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L'Harmonie Dissonante: Strict Products Liability Attempted in the European Community

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The European Community ("EC")¹, seeking to unify its laws of products liability, promulgated a directive² in 1985 that was greeted with a chorus of praise.³ The EC had long aspired to reconcile the

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1. The EC was established in 1957 through the Treaty of Rome. See Treaty Establishing the European Economic Community, Mar. 25, 1957, art. 189, 298 U.N.T.S. 11 [hereinafter Treaty of Rome].

The Commission, Parliament and Council comprise the primary institutions of the European Community. The Commission was created by combining the substantive duties of the European Economic Community, the European Atomic Energy Community and the European Coal and Steel Community. Treaty Instituting a Single Council and a Single Commission of the European Community, Apr. 8, 1965, art. 9, 10 O.J. Eur. Comm. (No. C 152) 2 (1967). The Commission is responsible for the functioning and development of the Common Market. The Parliament is elected by citizens of the Community's Member States, and consists of 434 representatives. According to the Treaty of Rome, Parliament has only "advisory and supervisory powers"; in practice, Parliament has certain budgetary powers which bind the Member States. The task of the Council is to approximate the Member States' economic policies. Each Member State delegates a representative to the Council. Under lawmaking procedures in the Community, the Commission initiates and drafts a proposal and submits it to the Council. The Parliament considers and comments on the proposal. The Council adopts the proposal, which becomes law. See P. Mathijsen, *A Guide to European Community Law* 11-53 (4th ed. 1985).

2. 28 O.J. Eur. Comm. (No. L 210) 29 (1985) [hereinafter Directive]. A directive is an EC law addressed to Member Nations of the Community. It is binding as to its result, but it leaves to each nation the choice of form and methods to implement it. See Treaty of Rome, *supra* note 1, art. 189.

3. Dielmann, *The European Economic Community's Council Directive on Product Liability*, 20 Int'l L. 1391 (1986); Note, *The European Community's Products Liability Directive: Is the U.S. Experience Applicable?*, 18 Law & Pol'y in Int'l Bus. 795 (1986).

many national laws on the subject. In a stance familiar to American readers of the Restatements of common law, the Council of the Community eschewed explicit movement away from existing rules. It described its task as rather one of approximation:⁴ to derive an ideal law of products liability from the traditions of the twelve nations that make up the European Community.⁵

Titled "On the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products",⁶ the Directive is known as a strict liability measure, although the phrase "strict products liability" or "strict liability" does not appear in it. Instead, "liability without fault on the part of the producer"⁷ signals its message. The Directive contains a detailed Preamble that announces its goals and explains its substantive choices, later detailed in specific articles. Major provisions include a "development risks" defense (the exoneration of manufacturers for damage caused by defects unknowable to them at the time of production),⁸ as well as definitions of "producer" and "defective product," and a cap on damages.⁹ The Commission has applied a familiar but ambiguous term, "harmonization", to this effort.¹⁰

The word harmonization has carried over into academic commentary. Writers agree that the Directive brings the twelve sovereigns together in key. An expanding literature describes the major differences among the existing national laws, explains the need for unifica-

[hereinafter U.S. Experience]; Thieffry, Van Doorn & Lowe, *Strict Product Liability in the EEC: Implementation, Practice and Impact on U.S. Manufacturers of Directive 85/374*, 25 *Tort & Ins. L.J.* 65 (1989)[hereinafter Thieffry]. More skeptical, but ultimately approving, comments on the Directive include Note, *Defining the Limits of Liability: A Legal and Political Analysis of the European Community Products Liability Directive*, 25 *Va. J. Int'l L.* 729 (1985) (writing before Directive officially promulgated) [hereinafter Virginia Note]. Almost alone in its criticism of the Directive is Stapleton, *Products Liability Reform—Real or Illusory?* 6 *Oxford J. Leg. Stud.* 392 (1986).

4. See Directive, *supra* note 2, at Preamble; see also *infra* note 21.

5. The twelve Member States are Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain and the United Kingdom. Other nations in Europe are considering membership.

6. Directive, *supra* note 2.

7. *Id.* at Preamble.

8. See Directive, *supra* note 2, at art. 7. The defense is optional. See *infra* note 79. Liability for development risks, or the state-of-the-art defense in American parlance, has confounded analysis because it is unclear what type of change ought to impose responsibility on a producer. For analysis of some conceptual problems of the defense as they relate to the Directive, see Stolker, *Objections to the Development Risk Defence*, 9 *Med. & L.* 783 (1990).

9. See Directive, *supra* note 2, at art. 7(e) (development risks); arts. 2, 3, 6 (definitions); art. 16 (1) (cap on damages). Member States are free to accept or reject the damages cap.

10. *Id.* at Preamble; see Treaty of Rome, *supra* note 1, art. 100.

tion, and details some of the prior debates over substance.¹¹ The chords progress. Voices of experience echo the themes of melody and resolution.¹²

The sounds from European Community nations themselves, however, have been discordant in the years since the Directive was promulgated in 1985. Most nations disobeyed the order to adopt a conforming statute before the deadline.¹³ Other countries passed statutes that the European Commission decided were nonconforming.¹⁴ Three years after the deadline, the Community has won a majority of compliance. Eight of the twelve member nations have passed a products liability directive,¹⁵ but these statutes are acceptable to the Commission primarily because the standards of compliance have been relaxed.¹⁶ The last six years after promulgation have brought formal proceedings for nonimplementation in the European Court of Justice,¹⁷ attempts to compromise stalled in national governments,¹⁸ hesitation to cooperate with the Directive,¹⁹ and pointed exchanges of correspondence between the Commission and the noncomplying states.²⁰ Even if all of these differences were resolved, and the Direc-

11. See *supra* note 3; see also Orban, *Product Liability: A Comparative Legal Restatement—Foreign National Law and the EEC Directive*, 8 Ga. J. Int'l & Comp. L. 342 (1978); Shettler, *Products Liability: A Comparison of U.S. and EEC Approaches*, 13 Syracuse J. Int'l L. & Comm. 155 (1986).

12. According to Patrick Thieffry, a lawyer specializing in the European Community with a practice based in New York and Paris, the "underlying logic of the Directive thus demands its uniform application throughout the Community without further delay." Thieffry, *supra* note 3, at 91. "The very essence of the Directive," writes Hans Taschner, a division head at the European Commission, "is the introduction of strict liability, which alone justifies all efforts [and] transcends all other questions . . ." Taschner, *Product Liability in Europe: Future Prospects*, in *EEC Strict Liability in 1992*, at 85 (Practising Law Inst. 1989). See also Bourgoignie, *Where We Stand on Product Liability*, 32 BEUC News (Feb. 1984) (Directive is "the only solution possible"). The English Law Commission, the Scottish Law Commission, and the Royal Commission on Civil Liability and Compensation for Personal Injury have all endorsed stricter liability laws. See Stapleton, *supra* note 3, at 392 n.1.

13. Member States were ordered to implement the Directive within three years after July 25, 1985. See Directive, *supra* note 2. As of August 1, 1988, Belgium, Denmark, Ireland, France, Germany, Luxembourg, the Netherlands, Portugal and Spain had not implemented the Directive. Thieffry, *supra* note 3, at 77-79.

14. *Id.* at 77-82.

15. These nations are Denmark, Germany, Greece, Italy, Luxembourg, the Netherlands, Portugal and the United Kingdom.

16. Author's interview with Thieffry, June 13, 1990.

17. See Claveloux, *EC Charges Six Countries Over Directive*, Bus. Ins., Mar. 26, 1990, at 27 (proceedings brought against Belgium, France, Ireland, Italy, the Netherlands, and the United Kingdom).

18. See, e.g., Thieffry, *supra* note 3, at 80 (deadlock among affected ministries in France).

19. *Id.* at 79 (Belgium).

20. See Claveloux, *supra* note 17.

tive implemented by all European Community nations, the increasing amount of leeway that the Commission now condones will assure divergent national laws in perpetuity.

This Article explores the reasons for the limited acceptance of a directive that sought to achieve harmonization. Part I begins with an inquiry into the meaning of harmonization,²¹ identifying three definitions available to the Commission. The first describes harmonization as a tactic of the Commission to supersede national rules in an effort to create a stronger federation, and not so much to resolve conflicts. This section concludes that this definition does not apply to the Directive. Law reform, the definition apparently favored by the Commission, is the second meaning examined. Law reform in the Community reconciles national laws with a Community ideal rather than with one another. This definition does apply to the Directive, and thereupon the examination shifts from the descriptive to the normative: Is the Directive a good idea? Analysis suggests that it is not. A final definition, approximation, describes an effort to unify, with minimal change of law. Harmonization as approximation, a meaning rejected by the EC lawmakers, would have led to more successful treatment of the perceived problem in products liability.

Part II argues that the Directive rests on dubious jurisdictional authority. Problems of jurisdiction also explain why national governments have responded to the Directive with dissonance. In the Conclusion, this Article observes how the Community has coped with the fate of the Directive and how it continues to expand its understanding of products liability.

I. HARMONIZATION

In a 1976 initiative to the Council on products liability,²² the predecessor of the Directive, the Commission found an absence of harmony in the products liability laws of the Member States.²³ The Preamble

21. Several writers have inquired into the meaning of harmonization. The Treaty of Rome uses "approximation" (*rapprochement*, *Angeleichung*) as a term distinct from "harmonization" (*harmonization*, *harmonieren*), but interpreters find it difficult to delineate the shades of meaning between the words. A complication is that different language versions of the Treaty use these terms inconsistently. See Dashwood, *Hastening Slowly: The Community's Path Towards Harmonization*, in *Policy Making in the European Community* 180 (H. Wallace, W. Wallace & C. Webb eds. 1983). One reference sheds little light on the problem by explaining that approximation "represents, by definition, a more intensive process of integration than harmonisation." D. Lasok & J. Bridge, *Law and Institutions of the European Communities* 458 (4th ed. 1987).

22. 19 O.J. Eur. Comm. (No. C 241) 9 (1976) [hereinafter 1976 Directive], Preamble.

23. Its Preamble declared that "[w]hereas the approximation of the laws of the Member

to this proposal claimed that "rules on liability which vary in severity lead to differing costs for industry in the various Member States" ²⁴ According to the proponents of the Directive, this divergence affected decisions to move goods with consumer protection varying from country to country: "to this extent therefore a common market for consumers does not as yet exist" ²⁵ Harmonization would reconcile these differences, according to the Commission. The three subparts below consider the possible interpretations of harmonization that might explain the decision to identify a products liability problem, and the proposed cure of a directive.

A. *Power Politics*

One view of harmonization, attributed to Hans von der Groeben, a former member of the Commission, ²⁶ might explain the creation of the ambitious Directive. Von der Groeben thought that harmonization is used, and should be used, expressly to drive forward the creation of an integrated Community. ²⁷ This view favors maximum use of power by the Commission. When conflicts between national laws arise, the Commission should not mediate between them, but forge an ideal resolution that would advance integration. According to von der Groeben, a market "can only function optimally if the general economic balance is guaranteed and the regional, structural and social development is directed in a particular way." ²⁸ It would not do to speak of elimination of barriers ²⁹ or to regard harmonization as the search for a "mathematical mean between the national regulations." ³⁰ A directive should impose on the Member States improvements to the functioning of the Common Market. To detractors, the von der Groeben approach pursues "harmonization for harmonization's sake." ³¹

States concerning the liability of the producer for damage caused by the defectiveness of his products is necessary, because the divergencies may distort competition in common market; . . ." *Id.*

24. *Id.*

25. *Id.*

26. Speech by Hans von der Groeben to the European Parliament, Nov. 19, 1969, 1969-1970 Eur. Parl. Deb. (No. 119) 148 (Nov. 27, 1969).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. See Dashwood, *supra* note 21, at 194. One author points out that Member States may object to a harmonizing directive because it poses a threat to national sovereignty or is simply a politically undesirable means to alter domestic legislation. See Virginia Note, *supra* note 3, at 757 n.160.

In this light, the Directive can be read as a heroic effort to expand the powers of the Community at the expense of individual national autonomy. A power-politics interpretation would hold that the Commission regarded explicit strict products liability as the optimal solution in light of the needs of the Community (per the von der Groeben speech) or decided to aggrandize its power by promulgating a directive in accord with the law of no EC country (per the detractors' cynical gloss on the von der Groeben speech). In both explanations, the Directive, though alien to European law, was a device aimed at strengthening the federation.

Cynical theories are hard to disprove, but the maximalist strategy of von der Groeben, in either a sincere or power-politics version, does not explain the promulgation of the Directive. A review of the changes in the Community shows that in the early 1970s the Commission abandoned the maximalist approach that flourished when von der Groeben delivered his speech. Even if this approach continued to exist during the late 1970s and early 1980s, it is improbable that the Commission chose strict products liability as a tactic of European integration.

Changes that took place in the EC from 1969, when von der Groeben spoke, to 1985, when the Directive was approved by the Council, moderated the ambition within the Commission to supersede national laws. There became simply too much work to be done. As the law grew more complex worldwide, the domains where the Community had an interest expanded correspondingly. For instance, when von der Groeben delivered his speech, the EC had no environmental policy;³² by the 1970s the environment was the subject of directives and regulations.³³ Consumerism, mergers and acquisitions, and intellectual property, for examples, all consumed an expanding share of EC resources, while more traditional concerns of the Community such as agriculture and competition law also increased in importance.³⁴ Consequently, more members and employees of the Commission became specialists, addressing narrow problems.

Indirect effects also moderated the aims of the Commission. A decision of the European Court of Justice, the *Cassis de Dijon* case,³⁵ firmly limited the power of an EC nation to use technical standards as

32. In 1973 the Community adopted a program for action in the environment. See Bulletin Euro. Comm. Supp. 3/73.

33. *Id.*

34. See Dashwood, *supra* note 21, at 184-194.

35. REWE-Zentral AG v. Bundesmonopolverwaltung fuer Branntwein, 1979 E. Comm. Ct.J. Rep. 649 (German minimum alcoholic content standards, which effectively ban the

a protectionist device.³⁶ According to one scholar, this decision demonstrated the power of "liberalization"³⁷ efforts, which are less ambitious than harmonization, and suggested to Europeans that the Commission might not need a centralizing type of harmonization to effect its ends.³⁸

Centralization within the Commission also encountered the practical problem of resistance to directives.³⁹ A review of European Court of Justice records shows an abrupt increase in the rate of nonimplementation proceedings against Member States in the late 1970s.⁴⁰ Although in theory the Commission must ultimately prevail in these contests,⁴¹ they cost the Commission momentum and goodwill. The EC appears to have decided that it cannot afford to promote centralization piecemeal in separate lawsuits.

These real-life obstacles to maximalism in the Commission encouraged a shift to pragmatism. A less aggressive approach, dating from about 1973, reduced criticism and disarmed opponents of the EC.⁴² The Commission that wrote and revised the Directive had moved away from the vision of von der Groeben.

B. *Law Reform*

Although the Commission probably did not create the Directive for

importation of certain potable spirits from other EC members, are prohibited under article 30 of the EC Treaty).

36. See Dashwood, *supra* note 21, at 186; Communication from the Commission Concerning the Consequences of the Judgment Given by the Court of Justice on 20 February 1979 in Case 120/78 ('Cassis de Dijon'), 23 O.J. Eur. Comm. (No. C 256) 2 (1980) (setting out guidelines covering national technical measures affecting trade within the common market); see also 23 O.J. Eur. Comm. (No. C 253) 2 (1980).

37. Liberalization is defined as the removal of barriers to free trade within the common market, such as customs duties on imports or exports. See Dashwood, *supra* note 21, at 182.

38. Dashwood, *supra* note 21, at 197. Dashwood adds that new membership in the EC of Denmark, Greece, Ireland, and the United Kingdom while the Directive was being prepared, and Spain and Portugal since then, also scattered the focus of the Commission. *Id.* at 196-97.

39. See section II(B) (discussing significance of resistance to the Directive).

40. One might, of course, argue that the increase in nonimplementation proceedings demonstrates von der Groeben's concept of the Commission as an aggressive centralizer, but most observers have characterized these proceedings as debilitating to the Commission. See Dashwood, *supra* note 21, at 204.

41. See Treaty of Rome, *supra* note 1, art. 169, 171.

42. Dashwood, *supra* note 21, at 205. Another commentator has argued that a more aggressive approach flourished in the EC in 1985 and 1986, when the Presidency of the Community was held by representatives of "pro-Europeanist" nations (Italy, Luxembourg, and the Netherlands). See Nielsson, "Europe, 1992": Riding High on the Fourth Wave, 1990 Brigham Young U. L. Rev. 1575, 1595. The pro-Europeanists favored the adoption of new action programs designed to achieve the Single Integrated Market by 1992. *Id.* at 1594. The date of the Directive falls within this period, but its prior drafts do not.

the maximalist reasons detailed above, modesty or minimalism is an equally unlikely descriptive explanation. Evidence suggests that the lawmaking institutions of the Community decided to reform the products liability laws of Europe and not merely seek out their common denominator. Under the law-reform definition of harmonization, the Community aimed to improve rather than reconcile its laws. Only this definition explains the creation of the Directive.

This evidence begins with the Commission's 1965 attempt to write a definition of harmonization.⁴³ Although not very intelligible, this statement seems to afford the Commission much opportunity to create a better, as well as a more unified, law. For its part, Parliament has gone on record as endorsing expansion of consumer protection in Europe, with products liability reform a stated element of that expansion.⁴⁴ One commentator quotes an unnamed Commissioner as having said that official statements calling for harmonization simply constituted "formalistic justification[s] for introducing new social policy"⁴⁵ The origins of the Directive suggest an appreciation for American-style, forthright strict products liability as a consumerist measure rather than a desire to align European laws with one another.

These ambitions require a formal jurisdictional basis,⁴⁶ and the law-reforming proponents of the Directive have found it in the Treaty of Rome and its meliorist ambitions. Signatories to the Treaty of Rome "[d]ecided to ensure the economic and social progress of the countries by common action in eliminating the barriers which divide Europe."⁴⁷ The Treaty looked forward to thriving "industrial, agricultural and commercial" sectors,⁴⁸ filled with working Europeans who would produce and consume all the better because of their community. Economic and social progress refers to a major purpose of the Community: the coexistence of free markets⁴⁹ and a modern, humane welfare state.⁵⁰ All citizens should enjoy the benefits of prosperity

43. [T]he object is to create not a comprehensive single European legal system but a system of federal type drawing its strength and prestige at once from the history, diversity and vigor of the laws of the Member States, from jurisprudence common to all the countries and from the needs of economic concentration.

Eighth General Report of the EEC, 1965, para. 2.

44. See European Parliament, Directorate General for Research, Consumer Policy, PE 100.200, EN III/O [hereinafter Directorate General].

45. See Orban, *supra* note 11, at 379.

46. See *infra* section II on Jurisdiction.

47. Treaty of Rome, *supra* note 1, Preamble.

48. Report of the Legal Affairs Committee, 1978-1979 Eur. Parl. Doc. (No. 246) 7 (1978) [hereinafter Legal Affairs]. See also *infra* section 2A (discussing *ultra vires* argument).

49. Treaty of Rome, *supra* note 1, arts. 110-116 (commercial policy).

50. *Id.* arts. 117-122 (social policy) and arts. 123-128 (establishing European Social Fund).

through a general increase in the standard of living.⁵¹ But prosperity is impossible without free trade and an atmosphere conducive to business.

Although economic progress and social progress are each dependent on the other, a distinct bifurcation between the two is evident in the Treaty of Rome.⁵² The Directive follows this bifurcation. Its Preamble expressly declares that justice requires a transfer of burden between business and consumers. The economic camp must somewhat give way to the social camp. Because the Directive was constructed in this dichotomous manner, the discussion of the Directive as law reform, below, respects its bifurcation.

1. Economic Progress

According to its Preamble, the Directive is needed for harmonization of the laws of the member nations, because "the existing divergencies may distort competition and affect the movement of goods" within the Community.⁵³ In an ideal Community, goods would be distributed throughout the Common Market, without the barriers of divergent laws. The EC has maintained that economic progress will result when national barriers are removed.⁵⁴ Predicted benefits include a rational division of labor within the Community, lower production costs, and larger-scale production with a resultant increase in productivity and wages.

a. Decisions to Move Goods

The promoters of the Directive argued that the existing differences among products liability laws had the potential to influence the decision to market goods.⁵⁵ To assert this claim, the promoters must have believed that the divergences could be cured. This speculation, made before the promulgation of the Directive, overstates the effects of the existing divergences and understates the level of divergence that would continue after reform. A look at the American federal system would have shown that the absence of strict products liability did not inhibit decisions to move goods, and the onset of strict liability did not make interstate commerce more unified.⁵⁶

51. *Id.* art. 2.

52. See *supra* notes 50-51 referring to the economic and social policies.

53. Directive, *supra* note 2, Preamble.

54. See Directorate General, *supra* note 44.

55. See *id.* No actual influence has been proved. See Legal Affairs, *supra* note 48, at 11.

56. Supporters of the Directive generally disdain this comparison. Of course, the analogy comparing a single nation to a federation of nations is imperfect. But one commentator faults

Moreover, the argument assumes that the Directive would be a powerful remedial device capable of eliminating the divergences by sending a clear signal to consumers, producers, lawyers and judges. Thus, strict liability would have the same meaning in all EC nations, divergences would disappear, and producers would move goods more evenly into each country.⁵⁷ The flaw is that case-by-case adjudication will continue. Each judge will begin the task of applying the Directive with little relevant expertise, because the implemented Directive will remain changeable at least in the short term, according to its own requirements of perpetual reevaluation;⁵⁸ and even when stability is achieved the Directive will be flexible.⁵⁹ The judge will become a kind of learned juror, able to apply her own opinion of the facts against a background of law derived secondhand. Suppliers and producers will find this system, at least initially, to have some of the randomness of the American jury trial system (without, of course, the same risk of very high damages), unless they can use pre-Directive experience to predict how each judge will apply the Directive. Where such prediction is possible, producers are no better off with the Directive than without it.

Because the wealthiest EC nations have the most liberal rules of recovery in that they most resemble the Directive, any shift in the movement of goods appears to favor these countries. To the extent that Greece or Portugal becomes *ein Paradies für Kläger*⁶⁰ like France, producers might as well ship goods into the most prosperous EC nations. If movement of goods follows changes in the law, an improbable claim, then the Directive will channel this movement away from those EC countries that could benefit most from increased

the analogy by focusing on an irrelevant difference: all American jurisdictions are equally lawless because juries assess liability and set verdicts. See Whincup, *Product Liability Laws in Common Market Countries*, 19 *Common Mkt. L. Rev.* 521, 537-38 (1982). In other words, it is idle to speak of liability doctrine in a place where civil juries give away money. Whincup is wrong, I believe, because the change to strict liability in the U.S. did indeed have consequences. See *infra* text accompanying notes 98-127.

57. But see Thieffry, *supra* note 3, at 84 (claiming that optional provisions of the Directive will not produce the same results).

58. See Directive, *supra* note 2, at art. 15(3) (review of development risk defense scheduled for 1995); art. 16 (review of cap on damages); art. 21 (review of Directive every five years by Commission). The Commission also retains the power to monitor the products liability laws of the Member States. *Id.* at art. 20.

59. For an argument that reform of private law can never, despite its efforts, eliminate flexibility and ought not to try, see Bernstein, *A Theory of Products Liability Reform* (in progress).

60. "A paradise for plaintiff." See Stiefel, *The Advantages of a "Civilized" Procedure in Civil Law Product Liability* (notes for speech sent to author, Dec. 14, 1989) [copy on file at Virginia Journal of International Law] ("caveat Amerika, ein Paradies für Kläger").

commerce.⁶¹

b. Predictability

American business leaders have complained that the worst aspect of U.S. tort law is its uncertainty. High costs can be anticipated, but unpredictable costs defy planning and burden such decisions as pricing and risk management.⁶² Although this complaint has focused on American vagaries, as a general rule any business will approach a more profitable level of production when it obtains better information about costs.⁶³

In addition to the drawbacks discussed above, the Directive will diminish predictability because its crucial rules are open-ended. It is true that the Directive gives consumers crisp and unequivocal information about the claims they may bring. An injured European consumer, even one in privity with a potential defendant, has a tort cause of action in strict products liability. In addition, the Directive broadens and clarifies the accepted definition of "producer."⁶⁴ For potential defendants, however, almost any potential source of certainty about liability exposure is kept obscure.⁶⁵

Whether the Directive mandates defenses based on a plaintiff's conduct is also obscure. Article 7 contains a defenses clause, but does not mention contributory negligence, assumption of risk, or product misuse.⁶⁶ The Directive says that recovery "may be reduced or disallowed" when the injured person is at fault,⁶⁷ and the Preamble apparently disapproves of product misuse and contributory negligence.⁶⁸ A reader, however, is hard pressed to determine what this language means. The Directive appears to endorse, but not quite require, plaintiff's-conduct defenses.

61. My colleague Steven Heyman sensibly comments that if the claim is false, the Directive will not channel trade away from poor countries but will allow consumers to recover more easily from producers who come from richer countries. This point reveals a dilemma of the Directive's proponents. As a jurisdictional matter, they have contended that the status quo affects the movement of goods. But their reformist hopes depend on the opposite assumption.

62. See McGovern, *The Impact of Product Liability*, 908 Conference Bd. Res. Rep. vii, 1-2 (1988).

63. The profit-maximizing firm chooses the output that brings marginal cost up to price. Attention to costs is rewarded: when a firm adjusts output to yield a more exact equivalence of marginal cost to price, the firm makes more money. See D. McCloskey, *The Applied Theory of Price* 237-38 (2d ed. 1985).

64. See Thieffry, *supra* note 3, at 69; see also Stapleton, *supra* note 3, at 398.

65. But see Directive, *supra* note 2, at art. 11 (requiring ten-year rule of repose).

66. *Id.* at art. 7.

67. *Id.* at art. 8(2).

68. See *id.* at Preamble.

Altogether avoided is the question of liability for patent defects. The adoption of a consumer expectation test for defects suggests that a producer might not be liable for injury caused by an obvious hazard: a reasonable consumer would expect a patent hazard to pose a risk.⁶⁹ But the consumer expectation test in America, one of the few places where it has been tried, has not been linked reliably to a patent-danger exculpation.⁷⁰ The patent-danger defense, which used to exonerate American manufacturers before strict products liability took hold, would tend to reduce the level of litigation. A repudiation of the defense in the Directive would tend to increase litigation. Ambiguity keeps the issue unpredictable.

In addition, the preservation of contractual remedies means that Member States may permit some products liability actions that will not be governed by the Directive.⁷¹ This preservation would have little effect in the United States, where strict products liability has superseded implied warranty, but in Europe contract and tort have coexisted more equally in products liability actions.⁷² EC countries have long regarded contract as the proper basis for recovery by plaintiffs in contractual privity with the producer.⁷³ Although European jurists, like their American counterparts, view contract damages as more circumscribed than tort damages, this construction may be adjusted after adoption of the Directive, in response to changes in the rules of damages and liability. The relative strength of contract law means that a producer cannot depend on the Directive to occupy the field of products liability.⁷⁴

The Directive also may squander the benefits of lower insurance premiums that probably would have resulted if there had been no

69. See Priest, *Products Liability and the Accident Rate*, in *Liability: Perspectives and Policy* 184, 210 (R. Litan & C. Winston eds. 1988).

70. See *Lovell v. Marion Power Shovel Co., Inc.*, 909 F.2d 1088, 1091-92 (7th Cir. 1990) (patentness of danger does not defeat claim under consumer expectation test); see also *Seattle-First Nat'l Bank v. Tabert*, 86 Wash. 2d 145, 542 P. 2d 774, 779 (Wash. 1975) (same). The consumer expectation test for design defect has been in decline in the United States. See Model Uniform Product Liability Act § 104[D], Analysis, 44 Fed. Reg. at 62, 721 (1979) (rejecting test); D. Fischer & W. Powers, *Products Liability: Cases and Materials* 67-68 (1988) (collecting criticisms of test). But note Whincup's warning that doctrine in American liability law is not to be taken too seriously. See Whincup, *supra* note 56.

71. One admirer of the Directive admits the seriousness of this problem. See Hondius, *The Impact of the Products Liability Directive on Legal Development and Consumer Protection in Western Europe*, 4 *Canterbury L. Rev.* 35, 41-42 (1989).

72. See section I(C) (discussion of contract principles).

73. *Id.*

74. Opinion of the Committee on Economic and Monetary Affairs, Ann. V, Legal Affairs, *supra* note 48, at 27 (potential for contract damages in excess of Directive cap).

directive. The post-1992 single market is expected to create intense competitive pressure, pushing down the price of premiums, but the uncertainty of the Directive will exert a counterpressure. After promulgation, insurers predicted an increase in the number and size of products liability claims.⁷⁵ Though self-serving, this forecast was plausible. Commentators accepted projections of a 5-20% increase in the cost of premiums,⁷⁶ although the evidence of actual increases in countries that have implemented the Directive is scant.⁷⁷

Very likely the Directive adds some new uncertainty. It is now apparent to Member States that the Commission, which monitors the Directive, has now expanded powers to pass judgment on their laws, but less apparent is exactly how to anticipate the way the Commission will read the Directive. Defensive maneuvers are likely to follow. Another potential dynamic is interplay among Member States. For example, within the EC debate the United Kingdom is known to favor a strong development risks defense,⁷⁸ but what does it think of the partial implementation of this defense that has resulted?⁷⁹ Will country A change course in reaction to country B? The veneer of harmonization obscures and distorts conflicts.

c. Competitiveness

Any relationship of liability rules to competitive strength in world markets is so tenuous that neither proponents nor critics of the Directive can resolve the point. But at least one proponent has tried. Thierry Bourgoignie, an early defender of the Directive,⁸⁰ has argued that the change to strict products liability will not "do damage to the

75. See Drag, *Managing Risk in 1992*, *Bus. Ins.*, Oct. 9, 1989, at 43.

76. See *id.*; Whitehead, *Product Liability and European Integration*, in *The European Economic Community: Products Liability Rules and Environmental Policy* 77, 83 (Practising Law Inst. 1990) [hereinafter *European Economic Community*]. See also Dielmann, *supra* note 3, at 1400 (predicting price increase for insurance premiums because Directive "tightens" and expands liability).

77. See, e.g., Schwartz, *Product Liability and Medical Malpractice in Comparative Context*, in *The Liability Maze: The Impact of Liability Law on Safety and Innovation* 28, 41 (P. Huber & R. Litan eds. 1991) (no increase in premiums in Germany after implementation of Directive).

78. See 991 House of Commons Deb. 1111 (Nov. 4, 1980) (statement of Sally Oppenheim, Minister of Consumer Affairs); Hondius, *supra* note 71, at 41.

79. The Directive provides that notwithstanding its development risks defense, see Directive, *supra* note 2, at art. 7(e), a Member State may abrogate this defense, see Directive, art. 15(1)(b), if it complies with certain requirements, see Directive, art. 15(2), which include notice to the Commission and a nine-month standstill period. To date, only Luxembourg has chosen to suppress the defense.

80. Bourgoignie, *supra* note 12.

competitiveness of European firms on the international level.”⁸¹ In support of this statement, he adds that “the principle of responsibility with fault is being abandoned by Member States,” and has been rejected by other nations, namely the United States, Japan and New Zealand.⁸²

This assertion, merely a variation on the simultaneous claim that the Directive is urgently needed but will change nothing,⁸³ is unjustified. The claim overlooks the existence of trade relations between EC countries and nations other than the three mentioned, and defies such rare but significant experiences as the Bhopal case, where the prospect of reaching a more generous forum shaped the litigation and raised its stakes.⁸⁴ That expanded products liability injures competitiveness as long as other countries defer more abjectly to business interests is an argument which in the U.S. has come from explicitly partisan sources.⁸⁵ Disinterested writers have not proved a connection.⁸⁶ All

81. *Id.* Later writing, after the Directive became more neutral, reveals a disillusioned Bourgoignie. See, e.g., Bourgoignie, *Product Liability: Old Arguments for a New Debate?* *European Consumer L.J.* 6, 17 (1986) (achievements of Directive too scant); see *infra* notes 203-04 and accompanying text (discussing compromises in the Directive).

82. See Bourgoignie, *supra* note 81. Japan and New Zealand have actually “abandoned” tort litigation in favor of a compensation scheme. See Bill of Consumer Product Safety Laws of 1973 (Japan); Accident Compensation Act of 1972 (New Zealand). Moreover, the principle of responsibility with fault is if anything renascent in the United States. See Henderson & Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 *UCLA L. Rev.* 479, 480 (1990).

83. For other examples, see Bourgoignie, *supra* note 3.

84. See *In Re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F. Supp. 842 (S.D.N.Y. 1986), *aff’d in part and rev’d in part*, 809 F.2d 195 (2d Cir. 1987). Access to a jury, of course, encouraged those plaintiffs and lawyers who sought to try Union Carbide in the United States. But strict products liability, in the loose sense of liberal recovery that the Directive endorses, was at least as great an inducement.

85. See Office of the Vice President, Fact Sheet on Product Liability Reform (undated document, ca. 1989, on file with Virginia Journal of International Law) (advocating “fault based liability” as essential to “U.S. international competitiveness”); Why reforming our liability system is essential if America is to succeed in overseas markets, insurer advertisement, *Time*, Nov. 27, 1989, at 1 (“One positive step would be to base liability suits on fault.”); Product Liability: Hearings Before the Subcomm. on Commerce, Consumer Protection, and Competitiveness of the House Comm. on Energy and Commerce, 100th Cong., 1st Sess. 42 (1987) (statement of Robert H. Malott, member, Product Liability Coordinating Committee). See also Besharov, *Forum Shopping, Forum Skipping, and the Problem of International Competitiveness*, in *New Directions in Liability Law* 139 (W. Olson ed. 1988) (American liability rules handicap American producers in world trade).

The liability system has been blamed for the American trade deficit, over \$100 billion in 1989. Basic macroeconomic rules contradict this claim. If liability rules make American exports more expensive, then demand among foreign buyers for these goods falls, and consequently the demand for U.S. dollars falls. The decline of the dollar makes American goods cheaper in the world market, and demand for them increases. Thus a trade deficit can exist only in the short term. See Litan, *The Liability Explosion and American Trade*

other things being equal, however, European manufacturers would compete better in world markets under a products liability law that affirmed the principle of fault-based responsibility. Inasmuch as strict products liability foments litigation, costs to manufacturers increase. In a fault-based regime, the Directive would not force manufacturers to speculate about the effects of an unfamiliar law. Consumers would not receive tacit encouragement to bring more products liability lawsuits. These effects are slight, but they may matter. The U.S. and Japan, important competitor nations, function in domestic markets with liability rules that are either stable or moving in favor of defendants.⁸⁷

2. *Social Progress*

A social-progress argument in favor of the Directive would maintain that explicit and expanded strict products liability advances the goals of the Treaty of Rome. It is socially optimal to reduce the rate of accidents and, where accidents cannot be avoided, to impose the burden of compensation on the producer. Strict liability based on a product defect gives producers an incentive to make various safety investments, inspect, redesign, communicate warnings, and anticipate misuse in ways that may not be mandated by a negligence rule.⁸⁸ Losses that result from unavoidable accidents, or accidents that the manufacturer chooses not to avoid, ought to be charged to the manufacturer. The justifications are familiar: the manufacturer profits from the enterprise; it can spread the loss by increasing prices or buy-

Performance: Myths and Realities, in *Tort Law and the Public Interest: Competition, Innovation, and Consumer Welfare* 127, 129-32 (P. Schuck ed. 1991). Macroeconomic rules do not, however, defeat the claim that an expensive or unjust liability system can lower both the ability of firms to compete outside the jurisdiction, and the standard of living for people within it.

86. See, e.g., P. Reuter, *The Economic Consequences of Expanded Corporate Liability: An Exploratory Study* 34-42 (1988) (RAND Corporation Study) (little evidence of effect on competitiveness).

87. For a description of the American shift toward pro-defendant lawmaking in the 1980s, see Henderson & Eisenberg, *supra* note 82, at 539-40.

88. That "defect" necessarily means something like "fault," at least in design cases, is an insight often attributed to a 1980 article by Sheila Birnbaum. See, e.g., *Prentis v. Yale Mfg. Co.*, 421 Mich. 670, 365 N.W. 2d 176 (1984) (citing Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 *Vand. L. Rev.* 593, 601 (1980)). But see Schwartz, *Understanding Products Liability*, 67 *Calif. L. Rev.* 435, 493 (1979) (articulating the same idea). Despite this resemblance between strict liability and negligence, lawsuits brought before the strict liability era that alleged injury by a product were more likely to be resolved in favor of manufacturers. It was not negligence rules as such, but rather a narrow view of manufacturer responsibility, that exonerated defendants in this "negligence" era. See Priest, *supra* note 69, at 202-07 (summarizing cases).

ing insurance; it ought to stand behind its products; it has better information than the user about dangers; by placing the products on the market, it represents to buyers that the product is safe.⁸⁹ These twin benefits, insurance and incentives to safety, promote social progress.

This reasoning, though not without some merit, suffers from its obvious connection to the American use of strict products liability as an instrument to achieve insurance and safety. Simply put, the American record is mixed. Its reputation is worse, as is evident from the strenuous arguments of the Directive's proponents that Europe is not really trying to emulate the American experience.⁹⁰ In looking to American products liability law for inspiration, the European Community linked both the substance and the appearance of the Directive to a flawed model.

Strict products liability as a source of insurance and safety has received extensive attention in American legal literature. These writings suggest that liability delivers very poor insurance. It has enhanced safety, although a commitment to regulation, which exists in Europe to a greater degree than the United States, would have done so more effectively. Change in doctrine as a source of safety and insurance, in sum, is an adaptation shifted to the United States, a country that has thus far refused to enact serious regulation or to assure social welfare.⁹¹

a. The Insurance Rationale

With medical care, income maintenance and disability protection guaranteed at a high level, a typical user of products in Europe is *ab initio* more protected than his American counterpart. All Member States of the EC have state-administered health insurance schemes.⁹² Plans vary: The National Insurance Scheme and National Health Scheme of the United Kingdom are comprehensive systems designed by statute and managed by the government;⁹³ in Germany, regional and local organizations administer insurance in a decentralized scheme;⁹⁴ nine statutes cover social security and public health in the

89. See W. Prosser, J. Wade & V. Schwartz, *Cases and Materials on Torts* 721 (8th ed. 1988).

90. See Bourgoignie, *supra* note 3; Thieffry, *supra* note 3, at 88-90 (discussing unlikely possibility of liability crisis in Europe).

91. See *infra* note 98 and accompanying text.

92. See Report on Social Developments—Year 1986, Addendum to the 2d General Report on the Activities of the Community at VII-1 (1987).

93. See A. Kahn & S. Kamerman, *Social Services in International Perspective* 35 (1985).

94. See 1989 *Europa World* Y.B. 1126.

Netherlands.⁹⁵ Observers are often struck by the lack of stigma attached to public social services in Western Europe; citizens partake of what they need as a right.⁹⁶

Despite this protection, the Directive favors litigation as a source of payment for injury. The Community has slighted its combination of assured compensation and well-developed principles of liability in favor of an alternative known chronically to fail as a source of compensation, and to waste money. Why? A ready explanation is that the health systems in Western Europe face deficits. For several years the national governments have confronted increases in the cost of health care, and discussed ways to reduce spending. Studies undertaken by the Paris-based Organization for Economic Cooperation and Development reveal an array of deficit-reducing measures, designed by each national government to match its health care scheme.⁹⁷ A more conservative political climate, the growth of expensive health-care technology, and an increase in non-European ethnic populations have combined to create a sense of finitude. In the spirit of austerity that began in the mid-1980s, many Europeans regard universal health care as a luxury of potentially infinite expense.

Strict products liability, it may be speculated, looked attractive to a Commission preoccupied with health-care deficits. For all its shortcomings, strict products liability buttresses a welfare system in a country that lacks universal health coverage. Under American-style liability, private insurers pay much of the medical costs for which European governments assume responsibility. The many flaws of American health insurance do not include government deficits, as the government has not undertaken the obligation of comprehensive med-

95. In the Netherlands, the five general National Insurance acts cover old-age pensions, widows' and orphans' pensions, children's allowances, disablement pensions and exceptional medical expenses. Additional legislation benefitting workers covers health insurance, sickness benefits, working incapacity insurance and unemployment benefits. See *id.* at 1862.

96. See A. Kahn & S. Kamerman, *supra* note 93, at 316, 331.

97. The three major devices tried in Europe have been the introduction of market competition forces, the implementation of user payments and the narrowing of health plan coverage. Britain has tried to create more competition for the National Health Service by allowing private physicians to perform elective surgery under NHS subcontracts, and by adding incentives to the compensation of NHS physicians. 1988-1989 Survey, Organization for Economic Cooperation and Development 1, 79 (1979). France has retreated from paying for all drugs, and tried to curb the supply of physicians. *Id.* at 78, 127. In its scheme of insurance-funded health care, Germany has narrowed the coverage of medical expenses, refunded a part of contributions to consumers who do not file a claim during the year, and made other reforms leading to an estimated saving of DM 12.4 billion. *Id.* at 95. In the Netherlands, the Dekker Commission recommended several reforms in a 1988 report, some of which have been implemented. *Id.* at 46-47.

ical care. A liability rule that would shift part of this expense to corporation insurers and shareholders probably tempted beleaguered national governments, and their representatives in Community institutions. The Directive reflects a hope that expanded liability might save government funds some money.

Unfortunately for the Directive, its gestation coincided with what became known as the insurance crisis in the United States.⁹⁸ The appeal of American-style strict products liability as reducer of deficits has lessened: Defenders of the Directive have been forced continually to argue that the Directive will not precipitate an American-style crisis in Europe.⁹⁹ A change in academic language may have affected the Directive as well. The "fair apportionment" justification for the Directive, written in the 1970s, reflects a time when strict products liability was viewed approvingly as a loss-spreading mechanism. In the U.S. today, the idea of loss spreading is in disrepute:¹⁰⁰ strict products liability is now said to offer "insurance," and those who use this word deem it very poor insurance. The shift in discourse has changed the progress of the Directive.

In an important paper on the insurance crisis, George Priest moved the polarized tort reform debate to a new conjunction.¹⁰¹ Whereas debaters had argued on behalf of either plaintiffs or defendants, Priest, who is identified with defendants, argued that expansive liability justified as loss spreading was bad for all consumers, especially low-income consumers, exactly the parties expansive liability was designed to aid.¹⁰² This conclusion came from the insight that liability does not simply shift a cost from point P to point D but rather creates an insurance apparatus bloated by transaction costs¹⁰³ and the paired ills of adverse selection¹⁰⁴ and moral hazard.¹⁰⁵ As is well known, the American tort system pays this insurance money inefficiently: About half the total cost of the system is retained by claimants, and only half

98. I use the term to refer to a period beginning in the 1970s and recurring intermittently through the next ten years, possibly longer. The exact nature of the crisis has been the subject of debate. Critics have challenged virtually every datum offered by the industry in its tort reform effort. See Comment, *Rumors of Crisis: Considering the Insurance Crisis and Tort Reform in an Information Vacuum*, 37 *Emory L.J.* 401 (1988).

99. See Thieffry, *supra* note 3, at 88-90; Bourgoignie, *supra* note 12.

100. See, e.g., Griffith, *Products Liability—Negligence Presumed: An Evolution*, 12 *J. Prod. Liab.* 201, 225-28 (1989).

101. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 *Yale L.J.* 1521 (1987).

102. *Id.* at 1525, 1551, and 1585-87.

103. *Id.* at 1560.

104. *Id.* at 1540-50 and 1562-70.

105. *Id.* at 1547-48.

of this sum represents compensation for economic loss.¹⁰⁶

Priest expanded the debate by arguing that the liability system has had three major retrogressive effects. First, expansive and unpredictable liability rules have caused insurers to reduce the level of coverage, raise their premiums, or refuse to issue insurance altogether.¹⁰⁷ Consequently, municipalities¹⁰⁸ and certain industries¹⁰⁹ suffer from decreased availability of insurance. Second, hard-to-insure products are no longer profitable, and consumers experience a reduced supply of goods, including necessities.¹¹⁰ Finally, all consumers must pay more for their goods and services because product prices reflect the increased cost of insurance. This increase burdens poorer consumers more.¹¹¹ Priest also noted that a plaintiff's economic status affects the measure of her damages awarded by a jury.¹¹² Thus, although the insurance of civil liability charges equal premiums to all consumers, overall the poor and low-income suffer more than high-income consumers.¹¹³

106. See Tillinghast, *Tort Cost Trends: An International Perspective* 15 (1989) [hereinafter *Tillinghast Study*]. A RAND study suggests that these figures should be read with caution. The RAND study, unlike the one done by Tillinghast, did not include the costs of operating the insurance system. RAND researchers found that the tort system in the U.S. cost between \$29 billion and \$36 billion in 1985, in contrast to the \$117 billion that Tillinghast estimated. The figures presented in the RAND study include compensation paid to plaintiffs, legal fees and related expenses for both plaintiffs and defendants, insurance company costs of processing claims in suit and the value of the litigants' time spent, and the costs of operating the tort system. See J. Kakalik & N. Pace, *Costs and Compensation Paid in Tort Litigation* vi-vii (RAND Corporation Study 1986). But see Litan, *supra* note 85, at 133 (Tillinghast figures underinclusive because they exclude costs of diverting corporate officials from regular duties, and of risk avoidance measures). The general contrast between compensation schemes and liability appears accurate. By contrast, workers' compensation returns 70% of its total cost to beneficiaries; private health insurance 85%, and public social security 99%. *Tillinghast Study* at 16. Industry has made much of data like these. For a reminder that defense interests have not always preferred the efficiency of workers' compensation to the process-heavy tort system, see *Ives v. South Buffalo R. Co.*, 201 N.Y. 271, 94 N.E. 431 (1911).

107. Priest, *supra* note 101, at 1570-1578. Priest attributes these responses to the "rapid departure of low-risk insured from commercial casualty pools." *Id.* at 1578.

108. *Id.* at 1574-82.

109. *Id.* at 1582-84 (discussing health industry).

110. *Id.* at 1566-70.

111. I thank my colleague Richard Wright, who disagrees with much of this section, for pointing out that the poor are injured by defective products more often than the rich, and therefore might, as a class, benefit from a system of higher liability/higher prices, Priest notwithstanding.

112. *Id.* at 1552.

113. This version of the liability story rests in part on the idea that the insurance industry has acted in good faith, a premise that Priest does not question. Others have suggested that the insurance industry might have canceled policies or withheld coverage for contingencies that were profitable to insure, in a conspiracy to influence legislatures and public opinion. See *Hearings Before the Subcommittee on Economic Stabilization*, 99th Cong., 2d Sess., (1986)

A defender of the Directive might reply that little of this criticism applies to the EC. Civil damages are set by judges, which means that European judges would have to be as prejudiced as American jurors to sustain Priest's point of damages discrepancy.¹¹⁴ Because damages are so much lower in Europe, the overall impact of discrepancies is less. The liability systems throughout Europe run much more cheaply than their American counterpart, undermining the argument about transaction costs.¹¹⁵ Because a European plaintiff cannot recover as much for noneconomic loss, the portion of Priest's argument criticizing the availability, on a third-party basis, of insurance

(statement of Joan Claybrook); Comment, *supra* note 98, at 409; Trebilcock, *The Social Insurance-Deterrence Dilemma of Modern North American Tort Law: A Canadian Perspective on the Liability Insurance Crisis*, 24 *San Diego L. Rev.* 929, 936 (1987) (conspiracy unlikely).

A basic problem with the Priest critique of modern American tort law has to do with the impossibility of separating recovery grounded in an insurance justification from recovery based on tort principles of responsibility. Particularly because most products liability cases brought to trial are decided by juries in secret deliberations, it is difficult, even with careful instructions, to keep a quasi-insurance function out of liability decisions. Priest has called for the excision of the insurance function in civil liability via a change in the liability standard. See Priest, *Strict Products Liability: The Original Intent*, 10 *Cardozo L. Rev.* 2301 (1989). But he has said little more about his proposed replacement than that it is a "sophisticated" and "modern" return to "a form of economic negligence," which would evaluate the producer's opportunity to make safety-related investments. See Priest, *The Deep Justification for Tort Reform*, in *Product Liability Reform: Debating the Issues* 7, 11 (K. Chilton ed. 1990). A likely, if not planned, effect of this change would be a reduction in aggregate payments by defendants to plaintiffs. While this change may represent a conceptual improvement in doctrine, the liability system in the United States may need the additional boost of an insurance justification to compensate for disincentives to sue. Without the insurance function, total claims by users might be too low for an optimal effect in the accident rate. Cf. Priest, *supra* note 69, at 221-22 (introduction of strict liability standard "may have improved accident prevention incentives," even though prior negligence standard ought to have required cost-justified safety measures). As for the insurance component of strict products liability, even though the coverage is biased and not what low-income consumers in particular would purchase, it is for a number of Americans the only health insurance they have. Estimates suggest that more than 30 million persons in the U.S. have no health insurance. See U.S. General Accounting Office, *Health Insurance: A Profile of the Uninsured in Michigan and the United States* (1990). Millions more are underinsured, and medical treatment available to the uninsured poor is inadequate. See generally Feder, Hadley & Mullner, *Poor People and Poor Hospitals: Implications for Public Policy*, *J. Health Pol., Pol'y & Law* 237 (1984).

114. To the extent that the American discrepancies can be attributed to factors other than prejudice by the jury—for example, more zealous advocacy for certain plaintiffs by their attorneys, or biased supervision by the trial judge—comparisons with Europe remain valid.

115. The Tillinghast study, using estimates and other private information, has calculated the cost of the tort system as a percentage of gross national output for several nations. The U.S. percentage is 2.5. The EC countries studied by Tillinghast—Denmark, Spain, Italy, the United Kingdom, West Germany, Belgium, and France—all spend about 0.5% of their GNP on their tort system. Tillinghast Study, *supra* note 106, at 12. Again, although the Tillinghast data may state inaccurately the cost of American liability, as a source of comparison they are sound.

unavailable to first-party buyers diminishes in the European Community.

But this response fails. Priest confined his lament to the United States not because of conditions unique to the western hemisphere but because the U.S. is the only country that has accepted the loss-spreading approach to compensation. The criticism will apply to all future takers. Insurance companies, playgrounds (said to have closed because of the "crisis"), racism, disregard for women's economic contributions and moral hazard are not American quirks. They will affect any legal system that links strict products liability to compensation. In its Preamble announcing the appropriate allocation of technological risks, the Directive forges this link.

The need to separate liability from compensation is familiar in American writing about torts. Civil liability can never compensate injured persons adequately, because liability is a function of fault, or responsibility, rather than need.¹¹⁶ The Directive is correct in saying that fault-based liability is the wrong way to compensate for injury caused by defective products. It errs in finding liability *without* fault an appropriate measure, let alone the "sole means" to the end of paying for product injury. Even with "fault" postulated away, the private-law litigant faces barriers (in the U.S. and more so in Europe) that keep her out of court, and even unaware of her claim. Some kind of welfare system is the only way to express a meaningful commitment to compensation. Although the Directive does not call for health-care reductions, its timing coincides with these calls. A new reliance on tort liability for compensation would hurt Europeans.

b. The Safety Rationale

In the years before promulgation of the Directive, American writers became interested in the question of whether the shift from negligence to strict liability for product-related injuries had enhanced safety. A theoretical model of strict products liability won the approval of economic analysts in the 1970s. They maintained that a strict liability rule was as amenable as negligence to the task of bringing the accident rate to an efficient level.¹¹⁷ Some writers, both econo-

116. See Abel, A Critique of Torts, 37 UCLA L. Rev. 785, 796 (1990). For elaboration on the poor fit between liability and compensation, see E. Bernzweig, By Accident Not Design: The Case for Comprehensive Injury Reparations (1980); Sugarman, Serious Tort Law Reform, 24 San Diego L. Rev. 795 (1987).

117. See R. Posner, Economic Analysis of Law 92-95 (1972); Shavell, Strict Liability Versus Negligence, 9 J. Leg. Stud. 1 (1980). The theoretical model diverges from strict products liability as it is applied. Because the model requires an effective defense of contributory

mists and noneconomists, made normative arguments for the expansion of a producer's liability.¹¹⁸ These arguments reinforced a view that strict products liability ought to increase safety: when manufacturers pay for a greater share of the costs of accidents, they will invest in measures that make products safer.

Whether United States' strict liability has indeed resulted in safer products and fewer accidents is a subject of disagreement. An empirical study reports, on the one hand, several declines: in the accidental death rate, the rate of accidental deaths at home, and the rate of injuries on the job, all in the last three decades.¹¹⁹ On the other hand, a product-by-product breakdown of workplace injuries shows an increase in the rate of injury caused by particular products.¹²⁰ It is undisputed that liability rules have affected the work of manufacturers, who devote more time and resources to questions of safety and liability.¹²¹ A consumer poll taken in 1987 reports that a majority of Americans think that product safety and quality has improved in the past ten years.¹²²

Thus, recent years have brought increased product safety, but only to a disputed degree, and not across the board. There are several explanations for the lack of dramatic benefit. The threat of damages encourages producers to minimize only the amounts they will have to pay, not the total accident rate. It would be rational for them to make greater investments where the user is more likely to sue, and more likely to prevail. For the liability-lawsuits-safety incentive sequence to function, victims must sue, and most do not.¹²³ Strict products

negligence (to impose incentives of care on the consumer) and because strict products liability developed into a rough equivalent to negligence for many situations, see Birnbaum, *supra* note 88, at 601, economic analysts have revisited their claim that strict products liability is efficient. See R. Posner, *Economic Analysis of Law* 160-64 (3d ed. 1986); Landes & Posner, *A Positive Economic Analysis of Products Liability*, 14 J. Legal Stud. 535, 537-543 (1985).

118. See Calabresi & Hirschoff, *Towards a Test for Strict Liability in Torts*, 81 Yale L.J. 1055 (1972); Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 Va. L. Rev. 1109 (1974).

119. See Consumer Federation of America, *The Benefits of the Modernization of the Tort Law in the Context of the Social Movement for Improved Safety and Quality in the National Economy* 14-18 (1987) [hereinafter *Consumer Federation*].

120. See Priest, *supra* note 69, at 192. Priest also reports an increase in the total number of product-related injuries requiring hospital treatment, *id.* at 192, but does not account for the increase in population and increased distribution of products. Another difficulty with the data is that they do not distinguish between defective and nondefective products: accidents involving persons who stood on the top step of a ladder, for instance, are not excluded.

121. See Weber, *Product Liability: The Corporate Response*, 893 Conference Bd. Res. Rep. 21, 21-22 (1987); *Consumer Federation*, *supra* note 119, at 3-6, 10.

122. *Id.* at 11.

123. See Abel, *supra* note 116, at 809-810, 814.

liability precludes a defense based on breach of duty but not on causation, and therefore producers can shift their resources (generally greater than those of a plaintiff) toward a challenge of causation.¹²⁴ Strict liability may land hardest on new technologies and unfamiliar products, even when they are safe, or safer than substitutes.¹²⁵ Organizational anomalies, employee ignorance and incompetence, small penalties and most of all liability insurance all combine to reduce the responsiveness of manufacturers to the effects of expanded liability.¹²⁶ It has also been suggested that expanded liability may reduce consumer safety conscientiousness.¹²⁷

A review of the United States record and related literature ought to have suggested to the Commission that although safety was enhanced during the strict liability era, this progress cannot be linked to a change in doctrine. Too many gaps separate each change that is connected ultimately to safety. Error, helplessness and perverse incentives break the links. These gaps become even more significant in a system where litigation is rare and risky for a plaintiff. Liberal doctrine means little to a victim who will not or cannot sue.

The relationship of incentives to safety is real, however, as is the overall increase in safety in the United States. Credit for the pressure of incentive goes to the consumer movement. Consumerism expressed through doctrine, rather than doctrine itself, imposed incentives toward safety on U.S. manufacturers. A similar groundswell has existed and continues to exist in the Community, but tradition suggests that it will choose expression through means other than litigation.¹²⁸

C. *Approximation*

Approximation, like harmonization, is a term of some ambiguity.¹²⁹ To this native speaker of English, it implies replication. Although some EC source material regards the two words as synonyms, this Article uses "approximation" to convey replication or reconciliation. A directive promulgated to create approximation would contain the

124. See Glenn, *Judicial Authority and the Liability of the Manufacturer, or Jusqu'ou Peut-on Aller Trop Loin?*, 38 Am. J. Comp. L. 555, 558 (1990).

125. See P. Huber, *Liability: The Legal Revolution and its Consequences* 155-61 (1988).

126. See Sugarman, *Doing Away with Tort Law*, 73 Calif. L. Rev. 555, 564-73 (1985).

127. See W.K. Viscusi, *Regulating Consumer Product Safety* 7 (1984) (noting that "compensation should depend on consumers' safety-related actions"). But see Latin, *Problem-Solving Behavior and Theories of Tort Liability*, 73 Calif. L. Rev. 677, 680 (1985) (disputing Viscusi argument).

128. See section III (Conclusion).

129. See *supra* note 21.

terms common to all of the laws of Member States, and where the laws diverged it would find a middle ground. A look at the Directive, however, reveals that it does not parallel the various national products liability laws. While most of the people of the European Community, and the majority of the twelve nations, live under legal systems where negligence and warranty govern products liability law,¹³⁰ the Directive provides for "liability without fault on the part of the producer."¹³¹

This statement contains some drama. When the Council declared that liability "without fault on the part of the producer is the sole means of adequately solving the problem, peculiar to our age of increasing technicality, of a fair apportionment of the risks inherent in modern technological production,"¹³² it echoed what Gary Schwartz has called "genuine strict liability."¹³³ By accepting liability "without fault" and its social justification, the Council also adopted two distinct constituents of strict products liability: a change in the plaintiff's requirements of proof, and a loss-spreading rationale. Although the Council went on to retreat from this bold step by favoring defect-based strict liability, the statement of motive has remained.

To understand the application of strict products liability in the European Community, and why the Directive does not achieve harmonization in the sense of approximation, it is crucial to separate the loss-spreading rationale from the question of proof. As discussed below, burdens of proof have long been flexible in Europe. The endorsement of loss spreading, however, is new to the Community. In its Preamble, the Directive declares that only expanded liability can allocate risks fairly between producers and consumers.¹³⁴ Thus, even if, as many have said, strict products liability and negligence rules generally lead to the same outcome when cases are decided,¹³⁵ the Directive changes rather than approximates European products liability law.¹³⁶ This change clashes with a long European tradition of

130. See *supra* notes 209-12 and accompanying text.

131. Directive, *supra* note 2, at Preamble.

132. *Id.* The Preamble to a directive is not merely introductory material: it is mandated by the Treaty of Rome as a statement of motive. See Treaty of Rome, *supra* note 1, art. 190.

133. Genuine strict liability, as defined by Professor Schwartz, is a rule that would make manufacturers liable for all accidents "caused or occasioned by their products." Schwartz, *supra* note 88, at 441. With no mention of the word defect, the Preamble apparently embraces this definition.

134. See Directive, *supra* note 2, at Preamble.

135. See *supra* note 88 and accompanying text.

136. See *infra* text accompanying notes 145-160. One comment suggests that although the doctrinal change of the Directive will be slight, implementation may have "psychological

manipulating existing contract and tort principles to provide legal redress for plaintiffs injured by defective products, and of compensating injured persons through social-welfare spending.

1. *The Past: Fault, Negligence, and Warranty*

A civil law heritage, which influences all of the EC including its two common law countries, has embedded the fault principle in the European laws of obligation. Product liability rules come from both contract and tort precedents,¹³⁷ as in the common law. Under Roman contract law, obligation was based on consent (*pacta sunt servanda*); in the case of extra-contractual liability, the basis of liability was the fault of the actor.¹³⁸ This principle of individual responsibility remained constant in European codifications, most prominently the French Civil Code of 1804, that brought civil law into the modern era.¹³⁹

As interpreted for many years in the United States and the United Kingdom, the laws of contractual and extra-contractual liability posed doctrinal obstacles to consumers who alleged that they were injured by a product. The rule of privity blocked recovery by persons who had not entered into a contract with the manufacturer. Tort law, which was later permitted as a basis of recovery, required the proof of negligence.¹⁴⁰ United States courts eventually saved plaintiffs from their plight with strict products liability. On the Continent, however, courts construed their old laws of obligation to cover product-caused injuries.

Contract law evolved early. Long before Cardozo decided to reject contract principles that purported to limit actions for injury caused by defective products,¹⁴¹ French jurists understood the connection between fault and the sale of defective goods. Venerable French statutes provide that a seller warrants a chattel to be free of latent defects

consequences . . . specifically a probable increase in plaintiff's expectations regarding damage awards and the effects of these expectations on developments in future case law." See Toepke & Hassels-Weiler, 1992 and the Approximation of Product Liability Law: the Implementation of the EC Council Directive on Product Liability, and its Effects in Germany and other EC Countries, in *European Economic Community*, supra note 76, at 137-38.

137. The law of Europe derives from a tradition linked back to Roman codification in 450 B.C. See J. Merryman, *The Civil Law Tradition* 2 (2d ed. 1985).

138. See Yntema, *The Law of Obligations*, in *Civil Law in the Modern World* 68 (A. Yiannapoulos ed. 1965).

139. See, e.g., Code Civil [hereinafter C. Civ.] art. 1382 (Fr.) (tort law); *Bürgerliches Gesetzbuch* [BGB] art. 242 (W. Ger.) (contract).

140. See E. Levi, *An Introduction to Legal Reasoning* 9-27 (1949).

141. See *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 111 N.E. 1050 (1916).

that make the chattel unfit for its intended use.¹⁴² The seller who knows of a defect is responsible for all damage; the good-faith, ignorant seller is responsible only for economic loss.¹⁴³ French courts have long interpreted this law to hold even the ignorant seller responsible for all injury.¹⁴⁴ Privity, another key element of civil-law contracts doctrine, was also interpreted in France to allow lawsuits by a consumer against a manufacturer.¹⁴⁵

French law drew a similar connection between past and present. The principle of *fait de la chose*, approved by the Court of Cassation in 1897,¹⁴⁶ a time when the citadel of privity stood firm in the U.S. and the United Kingdom, created a presumption of liability for the "act" done by things in one's charge.¹⁴⁷ Like traditional strict liability in Anglo-American law, *fait de la chose* linked harm to the lapse of an individual.¹⁴⁸

European courts have also revised burdens of proof. When viewed flexibly, the fault principle need not dictate more than some showing by a plaintiff that the defendant's actions caused injury. Judges in some EC countries have found liability under a fault principle when the particular harmful occurrence could reasonably have been prevented by a safer design, better instructions, or more care in manufac-

142. C. Civ., arts. 1641-43.

143. *Id.*, arts. 1645-46.

144. This construction has been traced back to Celsius, who had equated lack of professional skill and knowledge with fault, and was endorsed by the creators of the Civil Code. H. Tebbens, *International Product Liability* 84-85 (1979) (citing J. Domat, *The Civil Law in its Natural Order*, I. II. XI.VII. (1737)).

145. *Id.* at 87.

146. See Yntema, *supra* note 138, at 69-70.

147. French judges derived *fait de la chose* from ancient rules, recodified in the Civil Code, about responsibility for damage caused by an animal. *Id.* at 70. The story of *fait de la chose* is a neat civil law parallel to Levi's legal process narrative. See E. Levi, *supra* note 140. It partially refutes the notion that doctrinal change through reasoning is a phenomenon that distinguishes the common law. See also 11 *International Encyclopedia of Comparative Law* 23-28 (1983).

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

ture.¹⁴⁹ Of the EC countries, France has altered the burden of proof most in favor of plaintiffs, with Luxembourg following closely and Belgium accepting a slightly moderated form of French innovation.¹⁵⁰

France now permits users not in privity to recover, with relative ease, in tort. The courts have held that the same condition of a product which would give rise to liability by a seller to a buyer constitutes fault in regard to third persons.¹⁵¹ Liability for *fait de la chose*, which the Code Napoleon imposes on the keeper of a thing, seems on its face to attribute responsibility only to an owner.¹⁵² But substantial authority now distinguishes *garde du comportement*, the control exercised by an owner or carrier, and *garde de la structure*, control of the internal dynamism, finding the latter control to be a basis of liability.¹⁵³ Supported by these two concepts, a French plaintiff need prove only a defect causally linked to injury. In virtually all cases, this proof constitutes an irrebuttable presumption of fault.¹⁵⁴

Other EC countries observe the fault principle more closely. In Germany and the United Kingdom the plaintiff must prove that a manufacturer failed to exercise due care, and that this failure resulted in a defect that caused injury.¹⁵⁵ This requirement is interpreted to mean that once the plaintiff proves a defect, the manufacturer must prove that it exercised reasonable care.¹⁵⁶ To this end, Germany uses a rebuttable presumption of fault upon the showing of defect;¹⁵⁷ the U.K. reaches a similar result with its common-law reliance on *res ipsa loquitur*.¹⁵⁸ Unlike their counterparts in France, producers in Germany and the United Kingdom can rebut the presumption against

149. See H. Tebbens, *supra* note 144, at 84 n.16.

150. See Orban, *supra* note 11, at 350.

151. See *id.*

152. See S. Gruber-Magiot, *L'Action du Consommateur Contre le Fabricant d'un Objet Affecté par un Vice Caché* 98-99 (1978).

153. *Id.* at 100.

154. See Whincup, *supra* note 56, at 530-31. A Belgian plaintiff is similarly favored, except that in contract lawsuits the presumption of fault by the seller or producer is rebuttable, and the courts uphold some exculpatory agreements and disclaimers of liability. See Orban, *supra* note 11, at 350.

155. *Id.* at 354, 362. In addition, plaintiffs in Germany may sue in contract and tort law simultaneously, unlike plaintiffs in France or Belgium. *Id.* at 351.

156. *Id.*

157. Judgment of Nov. 26, 1968, Bundesgerichtshof [1969], *Neue Juristische Wochenschrift* 269, 274.

158. Orban, *supra* note 11, at 361. It has been widely noted that *res ipsa loquitur* parallels the rebuttable presumption of negligence. One distinction between the two is that courts may use *res ipsa loquitur* as a permissible inference of negligence, rather than impose a duty to rebut. See P. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser & Keeton on the Law of Torts* 257-59 (5th ed. 1984).

them.¹⁵⁹ Ireland, the Netherlands, and Denmark follow a similar rule.¹⁶⁰

European law, in sum, has kept constant the theme of individual dereliction in its laws of obligation, preferring ingenuity like *fait de la chose*, reinterpretation of contracts, and new presumptions to the sweeping concession that marks strict products liability. Clinging to fault and contract may seem artificial; the promulgators of the Directive clearly favored casting this tradition aside. Connecting injury to individual fault or consent has, however, demonstrated virtues. The connection made reform acceptable for centuries; it bends flexibly, and, as interpreted on the Continent, it has earned the consent of citizens who live with it under democratic governments.

2. *Strict Products Liability: A Trend?*

One way to save the approximation definition of harmonization is to say that although this history does respect the fault principle, strict products liability is a trend throughout Europe. Some proponents of the Directive have tried this argument.¹⁶¹ Old statutes say fault and contract; more and more often the judges who construe them find that manufacturers are liable for injuries caused by defective products. The obvious response to the claim is that if "trend" means anything like a recent tendency, it could not be applied to the movement of several European nations toward flexibility. French jurists took a broad view of liability in the eighteenth century, reinterpreted fault and contract in the nineteenth, and made presumptions of fault virtually irrebuttable in the twentieth.¹⁶² The German supreme court formally shifted the burden of proof for products liability actions in 1968. *Res ipsa loquitur* has been softening British rules of proof for more than a hundred years.¹⁶³

Trend theorists make the additional, and perhaps more important, mistake of failing to identify precisely what change they contend took place. It is probably true that, in general, a European plaintiff prevails more easily now in products liability litigation than at some

159. Orban, *supra* note 11, at 354, 364.

160. See Taschner, *supra* note 12, at 84. The remaining nations keep a traditional approach to the burden of proof, requiring plaintiffs to prove a failure to exercise due care, in which failure is not inferred from the presence of a defect.

161. See Boger, *The Harmonization of European Products Liability Law*, 7 *Fordham Int'l L.J.* 1, 21, 35 (1984); H. Tebbens, *supra* note 144, at 115 (finding trend toward strict liability shared among various legal systems, though not proceeding at same rate); see also Virginia Note, *supra* note 3, at 735-36 (alluding to, but not endorsing, trend theory).

162. See *supra* text accompanying notes 141-48, 151-54.

163. See *Byrne v. Boadle*, 2 H. & C. 722, 159 Eng. Rep. 299 (Exch. Ch. 1863).

date in the past. The evidence for this change is skimpy and anecdotal, especially because "products liability" still sounds unfamiliar to European (except German) ears and does not appear in most European codes, pleadings or captions.¹⁶⁴

But this change, if it exists, demonstrates only a shift in attitude toward consumers that has loosened burdens of proof. Having decided to treat the class of plaintiffs more leniently, European judges appear to have followed the European tradition of adjusting the burden of proof to facilitate litigation. The trend toward easing the burden of proof is different from a trend toward loss spreading, the second constituent of strict products liability as expressed in the Preamble of the Directive. The Directive explicitly changes the burden of proof and announces its intent to reallocate risk and loss. In order for a trend theory to explain the Directive as approximation and not law reform, there must have been a trend in Europe not only toward more plaintiffs' victories but also a clear endorsement of loss spreading. Trend theorists who defend the Directive only with reference to the former event are underdescribing their document.

Thus, the case for a trend requires specific instances of the adoption of strict products liability with a clear endorsement of loss spreading. In making their claim, proponents rely on only one statute: the Pharmaceutical Act of 1976,¹⁶⁵ a West German law created expressly to reallocate the cost of drug-caused injury.¹⁶⁶ The Pharmaceutical Act makes its commitment to loss spreading clear by not excluding development risks.¹⁶⁷

164. Will, *Asides on the Nonharmonization of Products Liability Laws in Europe*, in *Harmonization of Laws in the European Communities: Products Liability, Conflict of Laws and Corporation Law* 29 (1983). To create products liability law, judges have adapted principles of tort and contract. In civil law countries judge-made law is of uncertain precedential effect: principles become binding when they attain general acceptance. See Orban, *supra* note 11, at 349. This custom exacerbates the difficulty of identifying nonstatutory change in the law.

165. The Revised Pharmaceutical Act of 1976 (*Arzneimittelgesetz*) Aug. 24, 1976, *Bundesgesetzblatt*, Teil I [BGBl] I 2445 (W. Ger.).

166. The Act was passed in the wake of the Thalidomide disaster. See Boger, *supra* note 161, at 13, Virginia Note, *supra* note 3, at 762 n.184. See generally Mellin & Katzenstein, *The Saga of Thalidomide* (pts. 1 & 2), 267 N. Eng. J. Med. 1184, 1238 (1962) (teratogenic effect of drug).

167. Key provisions of the Act include a cap on liability (US \$327,000 per plaintiff; \$110 million overall, or \$7.9 million a year, for each producer per drug), a negligence standard for warning claims, a risk/utility mechanism to determine whether a particular injury is actionable, and a mandatory insurance plan. *Pharmaceutical Act*, *supra* note 165, at arts. 88, 84, 94. The monetary limits are converted based on an exchange rate of 1.6946DM to US \$1, the rate current as of October 11, 1991.

But the Directive and the Act have little in common.¹⁶⁸ The fundamental difference between the statutes lies in their ambition. Aimed narrowly at a particular industry, the Pharmaceutical Act addresses a particular historical event. Pharmaceutical injury raises unique problems of causation, loss spreading, insurance and support of innovation: these injuries represent an advanced problem of products liability. It is not a coincidence that the United States and Germany, the countries most preoccupied with products liability as a doctrine, have isolated pharmaceutical injury by statute. Just as the National Childhood Vaccine Injury Act of 1986¹⁶⁹ is *sui generis* in the United States, and presaged no trend,¹⁷⁰ the German compensation scheme marked no transformation in Europe, a conclusion mandated by the absence of similar statutes in the years 1976 to 1985.

3. *Whither Approximation?*

The approximation definition of harmonization thus fails to describe the basis for the Directive. Because the nations of Europe had declined to instill loss spreading in their products liability rules, the loss-spreading Directive does not approximate or reconcile existing law. A putative movement toward allowing plaintiffs to recover more easily is not the same thing as a trend toward loss spreading, and so a trend theory cannot support a characterization of the Directive as approximating national laws.

Approximation could have been tried. An approximation-based directive would provide that when a plaintiff can prove the existence of a defect in the product that impaired her, the manufacturer must prove that it exercised reasonable care. This rule, a rebuttable presumption of negligence, is the pre-Directive law of a plurality of EC nations (Germany, the United Kingdom, the Netherlands, Ireland, and Denmark), as well as the pre-Directive law of a majority of the EC population.¹⁷¹ As in the present Directive, under an approximationist directive the plaintiff would have the burden of proving a defect, causation, and damage.¹⁷² Midway between the French hard-

168. As Stapleton points out, the peril that the Pharmaceutical Act addresses, widespread consumption of a drug with disastrous effects unknowable at the time of circulation, cannot be covered by the Directive, which makes the development risks defense optional. See Stapleton, *supra* note 3, at 421-22.

169. 42 U.S.C. § 300aa-10 to -33 (West Supp. 1987).

170. See Schwartz & Mahshigian, *National Childhood Vaccine Act of 1986: An Ad Hoc Remedy or a Window for the Future?*, 48 Ohio St. L.J. 387 (1987).

171. See *supra* text at section I(C)(1).

172. See Directive, *supra* note 2, art. 4.

to-rebut presumption of negligence and the traditional burden on plaintiffs, this standard would have given Member States some direction from above but would, again like the Directive, impose nothing on individual cases that would change their outcome. In addition to being clearer, more consistent with European tradition, less enamored of a flawed American precedent, and more prudent than the Directive, such a measure would have been more likely to succeed.

The next section describes the difficult path of the Directive and attributes its problems to its content. Excessive ambition in the direction of law reform pulled the Directive to the boundary of lawfulness under the Treaty of Rome. Ultimately, the Community had to abandon this ambition and live with a Directive that does less for economic and social progress than an approximationist directive would have accomplished.

II. JURISDICTION

As has been mentioned above, the Directive is part of a larger consumer protection effort. In 1969, the European Parliament adopted a report that argued for a stronger position of consumers in the Community.¹⁷³ Strict products liability was slated for early action.¹⁷⁴ Five years later, the Commission promulgated the Directive pursuant to the official consumer protection program.¹⁷⁵ For the Directive to rest on a solid jurisdictional basis, the official consumer protection program must have fallen within the scope of article 100 of the Treaty of Rome.

The question of whether it does fall within this provision is complex. Commentators and the European Court of Justice agree that the Treaty of Rome is a flexible instrument,¹⁷⁶ but whether this flexibility extends to article 100, the provision governing directives,

173. See 12 O.J. Eur. Comm. 69 (1969) (189/68, OJC 17/69).

174. See Dashwood, *supra* note 21, at 202.

175. See Council resolution of 14 April 1975 on a preliminary programme of the European Economic Community for a consumer protection and information policy, 18 O.J. Eur. Comm. (No. C 92) 1 (1975) (Council resolution on consumer protection and information); Council Directive of 25 July 1985 on the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, 28 O.J. Eur. Comm. 133 (1985) (update of prior resolution).

176. Broad powers emanate from its Preamble. See Treaty of Rome, *supra* note 1. The Treaty also provides for the nullification of obstructionist national laws or conduct. See *id.*, art. 100 (approving issuance of directives); art. 170 (the power of Member States to bring proceedings against another Member State before the Court of Justice following Commission review of alleged infringement); art. 171 (compelling Member States to comply with decisions of Court of Justice). One important article, analogous to the "necessary and proper" clause of the United States Constitution, provides that the Council may act to attain any "one of the

remains unanswered. Article 100 provides that "[t]he Council shall, acting unanimously on a proposal from the Commission, issue directives for the approximation of such provisions laid down by law, regulation or administrative action in Member States *as directly affect the establishment or functioning of the common market.*"¹⁷⁷ Directives issued pursuant to article 100, which bind sovereigns,¹⁷⁸ must bear some relationship to the purposes of the Treaty. Beyond this basic agreement, however, the views regarding the scope of article 100 diverge.¹⁷⁹

Depending on the interpretation of article 100, then, the consumer protection program may or may not rest on faulty jurisdictional grounds. A rickety, but perhaps sufficient, argument may be made that the Treaty of Rome endorses consumerism. The Treaty was designed to promote the constant improvement of living and working conditions.¹⁸⁰ Various articles in the Treaty endorse promotion of a higher standard of living,¹⁸¹ policies that would tend to stabilize prices for agricultural goods,¹⁸² and the goal of eliminating unfair trade practices.¹⁸³ Parliament, an institution that has expressed doubts over the jurisdictional basis of the Directive, has found that consumerism is pervasive in the penumbras of the Treaty of Rome.¹⁸⁴

In this conflict, a loose definition of "consumerism" is necessary. Strict products liability endorses loss spreading, may tend to encourage consumer lawsuits, and may ease the burden of proof on plaintiffs. Thus, under the consumerist justification, the Community should prefer strict liability to fault-based liability. Consumerism is an ideal that nations can either reject or accept in their products liability laws merely by describing them as fault-based or strict. More and stricter strict liability equals more consumerism. The refusal of

objectives of the Community" when the Treaty has not provided the necessary powers. *Id.* art. 235.

177. Treaty of Rome, *supra* note 1, art. 100 (emphasis added).

178. *Id.* art. 189.

179. See Close, *The Legal Basis for the Consumer Protection Programme of the EEC and Priorities for Action*, 8 *Eur. L. Rev.* 221, 232 (1983). Close discusses three possible approaches to interpreting the jurisdictional basis for the consumer protection programs. *Id.* at 222-26. In addition, Close presents a spectrum representing the "degree of connection" between proposals and the goals of the Common Market. *Id.* at 231-35.

180. Treaty of Rome, *supra* note 1, Preamble.

181. *Id.* Preamble and art. 2; Directorate General, *supra* note 44, at 1.

182. Treaty of Rome, *supra* note 1, arts. 3, 39.

183. *Id.* arts. 3, 85-94.

184. According to a candid Parliament report, "the EEC Treaty makes no provision for a common consumer policy." Directorate General, *supra* note 44, at 1.

countries like Germany to adopt *de jure* strict products liability,¹⁸⁵ and the even more grievous refusal of countries like Italy to adopt *de facto* strict products liability,¹⁸⁶ interfere with a norm of the Common Market.

This part offers two responses to the use of consumerism to justify promulgation of the Directive. First, arguments that the Directive is *ultra vires*, raised in 1978, were never refuted and continue to have merit. Second, resistance to the Directive within the EC nations is of jurisdictional significance.

A. Article 100 Broadly Interpreted

When asked its opinion of the first products liability directive, the 1976 version, the Legal Affairs Committee of the European Parliament declared it *ultra vires*. The Committee read the phrase "as directly affect"¹⁸⁷ in article 100 to mean that proponents of a directive have the burden of showing that divergences among national laws have caused a malfunctioning of the Common Market, and that the Directive would cure that malfunctioning.¹⁸⁸ The proponents of the 1976 Directive did not meet this burden. Two of the three formal justifications included in the Directive, "divergencies *may* distort competition," and "the free movement of goods within the common market *may* be influenced by divergencies in law"¹⁸⁹ were speculative. According to its report, when the Legal Affairs Committee turned to "the relevant Commission department" for factual support for these conjectures it received an inadequate response.¹⁹⁰ The third justification, consumer protection, lacked a sufficient basis in the Treaty of Rome, according to the Committee.¹⁹¹

But the Committee wavered. Although it declared that "[f]or the Article to apply, it is essential for there to be an immediate causal link between (the divergencies between) national legislation and the (mal)functioning of the common market," it then continued, "or is it not sufficient for such an influence to be 'appreciable,' taking a broad interpretation of the word 'directly'?"¹⁹²

Implicitly accepting a broader interpretation of "directly," the

185. See Thieffry, *supra* note 3, at 79-80; see also Claveloux, *supra* note 17.

186. See Thieffry, *supra* note 3, at 79.

187. See *supra* note 177 and accompanying text.

188. See *id.*; see also Legal Affairs, *supra* note 48, at 8.

189. *Id.* (quoting 1976 Directive, *supra* note 23, Preamble) (emphasis in original).

190. *Id.* at 9.

191. *Id.* at 11.

192. *Id.* at 8.

Committee went on to stray from its jurisdictional complaint and reach the merits. The Committee explained that even if the phrase "as directly affect" is so broad as to mean nothing, the 1976 Directive ought not to be approved by the Council. There were too many flaws. The Directive would not completely replace all the national laws and hence could not create uniformity; it would impose heavy costs on industry; and it would injure competitiveness in the world market.¹⁹³

Debate over the merits of the Directive came to overshadow the *ultra vires* objection. Once compromises were in place in the 1985 version, particularly a development risks defense, subject to abrogation, close reading of article 100 vanished. Proponents of the Directive continued to intone that divergent liability rules meant divergent costs of doing business, which meant divergences in the functioning of the Common Market. From 1978 to the present, no EC institution has complained that this chain of reasoning is insufficient to support the Directive.

The old *ultra vires* objection, however, remains convincing, because proponents of the Directive failed to support their conjecture that divergent products liability laws affected competition and the movement of goods.¹⁹⁴ Even if "as directly affect" means "very indirectly affect," the proponents of the Directive suggested nothing more than possibilities. All that might survive from their defense is the claim of consumer protection, whose jurisdictional status is unclear. The reluctance of the Legal Affairs Committee clearly to resolve the jurisdictional problem, coupled with the proponents' inability to demonstrate the truth of their assertions, keeps the *ultra vires* objection alive.

B. *Resistance*

An evaluation of the jurisdictional basis of any directive is informed by the dynamic span of time between a directive's promulgation and implementation. The debates at the national level over implementation are relevant to determining the effect of a directive on the harmonization of the Common Market.

The story of the Directive is the story of two rejections. Its original incarnation, the 1976 Directive, failed at the Council level and had to be softened, if not eviscerated, by formal compromise. The present version, although adopted by delegates from all the EC nations in a unanimous vote, faltered at the national level; nine of the twelve nations did not meet the three-year deadline for implementation.

193. Id. at 11-12.

194. See text *infra* section I(B)(1)(a).

1. *Resistance in 1976*

The European Commission presented the 1976 Directive to the Council in October 1976. In accordance with procedure, the Directive had to be considered by the European Parliament and the Economic and Social Committee before the Council could make its decision.¹⁹⁵ Although neither group can issue binding advice,¹⁹⁶ in practice the Council usually heeds their views.¹⁹⁷ Voices of industry speaking to the two groups criticized the Directive.¹⁹⁸ The European Parliament initially deemed the 1976 Directive *ultra vires* and later suggested a version of the development risks defense that was eventually included in the final 1985 version. Parliament also suggested several other measures designed to restrict the liability of producers.¹⁹⁹ For its part, the Economic and Social Committee approved liability irrespective of fault but failed to agree on a development risks defense or a cap on damages.²⁰⁰ Both reports made the development risks defense their pivotal criticism. But for several years the Commission stood firm: consumerism mandated the strict liability of the producer for unknown development risks.²⁰¹

With consensus mandated by the unanimity rule of article 100, the Council referred this conflict to its Permanent Representatives Committee, a separate group of ambassadors, with the direction to promulgate a compromise.²⁰² In 1982, the Permanent Representatives

195. See *supra* note 1.

196. Both the Economic and Social Committee—a group of 144 members appointed by national governments to represent employers, employees, and “public interest coalitions”—and Parliament have only consultative powers. *Id.*; see M. Hopkins, Policy Formation in the European Communities 3 (1981). See also P. Mathijsen, *supra* note 1, at 95. However, the Single European Act of 1986 reformed the institutional system of the European Community and strengthened the position of the European Parliament. Schwartz, *The Reform of the European Community's Institutional System by the Single European Act*, in *Legislation for Europe* 1992, at 16 (J. Schwartz ed. 1989).

197. See A. Kerr, *The Common Market and How It Works* 66, 72 (3d ed. 1986).

198. See Virginia Note, *supra* note 3, at 730 n.5.

199. See Resolution embodying the opinion of the European Parliament on the proposal from the Commission of the European Communities to the Council for a Directive relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, 22 O.J. Eur. Comm. (No. C 127) 61-64 (1979) (contributory negligence defense, exoneration for producers who inform the public of defects upon discovery, judicial review of surrounding circumstances when determining whether a product was defective, intended to narrow permissible interpretation of defect).

200. See Opinion of the Economic and Social Committee on the proposal for a Council Directive relating to the approximation of the laws, regulations and administrative provisions of the Member States concerning liability for defective products, 22 O.J. Eur. Comm. (No. C 114) 17-19 (1979).

201. See Virginia Note, *supra* note 3, at 752-53.

202. See U.S. Experience, *supra* note 3, at 800. This committee is known as COREPER,

Committee succeeded in producing the rudiments of an acceptable compromise. As is reflected in the Directive, all major reforms would be supplementary. Member States could abrogate the development risks defense. Caps on damages, also optional, were held to minimums that in practice would provide for virtually unlimited liability.²⁰³ These terms survived and exist in the present Directive.²⁰⁴

2. *Resistance to the Compromise Directive of 1985*

After promulgation of the Directive, only the United Kingdom, Greece and Italy complied with the order to adopt statutes incorporating the directive into their national laws within three years of July 25, 1985. This 25% cooperation rate understates the level of resistance to the Directive: both the British and Italian statutes were deemed unsatisfactory by the Commission.²⁰⁵ Objecting to the wording of the development risks defense in both laws, the Commission subsequently brought proceedings for nonimplementation against both countries.²⁰⁶ Thus, the number of EC nations that implemented a timely statute, satisfactory to the Commission, in response to the Directive is one.²⁰⁷

In reviewing the roster of nations that have implemented the Directive, one is struck by its quality of randomness, not to say disharmony. The list includes large, medium-sized and small countries whose politics are disparate. Their pre-Directive products liability laws span the complete EC range, from Luxembourg's virtually irrebuttable presumption of manufacturer responsibility²⁰⁸ to the ada-

from its French title, *Comité des Représentants Permanents*. Established in 1958, the committee functions as a kind of sub-Council, carrying out assigned tasks and doing preparatory work. Critics feared that COREPER would endanger the Community's institutional balance by accreting power for the Council at the expense of the Commission; for a time COREPER was dubbed *Ständige Verräter* (Permanent Traitors) by parodists mocking its German title, *Ständige Verräter* (Permanent Representatives). The institutional balance appears to have been preserved. See D. Lasok & J. Bridge, *supra* note 21, at 200.

203. The COREPER recommendations, though they have been described as a "four-point solution," see U.S. Experience, *supra* note 3, at 800, were never official; the Committee works on an off-the-record basis. The substance of its 1982 compromise was published some months later in the media specializing in EC affairs. See Virginia Note, *supra* note 3, at 754 n.149.

204. Directive, *supra* note 2, at arts. 15(2) (development risks) and 16 (limitation on damages).

205. See Thieffry, *supra* note 3, at 77-79.

206. *Id.* at 78-9; see also Schneebaum, Products Liability in the European Community: what does it mean for U.S. Companies?, 44 Food Drug Cosm. L. J. 283, 285 n.14 (1989).

207. *Id.* at 285 (citing European Comm. Press Release 100 (88) 877 (Dec. 22, 1988) (announcing Commission's satisfaction with implementation by Greece)).

208. See Whincup, *supra* note 56, at 530.

mant fault rule of Italy.²⁰⁹ Only four of the implementing nations chose not to adopt a cap on liability.²¹⁰ France, the strict liability innovator of Europe, has conspicuously not implemented what is universally known as a strict liability directive.²¹¹ No national trait seems to correlate with the decision to implement the Directive. As evidenced by the statutes implemented pursuant to the Directive, divergence continues to exist.

Explanations for this outcome vary. Proponents of the Directive have claimed that implementation has been accomplished, except for a few delays that will be temporary. Some writers acknowledge no resistance, merely the inexperience of "EC bureaucrats"²¹² in implementing directives, a need to continue discussion of the problems of development risks and caps on damages,²¹³ and even a Mediterranean-based tendency to implement measures slowly.²¹⁴ Other explanations disperse resistance, attributing it to the peculiarities of individual countries. A British writer describes his country as "a notoriously difficult Community partner,"²¹⁵ and writes that attitudes toward harmonization in the United Kingdom and Denmark range "from the politely skeptical to the stridently hostile."²¹⁶

A plausible reason for delay, however, is that the Directive metamorphosed from its controversial stage in 1976 to a version that seemed empty.²¹⁷ When consumer advocates and industry could not reach accord over the substance of the Directive, the Council chose to

209. *Id.* at 533.

210. Thieffry, *supra* note 3, at 78-79 (Italy, the United Kingdom, Luxembourg, and Denmark).

211. *Id.* at 79-81.

212. Ludolph, *The European Community's 1992 Legislative and Regulatory Process: Rule Making to Implementation*, in *European Economic Community*, *supra* note 76, at 25 (discussing transposition of Council directives into national laws by member states.)

213. Schneebaum, *supra* note 206, at 284-85.

214. Writing in 1983, Dashwood identified the Mediterranean countries as particularly slow in the implementation process. See Dashwood, *supra* note 21, at 206 ("difficulty of achieving punctual implementation" in Italy, Greece, Spain and Portugal). Except for Spain, these countries subsequently defied predictions by implementing the Directive fairly quickly.

215. *Id.* at 204.

216. *Id.* at 196. See also Nielsson, *supra* note 42, at 1594 (Britain, Denmark and Greece are "the reluctant Europeans who support minimalist approaches based on intergovernmental cooperation."). Greece, of course, was the least reluctant nation of the Community in implementing the Directive. See *supra* notes 205-07 and accompanying text.

217. In fairness to those who make excuses for resistance to the Directive, it should be noted that almost all directives are met with some resistance. A Paris study in 1989 found that of 279 existing directives, 68 should by then have been implemented, but only seven were operative in the member nations. *Le Monde*, Oct. 6, 1989, at 12. But as the Commission battles indicate, see *supra* notes 13-20 and accompanying text, the Directive was the subject of unusually intense resistance.

compromise by removing most of the substance. The friends and enemies of the 1976 version became neither friends nor enemies of the Directive. Nothing was at stake.²¹⁸ Without agreement on what a complying statute ought to say, there could have been no serious discussion, consensus, or leadership about the Directive in the nations. A chaotic pattern of implementation resulted.

III. CONCLUSION: SOME LESSONS LEARNED

The Directive has jumped over the hurdles in its path, but over none of them cleanly. From its inception in the early 1970s, no adversary managed to topple the Directive. Industrial interests could not silence the strict liability message; close readings of the Treaty of Rome were abandoned; internal EC machinations did not bring redrafting and promulgation to a halt; and complete implementation is probably imminent. Yet each hurdle left its mark, and the Directive will reach the post-1992 single market with scars.

As this Article has contended, these hurdles may be understood in terms of jurisdiction. The elusive concept of harmonization mandated in article 100 of the Treaty means something more than what von der Groeben called a mathematical mean,²¹⁹ yet less than a total rewriting, of existing laws. Commandments contrary to national traditions offend the Treaty. But mere reduction to a common denominator would betray the agreement to advance the welfare of signatory nations. The Directive properly tried to improve rather than to replicate, and on its face did not exceed the Treaty. Jurisdictional inquiry, however, continues beyond promulgation. To the EC nations, the Directive was in 1976 a misguided, Americanish notion; in 1985, a misguided and neutralized notion. This reception suggests that the Directive did indeed go beyond the elastic but real boundaries of article 100.

Legal-minded perusal of the Directive did not cause resistance: nothing in the statute reflects a gross departure from the principles used to decide cases for most people in most EC nations. The resistance can be explained only by the rationale of the Directive: it was perceived as a reference to the United States and its trope of a liability crisis. Explicitly stated, strict products liability does not decide cases;

218. For a representative view, see Green & Murphy, *Product Liability Law in Ireland*, in *European Economic Community*, *supra* note 76, at 111 ("As would be expected, the manufacturing industry in Ireland has not been pressing for implementation. More surprisingly, however, no consumer lobby has been very vociferous in calling for the grafting of this new law onto the Irish Statute Book.").

219. See *supra* text accompanying note 30.

it stands for an endorsement of the lawsuit. To Europeans, who have never solved social problems by litigation, strict products liability is a cure for American lapses, and one that has caused harm.

Better cures exist. Affluent nations in Europe have done better than the United States with standards and regulations,²²⁰ and the Community ought to accomplish its consumerist goals with them. These devices have long been acceptable to Europeans. Although no single proposed standard is without some critic, the Member States and their citizens accept the need that a word, a product or a description mean the same thing throughout the Community.²²¹

But as an aspiration, consumerism cannot be commanded entirely by centralized regulations: the directive remains an important device.²²² Directives aim to effect a particular result, giving Member States some detail but leaving room for variance. The task of ensuring or expanding consumer protection is mostly practical. Use of a directive rather than a series of regulations adds idealism to the work.

The EC Product Safety Directive,²²³ promulgated in 1989, describes its purpose as an attempt to create a "general safety requirement." The requirement is that products "do not present unacceptable risks and that potential users are warned of any remaining risks."²²⁴ Continuing beyond this generalization, the Safety Directive mandates the creation of a well-funded and well-informed regulatory sector in each country, data collection to determine potential hazards to safety and centralized reporting to the Commission²²⁵provisions

220. See Quigley, *EC Law: Litigation and the Environment*, in *European Community*, supra note 76, at 285, 292 (unlike directives, regulations are automatically legally binding on EC nations).

221. According to Close's spectrum, "negative harmonization," the most permissible change, refers to the nullification of national laws incompatible with the Treaty of Rome. See Close, supra note 179, at 231. A synonym is "liberalization," meaning "the removal of obstacles to freedom of movement between the member states." Dashwood, supra note 21, at 182; see also supra note 37. The other end of the spectrum, the least permissible, consists of what Close calls "no hoppers." Near "negative harmonization" are measures that directly affect the functioning of the Common Market; near "no hoppers" are "measures for which [the Treaty of Rome] can be used as a legal basis." Close, supra note 179, at 232. Regulations and standards fit into the Close category of a "direct effect," perhaps even closer than that category to "negative harmonization," whereas the Directive fits the more distant category of measures that can (but might not) be justified by article 235.

222. Although the Council can choose flexibly between regulations and directives, among other measures (both binding and nonbinding), the regulation has been used sparingly. It addresses subjects that EC institutions control directly. Agriculture and trade regulation are the areas where the Council generally uses the regulation. See Quigley, supra note 220, at 292.

223. 32 O.J. Eur. Comm. (No. C 193) 1 (1989) [hereinafter *Safety Directive*].

224. *Id.* at Preamble.

225. *Id.* at art. 7. Other duties mandated in this article include assuring the competence of

that demonstrate at least an attempt to learn from American mistakes in regulation.

All of the Safety Directive bears evidence of hard thought. Facing the need to promote consumerism while believing that too much of it can lead to crisis, the Safety Directive reconceptualizes consumerism. According to the Safety Directive, consumerism stands for safety. The "fairness" justification of the Directive²²⁶ had previously been interpreted as a euphemism for bias, or at least the correction of an imbalance, thereby opening a winner-take-all conflict: whom would the Directive favor? By contrast, the Safety Directive casts product safety as in the mutual interests of industry and consumers: at last a harmonization of economic progress and social progress.

The Safety Directive does not preclude liability reform, not even the attempt at reform made in the Directive.²²⁷ Rather it facilitates such reform. By empowering national regulators to collect data²²⁸ as well as promulgate uniform safety rules,²²⁹ it can help to identify sources of danger: a particularly hazardous product, or a tendency of consumers to misuse a product, may call for special liability rules. Directive 85/374 has ignored the crucial subject of the duty to warn;²³⁰ article 4(1) of the Safety Directive contributes a helpful description of a good warning, specific yet not rigid, that would aid a judge trying to determine the reasonableness of a producer's conduct.²³¹ Unlike Directive 85/374, the Safety Directive avoids the con-

regulators (art. 7(1)(b)) and attention to consumer complaints (art. 7(1)(e)). The Safety Directive expressly prohibits national governments from limiting regulators' duties to compliance with regulations. *Id.* at art. 7(1)(B), 7(1)(e).

226. Directive, *supra* note 2, at Preamble.

227. See Safety Directive, *supra* note 223, at art. 16 (Safety Directive "shall be without prejudice to Directive 85/374/EEC").

228. *Id.* at art. 7(1)(d).

229. *Id.* at art. 7(2).

230. The only reference to warning in the Directive is the statement that "presentation" of the product bears on the question of whether it is "defective." See Directive, *supra* note 2, art. 6(1)(a). Warning law smacks of negligence, of course, and the authors of the Directive were apparently averse to negligence. Again, American experience bears on the task of the Commission. Strict products liability must confront the problem of the useful though risky product, where neither elimination of the hazard nor complete exoneration of producers is as good a solution as a warning. This dilemma calls for human judgment, and mandates a negligence-like standard.

231. The Safety Directive divides risks into "unacceptable" and "acceptable" categories, and article 4 addresses the acceptable risks. Such a risk must be "appropriately indicated" by a warning that takes into account "the intended use, consumption, packaging, transport and stage of a product." Safety Directive, *supra* note 223, art. 4(1)(a). The warning must be readily perceived at any necessary stage. *Id.* at 4(1)(b). The risk must be apparent to the user before he encounters the product, so that he can make "his own assessment of the risk." *Id.* at (4)(2). These rules are written as minimal standards.

cept of "defect," having learned from American experience that the label is misleading.²³² "Safe product" may prove no better. Neither term answers the inquiry. Safe product is a clearer concept than freedom from defect, however, at least in situations where a product design has been challenged.²³³ Reasonableness, ever-present in any assessment of risks and injury, is inherent in "safe product," whereas "defect" does not eliminate the trivial. At a minimum, the Safety Directive has chosen a term free from bad American history.

The reconciliation that the Safety Directive offers can be understood only in its context of an extra-legal approach to social welfare. Thus, this point is confined to Europe, as it has minimal application to the United States. Tort reform writers in the U.S. who would transfer authority for product safety and liability to professional administrators²³⁴ must overlook the American history of captured regulators, low fines, dismantling of agencies and other evidence of weakness in regulatory structure.²³⁵

The crucial distinction between American and European safety reforms is the large gap between administrative penalties and litigation judgments in the United States. A \$2,000,000 fine was the largest one levied based on the sale of a product in the U.S.²³⁶ Jury verdicts, some of which are upheld, frequently exceed that amount.²³⁷ American regulation fulfills a function different from the tort system not only in kind but in degree. Low jury awards and less inclination to sue mean that manipulation of the regulatory system in Europe offers more promise than this manipulation could at present deliver in the United States.

The European grasp of what regulation can offer is clearer than the Community's understanding of consumerism. To the European Parliament, consumerism means respect for the buyer and user of products and services. The consumer is "involved in those aspects of life

232. See *supra* note 88.

233. For discussion of the conceptual flaws of "design defect" as a cause of action, see Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 *Colum. L. Rev.* 1531 (1973).

234. See P. Huber, *supra* note 125, at 214-15.

235. See Schwartz, *A Product Safety Agenda for the 1990s*, 45 *Wash. & Lee L. Rev.* 1355, 1368 (1988); S. Tolchin & M. Tolchin, *Dismantling America: The Rush to Deregulate* 96 (1983). See also Priest, *supra* note 69, at 184 ("No one . . . can pretend that the United States makes any serious effort to regulate product quality directly.").

236. See Schwartz, *supra* note 235, at 1368.

237. See, e.g., *Ealy v. Richardson-Merrill, Inc.*, 897 F.2d 1159, 1161 (D.C. Cir. 1990) (\$20 million compensatory damages award in products liability trial "did not 'shock the conscience' of the trial court"); *Verdicts*, *Nat'l L.J.*, Jan. 29, 1990, p. S12 (\$152 million jury award to two plaintiffs exposed to asbestos; case settled for undisclosed sum).

in society which may directly or indirectly concern him as a consumer," and his point of view "must contribute to the drawing up of Community policies,"²³⁸ including directives. What is this person's point of view? Community institutions have come up with unimaginative answers. The Commission thought that the view includes a desire for a development risks defense.²³⁹ The Legal Affairs Committee of Parliament retreated from considering the point of view at all.²⁴⁰ Ultimately, that Committee thought it had to choose between slighting consumer protection and agreeing with proponents of the Directive.²⁴¹ But although consumerism requires attention to safety and to social welfare, it does not mandate liability without fault on the part of the producer. This liability rule, as imposed on Europe, hinders social progress as well as economic progress.

A final definition of harmonization remains. EC countries do not use litigation for the instrumentalist or public law function that prevails in United States; lawsuits do not achieve social goals. The action at law in Europe has been expensive and hazardous since Roman times.²⁴² This disapproval of litigation shows a dislike for open contention as a means to improve an individual's lot. Harmonization, in this new sense, means a preference for tranquil solutions over strife.²⁴³

The struggles of the Directive have shown the European Community that nonadversarial harmonization accords with pragmatic limitations as well as a cultural tradition in Europe. A new law can be devised in theory, but in democratic governments with independent judiciaries it is almost impossible to decree changes in private law lia-

238. Directorate General, *supra* note 44, at PE 100.200, En III/0.

239. See *supra* text accompanying notes 194-201.

240. See *supra* text accompanying note 189.

241. At the same time, American writers were beginning to perceive a subtler consumer, a person who is more than a victim. Richard Epstein was an early challenger of the idea that consumers are necessarily better off with pro-plaintiff rules in products liability law. See Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C.L. Rev. 643 (1978); Epstein, *Medical Malpractice: The Case for Contract*, 1976 Am. Bar. Found. Res. J. 87 (1976). Although this work has convinced few consumer advocates, it has been the source of an important literature.

242. See Thomas, *Risk Management in the New Europe: Insurance and Financial Management Issues*, in *European Economic Community*, *supra* note 76, at 143-44.

243. According to a German historian, "already in the early Middle Ages public opinion praised one principle—which applied to all economic and social measures—that it was better to prevent than to heal, in other words, that as a matter of principle one should combat everything that might possibly lead to conflicts." H. Bechtel, *Wirtschafts- und Sozialgeschichte Deutschlands* 91 (1967). Cf. Glenn, *Harmonization of Private Law Rules Between Civil and Common Law Jurisdictions*, General Report (on file at the Virginia Journal of International Law) (1990) (harmonization as "continuing, non-conflictual relationship of differing laws").

bility rules.²⁴⁴ These changes percolate from below. Grant Gilmore, who disapproved of strict products liability when it was new, foresaw that in the United States the concept would not be stopped: "There is no point in arguing with a revolution," he wrote.²⁴⁵ Americans waged a consumerist revolution in products liability law of necessity, because they could not bring themselves to require the regulation and social insurance needed for consumer protection. Attempting a similar revolution without inquiring whether it was desirable, the Directive created dissonance. But as the Community continues to blunt the effect of the Directive, reaffirms its commitment to economic equality and care for the afflicted, considers a better measure for safety, and asserts its unified identity, it moves closer towards harmony.

244. The effort to decree ambitious changes in private law rules has been described as an attempt to create a public law of liability. This focus unites the Directive with two public law attempts in the United States: the creation of strict products liability and the tort reform movement. See Bernstein, *supra* note 59.

245. Gilmore, *Products Liability: A Commentary*, 38 U. Chi. L. Rev. 103, 116 (1970).

