUTY ARE USED AGAINST WOMEN* 15, 22–24 (1991) (describing negative impact of industrialization on women).

156. 1 WILLIAM JAMES, *THE PRINCIPLES OF PSYCHOLOGY* 291 (1890).

157. Belk, *supra* note 153, at 149, 151–52.

158. *Chosisme*, an "all but stillborn literary movement," aspired to "portray human life mainly in terms of the characters' acquisition, use, and disposal of objects, and not in terms of an inner stream of consciousness or of a sequence of actions and events." CSIKSZENTMIHALYI & ROCHBERG-HALTON, *supra* note 20, at xi. See also *infra* text accompanying notes 163–65.

159. See MARCEL MAUSS, *THE GIFT: FORMS AND FUNCTIONS OF EXCHANGE IN ARCHAIC SOCIETIES* 10 (Ian Cunnison trans., 1967) ("The thing given [by Maoris] is not inert. It is alive and often personified, and strives to bring to its original clan and homeland some equivalent to take its place.") On product dynamism and symbolism present in gift-giving, see MCCracken, *supra* note 140, at 84–85; Pollack, *supra* note 28, at 1403.

160. See Rudmin, *supra* note 43; see also *supra* text accompanying notes 137–52.

161. See Elijah Anderson, *The Code of the Streets*, ATLANTIC MONTHLY, May 1994, at 81, 88–89 (arguing that for gang members trophy objects "can symbolize the ability to violate somebody—to 'get in his face,' to take something of value from him, to 'dis' him, and thus to enhance one's own worth by stealing someone else's").

as well as sociology—can provide examples of the investment of self in objects.¹⁶²

Several Nobel laureates in literature share an interest in the role of objects as sources and shapers of identity. In *Being and Nothingness*, Jean-Paul Sartre wrote that the only way individuals know who they are is by observing what they have.¹⁶³ Saul Bellow's *Humboldt's Gift* declares that the dead live through their possessions left on earth, and that those possessions affect the living.¹⁶⁴ Toni Morrison, in *The Bluest Eye*, tells the harrowing story of the effect of a doll on its young owner.¹⁶⁵ In addition to such literary flourishes, ordinary experience and observation suggest that products shape selves. Travel souvenirs remind their owners of their past and of their status as persons of the world. A gun as frontier "equalizer" conveys the power of an object to shape the self.¹⁶⁶ People grieve over the loss or destruction of objects that have no market value.¹⁶⁷

Objects can remind their possessors of an ideal self in the making. A small boy might express his craving for adulthood by taking his father's pipe or razor, or playing with forbidden things.¹⁶⁸ Objects also orient possessors toward a future that looks brighter than present reality. For example, researchers found that M.B.A. students who had predictors indicating a relatively low chance of success in the job market used stereotypical products such as attaché cases, expensive pens, and conservative clothes more frequently than their relatively successful classmates. The men in the low-success category were also more likely to wear their hair short and less likely to have mustaches or beards.¹⁶⁹

162. For a dissenting view, see Joel B. Cohen, *An Over-Extended Self?*, 16 J. CONSUMER RES. 125, 126-27 (1989) (arguing that concept of an "extended self" formed by possessions lacks empirical identification, meaning, and explanatory power).

163. See JEAN-PAUL SARTRE, *BEING AND NOTHINGNESS* 750-55 (Hazel E. Barnes trans., Washington Square Press, Pocket Books 1966) (1943).

164. SAUL BELLOW, *HUMBOLDT'S GIFT* (1975).

165. TONI MORRISON, *THE BLUEST EYE* (1970).

166. See Belk, *supra* note 153, at 145.

167. See Russell W. Belk, *The Role of Possessions in Constructing and Maintaining a Sense of Past*, 17 ADVANCES IN CONSUMER RES. 669, 674 (1990) (arguing that destruction of "important objects" causes the individual to lose a part of his past) (citation omitted); Radin, *Personhood*, *supra* note 66, at 959 (describing attachment to wedding rings, portraits, heirlooms, and houses).

168. ERNEST E. BOESCH, *SYMBOLIC ACTION THEORY AND CULTURAL PSYCHOLOGY* 204 (1991).

169. ROBERT A. WICKLUND & PETER M. GOLLWITZER, *SYMBOLIC SELF-COMPLETION*

Entire character traits—envy, acquisitiveness, materialism—express how much power possessions have over the identity of an individual. Awareness of the things or acquisitions of another helps to determine what an individual wants. How possessions shape attitudes and tastes is a phenomenon frequently studied in social science writing of interest to academic lawyers,¹⁷⁰ especially those who study the relationship between welfare economics and law.¹⁷¹

3. *Products as Antecedent Stimuli.* This discussion begins with the insights of Michael Solomon, who approaches the role of products as a priori stimuli through the discipline of symbolic interactionism.¹⁷² Professor Solomon begins by evaluating the assumption prevalent in marketing scholarship—and in the law of contracts and products liability as well—that products are responses to antecedent needs. Consumer research generally addresses the decision to purchase;¹⁷³ according to the prevailing view, the product is the material satisfaction of a need.¹⁷⁴ While conceding the empirical truth of this assumption, Solomon argues that it is not the whole story: Products, he writes, “can play an a priori role as stimuli that are antecedent to behavior.”¹⁷⁵ Solomon builds on the marketing literature discussed above that finds cues in the products used by another individual. If I draw inferences from your cologne, or

152–55 (1982).

170. See, e.g., JON ELSTER, *SOUR GRAPES* 109–24 (1983) (combining psychological concepts such as cognitive dissonance with assumptions present in economics).

171. See POSNER, *supra* note 16, at 461 n.2 (discussing envy); McAdams, *supra* note 110; Cass R. Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986). The legal/philosophical genre of incommensurability is a related project, as it also challenges presumptions of unitary valuation and stagnant tastes. See generally Cass R. Sunstein, *Incommensurability and Valuation in Law*, 92 MICH. L. REV. 779, 781, 825–50 (1994) (offering examples of topics in law that would benefit from increased attention to sources of valuation).

172. See Michael Solomon, *The Role of Products as Social Stimuli: A Symbolic Interactionism Perspective*, 10 J. CONSUMER RES. 319 (1983).

173. See JOEL R. EVANS & BARRY BERMAN, *MARKETING* (4th ed. 1990).

174. Contract law emphasizes autonomous decisionmaking and usually assumes that a buyer or consumer knows what she wants and thus enters into a transaction to fulfill that want. The contrary theme of consumer protection is premised on the idea that this autonomy must be augmented by the expansion of consumer choice: For example, buyers are sometimes allowed to rescind certain contracts within a few days after the contract is made. Beyond this point, according to prevailing contract theory, lies paternalism. See Clare Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997, 1027 (1985).

175. See Solomon, *supra* note 172, at 322.

clothing, or automobile,¹⁷⁶ and these same products have similar meanings for me as I attempt to explain and understand myself,¹⁷⁷ then the products may stimulate my behavior.¹⁷⁸ Solomon illustrates his point with a diagram.¹⁷⁹

FIGURE 1

BI-DIRECTIONAL RELATIONSHIP BETWEEN PRODUCTS AND CONSUMERS

	<i>Antecedent</i>	<i>Motivation</i>	<i>Result</i>
Products as responses (traditional view)	self-image →	need arousal →	need satisfaction product purchase impression management
Products as stimuli (Solomon proposal)	product → symbolism	role definition →	self-attribution situational self-image role performance

A simple application of this idea is dramaturgical: The individual responds to products as stimuli when she finds herself in a setting filled with meaning-laden objects.¹⁸⁰ She acts differently in a McDonald's franchise than she would in a gourmet restaurant.¹⁸¹ Products set the state of behavior; individuals respond.

Objects shape and communicate identity as indicated in Figure 1. The business student with a shaky place in graduate school sees the brand-name pen or briefcase and is reminded of an uncertain

176. See *supra* text accompanying notes 139-52.

177. See Michael Solomon, *Deep-Seated Materialism: The Case of Levi's 501 Jeans*, 13 *ADVANCES IN CONSUMER RES.* 619, 621 (1986) (arguing that Levi's jeans perform social and psychological functions such as personalization and facilitation of social role-playing).

178. Professor Kilbourne makes a similar point:

Though the direction of the process relating products to people is, in contemporary marketing, generally considered to be people creating products, there is substantial historic and contemporary precedent for considering the logical flow to be bidirectional, with products also contributing to the development of people.

Kilbourne, *supra* note 106, at 225-26.

179. Solomon, *supra* note 172, at 323.

180. See ERVING GOFFMAN, *THE PRESENTATION OF SELF IN EVERYDAY LIFE* 126-28, 135-36 (1953).

181. Similarly, the cues present in a stadium might contribute to a riot. Solomon offered these examples to me in a letter. Letter from Michael Solomon to Anita Bernstein (undated) (on file with the author).

future. Product symbolism makes the student think of success and confidence. This antecedent leads to what Solomon calls "motivation"; the student seeks a more secure situational self-image. Owning the pen or briefcase leads to self-attribution. McCracken's professor saw a Volvo and wanted one, but recoiled at "he thought of receiving, for free, the use of a car just because of its decorative touches."¹⁸² Teenagers will work with extraordinary energy to acquire the right sportswear or cosmetics: prior observation of products tells them how these items conduce to their selfhood.

As this discussion suggests, products function as symbols most strikingly in a world of advanced industrialization, because only this setting can provide a context in which each product is known not to be unique. The bidirectional relationship of Figure 1 presupposes a market economy, with well-developed exchange and also a background of advertisement, to create shared notions of what a product means. Every product, as Erich Fromm once explained, is both unique and general, concrete and abstract.¹⁸³ The abstract nature of the product always predominates in the consumption relationship. And when a product is an antecedent stimulus, it acts as an abstraction.¹⁸⁴ During the post-industrial era in the United States, when the abstract significance of manufactured products began to overcome their status as concrete, physical objects,¹⁸⁵ both product dynamism and products liability grew in force.¹⁸⁶

182. See MCCracken, *supra* note 140.

183. Kilbourne, *supra* note 106, at 225 (citing ERICH FROMM, *THE SANE SOCIETY* 114 (1955)).

184. See *id.* Another writer speaks of the "utter triumph of abstract value" within the consumer culture. STUART EWEN, *ALL CONSUMING IMAGES: THE POLITICS OF STYLE IN CONTEMPORARY CULTURE* 159 (1988).

185. See Kilbourne, *supra* note 106, at 222 (arguing that Americans "are far more interested in the symbolic aspects of products than the physical aspects") (citation omitted).

186. The Fromm distinction between concreteness and abstractness, or uniqueness and generality, of a product, see *id.*, has a counterpart in products liability doctrine that distinguishes between production or manufacturing defects on the one hand, and defects based on the seller's deliberate decisions, including marketing and design, on the other. When a product fails to conform to specifications, its uniqueness is at issue. Claims alleging defective marketing or design involve a more abstract idea of the product. See, e.g., *Leichtamer v. American Motors Corp.*, 424 N.E.2d 568, 580 (Ohio 1981) (allowing punitive damages against manufacturer based on strongly evocative, colorful advertising when design did not provide safety features commensurate with this portrayal).

II. PRODUCT DYNAMISM IN LEGAL DOCTRINE

The law of industrialized nations, especially American law, recognizes product dynamism. This understanding takes several forms of expression. In this Part, I address the numerous areas of law that regard nonhumans as animate sources of agency: Some of this recognition is metaphoric, and much of it extends past metaphor. As I have argued, the development of products liability law beginning in the American industrial era is another acknowledgment of the powers in products. For additional examples, I move ahead to the 1980s, surveying the attention paid to products that are deemed lost to liability doctrine.

Revealing images attribute vital properties to nonhuman actors. These metaphors ultimately do not relieve human beings of responsibility because the connection between things and human choices is acknowledged. They help, however, to explain the development, and persistence, of a unique legal doctrine for products.

A. *The Object as Wrongdoer*

The term *fait de la chose*, approved in France in 1897,¹⁸⁷ acknowledges figuratively that there can be an "act of the thing," for which the civil liability system might blame any of several human beings.¹⁸⁸ *Fait de la chose* regards the control over an object as having more than one possible source. Any type of *gardien*, or keeper, might be a defendant in a products liability action. The *gardien de la structure*, or keeper of the internal dynamism, is generally the producer of a manufactured product; the *gardien du comportement* is an owner, keeper, or operator.¹⁸⁹ From *fait de la*

187. See Hessel E. Yntema, *The Law of Obligations*, in *CIVIL LAW IN THE MODERN WORLD* 58, 69-70 (Athanasios N. Yiannopoulos ed., 1963); *CODE CIVIL* [C. civ.] art. 1384 (Fr.).

188. Yntema, *supra* note 187, at 70; see also STEPHANE GRUBER-MAGITOT, *L'ACTION DU CONSOMMATEUR CONTRE LE FABRICANT D'UN OBJET AFFECTÉ PAR UN VICE CACHÉ* 98-99 (1978). "*La doctrine est partagée*," adds Gruber-Magiot, *id.* at 100 n.1; but whether or not *fait de la chose* is currently used to resolve most products liability disputes in France, its analytical contribution to products liability law remains powerful.

189. As Jolowicz elaborates,

[T]he person who acquires a product acquires the *garde* only of its behavior (*comportement*); *garde* of its *structure* remains with the person best able to know its internal properties and composition. It follows, for example, that [in certain cases] it is sufficient for the victim to prove that his damage was caused by the "structure" of the thing—he need not even prove defect, let alone fault.

chose, a strict variation of products liability has evolved in some European nations.¹⁹⁰

The idea of the act of a thing exists also in American products liability doctrine and its English antecedents. For example, many subconcepts of products liability law isolate products as distinct from human beings and the corporations that employ them. Statutes of repose posit a radical separation between product and maker: After a period of years, these statutes disconnect products from their manufacturers by terminating the attribution of a flaw to the producer. This severance asserts that although a defective product may cause harm, the passage of years gathers all of this responsibility into the product itself (or onto another person) and away from the manufacturer. The theory behind breach of warranty avoids reference to manufacturer misconduct: It is the thing itself that must be merchantable or fit for a purpose, with little room for excuses. These doctrines are conventionally explained in terms of policy, not illustrations of the product as wrongdoer, but their emphasis on the object itself rather than individual or aggregate human conduct echoes *fait de la chose*.

The notion of the product as wrongdoer also illuminates caselaw that purports to reconcile "strict liability" with "fault," and it can accommodate other products-liability concepts, such as punitive damages or comparative negligence, that depend on fault.¹⁹¹ Rationales commonly used to apply comparative negligence to strict liability are illuminating. Most commentators want to permit the two concepts to coexist,¹⁹² and they struggle for a coherent analytical connection. One approach analogizes strict products liability to negligence per se.¹⁹³ Another rationale, with some

Jolowicz, *supra* note 8, at 376 (citations omitted).

190. See Frank A. Orban, III, *Product Liability: A Comparative Legal Restatement—Foreign National Law and the EEC Directive*, 8 GA. J. INT'L & COMP. L. 342, 349–50 (1978) (describing strict products liability derived from French interpretation in France, Belgium, and Luxembourg).

191. See *Jackson v. Johns-Manville Corp.*, 781 F.2d 394 (5th Cir. 1986) (punitive damages), *cert. denied*, 478 U.S. 1022 (1986); *Daly v. General Motors Corp.*, 575 P.2d 1162 (Cal. 1978) (comparative negligence).

192. Although some writers have contended that fault-based doctrines and strict products liability "will not mix," it is widely agreed that this argument has not withstood analysis. See David G. Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1268–70 & nn.47–54 (1976).

193. *Dippel v. Sciano*, 155 N.W.2d 55 (Wis. 1967), was the first expression of this

sophistry, finds "social fault" in marketing defective products or "legal fault" derived from a breach of duty to market products without defects.¹⁹⁴ Other efforts simply dodge the question of comparison.¹⁹⁵ The approaches rely either on stretching the concept of fault beyond its natural meaning or on denying the problem of logical compatibility. It is actually less farfetched to envision the product itself as a kind of wrongdoer. This concept preserves the notion of fault that must complement fault-based remedies and defenses while acknowledging that the product is distinct from its maker.

Apart from products liability doctrine, the object-as-wrongdoer approach of *fait de la chose* has other important analogies in American law. *Fait de la chose* derives from principles of liability for harms caused by animals.¹⁹⁶ The idea that nonhuman actors could be causal agents made French courts receptive to the idea that a thing also could act. English and American courts did not make this connection expressly, but modern products liability law, being "strict," traces its lineage to this older form of strict liability.

Animals and products occupy a unique place in an account of causation of harm. Semi-autonomous,¹⁹⁷ they cause injury only derivatively, and what they "do" is a manifestation of a human omission or act. Their connection to human conduct must be acknowledged for both corrective-justice reasons of attributing responsibility and for the policy of compensating a victim. But the incompleteness of that connection is expressed lexically in the term

rationale. See also *West v. Caterpillar Tractor Co.*, 336 So. 2d 80, 90 (Fla. 1976) ("Strict liability means negligence as a matter of law or negligence per se."); *Atkins v. American Motors Corp.*, 335 So. 2d 134, 139-42 (Ala. 1976). For cases analogizing strict products liability to negligence per se, see *Fischer v. Johns-Manville Corp.*, 512 A.2d 466, 471 (N.J. 1986); *Austin v. Raybestos-Manhattan, Inc.*, 471 A.2d 280, 285 (Me. 1984). But see *Young's Machine Co. v. Long*, 692 P.2d 24, 25 n.1 (Nev. 1984); *Wenatchee Wenoka Growers Assoc. v. Krack Corp.*, 576 P.2d 388, 391 (Wash. 1978), which both explicitly reject the *Dippel* formulation.

194. See David A. Fischer, *Products Liability—Applicability of Comparative Negligence*, 43 MO. L. REV. 431, 442 (1978).

195. See *id.* at 444-47 (describing and criticizing "comparative causation" approach); see also *id.* at 449-50 (offering Professor Fischer's preferred resolution, reducing plaintiff's recovery in proportion to his own fault).

196. See Yntema, *supra* note 187, at 69-70.

197. Cf. Elizabeth C. Hirschman, *Consumers and Their Animal Companions*, 20 J. CONSUMER RES. 616, 624 (1994) (discussing theory that companion animals mediate between nature and culture and, because of their semihuman status, must not be intentionally abandoned or consumed as food).

strict liability, implying that in one sense the person-defendant was not at fault.

Illustrations of this point may be found in ancient legal codes. Mosaic law provided a death penalty—stoning—for the ox that gored a man or a woman, causing the person's death.¹⁹⁸ Normally the owner would not be punished, but if the owner knew of the propensity of the ox to gore and did not keep the animal restrained, the owner also faced a penalty when the ox caused the death of a human being.¹⁹⁹ Again human conduct is linked with, but also separated from, the errant activity of the nonhuman wrongdoer. As in modern strict liability, the owner of the injuring animal (like the manufacturer of a product) cannot escape responsibility even when the victim does not prove fault; yet the defendant's conduct is pertinent, increasing or decreasing his culpability for the injury. The Biblical rule parallels the modern doctrine that a manufacturer is strictly liable for harms caused or occasioned by its product, and can be liable additionally (under a separate count of negligence or for punitive damages) if the plaintiff can prove fault.

The fact that inanimate objects can be wrongdoers is not an unfamiliar concept in medieval law, which provided occasionally for their punishment:

Probably to the primitive mind the ox that gored a man, the sword that slew, and the murderer that wielded it were much more on one level than they can be to us. The animal or tool, if not conscious themselves, might be endued with a magic power or possessed with an evil spirit. It was well to get rid of them before they did more harm.²⁰⁰

The English law of deodands, a topic that Oliver Wendell Holmes regarded as essential, attributed blame to an object that

198. See *Exodus* 21:28.

199. Penalties ranged from a fine to execution of the owner. See *Exodus* 21:29–32. The Code of Hammurabi was more lenient:

If a man's ox were known to gore, and he had been notified that it was a gorer, and he have not wound up its horns, and have not shut it up, and the ox gore a free-born man, and kill him, he shall pay one-half mina of silver.

THE CODE OF HAMMURABI No. 251, reprinted in *SOURCES OF ANCIENT AND PRIMITIVE LAW* 387, 436 (Albert Kocourek & John H. Wigmore eds., 1915).

200. Richard R. Cherry, *Primitive Criminal Law*, in *PRIMITIVE AND ANCIENT LEGAL INSTITUTIONS* 122, 143 (Albert Kocourek & John H. Wigmore eds., 1915).

was the direct agent of a person's death.²⁰¹ Under the law of deodands, the value of the harm-causing object was assessed, and this amount was payable to the Crown.²⁰² Holmes gave the example of a cart as a thing that could be viewed as the agent of a man's death and forfeited.²⁰³ A tree that fell and killed a person was to be "executed, its corpse delivered to the person's kinsmen to chop up and put to revengeful and beneficial use at the hearth."²⁰⁴

To some writers, notably former Justice Brennan, the modern law of forfeiture is derived from deodands.²⁰⁵ Whether this association is correct as a matter of history is disputed,²⁰⁶ but forfeiture shares the theme of personification of objects. Admiralty forfeiture, in particular, insists that a ship has a distinct personification. In two nineteenth-century admiralty cases, Justice Story upheld *in rem* actions against ships where actions against persons did not lie.²⁰⁷ The vessel, Story wrote, "is treated as the offender, as the guilty instrument or thing to which the forfeiture attaches."²⁰⁸

201. See OLIVER W. HOLMES, JR., *THE COMMON LAW* 24-25 (1881).

202. Jacob J. Finkelstein, *The Goring Ox: Some Historical Perspectives on Deodands, Forfeitures, Wrongful Death and the Western Notion of Sovereignty*, 46 *TEMP. L.Q.* 169, 185 (1973).

203. HOLMES, *supra* note 201, at 25.

204. Christopher D. Stone, *Should Trees Have Standing Revisited: How Far Will Law and Morals Reach? A Pluralist Perspective*, 59 *S. CAL. L. REV.* 1, 38 (1985) (discussing example from Holmes's *THE COMMON LAW*). Professor Stone's thesis is probably the best-known precedent in legal scholarship for the animist strain in my argument. See generally CHRISTOPHER D. STONE, *SHOULD TREES HAVE STANDING?* (1975).

Sources of ancient Greek law indicate that the Greeks tried and punished nonhuman wrongdoers, as well as unidentified human criminals, at the king's court at the Prytaneion. Animals, inanimate objects, and unknown killers were prosecuted at this court. It is not clear exactly how these trials took place, but there could be no presentation of a defense except possibly in cases where an animal might be defended by its owner. The penalty imposed on inanimate objects was to be cast from the city, while the penalty for animals was probably execution and expulsion of the corpse. Marilyn A. Katz, *Ox-Slaughter and Goring Oxen: Homicide, Animal Sacrifice and Judicial Process*, 4 *YALE J.L. & HUMAN.* 249, 269-70 (1992).

205. See *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 (1974).

206. See Tamara R. Piety, Comment, *Scorched Earth: How the Expansion of Civil Forfeiture Doctrine Has Laid Waste to Due Process*, 45 *U. MIAMI L. REV.* 911, 919 n.36 (1991).

207. See *The Palmyra*, 25 U.S. (12 Wheat.) 1 (1827); *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210 (1844). In *Brig Malek Adhel*, the ship's captain committed acts of piracy against other ships. The vessel's owners were not held liable for the acts of the captain. Nonetheless, Story held that their ship could be forfeited.

208. *Brig Malek Adhel*, 43 U.S. at 233.

Current statutory law requires the forfeiture of boats involved in the violation of customs laws.²⁰⁹

Like modern products liability law, deodands and its progeny have been attacked as preposterous fictions, devised with a cynical purpose in mind. According to some abolitionist writing about products liability, a separate doctrine exists to perpetuate a livelihood for lawyers, and makes no conceptual sense.²¹⁰ In a similar analysis, Blackstone once described deodands as a crude superstition that the English government invoked to tax its subjects.²¹¹ Deodands is, of course, as obsolete as a legal notion can be, and strict products liability may follow it into oblivion. The idea of animation behind both concepts, however, continues to resonate.²¹² And as the legal historians Pollock and Maitland have suggested, it will endure as long as human beings feel impelled to curse the chairs over which they stumble.²¹³

B. *Grieving for Lost Products*

Using the metaphors of abandonment, sacrifice, and loss,²¹⁴ some writers who study products liability demonstrate their belief that products are animated by a kind of life force. The cessation of a line of goods attributable to liability concerns can provoke expressions of bereavement. The difference between products withdrawn for reasons not based on liability and products "driven from the market"²¹⁵ appears to parallel the difference between natural

209. See 19 U.S.C. § 1594 (1988).

210. See Wheeler, *supra* note 9, at 23.

211. See 1 WILLIAM BLACKSTONE, COMMENTARIES 289-92 (1966).

212. See, e.g., Albert W. Alschuler, *Ancient Law and The Punishment of Corporations: Of Frankpledge and Deodand*, 71 B.U. L. REV. 307 (1991) (applying ancient legal concepts of personification to the problem of corporate criminal liability).

213. See FREDERICK POLLOCK & FREDERIC W. MAITLAND, A HISTORY OF ENGLISH LAW 474 (2d ed. 1899).

214. See HUBER, LIABILITY, *supra* note 14, at 207-08; Man C. Maloo & Benjamin A. Neil, *Products Liability Exposure: The Sacrifice of American Innovation*, 13 J. PROD. LIAB. 361, 362-63 (1991); Randolph J. Stayin, *The U.S. Product Liability System: A Competitive Advantage to Foreign Manufacturers*, 14 CAN.-U.S. L.J. 193, 205 (1988) (listing "abandoned" products).

215. Joseph A. Page, *Generic Product Risks: The Case Against Comment k and for Strict Tort Liability*, 58 N.Y.U. L. REV. 853, 878 (1983). Professor Page is not a griever.

death and death by violence.²¹⁶ Bad things, reform proponents appear to argue, happen to good products because of liability.

Grieving for lost products has come from varied quarters. According to one business-sponsored survey of manufacturing executives, 47% of American manufacturers have withdrawn products from the market, and 25% have discontinued research because of liability concerns.²¹⁷ A conference at the Brookings Institution produced Huber and Litan's *The Liability Maze*, a collection of papers assembled to demonstrate the proposition that liability harms innovation and prevents valuable products from reaching the market.²¹⁸ In a well-publicized 1991 speech, then-Vice President Dan Quayle told an audience of lawyers that the American liability system discouraged the marketing of useful and desired products.²¹⁹

Liability, according to those who grieve, eliminates products from the market in at least three ways. First, it obstructs innovation that would otherwise bring new technologies to the fore. Second, it militates at the margin against the marketing of a new product. Third, it causes managers to decide to cease manufacture of existing products. The first category, products never made because of the decline in innovation, is said to include contraceptives²²⁰ (sparse research into new technologies has been taking place in the last decades) and, in general, any product to be used mainly by younger persons in good health.²²¹ It also includes vaccines and general aviation.²²² The second, products known to have been created that were not marketed, includes miscellany such as certain new vaccines,²²³ a drug called Ocunum,²²⁴ a

216. The loss of a product due to the regulatory ban of an agency may be analogized to execution after due process of law.

217. See E. Patrick McGuire, *The Impact of Product Liability*, 908 CONF. BD. RES. REP. 20 (1988).

218. See *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* (Peter W. Huber & Robert E. Litan eds., 1991). See also Maloo & Neil, *supra* note 214 (subtitled, *The Sacrifice of American Innovation*). Huber has said that while preparing the book he contacted business organizations in search of authors he knew would write that liability concerns were "killing innovation." Kenneth Jost, *Tampering with Evidence*, A.B.A. J., Apr. 1992, at 45, 47-48.

219. See Queenan, *supra* note 34, at C1-C2.

220. See Gina Kolata, *Will the Lawyers Kill Off Norplant?*, N.Y. TIMES, May 28, 1995, at A3, A5.

221. See STEVEN GARBER, *PRODUCT LIABILITY AND THE ECONOMICS OF PHARMACEUTICALS AND MEDICAL SERVICES* 166 (1993).

222. See HUBER, *LIABILITY*, *supra* note 14, at 156, 161.

223. See Huber, *Safety*, *supra* note 14, at 289-90.

substitute for asbestos,²²⁵ a turbo-charged rotary engine for general aviation,²²⁶ and a child safety rail.²²⁷ The third category, products withdrawn because of liability, has received the most attention. In martyrdom are Bendectin, the morning sickness drug;²²⁸ Copper-7, the intrauterine device withdrawn by Searle;²²⁹ the CJ-5 and CJ-7 model Jeeps once made by American Motors;²³⁰ and the Puritan-Bennett anesthesia gas machine.²³¹ Writers have also identified imperiled products: certain contraceptives,²³² motorcycles,²³³ and antidepressants such as Prozac, among others.²³⁴ Even those who are habitual lamenters, however, have agreed that certain consumer items deserved to go to products-liability hell.²³⁵

In grieving for lost products, writers demonstrate some important features of product dynamism. The grieving posture favors the abstract, symbolic nature of products rather than their unique-

224. See Note, *A Question of Competence: The Judicial Role in the Regulation of Pharmaceuticals*, 103 HARV. L. REV. 773, 774 (1990). Oculinum was eventually approved by the FDA and brought to market.

225. See Richard J. Mahoney, *Time to Unshackle U.S. Competitive Strengths*, SCI. AM., May 1990, at 136.

226. See Stayin, *supra* note 214, at 205.

227. See Evelyn Gilbert, *Product Liability Woes Keep Juvenile Products Off Market*, NAT'L UNDERWRITER CO. REP., Mar. 11, 1991 at 1.

228. See Huber, *Safety*, *supra* note 14, at 333 n.196; Joseph Sanders, *The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts*, 43 HASTINGS L.J. 301 (1992).

229. See W. Kip Viscusi & Michael J. Moore, *Rationalizing the Relationship Between Product Liability and Innovation*, in TORT LAW IN THE PUBLIC INTEREST: COMPETITION, INNOVATION AND CONSUMER WELFARE 105, 112 (Peter H. Schuck ed., 1991) [hereinafter TORT LAW].

230. Kevin Klose, *A U.S. Era Ends: Last Jeep is Built—It's Taps for Popular World War II Vehicle*, WASH. POST, Jan. 29, 1986, at A3.

231. See Michael Brody, *When Products Turn Into Liabilities*, FORTUNE, Mar. 3, 1986, at 22; Dan Quayle, *Now is the Time for Product Liability Reform*, Daily Rep. for Exec. (BNA) No. 59 (Mar. 27, 1990).

232. See Albert G. Thomas, Jr. & Stephanie M. LeMelle, *The Norplant System: Where Are We in 1995?*, 40 J. FAM. PRAC. 125 (1995).

233. See *Where's Sen. Campbell?*, ROCKY MOUNTAIN NEWS, June 24, 1994, at 48A (attributing concern about the motorcycle industry to Colorado senator).

234. See Peter W. Huber, *Junk Science in the Courtroom*, FORBES, July 8, 1991, at 68, 70 (discussing spermicides and Prozac, among others).

235. See, e.g., HUBER, *LIABILITY*, *supra* note 14, at 162 (approving of loss of Dalkon Shield). Unlamented products lost to liability include the Corvair, the Pinto, thalidomide, Procter & Gamble's Rely tampon, the Firestone 500 tire, three-wheeled all-terrain vehicles for children, the Bork-Shiley heart valve, and hot-water vaporizers. See Tom Christoffel, *The Role of Law in Reducing Injury*, 17 LAW, MED. & HEALTH CARE 7, 12 (1989); Claybrook, *supra* note 15, at 1178.

ness.²³⁶ Because writers who grieve are committed to markets and the concomitant chance that any individual product will leave the market if consumers reject it,²³⁷ they do not argue that the loss of a product per se is an occasion for regret. Instead, they regard the lost product in terms of its symbolism. "Innovation" as a casualty of liability doctrine is the most abstract loss of all: The griever cannot say what unique item is lost, but instead regrets the wounding of a principle. Products known to have existed that were never marketed are almost equally abstract entities.²³⁸ The reader is asked to join in grieving products, even though she has never seen or touched any of the enumerated objects. Would they have worked well? Who is worse off for their absence? Appeals to competitiveness in world markets,²³⁹ a theme often favored by those who grieve, also invoke abstractions rather than tangible things.

The lament for lost products, like product dynamism, is sited firmly in post-industrial consumer culture. Those who regret the passing of a particular product, or a general deprivation such as the threat posed to innovation, express their argument in terms of lost consumer choice in a world where more choices necessarily means more happiness. However, alternative reasons do exist to mourn the passing of a product. The product could have been the best at its function, making competing products unnecessary. Its manufacture could have provided employment within a region. It might have been aesthetically pleasing, ritually significant, inspiring, humorous, or useful to basic research. The products-lost-to-liability literature downplays these arguments. Its writers stay firmly within the tradition of consumer sovereignty, even though consumer sovereignty can destroy products more cruelly than any other force.

In urging the reader to agree that liability is to blame for lost products, writers frame the subject in terms that Marx himself might have used. To these writers, decisionmaking looms from above: Government and capital wrestle over liability and its costs, while the individual must remain a passive spectator and recipient. In the "grieving" literature, it is never urged that *homo faber*

236. See *supra* notes 183-86.

237. See Lawrence M. Fisher, *Plug is Pulled on Heathkits, Ending a Do-it-Yourself Era*, N.Y. TIMES, Mar. 30, 1992, at A1 (describing removal of a product due to sales decline and loss in market advantages).

238. See *supra* notes 220-22 and accompanying text.

239. See Stayin, *supra* note 214, at 193.

decide what he needs and organize to get his products made. Nor is the consumer encouraged to free himself from wanting to be nurtured by consumer products, whose supply might be erratic.²⁴⁰ His labor is entirely irrelevant to design and strategy; he can only queue up in the market. Even there, he may be overcome by more potent forces that will nullify his sovereign desire to purchase by removing a product. Ideas about where power and decisionmaking lie are much the same within tort-reform writing and Marxist polemics. Grieving for lost products, like metaphors of animation in legal doctrine, illustrates the radical separation between conduct and thing.²⁴¹

III. PRODUCT DYNAMISM AND PRODUCTS LIABILITY

The symbolic properties of products, which create product dynamism, suggest that products liability exists independently, separate from human-agency bases of liability grounded in tort and contract. Put another way, product dynamism implies products liability. Further implications follow, pertaining to the liability of persons, who are the only entities capable of paying for injury within a civil liability system.²⁴²

The theory of product dynamism does not answer doctrinal questions of liability in yes-no fashion any more than does the conventional understanding of products liability. Instead, product dynamism is a variable, strongly present in some configurations of

240. The Marxist philosopher Herbert Marcuse was among the first thinkers to exhort his listeners and readers to free themselves from the control of consumer markets. See Douglas Kellner, *Advertising and Consumer Culture*, in *QUESTIONING THE MEDIA* 242, 253 (John Downing et al. eds., 1990).

241. As a final illustration of this point, compare the grieving-for-products commentary with popular and academic writing about refusals to provide services such as medical care. The two types of regret are different. Perhaps the most important distinction is that services are conceived as phenomena that do not completely disappear; they may become less available, but a determined patient can find an obstetrician, for example, and parents will track down a source of child care. Liability raises the price of services but does not eliminate them. When services are diminished, moreover, consumers who miss them know that they may well return later when the individuals who provide them are placated by changes in their perceived liability exposure or when new providers enter the market. Usually it is cheaper to enter or reenter the market of services than to launch a new product. A withdrawn product is much less likely to return. A product that was never marketed because of fears of liability exposure is also unlikely to be revived. The product thus remains a unique entity.

242. Cf. Jeremiah Smith, *Sequel to Workmen's Compensation Acts*, 27 HARV. L. REV. 235, 256 (1914) ("A machine cannot be 'in fault' in the same sense as a man.").

user-maker-product, and weak or absent in others. Where the quantity of dynamism is great, and injury results, the situation presents what I have designated "true products liability." Where product dynamism is absent or attenuated, yet the conventional elements of products liability—something that is labeled a product, a business-defendant, and injury—exist, the situation presents "nominal products liability." Traditional concepts, primarily negligence and warranty, explain nominal products liability, whereas true products liability is reserved for a smaller set of cases.

The distinction between true and nominal products liability helps to illuminate debates that are both conceptual and practical. Conceptual questions have been pressing for decades. If, for instance, "policy bases" justify the existence of a separate doctrine for something labeled products liability,²⁴³ then it becomes important to say which types of injuries fit within these desired policy bases. Even without the justification of policies, the nominal category exists, and both doctrine and commentary have not addressed the problem of drawing a line around it.

At a practical or doctrinal level, courts and litigants have grappled with the problem of scope. Does products liability apply, for instance, to situations involving the simultaneous delivery of a service and a product? Categories of defendants raise a similar question—retailers being the major example of a category whose place in "products liability" has been challenged.²⁴⁴ Resellers, installers, and trademark licensors have also disputed their place in a products liability scheme; and caselaw offers little guidance.²⁴⁵

243. See Thomas A. Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077 (1965).

244. See *Vandermark v. Ford Motor Co.*, 391 P.2d 168, 171-72 (Cal. 1964) (Traynor, J.) (declaring that strict liability for retailers serves insurance, incentives to safety, and loss-spreading purposes); see also John G. Culhane, *Real and Imagined Effects of Statutes Restricting the Liability of Nonmanufacturing Sellers of Defective Products*, 95 DICK. L. REV. 287 (1991) (presenting arguments for and against strict liability for retailers); William C. Powers, Jr., *Distinguishing Between Products and Services in Strict Liability*, 62 N.C. L. REV. 415, 426 n.49 (1984) (arguing that liability of retailers may no longer be justified by traditional rationales).

245. Compare *Peterson v. Idaho First Nat'l Bank*, 791 P.2d 1303, 1307 (Idaho 1990) (holding that there is no strict liability on the part of seller of used product) with *Thompson v. Rockford Mach. Tool Co.*, 744 P.2d 357, 361 (Wash. Ct. App. 1987) (holding that § 402A applies to dealers of used products), *review denied*, 110 Wash. 2d 1007 (1988); compare *Yost v. Fuscaldo*, 408 S.E.2d 72, 78 (W. Va. 1991) (holding that strict liability is not applicable to installer who lacks specialized skill to modify product) with *Dietrich v. Allstate Ins. Co.*, 540 So. 2d 358, 361 (La. Ct. App. 1989) (determining that

The growth of products liability legislation—vast state-level lawmaking²⁴⁶ as well as proposals in Congress²⁴⁷—gives rise to questions of statutory interpretation. What exactly is a products liability action? Separate statutes of limitation often apply to products liability cases.²⁴⁸ One state legislature even attempted to require victorious plaintiffs in products liability actions (and only products liability actions) to turn over to the state a share of any punitive damages they recover.²⁴⁹ Products liability is also mentioned by name in a variety of legislative packages.²⁵⁰ The prospect of congressional lawmaking in this area suggests problems of comprehensiveness and preemption: Which cases fit within the federal law, and which lie outside it?²⁵¹ Although statutes often attempt to define “product” or “products liability,”²⁵² they do not effectively anticipate problems of interpretation. Quasi-legislative measures such as the UCC and the *Second Restatement* also fail to

pool installer could be liable on strict products liability theory), *cert. denied*, 541 So. 2d 898 (La. 1989); compare *Torres v. Goodyear Tire & Rubber Co.*, 786 P.2d 939, 943 (Ariz. 1990) (holding that licensor is strictly liable) with *Tyler v. Pepsico*, 400 S.E.2d 673, 675-76 (Ga. Ct. App. 1990) (holding that licensor is not strictly liable).

246. Henderson and Twerski provide a state-by-state chart indicating that all 50 states undertook tort reform in the years 1986-1991, with products liability law significantly changed in California, Delaware, Georgia, Hawaii, Illinois, Iowa, Kansas, Louisiana, Michigan, Missouri, Montana, New Jersey, Ohio, Texas, and Utah. See HENDERSON & TWERSKI, *supra* note 18, at 859-62. In the history of products liability within the American federal system, only the UCC and § 402A of the *Restatement* engendered this much change.

247. The bill currently pending is H.R. 917, 104th Cong., 1st Sess. (1995), dubbed the “Common Sense Product Liability Reform Act.”

248. For cases where the survival of a claim depended on whether a products liability statute of limitation applied, see *Walls v. Armour Pharmaceutical Co.*, 832 F. Supp. 1467 (M.D. Fla. 1993); *Doe v. American Nat'l Red Cross*, 798 F. Supp. 301 (E.D.N.C. 1992).

249. See *McBride v. General Motors Corp.*, 737 F. Supp. 1563 (M.D. Ga. 1990) (striking down Georgia statute requiring victorious plaintiffs to remit 75% of punitive damages received in products liability actions to the state treasury); see also H.R. 917, 104th Cong., 1st Sess. § 6(c)(3) (1995) (requiring victorious plaintiffs to deposit 85% of punitive damages received into government fund).

250. See HENDERSON & TWERSKI, *supra* note 18, at xxix-xxx.

251. See Andrew Blum, *Tort Reform: Camel's Nose Into State Law*, NAT'L L.J., Mar. 20, 1995, at A1, A22.

252. Several states have defined “product” for purposes of strict liability in their statutes. See ARIZ. REV. STAT. ANN. § 12-681 (1982); ARK. CODE ANN. § 16-116-102 (Michie 1987); DEL. CODE ANN. tit. 18, § 7001 (1989); IDAHO CODE § [6-1402] 6-1302 (1990); ILL. REV. STAT. ch. 110, para. 13-213 (1989 & Supp. 1990); IND. CODE ANN. § 33-1-1.5-2 (West 1983 & Supp. 1991); MD. CTS. & JUD. PROC. CODE ANN. § 5-311 (1995); OHIO REV. CODE ANN. § 2307.71 (Anderson 1991); TENN. CODE ANN. § 29-28-102 (1980); WASH. REV. CODE ANN. § 7.72.010 (West 1992).

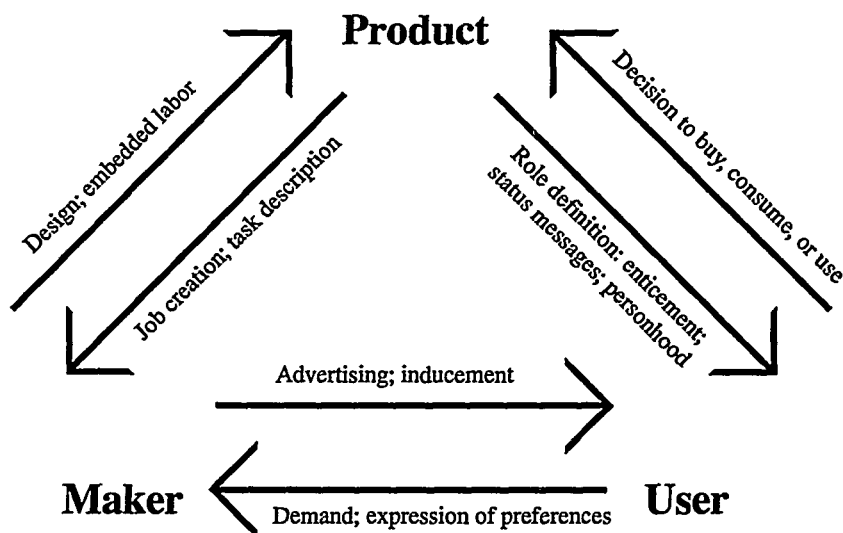
say exactly what territory products liability occupies. True and nominal products liability, then, should be separated from each other before the law of products liability can become intelligible.

A. *True Products Liability*

The "true" products liability paradigm involves three actors—product, user, and maker. They are united functionally by a set of interrelated expressions of agency, and all three impose dynamic force on the others. This relationship can be described using the figure of a triangle:

FIGURE 2

TRIANGULAR RELATIONSHIP OF PRODUCT, USER, AND MAKER



Each agent—either maker, product, or user—stimulates needs and responds to cues from the other two agents. This interaction is misunderstood in prevailing visions of products liability. Some conventional understandings regard the user as agent, the maker as recipient of the user's agency (later the maker becomes the defendant, the respondent, party *B* sued by *A*), and the product as an incidental connection between the two. Alternatively, the maker is often viewed as agent, acting upon a victim. Both economic ana-

lysts and abolitionist critics see products liability almost entirely in bipolar terms—the product is so incidental as not to be of interest, since all that is ever at issue in a products liability case is human conduct.²⁵³ The only relationship present, according to almost all writers and observers, is the one between the injured claimant and the seller-defendant. Thus, the schema displayed in Figure 2 differs sharply from other explanations of products liability, not only in its attribution of agency to the product, but its insistence that the three agents are united in a relationship of mutual influence and power.

The terms in Figure 2 need to be defined. Toward this end, caselaw and academic commentary is partially helpful, especially to identify the salient traits of a “product.” But because courts and commentators have sought to identify appropriate defendants in a bipolar scheme rather than to separate product and maker in recognition of their discrete status as agents, judicial and scholarly discussions contribute little to the working definition of “maker.” As for “user,” the product-dynamism approach offers a definition that is a subset of the one prevailing in conventional understandings of products liability. I elaborate below on these preliminary thoughts.

1. “*Product.*” Commentators frequently pose the question of what is a product,²⁵⁴ and some conclude that a coherent definition cannot be derived: Neither caselaw nor products liability scholarship delineates a clear boundary around the term.²⁵⁵ Nonetheless, the definitional enterprise has been ongoing for a long time in several areas. American law identifies a meaningful divergence between products on the one hand, and services or processes on the other, in subjects other than products liability. Antitrust and patent law, for examples, insist on the distinction.²⁵⁶ Article

253. See *supra* notes 9–12 and accompanying text.

254. See James P. Maloney et al., Note, *What Is or Is Not a Product Within the Meaning of Section 402A*, 57 MARQ. L. REV. 625 (1974); Jonathan B. Mintz, *Strict Liability for Commercial Intellect*, 41 CATH. U. L. REV. 617, 644–49 (1992); John Riper, Note, *Strict Liability in Hybrid Cases*, 32 STAN. L. REV. 391 (1980).

255. See Maloney et al., *supra* note 254; STAPLETON, *supra* note 12, at 303–11; see also MARSHALL S. SHAPO, *THE LAW OF PRODUCTS LIABILITY* ¶ 7.03[1], at 7–9 (1987) (stating that caselaw definitions of product cannot be reconciled).

256. For distinctions made in antitrust law, see the Clayton Act, 15 U.S.C. § 14 (1994) (making it illegal to form tying arrangements, where both the tying and the tied goods are tangible items—i.e., goods, wares, merchandise, machinery, supplies, or other

2 of the UCC, which pertains to the sale of goods, has been construed by commentators and judges not to apply where a relevant item is a service rather than a good.²⁵⁷ This division, however, only begins to say what a product is.

Understanding the characteristics of a product calls for an understanding of its sociological context. As a starting point, symbolic interactionism suggests that a product must be capable of existence in tangible, material form. Although intangible things have symbolic effect, the symbolic power of an entity is a function of the thing's ability to be perceived.²⁵⁸ Visibility and tangibility make that power evident. Conventional products liability law generally supports these criteria. Statutory definitions of "product" either explicitly or implicitly require tangibility, and caselaw is generally in accord.²⁵⁹ Two influential definitions of "product," those of the Model Uniform Product Liability Act²⁶⁰ and the European Union products liability statute,²⁶¹ also require tangibility.

A product need not have been sold, but it must have been, to quote the thoughtful Ohio statute on products liability, "produced, manufactured, or supplied for introduction into trade or commerce."²⁶² As is seen in Figure 2, the decision to buy is an inte-

commodities); see also *Krehl v. Baskin-Robbins*, 664 F.2d 1348, 1352-54 (9th Cir. 1982) (same). Section 6 of the Clayton Act also excludes from its purview practices that restrain the sale or employment of labor as opposed to goods. See 15 U.S.C. § 17 (1994) (the "labor of a human being is not a commodity or article of commerce"). Patent law distinguishes between product patents and process patents. See *In re Taylor*, 360 F.2d 232, 235-36 (C.C.P.A. 1966); *Amgen, Inc. v. Chugai Pharmaceutical Co.*, 706 F. Supp. 94, 107 (D. Mass. 1989); *In re Mancy*, 499 F.2d 1289, 1294 (C.C.P.A. 1974) (stating distinction between medical products and medical processes).

257. See *21st Century Properties Co. v. Carpenter Insulation and Coatings Co.*, 694 F. Supp. 148, 151 n.2 (D. Md. 1988) (holding that roofs, due to their immovable nature, are not goods); *G-W-L, Inc. v. Robichaux*, 643 S.W.2d 392, 394 (Tex. 1982) (overruled on other grounds) (holding that the construction of a house is a service).

258. See Holman, *supra* note 152, at 110-13.

259. Utilities cases are an exception; some courts deem electricity to be a product once it passes through the customer's meter. The cases are divided. See *infra* notes 293-94 and accompanying text.

260. "'Product' means any object possessing intrinsic value, capable of delivery either as an assembled whole or as a component part, or parts and produced for introduction into trade or commerce." MODEL UNIFORM PRODUCT LIABILITY ACT § 102(c), reprinted in 44 Fed. Reg. 62,714, at 62,717 (1979).

261. "'[P]roduct' means all movables, with the exception of primary agricultural products and game." Council Directive 85/374, art. 2, 1985 O.J. (L 210) 29, 30. The European Union statute adds an exception to this definition by stating that "product" includes electricity. *Id.*

262. OHIO REV. CODE ANN. § 2307.71(L)(1)(b) (Anderson 1993).

gral part of the triangular relationship that describes product dynamism. For purposes of identifying products, a sale need not have occurred, but the product must be something that is to be offered for sale. The reason for this requirement is that products liability is fundamentally a commercial and transactional concept. Only manufacture in quantity can result in a clear separation between maker and product. The historical development of products liability²⁶³ and the function of a product as communication²⁶⁴ support the requirement of a commercial context.²⁶⁵

The Marxist understandings reflected in postindustrial accident law elaborate on this description. A product, following Marx, is manufactured in quantity and contains embedded, alienated labor.²⁶⁶ These added elements of the definition can be inferred from the historical coincidence of industrialization and the birth of products liability law. It is also consistent with caselaw: Virtually all products liability actions involve products that fit this description, and cases where the injurious objects are not produced in quantity cause the courts anguish.²⁶⁷

Symbolic interactionism adds an additional set of requirements. A product is an object that is capable of serving as communication, as a shaper of identity, and as an antecedent stimu-

263. See *supra* text accompanying notes 71-95.

264. When a product is used to communicate, its messages derive from its abstract traits rather than its uniqueness. See Kilbourne, *supra* note 106, at 226. A distinctive appearance or a brand name transcends the individual who has acquired the product. Holman agrees. In presenting her theory of product use as communication, she uses numerous examples of products, all of them items mass-marketed in commerce. See Holman, *supra* note 152, at 106. (Holman's work affiliation stated in *Product Use as Communication* is Young & Rubicam, an advertising agency.) Although Holman notes the theoretical appeal of her ideas to "communication scholars," *id.* at 114, she puts emphasis on what she labels "consumer behavior, segmentation, and advertising." *Id.* at 115. A commercial context appears essential to support product use as communication.

265. *Accord*, *Stapinski v. Walsh Constr. Co.*, 383 N.E.2d 473, 475-76 (Ind. App. 1978) (holding that under Indiana law negligence standard, not strict liability, applies to non-commercial transactions), *vacated*, 395 N.E.2d 1251 (Ind. 1979).

266. See *supra* text accompanying notes 96-104.

267. See, e.g., *Brooks v. Eugene Burger Management Corp.*, 264 Cal. Rptr. 756, 764 (Ct. App. 1989) (discussing apartment complex, including playground equipment and grounds); *Moore v. Jesco, Inc.* 531 So. 2d 815, 816-17 (Miss. 1988) (discussing steel poultry houses); *Papp v. Rocky Mountain Oil & Minerals, Inc.*, 769 P.2d 1249, 1252 (Mont. 1989) (discussing an oil treatment facility); *Dwyer v. Skyline Apartments, Inc.*, 301 A.2d 463, 466-67 (N.J. Super. Ct. App. Div.) (stating that "a landlord is not engaged in mass production"), *aff'd*, 311 A.2d 1 (N.J. 1973).

lus.²⁶⁸ For the resulting lawsuit to fit within the category of true products liability law as propounded here, the product must have exercised these dynamic powers. This requirement eliminates several paradigms. For example, products liability is an inappropriate label where the plaintiff alleges that the defendant hit her with a lawnmower: There the lawnmower would be an "inert object"²⁶⁹ rather than an agent. A swimming pool into which a drunk person falls and drowns is also ineligible. Conventional nomenclature excludes these situations by stating that the product is not defective but, as has been pointed out repeatedly, the word "defective" is simply a conclusion, bereft of any independent meaning.²⁷⁰ Consciously trying to determine whether a product is dynamic would make for a difficult exercise, and courts do not undertake this exercise consciously; but this criterion helps to show why certain cases involving products fit so poorly into products liability law.

The requirement that the product be capable of serving as communication, a shaper of identity, and an antecedent stimulus is illustrated by the doctrinal distinction between prescription and nonprescription drugs. Led by a much-noted California precedent²⁷¹ and comment *k* to Section 402A of the *Restatement*,²⁷² many state courts exempt prescription drugs from strict liability.²⁷³ Prescription drugs are sometimes said to be too valuable to

268. See *supra* Part I, section C.

269. See *supra* note 24 and accompanying text.

270. See, e.g., STAPLETON, *supra* note 18, at 233-74 (characterizing defect as a term with many possible meanings and uses); HENDERSON & TWERSKI, *supra* note 29, at 492 ("What the courts mean" by defective design "is not clear."); W. PAGE KEETON ET AL., PRODUCTS LIABILITY AND SAFETY: CASES AND MATERIALS 189-90 (2d ed. 1989) (arguing that a single test for defectiveness may not work well in all cases); see also Powers, *supra* note 9, at 659-65 (arguing that defectiveness is, or should be, a proxy for negligence); John W. Wade, *On the Nature of Strict Tort Liability for Products*, 44 MISS. L.J. 825, 837-38 (1973) (creating influential risk-utility test for defective design, an indeterminate seven-factor balance that includes attention to insurance and other social-political concerns); cf. Richard A. Epstein, *The Risks of Risk/Utility*, 48 OHIO ST. L.J. 469, 474-77 (1987) (contending that risk-utility test for defective design is incoherent, impossible to administer, and a radical "assault on markets and private ordering").

271. *Brown v. Superior Court*, 751 P.2d 470 (Cal. 1988).

272. RESTATEMENT (SECOND) OF TORTS § 402A cmt. *k* (1965). According to comment *k*, products that are valuable yet "unavoidably unsafe" are not subject to strict products liability. *Id.*

273. The Supreme Court of Utah has followed the blanket immunity approach of *Brown*, and other courts have expressed willingness to protect prescription drugs from strict liability. See *Glassman v. Wyeth Lab., Inc.*, 606 N.E.2d 338, 342-43 (Ill. App. Ct.

bear the punishment of strict liability. According to the Utah Supreme Court, the exemption of prescription drugs may be defended as consistent with FDA regulation and the public interest in the availability and affordability of prescription drugs.²⁷⁴ This rationale fails to explain the refusal of courts to extend the application of comment *k* to nonprescription drugs.²⁷⁵ The product-dynamism approach works better: In most cases, consumers do not choose prescription drugs in the sense that they choose nonprescription drugs.²⁷⁶ Over-the-counter sales involve advertising and marketing aimed directly at the user. The products are physically close to consumers, in supermarket aisles, at eye level. Simultaneously, they communicate both a vision of happiness and a portrait of the consumer as weak or insufficiently stoic. Messages such as these are conveyed by prescription drugs in a lesser way. Thus prescription drugs are not true products to consumers in most situations, whereas nonprescription drugs fit the description of products.²⁷⁷

Although the product must be capable of taking tangible form, "product" encompasses more than one single item made by a maker and used by a user. For purposes of the doctrinal question of generic or product-line liability, many individual objects

1992), *appeal denied*, 610 N.E.2d 1262 (Ill. 1993); *Incollingo v. Ewing*, 282 A.2d 206, 219-20 (Pa. 1971); *Grundberg v. Upjohn Co.*, 813 P.2d 89, 90 (Utah 1991); *see also* *Graham v. Wyeth Lab.*, 906 F.2d 1399, 1406 (10th Cir.) (requiring case-by-case application of comment *k*), *cert. denied*, 498 U.S. 981 (1990); *West v. Searle & Co.*, 806 S.W.2d 608, 613 (Ark. 1991) (holding that the determination of whether a product is unavoidably unsafe is a question of fact); *Pollard v. Ashby*, 793 S.W.2d 394, 399-400 (Mo. Ct. App. 1990) (en banc) (holding that comment *k* is an affirmative defense). *But see* *Shanks v. Upjohn Co.*, 835 P.2d 1189 (Alaska 1992) (rejecting formal adoption of comment *k* in Alaska). The current draft Restatement follows the trend of limiting liability for harms caused by prescription drugs. *See* THIRD RESTATEMENT, *supra* note 4, § 8.

274. *See Grundberg*, 813 P.2d at 95, 97-99.

275. *See Brown*, 751 P.2d at 477 (stating that comment *k* applies to prescription drugs).

276. *See* DAVID A. FISCHER & WILLIAM POWERS, JR., *PRODUCTS LIABILITY: CASES AND MATERIALS* 407 n.1 (2d ed. 1994) (describing the physician's role in choosing prescription drugs).

277. Within the category of prescription drugs (a category that includes medical devices) there exists a range of product dynamism. At opposite ends of the spectrum are drugs chosen after much thought by the user—for example, minoxidil for hair loss and nicotine patches for smokers—and drugs administered to an unconscious patient. Products liability fits the former situation and not the latter. But intermediate situations may combine symbolism and choice utility; in these cases, the appropriate judicial response is to place weight on the symbolic elements of the product.

merge to become a "product" whose marketing or design can be challenged by an injured plaintiff. As Figure 2 indicates, the product as agent also can encompass an entire product line, as in, for example, the agency of product upon maker, where the existence of this entity shapes job descriptions and involving lines. Tangibility in part defines a product, but the agency or dynamic force of a product extends far beyond its embodiment in one manufactured entity.²⁷⁸

2. "*User.*" The user is a person who has chosen to have a relationship with the maker and the product. My reference to choice—a tremendously complex topic in its own right—is intended here minimally, to require only the possibility of nonuse. A user is someone who is able to do without the product, or to substitute another product, while remaining able to fulfill her purposes.

The relationship between user and maker, evoked approximately in the term "privity," is fundamental to true products liability. Without question, privity is archaic. When torts concepts replaced contract requirements following the rise of mass marketing, privity fell into analytical disrepute.²⁷⁹ But the tradition continues to express meaning. User and maker are united not by contract but by communication. In the act of use—a choice—the user expresses acceptance of a message from the maker. Purchase is the clearest way a user can communicate approval to the maker; thus, the paradigmatic user is a customer who actually bought the product. It is possible, however, for the user to communicate acceptance to the maker in another status—as borrower, caregiver, gift recipient, even thief—although purchase is the strongest expression of this communication.

As Figure 2 indicates, the relationship between user and product involves role definition, enticement, communication of status messages, and development of personhood. The potential of a product is actualized in use; the user receives messages and then

278. Thus far I have avoided this locution, because it seems to me somewhat conclusory, but a "product" is often roughly equivalent to what is commonly known as a consumer product. There are exceptions: as I go on to argue, true products liability can extend to workplace injury or injury to military service personnel because product dynamism may be strongly present in these situations. See *infra* text accompanying notes 327-44. In general, however, the elements of user choice and mass-marketed distribution mean that most true products liability cases will involve products marketed to consumers.

279. See *supra* text accompanying notes 73-82.

decides to acquire the product in order to deploy her own messages to others. To revisit the pharmaceuticals example, patients who choose to consume nonprescription drugs receive and communicate messages more personal to themselves—more central to their personhood—than is the case with consumers of prescription drugs. Just as a nonprescription drug is more of a “product,” so is its consumer more of a “user” for the same reasons involving agency and autonomous communication.

The relationship of products to personhood—identifiable with Hegel and, in the legal context, Margaret Jane Radin—adds the requirement that a user be a literal person.²⁸⁰ Although (as I will elaborate below) “maker” always includes various sources of agency, the entity that relates to products as communication must be a person in the philosophical sense—with one self-concept, life plan, and set of entitlements. Consistent with this requirement, when a product causes harm, the injury must be in the form of harm to person or property in order for true products liability to exist.²⁸¹

3. “*Maker.*” For several reasons, “maker” is the most complex leg of the triangle. Unlike the user and the product, the maker is not an entity characterized by integrated agency. Multiple identities exist behind the label. Products liability doctrine reflects these multiple identities. In its perception of defendants, American products liability law includes two distinct, historic themes: A defendant is the entity liable for *producing* (a tort approach, grounded in the wrong of the manufacturer in exposing persons to risk) and alternatively it is the entity liable for *selling* (a contract approach, traceable to Roman sales law, and assimilated into tort law by the *Restatement’s* choice of the term “seller” for purposes of strict liability).²⁸² Other doctrines such as misrepresentation and breach of implied warranty, which partake of both contract and tort, further layer the problem with competing ideas of what kind of conduct gives rise to products liability. The category that I

280. In the future, developments in artificial intelligence or changes in the understanding of business corporations may indicate a need to change this requirement. Some sociologists anticipate an expanded vocabulary of personhood or selfhood that would grow to include such newly envisioned “persons,” transcending the limits that I have endorsed in this Article. On this subject, see ALAN WOLFE, *THE HUMAN DIFFERENCE: ANIMALS, COMPUTERS, AND THE NECESSITY OF SOCIAL SCIENCE* (1993).

281. See *infra* notes 323-26 and accompanying text.

282. See *supra* note 94 and accompanying text.

have labeled "maker" has borne much of the brunt of products liability confusion, as writers and courts roil the question of who is strictly liable for harms caused by a product. Often viewing the problem pragmatically as one of locating a suitable defendant, commentators burden "maker" with more than a one-third share of attention in the triangle of true products liability.

The crux of "maker" is intentionality, which is not always a straightforward concept. Intentionality extends beyond selling and producing. The maker of a product is the entity that envisioned it as an item of commerce to be conveyed to a user via persuasion. But that entity is not completely integrated. The maker includes several human beings and combines several human functions: design, the repetitive work of executing that design, marketing, promotion, strategic decisions about the nature of the sale, and receipt of payment in exchange for the product. A maker is a deployer. In a collective expression—here the fiction of the corporation as person is apt—the maker decides to market a product and also engages in relationships with that product and with the user.

The ways in which a product and user relate to a maker as described above may be re-seen from the maker's perspective. Product and user are both sources of decision about product supply. As Marx pointed out, the existence of the product decides the nature of work. Products shape job descriptions and human lives. The user, in the form of a collective demand function and also in explicit verbal communication, informs the maker whether and how to provide products in the market.²⁸³

The maker, like products liability itself, can exist only in some kind of market economy in which consumer demand is at least a large part of the force that drives production and individuals can choose to buy the maker's product, buy a substitute, or refrain altogether from purchase. The connection between products liability and free-market capitalism, still somewhat unexplored in academic writing,²⁸⁴ is exceedingly strong: Development of products

283. See generally ALBERT O. HIRSCHMAN, *EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES* (1970) (arguing that complaints (voice) and withdrawing (exit) are equally important communicative measures that consumers, clients, and citizens use to reach providers and authorities).

284. For explorations of the connection, see STAPLETON, note 12, at 185–88 (suggesting that "the profit motive" is a more coherent conceptual boundary than "product" to achieve related aims); cf. Abel, *supra* note 14, at 443 (arguing that liability law "repro-

liability law in the nations of the world usually correlates with the size and productivity of their business sectors. Products do not exist outside of commerce. Just as one of the defining elements of a product is a commercial context,²⁸⁵ the maker is defined in part as an entity that charges, and receives payment, for the delivery of its product.

B. *Nominal Products Liability Contrasted*

Only a minority of cases commonly regarded as products liability actions fall within the descriptive boundaries of true products liability. "Nominal products liability" imposes few criteria—the products liability label is applied ipse dixit, with little heed paid to the cost of confusion and misunderstanding that results. The categories of product, maker, and user are narrower than current products liability doctrine would suggest. Nominal rather than true products liability exists when instruments of harm are not products, plaintiffs are not users, or defendants are not makers.

1. *Instruments of Harm That Are Not Products.* The definitional elements of "product" summarized in the prior section suggest the existence of objects that do not fit within these criteria. Caselaw classified under the products liability label includes several instruments of harm that do not fit within the boundaries of a product. Among the more important of these problems are substances delivered without regard to the choice of consumers, used products, and products that are sold or delivered in conjunction with a service.

a. Substances that are delivered without regard to choice. Notable examples in this category include transfused blood, electricity or gas, and mass-distributed vaccines. Blood is not a product in the sense of product dynamism because it is not significantly changed by embedded labor.²⁸⁶ It cannot stimulate new

duces bourgeois ideology by commodifying experience and justifying inequality") (citing Abel, *A Critique of American Tort Law*, 8 BRIT. J.L. & SOC'Y 199 (1981)); Priest, *Current Insurance Crisis*, *supra* note 14, at 1585-86 (arguing that loss spreading in products liability cases is unfair to the poor); Stayin, *supra* note 214, at 193-207 (discussing international-trade implications of product liability rules).

285. See *supra* notes 262-65 and accompanying text.

286. I stress "significantly." Transfused blood is changed to some degree by human

needs because it is distributed as a necessary replacement for something that its consumers already have or recently had. As Professor Ausness has pointed out, the distinction does not lie in the "naturalness" of blood;²⁸⁷ substances that occur naturally²⁸⁸ and even living organisms²⁸⁹ can be regarded as products in the law. Caselaw is in accord,²⁹⁰ although the courts usually rely on a statute²⁹¹ or a misplaced policy rationale.²⁹²

Electricity or gas, as provided by utilities to buildings, is not a product for similar reasons. Electricity and gas do not stimulate needs: they can be provided before any customer arrives. They are intangible and unseen; one court invokes their ineffable quality by describing electricity as "a subtle agency that pervades all space and evades successful definition."²⁹³ Caselaw tends to support this interpretation, and dicta about whether electricity arrives to consumers in "a marketable state"²⁹⁴ come close to expressing the appropriate distinction. "Marketable" is a word that may beg the question of what is a product. But courts that use it probably allude to the antecedent-stimulus test for a product.

Vaccines distributed pursuant to mass immunization programs are not products because of the absence of a choice to encounter them. This generalization will probably endure despite increased insistence by parents that they have a right to refuse mass-distrib-

labor. But after human beings have completed their work with it, blood retains most of the characteristics that had existed before this effort.

287. Richard C. Ausness, *Unavoidably Unsafe Products and Strict Products Liability: What Liability Rule Should Be Applied to the Sellers of Pharmaceutical Products?*, 78 KY. L.J. 705, 712-15 (1990).

288. See *Sease v. Taylor's Pets, Inc.*, 700 P.2d 1054 (Or. Ct. App. 1985) (holding that a pet skunk was a product), *appeal denied*, 299 Or. 584 (1985).

289. Cf. *Diamond v. Chakrabarty*, 447 U.S. 303 (1980) (approving patentability of genetically-engineered bacteria).

290. For cases that reject strict liability for harms caused by contaminated blood, see, e.g., *Wilson v. American Red Cross*, 600 So. 2d 216, 217-18 (Ala. 1992) (approving summary judgment for defendant); *Zichichi v. Middlesex Mem. Hosp.*, 528 A.2d 805, 807-08 (Conn. 1987) (holding that plaintiff is limited to negligence theory). Similarly, one case involving transmission by blood of the virus associated with AIDS approves contract or negligence actions, but rejects strict products liability. *Rogers v. Miles Lab., Inc.*, 802 P.2d 1346 (Wash. 1991).

291. See 2 CCH PROD. LIAB. REP. ¶ 4040.10, ¶ 90,112-95,260 (1993) (listing blood shield statutes, which have been enacted by 48 states).

292. See, e.g., *Snyder v. Mekhjian*, 582 A.2d 307, 312 (N.J. Super. Ct. App. Div. 1990) (reasoning that if the sale of blood were subjected to strict liability, patients would suffer), *aff'd*, 125 A.2d 318 (N.J. 1991).

293. *Farina v. Niagara Mohawk Power Corp.*, 438 N.Y.S.2d 645, 647 (App. Div. 1981).

294. *Genaust v. Illinois Power Co.*, 343 N.E.2d 465, 470 (Ill. 1976).

uted vaccines on behalf of their children.²⁹⁵ Even allowing for the possibility of refusal, mass immunizations eliminate the essential decisionmaking function of the individual user. Support for this proposition is extensive and varied. Courts universally recognize an exception to the learned intermediary doctrine for injuries caused by mass inoculation: This rule presumes that when a patient is vaccinated in a mass immunization, she lacks the individual attention of a physician.²⁹⁶ Vaccines are also one of the few consumer goods whose propensity to injure is addressed by preemptive federal legislation that substitutes a compensation scheme for full tort recovery.²⁹⁷

As it happens, the problem of vaccine-related injury is an instance of agreement between economics-based reasoning and the theory of product dynamism.²⁹⁸ The two approaches are not co-terminous or equivalent, but economic analysis helps to answer the fundamental question of whether product dynamism is present in the context of mass immunization. This economic analysis has been undertaken in the literature. Using elementary price theory, some writers have said that vaccines should be treated differently from other pharmaceutical products because of their price inelasticity.²⁹⁹ Because manufacturers cannot spread the costs or risks of injury by passing them along to buyers, it has been argued that vaccines are unique for purposes of liability. Price inelasticity is indeed a helpful concept, but only as the means to an end—that is, toward identifying product dynamism. When users and makers

295. See Kathleen Kelleher, *Take Two Herbs and Call Me in the Morning*, L.A. TIMES, May 15, 1994, at J12 (describing trend among some parents to refuse vaccination of their children).

296. See *Reyes v. Wyeth Lab.*, 498 F.2d 1264, 1276-77 (5th Cir. 1974), cert. denied, 419 U.S. 1096 (1974); *Givens v. Lederle*, 556 F.2d 1341, 1344 (5th Cir. 1977).

297. See Victor E. Schwartz & Liberty Mahshigian, *National Childhood Vaccine Injury Act of 1986: An Ad Hoc Remedy or a Window for the Future?*, 48 OHIO ST. L.J. 387, 387 (1987) (discussing National Childhood Vaccine Injury Act of 1986, Pub. L. No. 99-660, 100 Stat. 3755 (codified in scattered sections of 42 U.S.C. § 300)). This legislation emphasizes the unique status of vaccines; although it was statedly aimed at preserving supply, the statute also serves to isolate this entity from products in general.

298. For other examples, see *supra* notes 16 and 38 and accompanying text.

299. Fay F. Spence, Note, *Alternatives to Manufacturer Liability For Injuries Caused by the Sabin-Type Oral Polio Vaccines*, 28 WM. & MARY L. REV. 711, 736 n.186 (1987); see also Priest, *Current Insurance Crisis*, *supra* note 14, at 1569 (discussing alternative insurance mechanisms for the vaccine market); cf. H. William Smith, Note, *Vaccinating AIDS Vaccine Manufacturers Against Product Liability*, 42 CASE W. RES. L. REV. 207, 236-39 (1992) (describing economic structure of vaccine marketplace).

cannot communicate with each other via price, then true products liability is absent. When price communication moves in elastic fashion between maker and user, true products liability is likely to be present.

b. Used products. Is there a meaningful difference between used and new products? Of the courts that have considered this question, most generally insist on a distinction.³⁰⁰ Commentators tend to agree.³⁰¹ Courts also enforce disclaimers made in the sale of used products,³⁰² and some have gone so far as to hold that no implied warranty attaches to the sale of used goods.³⁰³ But disclaimers are generally deemed unconscionable in the sale of new products, especially attempts to disclaim responsibility for personal injury.³⁰⁴ As with many problems of products liability, courts and commentators reach the right answer—a product is indeed transformed by use—but they are hard pressed to state their reasoning. Proffered explanations generally beg the questions they raise.³⁰⁵

300. The leading case is *Tillman v. Vance Equip. Co.*, 596 P.2d 1299 (Or. 1979); accord *Peterson v. Idaho First Nat'l Bank*, 791 P.2d 1303 (Idaho 1990); *Grimes v. Axtell Ford Lincoln-Mercury*, 403 N.W.2d 781 (Iowa 1987). But see *Stiles v. Batavia Atomic Horseshoes, Inc.*, 579 N.Y.S.2d 790, 792-93 (App. Div. 1992) (imposing strict liability on reseller), *rev'd on other grounds*, 597 N.Y.S.2d 666 (N.Y. 1993).

301. See *infra* note 305. For mild dissent, see David G. Owen, *Rethinking The Policies of Strict Products Liability*, 33 VAND. L. REV. 681, 698 (1980).

302. Although this doctrinal point is clear, there are few reported cases. One is *Lecates v. Hertrich Pontiac Buick Co.*, 515 A.2d 163 (Del. Super. Ct. 1986).

303. See *Valley Datsun v. Martinez*, 578 S.W.2d 485, 489 (Tex. Ct. App. 1979); *Bayer v. Winton Motor Car Co.*, 160 N.W. 642, 644-45 (Mich. 1916). Current doctrine has moved away from this harsh extreme, however.

304. See U.C.C. §§ 2-302, 2-316, 2-719 (1994) (providing contracts-based rules pertaining to disclaimers of warranties). For cases refusing to enforce disclaimers, see *Matthews v. Ford Motor Co.*, 479 F.2d 399, 403 (4th Cir. 1973); *A & M Produce Co. v. FMC Corp.*, 186 Cal. Rptr. 114, 120-26 (Ct. App. 1982).

305. Professor Martin, for example, writes that "the risk-spreading policies that support strict liability simply are not as compelling with respect to the sellers of used products." Martin, *supra* note 2, at 1073. "Risk-spreading policies" are not especially compelling to many observers, e.g., Powers, *supra* note 9, at 645-46; Priest, *Current Insurance Crisis, supra* note 14, at 1553-82; and if they are compelling, they ought to be celebrated, not retreated from, wherever risks and unequal abilities to withstand these risks coexist. If all Martin means is that new-product sellers tend to be the Goodyears and Westinghouses of the world, whereas used-product sellers tend to be poor and obscure, the logical doctrinal response is to condition loss spreading on the degree of wealth of the defendant rather than rely on an inexact proxy. Cf. Jennifer H. Arlen, *Should Defendants' Wealth Matter?*, 21 J. LEGAL STUD. 413, 427-28 (1992) (arguing that courts should consider the extent of a defendant's wealth in establishing compensatory damages). Professors Henderson and

Used products differ from new products mainly in the message that accompanies purchase and sale. The phenomenon of symbolic contamination that explains, among other things, why there is no market for the sale of certain goods,³⁰⁶ distinguishes used things from new things. Communication from maker to user and from product to user is disrupted by the messages added, like static, by other sources. This communication may be clarified when a seller overhauls the used product significantly and offers the rebuilt item to a new user; and in this situation, the seller appropriately becomes a maker and is liable under true products liability doctrine.³⁰⁷ Unless a maker's agency clearly intervenes, however, the used product is layered with too many messages to fit within the true-products-liability triangle.

c. Sales-service hybrids. The sales-service problem arises when "a product is . . . delivered to (and used or consumed by) the buyer in the course of the seller's rendering a service. In the usual cases, the product permanently leaves the seller's possession, or is used up in the course of the transaction."³⁰⁸ The question then becomes whether to apply "strict liability" or negligence. Courts and commentators have suggested several approaches to this topic. One approach asks whether the seller is in the business of selling the product; if so, then "strict products liability" applies to the harmful occurrence.³⁰⁹ Another, more analytical, approach asks whether the "essence of the transaction" is the sale of a product or the rendering of a service.³¹⁰ A modification of "es-

Twerski write that one of the reasons courts have used for exempting resellers from strict liability is "that many, if not most, used product sales are 'as is' transactions." HENDERSON & TWERSKI, *supra* note 18, at 152 (citation omitted). This rather circular assertion appears in the Henderson & Twerski casebook one page after an excerpt from *Henningsen v. Bloomfield Motors Co.*, 161 A.2d 69 (N.J. 1960), in which Chrysler thought it had consummated an "as is" transaction, but was informed otherwise in this landmark opinion.

306. See *supra* text accompanying note 157.

307. See *Crandall v. Larkin and Jones Appliance Co.*, 334 N.W.2d 31, 33-34 (S.D. 1983).

308. HENDERSON & TWERSKI, *supra* note 18, at 158.

309. The leading case is *Newmark v. Gimbel's Inc.*, 258 A.2d 697, 701-03 (N.J. 1969). Cf. *Carroll v. Grabavoy*, 396 N.E.2d 836, 838-39 (Ill. App. 1979) (holding that dentist is not in the business of selling dentures and thus not strictly liable under an express warranty theory).

310. See HENDERSON & TWERSKI, *supra* note 18, at 158; see also *ITT Corp. v. LTX*

sence of the transaction" looks for the essence of the injury.³¹¹ Yet another approach asks whether this situation is one that warrants facilitating the burden of proof for plaintiffs: when plaintiffs face a problem of proof, courts should impose strict liability.³¹²

Whereas the used-products commentary is unpersuasive because it tends to resort to circular reasoning or unsupported assertion, the sales-service commentary is quite thoughtful. Writers tend to criticize one another. Dana Shelhimer attacks the essence-of-the-transaction approach, especially as modified by John Riper, and implies that the burden-of-proof concern pervading the work of Professor Powers is of only academic interest.³¹³ Her own idea-balancing in each case the justifications for strict liability against the social need for affordable access to the product or service—is nicely refuted by Powers' disdain for grand policy-making in products liability.³¹⁴ Focusing on the occupational identity of the seller, the first approach mentioned, once led former Chief Justice Rose Elizabeth Bird to write that the distinction between professionals and nonprofessionals was arbitrary and "elitist."³¹⁵

Enter product dynamism. Attention to the product itself yields an answer to the taxonomical problem. Some kind of essence-of-the-transaction inquiry is warranted: Did the plaintiff experience the sale-service transaction because she sought a product or because she sought a service?³¹⁶ If she was lured by the product, then it ought not to matter whether the source of the inquiry was negligence or the product itself because of the defendant's connection to the product. Thus, the essence-of-the-transaction approach

Corp., 926 F.2d 1258, 1266-67 (1st Cir. 1991) (illustrating concept with respect to hybrid transactions); *G-W-L, Inc. v. Robichaux*, 643 S.W.2d 392, 394 (Tex. 1982) (overruled on other grounds) (same).

311. See Riper, *supra* note 254, at 404-07.

312. See Powers, *supra* note 244, at 425-27.

313. Dana Shelhimer, Comment, *Sales-Service Hybrid Transactions and the Strict Liability Dilemma*, 43 Sw. L.J. 785, 810-12 (1989).

314. See Powers, *supra* note 9, at 639-40; cf. William C. Powers, Jr., *The Persistence of Fault in Products Liability*, 61 TEX. L. REV. 777, 815 (1983) (arguing that distinguishing fault from strict liability wastes "time and energy").

315. *Murphy v. E.R. Squibb & Sons, Inc.*, 710 P.2d 247, 258 (Cal. 1985) (Bird, C.J., dissenting).

316. She might have experienced the transaction without any expression of her own agency, in which case the situation would fall well outside the boundaries of true products liability.

generally ought to be followed in determining whether a sales-service hybrid transaction involves a product.³¹⁷

An illustration of how product dynamism elucidates essence-of-the-transaction reasoning is the opinion by Justice Grodin in *Murphy v. E.R. Squibb & Sons, Inc.*,³¹⁸ a DES case in which the plaintiff sought to hold the dispensing pharmacist strictly liable. The California Supreme Court was divided 4-3 on this question, and five separate opinions were issued; only Grodin's opinion was devoted entirely to the work-tasks of the pharmacist and his role in the delivery of prescription drugs. To Grodin, the essence of this transaction was neither a service nor a sale. The pharmacist is not a retailer because he "is not free to sell a prescription drug to anyone who merely requests the product . . . unlike a car dealer or a tire vendor . . ."³¹⁹ Nor is he a service provider because pharmacists' professional services, such as giving advice, usually are delivered in "incidental" fashion if at all.³²⁰ The Grodin concurrence is bracketed by opinions that miss the point: At one end, a two-person majority opinion, ruling against the plaintiff, distract-

317. According to Shelhimer, the essence-of-the-transaction test is flawed because it does not say whether this essence is to be determined objectively or subjectively. Shelhimer, *supra* note 313, at 810. As an example, Shelhimer mentions a patient who goes to a hospital expressly to take a drug for a week; according to the physician's orders, this patient must spend this entire week in the hospital. When the drug proves injurious, does "strict liability" apply to the hospital? Shelhimer believes that the "objective" essence of this transaction is a service, whereas the patient "subjectively" entered the hospital to buy a product. *Id.* at 810-11. What to do? The answer is simpler than she thinks: The essence of this event may or may not be a sale, but it is clearly not a service. Shelhimer's attempt to justify the "objective" answer is that "those who are sick go to hospitals so that the doctors' and hospitals' professional services will cure them." Shelhimer, *supra* note 313, at 810. As presented, however, Shelhimer's problem of *this* patient clearly involves a transaction to obtain a drug.

Subjective-versus-objective dilemmas are a recurring theme in accident law, and the tension between the two approaches has never been completely resolved. This tension is not a compelling argument against essence-of-the-transaction any more than it raises fatal doubts about reasonableness, negligence, comparative fault, assumption of risk, and other imperfect yet meaningful concepts that help fact-finders to judge the conduct of others. See generally W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 65, at 453-56 (5th ed. 1984) (addressing this issue in the context of contributory negligence). In general, the inquiries suggested by the theory of product dynamism can be understood as "objective," to the extent that word retains meaning, in that courts would try to refer to the generally-understood dynamic properties of the product.

318. 710 P.2d 247, 256-57 (Cal. 1985) (Grodin, J., concurring).

319. *Id.* at 256.

320. *Id.*

edly praises the unique knowledge of pharmacists;³²¹ at the other end, Chief Justice Bird complains about elitism and the betrayal of Traynor's "policies."³²² Grodin reaches the heart of the relevant transaction. In the area of sales-service hybrids, among many others, the theory of product dynamism insists on focus—*this* maker, *this* product, *this* user—and steers observers away from the distortion of distributive concerns.

2. Plaintiffs Who Are Not Users

a. *Business entities and economic-loss claimants.* Because the triangular relationship of product, user, and maker involves a manipulation or change of the user's personhood, the user must be a literal person. Current understandings of what it means to be a person require literal humanness.³²³ Business entities are frequently inspired by products, but they are not users in the sense of true products liability.

This reality is acknowledged in caselaw by the courts' discomfort with economic loss attributable to product malfunction in commercial settings. Purchasers usually have no remedy for these damages in either strict liability or negligence, except for the cases in which physical property is damaged. This rule is conventionally attributed to the existence of the UCC, which "provides a structured basis for allocating risks of loss."³²⁴ The availability of a much-admired code certainly makes the economic loss problem easier to resolve; it eliminates the need for recourse to a theory such as product dynamism. But invoking the UCC seems somewhat opportunistic, because courts and writers happily ignore or override it whenever they prefer a tort-based rationale.³²⁵

321. *Id.* at 251 (opinion of the court).

322. *Id.* at 258, 260–61 (Bird, C.J., dissenting).

323. *See supra* notes 83–92.

324. William K. Jones, *Product Defects Causing Commercial Loss: The Ascendancy of Contract over Tort*, 44 U. MIAMI L. REV. 731, 758 (1990). As Professor Schwartz amplifies, contract rules derived from the UCC are generally preferable in products liability cases because of the principle of legislative superiority: The UCC is a statute, entitled to deference. Gary T. Schwartz, *Economic Loss in American Tort Law: The Examples of J'Aire and of Products Liability*, 23 SAN DIEGO L. REV. 37, 70 (1986).

325. *See* FISCHER & POWERS, *supra* note 276, at 562 ("The [U.C.C.] imposes many restrictions on recovery that are circumvented by the strict liability doctrine."); Reed Dickerson, *The ABCs of Products Liability—With a Close Look at Section 402A and the Code*, 36 TENN. L. REV. 439, 452–53 (1969) (condemning the ascendancy of § 402A over the UCC in cases where both tort and contract reasoning could be applied). Justice

As an explanation of the limited availability of economic-loss damages in products liability actions, the theory of product dynamism is more coherent than intermittent attention to the UCC. Injury that hurts an individual in her property or in her person is critically different from financial loss. Although money is a real object in the universe of symbolic interactionism, injury to person or property is several steps closer to the user's self. This point is generally lost in the economics-driven analyses that dominate products liability scholarship, where it is presumed that conduct, products, and injuries are all commensurable within a money-matrix. By contrast, product dynamism emphasizes tangibility, which is essential to personal injury and property damages as well as absent or remote in economic loss.³²⁶

b. Bystanders. As used here, the category of bystander describes a person who was injured by a product but did not buy it.³²⁷ The place of bystanders in products liability has long occupied the attention of commentators³²⁸ and lawmakers.³²⁹ Foreseeability, but not communication, may unite the bystander with the maker of a product that inflicts injury. But communication—the connection of energy that ties together product,

Traynor was an early perpetrator: "The remedies of injured consumers ought not to be made to depend upon the intricacies of the law of sales." *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 901 (Cal. 1962) (citations omitted).

326. Cf. Harvey S. Perlman, *Interference With Contract and Other Economic Expectancies: A Clash of Tort and Contract Doctrine*, 49 U. CHI. L. REV. 61, 71-72 (1982) (arguing that "laws of physics" distinguish personal injury and damage to property from economic loss).

327. Sometimes the word bystander is misused to describe situations when the plaintiff bought the product and suffered emotionally while a third person suffered physically. In *Culbert v. Sampson's Supermarkets Inc.*, 444 A.2d 433 (Me. 1982), a mother suffered anguish when she realized she had spooned a foreign substance into the mouth of her infant son. According to the theory of product dynamism, Mrs. Culbert is no bystander. She is united by both symbolic communication and money to the maker and the product; thus, she is a user. The baby is not a user.

328. *E.g.* Schwartz, *supra* note 10, at 472-75; STAPLETON, *supra* note 12, at 127-29.

329. The UCC offers state legislatures three alternative approaches to the bystander problem. The first is the narrowest: Express and implied warranties run only to the buyer, the buyer's family, and house guests. The second extends warranties to all human beings who may "be expected to use, consume or be affected by the goods" and who suffer personal injury. The third is the same as the second except that it extends warranties to "any person," not just human beings, and is not restricted to personal injury. U.C.C. § 2-318 (1994).

user, and maker—is essential for true products liability, thus placing bystander cases outside the triangle.

The UCC views bystander status as a matter of degree, identifying a middle ground between bystander and buyer.³³⁰ This perspective is useful in separating true from nominal products liability. According to the UCC, members of the buyer's immediate family are more entitled than strangers to share in any warranties attached to the product.³³¹ If the plaintiff—who could be a relative of the buyer, although true products liability would not require a formal family relationship—partook of the product's shared communication with the product and with the maker, then this person, though not a purchaser, becomes less of a bystander and more of a user. The passenger in a family car is one example of such a person.³³² Similarly, gift recipients and patients can share to a degree in the user-status that is also occupied by the buyer.

The classic bystander problem involves a plaintiff who is struck by an automobile that was manufactured by the defendant. A paradigm case is *Elmore v. American Motors Corp.*,³³³ in which the California Supreme Court correctly pointed out that the plaintiff was not "a user."³³⁴ Nevertheless, this person was entitled to the protection of products liability law. Perhaps, wrote the Court, she should have even more protection than a user should have, because users "have the opportunity to inspect for defects" and can decide to patronize only "reputable retailers."³³⁵ The better way to write this dictum is in negligence terms: If indeed the buyer can protect herself through diligent shopping, then the duty of a reasonable maker to unidentified persons such as bystanders could be greater. In its trivializing discount of the effect of symbolic communication toward the buyer, the *Elmore* opinion

330. No matter which of the three alternatives is chosen, see *id.*, the UCC extends warranties beyond privity into at least the household of the buyer. Each subsequent alternative is a larger concentric circle around the previous alternative, with the third and biggest circle approximately equivalent in reach to a tort standard. This scheme presents bystander status accurately as a question of gradations rather than an either-or dichotomy, an approach consistent with the degrees of dynamism present in every product.

331. *Id.*

332. This paradigm is found in the leading implied-warranty disclaimer case. See *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960) (involving injury to buyer's wife).

333. 451 P.2d 84 (Cal. 1969).

334. *Id.* at 89.

335. *Id.*

also muddies products liability doctrine. Awareness of products dynamism would have made both the holding and dictum clearer.

Another type of bystander injury is harm to workers. Often workplace injury involves nominal rather than true products liability. The requirement of communication between maker, user, and product will frequently exclude jobsite injuries where the worker does not choose to encounter a particular product, but rather does what she is assigned. As a general rule, then, employees are excluded from true products liability because the injury entity is not a consumer product.

The rule about employees is not rigid, however, because workers are sometimes lured by a product to take a particular job. Workers may also be induced to disregard or even imperil their own safety.³³⁶ Again, true products liability can be separated from nominal products liability by attention to the degree of symbolic content present in the triangular relationship. The same analysis would be suitable for injuries experienced by military personnel while at work.³³⁷

A quasi-bystander category is "toxic torts" or "mass torts," in which a harmful product injures many people. In some of these cases, notably the Dalkon Shield disaster,³³⁸ product dynamism is

336. Older workers' compensation cases exhibit this phenomenon. See, e.g., *Costeczko v. Industrial Comm.*, 60 N.W.2d 355 (Wis. 1953) (denying payment to employee fatally injured on an amusement park ride run by a co-worker); *Redino v. Continental Can Co.*, 123 N.E. 886 (N.Y. 1919) (involving a child employee, employed to dip cans, who became fascinated by a stamping machine and injured himself); cf. Stan Gray, *Sharing the Shop Floor*, in *BEYOND PATRIARCHY: ESSAYS BY MEN ON PLEASURE, POWER, AND CHANGE* 216, 219-20 (Michael Kaufman ed., 1987) (discussing effect of masculine gender role on decisions to take workplace risks).

337. Although important and famous products liability cases have involved military-personnel plaintiffs, see *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1985); PETER H. SCHUCK, *AGENT ORANGE ON TRIAL* (1986), a separate understanding of the status of military plaintiffs in products liability has not developed. Judges and commentators might profitably consider the role of product dynamism in the creation of military combat assignments. David Boyle, for instance, was a pilot in the Marines; his father claimed that Boyle was killed because the escape hatch of his CH-53D helicopter opened out instead of in, and therefore could not function under water. *Boyle*, 487 U.S. at 502-03. What induces young men to become military pilots: choice, excitement, orders? Boyle's death preceded the Hollywood paean to Navy flying, *Top Gun*, but may have been related to similar antecedents. And what pushed or pulled servicemen into the jungle to spray dioxin herbicide? In arguing that these inducements or pressures are relevant to the study of products liability, I suggest that they should be noted in judicial opinions and commentary.

338. See MORTON MINTZ, *AT ANY COST: CORPORATE GREED, WOMEN, AND THE DALKON SHIELD* (1985).

strongly present. Other toxic-torts situations involve plaintiffs who exercised little or no choice to encounter the item or substance; for example, few persons seek asbestos or other ambient toxins.³³⁹ Prescription drugs and medical devices raise a slightly harder question because a degree of consumer choice is present even when the patient does not understand what the product is; extremely passive recipients fall within the "nominal" rather than the "true" category, but again the question is one of degree.³⁴⁰ In general, the theory of product dynamism has little to do with the labels of toxic torts or mass torts. These labels allude primarily to the number of plaintiffs. Quantity of harm, or the number of people suing, is by contrast not germane to product dynamism, which looks instead to communication between users, products, and makers. According to the taxonomy of product dynamism, the Dalkon Shield litigation is only a distant relative to examples such as the asbestos cases, whereas the Dalkon Shield cases are closely related to all true products liability cases.

Children are often the passive recipients of products that prove injurious in use.³⁴¹ Their status does not always pose doctrinal difficulty. The risk-utility test for design defect and the implied warranty provisions of the UCC make symbolic communication between the child and the defendant irrelevant. But the consumer expectations test for design defect gives the courts pause in these cases.³⁴² Courts and observers feel compelled to choose between a pure tort approach, such as the one advocated by Professor Powers, which repudiates some important aspects of products liability;³⁴³ or a contract-influenced consumer expectations approach, which does not say whose expectations govern.³⁴⁴ The

339. An exception, of course, is the removal worker who encounters asbestos or other toxins because the job is relatively remunerative. Product dynamism would be attenuated in that situation and would not tend to undermine the validity of a written waiver or other contractual recharacterization of an encounter with a toxin.

340. See *supra* notes 276-77 and accompanying text.

341. See *Culbert v. Sampson's Supermarket, Inc.*, 444 A.2d 433 (Me. 1982) (involving child who was fed baby food that contained a foreign substance); *Bellotte v. Zayer Corp.*, 352 A.2d 723 (N.H. 1976) (involving child injured by flammable pajama fabric); *Williams v. Beechnut Nutrition Corp.*, 229 Cal. Rptr. 605 (Ct. App. 1986) (involving glass baby bottle).

342. See *KEETON ET AL.*, *supra* note 270, at 194. Though dispatched in the current draft of the ALI's Products Liability Restatement, the consumer expectations test retains a hold on many state courts. See Jerry J. Phillips, *Achilles' Heel*, 64 TENN. L. REV. 1265, 1268 (1995).

343. See *supra* note 9.

344. See April A. Caso, Note, *Unreasonably Dangerous Products From a Child's Per-*

theory of product dynamism, sensitive to the difference between glamorous toys and pajama fabric, offers a more coherent alternative for bifurcated-plaintiff problems such as those involving injured children.

3. *Defendants Who Are Not Makers.* Recall that the "maker" of the product is always more than one individual. The term encompasses several sources of agency. The maker is a deployer—a decisionmaker—that brings together labor and raw materials to fashion a product for sale. The maker is the entity that deserves to be charged with understanding the product as a whole, and that benefits financially from the commonly understood properties of the product.

This financial nexus is an important source of products liability doctrine, and it is traceable to the sources that explain product dynamism. Caselaw and the *Restatement* exempt one-time or amateur sellers from the products liability designation³⁴⁵ for reasons consistent with (if not compelled by) the Marxist heritage of products liability law. Industrialization has created sectors and roles for individuals to play. It would be anachronistic to describe a person who lived in the eighteenth century as a manufacturer or a consumer.³⁴⁶ These labels have clear content today. Products liability—both "true" and "nominal"—is therefore confined to those persons who routinely either deploy or benefit from the symbolic properties of a manufactured item.³⁴⁷

spective: *A Proposal for a Reasonable Child Consumer Expectation Test*, 20 RUTGERS L.J. 433, 444 (1989) (describing doctrinal confusion).

345. See *supra* note 7 and accompanying text; see also *Galindo v. Precision Am. Corp.*, 754 F.2d 1212 (5th Cir. 1985) (holding that defendant would not be held strictly liable if jury determined the sale was an isolated event); *Santiago v. E.W. Bliss Div.*, 492 A.2d 1089 (N.J. Super. Ct. App. Div. 1985) (holding that defendant had executed only a "casual sale").

346. See generally T.J. Jackson Lears, *From Salvation to Self-realization: Advertising and the Therapeutic Roots of the Consumer Culture 1880-1930*, in *THE CULTURE OF CONSUMPTION: CRITICAL ESSAYS IN AMERICAN HISTORY 1880-1980*, at 1, 3-4 (Richard W. Fox & T.J. Jackson Lears eds., 1983) (arguing that category of consumer was invented in the late nineteenth century).

347. Here I am assuming that the role of maker is somewhat static. Though consistent with caselaw, this conclusion conflicts with the economics-based tenet that persons move freely (if there are no extrinsic barriers or transaction costs) into whatever activity produces the greatest wealth for themselves. Product dynamism, by contrast, maintains that people bear roles, which create barriers to both achieving and ending the status of "maker"—and that these barriers are not easily quantified as precise transaction costs.

FIGURE 3

THE FUNCTIONAL DOMAIN OF THE MAKER OVER TIME

←				→
Components; raw materials	Design; assembly; marketing; promotion; representations (several entities)	Retail sale; trademark license	Change of control or ownership	Successor management

In Figure 3, a continuum describes the business activity that might exist in product manufacture and sale. The continuum runs from the onset of manufacturing activity (identifying and obtaining raw materials or components) throughout the life of an enterprise or enterprises that make or sell the product. For some products, a later stage exists: The entity that fashioned and marketed the product ceases activity, and a successor enterprise continues some of the functions of its predecessor.

Courts and scholars have often found it difficult to identify the classes of business defendants that can be charged with products liability.³⁴⁸ Figure 3 refers to some types of enterprises whose status in products liability has been questioned: Retailers, trademark licensors, and corporate successors are some of these borderline-status defendants. Judicial opinions are divided on this question of identifying defendants. Although some judges try diligently to say what makes one business entity a suitable products liability defendant and another unsuitable, conceptual clarity has not emerged from the caselaw.³⁴⁹

For these harder cases—harder than the problem of nonbusiness sellers, which courts find easy³⁵⁰—the theory of product dynamism suggests a line of inquiry: *The thing is to blame; was it this*

348. Or, as the question is sometimes posed, "Who is Strictly Liable?" See HENDERSON & TWERSKI, *supra* note 18, at 136-73.

349. See *supra* note 245.

350. See *supra* notes 94-95, 262-65 and accompanying text.

maker's thing? Or, rephrased to follow the civil law approach: Is this defendant a *gardien de la structure*, a keeper of the internal dynamism of the product? Although these questions do not produce unequivocal clarity, they are not idle. The problem of the maker is presented in Figure 3 as a continuum because the status of "maker" varies in gradation. "Product" and "user" also are functional categories rather than on-off labels, but because of its multiple sources of agency, "maker" is the least determinate of the three labels.

Was the thing this person's thing? the observer asks, referring to the criteria set by the theory of product dynamism. To be a "maker," the defendant must have engaged in many of the activities listed in Figures 2 and 3: sending and receiving symbolic messages, deciding self-consciously to put a product in the stream of commerce, marketing, receiving revenue from product sales, integrating or fashioning a product from unassembled constituents, and selling. No one person does everything that a maker does, but when many of these functions are present, the entity is a maker.

Caselaw is consistent with this approach to identifying responsible defendants. For example, finding retailers "strictly" liable in design defect cases, as many courts say they have done, is not so illogical or anomalous as commentators have claimed.³⁵¹ Those who maintain that retailers should not be subject to products liability, or that such liability is a pragmatic, unprincipled yet acceptable device to compensate victims,³⁵² make the mistake of drawing a bright line between manufacturer and retailer. One designed, the other did not. As a method of analysis, this posture is erroneous for two reasons. First, it assumes that defendants are unitary entities. "Maker" helps to erase this misplaced bright line between manufacturer and retailer. Second, this approach accords tort perspectives too much privilege, looking (again) to sources of conduct rather than reasoning from the existence of a product.

For specific elaboration, consider two extremes of the Figure 3 continuum, right and left. Corporate successors who do not continue to make the product occupy a relatively remote point towards

351. See Powers, *supra* note 244, at 426 n.49 (suggesting that strict liability for retailers is "vestigial").

352. See MODEL UNIFORM PRODUCT LIABILITY ACT, *supra* note 260, at § 105 (providing that a retailer should be strictly liable in products liability cases only if the manufacturer is insolvent).

the right. These defendants have not partaken in much of the role of maker.³⁵³ The successor's connection to the product is typically only financial: One corporate entity has paid for another's assets, thereby acquiring a financial link to an earlier practice of product marketing.³⁵⁴ This connection includes too small a share of the functions of the maker. Corporate successors are not, then, makers within true products liability, and their liability would fall within the nominal category.³⁵⁵

Caselaw also grapples unsatisfactorily with the left side of the continuum, involving aspects of the maker's role that occur before the product is put together. The two recurring types of left-side problems are the government-contract defense cases that allege defective design and cases involving component manufacturers.

353. As ought to be evident by now, the theory of products dynamism exempts sham successors from this generalization. A new corporate veil draped around the maker does not obscure the multiple human functions present in the manufacture and sale of a product.

354. This point is demonstrated indirectly by a leading successor-liability case, *Ray v. Alad Corp.*, 560 P.2d 3 (Cal. 1977), in which the California Supreme Court focused on the continuity of a product line. If the successor continues to manufacture the same product, "strict tort liability" would apply. *Id.* at 11. Some commentators have attacked this approach, arguing that it is contrary to principles of corporate law and imposes tort liability on those who have done no wrong. See William J. Hudak, Jr., Comment, *Imposing Strict Liability Upon a Successor Corporation for the Defective Products of Its Corporate Predecessor: Proposed Alternatives to the Product Line Theory of Liability*, 23 B.C. L. REV. 1397, 1421-28 (1982). But the *Ray* opinion, though tinged with unfortunate political rhetoric, rests soundly on an distinction between product and conduct. When the successor's connection to the product is strong, as in the case of a continued product line, it is a "maker," linked to the errant thing. Only pure negligence reasoning or corporate nominalism, rather than true products liability, excuses the successor from responsibility. One major article on successor liability, Jerry J. Phillips, *Product Line Continuity and Successor Corporation Liability*, 58 N.Y.U. L. REV. 906 (1983), is in accord, placing central emphasis on the continuity of product manufacture, and minimal emphasis on corporate formalities, which are "unimportant." *Id.* at 921-23.

355. An illustration of the conventional approach to successors' liability is Timothy J. Murphy, Comment, *A Policy Analysis of a Successor Corporation's Liability for Its Predecessor's Defective Products When the Successor Has Acquired the Predecessor's Assets for Cash*, 71 MARQ. L. REV. 815, 848-49 (1988). The author argues that a successor should be liable based on its actual or constructive knowledge of liability exposure. Discussing successor liability in the context of firms that have dissolved, Judge Posner wanders down the same path, stressing the need to ask "whether the corporation's tort liability was foreseen at the time of dissolution." See POSNER, *supra* note 16, at 213. I find this emphasis misplaced. The approach, yet another unstated affirmation of tort reasoning as the way to decide products liability cases, distractedly looks to one small subfraction of the maker's many activities rather than all of them taken together and ignores the product.

These problems are highly fact-specific and can be resolved only with reference to the functions allocable to the defendant.

The problem of the government contractor defense indicates one type of split in the role of maker in which a nondefendant (a government agency) specifies or approves the design of a product and the defendant-manufacturer executes these specifications and receives a profit from the sale. This division may be equal for purposes of imparting the role of maker to the manufacturing defendant. Government contractor cases could thus be decided either way. Caselaw offers two approaches to this problem, both consistent with product dynamism. The first, favored by a majority of the Supreme Court in *Boyle v. United Technologies Corp.*,³⁵⁶ relies on the discretionary function exception to the federal government's consent to suit. This approach concedes that the manufacturer is a maker, but for reasons extrinsic to products liability it absolves the maker from liability.³⁵⁷ An alternative analysis, as used in the Eleventh Circuit, bars lawsuits only if (1) the contractor had not designed the defective product *or* (2) the contractor had warned the government of the danger in the design and nonetheless was authorized by the government to proceed.³⁵⁸ This second approach gives rise to two product-dynamism explanations. Alternative 1 finds that the contractor is not a maker. Under alternative 2, the contractor is a maker, but responsibility shifts to the (immune) government for the same policy reasons favored in *Boyle*.

Also at the left end of the Figure 3 continuum, defendants occasionally protest that they are not makers but rather component manufacturers, too far removed to be liable for the making of a defective product. In response, courts look to substance—the numerous functions of a maker—rather than the form of assembly, and frequently reject these defense arguments. In so doing, they properly focus on the conscious, cognitive activities of one who plans and then makes a product.³⁵⁹ Addressing a related prob-

356. 487 U.S. 500 (1985).

357. See *id.* at 512–13 (citing discretionary function exception and other policy arguments). Equally consistent for the purposes of this Article, the *Boyle* dissent challenged Justice Scalia's policy rationale, contending that the Court's majority had usurped the legislative functions of Congress. See *id.* at 515–31.

358. See *Shaw v. Grumman Aerospace Corp.*, 778 F.2d 736, 746 (11th Cir. 1985), *cert. denied*, 487 U.S. 1233 (1988).

359. See *Pust v. Union Supply Co.*, 561 P.2d 355, 361 (Colo. Ct. App. 1977) (refusing

lem, the landmark case *Vandermark v. Ford Motor Co.*³⁶⁰ held that a defendant could not delegate the final stages of assembly and inspection: In other words, an entity cannot repudiate the status of maker once that entity has met the functional criteria of a maker.

C. *Tort, Contract, and True Products Liability in Coexistence*

As has been seen, the label "products liability" in its current use lacks precision. When an object causes harm, the question of responsibility is frequently labeled one of products liability. For the convenience of having this facile category, American liability law has paid the price of conceptual coherence.

Understanding the true nature of products liability doctrine begins with the separation of true from nominal products liability. Many problems receive the products liability label, but only a fraction of them fulfill the criteria for true cases. An injury must have united product, user, and maker in a communicative relationship. Not every instrument of harm is a "product" as adumbrated by sociology and political theory; not every plaintiff encountered the product in the conscious, choice-driven, responsive sense that makes a person a user; and not every defendant partook in the set of activities that identify a maker. For a problem to fall within true products liability, all three of these agents must be present. The absence of any of them relocates the problem to nominal products liability.³⁶¹

Nominal products liability cases are covered mainly by the liability rules of tort and contract. Negligence law addresses problems of risk that can be attributed to heedless conduct. When the circumstances of the injury suggest lack of care—the disregard that is central to negligence—symbolic effect may be attenuated. Al-

to permit "a manufacturer to insulate itself from liability by categorizing the sale of its products as components simply because they have to be assembled"), *aff'd*, 583 P.2d 276 (Colo. 1978).

360. 391 P.2d 168, 171 (Cal. 1964).

361. The inquiry that I have in mind is straightforward and would not call for trial testimony from experts about symbolic interactionism or the niceties of neo-Marxism. Rather it involves exploration of common-sense shared understandings and an attempt to envision the mental state of another person, as has been done for centuries in numerous areas of the law. As I have argued throughout this Article, product-dynamism reasoning goes on in the minds of juries and judges when they decide products liability cases. Such reasoning is not only coherent but familiar.

though many "true" products liability cases are capable of resolution using negligence principles, the focus of accident law emphasizes inattention rather than communication, and thus true products liability is analytically closer to contract than tort.

Tort principles are useful, however, in both "true" and "nominal" settings. Regardless of the existence of symbolic relationships, accident law fits analytically with lapses of warning and design. These functions of a maker—warning and design—imply the existence of an ideal course of conduct for human beings. Similarly, tort principles best cover the problem of defenses based on the plaintiff's conduct. In "nominal" situations such as those involving bystanders, tort principles rightly identify a wrongdoer-victim, A-upon-B approach that seeks to determine whether the defendant acted unreasonably with respect to foreseeable contingencies. When foreseeability rather than communication connects the plaintiff and the defendant, negligence law is indispensable.

The triangular relationship of product, user, and maker, with each exerting the force of agency upon the others and receiving agency from them, suggests a contract in its mutuality and its exchange of communication,³⁶² but contract law is not coterminous with true products liability. Despite the wide swath of metaphor that extends around this word—the social contract,³⁶³ marriage as contract,³⁶⁴ constitutions as contracts³⁶⁵—a more formal sense of the term prevails in legal doctrine, which maintains that contract law must address specific promises that are enforceable by the law.³⁶⁶ The insistence on enforceability implies attention to human parties to an agreement rather than recognition of the force of agency inherent in an inanimate object. True products liability, then, mirrors contract in its fundamental nature rather than its formal legal requirements.

Contract doctrine continues to be important in sustaining the development of both true and nominal products liability law. In coexistence with tort approaches, contract law serves to emphasize

362. On exchange as a central theme of contract law, see E. ALLAN FARNSWORTH, *CONTRACTS* § 1.1, at 4 (1990).

363. See Jean-Jacques Rousseau, *The Social Contract*, in *THE SOCIAL CONTRACT AND DISCOURSES* 163 (G.D.H. Cole trans., J.M. Dent & Sons 1973) (1762).

364. See Allen M. Parkman, *Reform of the Divorce Provisions of the Marriage Contract*, 8 *BYU J. PUB. L.* 91 (1994).

365. See *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419, 471 (1793).

366. See *RESTATEMENT (SECOND) OF CONTRACTS* § 1 (1981).

the communication running between the three entities. This intellectual and theoretical role for contract suggests that doctrinal devices such as the implied warranty of merchantability will stay alive even as privity recedes. Similarly, the UCC will remain a vital source of law for both true and nominal products liability.

As with tort law, contract principles will have practical effect in nominal products liability too, especially in cases involving economic loss to a corporate plaintiff. Economic loss to a corporation falls outside true products liability and, frequently, outside negligence law as well. The UCC bystander rules address another important instance of nominal products liability.³⁶⁷

And whither "strict liability in tort" or "strict products liability"? The coexistence of tort, contract, and true products liability leaves no further need for this misleading and confusing phrase. Historically, "strict liability" for product injury has had one important function: It proclaims that products are important within the societies, and civil-liability systems, of all industrialized market economies. Although scholars have not been able to say what strict liability means,³⁶⁸ the term marks a unique place. As I have implied throughout this Article, "products liability"—pure and simple—should claim the title now held by "strict products liability." The empty reference to strictness ought to be purged, and the central importance of products reemphasized.

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

367. Beyond tort and contract in the liability system lie compensation schemes of interest in certain paradigms of nominal products liability. In current American law, compensation schemes govern most vaccine-caused injuries, and other compensation proposals or plans aim at recompense for other types of injury. See generally Schwartz & Mahshagian, *supra* note 297 (discussing vaccine statute and analogous proposals). A long-standing debate compares the relative merits of liability law and no-fault compensation. See Stephen D. Sugarman, *Doing Away With Tort Law*, 73 CAL. L. REV. 555 (1985). The theory of product dynamism does not resolve this debate. Although it imputes causal responsibility to products and related responsibility to their makers and users, this approach does not provide an independent normative basis to translate this agency into legal liability. Product dynamism may, however, help to explain the persistent appeal of "wasteful," "costly," even "inefficient" liability. See *supra* Part II.

368. See *supra* note 34 (questioning whether strict liability is distinguishable from negligence); see also note 270 and accompanying text (summarizing confusion about "defect"); note 9 and accompanying text (citing scholarship that favors abolition of products liability on the ground that the phrase is meaningless).

liability, which partake of both tort and contract, are concepts that illuminate cases. Political or distributional goals such as loss spreading or the manipulation of incentives, however, are separate from fundamentals of tort and contract³⁶⁹ and those of true products liability; they would accordingly fall away from products liability doctrine. True products liability, then, is a concept stripped not only of inapposite case paradigms but also political baggage.³⁷⁰

CONCLUSION

Products liability is an interdisciplinary subject. Some of its intellectual relationships are now universally acknowledged. Economic analysts have shed vast light on the doctrine, instructing judges, citizens, students, scholars and politicians about such fundamentals as cost internalization, risk shifting and spreading, incentives to safety, and the insurance aspects of civil liability. Another discipline important to products liability is history: The place of products liability in the history of ideas is now fixed.³⁷¹ As is increasingly plain, the subject is also political. Observers of American politics now understand products liability as an occasion of political crisis and reform,³⁷² and a lens through which to view

369. See generally Weinrib, *supra* note 17 (criticizing the attempt of American liability law to achieve distributional goals). But see Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1081 (1972) ("One cannot write off distributional considerations based on ability to spread, or on wealth or caste. . . with a reference to Aristotle and a comment that taxation is for legislatures and not for courts.").

370. Having just nodded to the Kantian-utilitarian debate in tort theory, I move to a second division here, equally cursorily. What is "political"? According to Professor Horwitz, for instance, hostility toward "authority for redistribution in torts" such as mine is a late nineteenth-century phenomenon—itsself never justified, and plainly political. HORWITZ, *CRISIS*, *supra* note 71, at 13. The scholarly battle between formalists (or "principlists") and critical theorists on the politics of liability is too voluminous to cite; this article, closer to the former camp, can only refer in passing to the contrary critical tradition.

371. For distinguished examples of intellectual history within products liability scholarship, see LEVI, *supra* note 74, at 8-27; Priest, *supra* note 78, at 461-527.

372. See Stephen D. Sugarman, *Taking Advantage of the Torts Crisis*, 48 OHIO ST. L.J. 329, 333-38 (1987) (summarizing the evolution of a "crisis mentality" involving tort law); KEETON ET AL., *supra* note 270, at 1013-36 (describing two separate crisis-and-reform periods).

American political institutions such as the civil jury,³⁷³ federalism,³⁷⁴ and interest-group lawmaking.³⁷⁵

Interdisciplinary inquiry must now proceed so that products liability will confront the sociology, philosophy and political theory that inhere in the doctrine. These disciplines carry products liability beyond torts and contracts into another area of the curriculum—property. As I have argued, property law contains a law of detrimental objects as well as law of beneficial holdings such as land and heirlooms. When understood as part of the law of detrimental objects, products liability is newly connected to venerable common law concepts—forfeiture, deodands, liability for animals—as well as the important civil law concept of *fait de la chose*. These intellectual connections enhance the concept of products liability and explain, indirectly, the persistence of a separate legal category for product-caused injury, going beyond tort and contract.

At the center of this new understanding is the power and autonomy of the product in society. A product is a community-created matrix.³⁷⁶ Without a human culture to live in, a product cannot exist. Yet it is equally true, per Hegel, Marx, and others, that without products human culture as we recognize it could not exist. Products help to form our selves; products order the lives of human beings long before human beings order the law of products liability.

Observers have tried to explain products liability by reference to one conscious human goal, which might be maximization of wealth, a taste for legal labels, conceptions of distributive justice, or political power, and in these explanations the product itself vanishes. Within culture, however, the product is vitally important and not subordinate to goals. It expresses an array of human wish-

373. See JOANNE DOROSHOW, *THE CASE FOR THE CIVIL JURY: SAFEGUARDING A PILLAR OF DEMOCRACY* 15–19 (1992) (describing the importance of major products liability cases that reached juries).

374. See Blum, *supra* note 251; Harvey S. Perlman, *Products Liability Reform in Congress: An Issue of Federalism*, 48 OHIO ST. L.J. 503 (1987); Marshall S. Shapo, *Making a "Federal Case" Out of a Tort Reform*, CHI. TRIB., Mar. 22, 1995, at 21.

375. See Linda Lipsen, *The Evolution of Products Liability as a Federal Policy Issue*, in TORT LAW, *supra* note 229, at 247, 248; Abel, *supra* note 14, at 447.

376. I thank my colleague Linda Hirshman for coining this phrase. See also Michael P. Mokka, *Ethical Consciousness and the Competence of Product Management: Beyond Righteousness, Rituals, and Rules*, in PHILOSOPHICAL AND RADICAL THOUGHT IN MARKETING, *supra* note 90, at 57, 71 ("Every product is a complex of aspirations, expectations, experiences, expressions, and ethics.").

es, impulses and tendencies. Too limber for the Procrustean beds that commentators build, products liability continually reasserts its autonomy.

Once acknowledged to be an independent doctrine, products liability can enlighten and provoke. The old dichotomies of instrumentation versus noninstrumentalism, solicitude for business versus solicitude for consumers, tort approaches versus warranty approaches, or safety versus innovation are broken open. Products liability invites lawmakers and observers to think about material culture, symbolism, history, the process of manufacture, preferences, personhood, continuity of memory over time, the daily life of a worker, and the bombardment of life all around us.