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# Closing the American Products Liability Frontier: The Rejection of Liability Without Defect

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## CLOSING THE AMERICAN PRODUCTS LIABILITY FRONTIER: THE REJECTION OF LIABILITY WITHOUT DEFECT

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*For over one hundred years American courts expanded the rights of plaintiffs in products liability cases. First the courts eliminated the privity requirement, next the necessity of proving fault, and finally, the necessity of proving a production defect. The next logical step in this progression would be to eliminate the need to show any type of defect at all. In this Article, Professors Henderson and Twerski assert that this step cannot and will not be taken. They explore both the possibility of across-the-board liability without defect and the more limited idea of product-category liability without defect. They describe how a system of liability without defect would work, and then they demonstrate why such a system is neither workable nor desirable. The authors examine both the practical and theoretical ramifications of the no-defect liability system that would emerge if courts somehow could clear the implementation hurdle. They also discuss the judicial system's flirtation with such an expansion. Asserting that our judicial system will not tolerate this development in products liability law, Professors Henderson and Twerski conclude that products liability has reached its outermost frontier.*

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## TABLE OF CONTENTS

INTRODUCTION .....	1266
I. The American Products Liability Frontier .....	1269
A. Major Stages in the Historical Evolution of American Products Liability Law .....	1269
1. Prodefendant Biases During the Industrial Revolu- tion (1850-1900) .....	1269
2. The Development of Strict Tort Liability for Production Defects (1900-1960) .....	1269
3. Extending Products Liability to Defective Design and Failure-to-Warn (1960-1980) .....	1270
4. Retrenchment and Judicial Flirtation with Liability Without Defect (1980 to the present) .....	1271
B. Theoretical Justifications for Imposing Liability With- out Defect .....	1273
II. Across-the-Board Liability Without Defect.....	1276
A. A Closer Look At What Such a System Would Be Like .....	1276
B. Problems of Implementation .....	1279
1. Determining Causation.....	1279
2. Users' and Consumers' Contributory Fault .....	1283
3. Measuring Useful Product Life .....	1285
C. A Brief Look at the Distortion Effects Across-the- Board Liability Without Defect Would Have on the Behavior of Firms and Individuals in the Marketplace .	1286
1. Distortion Effects That Accompany Liability Sys- tems in General .....	1287
2. The Unique Distortion Effects of an Across-the- Board System of Liability Without Defect .....	1289
D. Across-the-Board Liability Without Defect in Ameri- can Products Liability Decisions .....	1292
III. Narrower Forms of Liability Without Defect: Product- Category Liability .....	1297
A. Product-Category Liability: Some Initial Terminology .	1298
B. Problems of Implementation Presented by Product- Category Liability .....	1300
1. Why Courts Are Not Competent to Implement Risk-Utility-Based Product-Category Liability.....	1301
a. Risk-Utility and the Issues of Contributory Fault, Useful Product Life, and Causation.....	1301
b. Identifying Unreasonably Dangerous Product Categories.....	1305

- 2. Why Courts Are Not Competent to Implement Product-Category Liability Based on Other Criteria..... 1307
- C. Implications of Imposing Product-Category Liability... 1309
  - 1. Theoretical Policy Concerns..... 1309
  - 2. The Negative Distortion Effects of Product-Category Liability..... 1310
- D. Product-Category Liability in American Tort Law..... 1314
  - 1. Explicit Attempts to Establish Product-Category Liability..... 1316
    - a. Reliance on Risk-Utility Balancing to Establish the Relevant Categories..... 1316
    - b. Extending the “Ultrahazardous Activity” or “Abnormally Dangerous Activity” Doctrine.... 1319
  - 2. Implicit Attempts to Establish Product-Category Liability: Categorical Liability Disguised in Traditional Doctrinal Garb..... 1322
    - a. Stretching Failure-to-Warn Beyond Recognition ..... 1322
    - b. Other Potential Avenues for Achieving Product-Category Liability: Negligent Entrustment and Overpromotion ..... 1326
- CONCLUSION..... 1329

## INTRODUCTION

American products liability law has been evolving for more than a hundred years, primarily in the direction of expanding plaintiffs' rights to recover. Only recently—in the past decade or so—has this expansionary tendency slowed and, here and there, stopped dead in its tracks. State legislatures have played an important role in slowing expansion.<sup>1</sup> And largely independent of the statutory reforms it now appears that courts also have moved toward limiting recovery rights.<sup>2</sup> These recent developments commonly are explained in political terms.<sup>3</sup> At last, and not surprisingly, the recent trend toward political conservatism has caught up with liability law; an earlier, almost euphoric faith in a limitless American economy has given way to the realization that financial resources are, after all, finite.<sup>4</sup> As evidence, advocates of the view that tort has gone too far point to growing numbers of manufacturers who are unable to sustain the significant financial burdens imposed by vigorous judicial review of product decisions reached in the marketplace.<sup>5</sup>

In contrast, this Article offers a very different explanation for why the expansion of American products liability law is coming to an end. In our view, American products liability law has reached a point from which further meaningful development is not only socially undesirable but also institutionally unworkable. From the turn of the last century, significant expansions of products liability law have included eliminating the privity requirement in negligence actions,<sup>6</sup> replacing negligence and implied warranty with strict liability in tort,<sup>7</sup> and applying products liability not only to production defects but also to defective product designs and product marketing.<sup>8</sup> Eliminating the requirement that plaintiffs

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<sup>1</sup> See Litan & Winston, *Policy Options, in Liability: Perspectives and Policy* 223, 229-33 (R. Litan & C. Winston eds. 1988) (describing state tort reform measures).

<sup>2</sup> See Henderson & Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 *UCLA L. Rev.* 479, 498-533 (1990) (indicating that courts disfavored tort expansion independent of whether legislatures adopted reform). But see Schuck, *Introduction: The Context of Controversy*, in *Tort Law and the Public Interest* 17, 29-31 (P. Schuck ed. 1991) (casting doubt on Henderson & Eisenberg's methodology and predicting end to any prodefendant trend).

<sup>3</sup> See, e.g., Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, — *Ga. L. Rev.* — (1992) (forthcoming).

<sup>4</sup> For a description of the earlier expansionary vision, see Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 *J. Legal Stud.* 461, 505-18 (1985).

<sup>5</sup> See generally P. Huber, *Liability: The Legal Revolution and Its Consequences* 14-15, 56-57, 155-56 (1988).

<sup>6</sup> See, e.g., *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 389, 111 N.E. 1050, 1053 (1916).

<sup>7</sup> See, e.g., *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 62-63, 377 P.2d 897, 900-01, 27 Cal. Rptr. 697, 700-01 (1963).

<sup>8</sup> See, e.g., *Thibault v. Sears, Roebuck & Co.*, 118 N.H. 802, 807, 395 A.2d 843, 846

prove product defectiveness as a prerequisite to recovery would seem to be the next logical step on this path.<sup>9</sup> Indeed, a number of writers in recent years have advocated various forms of liability without defect,<sup>10</sup> even while expressing doubts regarding its efficacy.<sup>11</sup> Moreover, a few courts actually have adopted limited versions of liability without defect.<sup>12</sup>

Notwithstanding these developments, this Article takes the position that liability without defect never will become part of the products liability mainstream. Our pessimism stems not from the fact that liability without defect is politically unacceptable, since political opinion eventually could shift once again to favor plaintiffs. Rather, we demonstrate that defect is the conceptual linchpin that holds products liability law together; a system of liability without defect is beyond the capacity of courts to implement.

Part I of this Article divides American products liability law into four time periods and surveys the major developments of each period.

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(1978).

<sup>9</sup> Imposing liability without defect traces its intellectual roots to the beginnings of the strict products liability movement. For example, John Wade, an early and influential commentator, offered a test for defect which anticipated the liability-without-defect movement. See Wade, *On the Nature of Strict Tort Liability for Products*, 44 *Miss. L.J.* 825, 837-40 (1973) (enumerating seven factors to be weighed in determining whether product is unreasonably dangerous). See generally Priest, *supra* note 4, at 505-18 (emphasizing risk sharing rather than traditional tort law risk bearing).

<sup>10</sup> See, e.g., Croley & Hanson, *What Liability Crisis? An Alternative Explanation for Recent Events in Products Liability*, 8 *Yale J. on Reg.* 1, 8 (1991) ("courts should complete the shift toward enterprise liability"); Diamond, *Eliminating the "Defect" in Design Strict Products Liability Theory*, 34 *Hastings L.J.* 529, 531 (1983) (urging application of traditional strict liability—liability not premised on defect—to products associated with abnormally dangerous activities and suggesting that "[i]t is arguable that traditional strict liability also should be extended to products not associated with abnormally dangerous activities"); Edell, *Risk Utility Analysis of Unavoidably Unsafe Products*, 17 *Seton Hall L. Rev.* 623, 641 (1987) (arguing that product whose risk outweighs its utility should be "deemed to be so dangerous and of such little value to society that it should not be marketed at all"). But see Twerski, *A Moderate and Restrained Federal Product Liability Bill: Targeting the Crisis Areas for Resolution*, 18 *U. Mich. J.L. Ref.* 575, 588-89 (1985) (criticizing imposition of design-defect liability where no safer alternative design exists); Note, *Strict Products Liability and the Risk-Utility Test for Design Defect: An Economic Analysis*, 84 *Colum. L. Rev.* 2045, 2061 (1984) (arguing that design-defect liability, where no alternative is available, will result in net loss of social utility).

<sup>11</sup> See, e.g., Schwartz, *Foreword: Understanding Products Liability*, 67 *Cal. L. Rev.* 435, 442 (1979) (noting that "genuine strict liability" merits "serious attention," even though generally regarded as extreme).

<sup>12</sup> See, e.g., *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 115-17 (La. 1986) (asbestos manufacturer held liable even though did not and could not have known of product's danger); *Kelley v. R.G. Indus.*, 304 Md. 124, 144-57, 497 A.2d 1143, 1153-59 (1985) (innocent victim of criminal assault has cause of action against manufacturer of "Saturday Night Special" handguns); *O'Brien v. Muskin Corp.*, 94 N.J. 169, 184-85, 463 A.2d 298, 306 (1983) (aboveground swimming pool manufacturer held liable on risk-utility grounds despite absence of alternative design). In each jurisdiction, these decisions have been overturned by statute. See note 195 and accompanying text *infra*.

Conceiving the final period—the present—as one of retrenchment, this Part proposes that the expansive trend ceased not only because observers widely intuited that tort had gone too far, a hypothesis that this Article does not test, but more fundamentally because its next logical step is institutionally impossible. To highlight why this Article's focus on liability without defect is far from trivial, notwithstanding the force of our previous assertion of unworkability, section B of Part I examines several compelling justifications in favor of the no-defect liability expansion. These justifications provide a counterweight against which this Article's criticisms of liability without defect may be balanced and, in the final analysis, judged.

In light of this background, Part II examines in detail the viability of an "across-the-board" system of liability without defect and argues that courts would find such a system impossible to implement for three reasons. First, abandoning the defect requirement would create insurmountable problems in handling the already difficult questions of causation. Second, complex issues concerning the responsibilities of users and consumers for contributing to accidental injuries would have to be rethought and reworked. And third, excusing proof of original defect would burden product manufacturers with indefinite liability, even after their products' useful lives had expired. Even assuming that courts somehow could rise above these problems of institutional capacity, we argue that a no-defect liability system would cause such serious distortion effects on the behavior of firms and individuals in the marketplace that its adoption would be unwise in the extreme.

Part III focuses upon the possibility of imposing liability without defect on specific categories of notoriously dangerous products, such as handguns, cigarettes, or alcohol. This system would select the product categories to be covered either by a risk-utility analysis or by other criteria: for example, that a product is far too costly irrespective of its utility. After examining various practical and theoretical difficulties with a product-category system, Part III argues that, like across-the-board liability, this alternative is so riddled with problems that it too is beyond judicial capacity to implement fairly and well. Therefore, this Article concludes that, whatever might be said pro or con regarding a legislatively conceived system of no-fault compensation as a replacement for tort altogether,<sup>13</sup> tort as a common-law system of regulating product safety has

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<sup>13</sup> For a discussion of nonjudicial alternatives, see Pierce, *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 *Vand. L. Rev.* 1281, 1291-1331 (1980) (proposing creation of new federal agency to regulate safety); text accompanying notes 37-51 *infra* (describing arguments in favor of no-defect system of liability). For a treatment of the problems of implementation, see generally Henderson, *The Boundary Problems of Enterprise Liability*, 41 *Md. L. Rev.* 659 (1982). For a discussion and criticism of New Zealand's ground-

reached its inherent institutional limits.

If one analogizes the historical development of products liability to the westward migration of European settlers across the North American continent, products liability has reached the shores of its Pacific Ocean. We now can turn our attention inland to improve settled territories. From here, however, no further continental landmass remains to be discovered and occupied. Anyone who believes otherwise is in for a very long swim.

## I

### THE AMERICAN PRODUCTS LIABILITY FRONTIER

#### *A. Major Stages in the Historical Evolution of American Products Liability Law*

This section divides the historical evolution of American products liability doctrine into four time periods, beginning in 1850 and ending in the present. Although these divisions are somewhat artificial, the time periods capture four distinct phases in the development of American products liability doctrine.

##### *1. Prodefendant Biases During the Industrial Revolution (1850-1900)*

The first period of development corresponds roughly to the onset of the Industrial Revolution in this country. Prior to 1850, mass-produced products did not exist in sufficient quantities to support a system of tort liability concerned primarily with the risks of product use and consumption. However, this situation changed in the period following the Civil War when American industries grew rapidly and the consumption of mass-produced goods and services became commonplace.<sup>14</sup> The law of products liability was markedly antiplaintiff during this early period, epitomized by the privity rule which effectively barred plaintiffs from recovering against negligent manufacturers.<sup>15</sup> Indeed, so prodefendant were the rules relating to liability that a prominent legal historian observed that products liability hardly existed prior to 1900.<sup>16</sup>

##### *2. The Development of Strict Tort Liability for Production Defects (1900-1960)*

If the liability developments in the first period of evolution were

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breaking Accident Compensation Act of 1972, see generally Henderson, *The New Zealand Accident Compensation Reform*, 48 U. Chi. L. Rev. 781 (1981).

<sup>14</sup> See L. Friedman, *A History of American Law* 467-87 (2d ed. 1985).

<sup>15</sup> See W. Keeton, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* 679-81 (5th ed. 1984) [hereinafter *Prosser & Keeton on Torts*].

<sup>16</sup> See L. Friedman, *supra* note 14, at 684.



markedly prodefendant, the developments in the second were more strongly proplaintiff. One important change early in the second period was the elimination of the privity requirement in negligence cases.<sup>17</sup> Thereafter, sometimes by small increments but always steadily—one might even say, relentlessly—courts used both tort and contract principles to impose strict liability on the commercial distributors of defective products. In tort, courts expanded the traditional doctrine of *res ipsa loquitur* to the point where the mere fact of a product defect supported an inference of negligence.<sup>18</sup> In contract, courts dismantled the traditional impediments to plaintiffs' actions for breach of warranty.<sup>19</sup>

The second period ended in 1960 with the epochal decision in *Henningsen v. Bloomfield Motors, Inc.*,<sup>20</sup> stripping warranty completely of its contractual limitations and imposing strict liability in tort. Although it took several more years before privity-free strict liability in tort was recognized widely,<sup>21</sup> the *Henningsen* decision clearly signaled a more hospitable environment for plaintiffs.

### 3. *Extending Products Liability to Defective Design and Failure-to-Warn (1960-1980)*

Common-law developments in this period, as in the second, were substantially proplaintiff. From 1960 to 1980, courts extended and clarified the strict liability standard announced in *Henningsen*.<sup>22</sup> More significantly, courts developed a second major front in the products liability war—they focused attention on, and imposed liability for, generic product hazards—that is, for hazards that inhered in the design and marketing of products rather than in their production.<sup>23</sup> The same courts that had focused primarily on cases involving production defects<sup>24</sup> began dismantling the traditional doctrinal impediments to recovery for generic

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<sup>17</sup> See, e.g., *MacPherson v. Buick Motor Co.*, 217 N.Y. 382, 389, 111 N.E. 1050, 1053 (1916); see also Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L.J. 1099, 1100-02 (1960) (noting erosion of privity requirement).

<sup>18</sup> See *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 459-60, 150 P.2d 436, 438-39 (1944); see also Prosser, *supra* note 17, at 1114-20 (noting use of *res ipsa loquitur* by courts to allow inference of negligence from presence of defective product).

<sup>19</sup> See Prosser, *supra* note 17, at 1106, 1117-19.

<sup>20</sup> 32 N.J. 358, 161 A.2d 69 (1960).

<sup>21</sup> See, e.g., *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 62-63, 377 P.2d 897, 900-01, 27 Cal. Rptr. 697, 700-01 (1963); see also Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 Minn. L. Rev. 791 (1966) (tracing fall of privity doctrine and evolution of strict products liability).

<sup>22</sup> See generally Priest, *supra* note 4, at 505-19.

<sup>23</sup> See Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 Colum. L. Rev. 1531, 1542-44 (1973).

<sup>24</sup> See *id.* at 1544-46.

product hazards.<sup>25</sup> Decisions published during the late 1970s and early 1980s represent what many observers consider to be the high water marks of this expansionary, remarkably proplaintiff period.<sup>26</sup> By 1980, American courts had put in place a liability regime that hardly existed in 1960: a robust, expanding system of tort liability for defective product designs and failures to warn of product hazards.<sup>27</sup>

#### 4. *Retrenchment and Judicial Flirtation with Liability Without Defect (1980 to the Present)*

The first prodefendant period in the modern era of products liability law began in the early 1980s. With increasing frequency, judicial opinions suggested that developments in the third period had gone too far.<sup>28</sup>

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<sup>25</sup> These doctrinal barriers included the patent-danger doctrine, shifting duty, the intended-purpose doctrine, and the bystander rule. For a discussion of the barriers, referred to as "single factor no-duty rules," see Twerski, *Seizing the Middle Ground Between Rules and Standards in Design Defect Litigation: Advancing Directed Verdict Practice in the Law of Torts*, 57 N.Y.U. L. Rev. 521, 523-24 & nn.7-10 (1982). The first major decision imposing liability for obvious design hazards was *Pike v. Frank G. Hough Co.*, 2 Cal. 3d 465, 475-76, 467 P.2d 229, 235, 85 Cal. Rptr. 629, 635 (1970). The leading case denying liability, *Campo v. Scofield*, 301 N.Y. 468, 95 N.E.2d 802 (1950), was overruled in *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 376-80, 348 N.E.2d 571, 571-75, 384 N.Y.S.2d 115, 115-19 (1976).

In the same period, courts focused on issues tangential to the concepts of defective design and marketing, such as whether plaintiffs injured by a generically hazardous product should be allowed to recover when they cannot prove which of several producers manufactured the product unit(s) that caused injury, see, e.g., *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 612-14, 607 P.2d 924, 936-38, 163 Cal. Rptr. 132, 144-46, cert. denied, 449 U.S. 912 (1980), or whether plaintiffs guilty of misusing products nevertheless should be able to recover for bad product designs. See, e.g., *Hughes v. Magic Chef, Inc.*, 288 N.W.2d 542, 544-47 (Iowa 1980) (plaintiff's alleged misuse of stove not affirmative defense, but plaintiff still must prove product defect caused explosion and injury).

<sup>26</sup> See, e.g., *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 432-33, 573 P.2d 443, 455-56, 143 Cal. Rptr. 225, 237-38 (1978) (alternative tests for defective design: consumer expectations and risk-utility balancing with burden of proof shifted to defendant); *Beshada v. Johns-Manville Prods. Corp.*, 90 N.J. 191, 204-08, 447 A.2d 539, 546-49 (1982) (manufacturers of asbestos liable for product-related hazards that were scientifically unknowable at time of original distribution).

<sup>27</sup> See generally Henderson, *Renewed Judicial Controversy Over Defective Product Design: Toward the Preservation of an Emerging Consensus*, 63 Minn. L. Rev. 773 (1979).

<sup>28</sup> See, e.g., *Chaulk by Murphy v. Volkswagen of Am.*, 808 F.2d 639, 645 (7th Cir. 1986) (Posner, J., dissenting) ("Ours is not a system of people's justice where six laymen are allowed to condemn an entire industry on the basis of absurd testimony by a professional witness."); *Dawson v. Chrysler Corp.*, 630 F.2d 950, 963 (3d Cir. 1980) ("Although it is important that society devise a proper system for compensating those injured in automobile collisions, it is not at all clear that the present arrangement of permitting individual juries, under varying standards of liability, to impose this obligation on manufacturers is fair or efficient."), cert. denied, 450 U.S. 959 (1981); *Wilson v. Piper Aircraft Corp.*, 282 Or. 61, 67, 577 P.2d 1322, 1326 (1978) ("If liability for alleged design defects is to 'stop somewhere short of the freakish and the fantastic,' 'plaintiffs' prima facie case of a defect must show more than the technical possibility of a safer design." (quoting Prosser, *Palsgraf Revisited*, 52 Mich. L. Rev. 1, 27 (1953))); *Lewis v. Coffing Hoist Div.*, 515 Pa. 334, 346, 528 A.2d 590, 595 (1987) (Hutchison, J., dissenting) ("I am compelled, in the words of a popular song, to 'speak out against the madness.'")

Many state legislatures also expressed disapproval of products liability law by passing tort reform measures.<sup>29</sup> By the beginning of the 1990s, courts were favoring defendants distinctly more frequently than plaintiffs in cases of first impression in products liability decisions.<sup>30</sup> Courts did not invariably overturn prior decisions, although some backsliding did occur.<sup>31</sup> Instead, courts simply rejected plaintiffs' arguments favoring further expansions of the products liability boundaries.<sup>32</sup>

These judicial refusals have occurred at both the micro and the macro levels. At the micro level, courts frequently have declined to apply established doctrine to new facts and circumstances. They have refused, for example, to extend strict tort liability to commercial suppliers of what are deemed services rather than products.<sup>33</sup> Similarly, they have rejected a *per se* rule imposing vicarious liability on successor corporations merely because predecessor firms had distributed defective products.<sup>34</sup> At the macro level, courts overwhelmingly have rejected entreaties to abandon the requirement that plaintiffs show the injury-causing product to have been, in some way or other, defective.<sup>35</sup> Thus,

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The instant madness is a creeping consensus among us judges and lawyers that we are more capable of designing products than engineers. A courtroom is a poor substitute for a design office.").

<sup>29</sup> See note 1 *supra*.

<sup>30</sup> See note 2 *supra*.

<sup>31</sup> See, e.g., *Brock v. Merrell Dow Pharmaceuticals, Inc.*, 874 F.2d 307, 311 (in extended analysis, speaking explicitly of "retreating" from generous approach to plaintiff's epidemiological proof in *Bendectin* cases), modified on reh'g, 884 F.2d 166 (5th Cir. 1989), cert. denied, 110 S. Ct. 1511 (1990); *Feldman v. Lederle Laboratories*, 97 N.J. 429, 452-55, 479 A.2d 374, 386-88 (1984) (limiting to its facts holding in *Beshada v. Johns-Manville Prods. Corp.*, 90 N.J. 191, 204-08, 447 A.2d 539, 546-49 (1982), that manufacturer is liable for product-related risks scientifically unknowable at time of distribution).

<sup>32</sup> In recent years, for example, no fewer than six of the highest state courts have rejected the "product line" exception to traditional no-liability rules for successor corporations. See *Bullington v. Union Tool Corp.*, 254 Ga. 283, 285, 328 S.E.2d 726, 728 (1985); *DeLapp v. Xtraman, Inc.*, 417 N.W.2d 219, 222 (Iowa 1987); *Simoneau v. South Bend Lathe, Inc.*, 130 N.H. 466, 469-70, 543 A.2d 407, 409 (1988); *Flaughner v. Cone Automatic Mach. Co.*, 30 Ohio St. 3d 60, 66-67, 507 N.E.2d 331, 336-37 (1987); *Hamaker v. Kenwel-Jackson Mach., Inc.*, 387 N.W.2d 515, 519-21 (S.D. 1986); *Fish v. Amsted Indus.*, 126 Wis. 2d 293, 309-10, 376 N.W.2d 820, 828 (1985).

<sup>33</sup> See, e.g., *Affiliated FM Ins. Co. v. Trane Co.*, 831 F.2d 153, 156 (7th Cir. 1987) (non-manufacturer product designer not strictly liable).

<sup>34</sup> See *Niccum v. Hydra Tool Corp.*, 438 N.W.2d 96, 99-100 nn.1-2 (Minn. 1989) (in period 1983-1989, 18 out of 21 courts to consider successor liability rejected more generous approach).

<sup>35</sup> See cases cited in note 159 *infra*. But see cases cited in note 12 *supra*. One exceptional decision was *O'Brien v. Muskin Corp.*, 94 N.J. 169, 463 A.2d 298 (1983), discussed at length in notes 197-202 and accompanying text *infra*. A vigorous dissenter was moved to observe, "Absolute liability is imposed where, on the basis of policy considerations including risk-spreading, it is determined that a manufacturer or other seller should bear the cost of injuries . . . regardless of the presence or absence of any defect." *Id.* at 200, 463 A.2d at 314-15 (Schreiber, J., concurring and dissenting).

while products liability law has moved far in providing relief to plaintiffs, courts have refused to adopt a standard of absolute liability for manufacturers and distributors of certain broadly defined categories of products.<sup>36</sup> This possibility, to which we apply the term "liability without defect," provides the focus for the remainder of this Article.

### *B. Theoretical Justifications for Imposing Liability Without Defect*

If a system of liability without defect is as impossible to implement as we assert, the next logical question is why such a system deserves scrutiny. First, practical issues compel this attention: plaintiffs repeatedly have advanced the notion of liability without defect, and a few courts have flirted with the idea.<sup>37</sup> Second, liability without defect has been part of the agenda of liability commentators espousing expansionary trends from the outset of our modern products liability system.<sup>38</sup> Finally, assuming that a system of defect-free strict liability for product-related hazards somehow could be implemented,<sup>39</sup> strong social utility and fairness arguments can be made to justify such a system.<sup>40</sup>

From the standpoint of enhancing social utility, strict, defect-free liability would help to achieve three objectives. First, defect-free products liability would reduce the consumption of relatively risky products by increasing their monetary costs to users and consumers, thereby placing such products at a competitive disadvantage in the market.<sup>41</sup> Be-

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<sup>36</sup> See, e.g., *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1268-69 (5th Cir. 1985) (marketing of handguns not ultrahazardous activity); *Maguire v. Pabst Brewing Co.*, 387 N.W.2d 565, 570 (Iowa 1986) (beer not unreasonably dangerous product).

<sup>37</sup> See, e.g., *Halphen v. Johns-Mansville Sales Corp.*, 484 So. 2d 110, 113 (La. 1986); *Kelley v. R.G. Indus.*, 304 Md. 124, 132-33, 497 A.2d 1143, 1146 (1985); *O'Brien*, 94 N.J. at 184-85, 463 A.2d at 306.

<sup>38</sup> See generally Priest, *supra* note 4, at 505-19.

<sup>39</sup> See text accompanying notes 65-86 *infra* (discussing problems of implementation). Note that we are assuming that courts determine causation based on the defendant's knowledge at the time of original distribution. As commentators have observed, the retroactive imposition of liability based on new (time-of-trial) knowledge is inefficient. See Danzon, *Tort Reform and the Role of Government in Private Insurance Markets*, 13 J. Legal Stud. 517, 534-43 (1984); Schwartz, *Products Liability, Corporate Structures and Bankruptcy: Toxic Substances and the Remote Risk Relationship*, 14 J. Legal Stud. 689, 692-705 (1984). Reconstructing what was knowable at the time of original distribution, of course, would present serious problems of implementation.

<sup>40</sup> Various commentators have explored the advantages of adopting strict liability rather than a fault-based approach in the context of liability for production defects. See, e.g., Cowan, *Some Policy Bases of Products Liability*, 17 Stan. L. Rev. 1077, 1087-92 (1965); Henderson, *Coping with the Time Dimension in Products Liability*, 69 Cal. L. Rev. 919, 931-39 (1982); Owen, *Rethinking the Policies of Strict Products Liability*, 33 Vand. L. Rev. 681, 703-07 (1980). Imposing liability without defect for generic product hazards would generate many of the same advantages.

<sup>41</sup> This phenomenon is often referred to as "market deterrence." See generally G. Calabresi, *The Cost of Accidents* 26-27 (1970) (describing in detail relationship between risk and

cause users and consumers are thought to underestimate the potential dangers caused by hazardous products, overconsumption is likely unless product prices reflect manufacturers' liability insurance costs.<sup>42</sup> The current products liability system, which requires that a defect be established as a predicate for liability, allows many products that create substantial but unavoidable hazards to escape liability.<sup>43</sup> Such products, therefore, appear on the market without reflecting their true costs to society. Under a defect-free strict liability rule, the full costs of product-related injuries would be reflected in the purchase prices of products, leading to more appropriate levels of consumption.

Second, a system for all product-related injuries would promote more appropriate levels of investment in product safety. Theoretically, the current fault-based theories of liability for generic, design-related product hazards encourage manufacturers to invest optimally in product safety.<sup>44</sup> However, establishing the defectiveness of product designs or modes of marketing is no easy matter.<sup>45</sup> Fully aware of plaintiff's problems of proof, manufacturers may be willing to take their chances on escaping liability under our current system. Presumably, under a regime of defect-free strict liability manufacturers would be more likely to be found liable and therefore would be more likely to invest in the optimum level of safety.<sup>46</sup>

Third, defect-free strict liability might help to reduce certain dislocation costs that occur when individual victims are required to bear the full brunt of their accident losses.<sup>47</sup> Under a fault- or defect-based system, in the vast majority of instances in which the manufacturer com-

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consumption and concluding that only when acts are forbidden or consumers face greater initial costs will optimal consumption levels result); J. O'Connell, *Ending Insult to Injury* 76-80 (1975) (stating that if liability is imposed prices will rise, consumption will fall, and optimal consumption will result).

<sup>42</sup> See National Comm'n on Prod. Safety, *Final Report* 63 (1970) ("It is difficult to underestimate the knowledge of most consumers about product safety."); Henderson, *supra* note 40, at 933 (noting that strict liability has been justified as means to compensate for consumers' underassessment of product risks).

<sup>43</sup> See note 62 *infra*.

<sup>44</sup> See Posner, *Strict Liability: A Comment*, 2 *J. Legal Stud.* 205, 206-09 (1973) (rational producer will respond to threat of liability for negligence by investing in accident avoidance until marginal costs of avoidance equal marginal costs of accidents).

<sup>45</sup> See Twerski & Weinstein, *A Critique of the Uniform Product Liability Law—A Rush to Judgment*, 28 *Drake L. Rev.* 221, 227-28 (1978-79) (action sounding in negligence presents plaintiff with formidable issues of proof, such as what manufacturer with expertise in particular field should have known).

<sup>46</sup> See Schwartz, *supra* note 11, at 443-44 ("[A] genuine strict liability rule would create significant safety incentives.").

<sup>47</sup> See G. Calabresi, *supra* note 41, at 39 ("[T]aking a large sum of money from one person is more likely to result in economic dislocation, and therefore in secondary and avoidable losses, than taking a series of small sums from many people.").

plies with the liability standard, losses fall on the injured victims. When the injuries are serious, these losses can be crushing. By shifting the costs of product-related injuries onto manufacturers, and then by using insurance which adds the cost of the premium to the price of the product and thus spreads the risk among consumers,<sup>48</sup> liability without defect could alleviate the serious dislocation costs generated by injuries suffered from nondefective but often highly dangerous products.

In addition to fostering the three social-utility goals described above, strict products liability without defect arguably would give expression to at least two fundamental fairness norms. First, victims of injuries caused by hidden production defects legitimately argue that their reasonable expectations for product performance have been disappointed.<sup>49</sup> One might argue persuasively that defect-free liability for generic product hazards would address, in a parallel fashion, situations in which consumers have paid value for products that, despite meeting risk-utility norms, have turned on them. According to this view, a regime of defect-free liability based upon product-related injury would better satisfy consumer expectations than would the defect-related theories that currently govern, and drastically limit, liability for generic product risks.

Second, assessing liability against a manufacturer for all product-related injuries in many instances would shift the costs of such accidents from those who do not benefit directly from the product—bystander victims, for example—to those who do benefit directly—product users and consumers.<sup>50</sup> A pedestrian injured by an automobile may argue, with justification, that those who benefit directly from automobiles should

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<sup>48</sup> See *Cushing v. Rodman*, 82 F.2d 864, 869 (D.C. Cir. 1936) (businesses spread burden of strict liability in implied warranty by increasing prices); *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 462, 150 P.2d 436, 441 (1944) (Traynor, J., concurring) ("The cost of an injury and the loss of time or health may be an overwhelming misfortune to the person injured . . . [T]he risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.").

<sup>49</sup> See generally Hubbard, *Efficiency, Expectations and Justice: A Jurisprudential Analysis of the Concept of the Unreasonably Dangerous Product Defect*, 28 S.C.L. Rev. 587 (1977) (discussing use of "reasonable man" test in evaluating unreasonably dangerous product defects); Hubbard, *Reasonable Human Expectations: A Normative Model for Imposing Strict Liability for Defective Products*, 29 Mercer L. Rev. 465 (1978) [hereinafter Hubbard, *Reasonable Human Expectations*] (advocating imposing truly "human" expectations upon manufacturers in tort cases); Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 Va. L. Rev. 1109 (1974) (discussing use of consumer expectations in products liability suits).

<sup>50</sup> The Supreme Court of Illinois has articulated this fairness rationale from a "consumer v. manufacturer" perspective. See *Suvada v. White Motor Co.*, 32 Ill. 2d 612, 619, 210 N.E.2d 182, 186 (1965) (asserting that manufacturer should be strictly liable since it profits from its activity). One writer has articulated this same fairness rationale from the "consumer v. consumer" perspective. See Fletcher, *Fairness and Utility in Tort Theory*, 85 Harv. L. Rev. 537, 542 (1972) (identifying injury resulting from nonreciprocal risk as paradigmatic case for imposing strict liability).

bear the costs of automobile accidents.<sup>51</sup>

While all of these justifications compel serious attention to a non-defect-based theory of recovery for tort victims, the arguments ultimately fail. As the remainder of this Article demonstrates, a system of liability without defect not only would encourage problematical behavior on the part of manufacturers and consumers, but also would pose insurmountable implementation problems. Part II examines these assertions with respect to across-the-board liability; Part III focuses on limited product categories.

## II

### ACROSS-THE-BOARD<sup>52</sup> LIABILITY WITHOUT DEFECT

This Part considers the implications of holding distributors of all products strictly liable for the harms their products cause. After providing a more detailed blueprint for a system of across-the-board liability in section A, section B analyzes whether courts could implement liability without defect and concludes that they could not. In section C, a look at the likely market effects of such liability reveals that, quite aside from problems of implementation, adopting such a system would be unwise. Finally, section D describes the extent to which courts and legislatures to date have moved in the direction of across-the-board liability without defect.

#### *A. A Closer Look at What Such a System Would Be Like*

A system of across-the-board liability without defect would recognize causes of action for physical injuries<sup>53</sup> caused by all commercially distributed<sup>54</sup> products,<sup>55</sup> whether or not courts would consider such

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<sup>51</sup> Even if the pedestrian owns an automobile, at the time of the accident she was not benefitting directly from that product. The underlying point runs even deeper. Assuming the plaintiff is injured while riding in her own automobile, she is still in a subclass of "auto user/victims" as opposed to "auto users," and arguably has a fairness-based claim for compensation. For a treatment of this point in the context of allergic-reaction injuries, see Henderson, *Process Norms in Products Litigation: Liability for Allergic Reactions*, 51 U. Pitt. L. Rev. 761, 787 (1990).

<sup>52</sup> The phrase "across-the-board" is synonymous with "across-all-products."

<sup>53</sup> Courts, mindful of the Restatement (Second) of Torts § 402A (1965), which suggests that liability be limited to personal injury and property damage, are reluctant to permit recovery for intangibles such as emotional harm and pure economic loss. See, e.g., *Barber Lines A/S v. M/V Donau Maru*, 764 F.2d 50, 51 (1st Cir. 1985) (denying recovery for purely consequential economic loss); *Tobin v. Grossman*, 24 N.Y.2d 609, 617-19, 249 N.E.2d 419, 423-24, 301 N.Y.S.2d 554, 560-61 (1969) (rejecting rule that expanded liability for emotional harm).

<sup>54</sup> Again, mindful of the Restatement (Second) of Torts § 402A (1965), which suggests that liability be limited to commercial distributors of products, modern courts are reluctant to impose strict liability on noncommercial distributors. The set of noncommercial distributors that escapes strict liability includes sellers engaged in "casual sales," i.e., sellers "not in the busi-

products defective under traditional products liability doctrines. Causation alone, rather than the traditional combination of causation and defectiveness, would constitute the plaintiff's *prima facie* case. Liability for all types of product hazards would be strict. Current law imposes strict liability for harm caused by production defects.<sup>56</sup> However, as informed observers understand full well, our courts have never extended *true* strict liability—liability without any judgment of unreasonableness or fault—very far beyond production defects.<sup>57</sup> Although judges have talked repeatedly of imposing “strict liability” for defective product designs and failures to warn,<sup>58</sup> in reality they have retained a primarily fault-based approach to generic product hazards.<sup>59</sup> By abandoning the requirement that plaintiffs show defective modes of design and marketing, courts, for the first time, would impose true strict liability for all product hazards including, most significantly, generic hazards.<sup>60</sup>

As the next section makes clear, moving to across-the-board liability without defect would present courts with serious problems of implementation. But the basic idea of liability without defect is straightforwardly simple. For the first time, product distributors would be required to pay for the costs of all accidents caused by their products.<sup>61</sup> As opposed to

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ness” of distributing the particular product that caused injury. See, e.g., *Lemley v. J & B Tire Co.*, 426 F. Supp. 1376, 1377 (W.D. Pa. 1977) (sellers of used automobiles who are not dealers not held strictly liable); *Stapinski v. Walsh Constr. Co.*, 383 N.E.2d 473, 475 (Ind. App. 1978) (same), vacated on other grounds, 272 Ind. 6, 395 N.E.2d 1251 (1979).

<sup>55</sup> Courts traditionally have distinguished between commercial distributors of “products” and “services,” imposing strict liability only on the former. See note 33 *supra*.

<sup>56</sup> See, e.g., *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 61, 377 P.2d 897, 900, 27 Cal. Rptr. 697, 700 (1963).

<sup>57</sup> See, e.g., *Prentis v. Yale Mfg. Co.*, 421 Mich. 670, 687-88, 365 N.W.2d 176, 184 (1984) (“Although many courts have insisted that the risk-utility tests they are applying are not negligence tests because their focus is on the product rather than the manufacturer’s conduct, the distinction . . . appears to be nothing more than semantic. . . . The underlying negligence calculus is inescapable.” (citation omitted)). See generally Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 Vand. L. Rev. 593, 643-46 (1980) (casting doubt on incentive to safety argument for strict liability); Henderson, *supra* note 27, at 733-81 (noting use of cost-benefit analysis in majority of courts).

<sup>58</sup> See, e.g., *Schuldies v. Service Mach. Co.*, 448 F. Supp. 1196, 1199-1200 (E.D. Wis. 1978) (supporting no-defect liability where product defectively designed); *Barker v. Lull Eng’g Co.*, 20 Cal. 3d 413, 429, 573 P.2d 443, 454, 143 Cal. Rptr. 225, 236 (1978) (supporting no-defect liability if product does not perform up to consumer expectations or fails to pass risk-utility test); *Cronin v. J.B.E. Olson Corp.*, 8 Cal. 3d 121, 126, 501 P.2d 1153, 1157, 104 Cal. Rptr. 433, 437 (1972) (supporting no-defect liability for injury that occurs while product is used as intended); *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 559, 391 A.2d 1020, 1027 (1978) (supporting no-defect liability where product not safe for intended use).

<sup>59</sup> See Birnbaum, *supra* note 57, at 600-02 (describing how courts have struggled to differentiate strict liability from negligence); Henderson, *supra* note 27, at 774-78 (describing use of cost-benefit analysis to evaluate defective product design).

<sup>60</sup> An influential writer has referred to this true, comprehensive form of strict liability as “*genuine* strict liability.” See Schwartz, *supra* note 11, at 441 (emphasis added).

<sup>61</sup> For example, one writer has estimated that bringing the full societal cost of smoking to



the current regime, a system of liability without defect would not allow distributors of inherently and unavoidably dangerous products to escape accountability in tort for the significant social costs their products generate.<sup>62</sup>

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bear on smokers would increase the price of a package of cigarettes by \$2.16. See Tribe, *Anti-Cigarette Suits: Federalism with Smoke and Mirrors*, *The Nation*, June 7, 1986, at 788-89. Professor Tribe's estimation seems unduly conservative, for he has not accounted for the enormous transaction costs associated with such contentious litigation. In the asbestos cases, for example, litigation expenses for the defendants accounted for approximately 36% of the total award. These percentages do not reflect plaintiffs' attorney costs or costs to the judiciary for managing the litigation. See J. Kakalik, P. Ebener, W. Felstinen & M. Shaley, *Variation in Asbestos Litigation Compensation and Expenses* 82-91 (1984). For an excellent discussion of the problems relating to managing complex, mass-tort litigation, see McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. Chi. L. Rev. 440, 478-91 (1986). Under an across-the-board liability scheme, it is unlikely, given the prevalent attitude of the courts, that a federal preemption argument would prevent the imposition of liability for tobacco products. To date, five federal circuit courts of appeals have concluded unanimously that all claims arising after 1965 based on failure to warn, misrepresentation, or fraud are preempted by the 1965 Federal Cigarette and Labeling Act, 15 U.S.C. §§ 1331-1341 (1988). See *Pennington v. Vistrion Corp.*, 876 F.2d 414, 420-21 (5th Cir. 1989); *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230, 233-35 (6th Cir. 1988); *Stephen v. American Brands, Inc.*, 825 F.2d 312, 313 (11th Cir. 1987); *Palmer v. Liggett Group, Inc.*, 825 F.2d 620, 626 (1st Cir. 1987); *Cipollone v. Liggett Group, Inc.*, 789 F.2d 181, 186-88 (3d Cir. 1986), cert. denied, 479 U.S. 1043 (1987). The United States Supreme Court recently granted certiorari, see *Cipollone v. Liggett Group, Inc.*, 111 S. Ct. 1386 (1991), to review the conflict between the federal circuits and the lone decision of the New Jersey Supreme Court holding that there is no federal preemption. See *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 76-80, 577 A.2d 1239, 1247-51 (1990).

However, most of the courts that have confronted the problem have ruled that preemption affects only claims based on inaccurate or inadequate information, since the 1965 Federal Cigarette and Labeling Act speaks only to warnings. Claims that cigarettes have been designed or manufactured defectively are not federally preempted. See, e.g., *Cipollone v. Liggett Group, Inc.*, 893 F.2d 541, 578 n.46 (3d Cir. 1990) ("Federal Labeling Act . . . does not preempt design defect claims."), cert. granted, 111 S. Ct. 1386 (1991); *Pennington*, 876 F.2d at 421-24 (preemption limited to common-law claims arising from labeling and promotional activities). The grant of certiorari by the United States Supreme Court in *Cipollone* is directed only at the failure-to-warn issue and does not touch the question as to whether claims of defective design are preempted.

Since the prevailing authority limits preemption only to inadequate warning claims, if courts were to adopt across-the-board liability without defect, it is unlikely that federal preemption would prevent the imposition of liability. Of course, it is impossible to predict how the United States Supreme Court would deal with the tobacco companies' argument that *all* post-1965 claims are barred because by approving particular warnings, Congress has sub silentio concluded that tobacco products belong on the market and meet risk-utility guidelines. It is clear, however, that a system of across-the-board liability would preclude tobacco companies from arguing that risk-utility requires an evaluation of the warnings in considering the overall safety of cigarettes. See *Pennington*, 876 F.2d at 423 n.11. Since liability would be causation-based and thus independent of the alleged hazards of cigarettes, the court would have no need to evaluate the warning and its impact on safety.

<sup>62</sup> Because they have no cause of action against the makers and distributors of inherently and unavoidably dangerous products, see, e.g., Restatement (Second) of Torts § 402A, comments i, k (1965) (suggesting that manufacturers of unavoidably unsafe products not be held liable if these products have some utility), consumers are held, in effect, strictly liable for the

Superficially, the differences between a liability-without-defect system and our current system would not appear all that great. Admittedly, under liability without defect, distributors would more likely be held liable on the basis of time-of-trial knowledge regarding the harms a product causes, a significant expansion in their exposures when compared with current law which focuses on the time of original distribution.<sup>63</sup> But the blueprint for issues such as successor liability, liability for economic losses, punitive damages, and measurement-of-injuries presumably would remain much the same. Although distributors would be held liable more frequently than under our current system, eliminating the requirement of defect would not be as radical a change as, for example, the wholesale replacement of tort with a statutory scheme of no-fault compensation.<sup>64</sup> However, as the next section indicates, radical differences begin to appear as one probes beneath the surface.

### *B. Problems of Implementation*

Even if across-the-board liability without defect is theoretically attractive—a proposition that the next section's discussion of potentially negative market effects calls into doubt—our courts would be incapable of implementing such a system for three reasons. First, eliminating the defect requirement would create significant obstacles in the already complex determination of causation. Second, difficult issues involving the contributory fault of plaintiffs would have to be rethought and reworked. Finally, abolishing proof of defect would present conceptual difficulties when products beyond their useful lives caused injuries.

#### *1. Determining Causation*

Given the central role causation would play in a system of liability without defect, it is the logical place to begin our discussion of the problems of implementation. Regarding but-for cause-in-fact, courts would confront several sources of difficulty.<sup>65</sup> The first would arise in

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social costs generated by these products.

<sup>63</sup> For a description and discussion of current law, see generally Henderson, *supra* note 40, at 924-47. One example of a court imputing time-of-trial knowledge is *Beshada v. Johns-Manville Prods. Corp.*, 90 N.J. 191, 447 A.2d 539 (1982), which has been limited by decision, see *Feldman v. Lederle Labs.*, 97 N.J. 429, 437, 479 A.2d 374, 386 (1984), and by statute. See N.J. Stat. Ann. § 2A:58C-3 (West 1990). Under current law, the need to perform risk-utility analysis provides strong arguments against applying time-of-trial knowledge retroactively. Under a regime of across-the-board liability without defect, having obviated the need to perform risk-utility analyses, courts could adopt more easily a time-of-trial perspective regarding cause-in-fact.

<sup>64</sup> See note 13 *supra*.

<sup>65</sup> For purposes of this analysis, a product unit is a cause-in-fact of the plaintiff's injuries if those injuries would not have occurred if the product unit had never been distributed. Thus, any product unit that is a necessary condition to the plaintiff's injury is a cause-in-fact of that

cases involving chemicals, drugs, and similar products alleged to have caused injuries to exposed plaintiffs. Frequently, courts would have to rely on ambiguous epidemiological proof in the form of marginal increases in risks of injury. Among the most difficult problems courts confront under existing law,<sup>66</sup> certainly they would be no less difficult under liability without defect. Indeed, it can be argued that problems associated with reliance on epidemiological evidence would take on added significance under a regime of liability without defect.<sup>67</sup>

Moreover, in cases involving ordinary durable and consumable products, the truly daunting nature of but-for cause-in-fact under defect-free strict liability becomes clear. Observe the array of potential defendants that a court would have to consider in the following hypothetical. *P*, after eating a heavy lunch consisting of three servings of pasta accompanied by two bottles of beer, climbs the stairs to the second floor of his home to retrieve a book from his bedroom. Sleepily returning downstairs to answer the door, *P* trips on a roller skate left by his nine-year-old daughter, falls down the stairs, and crashes his head through the glass screen of the television in the living room. Since proof of defect is no longer required for the imposition of liability, the only question is which product(s) caused the injury. The combination of *P*'s eating pasta and imbibing beer contributed to his being unsteady on his feet and less observant than usual. The skate helped propel him down the stairs. The stairs and the television set are similarly implicated in *P*'s injury. With little effort, the net could be cast even more broadly. Would not the manufacturers of the vehicles that delivered the pasta, beer, television

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injury.

<sup>66</sup> The difficulties of deciding what confidence level is sufficient to warrant a finding of causal relationship has been the subject of considerable academic discussion. See, e.g., Cohen, *Confidence in Probability: Burdens of Persuasion in a World of Imperfect Knowledge*, 60 N.Y.U. L. Rev. 385, 397-98 (1985) (arguing court must evaluate not only probability of causation but also probability of supporting evidence being wrong); Kaye, *Is Proof of Statistical Significance Relevant?*, 61 Wash. L. Rev. 1333, 1364 (1986) (expert's role not to decide what statistical evidence proves or disproves; this task for judges or juries). The scholarly debate now has reached the courts in the Bendectin litigation. Compare *Lynch v. Merrell-National Laboratories*, 830 F.2d 1190, 1194 (1st Cir. 1987) (neither animal studies nor study of chemicals analogous to Bendectin "have the capability of proving causation in human beings in the absence of any confirmatory epidemiological data") and *Richardson v. Richardson-Merrell, Inc.*, 857 F.2d 823, 829-31 (D.C. Cir. 1988) (animal, test tube, and chemical studies did not support jury's determination that Bendectin caused birth defects at issue), cert. denied, 493 U.S. 882 (1989) with *Deluca v. Merrell Dow Pharmaceuticals, Inc.*, 911 F.2d 941, 953-54 (3d Cir. 1990) (allowing expert testimony based on epidemiological evidence even though not statistically significant).

<sup>67</sup> Under the present system, the causal question is muted somewhat by the fault inquiry; many potential troublesome cause-in-fact issues never are addressed because the plaintiff cannot show that the product was defective in design or warning. Under an across-the-board liability scheme, causation would have to be addressed in every instance.

set, and stairs be but-for causes of the harm? For that matter, the book publisher also might be added to the list, especially if *P* had opened the book to read as he was beginning to descend the stairs.

Moreover, once one adopts the general view that all product manufacturers who are causally implicated in an accident are viable defendants, limiting the causation-driven liability system to product manufacturers alone becomes extraordinarily difficult. Service-related defendants arguably should be included as well.<sup>68</sup> Thus, the telephone repair person who rang the bell that caused *P* to hurry his pace down the stairs is as much a cause-in-fact of *P*'s injury as any of the manufacturers. Similarly, if the stairs were carpeted and the carpet was still wet as a result of a recent cleaning, not only the carpet manufacturer but also the commercial carpet cleaner might be deemed a contributing cause of the injury. It is no easy matter to defend treating manufacturers of products and suppliers of services differently under current law.<sup>69</sup> In a world where any causal involvement served as a predicate for products liability, it would be much more difficult to justify exempting other causal actors from responsibility.

Narrowing the list of causation-based defendants by some form of proximate cause analysis does not solve the causation problem either.<sup>70</sup> Although laying the risk of *P*'s fall on the pasta manufacturer seems to involve a stretch, excluding this defendant is possible only through an impressionistic screening test. Such a liability-limiting doctrine would require a fact finder to draw distinctions between defendants on a case-by-case basis with almost no guidance from the law.<sup>71</sup> Once fault or defect is removed as the liability standard, the proximate cause issue has no firm anchor. Even those who eschew full reliance on fault as the lode-star for proximate cause recognize that fault plays a significant role in

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<sup>68</sup> Although we began our discussion assuming that liability would be attached to products only and not to other activities, see text accompanying notes 54-55 *supra*, once causation is the sole reason for the imposition of liability, this position becomes difficult to sustain.

<sup>69</sup> For arguments that suppliers of pure services should be treated the same as product manufacturers, see generally Baldwin, *Products Liability as It Applies to Service Transactions*, 43 J. Air L. & Com. 323, 333-36 (1977) (describing how courts, reluctant to impose strict liability upon those who render service, instead have found liability in negligence); Greenfield, *Consumer Protection in Service Transactions—Implied Warranties and Strict Liability in Tort*, 1974 Utah L. Rev. 661, 688-96 (arguing that policy reasons underlying strict liability in sale of goods context also apply to service transactions); Comment, *Application of Strict Liability to Repairers: A Proposal for Legislative Action in the Face of Judicial Inaction*, 8 Pac. L.J. 865, 873-81 (1977) (same).

<sup>70</sup> See Henderson, *supra* note 13, at 664-65 (arguing that proximate cause in strict enterprise liability system entails fact-intensive case-by-case analysis with higher administrative costs).

<sup>71</sup> Cf. note 163 *infra* (noting that some commentators have recognized absence of any rational basis or methodology to assigning liability in strict enterprise liability system).

drawing causation-based limits on liability.<sup>72</sup> Moreover, even if a proximate cause analysis arguably could exclude the manufacturers of the pasta and the television set, it could not so easily exclude the manufacturers of the beer, stairs, and roller skates. Tripping and falling is so commonly associated with imbibing beer, descending stairs, and encountering roller skates that it is the stuff of slapstick comedy, and thus eminently foreseeable as a consequence of using these products.

In discussing causation, we have thus far assumed that the events leading up to the plaintiff's injury actually happened as described. In our hypothetical case, for example, we assumed that *P* actually ate the pasta, drank the beer, tripped on the roller skate, and fell down the stairs. However, we now must recognize that these events probably are witnessed only by the plaintiff or a close family member. The self-serving testimony those witnesses offer at trial may implicate falsely and unfairly one or more of these products. The defendant's only hope is that the jury will be able to identify false testimony based on the witnesses' demeanor; however, at a minimum, the plaintiff will reach the jury in every case. Under existing law, the requirement that the plaintiff prove that a defect caused her injury keeps problems of nonverifiability in check.<sup>73</sup> With respect to the roller skate in our hypothetical, for example, it is hard to imagine how the plaintiff could succeed with his claim under current law. For one thing, the plaintiff would have to have been roller skating at the time of the accident, an inherently incredible hypothesis.

Nonverifiability is a serious problem in any system of court-applied standards.<sup>74</sup> Tort law, in particular, has been careful to avoid having liability turn on events that can be established only by nonverifiable, self-

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<sup>72</sup> See Prosser & Keeton on Torts, *supra* note 15, at 279 (discussing approach of "justly attachable cause" whereby "jury should be permitted to consider imposition of liability upon 'justly attachable causes,' on grounds of fairness and social advantage"); see also *Palsgraf v. Long Island R.R.*, 248 N.Y. 339, 353, 162 N.E. 99, 104 (1928) (Andrews, J., dissenting) ("[W]hat the prudent would foresee . . . may have some bearing for the problem of proximate cause . . ."); Green, Duties, Risk, Causation Doctrine, 41 Tex. L. Rev. 42, 57-58 (1962) (actual consequences of defendant's conduct, as opposed to foreseeable and foreseen consequences, important in determining defendant's duty); Green, Foreseeability in Negligence Law, 61 Colum. L. Rev. 1401, 1423 (1961) (reasonable foreseeability, often linked with proximate cause, requires jury to consider whether defendant's conduct should be penalized).

<sup>73</sup> With respect to defects based on design and failure to warn, the plaintiff must show a failure in design or marketing and link that failure proximately to the injuries sustained. This requirement substantially circumscribes, if it admittedly does not eliminate altogether, the plaintiff's opportunities to concoct a false story.

<sup>74</sup> See Henderson, Process Constraints in Tort, 67 Cornell L. Rev. 901, 913-14 (predicting liability is difficult when facts nonverifiable); Henderson, *supra* note 51, at 792-94 (nonverifiability especially problematic in cases such as those involving allergic reactions, in which products do not leave distinctive "fingerprints" enabling court to rule out other possible causes).

serving testimony from one of the parties.<sup>75</sup> Under liability without defect, nonverifiability regarding causation would compromise seriously the integrity of the liability system.

## 2. *Users' and Consumers' Contributory Fault*

Even though moving to liability without defect would represent a commitment to higher levels of liability, presumably the system would continue to recognize defenses based on plaintiff's contributory fault. Eliminating such defenses arguably would be unfair and might undermine incentives for users and consumers to invest in care when they are the lowest-cost risk minimizers.<sup>76</sup> On the assumption that most jurisdictions would make the appropriate adjustments via comparative fault,<sup>77</sup> courts would confront two problems of implementation. First, how would they compare the fault of the plaintiff with the presumably non-fault-based liability of the defendant? Many courts have gotten around this conceptual "apples and oranges" problem under existing law by requiring a showing that the product is defective and by comparing the "fault" of the product with the fault of the defendant.<sup>78</sup> If courts abandoned product defectiveness and began to apply "true" strict liability, both judges and juries might confront conceptual difficulties in comparing plaintiffs' fault with nothing more than the fact that the product is a cause-in-fact (possibly one among many) of the plaintiff's injuries.<sup>79</sup>

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<sup>75</sup> See Henderson, *supra* note 51, at 763 nn. 9-10 (restricting consideration of mental state to instances where it is objectively verifiable). Examples include the way courts have "objectified" the legal definitions of "intent" and "consent" in tort law. See, e.g., *O'Brien v. Cunard S.S. Co.*, 154 Mass. 272, 273, 28 N.E. 266, 266 (1891); *Garratt v. Dailey*, 46 Wash. 2d 197, 202, 279 P.2d 1091, 1094 (1955). See generally J. Henderson & R. Pearson, *The Torts Process* 19-20 (3d ed. 1988) (overviewing definitions of "intent").

<sup>76</sup> See notes 183-84 and accompanying text *infra*.

<sup>77</sup> A substantial majority of American jurisdictions apply comparative-fault principles in products liability cases. See H. Woods, *Comparative Fault* § 1:1 (2d ed. 1987 & Supp. 1991) (forty-five states, Puerto Rico, and Virgin Islands apply comparative negligence).

<sup>78</sup> In *Dippel v. Sciano*, 37 Wis. 2d 443, 155 N.W.2d 55 (1967), the Supreme Court of Wisconsin analogized the distribution of a defective product to the violation of a safety statute: both actions create an unreasonable risk of harm to others, so that both are tantamount to negligence per se. See *id.* at 451-52, 155 N.W.2d at 64. The court wrote that comparison of a plaintiff's contributory negligence and defendant's negligence per se "is so common and widely approved in our jurisdiction as to need no citation." *Id.* at 451, 155 N.W.2d at 64. The Court reasoned that if the unreasonable danger generated by the defective product "is a cause, a substantial factor, in producing the injury complained of, it can be compared with the causal contributory negligence of the plaintiff." *Id.* at 453, 155 N.W.2d at 65. Twelve years later, the Supreme Court of New Jersey held that contributory negligence may apply in a strict liability action when the plaintiff has voluntarily and unreasonably taken a known risk, for "when two parties 'share' . . . the blame for an accident they should also share the costs." *Suter v. San Angelo Foundry & Mach. Co.*, 81 N.J. 150, 162-64, 406 A.2d 140, 146-47 (1979).

<sup>79</sup> For a case comparing product defect with plaintiff's fault, see *Murray v. Fairbanks Morse*, 610 F.2d 149, 162 (3d Cir. 1979) (in action interpreting applicability of Virgin Islands comparative-negligence statute, trier of fact ascribed fault to defendant based on product de-

Second, in many cases courts would be required to reintroduce the concept of product defectiveness to deal with the issue of the plaintiff's fault. Cases would arise in which the appropriate response to the defendant's comparative-fault assertion would be an argument that the defendant owed the plaintiff an obligation in the first instance to avoid placing the plaintiff in the predicament of being required to act, and possibly to act negligently. An example will clarify the point: let us assume that the plaintiff injures her hand in a punch press accident. The press manufacturer argues that the plaintiff was at fault in placing her hand in harm's way. In response, the plaintiff argues that if the punch press had been designed adequately, with a guard, or if the defendant had given adequate warnings, the plaintiff's inadvertence would not have contributed to causing the accident.

Courts under existing liability rules properly allow plaintiffs to make this argument and, when appropriate, to escape any reduction in recovery for their own comparative fault.<sup>80</sup> Under existing law, therefore, the nature of the product defect may rescue the plaintiff from the consequences of what otherwise might be considered her own contributory fault. Of course, the marginal costs of this further step in the analysis are low; under existing law, the court already will have explored thoroughly the nature and quality of the product defect. In contrast, under a regime of liability without defect, the marginal costs of exploring product defectiveness would be high. Allowing the plaintiff to make exculpatory arguments would introduce for the first time an issue—the concept of product defect—that the underlying liability standard had sought to eliminate. And yet to foreclose the plaintiff from making this argument would be to put the plaintiff arguably in a worse position than under existing law, a result that is patently inconsistent with the proliability, expansionary bias of the move to true strict liability for generic product hazards. It is not clear how courts confronting this dilemma would, or should, respond. Moreover, the problems described above also would arise in connection with other issues such as product misuse, modification, and alteration.<sup>81</sup>

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fect, then reduced award in proportion to plaintiff's causal contribution to injury). But see *Austin v. Ford Motor Co.*, 86 Wis. 2d 628, 643, 273 N.W.2d 233, 239 (1979) ("In a strict liability action for wrongful death, the negligence to be compared is the negligence causative of the death and not the negligence causative of the accident.").

<sup>80</sup> See, e.g., *Green v. Sterling Extruder Corp.*, 95 N.J. 263, 272, 471 A.2d 15, 20 (1984) (permitting plaintiff to recover despite contributory negligence because plastic molding machine should have been equipped with protective interlocking guard system that would have prevented injury); *Bexiga v. Havir Mfg. Corp.*, 60 N.J. 402, 412, 290 A.2d 281, 286 (1972) (concluding that plaintiff's negligence did not bar recovery where that negligence "was the very eventuality the . . . safety devices were designed to guard against").

<sup>81</sup> These forms of user conduct may either entirely abrogate or partially mitigate manufacturer liability by assessing a percentage of fault to the party indulging in the undesired activity. See, e.g., *Ariz. Rev. Stat. Ann.* § 12-683 (1982) (defendant shall not be liable for injuries prox-

### 3. *Measuring Useful Product Life*

Moving to strict liability without defect would present courts with yet another implementation problem: for how long after original distribution of a durable product are the manufacturer and distributor to be on the liability hook? Under traditional approaches the defect that injures the plaintiff must have been present originally at the time of initial commercial distribution.<sup>82</sup> This requirement of originality places temporal limits on defendants' responsibilities. In production-defect cases, once a product unit reaches a certain age, or level of cumulative use, the necessary inference of original defect cannot be drawn.<sup>83</sup> Moreover, in cases in which products wear out and fail due to extended usage, the defect-based concept of "for how long must a reasonable product be designed to last?" provides a temporal limit to liability.<sup>84</sup> Finally, in cases involving designed-in generic hazards, requiring the plaintiff to prove original defect may exonerate defendants for failing to incorporate safety-oriented technology that was not available at the time of initial commercial distribution.<sup>85</sup>

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mately caused by product alterations, modifications, or use not reasonably foreseeable by defendant); Idaho Code § 6-1405 (1980) (defendant's liability will be reduced proportionately upon defendant's proof that product alteration, modification, or misuse was proximate cause of plaintiff's injuries); see also Twerski, *The Many Faces of Misuse: An Inquiry Into the Emerging Doctrine of Comparative Causation*, 29 Mercer L. Rev. 403, 413 (1979) ("[J]uries should be allowed to consider the *likelihood at a percentage basis* that a party's activities caused harm." (emphasis in original)).

Since the issues with regard to product misuse, modification, and alteration require a court to focus on whether the product should have been designed to take into account such forms of product abuse that likely will take place, they cannot be examined without reflecting back on the issues of defect. This examination would cause the defect issue to be examined for the first time in the context of aberrant user conduct.

<sup>82</sup> See Restatement (Second) of Torts, § 402A comment g (1965) (strict liability "applies only where the product is, at the time it leaves the seller's hands, in [a dangerous] condition not contemplated by the ultimate consumer . . . . The seller is not liable when he delivers the product in a safe condition . . . .").

<sup>83</sup> See, e.g., *Western Sur. & Casualty Co. v. General Elec. Co.*, 433 N.W.2d 444, 449 (Minn. App. 1988) (directed verdict for defendant where six-year-old headlight exploded and injured plaintiff because "lapse of time . . . [made] it equally probable a defective condition developed after leaving the defendant's control").

<sup>84</sup> See, e.g., *Glass v. Allis-Chalmers Corp.*, 618 F. Supp. 314, 316 (E.D. Mo. 1985) (defendant combine manufacturer held not liable for plaintiff's injuries resulting from natural deterioration of nonskid surface on equipment because "[t]o hold a manufacturer or seller liable for . . . ordinary wear and tear would be to place the manufacturer or seller in the place of an insurer"), *aff'd*, 789 F.2d 612 (8th Cir. 1986).

<sup>85</sup> See, e.g., *Boatland of Houston, Inc. v. Bailey*, 609 S.W.2d 743, 749 (Tex. 1980) (defendant could show that safety technology suggested by plaintiff at trial was unavailable at time of product sale). See generally Henderson, *supra* note 40, at 952-59 (failure to include unknowable risk-avoidance technology at time of distribution would not achieve market deterrence of manufacturers, improve allocative efficiency, or reduce transaction costs; moreover, achievement of loss spreading may be questionable where manufacturers are not able to forecast or control technological advances and thus are unable to insure accurately against such liability).



Abandoning the requirement of defect presumably would eliminate these built-in temporal limits. A durable product that fails after many years of use is no less the cause of a victim's injury than is a newer product that fails. Existing law automatically adjusts for the relative age of the product: the older product is less likely than the newer to be found defective. Presumably, under a system of liability without defect, judges could, and would, develop defenses based on the failures of victims and product users to take reasonable steps to avoid unnecessary injuries in connection with the continued use of older products. But the *prima facie* case based on the brute fact of causation would be made out in *all* cases involving old product units, where it is frequently (and appropriately) not made out under traditional approaches requiring a showing of original defect. And if courts allowed defendants to argue that "the product cannot be expected to last that long," or "the product could not have incorporated that safety device," the courts would be allowing defendants to reintroduce the concept of defectiveness in much the same way as with the issue of comparative fault.

As the foregoing discussions reveal, the products liability system relies on the defect concept for cohesion. The defect requirement is more than merely a convenient stopping place on a smooth continuum running from "less" to "more" liability. The defect concept, in helping to define the compensable event, frames the nature of the plaintiff's underlying entitlement.<sup>86</sup> Even seemingly neutral, factual issues of causation become incoherent unless they remain anchored to some adequately articulable basis on which the plaintiff's rights rest. Thus, any across-the-board attempt to abandon the requirement of defectiveness would place courts and the products liability system in total chaos. And, as the next section shows, even if some solutions to the practical problems of implementation were available, the probable effects of such a system would generate costs that far outweigh its possible benefits.

*C. A Brief Look at the Distortion Effects Across-the-Board Liability Without Defect Would Have on the Behavior of Firms and Individuals in the Marketplace*

In Part I we considered the theoretical arguments that might justify moving to a system of across-the-board liability without defect to demonstrate how tempting defect-free strict liability can be to advocates of expansionary trends in liability law. But as the last section has shown, there are serious questions regarding the capacity of courts to implement

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<sup>86</sup> See note 72 and accompanying text *supra*; see also Posner, *supra* note 44, at 218 ("from an economic standpoint an inquiry into causation [absent independent criteria determining entitlements] is vacuous").

a system of defect-free liability. Were the considerations to end there, one would be left with the task of making a difficult trade-off between positive substantive objectives and negative process implications. In an effort to show that the negative implications of implementation vastly outweigh the positive values of achieving substantive objectives, we return to those objectives and examine them more carefully. That is, we explore how liability without defect actually would affect, or be likely to affect, behavior in the market and argue that such a system would generate tremendously undesirable substantive effects. Given that implementation problems appear insurmountable with respect to across-the-board liability without defect, in this section we discuss only briefly the negative substantive effects, leaving a more complete discussion of these effects to Part III's exploration of defect-free product-category liability.<sup>87</sup>

### *1. Distortion Effects That Accompany Liability Systems in General*

We begin by observing that no liability system, including our current, traditional system, can be expected to work perfectly since courts are bound to commit errors that send liability signals that are either too weak or too strong. When the signals are too weak, actors to whom they are directed will either underinvest in safety, overengage in hazardous activity, or both.<sup>88</sup> Conversely, when the signals are too strong, actors will either overinvest in safety, underengage in the activity, or both.<sup>89</sup> And, if the overly strong signals are strong enough, many actors will leave the market altogether. These patterns of over- and underinvestment and engagement, which we refer to as "distortion effects," are socially wasteful.<sup>90</sup>

When one speaks of courts sending inaccurate liability signals, one usually thinks of courts getting their risk-utility or causation calculi wrong, or measuring the harms to plaintiffs incorrectly. If that is all that sending inaccurate signals implied, then the previous discussion of implementation problems arguably would have anticipated all there is to say about the inaccuracy of liability signals, and further discussion would be beside the point. But liability signals may be wrong for other reasons,

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<sup>87</sup> See text accompanying notes 171-90 *infra*.

<sup>88</sup> These conclusions are direct corollaries to those contained in the text accompanying notes 41-48 *supra*.

<sup>89</sup> If the accident cost that a marginal investment in safety would prevent is  $x$ , and the investment is  $2x$ , resources are preserved if the safety investment is not made. However, if the system erroneously threatens the actor with liability of  $3x$ , the actor rationally will make the  $2x$  safety investment, thereby wasting, from society's standpoint, resources worth  $x$  ( $2x - x = x$ ).

<sup>90</sup> Theoretically, the tort system aims at minimizing the sum of accident and avoidance costs. See G. Calabresi, *supra* note 41, at 26. When the costs of either accidents or accident avoidance are greater than optimal, cost minimization will not occur, and waste will result.

ones that relate directly to the proposal that courts adopt liability without defect. For example, courts may make their calculations and measurements accurately, but on the basis of aggregates—pools—of actors who are not contributing uniformly to the generation of relevant accident costs. If, as a result of this aggregation of dissimilar risk generators, a uniform signal is sent to actors who are not contributing uniformly to the risks, the signals will be too weak for some (the heavier risk contributors) and too strong for others (the lighter contributors).<sup>91</sup> Since actors react to liability signals on an individual basis rather than on the group basis upon which the calculations were made, they will respond inappropriately, thereby wasting scarce resources. This distortion effect is an implication of liability systems generally, but, as a subsequent discussion demonstrates,<sup>92</sup> it is a more serious implication of the defect-free liability system we are here considering.

Yet even if a system succeeds in sending exactly the right liability signals, the next section demonstrates that it may be possible for actors to deflect or blunt the impact of those signals. These evasive responses will be attractive in direct proportion to the intensity of the liability signals, irrespective of whether the signals are appropriate.<sup>93</sup> One method by which actors may insulate themselves from realizing the effects of liability threats is by engaging in "hit-and-run" tactics. That is, a manufacturer might enter a potentially risky market with an undercapitalized, underinsured corporation that is incapable of satisfying any future sizeable judgments.<sup>94</sup> In their extreme form, hit-and-run tactics assume the proportions of black market operations where anonymity of producers and distributors allows them to escape liability altogether.<sup>95</sup> Not only do

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<sup>91</sup> When the pooling of risks occurs via voluntary insurance, writers speak of the problem of adverse selection, whereby the heavier contributors to risk are attracted to join the pool, and the lighter contributors to leave the pool. See K. Abraham, *Insurance Law and Regulation* 3-5 (1990) (discussing effects of imperfect information in insurance industry, including adverse selection and moral hazard); see also text accompanying notes 127-28 *infra* (discussing negative effects of pooling). "Joining" and "refusing to join the pool" are analogous to over- and underengaging in risky activities.

<sup>92</sup> See text accompanying notes 183-90 *infra*.

<sup>93</sup> See note 89 *supra*.

<sup>94</sup> For a discussion of the entry of "irresponsible" producers into uncertain markets, see Siliciano, *Corporate Behavior and the Social Efficiency of Tort Law*, 85 Mich. L. Rev. 1820, 1848-53 (1987); see also Note, *An Efficiency Analysis of Vicarious Liability Under the Law of Agency*, 91 Yale L.J. 168, 197-98 (1981) (noting that, in absence of vicarious liability, judgment-proof agent may undertake socially inefficient activity). Of course, corporate law encourages risk-taking through rules limiting the liability of a firm's managers and directors. For a general discussion of the interplay between products liability and corporations law, see J. Henderson & A. Twerski, *supra* note 77, at 713-43.

<sup>95</sup> For a discussion of the workings of black markets, see generally S. Ray, *Economics of the Black Market* (1981). We speak not of an illegal black market but rather one that is simply designed to avoid any liability tax. See Stayin, *The U.S. Product Liability System: A Compet-*

these evasive responses frustrate the liability system's efforts to reduce accident costs,<sup>96</sup> but also—to the extent they are nonproductive—their implementation, in and of itself, imposes wasteful costs on society.<sup>97</sup>

## 2. *The Unique Distortion Effects of an Across-the-Board System of Liability Without Defect*

Thus far we have focused on existing systems of liability, sketching the negative behavioral effects likely to accompany such regulatory efforts. This section examines how the proposed regime of across-the-board liability without defect would exacerbate these problems. We observe at the outset that the distortion effects flowing from an across-the-board system of liability without defect are difficult to predict with any degree of precision. But we are quite certain that such effects would occur. The major result of the adoption of a defect-free causation-based products liability system would be to increase significantly the liabilities of producers and distributors of products. The potential magnitude of these increases is difficult to underestimate. Defect-related injury is a relatively rare event; product-related injury occurs almost as often as injury itself.<sup>98</sup>

Raising the stakes of the liability game in this fashion would tend to increase all of the negative distortion effects of the existing system. For example, as the prices of inherently dangerous products in normal commercial markets rose dramatically, one would expect the hit-and-run tactics mentioned earlier to become increasingly attractive. Moreover, those engaging in hit-and-run tactics would have little incentive to invest in processes replete with optimum quality control. The result would be "black-black" markets—both financially irresponsible and substantially more dangerous than the commercial markets that exist under the traditional, defect-driven products liability system.<sup>99</sup> Furthermore, since the

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itive Advantage to Foreign Manufacturers, 14 Canada-U.S. L.J. 193, 207 (1988) (noting that hit-and-run tactics are used to evade products liability tax and thus generate black markets). Of course, once such markets come into being, they may very well seek to avoid state and federal taxation as well.

<sup>96</sup> If successful, evasive tactics cause liability signals to be weaker than they should be, resulting in underdeterrence. See note 88 and accompanying text *supra*.

<sup>97</sup> These evasive tactics are analytically analogous to the efforts of property owners to prevent theft. The costs of such efforts are rationally borne by owners, at least to the point where the marginal prevention costs equal the marginal theft costs; but they are wasteful from the overall societal perspective. See Shavell, *Individual Precautions to Prevent Theft: Private Versus Socially Optimal Behavior*, 11 Int'l Rev. L. & Econ. 123 (1991).

<sup>98</sup> In a modern, industrialized society it is difficult to imagine a serious accident that could not be connected with one or more commercially distributed products.

<sup>99</sup> One need not guess whether such a phenomenon would occur when manufacturers who have no practical accountability supply the market. One of the great tragedies of Prohibition was the large number of deaths caused by poisoned or adulterated alcohol. See J. Coffey, *The*

products liability system imposes its liability premium on a one-shot basis at the time of distribution, the problem of some users and consumers subsidizing, and being subsidized by, other users and consumers would grow. Under the current approach, users and consumers who cannot prove defect generally do bear, in the aggregate, accident costs roughly in proportion to their levels of product usage. Eliminating the requirement of defect would shift all product-related accident costs to producers and distributors, causing all such costs to be borne on a per-purchase rather than per-use basis.

Moreover, as the prices of new durable products such as automobiles and washing machines rose dramatically to reflect the new, greatly enlarged exposures of producers to liability, most users would find it profitable to retain and continue to use older products and so escape the liability tax on new products.<sup>100</sup> Indeed, whether or not across-the-board liability without defect were applied retroactively to products sold earlier under the traditional defect-based system, adoption of liability without defect would increase greatly the value of all durable products already distributed in commerce. Thus, users who purchased such products prior to the new rule would have escaped paying for the new regime of defect-free liability; and people to whom the purchasers thereafter sold such products also would escape because subsequent private sales would be noncommercial and therefore beyond the reach of strict products liability.<sup>101</sup>

Therefore, if liability without defect were adopted, noncommercial and essentially unregulable markets in used durable products increasingly would infringe upon commercial new product markets. With a premium placed upon product longevity, markets in replacement parts likely would thrive. And while irresponsible, hit-and-run operators might find it difficult to manufacture and distribute sizeable durable

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Great Thirst: Prohibition in America: 1920-1933 196-200 (1975); E. Kellner, Moonshine — Its History and Folklore 119-40 (1971). Newspaper reports during Prohibition years abound with stories of deaths caused by contaminated whisky. See, e.g., Two More Victims Swell Liquor Toll, N.Y. Times, Jan. 3, 1927, at 4; 2 Whisky Deaths a Poison Mystery, N.Y. Times, Jan. 10, 1921, at 1. One author even suggests that organized crime played a benevolent role in public safety by supplying high quality alcohol while keeping inferior and dangerous alcohol from the market. See F. Homer, Guns and Garlic 32-33 (1974).

<sup>100</sup> See Huber, Safety and the Second Best: The Hazards of Public Risk Management in the Courts, 85 Colum. L. Rev. 277, 291-92 (1985) ("[I]mpos[ing] *greater* costs on the *safer* substitutes within particular markets . . . may encourage a shift in consumption toward the more hazardous." (emphasis in original)).

<sup>101</sup> Traditionally, noncommercial sales have not been captured by strict liability. Although they could be, doing so would not serve the broader policies of strict liability. See Henderson, Extending the Boundaries of Strict Products Liability: Implications of the Theory of the Second Best, 128 U. Pa. L. Rev. 1036, 1047-48 (1980); note 48 *supra*.

products,<sup>102</sup> replacement parts could be manufactured more easily. Once again there would be real cause for concern about the quality control utilized for manufacturing such replacement parts since the manufacturers serving such "black-black" markets would have little incentive to produce optimally safe products.<sup>103</sup> The substitution market would have far-reaching effects; as the new causation-driven liability tax drove the prices of new durable products dramatically upward, consumers at the margin would turn in substantial numbers to noncommercial markets for closely substitutable, yet nontaxable, products. And these effects would be negative; not only would markets for new products be threatened, but the used products, which increasingly would substitute for the new, presumably would present greater risks of accidental injuries.<sup>104</sup>

Again, the distortion effects of broad-scale adoption of liability without defect are impossible to predict precisely. But enough has been said to make a convincing case for the proposition that, even if courts could implement such a system and even if this system were justified in theory, liability without defect actually would generate more undesirable effects than desirable ones. The problem of hit-and-run tactics, black markets, and flight to noncommercial used product markets involve what economists refer to as "second-best" situations.<sup>105</sup> In an effort to regulate admittedly regulable behavior more completely, the system increases the liability costs of the regulated firms to the point where they and the consumers with whom they deal turn to new patterns of essentially unregulable behavior to escape the higher liability costs of the regulated markets. These substitution effects not only wreak havoc with traditional markets for new products, but also make society, on balance, less safe than it was with less regulation. In essence, the theory of the second best tells regulators to think twice about forcefully regulating one area of activity when those affected have access to a more-or-less substitutable area of activity

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<sup>102</sup> Any product that requires a large capital investment to produce and distribute probably would not attract black marketeers because those capital assets would be accessible to tort creditors. Of course, even under current law plaintiffs encounter difficulties obtaining and satisfying judgments against foreign corporations who export their products to this country. See, e.g., *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 112-14 (1987) (plaintiff could not assert jurisdiction over foreign component manufacturer). Moreover, foreign manufacturers simply could invite Americans to purchase durables such as automobiles abroad and bring them into this country themselves.

<sup>103</sup> See note 99 and accompanying text *supra*.

<sup>104</sup> On average, a 30-year old automobile is riskier than a relatively new one. See Henderson, *supra* note 101, at 1073 n.172, 1081-85.

<sup>105</sup> For a general discussion of second-best theory, see Lipsey & Lancaster, *The General Theory of Second Best*, 24 *Rev. Econ. Stud.* 11 (1956); see also G. Calabresi, *supra* note 41, at 86-88 (costs of illegal conduct not internalized); R. Posner, *Economic Analysis of Law* § 9.3, at 202-03 & n.1 (2d ed. 1977) (second-best theory relates to gaps between private and social benefits or costs); Henderson, *supra* note 101, at 1059-65 (tort reform efforts create problems addressed under theory of second best).

that cannot be reached effectively with similar regulation. It is quite possible that regulating "by halves" makes things worse, not better.<sup>106</sup>

#### *D. Across-the-Board Liability Without Defect in American Products Liability Decisions*

While across-the-board liability without defect is not now and never has been the operative rule in any American jurisdiction, several courts, probably without fully realizing the scope of their pronouncements, have come close to adumbrating such a rule.<sup>107</sup> Others have approved of policy objectives that could be achieved only by the ultimate adoption of a defect-free product liability system.<sup>108</sup> This section examines the reasoning of these courts and evaluates their success in light of the implementation and policy concerns discussed above.

In a leading decision, the California Supreme Court held that a plaintiff can establish a prima facie case for defective design by "showing that the injury was proximately caused by the product's design."<sup>109</sup> Once this showing is made, the burden shifts to the defendant to prove that the product meets risk-utility norms.<sup>110</sup> Although the ultimate determination of product defectiveness remains dependent on risk-utility balancing, the California formulation of the prima facie case for defective design smacks of defect-free liability.<sup>111</sup> In a recent case, for example, an

<sup>106</sup> For applications of second-best theory to products liability, see Henderson, *supra* note 101, at 1059-65; Huber, *supra* note 100, at 290-305.

<sup>107</sup> See, e.g., *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 431, 573 P.2d 443, 455-56, 143 Cal. Rptr. 225, 237 (1978) (requiring plaintiff only to make prima facie case proving that product's design proximately caused injury, whereupon burden shifts onto defendant to prove that product was not defective); *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 559-60, 391 A.2d 1020, 1026-27 (1978) (supplier is guarantor of its product's safety such that liability may be found where "the product left the supplier's control lacking any element necessary to make it safe for its intended use or possessing any feature that renders it unsafe for the intended use").

<sup>108</sup> See, e.g., *Price v. Shell Oil Co.*, 2 Cal. 3d 245, 251, 466 P.2d 722, 726, 85 Cal. Rptr. 178, 181-82 (1970) (purpose of strict products liability is to spread costs of compensating accident victims throughout society); *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 64, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963) ("Implicit in the machine's presence on the market . . . was a representation that it would safely do the jobs for which it was built."); *Phillips v. Kimwood Mach. Co.*, 269 Or. 485, 504, 525 P.2d 1033, 1041-42 (1974) ("imposition of [strict] liability has a beneficial effect on manufacturers of defective products both in the care they take and in the warning they give"); Epstein, *Products Liability as an Insurance Market*, 14 J. Legal Stud. 645, 659 (1985) ("if redistribution is desired there is no reason why the law should retain the requirements of causation and product defect"); Owen, *supra* note 40, at 708-09 (arguing that highly subjective consumer-expectations test is one-directional since consumers usually do not plan to injure themselves with products and hence rarely expect such injuries to result).

<sup>109</sup> *Barker*, 20 Cal. 3d at 431, 573 P.2d at 455, 143 Cal. Rptr. at 237.

<sup>110</sup> See *id.* at 432-33, 573 P.2d at 447, 143 Cal. Rptr. at 238.

<sup>111</sup> See Schwartz, *supra* note 11, at 466-67 ("The [*Barker*] rule places an enormous burden on the concept of a 'product design that proximately causes injury,' a burden which the concept seems ill-equipped to handle." (citation omitted)).

intermediate California appellate court allowed a jury verdict to stand where a plaintiff introduced no evidence of any alternative design that could have prevented the injury.<sup>112</sup> In that case, a car collided with the motorcycle that the plaintiff was driving, causing injury to her leg. The plaintiff's *prima facie* case consisted of asserting that a design feature of the motorcycle was the proximate cause of the injury. The plaintiff introduced no evidence of a safer design alternative and the appellate court found that none was necessary.<sup>113</sup> With considerable justification, the dissent argued that the plaintiff had established nothing more than that her injury occurred while she was using the product. The dissent also argued that there was not one shred of evidence that the product was defective.<sup>114</sup>

Given that the defendant in the case just described could have defended successfully by showing that its product met risk-utility guidelines, it may seem that the California rule is a long way from imposing defect-free product liability. Nonetheless, as numerous observers have noted, shifting the burden of proof to the defendant makes it difficult, if not impossible, for a defendant to defend itself from liability.<sup>115</sup> It is difficult enough to prove a negative. When the defendant bears the burden of proving that a product is not defective, without being able to consider what kinds of alternative designs should have been implemented, the defendant must carry a daunting load.<sup>116</sup> Ultimately, a jury can conclude that some alternative, about which it has heard no evidence, may have been feasible. Even if they have not explicitly adopted liability

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<sup>112</sup> See *Pietrone v. American Honda Motor Co.*, 189 Cal. App. 3d 1057, 1061, 235 Cal. Rptr. 137, 139 (1987) ("[E]ven were it to be assumed that plaintiff's burden . . . required that she demonstrate the existence of some alternative design which would have prevented or lessened her injury, this burden was met by . . . a cursory examination of [the motorcycle's] configuration . . .").

<sup>113</sup> See *id.* ("In the instant case the evidence conclusively established that a design feature of Honda's product—the open, exposed, rotating rear wheel in close proximity to the passenger's foot pegs—was a proximate cause of plaintiff's injury. Without more, the burden then shifted to Honda to justify its adoption and utilization of that particular design.").

<sup>114</sup> See *id.* at 1090-91, 235 Cal. Rptr. at 146 (Roth, J., dissenting) (allowing plaintiff "to sue a solvent defendant in strict liability merely by alleging purchase of the product and the sustaining of injuries while using the product . . . corrodes the rule of law as accepted since adversary trials have been an integral part of the administration of justice and substitutes an *ad hoc* judicial dispensation of justice").

<sup>115</sup> See, e.g., Henderson, *supra* note 27, at 782-97 (shifting burden of proof means that "no defendant, however capably represented will succeed, other than by agreeing to settle, in avoiding the retrospective evaluation of its design choices by lay jurors"); Schwartz, *supra* note 11, at 468 (arguing burden of proof should not force defendant to disprove presumption of negligence).

<sup>116</sup> See Schwartz, *supra* note 11, at 468 ("If an auto accident ignites a gas tank, it is apparently true that the location of the gas tank is a design feature of the car that has proximately caused the injury. To rebut the *Barker* presumption of defect, must the car manufacturer rule out, with trade-off evidence, every other possible gas tank location?").



without defect, California courts clearly are flirting with such a rule.<sup>117</sup>

A fair number of jurisdictions have couched their tests for product defect in whole or in part in terms of "consumer expectations."<sup>118</sup> Many courts have acknowledged that this test for defect reflects the historical influence of the implied warranty of merchantability on products liability

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<sup>117</sup> The California rule in *Barker* flirts with defect-free strict liability in much the same way that generous *res ipsa loquitur* flirted with defect-based strict liability in the 1940s and 1950s. See *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 462-63, 150 P.2d 436, 441 (1944) (Traynor, J., concurring).

<sup>118</sup> See, e.g., *Bruce v. Martin-Marietta Corp.*, 544 F.2d 442, 447 (10th Cir. 1976) (plaintiff must prove that product was "dangerous beyond the expectation of the ordinary consumer" to prevail in strict products liability action under § 402A of Restatement (Second) of Torts); *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 432, 573 P.2d 443, 455-56, 143 Cal. Rptr. 225, 237-38 (1978) (adopting two alternative tests for strict products liability: under first, plaintiff may establish design defect by showing that product "failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner;" under second, design defect may be found upon proof of proximate cause by plaintiff and failure by defendant to show that benefits of design exceeded design risks); *Aller v. Rodgers Mach. Mfg. Co.*, 268 N.W.2d 830, 834 (Iowa 1978) (plaintiff must show that product defect "not one contemplated by the user . . . which would be unreasonably dangerous to him in the normal and intended use thereof" to prove product unreasonably dangerous); *Lester v. Magic Chef, Inc.*, 230 Kan. 643, 653, 641 P.2d 353, 361 (1982) (noting that product may be found unreasonably dangerous if it is more dangerous than ordinary consumer, possessed of knowledge "common to the community," would expect; but refusing to adopt two-pronged test set forth in *Barker*); *Voss v. Black & Decker Mfg. Co.*, 59 N.Y.2d 102, 108, 450 N.E.2d 204, 208, 463 N.Y.S.2d 398, 402 (1983) (product "not reasonably safe" if reasonable person, with knowledge of design defect at time of manufacture, would find that product's risk exceeded its utility); *Leichtamer v. American Motors Corp.*, 67 Ohio St. 2d 456, 467, 424 N.E.2d 568, 577 (1981) ("[A] product will be found unreasonably dangerous if it is dangerous to an extent beyond the expectations of an ordinary consumer when used in an intended or reasonably foreseeable manner."); *Vincer v. Esther Williams All-Aluminum Swimming Pool Co.*, 69 Wis. 2d 326, 332, 230 N.W.2d 794, 798 (1975) (test for unreasonably dangerous product defect "depends upon the reasonable expectations of the ordinary consumer concerning the characteristics of this type of product").

The test has academic supporters as well. See, e.g., Bernacchi, A Behavioral Model for Imposing Strict Liability in Tort: The Importance of Analyzing Product Performance in Relation to Consumer Expectation and Frustration, 47 U. Cin. L. Rev. 43, 44 (1978) ("courts should view a product as 'defective' to the extent that it frustrates the reasonable expectations of the ordinary consumer"); Hubbard, Reasonable Human Expectations, *supra* note 49, at 465 ("liability for product-related injuries ought to be apportioned in accordance with reasonable human expectations" (emphasis in original)); Montgomery & Owen, Reflections on the Theory and Administration of Strict Tort Liability for Defective Products, 27 S.C.L. Rev. 803, 812-24 (1976) (contending that "in many cases the consumer expectations analysis produces a sound result, in others the test works restrictively, producing results inconsistent with a sound risk-benefit analysis of the problem"); Shapo, *supra* note 49, at 1192-96 (arguing that liability "should concentrate initially and principally on the portrayal of the product" so that product advertising may be "backdrop" supporting strict products liability under § 402B of Restatement (Second) of Torts); Twerski, From Risk-Utility to Consumer Expectations: Enhancing the Role of Judicial Screening in Product Liability Litigation, 11 Hofstra L. Rev. 861, 901-08 (1983) (arguing that under consumer-expectations test, strict products liability should apply when products fail in normal use where normal use is defined in part according to product image; where this test may not embrace all cases, such as foreseeable-misuse cases, test should be applied in tandem with risk-utility analysis).

law: "implicit in a [product's] presence on the market . . . [is] a representation that it [will] safely do the jobs for which it was built."<sup>119</sup>

Although much can be said in favor of a consumer-expectations test as a barometer for product defect,<sup>120</sup> it suffers from one major, even fatal flaw: its extreme subjectivity leaves the manufacturer open to the real possibility of liability without defect.<sup>121</sup> It is very difficult to rebut the contention that a consumer's expectations were disappointed.<sup>122</sup> In fact, as a practical matter, this standard for liability seems almost entirely rhetorical. Furthermore, since the consumer-expectations rationale stands as an independent basis for liability separate and apart from risk-utility,<sup>123</sup> the defendant would not be absolved of liability even upon establishing that an alternative design would have been more dangerous than the one actually used. The analogy to defect-free liability is too close to ignore.

Finally, the Pennsylvania high court has adopted a test for defect that in its direct terms seems close to defect-free liability, holding in effect that a manufacturer is a guarantor of the safety of its product.<sup>124</sup>

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<sup>119</sup> *Greenman v. Yuba Power Prods., Inc.*, 59 Cal. 2d 57, 64, 377 P.2d 897, 901, 27 Cal. Rptr. 697, 701 (1963); see also *Gray v. Manitowoc Co.*, 771 F.2d 866, 869 (5th Cir. 1985) ("consumer expectation test of section 402A is rooted in the warranty remedies of contract law, and requires that harm and liability flow from a product characteristic that frustrates consumer expectations").

<sup>120</sup> See authorities cited in note 118 supra.

<sup>121</sup> See Model Uniform Products Liability Act, 44 Fed. Reg. 62,714, 62,722 (1979) (analyzing § 104 of Act concerning construction defects); see also *Billota v. Kelly Co.*, 346 N.W.2d 616, 621-22 (Minn. 1984) (consumer-expectations instructions to jury not appropriate for design-defect cases but are appropriate for cases involving inadvertent manufacturing defects where jury can refer to flawless product as objective measure of alleged defect); *Turner v. General Motors Corp.*, 584 S.W.2d 844, 851 (Tex. 1979) (ruling that jury instructions based on consumer expectations as test for unreasonable dangerousness should not include element of ordinary consumer, and that "jury may be instructed . . . to consider the utility of the product and the risks involved in its use"); cf. *Schwartz*, supra note 11, at 476 n.241 (liability standards should not differ among companies or consumers according to differences or changes in advertising campaigns).

<sup>122</sup> For an example of the extreme subjectivity of the consumer-expectations test, see *Campbell v. General Motors Corp.*, 32 Cal. 3d 112, 126-27, 649 P.2d 224, 232-33, 184 Cal. Rptr. 891, 899-900 (1982) (consumer-expectations test does not require expert testimony but involves "the jurors' own sense of whether the product meets ordinary expectations as to its safety under the circumstances presented by the evidence").

<sup>123</sup> See cases cited in note 118 supra.

<sup>124</sup> See *Azzarello v. Black Bros. Co.*, 480 Pa. 547, 558-59, 391 A.2d 1020, 1026-27 (1978). This decision has been treated harshly by most commentators. See, e.g., *Birnbaum*, supra note 57, at 636-39; *Henderson*, *Products Liability: Controversial New Decision on Design Defects*, 2 Corp. L. Rev. 246, 248 (1979); see also Comment, *Returning the "Balance" to Design Defect Litigation in Pennsylvania: A Critique of Azzarello v. Black Brothers Company*, 89 Dick. L. Rev. 149, 172-73 (1984) (*Azzarello* "has generated an unacceptable and unnecessary level of confusion" by holding that manufacturer is guarantor of its product's safety and by intimating that absolute liability should be imposed on manufacturers); Note, *Restatement (Second) of Torts—Section 402A—Uncertain Standards of Responsibility in Design Defect Cases—Af-*

Although standing on its own this holding seems to call for defect-free liability, the Pennsylvania court also held that a court has an obligation to screen cases before they go to juries to see whether they meet risk-utility guidelines.<sup>125</sup> Thus, the issue of whether a product is "unreasonably dangerous" is a question of law for the court and not one of fact for the jury.

As with the other expansive tests for defect discussed above, the Pennsylvania "guarantor" test for liability does not adopt defect-free liability formally. Certainly, the court's arrogation to itself of some preliminary review based on risk-utility guidelines mutes the harshness of its liability test.<sup>126</sup> Nonetheless, since juries in Pennsylvania routinely are given cases in which they have free reign to impose liability without any formal restraints, that jurisdiction's "guarantor" standard suggests that courts are not far from practical implementation of a liability rule proclaiming injuries arising from product use compensable.

To the limited extent that American courts have flirted with across-the-board defect-free liability, that concept has been the cause of considerable mischief. By playing fast and loose with the definitions for defect, some courts may have created systems in which manufacturers are to some extent the insurers of their products for product-related injuries. As discussed earlier, one source of perverse market incentives stems from the aggregation, or pooling, of dissimilar risks under liability rules.<sup>127</sup> As we move from accident avoidance governed by a negligence standard to an effective insurance scheme governed by a true strict liability standard, these perverse incentives intensify. Not surprisingly, several leading commentators have suggested that one of the reasons for the so-called "products liability crisis" in recent years is that adverse selection has destroyed the relevant insurance pools.<sup>128</sup>

Yet even in courts that articulate the most open-ended liability tests, the formalities of fault and defect still exert significant restraint today. Although some courts have given voice to doctrines that approximate broad-scale liability without defect, clearly that approach has no hold at

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ter *Azzarello*, Will Manufacturers Be Absolutely Liable in Pennsylvania?, 24 Vill. L. Rev. 1035, 1050 (1978-1979) (*Azzarello* "[neglected] to articulate any workable standard of responsibility").

<sup>125</sup> See *Azzarello*, 480 Pa. at 558, 391 A.2d at 1026.

<sup>126</sup> See Twerski, *supra* note 118, at 922-26 (demonstrating that under *Azzarello*, court first goes through risk-utility analysis to decide if feasible alternative design exists, then jury decides if "failure to implement the feasible design has sufficiently disappointed consumer expectations," and noting that this approach may be justified by "the fear that design defect litigation may cause devastating consequences to industry").

<sup>127</sup> See note 91 and accompanying text *supra*.

<sup>128</sup> See Epstein, *supra* note 108, at 650-52; Priest, The Current Insurance Crisis and Modern Tort Law, 96 Yale L.J. 1521, 1540-41 (1987); Priest, Puzzles of the Tort Crisis, 48 Ohio St. L.J. 497, 500 (1987).

the formal level in today's American tort law. If nothing else, the lip service that is paid to the requirement of defect helps eliminate the implementation problems—especially with causation—that would render a true system of no-defect liability impractical.

### III

#### NARROWER FORMS OF LIABILITY WITHOUT DEFECT: PRODUCT-CATEGORY LIABILITY

Assuming that the problems associated with across-the-board liability without defect are sufficiently daunting to prevent implementation of such a system, might not courts consider narrower versions of the same theme? The most obvious way to accomplish that objective would be to impose liability without defect on a discrete and limited number of product categories. This option may appear compelling at first blush, given the public attention and concern over certain product categories such as cigarettes, alcoholic beverages, and handguns. Yet as this Part demonstrates, judicially applied product-category liability is plagued not only by many of the same implementation and policy problems described above, but also by a variety of problems unique to adopting such a system.

Two approaches to product-category liability might compete for the courts' attention: first, courts could choose the categories on the basis of risk-utility balancing, deciding which categories, in the aggregate, generate more social costs than benefits; or second, courts could pick categories on the basis of some other criterion, perhaps because some categories could be implemented more readily than others, because some are too risky regardless of their benefits, or because some are more controversial. Under any of these approaches, once a category is identified as appropriate for strict liability, by implication all the products within that category would be measured according to a no-defect strict liability standard; in other words, distributors or manufacturers would be strictly liable for any harm caused by their products whether or not these products could be found defective under traditional products liability doctrines. The relevant categories would be identified either by courts as a matter of law or by juries on a case-by-case basis.<sup>129</sup> Liability then would follow along the same general lines as across-the-board liability without defect.<sup>130</sup>

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<sup>129</sup> To the extent that a risk-utility test were used, juries probably would decide whether to impose categorical liability, just as they decide to impose negligence under current law. See *O'Brien v. Muskin Corp.*, 94 N.J. 169, 184-86, 463 A.2d 298, 314-17 (1983); note 132 *infra*. But if ultrahazardous-activity concepts were used, judges probably would set the categories. See text accompanying notes 224-25 *infra*; note 225 *infra*.

<sup>130</sup> See text accompanying notes 53-64 *supra*.

### A. *Product-Category Liability: Some Initial Terminology*

Before addressing the merits of the various product-category liability proposals, we should clarify certain issues of terminology that might seem confusing at first. Initially, one might argue that product-category liability would rest on a finding of defectiveness—the entire product category would be deemed defective either because it does not offer sufficient benefits to justify the injuries it causes or because it satisfies some other criterion.<sup>131</sup> We prefer terminology that avoids reliance on defectiveness because we feel that legal terminology, whenever possible, should clarify what is happening in the litigation to which it refers. To stretch the term “defective” to include broad categories of products that are not defective in any traditional sense could mask the profound differences between this use of the term “defective” and its more traditional uses. Courts that have faced this issue appear to have sensed the possible confusion and have avoided using “defectiveness” terminology.<sup>132</sup>

Of course, this first point regarding terminology also raises a point of substance: is risk-utility product-category liability really different from the liability traditionally imposed on product designs based on risk-utility balancing? If one were to think of every variation of product design as constituting a category unto itself—for example, if one thought of slightly longer-handled bicycles and slightly shorter-handled bicycles as constituting two separate categories—then the term “product-category liability” would apply to every instance in which a plaintiff attacked a product design as unreasonably dangerous, including all defective-design

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<sup>131</sup> In an early and influential piece, John Wade conflated the two senses of defectiveness distinguished here and offered as a test for liability the following jury instruction: “A [product] is not duly safe if it is so likely to be harmful to persons [or property] that a reasonable prudent manufacturer [supplier], who had actual knowledge of its harmful character would not place it on the market.” Wade, *supra* note 9, at 839-40. In a footnote, Wade makes clear that the word “defective” could be substituted for the phrase “not duly safe.” *Id.* at 840 n.47. Framed in terms of “placing a product on the market,” the concept of defectiveness would include what we here refer to as product-category liability.

<sup>132</sup> See, e.g., *Patterson v. Rohm Gesellschaft*, 608 F. Supp. 1206, 1210-11 (N.D. Tex. 1985) (describing as “delightfully nonsensical” proffered “claim that a product which does not have a defect can nevertheless, under the law, be defective”); *Kelley v. R.G. Indus.*, 304 Md. 124, 138, 497 A.2d 1143, 1149 (1985) (“[R]egardless of the standard used to determine if a product is ‘defective’ under § 402A, a handgun which functions as intended and as expected is not defective within the meaning of that section.”). Interestingly, the majority opinion in *O’Brien v. Muskin Corp.*, 94 N.J. 169, 463 A.2d 298 (1983), begins its discussion of liability with the requirement of defect but avoids the defect terminology when discussing liability for product categories based on risk-utility analysis. See *id.* at 181, 463 A.2d at 304; see also notes 197-203 and accompanying text *infra* (discussing this opinion in detail). In his concurring and dissenting opinion, Judge Schreiber recognizes the importance of the distinction between what we refer to as “product-category liability” and more traditional liability based on “defect”; “Until today, the existence of a defect was an essential element in strict product liability. This no longer is so. Indeed, the majority has transformed strict product liability into absolute liability . . . .” *O’Brien*, 94 N.J. at 192, 463 A.2d at 310 (Schreiber, J., concurring and dissenting).

claims under traditional law. Thus, if a plaintiff injured while learning to ride a bicycle argued that the handle bars on the bicycle should have been slightly longer to increase side-to-side stability, she could be said to be attacking the *category* of "shorter-handled bicycles." And yet intuitively one knows that an attack on slightly shorter-handled bicycles is not categorical but marginal. The plaintiff is not attacking the category "bicycles" but rather a marginal variation within the category. In contrast, if the plaintiff were to argue that three wheels, arranged triangularly, are required to achieve adequate lateral stability, she would be making a categorical assault on bicycles. The essential difference between these two claims is what distinguishes product-category liability from traditional liability for defective design.

The variable that determines whether one is dealing with a product category or merely a marginal design variation within a category is the degree of substitutability of the alternative suggested by the plaintiff and the product as designed by the defendant. In traditional, intracategory design litigation, the alternative design suggested or implicated by the plaintiff is a relatively close substitute for the product as designed by the defendant. Bicycles with slightly longer handle bars are close substitutes for bicycles with slightly shorter handle bars. Presumably, if plaintiffs succeeded with longer-handle bar claims, the new alternative design would resemble so closely the older design as to be nearly a perfect substitute, thus effectively driving the former variation, which alone would carry the burden of tort liability, from the new bicycle market. A few bicycle design purists might be willing to pay a substantial premium for the older, shorter-handled but less stable design. But intuitively, it seems likely that this demand would be so small that it would not justify the continued mass production of the earlier design.

In contrast, when a plaintiff attacks a bicycle design on the ground that a two-wheeled cycle is inherently unsafe, the next best alternative—a tricycle—is not a very close substitute.<sup>133</sup> Although a far better substitute for a bicycle than many other products, a tricycle is a much less suitable substitute for a bicycle than was the two-wheeled cycle with slightly longer handle bars. Indeed, a tricycle is so poor a substitute for a bicycle that if a court held that three wheels were minimally required to produce a safe cycle, it would be imposing liability not for how the defendant designed the bicycle but for having designed and distributed any sort of bicycle in the first place. Drawing on terminology currently in use, the court could be said to condemn bicycles for the "unavoidably

<sup>133</sup> Similarly, if one attacked a three-wheeled vehicle by insisting on four wheels, the attack would be categorical. See, e.g., *Antley v. Yamaha Motor Corp., U.S.A.*, 539 So. 2d 696, 703 (La. App. 1989) (plaintiff attacked three-wheel all-terrain vehicle based on "inherent instability").

unsafe" aspect<sup>134</sup> that defines two-wheeled transportation: lateral instability at low speeds. In other words, the court would be condemning the product for the very design feature—two-wheeledness—that not only rendered it more dangerous but also made it desirable to a majority of its users and consumers.

Another point regarding terminology relates to why we prefer "product-category liability" over "risk-utility balancing," a phrase used by some commentators to refer to the cases upon which we are focusing.<sup>135</sup> In the first place, some approaches to product-category liability outlined above—for example those based on the controversiality of the category—would not involve risk-utility balancing. Additionally, the term "product-category liability" better describes what is happening—or what plaintiffs argue should be happening. Risk-utility terminology serves a number of different functions in products liability doctrine, including traditional tests for defective design.<sup>136</sup> In the present context of liability without defect, the term "risk-utility" inadequately distinguishes the phenomenon to which it refers from the other phenomena to which it refers in other contexts.

### *B. Problems of Implementation Presented by Product-Category Liability*

Despite its being a narrower, more containable system than the system of across-the-board no-defect liability discussed in Part II, product-category liability is not implemented easily. More specifically, as this section demonstrates, although courts are better equipped to deal with issues of causation under this system, they do not possess the institutional competence to adopt a risk-utility-based version of product category-liability in the first place. Nor are they capable of implementing versions of product-category liability based on criteria other than risk-utility balancing.

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<sup>134</sup> See Restatement (Second) of Torts § 402A comment k (1965) (describing problem of "unavoidably unsafe products").

<sup>135</sup> See, e.g., W. Viscusi, Reforming Products Liability 11-12 (1991) (advocating "reformulation of the risk-utility test" in context of design defects); Viscusi, Wading Through The Muddle of Risk-Utility Analysis, 39 Am. U.L. Rev. 573, 585 (1990) ("strict liability [as applied] is not tantamount to absolute liability"); Note, *supra* note 10, at 2066-69 (adoption of *O'Brien* extension of risk-utility test for design defect "would allow a court to hold manufacturers liable for accidents arising from the use of products for which no feasible alternative design exists").

<sup>136</sup> See authorities cited in note 59 *supra*.

# 1. *Why Courts Are Not Competent to Implement Risk-Utility-Based Product-Category Liability*

a. *Risk-Utility and the Issues of Contributory Fault, Useful Product Life, and Causation.* Recall that adoption of across-the-board strict liability, by eliminating the requirement of defect, would create significant problems for courts trying to resolve issues of contributory fault,<sup>137</sup> useful product life,<sup>138</sup> and causation.<sup>139</sup> The elimination of the linchpin element of defectiveness would eliminate the baseline framework upon which intelligent analysis and resolution of these issues rest. Product-category liability, by retaining at least the categorical judgment of reasonableness if not the marginal judgment of defectiveness, would appear to supply at least some of the analytical framework missing in across-the-board liability without defect. For example, with respect to plaintiff's contributory fault, the unreasonableness of the product category could be balanced more easily against the unreasonableness of the plaintiff's conduct.

First appearances, however, are likely to be deceiving. Having concluded that the product in question should never have been distributed in the first instance, some courts might be tempted to conclude that plaintiff's fault should play no role at all. Their reasoning would be that if the product had never been distributed, it could not have been the object of plaintiff's foolish, risky behavior. But eliminating plaintiff's fault is viewed by most courts and commentators as unwise.<sup>140</sup>

For courts that sensibly decided to retain contributory fault, the tasks of assessing that fault and deciding when to count it against the plaintiff would be much more difficult than under traditional defect-based approaches to liability. The source of the difficulty inheres in the difference between a categorical versus marginal approach to product design. Under the traditional, marginal approach, the court undertakes a careful and precise evaluation of the particular design's reasonableness compared with feasible design alternatives.<sup>141</sup> If adding a slightly different safety feature would have saved—and thus “forgiven”—the plaintiff's foolish inadvertence, then probably the plaintiff's foolishness

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<sup>137</sup> See text accompanying notes 76-81 *supra*.

<sup>138</sup> See text accompanying notes 82-86 *supra*.

<sup>139</sup> See text accompanying notes 65-75 *supra*.

<sup>140</sup> See, e.g., *Daly v. General Motors Corp.*, 20 Cal. 3d 725, 575 P.2d 1162, 144 Cal. Rptr. 380 (1978); *Coney v. J.L.G. Indus.*, 97 Ill. 2d 104, 454 N.E.2d 197 (1983); *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414 (Tex. 1984); Schwartz, *Strict Liability and Comparative Negligence*, 42 Tenn. L. Rev. 171 (1974); Wade, *Products Liability and Plaintiff's Fault—The Uniform Comparative Fault Act*, 29 Mercer L. Rev. 373 (1978).

<sup>141</sup> See, e.g., *Garst v. General Motors Co.*, 207 Kan. 2, 484 P.2d 47 (1971); *Troja v. Black & Decker Mfg. Co.*, 62 Md. App. 101, 488 A.2d 516 (1985); *Macri v. Ames McDonough Co.*, 211 N.J. Super. 636, 512 A.2d 548 (1986).



should not count for much. But when the entire product category is condemned on risk-utility grounds and the court decides that it should not forgive, for that reason alone, all of the plaintiff's foolishness, the remaining question of "how much foolishness should this particular design forgive?" is begged rather than answered meaningfully by the categorical judgment of unreasonableness.

The problem posed by the categorical, as opposed to marginal, nature of the reasonableness judgment in product-category liability is even more obvious in connection with the issue of useful product life. Under across-the-board liability without defect, the absence of any element of original defect renders unresolvable the issue of how long a product should last.<sup>142</sup> Reintroducing the risk-utility analysis categorically in product-category liability might be thought to reintroduce a framework with which to decide the "how long?" question. But by introducing reasonableness only categorically, product distributors cease to be liable for old durable products only when those products are so old as to cease to be includable in the product category in question.

An example will clarify the point being made. Under traditional analysis, when a five-year-old aboveground swimming pool collapses due to metal fatigue, the plaintiff argues that a slightly stronger, slightly more expensive design would not have collapsed as soon as the defendant's pool. Because the reasonableness analysis is marginal, the cost of the alternative design supplies a built-in constraint on how long such pools may be expected to last—an aboveground pool designed to last thirty or forty years, for example, probably would be prohibitively expensive. Under product-category liability, in contrast, aboveground pools are condemned as unreasonably unsafe categorically. Once that judgment is made, no marginal cost consideration constrains or guides the court's judgment regarding how long any given aboveground pool should last, except some vague, intuitionist sense that bigger, stronger-looking aboveground pools probably should last longer—but who is to say how much longer—than smaller, flimsier-looking ones.

Finally, recall that a major stumbling block preventing courts from implementing across-the-board liability without defect is the issue of causation, both causation-in-fact and proximate causation.<sup>143</sup> Narrowing the focus from across-the-board to discrete product categories would eliminate some, but by no means all, of the difficulties identified in the earlier discussion. With respect to durable products—small handguns, for example—issues of cause-in-fact would be manageable; courts are competent to determine whether the plaintiff was shot by a handgun and

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<sup>142</sup> See text accompanying notes 82-86 *supra*.

<sup>143</sup> See text accompanying notes 65-75 *supra*.

whether the defendant produced that handgun. However, problems of verifiability would plague product-category liability in all but the simplest cases. To return to the hypothetical used in the discussion of across-the-board liability,<sup>144</sup> if roller skates comprised the only product category in that case deemed unreasonably dangerous, courts theoretically could conclude that the roller skate was a cause-in-fact of the plaintiff's fall and resulting injuries. When six or seven products are implicated, the analysis can become complicated; but with one product, the analysis is much simpler. As a practical matter, however, verifying that the plaintiff tripped on a roller skate and not over his own feet would present serious difficulties. The only eyewitnesses are likely to be strongly biased in the plaintiff's favor, and the lack of a defect requirement eliminates circumstantial clues regarding what really happened. The defendant's only recourse would be to hope a jury would be able to sort out true claims from false claims based on the plaintiff's demeanor as a self-serving witness.<sup>145</sup> Verifiability problems are presented under traditional law,<sup>146</sup> but because the plaintiff must prove that a product defect caused her injury, such problems do not threaten to explode.<sup>147</sup>

In cases involving consumables, cause-in-fact would be considerably more difficult, and frequently would involve multiple causation problems not unlike those presented in Part II in the stairs hypothetical. Assume, for example, that the category of cigarettes was deemed unreasonably dangerous. The questions whether the plaintiff's illness was caused by smoking and, if so, which producers' products are implicated, in many cases, would defy coherent resolution.<sup>148</sup> For example, imposing product-category liability would ensure that the enormously difficult problems posed today by failure-to-warn prescription drug cases<sup>149</sup>

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<sup>144</sup> See text accompanying notes 67-68 *supra*.

<sup>145</sup> See text accompanying notes 73-75 *supra*.

<sup>146</sup> See, e.g., *Hollis v. Ouachita Coca-Cola Bottling Co.*, 196 So. 376, 378 (La. Ct. App. 1940) (responding to plaintiff's claim of injury from ingesting soft drink containing harmful material, court stated, "Of course, in a suit of this nature the plaintiff must establish that the complained of injury was proximately caused by the act or omission on which defendant's contended liability is predicated. Furthermore, the proof offered by the complainant should be carefully scrutinized, because the manufacturer usually has no means of disproving by eye witnesses the occurrence of the alleged accident . . .").

<sup>147</sup> See note 73 and accompanying text *supra*.

<sup>148</sup> For a discussion of these problems, see Stein, *Cigarette Products Liability Law in Transition*, 54 Tenn. L. Rev. 631, 662 n.207 (1987) (noting impossibility of knowing whether individual would have contracted disease had he never used tobacco products makes proof of actual causation difficult); see also Note, *The Great American Smokeout: Holding Cigarette Manufacturers Liable for Failing to Provide Adequate Warnings of the Hazards of Smoking*, 27 B.C.L. Rev. 1033, 1047-49 & n.118 (recognizing that plaintiff must prove that defendant's product both actually and legally caused injury; moreover, proximate cause sometimes frustrated by intervening forces substantial enough to be actual cause of disease).

<sup>149</sup> The issue of the indeterminate defendant is at the center of the DES litigation. The

would become a steady diet for the courts.

Proximate causation also would be difficult to prove in many product-category liability cases. Assume, for example, that a court or jury finds alcoholic beverages to be unreasonably dangerous. Returning to our stairs hypothetical, would the producer of the beer that the plaintiff drank be liable for having helped cause the drowsiness that contributed to the plaintiff's fall? Admittedly, courts could reexamine the risk-utility balancing that led to a particular category's being singled out in the first place to determine whether the particular accident was within the scope of the contemplated risks.<sup>150</sup> To that extent, product-category cases dif-

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leading cases recognizing proportional liability are: *Sindell v. Abbott Laboratories*, 26 Cal. 3d 588, 599-601, 607 P.2d 924, 935-37, 163 Cal. Rptr. 132, 145-46, cert. denied, 449 U.S. 912 (1980); *Collins v. Eli Lilly Co.*, 116 Wis. 2d 166, 168-70, 342 N.W.2d 37, 46-48, cert. denied, 469 U.S. 826 (1984); see also *McCormack v. Abbott Laboratories*, 617 F. Supp. 1521, 1526 (D. Mass. 1985) (holding that market-share liability is available in DES case); *McElhaney v. Eli Lilly & Co.*, 564 F. Supp. 265, 269-70 (D.S.D. 1983) (holding that plaintiff does not bear burden of identifying source of DES); *Hardy v. Johns-Manville Sales Corp.*, 509 F. Supp. 1353, 1358-59 (E.D. Tex. 1981) (recognizing practical impossibility of isolating precise cause of injury and determining that Texas court would apply enterprise liability in asbestos case), rev'd in part, 681 F.2d 334 (5th Cir. 1982); *Martin v. Abbott Laboratories*, 102 Wash. 2d 581, 604-05, 689 P.2d 368, 382 (1984) (holding that manufacturers and distributors of DES may be held liable under "market-share alternate" theory).

For commentary on market-share liability, see Note, *Market Share Liability: A New Method of Recovery for D.E.S. Litigants*, 30 Cath. U.L. Rev. 551, 554 (1981) ("[M]arket share liability is a novel yet well-founded approach to litigation involving fungible defective products, consistent with the prior doctrine of products liability law, and represents a necessary expansion of tort liability . . ."); Note, *Market Share Liability: An Answer to the D.E.S. Causation Problem*, 94 Harv. L. Rev. 668, 680 (1981) ("[M]arket share approach not only provides compensation to victims of DES, but may promote deterrence of similar occurrences in the future . . . [and shows] the courts demonstrated willingness to use probability to resolve causation problems when inequity would result from the mechanical application of traditional doctrine.").

However, a substantial number of courts have rejected the market-share approach even in the DES cases. See, e.g., *Mizelli v. Eli Lilly & Co.*, 526 F. Supp. 589, 594-96 (D.S.C. 1981); *Ryan v. Eli Lilly & Co.*, 514 F. Supp. 1004, 1015-18 (D.S.C. 1981); *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 228-33, 560 N.E.2d 324, 326-28 (1990); *Mulcahy v. Eli Lilly & Co.*, 386 N.W.2d 67, 74-76 (Iowa 1986); *Zafft v. Eli Lilly & Co.*, 676 S.W.2d 241, 245-58 (Mo. 1984) (en banc).

The cigarette litigation to date has avoided the problem of defendant identification because plaintiffs' attorneys wisely have chosen to litigate only those cases in which the plaintiff had substantial brand loyalty. See cases cited in note 61 *supra*. Admittedly, cigarettes will never suffer from the total inability to identify the defendant because a smoker will know the various brands of cigarettes he or she has used. However, it is unlikely that courts will be prepared to impose classic joint and several liability on an entire industry without some apportionment formula. Furthermore, claims by passively injured plaintiffs based on environmental smoking damage would confront the DES identification dilemma.

<sup>150</sup> See James, *General Products—Should Manufacturers Be Liable Without Negligence?*, 24 Tenn. L. Rev. 923, 927 (1957) (explaining that strict liability applies only if injury traceable to unreasonably dangerous quality of product which arose in ordinary use or use of which defendant was aware and if that quality existed before product left defendant's control); James, *The Untoward Effects of Cigarettes and Drugs: Some Reflections on Enterprise Liability*, 54

fer from across-the-board liability. Such analysis would be difficult nonetheless.

*b. Identifying Unreasonably Dangerous Product Categories.* Even if causation were deemed manageable in these product-category liability cases, the shoal upon which that approach surely would founder is the risk-utility balancing necessary to single out particular product categories for special treatment. To understand why such balancing asks more of courts than they can deliver, it is necessary to examine more closely the adjudicative process by which courts reach decisions.

For the traditional process of adjudication to work rationally and properly, the parties must use applicable legal doctrine to focus their claims so that they may insist upon a favorable outcome as a matter of right.<sup>151</sup> As Professor Fuller explained, some problems are polycentric in nature.<sup>152</sup> They consist of elements that are connected to one another as are the strands of a spider's web, so that a decision with regard to any element affects the decisions with regard to all the others. Such problems are not suited to judicial resolution because neither side can move from element to element in an orderly sequence.

A certain degree of polycentricity inheres in defective product design cases generally.<sup>153</sup> Yet courts are able to manage in these traditional contexts because plaintiffs typically propose alternative designs and ask the judiciary to focus on the relatively small, marginal differences between the defendant's design and the proposed alternative.<sup>154</sup> With product-category liability, no comparison of marginal differences is necessary because the plaintiff is arguing that the entire product category, including all possible variations therein, should be subject to absolute liability. Quite literally, the question asked in product-category liability cases is: "taking all relevant considerations into account, is the product category in question appropriate for use and consumption in society?" Thus, the polycentricity that inheres in traditional design cases is magnified enormously.

That risk-utility-based product-category liability cases would be unadjudicable can be seen by considering how the parties would attempt

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Calif. L. Rev. 1550, 1554, 1557-58 (1966) (arguing that task of deciding whether new, unknown risks make already singled-out product "unreasonably dangerous" is well within ability of judiciary).

<sup>151</sup> See Henderson, *supra* note 23, at 1539-42.

<sup>152</sup> See Fuller, *The Forms and Limits of Adjudication*, 92 Harv. L. Rev. 353, 395-404 (1978).

<sup>153</sup> See Henderson, *supra* note 23, at 1534-42; Twerski, *supra* note 25, at 550-53.

<sup>154</sup> One of us argued years ago that courts were not competent to review manufacturers' conscious design choices. See Henderson, *supra* note 23, at 1534-42. Later, he grudgingly conceded that courts could manage, but only if they relied on a feasible alternative design approach. See Henderson, *supra* note 27, at 779-81.

to argue a typical claim. For example, in connection with a claim that small, cheap handguns are unreasonably dangerous and should be subject to strict liability, how small is small? How cheap is cheap? For what range of accidents and adverse outcomes are distributors to be liable? Are suicides by handguns to be compensable? How are the parties to obtain relevant data on the social costs associated with small handguns, especially if they cannot agree on the relevant parameters of the problem? Presumably small handguns serve useful as well as wasteful social purposes: people collect them as hobbyists and possess them for protection, deriving pleasure and senses of well-being. How can a court quantify those utilities?<sup>155</sup>

To be answered rationally, the question whether handguns of a particular size and monetary price are "good for society" would require extended legislative or administrative hearings and investigations. Even if courts attacked these problems incrementally, on a case-by-case basis, it is unrealistic to hope that courts could adjudicate their ways to intelligent, consistent solutions. Bearing in mind the magnitude of the stakes involved—imposing absolute liability might tax small handguns off the market—it is hardly surprising that most courts have refused to get involved.<sup>156</sup>

We believe, along with commentators,<sup>157</sup> legislatures,<sup>158</sup> and courts,<sup>159</sup> that these problems render risk-utility product-category liabil-

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<sup>155</sup> See Note, *Handguns and Products Liability*, 97 Harv. L. Rev. 1912, 1927 (1984) (posing similar questions in arguing that handgun control is issue for legislatures and not courts).

<sup>156</sup> See, e.g., handgun cases cited in note 192 *infra*.

<sup>157</sup> See, e.g., Note, *The Smoldering Issue in Cipollone v. Liggett Group, Inc.: Process Concerns in Determining Whether Cigarettes Are a Defectively Designed Product*, 73 Cornell L. Rev. 606, 622-26 (1988) (discussing benefits of having courts screen design-defect cases); Birnbaum & Wrubel, *The Difficulty in Defining a Test for Use in Design-Defect Litigation*, Nat'l L.J., Sept. 19, 1983, at 42 ("What we are left with when [defect is no longer required] . . . is an approach that permits juries, rather than market forces, to make highly individualized value judgments about whether certain products should be made available at all for sale.").

<sup>158</sup> The New Jersey legislature in 1987 superceded *O'Brien v. Muskin Corp.*, 94 N.J. 169, 463 A.2d 298 (1983). See N.J. Stat. Ann. § 2A:58C-3 (West 1987) (manufacturer or seller not liable for defective design if at distribution "there was not a practical and technically feasible alternative design that would have prevented the harm without substantially impairing the reasonably anticipated . . . function of the product"); see also La. Rev. Stat. Ann. § 9:2800.51-57 (West Supp. 1991) (prohibiting finding of defective design when no alternative existed). The authors have testified in several state legislative hearings in favor of this kind of legislation.

<sup>159</sup> Courts have recognized the difficulty of applying risk-utility based product-category liability in several contexts. See, e.g., *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1271-77 (5th Cir. 1985) (marketing of handguns not ultrahazardous since harm is caused by substandard conduct of third parties); *Maguire v. Pabst Brewing Co.*, 387 N.W.2d 565, 572 (Iowa 1986) (defendant not liable given that risks of intoxication were well-known to consumers at large); *Howard v. Poseidon Pools, Inc.*, 72 N.Y.2d 972, 972-73, 530 N.E.2d 1280, 1280-81, 534 N.Y.S.2d 360, 360-61 (1988) (plaintiff unable to recover for injuries from defendant pool man-

ity unmanageable for the courts. As with the issue of proximate cause, if adequate risk-utility balancing somehow could be accomplished, it would help, at least theoretically, the courts to sort those other issues out.<sup>160</sup>

## 2. *Why Courts Are Not Competent to Implement Product-Category Liability Based on Other Criteria*

This section considers the viability of systems of product-category liability based on criteria other than risk-utility balancing. These criteria might include extreme riskiness irrespective of benefits derived from use or consumption, political controversy surrounding the category, or feasibility of implementation. The courts capably could apply product-category liability if the rules adopted were extremely narrow and focused. For example, if a high court were to decide to impose strict liability only on Reynolds Tobacco Company and only for lung cancer suffered by persons who smoked at least one pack a day of Reynolds's products, and only Reynolds's products, for at least five years, the courts could adjudicate coherent, consistent outcomes. In other words, courts are competent to apply such a narrow rule case-by-case. The problem is that courts are not institutionally competent to *adopt* such a rule.<sup>161</sup>

The courts would be no more institutionally competent to adopt the somewhat broader approach of imposing strict liability on all cigarette manufacturers for all injuries proximately caused by cigarette smoking. Unless the court articulates an underlying rationale that would support even-handedly imposing liability on producers of other products that arguably pose serious threats to public health and safety, the suggested anticigarette rule is arbitrary in the same fundamental way, if not quite to the same degree, as the Reynolds Tobacco rule. While the implementation problems that stem from reliance on risk-utility analysis are eliminated, the cost is the court illegitimately exceeding its institutional prerogatives. And the other implementation problems identified earlier<sup>162</sup> would be more difficult here than in connection with risk-utility based product-category liability because of the absence of risk-utility balancing, which lessened those implementation problems.

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ufacturer since plaintiff's reckless conduct obviated any failure to warn); *Morris v. Adolph Coors Co.*, 735 S.W.2d 578, 582-84 (Tex. Ct. App. 1987) (beer manufacturer's products not defective since they were safe for normal consumption); *Baughn v. Honda Motor Co.*, 107 Wash. 2d 127, 132-34, 727 P.2d 655, 660-61 (1986) (en banc) (refusing to expand strict liability to extent that trail bikes would be outlawed). But see *O'Brien*, 94 N.J. at 185, 463 A.2d at 306 (applying risk-utility analysis to aboveground swimming pool).

<sup>160</sup> See authorities cited in note 72 *supra*.

<sup>161</sup> Moreover, the arbitrariness of such a narrow approach is so obvious as to generate legitimate cries of outrage and, we trust, constitutional review. See authorities cited in note 169 *infra*.

<sup>162</sup> See notes 151-60 and accompanying text *supra*.

A concrete example helps make these points clear. Let us suppose that a high court announced, without engaging in risk-utility balancing, that because small handguns are very dangerous henceforth they would be subject to strict liability without defect. One may object, of course, to the seeming arbitrariness of picking out handguns for such treatment, a point raised earlier. But here, to assess potential problems of implementation, we assume a court ignored those difficulties and announced, by fiat, the strict liability rule we have described. On what legitimate basis would the court decide if a plaintiff, injured by being "pistol whipped," could recover? Had the original court attempted a risk-utility balancing, the present court might solve this proximate cause issue by referring back to the value judgments inhering in that balancing. Having eschewed such balancing, however, to what other source would the court refer? Intuition?<sup>163</sup> Should the court leave the decision to successive juries on deliberately vague instructions?

Trying to apply product-category liability catches the court between a rock and a hard place. The hard place is the frustration of trying to run a legitimate, fact-based, risk-utility balancing. The rock is the arbitrariness of refusing to run one. The court cannot have it both ways. And either way it chooses, it exceeds the limits of its institutional competence.<sup>164</sup>

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<sup>163</sup> See notes 107-26 and accompanying text *supra*. Professor Schwartz recognizes the difficulty of assigning liability without first performing risk-utility analysis. He remarks, "[I]f liability were imposed on the sole basis of a product's factual involvement in an accident, one does not even know what methodology to utilize in developing a 'correct' apportionment formula." Schwartz, *supra* note 11, at 447. Professor Klemme makes the same observation in his critique of enterprise liability: "On what rational basis should the law decide which particular enterprise the loss should be treated as a cost of having engaged in? . . . The theory of enterprise liability as it is usually put does not provide a rational answer to this basic question." Klemme, *The Enterprise Liability Theory of Torts*, 47 U. Colo. L. Rev. 153, 162 (1976). Writers nevertheless have advanced what appear to be intuition-based alternatives to risk-utility analysis. See, e.g., A. Ehrenzweig, *Negligence Without Fault: Trends Toward An Enterprise Liability for Insurable Loss* 52-62 (1951) (liability limited to losses "typically" caused by enterprise in question).

<sup>164</sup> When contrasting the competence of courts to monitor product designs at the margin with their lack of competence to decide whether broad categories of products should be marketed at all, an interesting question arises: would adopting liability without defect have spill-over effects on the traditional process of marginal design review? The traditional approach to defective design retains considerable vigor because in every design case the plaintiff must prove a feasible alternative. If product-category liability were to be adopted, it would no longer be unthinkable to ban a product from the market even though no feasible alternative exists. Might courts find it more difficult to hold the line in requiring plaintiffs to prove feasible alternative designs in traditional, noncategorical litigation? For example, under current law, when a plaintiff attempts to attack a Volkswagen's fragility by urging a midsize Ford as an alternative, courts conclude as a matter of law that the suggested alternative is not feasible. *Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066, 1076 (4th Cir. 1974) ("a microbus is [not] . . . to be compared with a standard 1966 passenger type car"). But if courts began allowing claims against product categories where feasible alternatives are not available, they

### *C. Implications of Imposing Product-Category Liability*

#### *1. Theoretical Policy Concerns*

If courts somehow could overcome problems of implementation, and if they were to impose liability on the basis of category-by-category risk-utility balancing, then the same efficiency and fairness objectives outlined earlier in terms of across-the-board liability without defect would be realized for product-category versions of liability without defect.<sup>165</sup> For example, under risk-utility product-category liability, one would expect producers to invest in more care and consumers to consume at lower levels than under our current liability system.<sup>166</sup> And once a product was deemed to generate more social costs than benefits, a product-category system would enhance fairness by adjusting costs between consumers and producers and among different classes of consumers.<sup>167</sup>

The more interesting policy questions arise in the context of selecting product categories on criteria other than risk-utility balancing. For example, if courts were to choose to impose product-category liability on the distributors of small handguns because they are controversial or because they are intended to kill people and human life is sacrosanct, one could not be confident that singling out small handguns for extraordinary treatment would further efficiency goals.<sup>168</sup> Additionally, any criteria used to determine if a handgun is "small" would be sufficiently arbitrary to support claims of discrimination and unequal treatment before the law,<sup>169</sup> not to mention that singling out certain product categories on

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might experience difficulty resisting the "V.W./midsize Ford" claim since feasibility would no longer be required in all design cases. Once the requirement of feasible substitutability has been compromised in categorical litigation, such compromise might erode the vigor and integrity of traditional marginal product design review.

One might argue that jurisdictions that have adopted a consumer-expectations test already have undermined the role of alternative design, and that those jurisdictions do not need product-category liability to accomplish defect-free liability. By and large, however, manufacturers' decisions to reject extreme design changes are not the kinds of decisions that disappoint consumer expectations. For example, a consumer who purchases a Volkswagen is fully cognizant that she is not purchasing a large-sized automobile. Thus, if a court wishes to condemn small-sized automobiles for their smallness, a consumer-expectations standard will not suffice. What is required in that instance is product-category liability. See, e.g., *Lovell v. Marion Power Shovel Co.*, 909 F.2d 1088, 1091-92 (7th Cir. 1990) (concluding that despite decedent's knowledge of machinery hazards, court must consider "the extent to which additional feasible safety devices could have been added to make the product more safe").

<sup>165</sup> See notes 41-51 and accompanying text *supra*.

<sup>166</sup> See notes 41-46 and accompanying text *supra*.

<sup>167</sup> See note 47 and accompanying text *supra*.

<sup>168</sup> See text accompanying notes 172-90 *infra*. Whenever the courts tried to distinguish between handguns that warrant and handguns that do not warrant strict liability, "second best" problems undoubtedly would abound. See notes 105-06 and accompanying text *supra*.

<sup>169</sup> In *Gogol v. Johns-Manville Sales Corp.*, 595 F. Supp. 971 (D.N.J. 1984), the court noted that *Feldman v. Lederle Laboratories*, 97 N.J. 429, 479 A.2d 374 (1984), which limited the holding of *Beshada v. Johns-Manville Prods. Corp.*, 90 N.J. 191, 447 A.2d 539 (1982), to its



what appear to be patently political grounds would constitute bad judicial policy.<sup>170</sup>

## 2. *The Negative Distortion Effects of Product-Category Liability*

In our earlier discussion of across-the-board liability without defect we considered how markets were likely to react to the imposition of such a liability standard. We argued that the adoption of such a sweeping, unforgiving liability rule would encourage a wide range of evasive tactics on the parts of business firms, designed to avoid paying the exorbitant liability tax.<sup>171</sup> These evasive tactics, it will be recalled, present what economists refer to as "second best" problems: targets of burdensome governmental regulation, when possible, will seek to escape the burdens by substituting unregulable (and in this context, possibly riskier) modes of behavior. The results of such evasive behavior actually can make things worse, rather than better. As we pointed out, these problems—which we label "distortion effects"—can be quite serious. In contrast to the analysis about to be undertaken, however, our earlier discussion of the distortion effects of across-the-board liability had a decidedly hypothetical tone. After all, no court has ever actually adopted across-the-board liability, and we have amply demonstrated that to do so would raise unresolvable implementation problems.<sup>172</sup> Given that some courts have actually adopted forms of product-category liability, at this juncture distortion effects must be reckoned with in deadly earnest.

It will be recalled that even if a products liability system succeeds in sending exactly the right liability signals to firms engaged in the production and distribution of products, those firms may be able to deflect or blunt the impact of those signals. Irrespective of whether the signals are theoretically appropriate, these evasive responses will be attractive in direct proportion to the intensity of the liability signals.<sup>173</sup>

Product categories singled out for "true" strict liability are likely to

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facts, effectively held "that one rule applies to asbestos products, and a different rule applies to non-asbestos products"; but the *Gogol* court declined to upset the *Feldman* rule on the equal protection grounds advanced by the defendant. *Gogol*, 595 F. Supp. at 973-74; see also *McBride v. General Motors Corp.*, 737 F. Supp. 1563, 1568-69 (M.D. Ga. 1990) (state cannot single out products claims from other torts for limiting punitive damages).

<sup>170</sup> See Epstein, *Market and Regulatory Approaches to Medical Malpractice: The Virginia Obstetrical No-Fault Statute*, 74 Va. L. Rev. 1451, 1468 (1988) (criticizing Virginia statute for choosing one class of serious birth-related injuries for legislative treatment and not others); see also *Montgomery v. Daniels*, 38 N.Y.2d 41, 64, 340 N.E.2d 444, 459, 378 N.Y.S.2d 1, 21 (1975) ("[E]very line drawn by a legislature leaves out some [products] that might well have been included. That exercise of discretion, however, is a legislative, not a judicial function." (quoting *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974))).

<sup>171</sup> See text accompanying notes 93-97 *supra*.

<sup>172</sup> See text accompanying notes 65-85 *supra*.

<sup>173</sup> See note 89 *supra*.

involve highly dangerous products incapable of being made safe for use without destroying their inherent, categorical utility.<sup>174</sup> As the prices of these inherently and unavoidably dangerous products on normal commercial markets rose dramatically to reflect the higher liability costs, extreme forms of hit-and-run tactics would become increasingly attractive. As in the days of Prohibition, black markets could be expected to thrive.<sup>175</sup> Potential defendants could be expected to engage in patterns of clandestine production and distribution designed to escape liability.<sup>176</sup> Such responses not only frustrate the liability system's efforts to reduce accident costs,<sup>177</sup> but their implementation, because they are nonproductive, wastes resources.<sup>178</sup> Legislatures, confronting such evasive tactics, could be expected to enact regulations rendering the actions criminal or at least assuring the actors' financial responsibility.<sup>179</sup> These legislative

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<sup>174</sup> See note 95 and accompanying text *supra*.

<sup>175</sup> Prohibition involved laws and regulations aimed at the importation and distribution of alcoholic beverages. Liability without defect would aim ultimately at the manufacturers of products. Nonetheless, the basic problems presented would be the same—distributors would have strong incentives to escape regulation.

<sup>176</sup> For example, a 1977 study concluded that relatively modest state tax differentials on cigarettes (ranging from 2 to 23 cents per package) created a serious problem of bootlegging to avoid the cigarette tax, resulting in revenue losses to states amounting to \$391 million per year. According to one report, organized crime had become the largest wholesalers of cigarettes in New York State. See Advisory Comm'n on Intergovernmental Relations, Commission Report: Cigarette Bootlegging—A State and Federal Responsibility 1-3, 21-25 (1987). In 1978 Congress enacted Pub. L. No. 95-575 which prohibited the transportation, receipt, shipment, possession, distribution or purchase of more than 60,000 cigarettes not bearing the tax indicia of the state in which the cigarettes are found. See 18 U.S.C. §§ 2341-2346 (1988). Although the federal act has caused a dramatic decline in cigarette smuggling, the problem of bootlegging remains a serious one. Advisory Comm'n on Intergovernmental Relations, A Commission Report, Cigarette Tax Evasion: A Second Look 58-59 (1985). See generally Siliciano, *supra* note 94.

We recognize that a price differential of up to 21 cents per package may be significant enough to encourage bootlegging but not to promote undercapitalized manufacturing. We profess no expertise on this matter; however, we are willing to predict that if the estimates of \$2-3 per package increases set forth above, see note 61 *supra*, are near accurate, black-marketeering is inevitable.

Foreign importation and/or smuggling likely would become a serious concern as well. If American cigarette manufacturers sold exclusively to foreign markets but their cigarettes were imported clandestinely back into the United States, the question whether such importation would constitute an intervening cause and exonerate manufacturers of liability to American consumers becomes relevant. See Prosser & Keeton on Torts, *supra* note 15, § 44, at 305.

<sup>177</sup> See note 88 and accompanying text *supra*.

<sup>178</sup> See note 97 *supra*.

<sup>179</sup> If courts adopted liability without defect, and clandestine producers began to supply significant percentages of the relevant markets, legislatures would be tempted to try and squelch such operations by rendering them illegal. If they took that step, the new system would resemble the days of Prohibition. Cf. note 175 *supra*. The next step might very well be legislation regulating the production and distribution of many products in much the same way that insurance is regulated today. After all, under a regime of liability without defect, producers would be selling insurance as much as, or perhaps more than, they would be selling bever-

and administrative responses, like the hit-and-run tactics against which they are aimed, would represent nonproductive, wasteful allocations of resources.

Once we posit the presence of unidentifiable or financially irresponsible defendants we confront yet another undesirable distortion effect of adopting defect-free product-category liability—a significant increase in levels of production defects. Absent the worry about answering at all to injured product users, hit-and-run operators would have little incentive to invest in processes replete with optimum quality controls.<sup>180</sup> Thus, we could expect an increase in injuries arising from, for example, contaminated tobacco or alcohol products.<sup>181</sup> These consumables would be more likely to attract such illicit behavior than would durable goods since they would require a smaller initial capital investment than automobiles, for example.<sup>182</sup>

Meanwhile, with respect to durables, product-category liability would encourage the retention and continued use of durable products for longer periods of time. Commercial and noncommercial used product markets would compete with commercial new product markets. Moreover, if courts applied product-category liability retroactively to products already consumed or in use when the new liability regime was adopted, not only would society become more dangerous as used products increasingly substituted for new, but also the original manufacturers and distributors of the aging products would face steadily increasing liabilities for harm caused by those products.

Furthermore, because imposing liability on producers and distributors causes those costs to be borne by users and consumers on a per-product basis rather than on a per-use or per-consumption basis, all users pay the same liability premium upon purchase and thereafter are free, without further monetary charge for accident costs, to use the product as much or as little, and as carefully or carelessly, as they wish.<sup>183</sup> As a result, those individuals who contribute relatively lightly to the risks of

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ages or cigarettes.

<sup>180</sup> See note 103 *supra*.

<sup>181</sup> See note 99 *supra*.

<sup>182</sup> See note 102 *supra*.

<sup>183</sup> Dean Calabresi refers to this problem as one of "insufficient subcategorization." See G. Calabresi, *supra* note 41, at 246-49. Of course, to the extent that users are themselves at risk, and face threats of not being able to recover due to their own fault, they are constrained by tort law. See generally Posner, *supra* note 44. But user fault is dealt with lightly by products liability law. See Restatement (Second) of Torts § 402A comment n (1965). And the statement in the text is true regarding risks to third parties, on the assumption and to the extent that negligence claims by third parties against users are unlikely to succeed. Moreover, these caveats all relate to how carefully users use products and do not address the "how much use?" question. Using products frequently is rarely tortious; there are no tort-based constraints on how much a user uses a product.

injury from product use and consumption subsidize those who contribute heavily.<sup>184</sup> Ideally, users would pay on a per-use or per-risk basis;<sup>185</sup> but that is not possible under our current products liability system.<sup>186</sup>

Although the current products liability system presents difficulties in this regard, at least they are limited in that traditional law, in the absence of a design or marketing defect, leaves product-related accident costs where they fall. Proving that a product is defectively designed or marketed is not an easy task. Thus, the substantial majority of individual product users and consumers who cannot prove the existence of a defect generally *do* bear accident costs roughly in proportion to their levels of product usage and their contributions to the risks of injury.<sup>187</sup> Consequently, the distortion effect here identified is not so great under a defect-based system. Adopting product-category liability would change this circumstance. Eliminating the requirement of defect for the product categories involved would shift all product-related accident costs to producers and distributors of certain products.<sup>188</sup> This subsidy would encourage individuals to contribute relatively more heavily to product-related risks, thereby wasting resources. In our earlier discussion of the current, defect-based liability system we observed that these effects are

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<sup>184</sup> The point here is that the insurance pool associated with the sale and purchase of a product is at one level, an involuntary pool. Less frequent, more careful users cannot escape the pool once they decide to buy the product. See note 91 *supra*.

<sup>185</sup> This system would achieve, in effect, the level of "subcategorization" that Calabresi would deem optimal. See note 183 *supra*. Frequent users would pay premiums in direct proportion to their frequency of use; less careful users would pay in proportion to their lack of care.

<sup>186</sup> Although theoretically possible, see Posner, *supra* note 44, at 211, as a practical matter, products liability law tends to forgive the sins of private individuals and push most of the liability onto commercial distributors. See, e.g., Restatement (Second) of Torts § 402A comment n (1965).

Interestingly, consumable products do not present this problem under existing law because they more nearly reflect their liability costs on a per-use basis. Two kinds of liability may fall on producers of consumables: (1) production or manufacturing defects and (2) failure to warn about less well-known risks. Injuries arising from these two sources tend to be rare and rather idiosyncratic in nature. Most generic risks that inhere in consumables are matters of "common knowledge" for which there is no liability under Restatement (Second) of Torts § 402A comment i (1977) or are "unavoidably unsafe" and thus covered by comment k of § 402A. Thus, because producers of these products are not liable, the cost of injuries falls on consumers whose exposure to risk is on a per-use basis.

<sup>187</sup> Since defectiveness is a prerequisite to recovery in the courts, the class of users and consumers injured by nondefective products must absorb their net loss in physical well being, and their treatment costs, in addition to other associated costs. In practice, however, few of the individual members of the class actually bear the full costs.

<sup>188</sup> Where liability is defect based, the cost of injury is roughly assignable to consumers on a per-use basis. See note 186 *supra*. In the present discussion, having moved to defect-free liability where producers would be liable for injuries caused by "commonly known" and "unavoidably dangerous" products, we can no longer assume that injuries will be borne on a per-use basis. As discussed in note 190 *infra*, occasional product users will pay for the injuries suffered by product abusers.

not very significant with respect to consumable products.<sup>189</sup> Under defect-free liability, consumables as well as durables would generate significant levels of distortion.<sup>190</sup>

Finally, because fewer products would be subject to defect-free liability under the product-category regime, the effects of enhanced liability would be concentrated on those products singled out. For example, every accident involving alcohol would place liability on that product even if others were more to blame. These financial pressures, coupled with decreasing demand, black markets for new products, and noncommercial markets for used products, would result in a death warrant for any industry singled out for such treatment.

It follows that even if courts could somehow implement a system of product-category liability, the drastic, prohibitionary qualities of that system would cause market distortions of gigantic proportions. What was theoretically interesting to note with respect to an across-the-board no-defect liability scheme, becomes an acutely and practically essential consideration for a product-category system of liability without defect because of the latter system's seductive appearance of feasibility. But as tempting as the judicial proscription of certain product categories may be to some reformers, this section demonstrates that it is a temptation to which our courts must not, and will not, succumb.

#### *D. Product-Category Liability in American Tort Law*

While no court has purported to adopt across-the-board liability without defect,<sup>191</sup> the situation with respect to judicial recognition of product-category liability is quite different. Litigants have argued repeatedly in favor of product-category liability,<sup>192</sup> and several courts actu-

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<sup>189</sup> See note 186 *supra*.

<sup>190</sup> One might think that consumables such as alcohol and cigarettes would carry their liability on a per-use basis. More frequent users would pay for their overconsumption because each unit would reflect a liability tax. But that is not necessarily the case. Chronic abusers of alcohol and cigarettes are likely to suffer health consequences that are more serious than occasional users even when measured on a per-use basis. The occasional drinker, for example, would rarely suffer injury, thus not tapping the liability system, but would help, out of proportion to his own contribution to the risk, to pay for the injuries suffered by the alcoholic since the cost of liquor would reflect all the costs attributed to the product.

<sup>191</sup> Recall, however, that some courts have come close to doing so, even though their rhetoric belies the underlying reality. See text accompanying note 107 *supra*.

<sup>192</sup> For cases involving firearms, see *Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532, 1533 (11th Cir. 1986); *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1273 (5th Cir. 1985); *Armijo v. Ex Cam, Inc.*, 656 F. Supp. 771, 773 (D.N.M. 1987), *aff'd*, 843 F.2d 406 (10th Cir. 1988); *Hilberg ex rel. Hilberg v. F.W. Woolworth Co.*, 761 P.2d 236, 240 (Colo. Ct. App. 1988); *Riordan v. International Armament Corp.*, 132 Ill. App. 3d 642, 649-51, 477 N.E.2d 1293, 1298-99 (1985); *Knott v. Liberty Jewelry & Loan, Inc.*, 50 Wash. App. 267, 272-73, 748 P.2d 661, 663-64 (1988). For cases involving cigarettes, see *Kotler v. American Tobacco Co.*, 731 F. Supp. 50, 52 (D. Mass.), *aff'd*, 926 F.2d 1217 (1st Cir. 1990); *Gianitsis v. American Brands*,

ally have adopted versions of it.<sup>193</sup> Notwithstanding plaintiffs' repeated and strenuous efforts to stake out this new judicial approach, however, product-category liability is not now the governing law in any jurisdiction.<sup>194</sup> In the few instances where plaintiffs have been successful, the breaches have been quickly closed by legislative intervention.<sup>195</sup> Plaintiffs also have urged courts to broaden existing doctrine to accomplish indirectly what they have refused to do directly.<sup>196</sup> For the most part, these more subtle stratagems have not succeeded. This section investigates both explicit and implicit product-category decisions to demon-

Inc., 685 F. Supp. 853, 855 (D.N.H. 1988); *Miller v. Brown & Williamson Tobacco Corp.*, 679 F. Supp. 485, 486 (E.D. Pa.), aff'd, 856 F.2d 184 (3d Cir. 1988); *Gunsalus v. Celotex Corp.*, 674 F. Supp. 1149, 1159 (E.D. Pa. 1987). For a case involving minitrail bikes, see *Baughn v. Honda Motor Co.*, 107 Wash. 2d 127, 134-35, 727 P.2d 655, 660 (1986).

<sup>193</sup> See, e.g., *O'Brien v. Muskin Corp.*, 94 N.J. 169, 185, 463 A.2d 298, 306 (1983) (aboveground swimming pool with vinyl bottoms); text accompanying notes 197-202 *infra*. In *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110 (La. 1986), the court concluded that a manufacturer can be held to a strict liability standard for a product that fails to meet risk-utility norms because the dangers created by its use, even if unforeseen at the time of manufacture, outweigh its utility. See *id.* at 114. But, if a product does meet risk-utility norms on its own and is only defective because there exists an alternative design, the manufacturer is held to a negligence-foreseeability standard. See *id.* at 115.

A third state appellate court may have imposed product-category liability on the theory that the overall danger of the product outweighs its benefits. In *Kelley v. R.G. Indus.*, 304 Md. 124, 497 A.2d 1143 (1985), the court held that the manufacturers of "Saturday Night Specials" could be held liable for injuries suffered by innocent third parties at the hands of criminals. See *id.* at 136-37, 497 A.2d at 1148-49. Although earlier in the decision the court rejected product-category liability based on risk-utility balancing, see *id.* at 138, 497 A.2d at 1149, the court's imposition of liability on manufacturers for injuries caused by cheap handguns appears to condemn them because the overall utility of this genre of handgun to society is too low to justify their continued marketing. See *id.* at 155, 497 A.2d at 1158. Nonetheless, at bottom *Kelley* is probably a case based primarily on a theory of negligent entrustment. See text accompanying notes 260-62 *infra*.

<sup>194</sup> Although state legislatures have nullified judicial adoption of product-category liability, see note 195 *infra*, such nullification has limited application in at least one jurisdiction. In *Dewey v. R.J. Reynolds Tobacco Co.*, 121 N.J. 69, 95, 577 A.2d 1239, 1252 (1990), the court held that the New Jersey statute did not reflect the common law of the state prior to its enactment. Thus, for cases filed prior to the enactment of the statute, a risk-utility case could be established theoretically for products such as cigarettes. Since only six cigarette cases were pending in New Jersey at the time the legislation was enacted, the decision of the court allowing a risk-utility case to be made out when there is no alternative design available is only relevant to a handful of cases.

<sup>195</sup> See La. Rev. Stat. Ann. § 9:2800.56(1) (West Supp. 1991) (overruling *Halphen*); Md. Crim. Law Code Ann. art. 27 § 36-I (West Supp. 1990) (overruling *Kelley*); N.J. Stat. Ann. § 2A:58C-3(3) (West 1990) (overruling *O'Brien*).

Several states have passed somewhat narrower legislation that prohibits actions against firearm manufacturers for injuries resulting from the weapon's inherent danger. These statutes specifically allow for claims based on either defective manufacture or defective design (i.e., the failure to institute an alternative design). See Cal. Civ. Code § 1714.4 (West 1985) (added by Proposition 51, approved by electorate on June 3, 1986); Colo. Rev. Stat. § 13-21-501 (1986); Idaho Code § 6-1410 (1987); Mont. Code Ann. § 27-1-720 (1989); Nev. Rev. Stat. § 41.131(1) (1987).

<sup>196</sup> See text accompanying notes 239-59 *infra*.

strate that all of the concerns described above are reinforced by actual judicial resistance to this doctrine.

### 1. *Explicit Attempts to Establish Product-Category Liability*

a. *Reliance on Risk-Utility Balancing to Establish the Relevant Categories.* The leading decision espousing product-category liability, *O'Brien v. Muskin Corp.*,<sup>197</sup> involved an outdoor, aboveground swimming pool. The plaintiff dove head first into a shallow pool manufactured by the defendant.<sup>198</sup> As his outstretched hands hit the pool's slippery vinyl bottom, they slid apart and caused him to strike his head.<sup>199</sup> A crucial issue in the case was the appropriateness of the slippery vinyl pool liner and its contribution to the plaintiff's injury. The trial judge took the design-defect issue from the jury because the plaintiff's expert admitted that he knew of no aboveground pool that used any material other than vinyl as a liner and could suggest no economically viable substitute.<sup>200</sup> On appeal, the New Jersey Supreme Court reversed, holding that even in the absence of a feasible alternative design the jury was entitled to conclude that "the risk posed by the pool outweighed its utility."<sup>201</sup> In short, the court held that triers of fact may impose liability on product manufacturers even when the plaintiff fails to present any evidence of an alternative design and the existing design meets the reasonable expectations of consumers in general.<sup>202</sup>

Plaintiffs' lawyers were quick to realize that this new product-category liability theory provided plausible, potentially devastating causes of action in cases brought against manufacturers of inherently dangerous products such as handguns, beverage alcohol, and cigarettes. If a product that could not be shown to be defective on traditional grounds could be declared unreasonably dangerous on the ground that the misery it

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<sup>197</sup> 94 N.J. 169, 463 A.2d 298 (1983).

<sup>198</sup> *Id.* at 178, 463 A.2d at 301.

<sup>199</sup> *Id.*

<sup>200</sup> *Id.* at 179-80, 463 A.2d at 304.

<sup>201</sup> *Id.* at 185, 463 A.2d at 306. In elaborating on this theme, the court said:

The evaluation of the utility of a product also involves the relative need for that product; some products are essentials, while others are luxuries. A product that fills a critical need and can be designed in only one way should be viewed differently from a luxury item. Still other products, including some for which no alternative exists, are so dangerous and of such little use that under the risk-utility analysis, a manufacturer would bear the cost of liability of harm to others. That cost might dissuade a manufacturer from placing the product on the market, even if the product has been made as safely as possible. Indeed, plaintiff contends that above-ground pools with vinyl liners are such products and that manufacturers who market those pools should bear the cost of injuries they cause to foreseeable users.

*Id.* at 184, 463 A.2d at 306.

<sup>202</sup> See *id.* at 198, 463 A.2d at 313-14 (Schreiber, J., concurring and dissenting).

brings to society outweighs its benefits, then the multitude of plaintiffs who suffer injury from these controversial products have a means of recovery even when traditional design defect and failure to warn cannot be proved.

Many plaintiffs have asked the courts to adopt a theory of product-category liability.<sup>203</sup> Notwithstanding the plaintiff's success in *O'Brien*, courts overwhelmingly have turned plaintiffs away as a matter of law, offering a variety of reasons. Most of the reasons mirror both the policy and implementation problems identified earlier in our discussion of the theoretical and practical problems that would flow from the adoption of product-category liability.<sup>204</sup> Courts have said that risk-utility analysis should not apply to products whose dangers are so commonly known and which measure up to broad-based consumer expectations;<sup>205</sup> that it would be extremely difficult to measure and monetize the psychic and emotional pleasure of owning handguns or smoking cigarettes;<sup>206</sup> that product-category liability is a "radical doctrine which imprudently arrogates to the judicial process some very significant societal determinations;"<sup>207</sup> that courts would have no way of preventing inconsistent jury verdicts for similar products;<sup>208</sup> that the test is so expansive that sellers would face potential and unpredictable liability for almost any injury related to product use;<sup>209</sup> that manufacturers would become insurers of their products;<sup>210</sup> and that such highly political liability issues are best left to the legislature.<sup>211</sup>

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<sup>203</sup> See cases cited in note 192 *supra*. In particular, extensive discussion appears in the literature about categorically defective products. Several commentators have argued that risk-utility analysis should be used to declare handguns defective. See, e.g., Turley, *Manufacturers' and Suppliers' Liability to Handgun Victims*, 10 N. Ky. L. Rev. 41 (1982); Note, *Manufacturers' Liability to Victims of Handgun Crime: A Common Law Approach*, 51 Fordham L. Rev. 771 (1983). But most commentators disagree. See, e.g., Santarelli & Calio, *Turning the Gun on Tort Law: Aiming at Courts to Take Products Liability to the Limit*, 14 St. Mary's L.J. 471, 493-94 (1983); Note, *supra* note 155, at 1912-20; Note, *Do Victims of Unlawful Handgun Violence Have a Remedy Against Handgun Manufacturers?: An Overview and Analysis*, 1985 U. Ill. L. Rev. 967, 981-83.

<sup>204</sup> See notes 165-70 and accompanying text *supra*.

<sup>205</sup> See, e.g., *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1202 (7th Cir. 1984); *Armijo v. Ex Cam, Inc.*, 656 F. Supp. 771, 773 (D.N.M. 1987), *aff'd*, 843 F.2d 406 (10th Cir. 1988); *Mavilia v. Stoege Indus.*, 574 F. Supp. 107, 109-10 (D. Mass. 1983); *Baughn v. Honda Motors Co.*, 107 Wash. 2d 127, 134-36, 727 P.2d 655, 660-61 (1986).

<sup>206</sup> See, e.g., *Kotler v. American Tobacco Co.*, 731 F. Supp. 50, 53 (D. Mass.), *aff'd*, 926 F.2d 1217 (1st Cir. 1990); *Patterson v. Rohm Gesellschaft*, 608 F. Supp. 1206, 1210 (N.D. Tex. 1985).

<sup>207</sup> See, e.g., *Kotler*, 731 F. Supp. at 53.

<sup>208</sup> See, e.g., *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1274 n.68 (5th Cir. 1985).

<sup>209</sup> See, e.g., *Baughn*, 107 Wash. 2d at 134, 727 P.2d at 660.

<sup>210</sup> See, e.g., *Patterson*, 608 F. Supp. at 1213.

<sup>211</sup> See, e.g., *Kotler*, 731 F. Supp. at 53; *Patterson*, 608 F. Supp. at 1216; *Mavilia v. Stoege Indus.*, 574 F. Supp. 107, 111 (D. Mass. 1983); *Hilberg v. F.W. Woolworth Co.*, 761 P.2d 236,



Several courts have noted that the list of products that would become subject to risk-utility attack is substantial.<sup>212</sup> Alcohol, cigarettes, radar detectors, all-terrain vehicles, and high-speed automobiles are all products that arguably score high on the misery scale, and yet most are prominent fixtures in a free-market economy.<sup>213</sup> Given the wide range of individual consumer behavior when making use of these products,<sup>214</sup> judges understandably are loathe to place the onus for injury on the manufacturer. Thus, one of the reasons that courts are hostile to the idea of product-category liability may be that they intuit that the list of product categories to which such an approach might apply is great and the implications for each product on the list enormous. Indeed, many judges appear to view the product-category liability derisively, describing it as "radical"<sup>215</sup> and "delightfully nonsensical."<sup>216</sup>

As we noted earlier, state legislatures overruled all three judicial adoptions of product-category liability.<sup>217</sup> For example, in New Jersey, the *O'Brien* jurisdiction,<sup>218</sup> the legislature provided that whenever harm allegedly is caused by a design defect, liability will not attach if there was no "practical and technically feasible alternative design that would have prevented the harm without substantially impairing the reasonably anticipated or intended function of the product."<sup>219</sup> Although the legislature created a narrow exception for products that are highly dangerous and have almost no social utility,<sup>220</sup> it is quite evident that product-category

241 (Colo. Ct. App. 1988); *Rhodes v. R.G. Indus.*, 173 Ga. App. 51, 52, 325 S.E.2d 465, 467 (1984).

<sup>212</sup> See, e.g., *Armijo v. Ex Cam, Inc.*, 656 F. Supp. 771, 773 (D.N.M. 1987), *aff'd*, 843 F.2d 406 (10th Cir. 1988); *Patterson*, 608 F. Supp. at 1212; *Richardson v. Holland*, 741 S.W.2d 751, 756 (Mo. Ct. App. 1987).

<sup>213</sup> See *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1204 (7th Cir. 1984) (selling handguns not ultrahazardous); *Richardson*, 741 S.W.2d at 758 (rejecting claim that 22-calibre handgun exclusively for criminal use).

<sup>214</sup> See *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1269 (5th Cir. 1985); *Gianitsis v. American Brands, Inc.*, 685 F. Supp. 853, 856 (D.N.H. 1988); *Gunsalus v. Celotex Corp.*, 674 F. Supp. 1149, 1158-59 (E.D. Pa. 1987); Note, *Legal Limits of a Handgun Manufacturer's Liability for the Criminal Acts of Third Persons*, 49 Mo. L. Rev. 830, 846 (1984).

<sup>215</sup> *Kotler*, 731 F. Supp. at 53.

<sup>216</sup> *Patterson*, 608 F. Supp. at 1211.

<sup>217</sup> See note 195 *supra*.

<sup>218</sup> *O'Brien v. Muskin Corp.*, 94 N.J. 169, 463 A.2d 298 (1983); see notes 197-202 and accompanying text *supra*.

<sup>219</sup> N.J. Stat. Ann. § 2A:58C-3(a)(1) (West 1990).

<sup>220</sup> Id. § 2A:58C-3(b) provides that to invoke the exception the court must make all of the following determinations based on clear and convincing evidence:

- (1) The product is egregiously unsafe or ultra-hazardous;
- (2) The ordinary user or consumer of the product cannot reasonably be expected to have knowledge of the product's risks, or the product poses a risk of serious injury to persons other than the user or consumer; and
- (3) The product has little or no usefulness.

Id.

liability is a dead letter in New Jersey.<sup>221</sup>

*b. Extending the "Ultrahazardous Activity" or "Abnormally Dangerous Activity" Doctrine.* Another explicit stratagem utilized by claimants to assert defect-free product-category liability asks judges to treat the production and commercial sale of certain highly dangerous products as abnormally dangerous activities upon which strict liability traditionally has been imposed.<sup>222</sup> Two factors distinguish this approach to strict product-category liability from the approach described in the preceding section. First, plaintiffs do not purport to rely on risk-utility balancing to declare the product inappropriate for use and consumption. Thus, they do not deprecate the overall benefits of the product to society, but claim instead that regardless of these benefits the potential harm arising from the product's use and consumption is so significant that sellers should be made to bear the cost of that harm when it materializes.<sup>223</sup> Second, in contrast to product-category liability based on risk-utility balancing, which might leave the balancing to juries on a case-by-case basis,<sup>224</sup> the task of deciding which activities fall under the "abnormally dangerous" rubric is solely for judges to perform.<sup>225</sup> Consequently, if courts were to

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<sup>221</sup> Appended to the legislation is an official commentary by the New Jersey Senate Judiciary Committee which indicates just how limited the exception was intended to be. The commentary notes, "It is intended that such a finding [under the exception] would be made only in genuinely extraordinary cases—for example, in the case of a deadly toy marketed for use by young children, or of a product marketed for use in dangerous criminal activities." N.J. Senate Judiciary Committee Statement, No. 2805-L.1977, cl. 197.

Clearly, almost all of the product categories discussed in the text would be covered by the general requirement that an alternative design must be feasible if recovery is to be allowed. It is difficult to see how a court could conclude that products such as handguns, alcoholic beverages, or cigarettes have little or no usefulness to those who knowingly and willingly choose to use and consume them. The examples set forth by the official commentary to the New Jersey statute reinforce the exception's minimal practical meaning for products litigation.

<sup>222</sup> See, e.g., *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1253-55 (5th Cir. 1985) (handguns); *Caveny v. Raven Arms Co.*, 665 F. Supp. 530, 532-34 (S.D. Ohio 1987) (same), aff'd, 849 F.2d 608 (6th Cir. 1988); *Armijo v. Ex Cam, Inc.*, 656 F. Supp. 771, 772-73 (D.N.M. 1987) (same), aff'd, 843 F.2d 406 (10th Cir. 1988); *Riordan v. International Armament Corp.*, 132 Ill. App. 3d 642, 644, 477 N.E.2d 1293, 1294 (1985) (same); *Knott v. Liberty Jewelry & Loan, Inc.*, 50 Wash. App. 267, 272, 748 P.2d 661, 665 (1988) (same).

<sup>223</sup> In almost all cases, plaintiffs have drawn the analogy to the Restatement (Second) of Torts §§ 519-20 (1977), under which liability is imposed even though the activity was conducted with the utmost care. See, e.g., *Perkins*, 762 F.2d at 1253; *Caveny*, 665 F. Supp. at 532; *Burkett v. Freedom Arms, Inc.*, 299 Or. 551, 554-55, 704 P.2d 118, 119-20 (1985). For a discussion of Restatement §§ 519-20 as they relate to handguns, see Note, *The Manufacture and Distribution of Handguns as an Abnormally Dangerous Activity*, 54 U. Chi. L. Rev. 369, 393-99 (1987).

<sup>224</sup> See note 129 supra.

<sup>225</sup> See *Langan v. Valicopters, Inc.*, 88 Wash. 2d 855, 861, 567 P.2d 218, 221 (1977) (en banc) ("Whether an activity is abnormally dangerous is a question of law for the court to decide."); Restatement (Second) of Torts § 520 comment l (1977) ("[w]hether the activity is an abnormally dangerous one is to be determined by the court"). Judges have encountered con-

adopt a theory of liability for abnormally dangerous products, they could decide which categories or subcategories of products to bring within the doctrine's ambit. Therefore, unlike the risk-utility product-category liability considered earlier, the abnormally dangerous activity doctrine runs less risk of succumbing to jury lawlessness.

Given these important differences between the abnormally dangerous activity version of product-category liability and the version described earlier, one might have expected judges to be more willing to impose no-defect liability in the context of high-risk product categories. However, courts have been equally resistant to utilize this more circumscribed method of establishing product-category liability. With the exception of a few cases that have suggested obliquely that the sale of a dangerous product might trigger liability for abnormally dangerous activity,<sup>226</sup> the courts steadfastly have refused to recognize such a cause of action. In cases involving handguns, plaintiffs have argued repeatedly that the sale of these dangerous weapons qualifies for strict liability.<sup>227</sup> In rejecting this application of the doctrine, some courts have noted that, unlike the classic doctrine developed in the context of potentially dangerous use of land,<sup>228</sup> the activity of the defendant was not land-based.<sup>229</sup> Others have concluded that the widespread availability of handguns

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siderable difficulty deciding which activities deserve to be considered abnormally dangerous. Activities such as blasting, see *Ward v. H.B. Zachry Constr. Co.*, 570 F.2d 892, 894-97 (10th Cir. 1978); *Laughon & Johnson, Inc. v. Burch*, 222 Va. 200, 204-06, 278 S.E.2d 856, 857-59 (1981); storing explosives, see *Exner v. Sherman Power Constr. Co.*, 54 F.2d 510, 512-13 (2d Cir. 1931); and setting off fireworks in public streets, see *Harris v. City of Findlay*, 59 Ohio App. 375, 377-78, 18 N.E.2d 413, 415-16 (1938), have been deemed abnormally dangerous and subject to strict liability. At the same time, seemingly dangerous activities such as driving an automobile, see *Steffen v. McNaughton*, 142 Wis. 49, 52, 124 N.W. 1016, 1017 (1910), or engaging in building construction, see *Gallin v. Poulou*, 140 Cal. App. 2d 638, 640-42, 295 P.2d 958, 960-62 (1956), have been held subject to the normal negligence doctrine.

<sup>226</sup> See, e.g., *Chapman Chem. Co. v. Taylor ex rel. Wilson*, 215 Ark. 630, 644, 222 S.W.2d 820, 827 (1949) (strict liability for sale of crop dusting chemicals); see also *Barker v. Lull Eng'g Co.*, 20 Cal. 3d 413, 430 n.10, 573 P.2d 443, 455 n.10, 143 Cal. Rptr. 225, 237 n.10 (1978) (somewhat delphic footnote suggesting potential for liability even absent safer alternative design); cf. *Indiana Harbor Belt R.R. v. American Cyanamid Co.*, 517 F. Supp. 314, 318 (N.D. Ill. 1981) (strict liability for transportation of highly toxic chemicals).

<sup>227</sup> See cases cited in note 222 *supra*.

<sup>228</sup> See *Fletcher v. Rylands*, 159 Eng. Rep. 737 (1865); In the Exchequer Chamber, 1 L.R. - Ex. 265 (1866); In the House of Lords, 3 L.R. - H.L. 330 (1868). The *Rylands* doctrine has had a long and checkered history in American jurisprudence. Suffice it to say that the vast majority of American courts recognize that, for a narrow band of activities presenting risks of serious harm even when conducted with the utmost of care, strict liability should attach. See 3 F. Harper, F. James & O. Gray, *The Law of Torts* Ch. 14 (2d ed. 1986); Prosser & Keeton on Torts, *supra* note 15, § 78.

<sup>229</sup> See, e.g., *Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532, 1534 (11th Cir. 1986); *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1267 (5th Cir. 1985); *Kelley v. R.G. Indus.*, 304 Md. 124, 133, 497 A.2d 1143, 1147 (1985); *Richardson v. Holland*, 741 S.W.2d 751, 755 (Mo. Ct. App. 1987).

makes them commonly used products and thus not subject to the Restatement rule.<sup>230</sup> Finally, many courts have noted the distinction between the use of handguns and their sale.<sup>231</sup>

This pattern of judicial denial is consistent with this Article's earlier analysis of the implications of imposing product-category liability.<sup>232</sup> When strict liability is placed directly on an activity that happens to involve product use and consumption, each user and consumer can control the risk levels of her activity. For example, if liability is placed on persons who consume alcoholic beverages or on blasters who use dynamite, each drinker or blaster, at least in theory, controls her own risk level. Those who drink or blast in more dangerous contexts, or who do so less carefully, will be exposed to correspondingly greater liability. In contrast, were liability shifted to distributors of alcoholic beverages or sticks of dynamite, users and consumers would pay the same prices per unit of product, regardless of their contexts of use or how carefully they behaved. That different blasters might bring different risk levels to the activity of blasting would be of little moment under a regime of strict manufacturer's—as contrasted with strict user's—liability.<sup>233</sup> The manufacturer would have no practical method of distinguishing safe purchasers from risky ones and setting prices for each accordingly. The results would be significant moral-hazard problems; users and consumers would face distorted incentives to take care because safer users would subsidize the riskier.<sup>234</sup>

Commercial users of some high-risk products—in contrast to commercial distributors—are covered under the traditional “abnormally dangerous” doctrine.<sup>235</sup> For example, dynamite blasting, widely regarded as an ultrahazardous activity,<sup>236</sup> is most often performed by commercial, highly skilled experts who must insure against the risks of blasting. For the most part, shifting liability away from dynamite users to dynamite

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<sup>230</sup> See, e.g., *Caveny v. Raven Arms Co.*, 665 F. Supp. 530, 532 (S.D. Ohio 1987), *aff'd*, 849 F.2d 608 (6th Cir. 1988); *Armijo v. Ex Cam, Inc.*, 656 F. Supp. 771, 774 (D.N.M. 1987); see also note 223 *supra* (discussing Restatement rule).

<sup>231</sup> See, e.g., *Martin v. Harrington & Richardson, Inc.*, 743 F.2d 1200, 1204 (7th Cir. 1984) (distinguishing use of abnormally dangerous products from manufacture or sale of those products); *Delahanty v. Hinckley*, 564 A.2d 758, 761 (D.C. 1989) (same), *aff'd*, 900 F.2d 368 (D.C. Cir. 1990); *Coulson v. DeAngelo*, 493 So. 2d 98, 99 (Fla. Dist. Ct. App. 1986) (*per curiam*) (same); *Burkett v. Freedom Arms, Inc.*, 299 Or. 551, 556-57, 704 P.2d 118, 121 (1985) (same).

<sup>232</sup> See text accompanying notes 171-90 *supra*.

<sup>233</sup> See notes 183-86 and accompanying text *supra*.

<sup>234</sup> See notes 91, 184 and accompanying text *supra*.

<sup>235</sup> See, e.g., *Northglenn v. Chevron U.S.A., Inc.*, 519 F. Supp. 515 (D. Colo. 1981) (service station stored large amounts of gasoline underground near residential area); *Luthringer v. Moore*, 31 Cal. 2d 489, 190 P.2d 1 (1948) (fumigation using poisonous gases); *Langan v. Valicopters, Inc.*, 88 Wash. 2d 855, 567 P.2d 218 (1977) (crop dusting).

<sup>236</sup> See, e.g., *Ward v. H.B. Zachry Constr. Co.*, 570 F.2d 892, 895-96 (10th Cir. 1978) (applying Oklahoma law).

distributors not only would distort care-taking incentives, but also would do so for no good reason. The distributors of the high-risk products would constitute redundant back-ups to already commercially viable defendants.<sup>237</sup> Courts traditionally have made exceptions to their refusals to impose categorical liability on product distributors when it is clear that those distributors are in positions to manage the relevant risks in a qualitatively superior fashion.<sup>238</sup> Thus, commercial distributors of highly dangerous items such as dynamite or liquor, while not generally liable, may be liable in some cases for placing such products in the hands of incompetents.

Three decades after the birth of strict products liability, the courts have yet to declare high-risk products to be ultrahazardous or abnormally dangerous. Although willing to impose almost absolute liability on abnormally dangerous activities, courts have rejected outright the claims of plaintiffs against manufacturers for harms caused by generically dangerous products. The message is clear: applying ultrahazardous activity liability in the fashion just described would do more than merely charge the costs to the manufacturer, it would bar the product from all or a significant sector of consumers. As with risk-utility product-category liability, the courts will have none of it.

## 2. *Implicit Attempts to Establish Product-Category Liability: Categorical Liability Disguised in Traditional Doctrinal Garb*

a. *Stretching Failure-to-Warn Beyond Recognition.* Failure-to-warn products liability claims generally do not seek to impose liability on product categories. More modest in their goals, failure-to-warn claims usually target specific products and argue that the warnings that attended their sale were marginally inadequate.<sup>239</sup> However, in at least two major litigation categories, alcoholic beverages and cigarettes, product-category liability claims frequently masquerade as failure-to-warn claims. That is, claimants illegitimately utilize the traditional failure-to-

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<sup>237</sup> Presumably, the commercial users of dangerous products would be primarily liable to injured plaintiffs. Thus, explosives manufacturers whose products are in no way defective would be allowed rights of indemnification against commercial users of their products.

<sup>238</sup> For example, courts generally recognize causes of action for negligent entrustment, see authorities cited in note 261 *infra*. For an excellent review of authority dealing with the civil liability of commercial sellers of liquor for the subsequent conduct of purchasers, see *Ling v. Jan's Liquors*, 237 Kan. 629, 634-36, 703 P.2d 731, 735-36 (1985) (discussing trend toward imposing liability on liquor sellers).

<sup>239</sup> For a comprehensive discussion of the role of warnings in products liability, see Hender-son & Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. Rev. 265, 271-80 (1990) (confusion in failure-to-warn cases often results in imposition of excessive liability on manufacturers); Sales, *The Duty to Warn and Instruct for Safe Use in Strict Tort Liability*, 13 St. Mary's L.J. 521, 527-55 (1982) (discussing basis and scope of duty-to-warn action).

warn action to hide their true agenda of imposing enormous liability costs on, and perhaps thereby ridding the market of, certain categories of products because those products do not meet the claimants' views of overall social desirability.

Plaintiffs have made numerous attempts to sue manufacturers of alcoholic beverages on the ground that they have failed to warn about the dangers of addiction to their product. Traditionally, no court would countenance such a claim.<sup>240</sup> In a recent decision, however, an intermediate appellate court in Texas recognized a duty to warn consumers about the health risks associated with massive, long-term overconsumption of beverage alcohol.<sup>241</sup> Although the Texas Supreme Court reversed and held that knowledge of the dangers of alcoholism is widespread,<sup>242</sup> the intermediate court of appeals decision is a stark example of an attempt to accomplish product-category liability by styling the cause of action as a traditional failure-to-warn claim.

In the Texas litigation, the plaintiffs were chronic alcoholics who sought damages from several distillers for "certain diseases, bodily injury, financial ruin, mental anguish and loss of consortium caused by the addictive drug, alcohol."<sup>243</sup> They alleged that the defendants failed to communicate to consumers twenty-four separate items of information relating to alcoholic beverages.<sup>244</sup> Notwithstanding the defendants' argu-

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<sup>240</sup> See, e.g., *Garrison v. Heublein, Inc.*, 673 F.2d 189, 191-92 (7th Cir. 1982) (alcoholic beverage manufacturer has no duty to warn of "generally known and recognized" danger); *Maguire v. Pabst Brewing Co.*, 387 N.W.2d 565, 570 (Iowa 1986) (same); *Pemberton v. American Distilled Spirits Co.*, 664 S.W.2d 690, 693 (Tenn. 1984) (no duty to warn where danger is apparent to ordinary user).

<sup>241</sup> See *McGuire v. Joseph E. Seagram & Sons, Inc.*, 790 S.W.2d 842, 852 (Tex. Ct. App. 1990) (requiring warnings since alcohol is dangerous beyond contemplation of ordinary consumer), rev'd, 814 S.W.2d 385 (Tex. 1991). The authors helped write an amicus brief supporting reversal in the Texas high court.

<sup>242</sup> See *McGuire v. Joseph E. Seagram & Sons, Inc.*, 814 S.W.2d 385, 388 (Tex. 1991).

<sup>243</sup> *McGuire*, 790 S.W.2d at 845.

<sup>244</sup> *Id.* The following items were listed:

- (1) Continued use or excessive use of alcohol would cause cirrhosis of the liver;
- (2) Alcohol is a drug;
- (3) Alcohol is a depressant;
- (4) Alcohol causes diseases of the stomach and duodenum;
- (5) Alcohol inhibits medical treatment;
- (6) Alcohol is toxic to the brain cells and tissues;
- (7) Alcohol is toxic to tissues of the stomach, liver and heart;
- (8) Drinking alcohol for pleasure or recreational purposes may lead to psychological and physical dependency;
- (9) Alcohol compromises the immune system;
- (10) Some people are genetically predisposed to alcoholism;
- (11) Psychological and social factors may predispose a person to alcoholism;
- (12) Alcohol is harmful to health;
- (13) Over two (2) drinks per day is harmful to health;
- (14) They failed to warn of the signs and symptoms of alcoholism;
- (15) They failed to instruct on the symptoms of alcoholism;
- (16) They failed to instruct on safe use of the drug;
- (17) They failed to warn that alcoholism causes marital discord, family problems and financial problems;
- (18) They failed to warn that alcoholism will deteriorate or destroy conjugal relations;
- (19) They failed to warn that alcoholism is a lifetime disease and that recovery is impossible;
- (20) That "denial" prohibits addicts from recognizing an addiction and receiving treatment;

ment that the dangers of long-term overconsumption of alcohol were well-known, the intermediate appellate court held that given the "vastly increasing complexities in relationship between and among human beings, (coupled with entire new fields of scientific knowledge and empirical wisdom)," there was reason to reexamine the law and to "implant correlative duties."<sup>245</sup>

Whatever else may be said for it, the case just described is not a legitimate failure-to-warn case. Given the irrefutable fact of widespread knowledge of the dangers of chronic alcohol abuse, a claim of inadequate warning could proceed only if the court were willing to predicate liability based on either: (1) the need for defendants to supply consumers with highly specific information that generally is subsumed within broader categories of risks well-known to society; or (2) the desirability of adding tiny increments of information to the store of public knowledge. Many of the allegations in the Texas beverage alcohol case called for specificity that added nothing more than useless detail to what were generally understood risks.<sup>246</sup> As numerous courts<sup>247</sup> and commentators<sup>248</sup> have noted, detailed warnings that impart no new information are costly to society.

That warnings should not be cluttered with needless detail seems elementary.<sup>249</sup> However, what about the claims based on aspects of alco-

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(21) That treatment of the addiction is very costly and beyond the economic means of most alcohol addicts; (22) They failed to warn of the latent, hidden and concealed hazards, defects and dangerous effects of the drug alcohol; (23) They failed to warn Ronald McGuire's family and friends of the signs and symptoms of alcoholism; (24) They failed to instruct Ronald McGuire, his family and friends to encourage him to seek help at the first symptoms of alcoholism.

Id.

<sup>245</sup> Id. at 852.

<sup>246</sup> For example, the first allegation charged a failure to warn that "continued use or excess use of alcohol would cause cirrhosis of the liver." See note 244 *supra*. If one asked intelligent adults whether drinking in excess caused "cirrhosis," some percentage likely would not know what "cirrhosis" means. But if one were to ask the same group whether drinking too much for too long harms one's liver, few could feign ignorance.

<sup>247</sup> See, e.g., *Cotton v. Buckeye Gas Prods. Co.*, 840 F.2d 935, 937-39 (D.C. Cir. 1988) (discussing information costs); *Kerr v. Koemm*, 557 F. Supp. 283, 288 n.2 (S.D.N.Y. 1983) (considering impracticability of providing warnings for well-known and obvious dangers); *Finn v. G.D. Searle & Co.*, 35 Cal. 3d 691, 701, 677 P.2d 1147, 1153, 200 Cal. Rptr. 870, 876 (1984) (discussing costs of overwarning); *Dunn v. Lederle Labs.*, 121 Mich. App. 73, 81-83, 328 N.W.2d 576, 580-81 (1982) (arguing that excessive warnings on product labels may be counterproductive).

<sup>248</sup> See, e.g., *Henderson & Twerski*, *supra* note 239, at 296-97 (warning of remote risks can cause social costs that outweigh benefits of reduced accident costs); Schwartz & Driver, *Warnings in the Workplace: The Need for a Synthesis of Law and Communication Theory*, 52 U. Cin. L. Rev. 38, 58-60 (1983) (overwarning lessens overall effectiveness of warnings in general).

<sup>249</sup> See Twerski, Weinstein, Donaher & Piehler, *The Use and Abuse of Warnings in Products Liability—Design Defect Litigation Comes of Age*, 61 Cornell L. Rev. 495, 513-17 (1976)

holism that are less well known or more controversial? Consider, for example, the contention that distillers should have warned that "some people are genetically predisposed to alcoholism."<sup>250</sup> Many people probably are unaware of the possibility of biological predisposition to addiction. Even so, the demand that it be included in the warning is impractical. Opinions differ widely regarding what causes alcohol addiction.<sup>251</sup> If biological predisposition is to be the subject of a warning, should not consumers also be told that many scientists believe that the evidence to support the biological predisposition theory is inconclusive? Moreover, if evidence suggests a strong correlation between chronic alcoholism and cultural and social class characteristics,<sup>252</sup> should this information, although offensive to many, become part of the warning label? As these examples show, one always can identify some tidbit of information or detail of recent medical knowledge that a manufacturer might have included. A cause of action that one can establish merely by claiming that some tiny increment of information should be added to the product label is virtually identical to product-category liability. In truth, the product is faulted not because the warnings of its dangers are inadequate, but rather because the product is controversial and deemed by some to fail the overall risk-utility test for society.

Arguments supporting liability for failure-to-warn in cigarette litigation, though admittedly stronger than in the alcoholic beverages context,<sup>253</sup> are fatally flawed for the same fundamental reasons. The amount of information available to American consumers about the dangers of smoking is, and for some while has been, staggering.<sup>254</sup> The term "coffin

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(discussing inverse correlation between number of product warnings and weight consumers give to those warnings).

<sup>250</sup> See note 244 *supra*.

<sup>251</sup> Many believe that certain substances (including alcohol) are capable of addicting anyone. See Schwartz, *Views of Addiction and the Duty to Warn*, 75 Va. L. Rev. 509, 558 (1989). Others believe that biological predisposition plays a significant causative role. See Searles, *The Role of Genetics in the Pathogenesis of Alcoholism*, 97 J. Abnormal Psychology 153, 158 (1988). Yet another view is that character traits play the predominant role in determining the profile of the addict. See Schwartz, *supra*, at 531.

<sup>252</sup> See Stanton, *A Moral Vision of Addiction: How People's Values Determine Whether They Become and Remain Addicts*, 17 J. Drug Issues 187, 189-94 (1987).

<sup>253</sup> The direct linkage of tobacco to cancer has become known only in the last half-century. Thus, a failure-to-warn argument focusing on the disparity of knowledge between the tobacco industry and consumers, at least in the early years of this century, is easier to formulate.

<sup>254</sup> Over the years a huge antismoking literature of books, booklets, and pamphlets has come into being. See, e.g., L. Coles, *The Beauties and Deformities of Tobacco-Using* (1851); S. Goff, *Petition to Congress: Prohibit Growing and Importation of Tobacco* (1913); J. Griscom, *The Use of Tobacco, and the Evils* (1868); C. Slocum, *About Tobacco and Its Deleterious Effects* (1909); T. Taylor, *Don't Smoke* (1944); R. Walsh, *The Burning Shame of America: Outline Against Nicotine* (1924). The Anti-Cigarette League, The Boys International Anti-Cigarette League, The Non-Smokers Protective League of America, and The Women's Christian Temperance Union (WCTU) (each with numerous state chapters) all sought to end smok-



nails," for example, dates back to the late 1800s.<sup>255</sup> Doctors regularly warned patients that smoking was seriously deleterious to their health.<sup>256</sup> National magazines regularly ran feature articles on the dangers of smoking.<sup>257</sup> The plain truth is that smoking has been the subject of intense national controversy for at least the last half-century. To transplant this raging debate into the courts for case-by-case resolution under the failure-to-warn rubric hardly would foster the goals of traditional products litigation.

Advocates of such litigation speak the language of abolition,<sup>258</sup> and even the more moderate reformers talk of increasing the price of cigarettes to the point where they would be beyond the reach of ordinary consumers.<sup>259</sup> As with beverage alcohol failure-to-warn claims, plaintiffs are seeking liability not for failing to provide adequate warnings but for deciding to distribute inherently and unavoidably risky products in the first instance.

*b. Other Potential Avenues for Achieving Product-Category Liability: Negligent Entrustment and Overpromotion.* Two other traditional bases of tort liability, negligent entrustment and overpromotion, have not yet been stretched to the point of achieving the equivalent of product-

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ing and published journals and periodicals to carry forward their message. See Corst & Majoras, The "New" Wave in Smoking and Health Litigation—Is Anything Really So New? 54 Tenn. L. Rev. 551, 554-55 nn.18 & 24, 556 n.34 (1987).

By 1921, fifteen states had banned the production or sale of tobacco. However, by 1927, these statutes were all repealed. The states were: Arkansas (enacted in 1907, repealed in 1921), Idaho (1921, 1921), Indiana (1905, 1909), Iowa (1896, 1921), Kansas (1917, 1927), Minnesota (1909, 1913), Nebraska (1905, 1919), North Dakota (1895, 1925), Oklahoma (1901, 1915), South Dakota (1909, 1917), Tennessee (1897, 1921), Utah (1921, 1925), Washington (1909, 1911), and Wisconsin (1905, 1915).

<sup>255</sup> See 3 The Oxford English Dictionary 441 (2d ed. 1989).

<sup>256</sup> See *Pritchard v. Liggett & Meyers Tobacco Co.*, 295 F.2d 292, 300 (3d Cir. 1961).

<sup>257</sup> See, e.g., Burke, Women Cigarette Fiends, *The Ladies Home Journal*, June, 1922, at 245-46; Does Tobacco Make One Tired?, *The Literary Digest*, April 15, 1922, at 27 (quoting results of study comparing efficiency of heavy-smoking, light-smoking, and nonsmoking workers); Hirshberg, Truth About Tobacco, *Harper's Weekly*, Jan. 4, 1913 (commenting on pervasiveness of consumer awareness of claims linking smoking to cancer, heart disease, and bronchitis). But see Whelan, *Big Business v. Public Health: The Cigarette Dilemma*, in *Drugs, Society and Behavior* 87/88, at 91-97 (W. Rucker & M. Rucker eds. 1987) (arguing that by use of economic pressure cigarette companies have discouraged all but handful of American magazines from publishing articles dealing with health impact of cigarettes).

<sup>258</sup> See Hearing before the Joint Comms. on Judiciary and Labor Relations on Products Liability Issues, The House of Representatives of Pennsylvania, at 37-46 (Nov. 2, 1989) (statement of Dr. Richard Daynard, Chairman, Tobacco Products Liability Project, Editor-In-Chief, Tobacco Prods. Litig. Rep.) (expressing hope that imposition of liability would make it financially impossible for minors to take up smoking). See generally Berger, *A Sociological View of the Antismoking Phenomenon*, in *Smoking and Society* 225-40 (R. Tollison ed. 1986) (discussing ideology of antismoking movement).

<sup>259</sup> See note 61 supra.

category liability. Given their potential in this regard, however, they deserve mention. Plaintiffs sometimes urge courts to impose liability on product sellers not because the products never should have been sold to anyone but because they should not have been sold to a particular class of purchasers.<sup>260</sup> Typically, the plaintiff alleges that the buyer lacked the competence to handle the product in a responsible fashion and that a reasonable seller should have foreseen that placing the instrumentality in the hands of the buyer would lead to injury.<sup>261</sup> In the leading case suggesting a broad-based theory of negligent entrustment against a manufacturer, the court upheld a judgment against the entire distributional chain, including the manufacturer, when an eleven year old fired a pellet from a slingshot and caused his twelve-year-old playmate to lose the sight of an eye.<sup>262</sup> The decision fully explores the role of the court and jury in deciding the legitimacy of such a claim and concludes that a jury might find that marketing slingshots directly to children creates unacceptable risks. In this case, the eleven-year-old perpetrator apparently purchased the slingshot in a discount store off a sales rack. The court noted, "[S]lingshots could be marketed [by the manufacturer] in a manner designed to confine sale to adults and exclude purchase by children."<sup>263</sup>

Negligent entrustment cases currently are so relatively rare and fact sensitive that they do not implicate product-category liability.<sup>264</sup> If,

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<sup>260</sup> See Restatement (Second) of Torts § 390 comments a, b (1978) (discussing supplying chattel to persons of class incompetent to use it); 5 F. Harper, F. James & O. Gray, *supra* note 228, § 28.2 nn.23-25 ("[I]t may be negligent . . . to entrust some things to some classes of people because of the likelihood that harm will ensue."); Prosser & Keeton on Torts, *supra* note 15, at 197-203 (discussing negligent entrustment). Arguably, much of traditional design-defect litigation smacks of negligent entrustment. At bottom, imposing liability for products that could have been designed in a safer fashion reflects a judgment that users and consumers cannot be trusted to act responsibly and that manufacturers must protect those users and third parties from irresponsible product use and consumption. See, e.g., *Auburn Mach. Works Co. v. Jones*, 366 So. 2d 1167, 1169 (Fla. 1979); *Holm v. Sponco Mfg.*, 324 N.W.2d 207, 213 (Minn. 1982); *Micallef v. Miehle Co.*, 39 N.Y.2d 376, 379-80, 348 N.E.2d 571, 573-74, 384 N.Y.S.2d 115, 118-19 (1976). Nonetheless, the emphasis in traditional design claims is on the manufacturer's failure to improve the product design, while in the classic negligent-entrustment case the product per se is not put into question.

<sup>261</sup> See, e.g., *Jones v. Robbins*, 289 So. 2d 104, 107 (La. 1974) (sale of gasoline to six-year-old girl); *Pair v. Blakly*, 160 N.J. Super. 14, 17-18, 388 A.2d 1026, 1028-29 (sale of BB-gun to minor), cert. denied, 77 N.J. 509, 391 A.2d 523 (1978); *First Trust Co. v. Scheels Hardware & Sports Shop, Inc.*, 429 N.W.2d 5, 8 (N.D. 1988) (sale of handgun to 15-year-old boy); *Lake Washington School Dist. No. 414 v. Schuck's Auto Supply, Inc.*, 26 Wash. App. 618, 621, 613 P.2d 561, 562-63 (1980) (sale of automotive flares to 13 year old who set them off and thereby caused fire on school property).

<sup>262</sup> See *Moning v. Alfano*, 400 Mich. 425, 432, 254 N.W.2d 759, 767 (1977).

<sup>263</sup> *Id.* at 456, 254 N.W.2d at 773.

<sup>264</sup> In *Robinson v. Reed-Prentice Div. of Package Mach. Co.*, 49 N.Y.2d 471, 403 N.E.2d 440, 426 N.Y.S.2d 717 (1980), a plaintiff injured on the job brought suit in negligent entrustment against the manufacturer of machinery claiming that the manufacturer was aware that the machine would be altered and put to use in a dangerous fashion. *Id.* at 475, 403 N.E.2d at

however, courts were to utilize negligent entrustment broadly to impose liability for marketing products to categories of users and consumers deemed to be especially susceptible and if there were, in fact, no practical method to market the products so as to exclude the susceptible class, a very real threat of product-category liability would exist.

Courts also might impose the equivalent of product-category liability by holding the commercial distributors of controversial products liable for having promoted their products too vigorously in the market. In effect, the courts would recognize market failures when purchaser-consumers are unable to reach rational decisions because of excessively seductive advertising and sales promotions on the part of distributors. Traditional representational bases of liability—misrepresentation of fact, failure to warn, and breach of express warranty—would not be necessary for recovery. Instead, courts would hold distributors of nondefective products liable for having promoted their product too aggressively. Although a few decisions over the years have explicitly relied on theories of overpromotion to justify liability in the absence of traditionally defined defect,<sup>265</sup> and although several opinions in more recent alcohol and cigarette litigation have referred disapprovingly to the methods by which distributors have promoted their harmful products,<sup>266</sup> American courts generally have not recognized product overpromotion as an indirect means of imposing product-category liability.<sup>267</sup>

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444, 426 N.Y.S.2d at 721. In refusing to hold the defendant liable, the majority noted that a manufacturer does not have a duty to design a product with safety features that will guarantee against abuse by a particular purchaser. See *id.* at 475-76, 403 N.E.2d at 444-45, 426 N.Y.S.2d at 721-72. The dissent found ample grounds for imposing liability under the doctrine of negligent entrustment. See *id.* at 482, 403 N.E.2d at 446, 426 N.Y.S.2d at 723 (Fuchsberg, J., dissenting).

<sup>265</sup> See, e.g., *Stevens v. Parke, Davis & Co.*, 9 Cal. 3d 51, 54, 507 P.2d 653, 655, 107 Cal. Rptr. 45, 48 (1973).

<sup>266</sup> See, e.g., *Hon v. Stroh Brewery Co.*, 835 F.2d 510, 514 n.4 (3d Cir. 1987) (maintaining that appropriate standard looks to effects of advertising on individual as well as general public); *Cippollone v. Liggett Group, Inc.*, 683 F. Supp. 1487, 1491 (D.N.J. 1988) (holding that jury might conclude that defendants, and cigarette industry in general, intentionally and willfully ignored known health consequences in advertising their products), *aff'd in part and rev'd in part*, 893 F.2d 541 (3d Cir. 1990), *cert. granted*, 111 S. Ct. 1386 (1991); *McGuire v. Joseph E. Seagram & Sons, Inc.*, 84 S.W.2d 385, 388 n.5 (Tex. 1991) (noting "irony" that although Seagram claimed it had no duty to warn because risk of alcoholism is well-known, it aggressively advertised alcohol consumption as "particularly positive activity").

<sup>267</sup> Aside from the reasons offered in the text, we believe that the overpromotion theory raises a substantive issue which is extremely hard to litigate. At bottom, an overpromotion case questions whether a manufacturer has presented a reasonably balanced picture of the effectiveness, risks, and safety of the product. Admittedly, the manufacturer has presented the raw data to the public, but the question is whether the total picture was fairly portrayed. In the case of drugs, the costs of undervaluing the risks are significant. In general, however, the question of what is a "reasonable advertisement" under the circumstances is highly polycentric and raises serious justiciability problems. See authorities cited in notes 151-60 *supra*.

## CONCLUSION

Strong evidence indicates that American products liability law, both conceptually and structurally, has reached its limits. Further development is always possible in the form of marginal changes in existing approaches. Furthermore, we do not doubt that the unrealized future will bring public health disasters like asbestos that will threaten to overwhelm our tort system.<sup>268</sup> But those developments will be factual in nature. Legally and conceptually, the frontier of American products liability has closed.

Reviewing the major breakthroughs of American products liability law, one is struck by the courts' systematic elimination of conceptual barriers to plaintiffs' recovery. First, courts eliminated the privity requirement; then, the need in every instance to show fault; then, the necessity of proving a production defect. Their next logical step would be to eliminate the plaintiff's need to show any type of defect at all. Such a move would be tantamount to imposing true strict liability for generic product hazards, something that many courts claim rhetorically to have done, but which none, in fact, yet has accomplished. Notwithstanding its superficial attractiveness, however, across-the-board liability without defect will never happen because it cannot happen.

In recent years, plaintiffs have urged courts to adopt what we refer to as product-category liability—strict liability for producing and marketing certain categories of risky products, such as handguns, cigarettes, and alcoholic beverages, without regard to whether such products could be designed or marketed more safely. In effect, the plaintiffs in these cases seek to prohibit altogether the continued commercial distribution of such products by holding producers liable for all the harm their products proximately cause. Both institutional and substantive considerations strongly support rejection of product-category liability. Courts are not suited to making the sorts of judgments required to be made. Consistent with our analysis, most courts that have considered product-category liability claims have rejected them out of hand. And of the very few decisions that have embraced the notion, each has been reversed by its respective state legislature. Most judges appear to have reached these conclusions on their own. It may take time to educate the few who are inclined to think otherwise. But we are confident that product-category liability, with its abandonment of the traditional defect requirement, is one significant step in the evolution of American products liability that

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<sup>268</sup> See McGovern, *supra* note 61, at 441-42 (current legal system inadequate to handle mass torts); National Center For State Courts Judicial Administration Working Group On Asbestos Litigation: Final Report With Recommendation 15 (1985) (traditional practice of settling cases prior to protracted and costly litigation breaks down in mass tort cases).

our courts never will take.

In concluding that courts will not accept product-category liability because they are institutionally incapable of managing the litigation that acceptance would invite, we have not yet addressed the underlying political issues regarding whether any of these product categories ought to be more stringently regulated by nonjudicial institutions, agencies, and markets. We note that these institutions are demonstrably more competent than courts to reach the sorts of decisions called for in product-category liability. Understand that we are not challenging the superior competency of courts to administer most of our existing products liability system. Products liability is a necessary and appropriate response to market failures, such as consumers' lack of adequate information about product-related risks of injury.<sup>269</sup>

However, when one's attention shifts to the products most likely to be deemed socially inappropriate under a system of product-category liability—handguns, cigarettes, alcoholic beverages, and the like—it is frequently difficult to see where the relevant markets have failed in any ordinary sense of the term. Americans may smoke and drink too much; but in substantial measure that is probably because many Americans who do so prefer to engage in those activities knowing of the relevant risks. Those who would prohibit outright or via a crushing liability tax the routine commercial distribution of unavoidably unsafe products may be reacting not so much to society's ignorance of the relevant risks as to society's indifference to them.

Of course, to the extent that smoking and drinking generate externalities or involve addictive behavior, society confronts potentially significant market failure.<sup>270</sup> In those instances, society sensibly may reach collective decisions that this or that activity should be legally regulated—perhaps even proscribed altogether—regardless of the existence of strong consumer demand in the marketplace. But we find no reason to believe that legislatures and administrative agencies are not up to the task of making those decisions. As Lon Fuller, upon whose theoretical work we rely, recognized, legislatures and regulatory agencies are designed, as courts are not, to address polycentric planning tasks of the sort presented by product-category liability analysis.<sup>271</sup> And the remedies that these regulatory bodies can impose are infinitely more subtle than the “off-on” toggle switch between dramatically high tort liability and practically no

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<sup>269</sup> For example, in a recent article critical of trends in failure-to-warn litigation, we reaffirmed the underlying good sense of recognizing such causes of action. See Henderson & Twerski, *supra* note 239, at 312-13.

<sup>270</sup> See notes 41-48 and accompanying text *supra*.

<sup>271</sup> See Fuller, *supra* note 152, at 371.

liability at all.<sup>272</sup> The proscription of smoking during certain airplane flights,<sup>273</sup> or in public spaces generally,<sup>274</sup> are examples of more limited ways that legislative or administrative regulation can approach the problem.

The market, too, can adjust in subtle, incremental ways to affect the relevant risks of injury. For example, a growing number of life and health insurance companies extend more favorable rates to non-smokers.<sup>275</sup> Similar flexibility is almost never available to courts considering whether to impose product-category liability.<sup>276</sup> A "yes" decision on liability would translate quickly and certainly into total proscription.

Taken together, these nonjudicial regulators are better equipped than courts to respond to market failure relating to broad categories of products. Unlike the situation concerning traditional design-based liability, where governmental regulators could never hope to respond adequately to the relevant risks presented marginally and incrementally, the risks identified by product-category liability claims are highly visible and relatively few in number. With respect to these risks, courts are not needed even if they were institutionally capable of performing the necessary regulatory tasks.

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<sup>272</sup> For example, a legislature or administrative agency concerned with the negative health effects of certain widely consumed products may restrict the advertising efforts of producers, see, e.g., 15 U.S.C. § 1335 (1988) (making it unlawful to advertise cigarettes "on any medium of electronic communication subject to the jurisdiction of the Federal Commerce Commission"); Fla. Stat. ch. 561.42(10)-(12) (1989) (restricting distribution and display of promotional items for alcoholic beverages); Okla. Stat. tit. 37, § 516 (1981) (unlawful to advertise alcoholic beverages except at retail liquor stores); or require warnings to accompany distribution. See 15 U.S.C. § 1333 (1988) (requiring Surgeon General's warning conspicuously located on packs of cigarettes for domestic sale); 27 U.S.C. § 215 (1988) (mandating Surgeon General's warning on alcoholic beverages for sale in United States).

<sup>273</sup> See 49 U.S.C.A. § 1374 (West Supp. 1990) (banning smoking on domestic flights scheduled for less than six hours).

<sup>274</sup> See, e.g., Ariz. Rev. Stat. Ann. § 36-601.01 (1986) (smoking prohibited in elevators, theaters, libraries, art museums, lecture or concert halls, buses, school buildings, and certain areas of health care institutions); Cal. Health & Safety Code §§ 25940-25949.8 (West Supp. 1990) (declaring tobacco smoke a hazard and restricting smoking in publicly owned buildings, health facilities, and restaurants); N.Y. Pub. Health Law § 1399-n-x (McKinney 1990) (smoking prohibited or heavily restricted in private and public schools, hospitals, public buildings, theaters, retail stores, arenas, and public transportation systems).

<sup>275</sup> See J. Athearn, F. Pritchett & J. Schmit, *Risk and Insurance* 351 (6th ed. 1989).

<sup>276</sup> See notes 272-74 and accompanying text *supra*.