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The Moral Foundations of Products Liability Law: Toward First Principles

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TABLE OF CONTENTS

I. INTRODUCTION 429

II. FOCUSING ON THE PERSON: FREEDOM 438

A. *The Concept of Freedom* 438

B. *Truth* 439

C. *Equality* 441

D. *Strict Liability or Fault?* 447

III. FOCUSING ON THE GROUP: COMMUNITY 453

A. *The Concept of Community* 453

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This Article is dedicated to the memory of Ferdy Schoeman, whose pioneering work in philosophy and law is a lasting monument to his life as a philosopher and friend of lawyers and the law.

B. *Utility* 455

C. *Sharing* 457

IV. FOCUSING ON THE DISPUTE: FREEDOM AND COMMUNITY IN PRODUCTS LIABILITY LAW 459

A. *Freedom and Harm* 459

B. *Truth and Expectations* 462

C. *Equality and Risk Control* 468

D. *Utility and Efficiency* 477

E. *Burden Sharing* 484

F. *Aggregate Autonomy* 493

G. *Ordering Freedom and Community* 498

V. TOWARD FIRST PRINCIPLES OF PRODUCTS LIABILITY LAW . 500

VI. CONCLUSION 506

I. INTRODUCTION

Products liability law lies at the center of the modern world. Whether or not humans have evolved much over the ages as moral creatures, civilization is marching into the twenty-first century in a blaze of advancing technology. To a large extent, persons accomplish their individual and collective objectives, and relate to one another, through the products of technology—automobiles, punch presses, tractors, prescription drugs, frozen dinners, tennis rackets, perfumes, greeting cards, and airplanes (civilian and military). Matters concerning the creation and exchange of such products of technology are addressed by the law of property, contracts, and commerce. Products liability law concerns instead the consequences of modern technology gone awry—when products, or the interactions between persons and their products, fail.

But products liability law deals with matters of much greater import than merely the relationship between people and their machines. This rather sterile conception of the subject matter unhappily has dominated the thinking about products liability law since it was "invented" in modern form three decades ago.[1] When a person is injured by a product, the principal question of interest in products liability law is whether the product was too dangerous, according to some standard of product safety. This focus of modern products liability law expressly upon the products—both the one which caused the injury, and some hypothetical one of proper safety—thus tends to direct the liability issue into a barren, technologically based determination.[2]

Yet the most essential question in any products liability case is not whether certain engineering, production, or informational psychology standards were met or breached. Rather, the relationship

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1 On the invention of products liability law, see George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985). On Priest, see David G. Owen, *The Intellectual Development of Modern Products Liability Law: A Comment on Priest's View of the Cathedral's Foundations*, 14 J. LEGAL STUD. 529 (1985).

2 This point is demonstrated by the central role in products liability litigation of engineers, chemists, and other experts in science and technology. "The explosion of product liability has thrust the technologist into a position of preeminence in the judicial decision-making process." Alvin S. Weinstein et al., *Product Liability: An Interaction of Law and Technology*, 12 DUQ. L. REV. 425, 426 (1974). *See generally* W. PAGE KEETON, DAVID G. OWEN, JOHN E. MONTGOMERY, & MICHAEL D. GREEN, PRODUCTS LIABILITY AND SAFETY—CASES AND MATERIALS 30, 56, 297-302 (2d ed. 1989).

between the maker of a product and the victim of a product accident implicates fundamental issues of moral philosophy. By choosing to expose product users and others to certain types and degrees of risk, product makers appropriate to themselves certain interests in safety—in bodily integrity—that may belong to those other persons.[3] Similarly, by choosing to purchase products with certain inherent risks or by choosing to use such products in certain risky ways, and then by choosing to make claims against the maker for harm resulting from such risks or uses, victims of product accidents[4] seek to appropriate to themselves economic interests that may belong to product makers and to other consumers. Both situations involve important questions of how persons should treat one another. Ethical theory, therefore, has much to say as to whether moral responsibility for product accidents lies (in part or in whole) with the maker, the user, or the victim. At bottom, product accidents are moral—not technological—events. And so the law of products liability should turn to moral theory in establishing its fundamental principles.[5]

To date, neither courts nor commentators have shown much interest in the explicit application of moral and political philosophy principles to the field of products liability. During the 1960s and 1970s, as modern products liability doctrine first swept across the land, most of the theorizing that sought to justify and explain these developments had shallow analytical roots. Two forms of justification in social policy were most heavily invoked: (1) the need to provide compensation to injured consumers, through the mechanism of risk-spreading, by means of a third-party accident insurance system imposed on manufacturers by the courts; and (2)

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3 *See* Thomas A. Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077, 1088 (1965) (referring to a manufacturer's deliberately created risk as "expropriation").

4 Of course the purchaser and user may be different persons, and the victim may be a bystander. The moral considerations relevant to the relationship between the maker and the victim no doubt depend considerably upon the extent to which the victim chose to create the risk. The moral implications of these separate victim roles exceed the scope of the present Article in which the victim generally is assumed to be both the purchaser and the user.

5 Working out the proper relationship between law and morals, whether generally or with respect to accidents, is a daunting task. *See generally* JULES COLEMAN, RISKS AND WRONGS (1992); IZHAK ENGLARD, THE PHILOSOPHY OF TORT LAW (1993); DAVID G. OWEN, THE PHILOSOPHICAL FOUNDATIONS OF TORT LAW (forthcoming 1995); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (forthcoming 1993); Tony Honoré, *The Dependence of Morality on Law*, 13 OXFORD J. LEGAL STUD. 1 (1992) (1992 Hart Lecture in Jurisprudence and Moral Philosophy). The premise of this Article is that liability rules should be based, as much as practicable, on moral principles of personal accountability for causing harm.

the need to improve product safety and restrain the power of manufacturers through rules designed to deter the production of dangerous products.[6] As the effects of the new doctrine filtered through the courts into the boardrooms of manufacturers and their liability insurers in the 1970s and 1980s, the nation experienced increasingly agonizing "crises" in products liability law and insurance that underscored the necessity for rethinking the fundamentals of products liability law.[7] Precisely this type of rethinking has now been set in motion by the American Law Institute with its commissioning in 1992 of a Restatement of the Law on the specific topic of products liability.[8]

Despite the need to anchor products liability principles in a firm bedrock of moral theory, only one or two commentators have yet attempted to develop a general ethical approach to products liability law. The only major philosophical effort of this sort was offered by John Attanasio in an article published in the *Virginia Law Review* in 1988.[9] In a probing application of principles of

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6 *See generally* David G. Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681 (1980); Priest, *supra* note 1. For a cataloguing of the conventional rationales invoked by the courts and most early commentators, see John E. Montgomery & David G. Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C. L. REV. 803, 809-10 (1976), *reprinted in* KEETON ET AL., *supra* note 2, at 181. For an explanation of the intellectual history of the development, see Priest, *supra* note 1. For a rich historical account, see Gary T. Schwartz, *The Beginning and the Possible End of the Rise of Modern American Tort Law*, 26 GA. L. REV. 601 (1992).

7 *See generally* RICHARD A. EPSTEIN, MODERN PRODUCTS LIABILITY LAW, ch. 4 (1980); Richard A. Epstein, *Products Liability as an Insurance Market*, 14 J. LEGAL STUD. 645 (1985); David G. Owen, *Products Liability: Principles of Justice for the 21st Century*, 11 PACE L. REV. 63 (1990) (revised in David G. Owen, *Products Liability: Principles of Justice*, 20 ANGLO-AM. L. REV. 238 (1991)); Owen, *supra* note 6; William C. Powers, Jr., *A Modest Proposal to Abandon Strict Products Liability*, 1991 U. ILL. L. REV. 639, 639 (1991) ("The foundation of strict products liability is flawed because the reasons courts have articulated to support strict liability for product injuries do not do so."); George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987); Robert L. Rabin, *Some Reflections on the Process of Tort Reform*, 25 SAN DIEGO L. REV. 13 (1988); Catharine P. Wells, *Tort Law as Corrective Justice: A Pragmatic Justification for Jury Adjudication*, 88 MICH. L. REV. 2348, 2350 (1990) ("the chief reason for the perception of failure in the tort system is confusion and disagreement over its legitimate goals").

8 The project is expected to take five years. James Henderson and Aaron Twerski, who had already offered such a proposal, are the reporters. *See* James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement (Second) of Torts*, 77 CORNELL L. REV. 1512 (1992).

9 John B. Attanasio, *The Principle of Aggregate Autonomy and the Calabresian Approach to Products Liability*, 74 VA. L. REV. 677 (1988). Dean Attanasio's article is the most ambitious and important application of moral theory to products liability law to date. For an application of formal logical analysis to this area of the law, through an examination of the prescriptive rationality of strict products liability in terms of Alan Gewirth's Principle

moral philosophy to the products liability context, John Attanasio sought to justify the application of Guido Calabresi's economic theory of accident law to cases of this type. Also in 1988, in an article in the *Yale Law Journal*, Alan Schwartz proposed a "theoretical synthesis" of products liability in which he examined products liability law from a "consumer sovereignty" hypothetical consent perspective.[10] While both pieces advance the search for a meaningful theory of products liability law, neither presents a frame-

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of Generic Consistency, see Deryck Beyleveld & Roger Brownsword, *Impossibility, Irrationality and Strict Product Liability*, 20 ANGLO-AM. L. REV. 257 (1991). Works in progress include MARSHALL S. SHAPO, PRODUCTS LIABILITY AND THE SEARCH FOR JUSTICE (forthcoming 1993); Anita Bernstein, *Why Products Liability?* (forthcoming 1994).

Commentators for some time have been interested in the philosophical justifiability of the strict liability principle in tort theory generally. *See, e.g.*, COLEMAN, *supra* note 5; RONALD M. DWORKIN, LAW'S EMPIRE ch. 8 (1986); ENGLARD, *supra* note 5; Jules L. Coleman, *The Morality of Strict Tort Liability*, 18 WM. & MARY L. REV. 259 (1976); Izhak Englard, *Can Strict Liability Be Generalized?*, 2 OXFORD J. LEGAL STUD. 245 (1982); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151 (1973); Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165 (1974); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Tony Honoré, *Responsibility and Luck: The Moral Basis of Strict Liability*, 104 LAW Q. REV. 530 (1988); Francis E. Lucey, *Liability Without Fault and the Natural Law*, 24 TENN. L. REV. 952 (1957); David G. Owen, *The Fault Pit*, 26 GA. L. REV. 703 (1992); Stephen R. Perry, *The Impossibility of General Strict Liability*, 1 CAN. J. L. & JURISPRUDENCE 147 (1988); Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 LAW & PHIL. 37 (1983). Philosophical implications of risk creation generally are sensitively explored in Christopher H. Schroeder, *Rights Against Risks*, 86 COLUM. L. REV. 495 (1985) [hereinafter Schroeder, *Rights*]. *See also* Christopher H. Schroeder, *Corrective Justice and Liability For Increasing Risks*, 37 UCLA L. REV. 439 (1990); Kenneth W. Simons, *Corrective Justice and Liability for Risk-Creation: A Comment*, 38 UCLA L. REV. 113 (1990).

Limited but helpful applications of moral philosophy to products liability issues include Richard C. Ausness, *Compensation for Smoking-Related Injuries: An Alternative to Strict Liability in Tort*, 36 WAYNE L. REV. 1085 (1990); James A. Henderson, Jr., *Coping with the Time Dimension in Products Liability*, 69 CAL. L. REV. 919 (1981); F. Patrick Hubbard, *Reasonable* Human *Expectations: A Normative Model for Imposing Strict Liability For Defective Products*, 29 MERCER L. REV. 465 (1978); Martin A. Kotler, *Utility, Autonomy and Motive: A Descriptive Model of the Development of Tort Doctrine*, 58 U. CIN. L. REV. 1231 (1990); Alan Schwartz, *Products Liability, Corporate Structure, and Bankruptcy: Toxic Substances and the Remote Risk Relationship*, 14 J. LEGAL STUD. 689 (1985); Kathryn D. Sowle, *Toward a Synthesis of Product Liability Principles: Schwartz's Model and the Cost-Minimization Alternative*, 46 U. MIAMI L. REV. 1 (1991); Frederick L. Sharp, Note, *Aristotle, Justice and Enterprise Liability in the Law of Torts*, 34 U. TORONTO FAC. L. REV. 84 (1976).

My earlier work on this topic has also been quite modest. *See* Owen, *supra* note 7; Owen, *supra* note 6.

10 Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353 (1988) [hereinafter Schwartz, *Proposals for Reform*]. For a thorough critique of this article, see Sowle, *supra* note 9. Professor Schwartz builds upon and refines his hypothetical consent analysis in Alan Schwartz, *The Case Against Strict Liability*, 60 FORDHAM L. REV. 819 (1992) [hereinafter Schwartz, *Strict Liability*].

work of moral theory adequate for the development of a morally grounded system of products liability rules.

The weakness of both articles, both normatively and explanatorily, lies in what many modern model-builders consider to be a strength—the effort to explain (or justify) all or most of a field of law in terms of a single-value, unifying, and overarching "metatheory."[11] Probably the clearest example of such a single-value model is the theory of economic efficiency, which is often offered as the sole explanatory or justificatory basis for a particular legal doctrine,[12] an entire legal field,[13] or even all of law.[14] Attanasio's article thus suffers not from demonstrating the substantial conjunction of the principles of allocative efficiency and autonomy in products liability law, for the conjunction is wide and deep, as Attanasio well demonstrates. Nor can Schwartz's piece be faulted for explaining products liability law in contractarian terms of hypothetical consumer consent, for this form of theorizing provides a beacon that well illuminates many of the fairness questions arising when injured consumers seek redress from manufacturers. Rather, the models of Attanasio and Schwartz are both deficient in organizing products liability law around a single moral pole, thereby excluding from consideration other perspectives that enrich the analysis.[15] Metatheories are valuable in focusing the light through

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11 *See* Schwartz, *Proposals for Reform*, *supra* note 10, at 359 (explicitly adopting a "meta rule" approach). I have borrowed the helpful "metatheory" term from Jay M. Feinman, *The Significance of Contract Theory*, 58 U. CIN. L. REV. 1283, 1295 (1990), and others.

12 *E.g.*, Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972).

13 *E.g.*, WILLIAM M. LANDES & RICHARD A. POSNER, THE ECONOMIC STRUCTURE OF TORT LAW (1987); STEPHEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW (1987); William M. Landes & Richard A. Posner, *A Positive Economic Analysis of Products Liability*, 14 J. LEGAL STUD. 535 (1985).

14 *E.g.*, RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (4th ed. 1992); John C. Goodman, *An Economic Theory of the Evolution of Common Law*, 7 J. LEGAL STUD. 393 (1978).

15 In fairness to Professor Schwartz, he does offer his theory "in an exploratory spirit." *See* Schwartz, *Proposals for Reform*, *supra* note 10, at 356. Moreover, he admits in passing to the relevance of moral considerations: "The rules favored in this Article are either implied by, or are consistent with, utilitarian and neo-Kantian notions of efficiency and autonomy." *Id.* at 360 n.12. Indeed, Schwartz only thinly grounds his consumer sovereignty norm in utility and autonomy theory and devotes his primary attention instead to the application of the norm to products liability problems. Because Schwartz's article purports to apply, rather than develop, the moral foundations of products liability law, its purpose is quite different from my inquiry in this Article, and so it is not subjected to further scrutiny in the text. By contrast, Attanasio's piece deeply explores the philosophical bases of products liability law, and so it is examined at some length below. *See infra* notes 290-309 and accompanying text.

a particular window upon a single point; metatheories are pernicious in shrouding the rest of the world in darkness.

An important thesis of this Article is that the principles of moral and political philosophy relevant to the issues of tort law generally, and products liability law in particular, are many, varied, complex, and that they cannot ultimately be reduced to a single, exclusive metatheory.[16] Instead, most of the problems of products liability law are multidimensional, requiring a pluralistic analysis from various moral planes. The approach taken here, therefore, is to apply a variety of moral perspectives to the most important issues concerning products liability. I thus consider principles of efficiency, like Attanasio, and the hypothetical preferences of consumers, like Schwartz, but also other matters of moral interest. For example, one might think that other particular values, such as the ideals of freedom, truth, and equality, have substantial moral relevance to the problems of products liability. And the hypothetical preferences of product makers, in addition to those of product users, should also be of interest in developing a satisfactory moral theory. The search here, therefore, is for a multidimensional, pluralistic moral framework—not a single-value metatheory—for products liability law.

Rather than classifying the problems of products liability law as problems of tort or contract and then applying the nascent moral theory of either discipline to the products liability context, it seems more useful to an *a priori* inquiry of this type to treat the problem of responsibility for product accidents as a separate matter deserving independent philosophic thought. The scholarship to date has failed to pull together the disparate philosophic strands into an inclusive structure to frame the moral problems of the law of product accidents. Most valuable moral theorizing on tort law in recent years has examined the problems of accident law from the perspective of some form of "corrective justice."[17] Yet conven-

16 Many scholars have noted the truth of this thesis for tort law generally. *See, e.g.*, ENGLARD, *supra* note 5; SHAPO, *supra* note 9; Jules L. Coleman, *Moral Theories of Torts: Their Scope and Limits* (pt. 2), 2 LAW & PHIL. 5, 36 (1983) ("no single principle is capable of explaining the full extent of tort law"). It has been recognized as well in the particular context of products liability law. *See, e.g.*, James A. Henderson, Jr., *Process Norms in Products Litigation: Liability for Allergic Reactions*, 51 U. PITT. L. REV. 761, 782-91 (1990).

17 *See, e.g.*, COLEMAN, *supra* note 5; Larry A. Alexander, *Causation and Corrective Justice: Does Tort Law Make Sense?*, 6 LAW & PHIL. 1 (1987); Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515 (1992); Jules L. Coleman, *The Mixed Conception of Corrective Justice*, 77 IOWA L. REV. 427 (1992) [hereinafter Coleman, *Mixed Conception*]; Jules L. Coleman, *Corrective Justice and Wrongful Gain*, 11 J.

tional corrective justice models[18] cannot alone provide a moral justification for products liability law that is at all complete. Their formal abstraction may dazzle the intellect[19] but fails to help determine whether a harmful act was also "wrongful,"[20] thus leaving corrective justice drained of a substantive core to help resolve the fundamental moral questions of accountability for product accidents.[21] Probably the most valuable aspect of corrective justice in its more classical, Aristotelian form derives from its inherent reliance on the ideal of equality;[22] yet equality has independent ana-

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LEGAL STUD. 421 (1982) [hereinafter Coleman, *Corrective Justice*]; Fletcher, *supra* note 9, at 543-56 (developing the paradigm of reciprocity); Heidi M. Hurd, *Correcting Injustice to Corrective Justice*, 67 NOTRE DAME L. REV. 51 (1991); Stephen A. Kiholm, *Corrective Justice as the Redress of Wrongful Gain*, 18 MEM. ST. U. L. REV. 267 (1988); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992); Ernest J. Weinrib, *Corrective Justice*, 77 IOWA L. REV. 403 (1992) [hereinafter Weinrib, *Corrective Justice*]; Ernest J. Weinrib, *Understanding Tort Law*, 23 VAL. U. L. REV. 485 (1989) [hereinafter Weinrib, *Understanding Tort Law*] Weinrib, *supra* note 9; Wells, *supra* note 7; Richard A. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625 (1992). As this Article was in press, a Symposium was published containing several important articles commenting on Jules Coleman's vision of corrective justice in his then book manuscript, RISKS AND WRONGS, *see* COLEMAN, *supra* note 5. *See Symposium on Risks and Wrongs*, 15 HARV. J.L. & PUB. POL'Y 621 (1992) (including articles by Coleman, Emily Sherwin, Kenneth W. Simons, Richard J. Arneson, and Stephen R. Perry).

18 Professors Coleman and Weinrib, who have written most (and very differently) about corrective justice, have both defined it very generally in terms of rectifying an imbalance caused by a wrongful act. In addition to their works cited in *supra* note 17, see Jules L. Coleman, *Tort Law and the Demands of Corrective Justice*, 67 IND. L.J. 349 (1991); Ernest J. Weinrib, *Liberty, Community, and Corrective Justice*, CAN. J.L. & JURISPRUDENCE 3 (1988). The corrective justice models of both Coleman and Weinrib continue to evolve and are now far more refined and richer than when first proposed. For their latest conceptions of corrective justice as this Article is written, see COLEMAN, *supra* note 5; Coleman, *Mixed Conception*, *supra* note 17; Jules L. Coleman, *Risks and Wrongs*, 15 HARV. J.L. PUB. POL'Y 637 (1992).

19 Wright, *supra* note 17, at 630, deserves credit for this apt characterization.

20 *See, e.g.*, JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 178-79 (1980) (The notion of "correction" is "parasitic on some prior determination of what is to count as a . . . tort"); Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187, 202 (1981) (Aristotle's corrective justice theory is more concerned with rectification of wrongful conduct than with defining wrongfulness).

21 *See* Wright, *supra* note 17, at 630 (decrying Coleman and Weinrib's portrayals of corrective justice as "empty sterile abstraction[s]"). Empty abstractions of corrective justice invite abuse by allowing anyone to fill the voids with anything—from narrow, restrictive models of fault and proof, *e.g.*, Edwin Meese, III, *Address on Tort Reform Given Before the National Legal Center for the Public Interest*, 23 IDAHO L. REV. 343 (1987) (urging restrictive, legislative tort reform), to whatever brand of justice a jury may choose. *See, e.g.*, Wells, *supra* note 7, at 2411 (advocating the empty vessel approach and offering a "pragmatic conception of corrective justice" that "allow[s] the jury to evaluate a wide range of issues and [which] requir[es] that it operate in a decisional context that produces locally objective judgments.").

22 *See* Wright, *supra* note 17, at 691-702.

lytical power of its own, as examined in some depth below.[23] Ignoring the central significance of the equality ethic, conventional corrective justice analysis thus is able to provide little more than an analytical framework within which to begin to examine most substantive products liability issues of moral interest.[24]

The purpose of this Article is to explore at a fundamental level, much more broadly than any single-value metatheoretical model is capable of doing, the philosophical foundations that should—and to quite a large extent do—support the law of products liability. The Article's principal objective, therefore, is to formulate a normative structure of products liability principles grounded in moral theory. In the process, the principles and theory will serve in many ways to explain much of the existing law concerning product accidents.

Although many problems of products liability theory derive from the special nature of the relationship between product makers and product users, product accidents are of course contained within the realm of accidents in general. In order to make sense of products liability problems, therefore, it is helpful first to develop a theory of moral responsibility for accidents in general, and then to adapt the general theory to the specific context of product accidents. The most central and perhaps most difficult problem in both contexts is determining whether responsibility for accidental harm should be based on moral or legal fault, or whether accountability should instead be "strict." The elemental importance of this classic problem, in legal and moral theory, suggests that the philosophical aspects of this crucial issue need first to be carefully explored in general accident theory, and then reexamined, adjusting the general accident theory as necessary to fit the context, in the specific area of product accidents.

The Article thus begins broadly, by examining the philosophical issues concerning the general problem of accidents around two fundamental moral poles—freedom and community. Part I examines the freedom ideal, and focuses upon two subsidiary values—truth and equality. Against this background of freedom and

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23 *See infra* notes 40-69, 157-203 and accompanying text.

24 *See generally* Wright, *supra* note 17. As the inquiry broadens beyond corrective justice in its classical form, the enterprise might more usefully be relabeled as involving "commutative justice," as Aquinas did, or, perhaps, "rectificatory justice," in order to make room for the variety of values relevant to a morally complete resolution of harmful interpersonal transactions, while retaining the purity of the classical concept of "corrective justice." *See infra* note 65.

equality, the Article explores and refutes the moral plausibility of a general principle of strict liability as inappropriate to cases of accidental harm. The analytical groundwork on this point is necessarily quite extended because of the central significance and analytical difficulty of the issue of strict liability in modern products liability law. In Part II, the Article considers briefly the notion of community, as it applies generally to accidental harm, from two starkly contrasting perspectives—utility and sharing. In Part III, the analysis shifts away from the problem of accidents in general to the particular area of *product* accidents. In this context, various aspects of both freedom and community are separately considered in order to uncover the underlying issues of moral significance when persons suffer injury from product use. In addition to applying the values examined more generally earlier, the inquiry at this point focuses as well upon the more particularized notions of risk control, expectations, burden sharing, and aggregate autonomy. This part of the analysis then concludes with an ordering of the freedom and community ideals. Although freedom emerges as the dominant moral value, the community ethic is seen to provide vital moral insights into certain products liability problems.

Rather than moving at this point more abstractly toward a grand and unitary metatheory of products liability law, this Article accepts the pluralistic nature of the different moral concepts that should and do inform this area of the law. In Part IV, therefore, the inquiry turns instead to an effort to convert the various moral notions pertinent to responsibility for product accidents to a form that may help resolve particular problems of products liability law. To that end, the Article concludes by postulating and briefly explaining certain first principles of justice and liability that are generated by the underlying moral concepts. The principles in some ways will be seen to undermine particular aspects of orthodox products liability law, most notably the rule of strict liability for inadequate warnings and dangers in design. Yet the principles in other ways will be seen to provide moral justification for much of the prevailing structure and doctrine in this area of the law. Perhaps most importantly, the principles provide a methodological framework that should help resolve in an ethical manner many of the most perplexing problems in the law of products liability.

II. FOCUSING ON THE PERSON: FREEDOM

A. The Concept of Freedom

Freedom, one may confidently postulate, is the most fundamental, and most important, moral and political value. Among modern philosophers, the one most credited with propounding this ideal is Immanuel Kant, who considered freedom to be "the one sole and original right that belongs to every human being by virtue of his humanity."[25] While philosophers and governments of course must concern themselves to a large extent with notions of group welfare, and while selfishness is widely regarded as a vice rather than a virtue, freedom should be viewed as the first and most essential ideal within a broad philosophy of government and justice.[26]

The freedom concept rests upon the possession by humans of free will[27]—the capacity of persons rationally to select personal goals and plans for life, and their possession of means to achieve those ends. This concept, sometimes called autonomy,[28] thus entails at least two conditions: choice and power.[29] The design of life plans and the selection of specific goals to achieve those plans implies a range of options and opportunities, alternatives from which to choose. As a person's choices are enhanced, so too is the

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25 IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE (*Rechtslehre*) *237 (John Ladd trans., 1965) (1797) [hereinafter KANT, ELEMENTS OF JUSTICE]. Freedom, autonomy, and morality in Kant's view are all inseparably bound together. IMMANUEL KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS *452-53 (L. Beck trans., 1959) (1785) [hereinafter KANT, METAPHYSICS OF MORALS]. "Autonomy is thus the basis of the dignity of both human nature and every rational nature." *Id.* at *436. Kant viewed autonomy, freedom of the will, as "the supreme principle of morality." *Id.* at *440.

26 *See, e.g.*, Robert B. Thigpen & Lyle A. Downing, *Liberalism and the Communatarian Critique*, 31 AM. J. POL. SCI. 637 (1987). Equality and other community ideals logically presuppose the priority of freedom. "Liberty is crucial to political justice because a community that does not protect the liberty of its members does not—cannot—treat them with equal concern . . . ." Ronald M. Dworkin, *What is Equality? Part 3: The Place of Liberty*, 73 IOWA L. REV. 1, 53 (1987) (explaining "[t]he priority of liberty, under equality of resources").

27 "The will is free, so that freedom is both the substance of right and its goal . . . ." GEORG W.E. HEGEL, PHILOSOPHY OF RIGHT 20, para. 4 (T.M. Knox trans., 1965) (1821). Determinists, of course, challenge the very premise of free will. *See generally* John L. Hill, Note, *Freedom, Determinism, and the Externalization of Responsibility in the Law: A Philosophical Analysis*, 76 GEO. L.J. 2045 (1988).

28 I use the two terms interchangeably, although for some purposes there may be value in distinguishing between them. *See* JOSEPH RAZ, THE MORALITY OF FREEDOM ch. 15 (1986).

29 *Id.* at 371.

person's freedom. Freedom also requires power, for one must have the ability to bring one's chosen goals to fruition in order to control one's destiny, in order to be free. To be autonomous, one therefore must possess requisite mental and physical prowess and adequate physical goods and monetary resources to achieve the objectives one selects.[30]

Freedom accords persons dignity, for it permits each human to design and then to follow his own life plan, unique from any other. The concept also forces persons to shoulder a burden, for it places responsibility upon each person to plan and live a life that is "good" for that individual. While philosophers and theologians will perhaps debate forever the notion of what, in the abstract, constitutes the ultimate good life and its component virtues, it is each human's moral privilege—and his or her special moral responsibility—to choose the particular life goals that he or she deems most worthwhile,[31] and to seek to achieve them through personal choice and action.

Viewed in this way, freedom is the primary moral and political ideal. It is the first condition to protecting or advancing other values, such as equality,[32] altruism, and communal welfare. Thus, whether the ultimate goal of law is thought to be the promotion of individual well-being or the welfare of the group, the first and most important function of the law is to protect and promote freedom or autonomy.

B. Truth

Subsumed in freedom is the ideal of truth, a concept closely related to knowledge. From the time of Plato, knowledge classically has been defined as "justified true belief."[33] Knowledge, justifi-

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30 *Id.* at 372-73. Having the means to be one's own master may be viewed as "positive" freedom, as distinguished from freedom in its "negative" form, consisting in the absence of interference with one's activities by others. For the classical formulation of this distinction, see Isaiah Berlin, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 121 (1969), *reprinted in* LIBERTY 33 (David Miller ed., 1991). The usefulness of bifurcating the concept of freedom in this manner is subject to challenge. *See* Gerald C. MacCallum, Jr., *Negative and Positive Freedom*, 76 PHIL. REV. 312 (1967), *reprinted in* LIBERTY, *supra*, at 100. A consideration of this distinction, as other interpretations of the freedom concept, is unnecessary to the analysis in this Article.

31 For a discussion of freedom as requiring "good" choices, see RAZ, *supra* note 28, at 378-85.

32 *See supra* note 26 and accompanying text.

33 PAUL K. MOSER & ARNOLD VANDER NAT, HUMAN KNOWLEDGE: CLASSICAL AND CONTEMPORARY APPROACHES 3 (1987).

cation, truth, and belief thus are all functionally related. Among these concepts, however, truth is the only one that is absolute, the only true ideal.[34] Knowledge, for example, only describes the state of possessing the ideal of truth.[35] For help in resolving moral questions arising out of accidental loss, truth may be viewed as the correspondence of a person's beliefs with reality.[36]

The intelligent and effective selection and pursuit of goals implies an ability to perceive and comprehend things in the world and how those things interrelate according to the principles of cause and effect. No person, of course, can absolutely know the truth, which is one important reason why no one ever can be absolutely free. Humans, hampered by both physical and cerebral imperfection, can see the world but dimly, and so their choices of both ends and means are always frustrated by their lack of knowledge. The promotion of autonomy therefore is facilitated by the promotion of truth—improving the correspondence between people's beliefs or expectations, on the one hand, and the true world as it exists and changes, on the other.

Truth, or the absence of it, plays a powerful role in causing accidents. Indeed, the very word "accident" is defined in terms of *unexpected* harm.[37] Accidental harm, then, is harm attributable to the failure of at least one person, the actor or the victim, to ex-

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34 Aristotle apparently viewed truth as "*more* self-evidently and fundamentally good than life." John M. Finnis, *Skepticism, Self-Refutation, and the Good of Truth, in* LAW, MORALITY, AND SOCIETY—ESSAYS IN HONOUR OF H.L.A. HART 247, 249 (Peter M. Hacker & Joseph Raz eds., 1977).

35 The notions of knowledge and truth are so closely related, however, that they may be substituted one for the other in most contexts. *See, e.g.*, FINNIS, *supra* note 20, at 59 (interchanging the terms "knowledge" and "truth," and referring to truth as "the basic good").

36 "Perhaps the most ancient and certainly in all eras the most widely accepted theory of truth is the *correspondence theory*, according to which truth is *correspondence to fact*." NICHOLAS RESCHER, THE COHERENCE THEORY OF TRUTH 5 (1973). "The traditional correspondence theory [of truth] holds that P is true if, and only if, it corresponds to reality." DAVID M. ARMSTRONG, BELIEF, TRUTH AND KNOWLEDGE 113 (1973). Because the correspondence theory of truth provides epistemologists with only partial help in resolving abstract questions of knowledge, particularly in respect to the truth of propositions, it holds little interest for many modern philosophers. *See generally* THOMAS MORAWETZ, WITTGENSTEIN & KNOWLEDGE ch. 3 (1978); RESCHER, *supra*, at ch. I. For help in analyzing the empirical and moral problems of accidental harm, however, which involve "truths of fact" rather than "truths of reason," a definition of truth in correspondence terms appears especially helpful. *See* David G. Owen, *The Moral Foundations of Punitive Damages*, 40 ALA. L. REV. 705, 718-22 (1989).

37 *See, e.g.*, WEBSTER'S NEW WORLD DICTIONARY OF THE AMERICAN LANGUAGE 9 (1964) ("a happening that is not expected"). *See generally* H.L.A. HART & TONY HONORÉ, CAUSATION IN THE LAW 151 (2d ed. 1985).

pect the harm, to possess the truth concerning the things that caused the harm.

If *A* knows that a certain fact is *x*, and if *B*, thinking incorrectly that it is *y*, suffers accidental harm as a result, then the inequality of *A* and *B* in the possession of the truth may be viewed as a cause of *B*'s harm.[38] If *A* and *B* are strangers, *A* may have no obligation to act to share the truth with *B*, even if he knows that *B* needs the truth to avoid harm. But if, instead, *A* and *B* are linked together in some relationship that generates in *B* an expectation that *A* will provide the truth to *B* for *B*'s protection, then *A* may well be obligated to cure the inequality and tell the truth to *B*.[39]

A person's ability to control his life, to live effectively within the world, is highly dependent upon the extent to which that person's vision of the world is true. Without possessing the truth in substantial measure, humans frequently would suffer accidental harm. Thus, truth is an extremely important resource that persons must seek and often share to protect the autonomy of themselves and other persons threatened with accidental harm.

C. Equality

A threshold problem the law confronts in the promotion of individual freedom is that there is a multiplicity of separate persons whose freedoms frequently collide. In a crowded world, it must be expected that each person's pursuit of life goals often will conflict with other persons' pursuit of their own life goals. The law therefore must draw boundaries around individuals, defining where one person's freedoms end and where another person's freedoms begin.[40] The most fundamental and helpful criterion for drawing such boundaries in a just and enduring society is equality.[41]

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38 The foundational role of equality, closely interconnected with the freedom ideal, is developed separately at length below. *See infra* notes 41-69 and accompanying text.

39 If the relationship between *A* and *B* is based upon the mutual assumption that *B* may trust in *A* to exercise his greater power to protect *B*'s interests, then *A* will have an obligation to provide *B* with certain types of information affecting *B*. *See* Owen, *supra* note 36, at 718-22.

40 This fundamental concept is nicely captured in Nozick's "border crossing" metaphor. ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA ch. 4 (1974).

41 The equality ideal has been a profoundly important ethic in moral and political philosophy throughout the ages. It was perhaps the central ethic in Aristotle's theory of corrective justice. "[T]he law . . . treats the parties as equal, and asks only if one is the author and the other the victim of injustice or if the one inflicted and the other has sustained an injury. Injustice then in this sense is unfair or unequal, and the endeavor of

Determining how equality helps to define the scope of each person's freedoms depends upon the type and strength of one's view of equality. Assume that *A* and *B* start off equally in all respects to pursue their respective goals, and that they interact in some manner that harms *B*. A "strong" version of equality—one that emphasizes the security of resources—might require *A* to transfer enough of his goods to *B* to restore the state of equality between *A* and *B*, based only upon the change in their respective holdings of goods from a status of equality to one of inequality.[42] A very strong version of equality could require this result even if *B*, not *A*, were morally responsible for the accident. A different, "weak" version of equality, based on an equal right of action rather than on an equal right of security of resources, might leave the loss entirely with *B*, if neither *A* nor *B* were otherwise responsible for the loss. Thus, the version of equality selected is crucial in defining limits to individual freedom.[43]

Sometimes actors harm the security of other persons accidentally. Equality in such cases demands, as a general rule, that the interests of the victim not be favored over the interests of the actor. Action is necessary in a dynamic world to achieve one's goals, both to protect and to enhance one's property and satisfac-

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the judge is to equalize it." ARISTOTLE, NICOMACHEAN ETHICS 154, (J.E.G. Welldon trans., 1987) (bk. 5, ch. 7). Equality was central to the philosophy of Kant, who considered it to be contained within the principle of freedom. KANT, ELEMENTS OF JUSTICE, *supra* note 25, at *237-38; *see infra* note 54. And its elemental power remains at the heart of much contemporary jurisprudence. *See generally* GERALD DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 110 (1988) ("Every moral theory has some conception of equality among moral agents . . . ."); R. DWORKIN, *supra* note 9, at 295-301; ERIC RAKOWSKI, EQUAL JUSTICE (1991); JOHN RAWLS, A THEORY OF JUSTICE §§ 11, 32-39, 77 (1971); PETER WESTEN, SPEAKING OF EQUALITY (1991) (examining the paradoxes and rhetorical force of equality); Jeremy Waldron, *Particular Values and Critical Morality*, 77 CAL. L. REV. 561, 577 (1989) ("[O]ne cannot go anywhere in serious moral thought except on the basis of some assumption about the fundamental equality of human worth.").

The innate link between freedom and equality, defined by Kant, KANT, ELEMENTS OF JUSTICE *supra* note 25, at *237-38, is captured succinctly by Hart: "[I]f there are any moral rights at all, it follows that there is at least one natural right, the equal right of all men to be free." H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 175 (1955), *in* THEORIES OF RIGHTS 77, 77 (Jeremy Waldron ed., 1984). This constitutive link between equality of resources and freedom is explained in R. DWORKIN, *supra* note 26, at 54 (arguing that "liberty and equality are not independent virtues but aspects of the same ideal of political association," which "strategy uses liberty to help define equality and, at a more abstract level, equality to help define liberty").

42 To restore equality between the two, *A* would have to give to *B* an amount of goods equal to half of all *B*'s losses. Alternatively, the state might transfer enough communal goods to *B* to rectify the loss.

43 Various conceptions of equality are examined in WESTEN, *supra* note 41.

tion. One must drive (or walk) to the store to buy one's bread. This interest might be designated as a person's "action interest." Each person also has another, passive form of interest, which might be called one's "security interest." This latter form of interest is the person's interest in protecting his present stock of property and satisfaction against depletion.

When people interact, the transaction often benefits them both,[44] so that actors frequently enhance the interests of other persons. But sometimes accidental interactions harm the interests of certain persons, depleting their stock of property and satisfaction. Despite an undeniable counter-intuition, the accident victim's passive security interest in maintaining his stock of goods logically should have no higher intrinsic value than the actor's affirmative action interest in protecting (and augmenting) his stock of goods.[45] Indeed, freedom of action is especially deserving of pro-

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44 Economists refer to such transactions as Pareto maximizing. *See generally*, Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 512-18 (1980).

45 "[T]he public generally profits by individual activity. As action cannot be avoided, and tends to the public good, there is obviously no [sound] policy in throwing the hazard of what is at once desirable and inevitable upon the actor." OLIVER WENDELL HOLMES, JR., THE COMMON LAW 95 (1881); Ernest J. Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407, 428 (1987) (a property holder may not insist that his security interests are more valuable than an actor's freedom).

When an accident victim suffers personal injury or death, the one obvious difference between the values of the respective interests of the actor and the victim concerns the nature of those interests. The intuitive (and traditional legal) preference for the interest in bodily integrity is examined below. *See infra* notes 162-73 and accompanying text.

The intuitive correctness of a liability principle holding actors responsible for causing harm only when they are at fault, even when they are artificially much more powerful than their weak and vulnerable human victims, may be demonstrated by a hypothetical. Assume that a driver, *D*, approaches an intersection with a green light in his favor. A blind person, *B*, at the moment *D* begins to enter the intersection, steps out in the crosswalk from behind an ambulance parked at the curb beside the crosswalk, hiding *B* from *D's* view. *D's* car hits and injures *B*.

The ambulance was legally parked for an emergency call in a No Parking zone beside the crosswalk. *D* was driving with all due care and had no reason to believe that a blind person might be in the vicinity. *B's* decision to traverse the intersection was reasonable: *B* had a good reason to cross the street, and no one was around to assist *B* in crossing the road. *B* pressed the control button on the crosswalk pole to change the light to red, listened to and heard the usual electronic sounds from the control box indicating that the light was changing from green to red, and had no reason to suspect that the control mechanism could malfunction and emit changing noises without actually changing the light, which in fact it did. There was no way that the control mechanism malfunction could have been anticipated or prevented by the city, the manufacturer, or anyone else.

On facts like these, where *D* was truly acting with reasonable respect for the rights of others, an intuitive sense of justice would shield *D* from legal responsibility for "caus-

tection in a dynamic world because persons regularly must readjust through action to ever-changing conditions even if their only goal is to protect their own security.[46]

Autonomy entails the notion that a person may—indeed, must—make choices and then act upon those choices, and each such action always restricts in some measure the choices available to others. If *A* decides to move from point *x* to point *z*, and does so, he deprives *B*, standing at point *y*, of the opportunity to move to *z*. This also is true concerning decisions not to act: If *A*, standing at point *x*, decides not to move at all, he limits the opportunity of *B*, standing at point *y*, to move to *x*. Thus, whether of action or inaction, all choices of all persons diminish in some manner the available choices (and hence the freedom) of other persons, who are "harmed" to that extent.[47] The choices and action inherent in the very notion of individual autonomy, therefore, imply harm to other persons. This important concept may be called the "choice-harm principle."[48]

The choice-harm principle demonstrates that, in a society devoted to autonomy and equality, no initial preference should be given to security over action.[49] This conclusion suggests the formulation of some "weak" version of equality, which allows each person the maximum amount of freedom, for both security and action, consistent with an equal right of others.[50] This type of weak but useful form of equality has been aptly termed an "equality of concern and respect."[51] Philosophers across the centuries,

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ing" harm to *B*. This is so, first, because the only risks *D* chose to inflict on *B* were reasonable and, second, because *B* as much as *D* chose to risk—and hence "caused"—the collision. Protecting *D* from legal responsibility for *B*'s harm is fair to *D*, and it is not unfair to *B*, who may choose to insure against the risks of such reasonably caused accidents as he might insure against all other risks of injury not attributable to the fault of others, such as from tripping on a curb.

46 G. DWORKIN, *supra* note 41, at 112 ("In general, autonomy is linked to activity, to making rather than being, to those higher forms of consciousness that are distinctive of human potential.").

47 *See infra* note 69 and accompanying text.

48 For a further discussion of the nature and implications of the choice-harm principle in the law of torts, see David G. Owen, *The Choice-Harm Principle in Tort Law*, *in* OWEN, *supra* note 5.

49 The choice-harm principle, therefore, should be distinguished from John Stuart Mill's "harm principle," which accords a higher priority to security, by providing that one person may not interfere with the freedom of another except to prevent harm to others. *See* JOHN STUART MILL, ON LIBERTY 68-69 (G. Himmelfarb ed., 1974) (1859).

50 This proposition as so formulated is fundamental for both Kant and Rawls. *See infra* notes 54 and 56.

51 Although the concept derives, through Rawls, from Kant, its statement in this

from Plato[52] and Aristotle,[53] to Kant,[54] to Nozick,[55] and even to Rawls and Dworkin,[56] generally have accorded equality some such weak position among moral values.[57]

When equality is defined weakly, in terms of equality of concern and respect, it becomes subject to the criticism that it is "empty," devoid of analytical content[58] and so, incapable of helping to define freedom or any other ideal.[59] Yet the concept of

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form is Dworkin's. *See, e.g.*, RONALD M. DWORKIN, TAKING RIGHTS SERIOUSLY 182 (1977) (noting that Rawls' "justice as fairness rests on an assumption of a natural right of all men and women to [an] equality of concern and respect . . . [possessed] simply as human beings with the capacity to make plans and give justice"). As with equality generally, the notion of equality of concern and respect may be considered ultimately profound, as do Rawls and Dworkin, *id.* at 180-83, or trivial, as does Raz, RAZ, *supra* note 28, at 220 n.1 & 228. *Cf.* FINNIS, *supra* note 20, at 221-23 (critiquing Dworkin's interpretation of the requirements of equal concern and respect). I believe that the notion may best be accorded a meaning somewhere in between, establishing equality as a strong initial ethic from which deviations must be justified. This approach provides equality with a useful analytical role, not too different from that envisioned by Aristotle and Kant, but one which is weaker than that for which strict egalitarians—and probably both Rawls and Dworkin—would argue.

52 *See* PLATO, LAWS VI.757, at 143 (Taylor trans.), *quoted in* WESTEN, *supra* note 41, at 52-53.

53 *See* ARISTOTLE, *supra* note 41, at 140-49.

54 "Hence the universal law of justice is: act externally in such a way that the free use of your will is compatible with the freedom of everyone according to a universal law." KANT, ELEMENTS OF JUSTICE, *supra* note 25, at *231.

55 Nozick may find the least use for equality among the major contemporary philosophers in this nation. *See* NOZICK, *supra* note 40, at 222-24. He is not, of course, alone in this position. *See, e.g.*, Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). For a valuable critique of equality from a leading English legal philosopher, see RAZ, *supra* note 28, at ch. 9.

56 It may seem odd for Rawls and Dworkin to be included among proponents of "weak" equality, for they both view equality as central to their systems. *See generally* RAWLS, *supra* note 41, at 222-24, 453-504; Ronald M. Dworkin, *In Defense of Equality*, 1 SOC. PHIL. & POL'Y 24 (1983). Yet neither one has argued for a strict "material equality," *see* R. DWORKIN, *supra* note 9, at 297, requiring that persons be provided with equal wealth throughout their lives. Thus, they both fall on the weaker side of the line of strict equality. Both also subscribe to the notion of equal concern and respect, *see supra* note 41, which defines the concept weakly. Finally, although Rawls's difference principle, as expressed in his second principle of justice, is thoroughly rooted in equality, his first and "prior" principle of justice echoes Kant's dominant concern for freedom and autonomy: "[E]ach person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others." RAWLS, *supra* note 41, at 60.

57 John Finnis considers equality one of three elements embraced in the concept of justice, together with other-directedness and duty. FINNIS, *supra* note 20, at 161-64. He appears to find a larger role for it, however, in the realm of distributive—rather than corrective or commutative—justice, although it serves only as a "residual principle" even in the former realm. *Id.* at 173-84.

58 It is at least ambiguous. WESTEN, *supra* note 41, at 73-74.

59 Westen, *supra* note 55. By "empty," Professor Westen meant that normative equali-

freedom itself can be subjected to such a charge,[60] albeit less persuasively, and the charge of emptiness misses the fundamental point of freedom and equality that celebrates the ineffable worth of every member of the human family.[61] The value of this vague notion of equality lies not in its substance, for it possesses little if any substantive content, but in its structure, which provides a principled basis for interpersonal comparisons that provides a powerful, initial framework for evaluating the moral questions when freedoms clash.[62]

Aristotle's conceptions of distributive and corrective justice, grounded in differing notions of equality, provide a helpful initial framework of just this type.[63] "Distributive justice" concerns the manner by which goods are distributed among persons across society, prior to individual transactions among those persons. Rather than basing such distributions upon strict equality, Aristotle argued that distributive justice requires only proportionality—that is, a distribution of goods proportionate to a person's desert or worth.[64] In technologically advanced societies, a person's worth is measured to a large extent by his productivity which, in turn, is conveniently (if imperfectly) measured by the market. Variations among persons in productivity, accidents, and other factors result in variations over time between persons in their stocks of wealth. Under Aristotle's proportionality conception of equality, therefore, variations in holdings of wealth are not only proper, but inevitable and even necessary.

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ty claims were "*derivative*," not "meaningless." WESTEN, *supra* note 41, at xix-xx (examining the meaning of equality) (emphasis in original).

60 R. DWORKIN, *supra* note 51, at xiii & ch. 12.

61 *See* Erwin Chemerinsky, *In Defense of Equality: A Reply to Professor Westen*, 81 MICH. L. REV. 575 (1983); Kent Greenawalt, *How Empty is the Idea of Equality?*, 83 COLUM. L. REV. 1167 (1983). *See generally* RAZ, *supra* note 28, at 228.

62 This is similar to the problem of whether to adopt a strict liability rule, discussed below. *See supra* notes 70-94 and accompanying text. I am increasingly impressed with the power of equality both to explain and justify the law of accidents. Ronald Dworkin's efforts in this respect are the best I have discovered. R. DWORKIN, *supra* note 9, at ch. 8.

63 ARISTOTLE, *supra* note 41, at 140-49. *See generally* FINNIS, *supra* note 20, at 161-84; WOLFGANG VON LEYDEN, ARISTOTLE ON EQUALITY AND JUSTICE: HIS POLITICAL ARGUMENT 13 (1985). For full and careful discussions of the distinction, see Benson, *supra* note 17; Steven J. Heyman, *Aristotle on Political Justice*, 77 IOWA L. REV. 851 (1992); Weinrib, *Corrective Justice*, *supra* note 17; Wright, *supra* note 17.

64 Aristotle may have borrowed the idea from Plato, who argued that "the true and best equality," in the distribution of goods, such as honor, "deals proportionately with either party, ever awarding a greater share to those of greater worth, and to their opposites . . . such as is fit." PLATO, *supra* note 52, at VI.757. *See generally* WESTEN, *supra* note 41, at 52-57.

Imbalances in the proportional holdings of persons thus develop over time from various private transactions, both voluntary and involuntary. Whether the law should allow such transactions and their consequences, or instead should discourage and rectify them, involves the entirely separate notion of "corrective justice."[65] Aristotle believed that this form of justice required a stronger, "mathematical"—rather than proportional—version of equality.[66] Thus, a thief should be required to disgorge his booty and return the goods (or equal value) to his victim in order to restore the prior proportional equality of the parties.[67] So, too, a person *wrongfully* causing another to suffer accidental loss should be required to rectify the loss, and so restore the prior proportional relationship between the parties.[68] This weak form of equality, which is consistent with the dominant role of freedom, thus requires compensation for losses caused by *wrongful* action, but not for the other losses necessarily caused by every action.[69]

D. Strict Liability or Fault?

In searching for an elemental theory of accident law, one might be inclined initially toward a rule of strict liability,[70] rather than one based on wrongfulness, whereby *A* generally would be subject to liability[71] for causing harm to *B*, whether intentionally

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65 Finnis argues persuasively for replacing Aristotle's "corrective justice" phraseology with Thomas Aquinas' "commutative justice" term, on grounds that the latter term more comfortably embraces the variety of relevant considerations seemingly excluded by the narrower, formal conception of corrective justice described by Aristotle. FINNIS, *supra* note 20, at 178-79. After 2500 years, however, a certain presumption of correctness might be deemed to attach to a concept's name, such that it may simply be too late, as a practical matter, to change its name.

66 Plato referred to this form of equality as "numerical," distinguishing it from the "proportional" or "geometric" kind. WESTEN, *supra* note 41, at 52-53.

67 *See generally* Owen, *supra* note 36, at 708-13.

68 *See generally* Weinrib, *Understanding Tort Law*, *supra* note 17; Kiholm, *supra* note 17. *Cf.* Coleman, *Corrective Justice*, *supra* note 17 (distinguishing between the actor's and the victim's respective interests).

69 Recall that every action "harms" other persons to the extent that such persons are deprived, at least hypothetically, of opportunities displaced thereby. *See supra* notes 47-48 and accompanying text.

70 This was the approach taken by Tony Honoré, *supra* note 9, and by Richard Epstein, subject to defensive pleas. *See* Epstein, *Defenses*, *supra* note 9, at 164; Epstein, *Strict Liability*, *supra* note 9, at 151. Among the numerous critiques of Epstein's strict liability theory, the most philosophically illuminating is Perry's. *See* Perry, *supra* note 9, at 147.

71 The phrase "subject to liability" contemplates the possibility of privileges and defenses. RESTATEMENT (SECOND) OF TORTS § 5 (1965). *See* Epstein, *Defenses*, *supra* note 9.

or accidentally. Equality might at first appear to demand that *A* correct such harm in order to restore to *B* what *A* effectively appropriated to himself by choosing to expose *B* to a risk of harm.[72] Indeed, if the law had assigned a prior property right[73] to *B*'s security from accidental harm,[74] then principles of both freedom and equality would argue for corrective justice strictly to be applied to such a case. Yet this type of appropriation theory is logically dependent upon such a prior assignment of a property right to *B*, the victim, which thereby injects wrongfulness into *A*'s "taking." But this begs the underlying question of whether *A* should be liable for accidentally causing harm to *B* where *B*'s interests in avoiding such harm have been assigned no prior protective right.[75]

In accident cases of this type, where neither the actor nor the victim has a prior right superior to the other, the equality ideal may help resolve this moral conundrum. The key to resolving the conflict lies in evaluating and comparing the apparent worth of the relevant interests—those likely to be promoted by *A*'s action

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72 That is, the security of *B* that *A* chose to put at risk.

73 Philosophical problems concerning liability for harm ultimately reduce largely to a question of the allocation of property rights. *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 96-98 (1985) (arguing that property rights and tort liability rights are opposite sides of the same coin); Richard A. Epstein, *Causation and Corrective Justice: A Reply to Two Critics*, 8 J. LEGAL STUD. 477 (1979); Weinrib, *supra* note 45. In the context of intentional takings, tort liability rules and property rights may indeed be seen as opposite sides of the same coin, as in the starving hiker hypothetical discussed below. *See infra* notes 79-81 and accompanying text. Yet the property rights notion does not appear to help explain the moral or legal quality of choices to act for purposes unrelated to a victim's property holdings that produce a risk of harm to such holdings only contingently and incidentally to the actor's chosen goals. In considering the problem of responsibility for such "secondary" risks, therefore, property rights probably need to be regarded as a separate and prior notion to the concept of liability rights. *See infra* notes 74-81, 73-162 and accompanying text. *See generally* Guido Calabresi & A. Douglas Malamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

74 As by positing that *B*, standing at point *y*, "owns" *y*—or, more precisely, that *B* owns at the time an exclusive possessory right in *y*.

75 Efforts to understand the philosophical aspects of corrective justice tend to run into impenetrable bedrock located at the bottom of the inquiry, framed in terms of fairness in the initial distribution of property rights. The inquiry at this point thus transforms into much broader questions of distributive justice, involving the most fundamental issues of property and political philosophy. For an introduction to these issues, see, *e.g.*, DAVID L. MILLER, MARKET, STATE AND COMMUNITY ch. 2 (1989). This may well be the point at which philosophical inquiry into principles of tort law end, and pure political philosophy begins. "I have reached bedrock and this is where my spade is turned." LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS § 217 (1953), *quoted in* Wells, *supra* note 7, at 2363.

and those likely to be protected by *B*'s security. If *A* reasonably believes that *B*'s security from risk is more valuable than the interests (*A*'s own and those of others) that *A*'s action likely will promote, *A*'s choice to sacrifice *B*'s greater interests denies *B*'s equal worth, and so is wrongful in moral theory.[76] If, to the contrary, *A* reasonably believes that the interests to be promoted by his action are more valuable than the interests risked[77] thereby, then *A*'s choice of action is proper under principles of equality.[78] Correspondingly, *B*'s insistence in the latter case that the law require *A* to compensate *B* for his loss, under a principle of strict liability, would be to demand that *B*'s interests be accorded more than equal worth.

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76 An unremitting principle requiring actors always to accord the interests of others equal concern and respect to their own may be too strong for a practical moral or legal theory. *See generally* R. DWORKIN, *supra* note 9, at 291-301; FINNIS, *supra* note 20, at 304. Yet the principle unremitted is arguably what the classic "Golden Rule" concept contemplates in abstract terms. *See, e.g.*, KANT, METAPHYSICS OF MORALS, *supra* note 25. Moreover, when the principle of equal respect is applied to problems of accident law, it may be interpreted consistently with a general proposition permitting an individual ordinarily to accord primacy to his own interests as a matter of practical convenience. *See* FINNIS, *supra* note 20, at 177 (As a matter of "practical reasonableness," one "cannot reasonably give equal 'weight,' or equal concern, to the interests of every person anywhere whose interests he could ascertain and affect."); *see also* SAMUEL SCHEFFLER, THE REJECTION OF CONSEQUENTALISM (1982) (arguing that actors may accord their own interests slightly greater weight).

Apart from violations of property rights, an actor may fairly be considered blameworthy for causing another's accidental harm only if the actor knew or reasonably could foresee that his conduct was likely to cause more harm than good to the interests of a foreseeable class of persons of which the victim was a member. To recover damages for such accidental harm, an accident victim may not merely show that the actor failed to devote equal attention to the victim's interests. Instead, the victim should be required to prove that (1) the actor chose to act in a manner that would foreseeably and affirmatively diminish the physical security interests of foreseeable persons, which interests he knew or should have known were more valuable than the interests of his own (and others) that he was seeking to promote, and that (2) such excessive harm in fact resulted. Thus, the equal respect principle in the accident context is circumscribed by linked notions of evaluation, selfish choice, affirmative action, actual physical harm, causation, and the burden of proof in law.

77 It is important to remember that the utility calculus discussed here concerns only the law of *accidents* and, hence, only (foreseeable) *risks* of harm to the interests of others. At the time of action, therefore, the possibility of such harm is by hypothesis contingent—an unlikely future eventuality that probably will not occur. This fact bears materially upon the moral quality of *A*'s decision to "sacrifice" *B*'s interests for his own. *See* FINNIS, *supra* note 20, at 126-27.

78 It is also proper under related principles of efficiency. *See* R. DWORKIN, *supra* note 9, at 282. *See generally* Schwartz, *supra* note 10. Even if *A*'s choice proves wrong in fact, it still would be a morally proper choice if it was reasonable on the facts available to *A* at the time *A* acted. *Cf.* RAKOWSKI, *supra* note 41, at 235-37 (arguing that uncompensated loss is morally proper only when the gains to others are considerably greater).

B might argue that a strict liability rule would not prevent *A* from promoting the greater good but would only require *A* to pay for, and hence "internalize," the (lesser) costs of promoting the greater good—just as a starving hiker must pay the owner for food that he takes from an uninhabited mountain cabin.[79] Yet, the cabin owner deserves compensation from the hiker in this context because the latter *deliberately* chose to "take" and appropriate to his own use something that he *knew* was *owned* by someone else.[80] When an actor chooses to act for the very purpose of consuming property rights in goods that he knows are owned by, and hence in part define, another person, he thereby merges in part his will (and hence his personhood) with that of the victim. This results in a form of communion between the actor and the victim, who are to this extent conjoined into a kind of unity or "superperson."[81] Inasmuch as he has chosen to make himself part of this unified superperson, the actor may be seen to have inflicted the harm unto himself. Yet the resulting superperson is an illegitimate creation, for it is born as a result of a kind of rape. By forcing a communal integration upon the victim without consent, the actor has violated the separate, equal, and autonomous status of the victim, and, in justice, must act to restore the victim's separateness, the condition which gave him dignity as a human being. To achieve the separation, to undo the illicit link between the two, the actor must return the taken property (or its monetary equivalent) to the victim, and thereby retrieve unto himself the harm he willed upon the victim.

No similar forced communal nexus between the wills of actors and victims occurs in cases of mere accidents. By contrast to the situation where the actor intentionally consumes goods known to belong to someone else, a person acting for a purpose unrelated to another person is, by hypothesis, not willing a communion with that person. Instead, harm caused by accidental encounterings

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79 For the hungry hiker hypothetical, see Jules L. Coleman, *Moral Theories of Torts: Their Scope and Limits* (pt. 2), 2 LAW & PHIL. 5, 7-9 (1983) (citing Joel Feinberg, *Voluntary Euthanasia and the Inalienable Right to Life*, 7 PHIL. & PUB. AFF. 93, 103 (1978)). The compensatory duty in the necessity context is classicly demonstrated in tort law by Vincent v. Lake Erie Transp. Co., 124 N.W. 221 (Minn. 1910).

80 A closer analogy would be to a well-fed hiker who is hit and injured by a falling tree cut down by a cabin owner who had no reason to expect anyone in the woods. A strict liability rule in such a case would give preference to the hiker's security interest over the owner's action interest for no good reason and would thus deny the principle of equality. *See generally* R. DWORKIN, *supra* note 9, at ch. 8.

81 *See generally* Epstein, *supra* note 73; Weinrib, *supra* note 45.

with other persons is by definition unwilled. Creating mere risks to the interests of others is an inherent and unavoidable consequence of every action, for every action entails harm (at least contingently) to others.[82] To the extent that risks of action may be deemed a necessary part of "proper" choices of action in an uncertain world, and hence "reasonable" according to some fair standard, they should be viewed as "background risks" of life for victims to protect against and bear.[83] Thus, *B*'s "taking" argument, for imposing strict responsibility on *A*, is unpersuasive in cases of accidental harm.

B's compensation claim for harm[84] nonnegligently caused by *A* fails finally on causation grounds. As demonstrated by the choice-harm principle discussed above, every choice to act or refrain from acting causes "harm," at least theoretically and potentially, to other persons who commensurately are deprived of related opportunities.[85] Thus, unless the wrongfulness issue has al-

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82 *See supra* notes 47-48 and accompanying text. Aristotle's views on the importance of intention to corrective justice are unclear. *See generally* Wright, *supra* note 17, at 695-700. However, the central role of intention in justice, denied by the economists, is being reasserted by modern philosophers:

> The distinction between what is chosen as end or means, i.e. intended, and what is foreseen and accepted as a side-effect (i.e. an unintended effect) is a feature of the human situation which is more or less spontaneously and more or less clearly understood in unreflective practical reasoning, but which must be brought to full clarity in a reflective ethical, political or legal theory.

John Finnis, *Natural Law and Legal Reasoning*, 38 CLEV. ST. L. REV. 1, 5 (1990) [hereinafter Finnis, *Natural Law*]; *see also* RAKOWSKI, *supra* note 41, at 245-47 (noting the intuitive primacy of intentionally inflicted harm); John Finnis, *Allocating Risks and Suffering: Some Hidden Traps*, 38 CLEV. ST. L. REV. 193, 205 (1990) [hereinafter Finnis, *Allocating Risks*] (intentionally inflicted harm "is the paradigmatic wrong, the exemplary instance of denial of right").

83 On background risks, see Fletcher, *supra* note 9, at 543.

84 Not involving a prior property right in *B*.

85 *See supra* notes 47-48 and accompanying text. If *B*, standing at point *y*, chooses not to move at all but instead to remain at *y*, he deprives *A*, standing at point *x*, of the opportunity to move to *y*, thereby "harming" *A*. If, notwithstanding *B*'s presence at *y*, *A* decides to move to *y*, resulting in a collision that causes harm, the decision of *B* as well as that of *A* may be seen to "cause" the harm. Assuming that *B* had no prior property interest in point *y*, and assuming further that there is no good reason to prefer security (inaction) to action, then *B*'s choice to remain at *y* is just as much a cause of the collision as *A*'s choice to move to *y*. *See generally* Judith Jarvis Thomson, *Causality and Rights: Some Preliminaries*, 63 CHI.-KENT L. REV. 471 (1987). One's intuitive preference for the passive security interest of *B* in this situation probably reflects assumptions, often unfounded, that (1) *A* intended to harm *B*, and that (2) *B* had a prior property right in *y*. In the accident situation, the first assumption is simply wrong. The second assumption is more problematical and may derive from some rough conception of first-in-time-first-in-right. *See* Benson, *supra* note 63, at 584-91. Or perhaps it reflects a confusion between

ready been resolved by a preassignment of property rights to the victim of an accident,[86] even a "passive" accident victim[87] may be considered the responsible "cause" of the harm he suffered.[88] This is because the victim, even if completely motionless at the time of the accident, made a series of deliberative choices (and resulting actions) at some time prior to the accident that were necessary antecedents to its eventuality.[89] Nothing inherent in the victim's mere "passivity" at the precise moment of the accident is a shield from bearing moral responsibility for the intended or foreseeable consequences of such prior choices.[90]

Consequently, if the law is to treat actors[91] and victims[92] as equals, there appears to be no moral basis—in freedom or

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one's (imperfect) property rights to one's own body and one's mere interest in remaining at a particular point in space. *See infra* note 163. It may be, however, that *A* rather than *B* "owns" *y*, in which case *B*'s poaching thereon, and his obdurate refusal to move when he sees *A* coming, is as much or more the "cause" of the collision as is *A*'s assertion of a right to occupy his *y*.

86 *See generally* Epstein, *supra* note 73.

87 If at the time of the accident, the victim in fact is not passive, but chooses to act in a manner that immediately and foreseeably contributes to cause the harm, then even the initial intuitive preference for the victim diminishes sharply. *See infra* notes 133-34, 198-202 and accompanying text.

88 *See generally* Ronald H. Coase, *The Problem of Social Cost*, 3 J. L. & ECON. 1, 2, 12-13 (1960); Richard A. Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205, 217-20 (1973).

89 *See generally* Richard W. Wright, *Causation in Tort Law*, 73 CAL. L. REV. 1737 (1985).

90 Consider the observations of Perry, *supra* note 9.

> Except in unusual circumstances it can be said of any plaintiff that he made a choice to be where he (or his property) was when the harm he suffered occurred, and, just as the defendant was pursuing his own purposes in choosing to act as he did, so in making *his* choice the plaintiff was presumably attempting to further ends of his own . . . . In general, then, it would seem that, so far as the determination of who is responsible for a loss which has resulted from the interaction of two parties is concerned, there is no principled distinction to be drawn between cases involving an active plaintiff and those in which the plaintiff is supposedly passive.

Id. at 156.

> There is thus no simple distinction to be drawn between the parties to a tort action such that one can be labelled the 'active' injurer, and the other the 'passive' victim . . . . [W]e are necessarily dealing in tort law with an intersection of *two* choices to act, not with the effects for one person of a single such choice which has been made by another.

Id. at 157 (footnote omitted).

91 Who might more appropriately be referred to as "later actors," when the victims are passive at the time of harm.

92 Who might more appropriately be referred to as "earlier actors," when they are passive at the time of harm.

equality—for a general rule of liability that holds actors strictly accountable for accidental harm.[93] Instead, as will be seen below, the ideals of freedom and especially of equality support a scheme of responsibility containing pockets of strict liability but basically built on fault.[94]

III. FOCUSING ON THE GROUP: COMMUNITY

A. *The Concept of Community*

In contrast to the freedom ethic, which idealizes the interests of the individual, the ethic of the community[95] idealizes the interests of the group.[96] Although individuals comprise society so that the promotion of communal welfare advances the interests of (at least some of) its individual members, and vice versa,[97] the community ideal subordinates the separate welfare of members individually to the broader welfare of the group. Autonomy has no intrinsic value within the community ideal, but is valuable only instrumentally to advance the communal interests of society.

Although the communal ethic has been waning around the globe in recent years in certain formulations as a political and

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93 *See generally* Coleman, *supra* note 9; Owen, *supra* note 9; Perry, *supra* note 9; Weinrib, *supra* note 9. Thus, Ames and other early tort law scholars were right in arguing for the general superiority of a rule of fault (negligence) to the "unmoral" rule of strict liability. *See, e.g.*, James B. Ames, *Law and Morals*, 22 HARV. L. REV. 97, 99 (1908).

94 This is, of course, the prevailing scheme of responsibility for accidents in the general law of torts. I argue below that principles of moral philosophy suggest a like approach for products liability, such that negligence should replace strict liability as the dominant rule of responsibility in this particular area of the law of accidents. *See infra* notes 125-337 and accompanying text.

95 I use the term "community" here in its broadest sense, meaning basically the same thing as "society." This contrasts with the meaning given to the word by "communitarian" theorists, who consider communities to be smaller groups whose very purpose is to "mediate" between individuals and society. *See infra* note 119.

96 Freedom and community, or something like them, are perhaps the most fundamental—often opposing—ideals in contemporary American jurisprudence. *See, e.g.*, RONALD DWORKIN, A MATTER OF PRINCIPLE 71 (1985); Robert A. Burch Bush, *Between Two Worlds: The Shift From Individual to Group Responsibility in the Law of Causation of Injury*, 33 UCLA L. REV. 1473, 1519-29 (1986) (contrasting "liberal" and "social welfare" ideals). *But see* VALERIE KERRUISH, JURISPRUDENCE AS IDEOLOGY 19 (1991) (challenging "the individual-society dichotomy").

97 "[T]he common good is the good of individuals, living together and depending upon one another in ways that favour the well-being of each." FINNIS, *supra* note 20, at 305. Aristotle viewed the common good as "nothing more nor less than the good of each and every citizen." Wright, *supra* note 17, at 685. This is an important premise of the liberal wing of communitarian theory. *See* Bush, *supra* note 96, at 1553 (referring to this phenomenon as "[t]he paradox of the communatarian vision").

economic ideal,[98] it inevitably must remain a central value in any organized society where people live closely with their neighbors. Most persons understand that a single individual cannot be allowed to hold the entire world hostage to the satisfaction of his personal wants, that individuals often must make personal sacrifices for the greater good of others.[99] Whether one labels this ethic "altruism,"[100] "communal welfare," or something else,[101] it has been a central moral and political value in differing societies, religions, and philosophies throughout the history of the world. The community ideal was important even to Aristotle, the father of corrective justice, and to Kant, the father of modern "liberal" theories of philosophy based on the freedom of the individual. Aristotle considered humans to be by nature social;[102] Kant directed individuals to harmonize their personal ends with the ends of others within the community:[103] free though persons may all be, free within community.[104]

The community ideal is considered briefly here from various perspectives. First examined is the principle of utility, which has had a long and durable tradition in Anglo-American political theory. Although classical utilitarian theory is seriously flawed on a number of grounds,[105] and is even arguably irrational or inco-

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98 As demonstrated by the spectacular collapse of Marxism and Communism in the former Soviet block nations, and with the widespread decline of socialism around the world, even in Sweden, long viewed as the West's bulwark of the socialist state. "Sweden . . . spent decades creating a political and social utopia that made the country a model of socialism that worked. The system has now been declared dead and is being buried with the most cursory of honors." Marc Fisher, *The State is Humbled, but Swedes Adjust*, INT'L HERALD TRIB., June 1, 1992, at 2.

99 *See* Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29, 31 (1985).

100 *See* Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, With Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 584 (1982).

101 This ethic, at least in one formulation, may be referred to as "aggregate-social-welfare (e.g., utilitarian)," as distinguished from a freedom-type ethic which is "rights-based (e.g., Kantian)." *See, e.g.*, Wright, *supra* note 17, at 681.

102 *See* ARISTOTLE, POLITICS 5 (E. Barker trans., 1958); ARISTOTLE, *supra* note 41, at 321 ("whatever it is that people regard as constituting existence, whatever it is that is their object in desiring life, it is in this that they wish to live with their friends"). *See generally* Wright, *supra* note 17.

103 KANT, METAPHYSICS OF MORALS, *supra* note 25, at *433, 436; *see* JOHN FINNIS, FUNDAMENTALS OF ETHICS 121 (1983) (referencing Kant's third categorical imperative).

104 More recently, John Stuart Mill celebrated the ideals of both freedom and community. JOHN STUART MILL, UTILITARIANISM, LIBERTY, AND REPRESENTATIVE GOVERNMENT (1863).

105 It is particularly flawed in disregarding the separateness of persons. *See, e.g.*,

herent as a *universal* moral theory,[106] a general and nonrigorous[107] notion of utility serves as a useful model for values that seek to maximize the aggregate welfare or preferences of the group. The economic notion of efficiency, which rests to a large extent upon utility, is considered also within this context. Principles of both utility and efficiency, although incomplete as general theories of moral responsibility, will be seen to provide rational and fair results to particular accident law problems[108] when applied in a secondary, "default" role to principles of freedom. Softer notions of community, also relevant to the law of accidents, are then examined under the label "sharing."

B. Utility

Utility may be the most prominent communal theory in the recent history of Western political philosophy.[109] Consequential in nature, this ethic evaluates the moral quality of actions, and sometimes rules,[110] by the extent to which they maximize the av-

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RAWLS, *supra* note 41, at 29; RAZ, *supra* note 28, at ch. 11. *See generally* FINNIS, *supra* note 20, at 111-18, 176-77; JOHN J.C. SMART & BERNARD A.O. WILLIAMS, UTILITARIANISM: FOR AND AGAINST (1973). On the general decline of utilitarianism, see, *e.g.*, Brian Barry, *And Who Is My Neighbor?*, 88 YALE L.J. 629, 630 (1979) (book review) ("consequentialists are an endangered species among the philosophers of the world").

106 *See generally* FINNIS, *supra* note 20, at 112-13, 177. "[T]he [utilitarian and] consequentialist methodological injunction to maximize net good is senseless, in the way that it is senseless to try to sum up the quantity of the size of this page, the quantity of the number six, and the quantity of the mass of this book." *Id.* at 115.

107 The notion of utility employed throughout this Article deviates from classical utilitarianism, and hence is nonrigorous, in a variety of ways, including its substitution of aggregate welfare or preferences for happiness.

108 "Over a wide range of preferences and wants, it is reasonable for an individual or society to seek to maximize the satisfaction of those preferences or wants." FINNIS, *supra* note 20, at 111-12.

109 *See* Ronald M. Dworkin, *Rights as Trump*, *in* JEREMY WALDRON, THEORIES OF RIGHTS 153 (1984) (postulating that "some form of utilitarianism" is "the most influential background [political] justification . . . in the Western democracies"). For classical statements of utility, see JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION (1789); MILL, *supra* note 104. For a modern examination of its strengths and weaknesses, see SMART & WILLIAMS, *supra* note 105. For a sensitive comparison of utilitarian and egalitarian justifications of accident law, see R. DWORKIN, *supra* note 9, at 288-301 (finding the egalitarian account superior).

110 Although the application of rules may generate disutility in particular cases, they generally may satisfy the broader principles of "rule utilitarianism" by promoting the general welfare over time. *See generally* John Rawls, *Two Concepts of Rules*, 64 PHIL. REV. 3 (1955); J.O. Urmson, *The Interpretation of the Moral Philosophy of J.S. Mill*, 3 PHIL. Q. 33 (1953). Since rule utilitarianism has little relevance to personal moral accountability, it is accorded only slight consideration in this Article. *See infra* notes 118, 234, 244.

erage (or aggregate) welfare of all members of society. Since every action always produces some measure of harm as well as good,[111] the utilitarian goal is to produce the greatest proportion of benefits to harms, the greatest net benefit to society. The principle of allocative efficiency, which broadly seeks to maximize communal wealth, is an economic variant of the utilitarian ideal,[112] with philosophical roots in hypothetical consent.[113]

Conduct causing accidents is justified, according to both these theories, if the social harm reasonably expected to result from the conduct is exceeded by the expected social benefit. The converse is also true: accidental conduct is improper if it may be reasonably expected to produce more harm than good. The most renowned formulation of this concept in accident law is the Learned Hand standard for determining negligence, by which an actor's failure to incur a lesser burden to prevent a greater risk of harm implies the actor's negligence.[114] The Hand standard may be viewed as defining negligence in economic terms:[115] if the costs of preventing an accident are less than the costs of permitting it, the failure to incur the prevention costs is inefficient and, hence, improper. Guido Calabresi's "cheapest cost avoider" standard, which seeks to minimize the sum of the costs of accidents and the costs of ac-

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111 *See supra* notes 47-48 and accompanying text.

112 Explained in R. DWORKIN, *supra* note 9, as follows:

> (1) Everyone has a general moral duty always to act, in each decision he makes including decisions about the use of his own property, as if the interests of all others were just as important as his own interests . . . . (2) People act in that way when they make decisions that improve average happiness in the community as a whole, trading off losses in some people's happiness against gains to others. (3) The best practical elaboration of the duty that flows from these two first steps, the duty to maximize average happiness, takes the form of market-simulating rules of personal liability . . . .

Id. at 288. Dworkin ultimately rejects the utilitarian justification of accident law in favor of an egalitarian one based on a weaker notion of equality than the first utilitarian step expressed above. *Id.* at 295-301.

113 *See generally* Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980); Schwartz, *Proposals*, *supra* note 10, at 357-60.

114 *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (L. Hand, J.) (expressing the concept algebraically as B<PL implies negligence, where B is the burden or cost of avoiding accidental loss, P is the increase in probability of loss if B is not undertaken, and L is the probable magnitude or cost of such loss).

115 "Hand was adumbrating, perhaps unwittingly, an economic meaning of negligence." Posner, *supra* note 12, at 32. Note, however, that the principal relevance of the Hand standard to a moral inquiry of this type lies in its demonstration of respect for the equality of other persons and for communal interests. *See* Owen, *supra* note 9, at 722.

cident prevention,[116] rests similarly upon the goal of maximizing communal wealth or, the mirror image, minimizing communal waste. By placing liability upon those persons who most efficiently can prevent accidents, the law may help achieve an efficient level of expenditures on both accidents and precautionary measures.[117] Thus, principles of both utility and efficiency seek to deter accident-producing conduct that is on balance wasteful for society. Conversely, both principles encourage accident-producing conduct that produces greater benefits than harm.[118]

C. Sharing

Other "softer" theories of the community ideal have been developing increasingly in recent years, often under the label of "communitarianism."[119] Such theories are starkly different from both the liberal ideal of freedom and the "hard" versions of community that seek by some measure to maximize group welfare. The community itself is regarded deontologically[120] as a good, as are its essential aspects of fellowship and solidarity. Individuals take their definition from membership in the community, which provides the basis for their nourishment. The human condition is characterized more by the interrelationships among members of the community than by the members themselves. Through this prism, the ethic of autonomy is viewed as a sterile and unrealistic concept that fails to recognize the socialized nature of persons,

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116 *See* GUIDO CALABRESI, THE COSTS OF ACCIDENTS 135 (1970); Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055, 1084 (1972).

117 *See generally* CALABRESI, *supra* note 116; LANDES & POSNER, *supra* note 13.

118 Before leaving this introduction to the role of utility and efficiency in accident law, it is important to stress that the relevance of these social goals is limited by the nature of the present enterprise. That is, the principal objective of this Article is to develop liability principles grounded in personal moral accountability for one's choices and reflected actions. The principles themselves are designed, therefore, not to promote utility and efficiency, but to reflect the moral quality of the actors' choices. Thus, the focus of this Article is upon act, not rule, utility. *See supra* note 110 and *infra* notes 234, 244.

119 Communitarian political theory is developed in ALASDAIR MACINTYRE, AFTER VIRTUE (2d ed. 1984), MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE (1982), and CASS SUNSTEIN, THE MORAL COMMUNITY (1992). *See generally* LAW AND THE COMMUNITY—THE END OF INDIVIDUALISM? (Allan C. Hutchinson & Leslie T.M. Green eds., 1989); Drucilla Cornell, *Beyond Tragedy and Complacency*, 81 NW. U. L. REV. 693 (1987); Frank I. Michelman, *The Supreme Court, 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4 (1985); Philip Selznick, *The Idea of a Communitarian Morality*, 75 CAL. L. REV. 445 (1987); Sunstein, *supra* note 99; John R. Wallach, *Liberals, Communitarians, and the Tasks of Political Theory*, 15 POL. THEORY 581 (1987).

120 That is, in its essence, viewed nonconsequentially.

whose richness as humans can flower only through interdependent and mutual support with others in the community. Human value is found not in atomistic isolation, but in sharing.

The notion of communal sharing plays a role in both the substance and process of accident law. From a substance perspective, the sharing concept is embedded in the notion of spreading the burdens—the risks and costs—of accidents throughout the community. Here the inquiry shifts away from moral or economic accountability for accident causation to the unexpected calamity befalling members of the group and an ethic that the group should help relieve the suffering of its members if it can. In basic terms, the idea is that it is preferable for all to chip in a little bit, and so share the economic consequences of an accident, than for the victim to be left isolated and alone to shoulder a crushing economic loss. This sound idea of social philosophy provides a foundation for the institution of insurance, both private and public, and it is achieved to some extent through the process of holding manufacturers liable for accidental loss. From a quite different process perspective, the jury system promotes the sharing process. Representing the community, the jury[121] shares in the decision of whether an accident should have been avoided and who should bear its consequences according to group notions of both proper behavior and burden sharing.[122]

From a substance perspective, the sharing notion provides little guidance in designing rules or deciding cases since it fails to provide meaningful norms of responsibility for accidental loss. More generally, however, the sharing value provides at least some support for an admittedly imperfect accident litigation system, as will be seen below.[123] When particular cases are litigated within this system, juries infuse decisions with an important form of indi-

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121 The conceptual ideal of the jury as the community's representative fails in practice, of course, for a variety of reasons. *See generally* Symposium, *Is the Jury Competent?*, LAW & CONTEMP. PROBS., Autumn 1989, at 1; F. Patrick Hubbard, Trial Juries: A Just Reflection of the Community? (Oct. 26, 1990) (unpublished manuscript on file with author).

122 *See generally* Wells, *supra* note 7, at 2349. At least in this manner, Aristotle's notion of "distributive justice" finds its way, obliquely and extralegally, into accident decisionmaking. Whether and how distributive justice considerations may figure in a moral theory of tort and products liability law is beyond the scope of this Article. *See supra* note 63. On distributive justice in tort theory, see Benson, *supra* note 17; Perry, *supra* note 17; Wright, *supra* note 17. On distributive justice generally, see NORMAN E. BOWIE, TOWARDS A NEW THEORY OF DISTRIBUTIVE JUSTICE (1971); MORTON DEUTSCH, DISTRIBUTIVE JUSTICE: A SOCIAL-PSYCHOLOGICAL PERSPECTIVE (1985).

123 *See infra* notes 245-89 and accompanying text.

vidualized yet communal justice.[124] Thus, communal sharing values do provide certain secondary insights pertinent to a system of moral accountability for accidental loss.

IV. FOCUSING ON THE DISPUTE: FREEDOM AND COMMUNITY IN PRODUCTS LIABILITY LAW

The discussion thus far has focused on freedom and community as abstract values, and on their relevance to the general law of accidents. Here the inquiry shifts to the specific field of products liability law in an effort to determine how the principles of freedom and community may help determine the proper resolution of disputes within this context. The philosophical ideals addressed more generally above are seen to provide powerful insights that illuminate the search for justice in products liability law.

A. Freedom and Harm

The manufacture and use of products is in general good.[125] As a form of property, products generally promote the autonomy of both their makers and their users. Makers derive profits from the manufacture and sale of products, providing opportunities, and hence more autonomy, for the persons who own the maker.[126] The autonomy of the maker's employees is similarly promoted, as is the autonomy of the owners and employees of the maker's suppliers and distributors.[127]

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124 *See generally* Wells, *supra* note 7.

125 *See* Owen, *supra* note 7, at 64-66.

126 The terms "maker" and "manufacturer" are used in this Article to refer to the managers of a manufacturing enterprise in addition to the enterprise itself. This usage is helpful in distinguishing the owners from the managers, for it is the latter group which makes the choices concerning product safety. Despite the artificiality of regarding shareholders in some respects apart from the manufacturing enterprise, this terminology helps illuminate the point that the owners' interests are affected, just as those of victims and consumers generally, by product safety decisions made by a separate institution—management—with separate interests of its own.

127 It may be that the enhancement of autonomy for such collateral persons, however, should be largely disregarded in order to prevent double counting, since it comes at the expense of autonomy enhancement of persons who would have been employees of other enterprises that would have been supported by the capital of the maker's owners had they devoted it to some other use. *See infra* note 157. For a consideration of the position in moral theory of secured creditors of the maker, see Kathryn R. Heidt, *Corrective Justice from Aristotle to Second Order Liability: Who Should Pay When the Culpable Cannot?*, 47 WASH. & LEE L. REV. 347 (1990).

Users promote their own autonomy by purchasing goods. The very decision to purchase a product entails a choice to convert one's wealth (property) from stored (monetary) to tangible (chattel) form. The selection process involves a further exercise of choice and, hence, autonomy because the buyer must decide what other similar and dissimilar products (and services) to reject. Buyers purchase products to achieve some combination of personal objectives—a coat, for warming one's body and enhancing one's appearance; a book, for education and entertainment; a saw, for facilitating the assembly of other products to promote the user's more specific goals. Each such purchase reflects the buyer's choice to sacrifice other ends to further whatever purposes the product appears capable of helping him achieve. Thus, the very nature of product manufacture, exchange, and use is to promote the autonomy of human beings.[128]

The problem for products liability law, however, is that products sometimes also cause accidental harm: cars sometimes crash, and toasters sometimes start fires, because they are defective or used improperly. When a person is injured accidentally by a product, his autonomy may be restricted in a variety of ways—by hospitalization, loss of bodily function, pain, loss of income, loss of property, and damage to his ability to relate to others arising from these other losses. The manufacturer often may be able to restore at least that portion of the victim's lost autonomy caused by economic deprivation. But there is no good reason in freedom theory for obligating the manufacturer in every case to compensate the victim. The resources that a manufacturer might use to relieve the victim's harm, or loss of autonomy, must come from somewhere; they must be taken from someone else. They are taken in the long run both from the maker's owners,[129] through diminished

128 Philosophers across the centuries have understood the fundamental importance of property to the human enterprise and to the very identity of persons attempting to define themselves as separate individuals. "The point of property is . . . to provide an external sphere for the operation of the free will." Ernest J. Weinrib, *Right and Advantage in Private Law*, 10 CARDOZO L. REV. 1283, 1291 (1989). "The point, in justice, of private property is to give the owner first use and enjoyment of it and its fruits (including rents and profits), [which] enhances his reasonable autonomy and stimulates his productivity and care." FINNIS, *supra* note 20, at 173. *See generally* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1859 (1987). The idea is found in the philosophy of Hegel. *See* HEGEL, *supra* note 27, at Paras. 41, 44, 44A. Aristotle considered the possession of property important to (and limited by) the pursuit of virtue. ARISTOTLE, *supra* note 41, at 106-19 (bk. 4, chs. 1-6); *see* Wright, *supra* note 17, at 684; *infra* notes 171-72 and accompanying text.

129 *See supra* note 126.

profits,[130] and from other consumers, through higher prices. The very difficult issue therefore becomes determining the circumstances that require one person (or group of persons) in justice to surrender his or her (or their) autonomy in order to promote the autonomy of others.

The fact that a manufacturer makes and sells products, which generally are good, is an insufficient reason for requiring a manufacturer to compensate a victim of a product accident. This activity, like any other action, always involves some harm to others.[131] As demonstrated by the choice-harm principle discussed above, moral philosophy requires more than action, related in some manner to another's harm, for the actor to be held accountable for the harm.[132] Moreover, the choice-harm accident paradigm involves a victim who is "passive," who is affirmatively "hurt by" an actor pursuing conflicting interests of his own. Yet, product accidents generally result from deliberative choices and actions of a product user, who has selected a particular product and reduced it to his personal dominion and control, and who is putting it (often actively) to use in the pursuit of his own chosen goals. The choice-harm paradigm of an active *A* hitting a passive *B*, therefore, simply does not fit the typical products liability case.

The products liability paradigm[133] is more complex: *A*, standing at point *x*, makes product *P; A* takes *P* to point *z* where he leaves it, offering it for sale to all persons, and then returns to *x* where he resumes his other business; *B*, standing at point *y*, wanting a particular type of product to pursue a particular goal, leaves *y* and goes to various points including *z* to examine various products, finally deciding upon *P*, which he pays for and reduces to his dominion and control; *B* then returns to *y* with *P*, where he resumes his business, using *P;* in the process of using *P*, *B* is hurt. This complex paradigm of a typical product accident demonstrates that even the most attractive paradigm for compensation—*A* actively hits a passive *B*—is unable to explain the normal product accident. Even if we exclude from the paradigm the frequent fact of *B*'s carelessness in using *P*, sometimes for an improper pur-

130 And in diminished dividends and investment value.

131 *See generally* Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277 (1985); David G. Owen, *Problems in Assessing Punitive Damages Against Manufactures of Defective Products*, 49 U. CHI. L. REV. 1 (1982); Schroeder, *Rights*, *supra* note 9, at 495.

132 *See supra* notes 47-49 and accompanying text.

133 Based only on the maker and the user-victim, as assumed above. *See supra* note 4.

pose,[134] *B*'s harm appears to be as much or more the result of his own choices and actions as of any morally relevant choice or action by *A*. A product user, in other words, is at least as likely the author of his own harm as the "passive victim" of the maker's conduct.

Basing liability merely on the acts of making and selling products thus would produce a general rule of strict liability that is unacceptable on moral grounds.[135] A manufacturer's liability must rest instead on something that is wrongful in its actions. From an autonomy perspective, the maker can be held morally accountable for a harm only if it should contemplate that the product by some measure will cause *unwarranted* harm to the freedom of product users. Yet freedom as a naked ethic cannot provide a method for determining whether harm to product users is proper or unwarranted, or where or how the limits on a maker's or user's freedom should be drawn. For its necessary enrichment, freedom must draw from the ideals of truth, equality, and utility.

B. Truth and Expectations

The first key to enriching freedom, as discussed in general terms above, lies in truth. People's conceptions of the true world, their expectations as to how the future will unfold in relation to their choices and their actions, depend to a large extent on what other people say and do. Truth and expectations, rooted deeply in autonomy, therefore play a major role in determining moral accountability for product accidents.[136] Product accidents simply would not occur at all if both the manufacturer and the user truly understood all characteristics of the product, the level of the user's knowledge and skill, and the context of the product's use.[137]

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134 "[O]ver 2/3 of all injuries related to consumer products have nothing to do with the design or the performance of the product. They relate to the misuse or abuse of the product." Mary Fisk, *An Interview with John Byington, Chairman, Consumer Product Safety Commission*, 14 TRIAL 25 (1978). Compare the results of a Consumer Product Safety Commission in-depth study of 74 accidents involving portable power circular saws in 1975, in which "operator error" was found to be "the only appropriate description of the accident process" in 33 of the cases. Verne L. Roberts, *Circular Saw Design: A Hazard Analysis*, 1 J. PROD. LIAB. 127 (1977).

135 *See supra* notes 70-94 and accompanying text.

136 The classic study of this general issue is the monumental "article" by Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974).

137 This proposition is established generally above. *See supra* notes 33-39 and accompa-

Manufacturers and users each have certain visions of the world, which may or may not be true, that are relevant to moral accountability for product accidents. The first such visions of reality, or expectations, concern the capacity of persons (generally or in particular) to interact safely with particular products in various environments of use. The second type of expectations concerns the allocation of responsibility for safety between the maker and the user. These are a form of "background expectations" based on communal beliefs concerning moral and legal norms of behavior and personal or corporate responsibility.[138] If, in any particular case, both forms of expectations conform to reality and hence are true, then the product can be used safely to accomplish the user's goals. If, instead, either the maker or the user misperceives the true capacities of the product or the user, an accident may result.

The first problem to consider from a truth perspective concerns express statements that affirmatively create false expectations of product safety. When the maker knowingly makes false statements about a product's safety, hoping to trick consumers into buying the product upon the belief that it is safer than it truly is, the manufacturer steals the autonomy of consumers. Thus, it should pay for any harm resulting from the theft.[139] Even if a manufacturer's assertions of product safety are not wilful but merely negligent, they still are by definition wrongful, so that the manufacturer is morally accountable for resulting harm.

More difficult is the moral significance of a manufacturer's making an innocent but untrue statement about a product's safety. Arguably, making such a statement is merely a particular form of action, such that there should be no moral responsibility for untoward consequences because of the absence of a guilty will. Yet there are powerful reasons within the ideals of freedom and truth that support a rule of strict liability for accidental harm resulting from innocent but false assertions of product quality.

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138 A manufacturer's expectations of this type are often formed at a conscious level, frequently with the assistance of legal counsel. Even sophisticated consumers, on the other hand, probably do not often deliberate upon the division and degrees of safety responsibility in the products they buy and use. However, shared notions of responsibility for safety and accidents in various contexts do generally inhere in the community, forming a kind of background expectation possessed, at least subconsciously to some extent, by consumers generally.

139 For an argument that fraud in moral theory is a form of theft, see Owen, *supra* note 36, at 718-19.

When a manufacturer makes safety "promises" in an effort to sell its products, its very purpose is to convince potential buyers that the promises concern matters that are both important and true. Safety information is important and valuable to users because it provides a "frame of reference"[140] that permits a user to shift his limited cognitive and other resources away from self-protection, responsibility for which is thereby placed upon the manufacturer, toward the pursuit of other goals. In this manner, true safety information adds value to the product by enhancing the autonomy of the user, for which the consumer fairly pays a price.[141] So, if the information is false, the purchaser loses both significant autonomy and the benefit of his bargain. Since an important purpose of the law is to promote autonomy and the equality of the buyer to the seller as reflected in their deal, the law should demand that the seller rectify the underlying falsity and resulting inequality in the exchange transaction if harm results[142]—whether or not the seller should have realized that the price unfairly reflected value that was false.[143] More general communal interests are also promoted by the enforcement of such promises, for the confidence of all members of the community in the trustworthiness of others is

140 *See* FINNIS, *supra* note 20, at 304.

141 Even if the payment of such a price might sometimes seem only theoretical, it is in fact quite real, for the apparent but false value will convince consumers at the margin to buy the product and will diminish the ability of all users to choose to use the product safely according to their fair expectations of its capabilities.

142 *See generally* James Gordley, *Equality in Exchange*, 69 CAL. L. REV. 1587 (1981).

143 Custom buttresses the moral argument for a strict accountability norm for innocent misrepresentations of product quality. Explicit assertions of product quality have for centuries been construed as guarantees, placing the risk of falsity upon the seller, who generally also was the maker in times past. Liability for express warranties is traceable at least to the law of ancient Rome. *See, e.g.*, BARRY NICHOLAS, AN INTRODUCTION TO ROMAN LAW 181 (1962). Perhaps this guarantee convention arose from the intractability of establishing a seller's state of mind and upon an assumption that it was more likely guilty than free from blame. *See* Walton H. Hamilton, *The Ancient Maxim Caveat Emptor*, 40 YALE L.J. 1133 (1931). Or perhaps the source of the seller's strict responsibility at law for untrue statements may be found instead in the utilitarian notion that advantageous trade should be enhanced by a rule permitting buyers to rely upon the claims of sellers: it usually is cheaper for sellers to ascertain the truth of their claims than it is for buyers. Be that as it may, centuries of custom now both support and generate the expectations of buyers that they are at law entitled to trust in the truth of claims of quality, including safety, made by product sellers.

fundamental to positive interpersonal relating[144] in general, and to commercial efficiency in particular.

Whether manufacturers are morally obligated to act affirmatively to provide consumers with information—by warning of product dangers and instructing on safe use—is a very different question that depends largely upon the availability of information to manufacturers and consumers. If the information is obvious or possessed already by consumers—that knives can cut and matches burn—there generally is no reason in moral theory for a manufacturer to warn consumers.[145] The possibility of a duty to warn only arises, therefore, if the risk is a latent one, hidden from consumers in the product. A seller's failure to warn about such dangers, depriving consumers of the truth, was considered a form of passive fraud in Roman law[146] and by Aquinas.[147] At least in terms of their "background expectations,"[148] most people today probably believe that manufacturers should provide warnings about conditions that they know to be dangerous to consumers. In addition, consumers probably have a background expectation that manufacturers will seek to discover and warn about unknown but foreseeable dangers that are reasonably discoverable—discoverable, that is, at a cost justified by the product's price and proportionate to its foreseeable risks. At bottom, such expectations of reasonableness probably derive largely from equality of respect.

When a danger at the time of sale is neither known nor reasonably discoverable, the problem of moral accountability for resulting accidents becomes far more difficult. Responsibility arguments based on "theft" or other fault collapse, as do theories based on credible notions of the community's background expectations. Truth arguments made above, in the context of affirmative

144 *See* FINNIS, *supra* note 20, at 306 (noting the importance of trustworthiness to "the common good, the need for individuals to be able to make reliable arrangements with each other for the determinate and lasting but flexible solution of co-ordination problems and, more generally, for the realizing of the goods of individual self-constitution and of community").

145 Whether consumers ought to be reminded of significant dangers that they are likely to forget is a special problem.

146 "[I]f the vendor was aware of the defect and did not disclose it, he was guilty of *dolus* and would be liable in the *actio empti* . . . ." JOSEPH A.C. THOMAS, TEXTBOOK OF ROMAN LAW 288 (1976); *cf.* THE DIGEST OF JUSTINIAN 548 (Theodor Mommsen et al. eds., 1985) (if the seller "knew but kept silent and so deceived the buyer, he will have to be held responsible to the buyer for all losses he sustained due to this sale").

147 *See* Hamilton, *supra* note 143, at 1138.

148 *See supra* note 138 and accompanying text.

safety representations that are unknowably false,[149] may at first appear to be the same, but they are not. That the maker in the present context does not affirm the product's safety, but is merely silent, makes all the difference: the maker does not by false statements affirmatively construct a false world of value by promising potential buyers that the product is safer than in truth it is. Thus, failing to warn about an unknowable danger contrasts sharply, in terms of moral accountability, with actively (albeit innocently) misleading consumers by false statements to relinquish their normal levels of self-protection. The "silent" maker, by hypothesis, in no way wills any safety expectation or loss upon the victim; nor does the maker otherwise *cause* the loss, except by providing a product it reasonably thinks is good and by failing to cure a misimpression it neither made nor even knows exists.

Responsibility for harm from undiscoverable product dangers thus may be viewed most fairly as lying with the product[150]—or, perhaps, in nature or in the inadequacies of science or technology—rather than with the manufacturer. That the chemistry[151] of the world contains vast numbers of unknown dangers is a fact well known to consumers who seek the benefits of the products of modern science and technology. Especially when potent chemicals are first developed to treat serious human illnesses, consumers well understand—even if only in a subconscious, "background" kind of way—that unknowable risks may well accompany the benefits expected to result from manipulating the atoms of the universe. And notwithstanding this important background understanding or expectation, most people probably want (or "demand," from the economic perspective of product makers) manufacturers to provide them with the benefits of science and technology if and when such benefits reasonably appear to exceed the risks.[152] If a maker does so, and an undiscoverable danger lurking in the product causes injury to a user, the maker cannot fairly be held responsible for the harm. The maker did not choose to put, nor did he unreasonably put, the danger in the product or the world, nor did the maker affirmatively mislead users into surrendering their own

149 *See supra* notes 140-44 and accompanying text.

150 *See generally* Bernstein, *supra* note 9; C.A. Peairs, Jr., *The God in the Machine: A Study of Precedent*, 29 B.U. L. REV. 37 (1949).

151 And physics, although perhaps to a lesser extent.

152 This conclusion thus assumes that the maker has devoted reasonable efforts to discovering unknown risks, to mitigating known risks, and to warning about important risks known to the maker but hidden from consumers.

responsibility for self-protection. Instead, the manufacturer served in a real sense only as a conduit for consumer preferences, providing consumers with what they reasonably appeared to want. Thus, the victim of an accident from an unknowable generic product danger probably should have no claim to hold the manufacturer accountable for the loss.[153]

Manufacturing flaw cases, however, involve entirely different types of expectations by manufacturers and consumers. The very essence of an ordinary exchange transaction involving a new product is the notion that the buyer is paying appropriate value for a certain *type* of "good" comprised of various utility and safety characteristics common to each unit of that type produced by the maker according to a single design. In this context, both the maker and the buyer contemplate (and hence contract for) an exchange of a standard, uniform monetary value for a standard, uniform package of utility and safety. At some level of abstract awareness, most consumers know of course that manufacturers sometimes make mistakes and that the cost of perfect production for many types of products would be exorbitant. However, while consumers may abstractly comprehend the practical necessity of allowing imperfect production, their actual expectation when purchasing a new product is that its important attributes will match those of other similar units. When a purchaser pays full value for a product that appears to be the same as every other, only to receive a product with a dangerous, hidden flaw, the product's price and appearance both generate in the buyer false expectations of safety which denies the buyer's right to truth.

The earliest approach the modern law employed to enforce these expectations, which has now been in effect for a century or two,[154] was to imply into the exchange transaction a promise or warranty by the seller of the basic, uniform soundness—safety, in this context—of its goods. The important idea here is not that the

153 This conclusion is limited to generic dangers, and otherwise stated weakly, because it may well be the closest and most difficult question of moral theory in products liability law. The limitation of the conclusion to generic (design) dangers, as distinguished from unknowable production flaws affecting only some small proportion of the line of products, springs from the differing effect of truth, equality, utility, and hypothetical consent principles in design and manufacturing defect cases. *See supra* notes 149-52; *infra* notes 154-56, 196-97, 237-44 and accompanying text.

154 It has been in effect longer in England than in most states in this nation. *See generally* William L. Prosser, *The Implied Warranty of Merchantable Quality*, 27 MINN. L. REV. 117 (1943).

law of sales compels this result but that the law has long recognized the existence of such central expectations of the parties, and especially of consumers. Buyers cannot intend to pay fair value for a mismanufactured product only to be maimed or killed.[155] Nor, in the modern world, can a manufacturer reasonably expect to be relieved of responsibility for such harm from hidden production defects.[156] Thus, the expectations of the parties, and ultimately the truth, support the maker's responsibility for harm from latent manufacturing defects.

C. Equality and Risk Control

Equality provides another important key to understanding how freedom should be defined in products liability law, as it does in accident law more generally. In making product safety decisions, a manufacturing enterprise should accord equal respect to the interests of all persons likely to be affected—its owners, potential accident victims, and the vast majority of consumers who will not be injured and who need useful products that they can afford.[157] Thus, although a manufacturer must respect the security interests of potential accident victims, the principle of equality demands that the type and amount of that respect be limited by a "due" respect[158] to the conflicting interests of these other groups of persons. The proper balancing of these overlapping and competing interests is fraught with difficulty and may be considered "legislative" in its nature.[159] Manufacturers must act paternalistically to protect—with equal concern and respect—the freedom[160] and

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155 In the leading English case explaining this notion of implied warranty, Lord Ellenborough colorfully explained the concept: "[T]he intention of both parties must be taken to be, that [the product] shall be saleable in the market under the denomination mentioned in the contract between them. The purchaser cannot be supposed to buy goods to lay them on a dunghill." Gardiner v. Gray, 171 Eng. Rep. 46, 47 (K.B. 1815).

156 If the defect is obvious, rather then hidden, there is no untruth within the transaction to support the maker's responsibility for resulting harm.

157 Although important, the interests of the manufacturer's employees, suppliers, creditors, and others collaterally benefiting from the manufacture and sale of products perhaps should be excluded from the moral calculus in order to prevent double counting. *See supra* note 127; *cf.* Mary Griffin, 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, 619-22 (1988).

158 For a definition of "due," see Gordley, *supra* note 142.

159 Compare James Henderson's characterizations of manufacturer design decisions as "polycentric" and "managerial." James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973).

160 If the legislation analogy is apt, manufacturers (as the state) should be guided by

other interests of competing constituencies: shareholders are entitled to a fair[161] return on their investments; potential accident victims are entitled to a fair measure of product safety; and users are entitled to a fair measure of usefulness in their products, a proper but not excessive level of product safety, and the availability of products at a fair price.

Before exploring how in moral theory a manufacturer should conduct this kind of legislative balance, it should be helpful to scrutinize the common assertion that safety interests of potential victims are inherently of a higher order than the interests of actors in "mere" money and convenience.[162] Interest ordering along these lines, whereby the bodily integrity interest[163] is accorded a higher abstract value than property and economic interests, has a long and deep tradition in the law of torts.[164] Yet this ethic is rooted generally in the context of truly intentional takings,[165] of palpably identifiable property interests known to belong to specific persons targeted by the actor,[166] where the certainty of harm to vested "property rights" is clear.[167] This

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the Kantian precept that legislation should maximize the freedom of all persons. *See* IMMANUEL KANT, CRITIQUE OF PURE REASON *316/B373 (N. Smith trans. 1929 [1965 ed.]) (1781, 2d ed. 1787).

161 I use the term "fair" in this discussion to mean adequate under the circumstances for the constituency, not equal.

162 *See, e.g.*, Beyleveld & Brownsword, *supra* note 9 (utilizing Alan Gewirth's lexical ranking of goods into three tiers, whereby a person's physical integrity is ranked as a first-tier, "basic" good, whereas wealth and convenience would be ranked as third-tier, "additive" goods).

163 One must cautiously bear in mind the important and often subtle distinctions between notions of a person's "interests" in safety, bodily integrity, and security; a person's (imperfect) property rights in his body; and the differing conceptions of abstract "rights" and "property rights" variously employed by commentators on tort law theory. *See supra* notes 43-94 and accompanying text.

164 *See generally* RESTATEMENT (SECOND) OF TORTS §§ 77-86 (1965); W. PAGE KEETON, D. DOBBS, R. KEETON & D. OWEN, PROSSER AND KEETON ON THE LAW OF TORTS 132 (5th ed. 1984) [hereinafter PROSSER & KEETON ON TORTS] ("the law has always placed a higher value on human safety than upon mere rights in property").

165 "[T]hose who intend a result . . . are not merely creating a risk of that result. Rather, in their own self-understanding, they are trying . . . to bring it about . . . . They are not content to leave things to chance, i.e. to hazard or to risk, but are intervening to achieve what they intend." Finnis, *Allocating Risks*, *supra* note 82, at 201-02. "In *intending* harm, one precisely makes [losses to others] one's gain . . . ; one to that extent uses them up, treats them as material, as a resource for a good that no longer includes their own." *Id.* at 203. "To choose harm is the paradigmatic wrong, the exemplary instance of denial of right." *Id.* at 205.

166 The classic case is Vincent v. Lake Erie Transp. Co., 124 N.W. 221 (Minn. 1910). The modern classic is Katko v. Briney, 183 N.W.2d 657 (Iowa 1971).

167 *See supra* notes 70-83 and accompanying text.

form of interest ordering fits much less comfortably in accident law,[168] however, which generally involves only remote and contingent harm in the form of risks to speculative interests[169] of often unknown persons.[170] While autonomy certainly is dependent on a person's health and safety, it also depends significantly on the state of a person's wealth[171]—of holdings of money and other property.[172] Convenience by definition is what facilitates a person's achievement of chosen goals. The choice-harm principle[173] itself is premised on the equality of one person's interest in security, including safety, with another's freedom of action to promote chosen goals—goals which often require the use of property and may be stored in monetary form. Of course this equality is one only of interests in the abstract, so that a person's safety interests should be protected against the action interests of another when the latter's interests (in profits, convenience, or other goods) are of lesser value by some fair measure. But the

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168 Early, undeveloped efforts to justify a rule of strict products liability in terms of risk-spreading and enterprise-liability theories were predicated on interest ordering of this type, at least to some extent. *See, e.g.*, ALBERT A. EHRENZWEIG, NEGLIGENCE WITHOUT FAULT (1951), *reprinted in* 54 CAL. L. REV. 1422 (1966). The soundness of such efforts is increasingly challenged. *See, e.g.*, Richard A. Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C. L. REV. 643 (1978); Howard C. Klemme, *The Enterprise Liability Theory of Torts*, 47 COLO. L. REV. 153 (1976); Owen, *supra* note 6, at 681; Priest, *supra* note 1; Alan Schwartz, *Products Liability and Judicial Wealth Redistribution*, 51 IND. L.J. 558 (1976). *See generally* Fredrick L. Sharp, Note, *Aristotle, Justice and Enterprise Liability in the Law of Torts*, 34 U. TORONTO FAC. L. REV. 84 (1976).

169 Such interests may or may not include rights against such risks.

170 It is true that mass marketing of many thousands of products with inherent design dangers generates a statistical certainty that some number of consumers will be injured, from which one may argue that such injuries are intentional takings by the manufacturer. *See* Cowan, *supra* note 3, at 1077. Yet most consumers probably would consent in advance to bear responsibility for (and personally insure against) such risks as might be reasonable, that is, to the extent that the foreseeable risks were worth the foreseeable benefits, and manufacturers warned consumers of hidden risks and did not misrepresent their products' safety. As for unforeseeable risks, the "taking" theory fails by its own terms, because one cannot have "statistical certainty" of that which is unknowable by hypothesis.

171 Together with liberty, opportunity, and self-respect, Rawls classifies wealth as a "primary good," since it is "necessary for the framing and the execution of a rational plan of life." RAWLS, *supra* note 41, at 433. Viewing property as a form of wealth, philosophers from the time of Aristotle have recognized its fundamental importance to the pursuit of goals by human beings. *See supra* note 128 and accompanying text. Some philosophers, such as Alan Gewirth, *see* Gewirth *supra* note 9, and Joseph Raz, *see* RAZ, *supra* note 28, accord property and other forms of wealth a lower value.

172 The importance of property to a person's sense of identity, and overall autonomy, is discussed above and below. *See supra* note 128; *infra* notes 204-12 and accompanying text.

173 *See supra* notes 47-49 and accompanying text.

converse is also true: accident victims have no inherent moral right to derogate the greater profit-seeking (hence freedom-seeking) interests of product makers.

A manufacturer, therefore, must in moral theory accord equal ("due") respect to the individual interests of potential victims, consumers generally, and its shareholders. If the maker does not do so, if it subordinates the safety interests of potential victims to shareholder and general consumer interests of lower value, then it is morally responsible for resulting harm. But if instead, the maker properly strikes the balance, according due consideration to potential victim interests in making product safety decisions,[174] then it has fulfilled its moral obligations and may not fairly be held accountable for resulting harm.[175] Such harm to victims of product accidents, whose safety interests have been accorded due respect, should be considered "necessary" harm within the inherent limitations of science, technology, and the social calculus.[176] And so the principle of equality appears to demand that manufacturers improve a product's safety as much as possible without increasing its price or decreasing its utility "unreasonably."[177] This kind of

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174 Due consideration to potential victim, from an equality perspective, interests includes guarantees against false safety statements and flaws of manufacture. *See infra* notes 186-90 and accompanying text. In addition, due consideration means taking all reasonable steps to provide consumers with information on all material, hidden product risks. *See infra* note 191 and accompanying text. In the context of design, due consideration reflects a balance based on reason, generating just "enough" safety but not "too much." This is because the manufacturer, as legislator, is able typically to provide only a single standard of general applicability with respect to each product safety decision. Such decisions may not properly seek to *maximize* the safety interests of potential victims but instead should seek an aggregate mix of utility, safety, and cost that *optimizes* the interests of all constituencies. *See infra* notes 193-97 and accompanying text. Such a welfare-maximizing approach should not cause rights guardians to despair, however, since it contemplates "due" consideration of all relevant potential victim interests, including such rights as the entitlement to truth concerning product dangers and products free of manufacturing defects. It simply is beyond the power of a legislator legislating morally to provide more than due consideration to the conflicting interests of the affected constituencies. *See infra* notes 217-22 and accompanying text.

175 This is true whether the risk of harm was foreseeable or unforeseeable at the time the manufacturer made its balancing decision. A manufacturer can make reasoned decisions of this type only upon such information that it possesses or reasonably can obtain. There simply is no rational way for it to evaluate risks which are unknowable and speculative.

176 *See* Schroeder, *Rights*, *supra* note 9. Reasonable risks of this type might be referred to as "background risks." *See* Fletcher, *supra* note 9. Or they might be designated morally or socially unavoidable risks.

177 The term "unreasonably" here means without due regard to the equal worthiness (not worth, but proportionate thereto) of the interests of all parties affected by the deci-

legislative balancing demanded by equality thus suggests a principle of optimality.[178]

The equality analysis may be clarified by focusing more closely on the primary determinant of whether accidents occur: risk control. The notion of risk control lies at the very heart of products liability law, for it involves the various determinants of whether accidents will occur. It concerns at once risk creation and its limitation by the parties who control it—both the maker and the user.[179]

Manufacturers have much greater control over product safety than consumers in many ways: the manufacturer, not the consumer, conceives and determines the balance of utility and safety in the product; the manufacturer alone determines how much quality control to use to prevent and screen out errors in production; the manufacturer has practical access to far greater safety information than consumers, and it alone determines how much and in what manner to share such information with the consumers who need it; and the manufacturer alone decides what promises about product safety to make to consumers to induce them to buy the product. In sum, the manufacturer's initial power over product safety—risk control—is enormous; by comparison, the consumer's initial control of product risk is almost trivial. Thus, there is a gross inequality in the initial distribution of risk control between the maker and the user.[180]

Because a person's freedom depends significantly upon his power,[181] this tremendous imbalance in the allocation of risk control or power between makers and users is of significant moral and legal interest.[182] When persons involved together in an accident are strangers to one another, the prior allocation of power

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sional calculus.

178 *See infra* notes 193-95 and accompanying text.

179 Recall that here, as elsewhere, this Article for simplicity considers the paradigmatic case involving a maker and a user only, where risk control is allocated fully between the two, rather than being shared with third parties such as employers, doctors, or bystanders. *See supra* note 4. For a helpful analysis of bystander issues, see Robert F. Cochran, Jr., *Dangerous Products and Injured Bystanders*, 81 KY. L.J. (forthcoming Apr. 1993).

180 Compare Ronald Dworkin's concept of "equality of resources." R. DWORKIN, *supra* note 9, at 297.

181 *See supra* notes 29-30 and accompanying text.

182 "[M]uch of [tort law] can best be understood as a manifestation of the law's concern with exercises and defaults in the use of power." MARSHALL S. SHAPO, THE DUTY TO ACT—TORT LAW, POWER, & PUBLIC POLICY xiii (1977). *See* David G. Owen, *Civil Punishment and the Public Good*, 56 S. CAL. L. REV. 103, 104-05 (1982).

between the two, like the allocation of any resource, is generally irrelevant to the issue of responsibility for the accident.[183] The truth of this general proposition, however, depends upon the parties being strangers before the accident, not linked together in some relationship generating rights and duties between the two. Although the maker-user relationship is not ordinarily viewed as linking the parties closely, their fortunes in fact are intertwined significantly: makers owe their very existence to user demand for their products, and the welfare of "user-constituents" depends significantly upon how makers "legislate" on product usefulness, price, and safety. This form of legislative relationship between makers and users, examined more closely below,[184] is a sufficient link for morals and the law to require makers to take reasonable steps to employ their resources in a manner that is likely to protect users from unreasonable risks.[185] In the modern world, the maker-user relationship probably creates in the minds of most consumers a generalized expectation of such protection, and equality of respect appears to demand it also.

More specifically, equality of respect demands, first, that a maker provide consumers with all important information that it possesses or should possess on the dangers in its products, and of course it should promise no more safety than its products truly have. Second, manufacturers are accountable for injuries resulting from production flaws, regardless of the maker's efforts or even power to prevent such errors.[186] The manufacturer ordinarily has

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183 As a general abstract proposition, the extent of the parties' respective holdings of resources (the ownership of which entails power) prior to an accident properly has no bearing on moral accountability for the accident. This is because the proper allocation of resources among persons in society involves matters of "distributive justice," as opposed to the "corrective justice" issues arising out of accidental transactions between two persons. *See, e.g.*, Coleman, *Corrective Justice*, *supra* note 17, at 2-7; Ernest J. Weinrib, *Legal Formalism: On The Immanent Rationality of Law*, 97 YALE L.J. 949, 983-84 (1988); Wright, *supra* note 17, at 625; *see supra* notes 63-69 and accompanying text.

184 *See infra* notes 219-22 and accompanying text.

185 Tort law has found a relationship sufficient to impose a duty of affirmative action to help another where the victim is "particularly vulnerable and dependent upon the defendant who, correspondingly, holds considerable power over the plaintiff's welfare." Moreover, such relations typically involve "some existing or potential economic advantage to the defendant. Fairness in such cases thus may require the defendant to use his power to help the plaintiff, based upon the plaintiff's expectation of protection, which itself may be based upon the defendant's expectation of financial gain." PROSSER & KEETON ON TORTS, *supra* note 164, at 374.

186 Hence, the manufacturer is accountable for resulting injury regardless of the unforeseeability of the risk, assuming the risk inhered within the product's normal uses. On the latter point, a manufacturer would not appear to bear moral responsibility for

virtually exclusive power to prevent errors in the manufacturing process. From this enormous imbalance of power springs the demand, from equality,[187] that makers bear responsibility for the consequences of production defects. This is so because the maker, as a legislator, is duty-bound to treat potential victims with equal respect to consumers generally and to shareholders. A consumer injured by a production defect is subjected to a vast disparity in both risk[188] and result[189] from consumers generally. This inequality is unfair and should be rectified because the victim paid an equal price for what was sold as and appeared to be a product of equal quality to those supplied to other consumers. Moreover, since the price charged by the maker and paid by the victim was for a product that was "good," but was really bad, restitutionary notions behind equality compel the maker to absorb the victim's losses and to transfer them to its shareholders.[190]

The moral questions concerning dangers in design raise very different questions of equality and risk control. If the manufacturer should foresee that some aspect of a product's design will present a danger that may be hidden from consumers, it must respect their dignity by at least warning of the risk.[191] Yet many prod-

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harm caused by a person who maliciously converts a production defect, such as a letter opener mistakenly produced too sharply, to an instrument for inflicting harm.

187 The demand springs as well from truth. *See supra* notes 153-56 and accompanying text.

188 This "risk disparity" arises at the time the consumer purchases a product that contains a defect. As a defectively manufactured product leaves the assembly line, all potential consumers share a small and equal risk of buying the product with the flaw. Yet, the maker-consumer relationship ordinarily does not become significant until a particular consumer actually buys a particular product manufactured by a particular maker. Once the consumer consummates the purchase of a particular product that is flawed, that person buys as well a risk of harm peculiar to himself not shared by purchasers generally.

189 This "result disparity" reflects the fact that the victim's injury was not suffered by the great majority of others who, for an equal price, purchased and used the same type of product.

190 Although the victim's loss and shareholder gain ordinarily will not be exactly equal, which may appear to weaken the restitution metaphor, shareholders theoretically will have received a substantial wrongful gain from producing the product with a flaw. This gain should be available for restitutionary recovery by the victim. The maker wrongfully benefits in two ways from making and selling products with production flaws. First, in making such defective products and, then, in failing to catch such products prior to distribution, the maker improperly saves costs in regulating both production quality and quality control. Second, in pricing defective products at full value, the maker improperly takes full monetary value for product "value" that is false. Indeed, the value of a dangerously defective product will be negative, and perhaps substantial, reflecting the buyer's risk of harm presented by the defect.

191 Assuming, of course, that there is a feasible way to do so. If there is not, and

ucts, chain saws for example, contain inherent dangers in design that are obvious for all to see. With products such as these, the consumer is not tricked into thinking that the product is safer than it really is, nor does he pay for safety value that is imaginary. Instead, when persons buy and use products with obvious, inherent dangers—or dangers that have been warned about—they make personal choices to engage the risk.[192] When consumers suffer injury from risks that they deliberately selected to accomplish their personal objectives, or willingly accepted and chose to work around, equality and risk control have much to say about moral responsibility for the accident.

Equality requires manufacturers to legislate proper levels of inherent danger in design, as further discussed below.[193] This obligates manufacturers to provide potential victims with as much respect as given others, by building into products as much safety as dictated by reasonable—optimal—care.[194] Yet manufacturers are also bound by principles of equality to stop there and to refuse to make their products safer than the point at which a proper balance reasonably appears to be struck between product value,[195] for consumers generally, and profits, for their shareholders. This is the point of "optimal," rather than maximum, safety, where the interests of these other groups are accorded equal respect to the interests of potential victims.

Victims of accidents from risks that reasonably inhere in a product's design—risks that cannot be eliminated or sufficiently reduced[196] without diminishing the product's utility or increasing its price unreasonably or that are unknowable to the manufacturer—cannot fairly demand compensation for their injuries from the manufacturer. Such a demand for maximum instead of optimal safety derogates the equal worth of shareholders, who have an important property right in a fair return upon their investments,

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the danger is significant, moral theory may preclude marketing the product altogether.

192 Assuming that users truly understand the specific dangers, and putting aside important questions of compulsion, as confronted by an employee using an industrial machine.

193 The inherent danger in design is discussed within the context of utility and efficiency below. *See infra* notes 217-22 and accompanying text.

194 The manufacturer can respect the rights of potential victims and others by striking an optimal balance between profits and product value, under principles of utility, as discussed below. *See infra* note 204-22 and accompanying text.

195 Product value includes usefulness, price, and safety, as discussed below. *See infra* notes 204-18 and accompanying text.

196 A manufacturer can reduce risks inherent in the design by warning or redesign.

and the equal worth of other consumers, who have an important interest in useful and affordable products, as explained in utility and efficiency terms below.[197] In the context of design decisions, therefore, equality supports a principle of *optimal*, not maximum, product safety.

By focusing principally upon the choices and actions of the manufacturer, the analysis so far has been incomplete. Risk control typically is shared by the manufacturer with the user, when a danger in design is warned about or open to one's view, as in the chain saw example discussed above. Because the user's autonomy deserves in the abstract no greater protection than the autonomy of other consumers and of the maker's owners, the user, like the manufacturer, is obligated in moral theory to respect the equal worth of such other persons. A user who is injured unexpectedly by an unknown product characteristic in the course of normal use is not morally accountable for the accident. But if a user chooses to take the benefits of a well-made but obviously dangerous product,[198] or if he puts any kind of product to a uniquely adventuresome use that he should know may exceed the product's capabilities,[199] responsibility for the product's failure and the resulting harm properly lies with him.[200] Here the user has no fair claim to compensation from the maker, diminishing the autonomy of the maker's owners and other consumers, because the accident was caused by the victim's greed in demanding greater usefulness from the product than other consumers sought and greater usefulness than was reflected in the price he paid.[201] The principle of equality, therefore, suggests that consumers who knowingly and voluntarily engage a product's inherent risks, and those who put products to unfair use, are morally responsible for resulting harm.[202] Thus, equality and risk control[203] both are central

197 *See infra* notes 204-15 and accompanying text.

198 Or that the user otherwise knows is dangerous.

199 As by driving at very high speed on a worn automobile tire.

200 *See generally* Alden D. Holford, *The Limits of Strict Liability for Product Design and Manufacture*, 52 TEX. L. REV. 81, 89 (1973); Owen, *supra* note 6, at 507.

201 According to Aristotle, to demand more than one's due, to be "grasping," exhibits a species of vice that is a form of injustice. *See* ARISTOTLE, *supra* note 41, at 146-48. *See generally* Wright, *supra* note 17, at 688-702.

202 So, even if a victim's particular psychological makeup may undercut his consent to risk as the basis for his responsibility, *see* Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 411-13 (1985), the equality ideal supports an objective standard of victim responsibility for harm from unreasonable risks created by the victim's peculiar kinds of product use.

203 Despite the importance of risk control in determining moral responsibility for

concepts in the search for moral accountability for product accidents.

D. Utility and Efficiency

Also important to accountability for product accidents in moral theory, and dependent to a large extent on notions of equality and risk control, are the concepts of utility and efficiency. In utilitarian theory, the manufacturer's obligation is to make its products so as to maximize the welfare, or preferences, of its shareholders and consumers. Maximizing profits is the manufacturer's classic measure of success in satisfying the welfare of its shareholders. In a sense, the welfare of consumers also has a single measure: "product value." The concept of product value is more complex than monetary value, however, and it is therefore helpful to divide it into three separate components of consumer preference: product usefulness ("utility"), price ("affordability"), and safety.

A product's utility is measured by its ability to accomplish the consumer's goals, to satisfy the consumer's other preferences. Products help humans to achieve all kinds of goals: from work,[204] education,[205] and nourishment in body,[206] to recreation,[207] rest,[208] and nourishment in spirit.[209] Products facilitate autonomy by permitting individuals to develop and extend themselves;[210] products facilitate community by increasing resources[211] and by helping individuals relate to one another.[212]

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product accidents, it should be noted that a person's greater power over risk does not in itself provide a principled basis in moral theory for legal responsibility, as discussed above. *See supra* note 183 and accompanying text. Mere action causing harm is an insufficient basis for responsibility, as demonstrated by the choice-harm principle discussed above. *See supra* notes 47-49 and accompanying text. *A fortiori*, the mere *ability* to act so as to prevent harm cannot support responsibility, no matter who was in the best position to do it. One person always will be in a better position than others to avert every risk of harm, yet every harm is not in moral theory wrong, nor does the most powerful person always bear responsibility for every harm. Thus, the manufacturer's substantial power to control product risks cannot alone support a rule of strict accountability for manufacturers.

204 *E.g.*, hammers and punch presses.

205 *E.g.*, books and computers.

206 *E.g.*, vitamin pills and chemical fertilizers for crops.

207 *E.g.*, tennis racquets and sailboats.

208 *E.g.*, beds and sleeping pills.

209 *E.g.*, violins and stereophonic equipment.

210 *E.g.*, exercise equipment, books, pacemakers, airplanes, shovels and dynamite.

211 *E.g.*, fertilizers, pesticides, desalinization equipment, and printing presses.

212 *E.g.*, seesaws, greeting cards, Monopoly games, automobiles, and condoms.

Price, in a competitive marketplace, is closely and functionally related to a product's usefulness. Consumers prefer, of course, that manufacturers minimize product prices to make them more affordable, leaving consumers with more money to satisfy their other preferences. Manufacturers generally prefer the opposite—to maximize prices until demand begins unduly to diminish. Manufacturers of most products might charge, in freedom theory,[213] whatever price they choose, provided that consumers could ascertain the product's true extent of utility and safety. Consumers ordinarily are free, after all, to refuse to buy the product.[214] Yet if the product contains an unnecessary danger[215] hidden from consumers, and the price is not discounted to reflect this fact, consumers will be paying for apparent safety value attributable to the manufacturer that is false. In such cases, in part because of the surplus price paid for the product, the manufacturer generally should bear responsibility for resulting harm.

Safety is the final component of product value. In one sense, it is a negative value, for it is defined in terms of the absence of a detriment, danger, which itself is a negative concept: perfect safety, an unattainable ideal, means zero danger. Safety is a complex value in at least two important ways. First, it frequently concerns persons other than the parties to the exchange transaction, for products typically impose some risks on third parties, usually without their consent. Second, unlike utility and price, safety often is a hidden value, and its converse, danger, is often a hidden cost. This is true especially with drugs and other toxic substances, but it is also true in important respects with durable products, such as saws and cars. As a result of both these complicating factors, the relationship between safety and price often is quite weak, although it tends to strengthen over time.[216]

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213 In utility theory, price is controlled by principles of optimality. And in the real world, similar economic principles control a manufacturer's actual pricing practices.

214 This assumes that consumers reasonably may choose to forego the purchase of the product, because it is not essential to their welfare or because they may meaningfully choose among alternative products in a competitive market. When these assumptions fail, as with the only drug that may save consumers from a dread disease, the moral calculus becomes much more complex. The manufacturer in this context may well be obligated to charge a price that is by some measure "fair."

215 "Unnecessary" here means accompanied by a misrepresentation, containing a manufacturing flaw, or containing a foreseeable risk that the manufacturer reasonably could have reduced to an acceptable level by warning or redesign. For the reasons for limiting a maker's warning and design obligations to unreasonable failures to prevent foreseeable risks, see *supra* notes 149-53, 191-203 and accompanying text; *infra* notes 237-44, 279-88 and accompanying text.

216 As the costs of a product's hidden dangers become revealed to the public over

The theory of utility[217] requires manufacturers to maximize, as best they can, profits *and* product value—including product usefulness, affordability, and safety to consumers and third parties. The resulting problem for the manufacturer is that the goals of increasing profits and product value often conflict, as do the individual components of product value among themselves. Improving product safety, for example, typically diminishes both profits and affordability,[218] as well as product usefulness.

Moral theory thus forces manufacturers into a complex, "legislative" decisionmaking process. This form of decisionmaking is very difficult, for it requires the manufacturer to compare—and accord equal respect to—incommensurable values of different "constituencies" or interest groups. The task is rendered even more problematic by the inherent primacy of the manufacturer's allegiance to its shareholders—the constituency that gave it birth and with which it shares an identity.[219] Utility (and equality) the-

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time, the market should respond so as to require the manufacturer either to improve the product's safety or to decrease its price.

217 And at bottom, equality.

218 This general proposition is true at least in the short run. In a perfect, third-party liability world, cost-effective safety improvements should *ex hypothesi* improve both affordability and profits in the long run, as product accidents and hence the accident costs internalized by the manufacturer diminish. In the real world, however, such adjustments will be quite imperfect and will be preceded by a considerable lag from the time safety improvements are first implemented. *See generally* Henderson, *supra* note 9. Safety improvements, therefore, generally will require at least short-term price increases, which will diminish demand (hence profits) unless consumers know about the improvements and appreciate their value. Most safety improvements, however, are too technical to be understood—or too banal to be appreciated—by most consumers. Thus, demand, profits, and affordability will all generally suffer in the real world, even in the long-term, unless the technology improves safety so markedly or dramatically (such as, respectively, anti-lock braking systems and airbags in cars) that it is widely publicized. Accordingly, because in most cases the market (together with the third-party liability system) appears inadequate to maximize the aggregate welfare of both manufacturers and consumers, there would appear to be an important role for administrative regulation in pursuing ideal levels of product safety. *See generally* Richard J. Pierce, Jr., *Encouraging Safety: The Limits of Tort Law and Government Regulation*, 33 VAND. L. REV. 1281 (1980). Yet the net value in the real world of federal safety regulation is open to considerable doubt both empirically and in theory. *See, e.g.*, W. KIP VISCUSI, REGULATING CONSUMER PRODUCT SAFETY (1984); Clayton P. Gillette & James E. Krier, *Risk, Courts, and Agencies*, 138 U. PA. L. REV. 1027, 1061 (1990).

219 Here, as elsewhere, the "manufacturer" is considered from the viewpoint of its managers. *See supra* note 126. Despite the inherent primacy of allegiance owing to the owners, management probably should be required to respect equally at least the safety interests of potential victims. It may be argued that the law should not require actors always to respect equally the safety interests of potential victims. *See supra* note 76. Yet even if this proposition is a sound one for fallible human actors, there may be good

ory flounders here over the difficulty of making interpersonal comparisons among incommensurable values.[220]

This is where economic efficiency can lend assistance to utility by assigning the balancing process to the market for decisions by consumers as a group. Consumer "voters" compare the legislated packages of usefulness, price, and safety offered by competing producer candidates, and they cast their ballots for those products that appear most likely to maximize their preferences. Votes are cast in dollars, which ultimately are converted into profits (or their opposite). The market thus provides manufacturers with an incentive to maximize consumer welfare by maximizing product value.[221] Manufacturers thereby are encouraged to legislate "correctly," or efficiently, by maximizing the sum of utility and safety at prices consumers are willing to pay.[222]

This model of efficiency, of course, suffers from a deep and false assumption—the existence of a perfect economic world where humans act rationally to maximize their wealth and where information and transactions both are free. In the real world, of course, there is an abundance of problems with these assumptions, beginning with the supposed rationality with which persons plan and live their lives.[223] Nor is safety information ever entirely available or completely free. As discussed above, danger is always hidden at least to some extent from all parties—manufacturers, consumers,[224] and third parties. And bargaining transactions between the parties on types and degrees of safety exist more in the

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reason to require institutional actors to conform their policies to an unremitting equality ideal.

220 On theoretical difficulties arising out of the incommensurability of personal values, see generally RAZ, *supra* note 28, at chs. 12 & 13. *But see* Ken Kress, *Legal Indeterminacy*, 77 Cal L. Rev. 283, 335-36 n.215 (1989) (arguing that persons regularly do and must make such decisions).

221 I use the term maximize here, instead of optimize, because the product value notion is itself a calculus of competing factors.

222 *See generally* POSNER, *supra* note 14; CALABRESI, *supra* note 116.

223 *See generally* THE LIMITS OF RATIONALITY (Karen Schweers Cook & Margaret Levi eds., 1990). For a perceptive analysis of the rationality hypothesis from a philosophical perspective, see Ferdinand Schoeman, Cognitive Limits and Moral Heuristics: An Essay on Unbounded Morality (1989) (unpublished manuscript on file with author). For a helpful analysis of the problem in the context of the law of product warnings, see Aaron D. Twerski & Neil B. Cohen, *Informed Decision Making and the Law of Torts: The Myth of Justiciable Causation*, 1988 U. ILL. L. REV. 607.

224 That consumers possess imperfect information on product dangers is a well-established fact. *See generally* Schwartz, *Proposals*, *supra* note 10, at 371-84; Victor E. Schwartz & Russell W. Driver, *Warnings and the Workplace: The Need for Synthesis of Law and Communication Theory*, 52 U. CIN. L. REV. 38 (1983); Twerski & Cohen, *supra* note 223.

minds of theorists than in the world: bargaining on product safety is difficult, to say the least, for persons contemplating the purchase of a car;[225] it is virtually impossible for young children, employees, patients, and bystanders confronting product hazards. The market, as a surrogate for utility, cannot handle these two problems, and so it may be said to fail.[226]

This is where the law of accidents, and products liability law in particular, can be put to an important instrumental use to promote efficiency and hence utility by "deterring" manufacturers from selling products that contain excessive dangers.[227] Because efficiency suffers due to an insufficient level of safety information and safety transactions, the law should seek to increase (and optimize) them both. This suggests that the purpose of the law should be to encourage all affected parties to (1) take cost-effective measures to increase the stock of safety information, (2) distribute and act upon it in a cost-effective manner, and (3) facilitate safety transactions optimally among themselves. More specifically, the law should encourage manufacturers to (1) invest in cost-effective types and levels of research to discover product dangers, (2) provide consumers with as much safety information as may cost-effectively be conveyed,[228] and (3) reduce production and design dangers in their products to the lowest cost-effective level.[229]

Potential victims should be provided with available information on product hazards and on efficient methods for avoiding product accidents. Providing consumers with warnings of product dangers and instructions on safe use often is a cost-effective way to prevent social waste.[230] The law should also encourage consum-

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225 For the classic explanation of this point, see Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 85-87 (N.J. 1960).

226 *See, e.g.*, Pierce, *supra* note 218, at 1284-86; Schwartz, *Proposals*, *supra* note 10, at 368-92. *See generally* THE THEORY OF MARKET FAILURE (Tyler Cowen ed., 1988).

227 The goal in this context, of course, is to promote efficiency, not safety. Efficiency suffers from the sale of products that are too safe, just as from those that are too unsafe.

228 That consumers are to a large extent unable rationally to process and act upon danger and safety information is an important problem in a realistic efficiency calculus. *See* Twerski & Cohen, *supra* note 223.

229 Although efficiency requires only that production flaws be reduced to an optimal level, truth and equality require that the manufacturer compensate persons injured by such defects. *See supra* notes 153-56, 186-90 and accompanying text; *infra* notes 231-36 and accompanying text.

230 Such waste occurs when material dangers that should be known to the manufacturer are hidden from, yet reasonably conveyable to, consumers. Problems with basing liability on deficient warnings are explored in James A. Henderson, Jr. & Aaron D. Twerski,

ers to educate themselves on safety, and to use their products with cost-effective levels of skill and care. As discussed above, equality broadly requires that product safety be limited by efficiency. By demanding more, consumers ask that their own safety interests be valued more highly than they in fact are worth. Such overvaluation would waste and misdirect communal resources, to which others are entitled under principles of equality, away from more productive uses. Finally, victims and manufacturers should be provided with efficient methods for determining responsibility and damages from product accidents. If the law reflects these principles, it should in general promote efficiency and, to a large extent, utility, and communal welfare should be advanced.

As explained in part already, utility and efficiency as guides to moral responsibility lend important insights into the central products liability problem of responsibility for *unavoidable* accidents—accidents that for some reason are unpreventable. Why manufacturers should not be held accountable for socially or morally unavoidable accidents, resulting from correct decisions to trade off design safety for utility and affordability beyond the point of optimality, has already been explained, in terms of equality[231] as well as utility and efficiency.[232] When the problem shifts to responsibility for harm from cost-effective levels of production flaws, arguments based upon social necessity are similarly available. Indeed, as discussed above, a manufacturer guided by principles of utility and efficiency should only seek to optimize, not maximize, the quality of production-line engineering and quality control. That is, utility and efficiency both support a manufacturer's decision to produce and sell a cost-effective percentage of products with production defects, rather than attempting to eliminate such defects altogether. Nevertheless, while a manufacturer's decision to make and sell a certain fraction of products containing "socially necessary" production defects is supported in moral theory by principles of utility and efficiency, the efficient administration of the law may argue the other way. That is, if it be true that most production defects causing injury result from the maker's negligence, and that proof of such negligence is expensive and often impossible for victims to obtain, assumptions

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Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn, 65 N.Y.U. L. REV. 265 (1990).

231 *See supra* notes 193-97 and accompanying text.

232 *See supra* notes 217-22 and accompanying text.

that have been current for many years,[233] then at least "process" efficiency[234]—along with truth[235] and equality[236]—would argue for a rule of strict liability for production defects.

There remains the question of what to do about scientifically unavoidable risks ("undiscoverable" or "unknowable" dangers) that result when an apparently good product—one apparently containing a proper balance of risk and utility—turns out after the fact, unforeseeably, to have an excessive type or level of danger in its design. This problem sometimes manifests itself long after the product was first sold and used.[237] The doctrinal question in such cases involving unforeseeable generic risks, as where an apparently safe drug is discovered to be a carcinogen, is whether a manufacturer should have a duty to warn of unknowable risks, as discussed above.[238] An argument sometimes proposed in favor of such a duty is that liability for such risks may serve instrumentally as an incentive for manufacturers to increase their levels of research to discover dangers at the threshold of knowledge, which may result in a net benefit for society.[239] If liability for failing to warn of unknowable dangers really did have this result, and if the resulting benefits to potential victims really did exceed the detriments to other consumers and to shareholders, then utility and

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

234 That is, efficiency in the administration of the legal rules concerning allocation of loss from product accidents. Although this process role for efficiency is of obvious utilitarian value (in terms of rule utility), and despite its secondary but real implications for fairness, it possesses only limited value for the present enterprise. This is because the principal purpose of this Article is to ascertain (and explore the role of) moral values relevant to choices, made by makers and users, that may bear on responsibility for product accidents. My general premise here is that legal principles of responsibility first and foremost should reflect and be framed around the moral quality of choices that individual people make *ex ante*, regarding how to act toward other persons, and only secondarily should be concerned with the effects such rules may generate. Utility and efficiency are of interest here, therefore, mainly in how they bear on the moral quality of decisions made by product makers and product users. Thus, this Article is focused principally upon the probable social utility or efficiency of *acts*, rather than of rules or process. *See supra* notes 110 and 118; *infra* note 244. I assume that individual justice, in other words, is worth a price.

235 *See supra* notes 153-56 and accompanying text.

236 *See supra* notes 186-90 and accompanying text.

237 Such dangers most typically inhere in pharmaceutical drugs and other toxic substances such as asbestos or chemicals.

238 *See supra* notes 149-53; *infra* notes 279-88 and accompanying text.

239 *See* Beshada v. Johns-Manville Prod. Corp., 447 A.2d 539 (N.J. 1982). *But see* Brown v. Superior Ct., 751 P.2d 470 (Cal. 1988); Feldman v. Lederle Lab., Inc., 479 A.2d 374 (N.J. 1984).

efficiency would support a rule of liability in such cases. But manufacturers should be investing optimally in research under a negligence standard of accountability, based on knowable risks alone, and extending liability to risks that cannot reasonably be discovered probably will not cause most manufacturers to do more research than they already think is best.[240] Moreover, there is a real risk that a rule that holds manufacturers responsible for unforeseeable harm will result in "overdeterence," to the net detriment of society, by inducing manufacturers to delay or completely forbear marketing useful products—especially new medicines made from potent chemicals—that may contain substantial unknown risks.[241] Utility theory, as truth[242] and equality,[243] thus suggests that manufacturers are not morally accountable for generic dangers that cannot reasonably be discovered.[244]

E. Burden Sharing

There are two principal ways in which the community may share in the economic burdens of product accidents so as to protect its members against the risk of much greater individual burdens: accident prevention and loss spreading.[245] First, the community may share in the burden *ex ante*, by devoting more communal resources to reducing the *risks* of product accidents. Although the mechanisms available for reducing such risks are quite

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240 This point is persuasively developed in Schwartz, *supra* note 9.

241 *See Brown*, 751 P.2d at 470; *Feldman*, 479 A.2d at 374. *See generally* Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277 (1985); Schroeder, *supra* note 9.

242 *See supra* notes 149-53 and accompanying text.

243 *See supra* note 175 and text accompanying note 196.

244 This point is argued further, from a burden-sharing hypothetical consent perspective, below. *See infra* notes 279-88 and accompanying text. One may argue from utility that a strict liability rule may be preferable to negligence in that the former rule will avoid litigation costs (concerning such issues as the discoverability of the risk) that are excessive in the greater calculus of costs and benefits. *See, e.g.*, Beshada v. Johns-Manville Prod. Corp., 447 A.2d 539, 539 (N.J. 1982). No doubt, judicial process considerations of this type are important in developing a fair and rational theory for tort and products liability cases. *See generally* James A. Henderson, Jr., *Process Constraints in Tort*, 67 CORNELL L. REV. 901 (1982); Henderson, *supra* note 16. Yet the question of how moral (and resulting) legal theory may best be converted into practice in the world is logically secondary to the development in the first instance of a substantively justifiable system of moral and legal principles. *See generally* Robert S. Summers, *Two Types of Substantive Reasons: The Core of a Theory of Common-Law Justification*, 63 CORNELL L. REV. 707, 722-24, 749-51, 764-65 (1978). Thus, this Article is concerned principally with the utility of acts and only secondarily with the efficiency of the legal process. *See supra* notes 110, 118, 234.

245 *See generally* Pierce, *supra* note 218.

imperfect, there are a variety of ways in which society can reduce the number and severity of product accidents: manufacturers and users may be provided with information and incentives for discovering and reducing product dangers, and products that are particularly dangerous may be banned. Government can achieve these objectives by regulating product safety both directly and indirectly, through administrative safety regulation enforced by civil and criminal fines and by civil liability rules.[246] Consumer education, on product hazards and methods of safe use, will help reduce accidents in some contexts more than others.[247] The important point, however, is that product accidents can be prevented in substantial measure—if the community is willing to pay the price.

The price that society must bear to increase product safety is the reduction in autonomy of members of the community in other ways. Improvements in product safety generally come at the expense of both product usefulness ("utility") and affordability, as discussed above. That is, safety ordinarily is directly proportional to price and inversely proportional to utility: as product safety is increased, prices rise and utility is diminished.[248] Thus, aggregate improvements in product safety across society tend to decrease the stock of other social goods that enhance autonomy; persons consequently have fewer and less useful products and less money to help achieve their other personal and collective goals.

For example, accidental injuries may be reduced by adding more steel and foam to automobiles, making them bigger on the outside and smaller on the inside, and by slowing down their speed. But people as a consequence will have to spend more time and money driving to and fro, hunting for places to park, and so will have less time and money to spend on other pursuits—including interpersonal relating. These forms of autonomy (and sometimes efficiency)[249] losses may be significant individually and in the aggregate, but a community may choose that they are worth accepting, at least to some extent, in order to reduce the types of calamitous losses of autonomy[250] confronting victims

246 *See id.* at 1308-30.

247 On the practical difficulties of educating consumers and modifying their behavior, see *supra* notes 223-24.

248 *See supra* note 218 and accompanying text.

249 For the classic efficiency perspective on this problem, framed in terms of whether pedestrians should be protected by equipping cars with spongy bumpers, see CALABRESI, *supra* note 116.

250 John Attanasio refers appropriately to these losses as "profound" and "severe"

of serious product accidents and their families. Yet, no matter how strong the communal resolve may be, the community possesses too few resources (physical and cerebral) to reduce the level of product accidents to zero, or even close. And so, perhaps forever, large numbers of people simply will have to suffer accidental losses, often minor but sometimes devastating.

But even though such accidents are statistically inevitable, and required in some large number by the public good, the community may decide to protect its members against the risk of suffering the economic consequences by sharing such economic burdens *ex post.* That is to say, *losses* from product accidents may be "spread" throughout the community. The mechanism of loss spreading (or risk spreading, its *ex ante* counterpart) simply is insurance by another name.[251] Risks and losses from product accidents may be spread across society (insured against) in three basic ways. Potential victims (or their employers[252]) may insure themselves against accidental losses by purchasing first-party health, disability, and life insurance from private insurers.[253] Alternatively, the government may "socialize" such losses through various forms of social welfare programs funded by taxation. Finally, product manufacturers may be required to absorb the losses and distribute them among their shareholders[254] and, especially in the long run, consumers.[255] All three mechanisms for distributing risks of and losses from product accidents are used today, to some extent and in varying amounts, in the United States and the British Commonwealth, except New Zealand.[256]

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autonomy infringements. Attanasio, *supra* note 9, at 713, 733.

251 *See generally* KENNETH S. ABRAHAM, DISTRIBUTING RISK (1986). To the extent that the spreading mechanism extracts premiums from persons involuntarily, its funding mechanism should be considered a form of taxation. *See generally* Epstein, *supra* note 168; Gary T. Schwartz, *Economics, Wealth Distribution, and Justice*, 1979 WIS. L. REV. 799.

252 Robert Sugarman proposes that employers be the principal providers of accident insurance. *E.g.*, Robert Sugarman, *Doing Away with Tort Law*, 73 CAL. L. REV. 558 (1985).

253 *See generally* Gary T. Schwartz, *The Ethics and The Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313 (1990); Sugarman, *supra* note 252.

254 Through diminished profits and a commensurate reduction in the value of their stock and, possibly, dividends.

255 In the form of higher prices and diminished availability of the product. *See infra* note 264.

256 New Zealand has abolished most of the tort system and replaced it with a broad social insurance program for accidental loss. *See, e.g.*, Marc A. Franklin, *Personal Injury Accidents in New Zealand and the United States: Some Striking Similarities*, 27 STAN. L. REV. 653 (1975); Geoffrey W. R. Palmer, *Compensation for Personal Injury: A Requiem for the Common Law in New Zealand*, 21 AM. J. COMP. L. 1 (1973).

The third insurance mechanism, funded by manufacturers, could be designed to operate like workers' compensation programs.[257] In such a program, manufacturers could be required to insure against product accidents, paying insurance proceeds directly to the victims, perhaps according to some schedule quantifying various types of loss.[258] In fact, however, manufacturers today provide a form of unscheduled third-party insurance through the products liability litigation system. This latter mechanism for spreading losses is subject to criticism on a variety of grounds,[259] including its unfairness and inefficiency in determining obligations for payouts and eligibility for benefits,[260] and the unfairly regressive nature of its premium-benefit structure.[261]

As serious as the shortcomings of the products liability insurance mechanism may be, this mechanism nevertheless does achieve an important and sometimes beneficial result—the assignment or "internalization" of the costs of certain product accidents[262] to the enterprises that make the products and, ultimately, to the persons who buy and use them.[263] The internalization of *appropriate* costs is desirable because it promotes both fairness and efficiency. Fairness is promoted by requiring those who benefit from the manufacture and use of products to shoulder all appropriate costs, reflected in an appropriate price, of what they make and use.[264] By assigning appropriate costs to manufactur-

257 Workers' compensation is a fourth form of product accident insurance, available to workers only.

258 Jeffrey O'Connell has long advocated plans along these lines. *See, e.g.*, JEFFREY O'CONNELL, ENDING INSULT TO INJURY: NO-FAULT INSURANCE FOR PRODUCTS AND SERVICES (1975).

259 *See generally* Bernstein, *supra* note 9; Epstein, *supra* note 7; Sugarman, *supra* note 252.

260 Recovery is dependent upon a victim's successful litigation of issues such as fault, defect, causation, and damages. *See generally* Sugarman, *supra* note 252.

261 *See generally* Epstein, *supra* note 7; Priest, *supra* note 7.

262 Those accidents for which plaintiffs are able to recover under the liability rules.

263 Perhaps the classic argument for enterprise liability is EHRENZWEIG, *supra* note 168. *See also* Albert A. Ehrenzweig, *Enterprise Liability Under "Foreseeable and Insurable Laws,"* 69 YALE L.J. 595, 794, 978 (1960). For probably the classic rebuttal, see Priest, *supra* note 1. For surely the classic reply to the rebuttal, see Owen, *supra* note 1.

264 A subsidiary fairness (and efficiency) problem, however, concerns the allocation of costs between differing groups of consumers over time. There almost invariably is a substantial lag from the time the manufacturer first assigns a price to a product, prior to initial marketing, until the time the manufacturer pays a settlement or judgment on account of an injury caused by the product's performance in the field. If the manufacturer revises the product's price at the time it makes the payout, in an effort to have users help internalize the product's accident costs, a class of consumers subsequent to

ers, cost internalization promotes efficiency in two important ways. First, the manufacturer is provided with an incentive to reduce dangers in its products to a level that is optimal. Second, to the extent that manufacturers pass on such costs to consumers through higher prices, demand and product use should fall toward efficient levels that reflect the product's dangers.[265] Cost internalization may of course be accomplished by other means, as through administrative mechanisms regulating product safety and compensating accident victims.[266] Yet administrative regulation of this type is unlikely to be a model of fairness, efficiency, or rationality, as experience has demonstrated[267] and as the application of public choice theory to this context has explained.[268] A persuasive case for displacing the litigation *system* with an administrative regulatory system simply has not yet been made.[269]

A broad theory of justice in this context would describe and justify, in ethical theory, the nature and ideal mix of each of the three loss-spreading mechanisms together with an administrative system directly regulating certain safety issues.[270] That task is very

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the ones who bought the original product will be paying, retroactively, for the risks and accident costs of the earlier product. Since the manufacturer may already have responded to the accident claims by eliminating the relevant hazard, the subsequent class of consumers may end up paying a premium in price for risks the subsequent product does not contain. Although a competitive market may to some extent preclude this type of pricing strategy, this type of risk-payout time lag probably generates in many instances a rather substantial disjunction in the correlation between a product's actual danger and the danger premium charged and paid therefor.

265 *See generally* Stephen Shavell, *Strict Liability versus Negligence*, 9 J. LEGAL STUD. 1 (1980).

266 *See generally* David G. Owen, *Deterrence and Desert in Tort: A Comment*, 73 CAL. L. REV. 665 (1985); Pierce, *supra* note 218; Sugarman, *supra* note 252.

267 The National Commission on Product Safety, formed by Congress in 1967, voiced considerable confidence in the ability of a federal safety regulatory agency to reduce the level of "unreasonable [consumer] product hazards." NAT'L COMM'N ON PRODUCT SAFETY, FINAL REPORT 43 (1970). In 1972, Congress enacted legislation establishing the Consumer Product Safety Commission (CPSC) charged with this responsibility. The agency has been controversial from the start, however, and is generally conceded to have fallen far short of the Congressional mandate. The other major regulatory agencies charged with product safety are NHTSA (automobiles), OSHA (machinery and other workplace products), and the FDA (food, cosmetics, and drugs). They have had broader, but still very incomplete, success in reducing "undue" product accidents. *See generally* KEETON, *supra* note 2, at 1-13.

268 For a thorough explication of this point, see Gillette & Krier, *supra* note 218.

269 *See, e.g.*, James A. Henderson, Jr., *The New Zealand Accident Compensation Reform*, 48 U. CHI. L. REV. 781 (1981); Marshall S. Shapo, *Tort Reform: The Problem of the Missing Tsar*, 19 HOFSTRA L. REV. 185 (1990). Some scholars have argued vigorously for such schemes. *See, e.g.*, Franklin, *supra* note 256.

270 A number of commentators have examined, from a variety of perspectives, how the various insurance and regulatory systems should relate to one another. *See, e.g.*, Ken-

broad and far exceeds the scope of the present inquiry into one piece of the civil-law litigation system pie—private accountability for product accidents. The more modest goal here is to demonstrate that the products liability litigation *system* may be justified, albeit only partially, by its promotion of communal sharing of certain product risks and losses. Albeit in a rather awkward way, the litigation system promotes communal sharing goals by requiring manufacturers to internalize the costs of certain accidents: at least certain portions of the community are required to share in the economic consequences of certain product accidents befalling individuals. In a very different way, juries in individual cases inject communal sharing notions into the resolution of particular products liability disputes in ways that are ad hoc and imprecise but undoubtedly important.[271]

Yet the products liability litigation process more generally is unable to promote the kind of "deep"[272] or "strict"[273] equality implied by the value of burden sharing. Even if one broadly endorsed this form of distribution goal, private litigation simply is not capable institutionally of spreading all detriment from all accidents equally among all persons.[274] No doubt any broad system of justice must include at bottom a comprehensive safety-net program to assure protection of the minimal health and dignity needs of the least fortunate members of society—those persons who are unable to exercise their autonomy meaningfully to achieve even minimal human goals. In addition to many persons who are poor initially, this class of needy accident victims includes many persons of greater initial affluence who, for some reason or another, were underinsured. The most serious types of injuries may well wreak economic devastation even upon affluent victims because of the extraordinary costs of medical care, to say nothing of the long-term loss of income. Social welfare insurance programs of various types thus should lie beneath the various forms of first-

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neth S. Abraham & Lance Liebman, *Private Insurance, Social Insurance, and Tort Reform: Toward a New Vision of Compensation for Illness and Injury*, 93 COLUM. L. REV. 75 (1993); Pierce, *supra* note 218; Sugarman, *supra* note 252.

271 *See generally* Wells, *supra* note 7; *infra* notes 307-09 and accompanying text.

272 The "deep equality" phrase is Dworkin's. R. DWORKIN, *supra* note 51.

273 The "strict equality" phrase is Raz's. RAZ, *supra* note 28.

274 It also conflicts with the notion of "weak" equality, which appears preferable to me. *See supra* notes 47-69 and accompanying text. Moreover, a system of taxation and insurance (public and private) is a far better way—in ethical, political, and economic theory—to promote this kind of fundamental, redistributive goal. *See generally* R. DWORKIN, *supra* note 51, at 308; Epstein, *supra* note 168.

party medical and income-protection insurance that are generally available and adequate for most persons and most risks on a self-insurance basis.

The point here, however, is not to demonstrate the moral necessity of such communal forms of burden sharing but instead to note the important fact that such private and public insurance mechanisms, which widely if imperfectly do protect most persons, exist outside the private litigation system.[275] That present insurance mechanisms in this nation, both private and governmental, suffer from many weaknesses of course is true.[276] Yet these and other institutions generally do provide at least basic medical protection to the victims of most product accidents.[277] Thus, because communal burden-sharing needs are satisfied at least minimally elsewhere—by institutions specifically designed to administer such programs outside the products liability litigation system—there is little reason even to engage the argument that communal burden-sharing responsibilities should be duplicated within a private litigation system designed to rectify private instances of injustice, rather than the broader public kinds.[278]

The specific burden-sharing issue of greatest interest in the products liability context concerns the question of whether manufacturers or users should bear generic product risks unknowable to either party.[279] That most persons forming a community probably would choose *ex ante* to insure against such unforeseeable risks outside the litigation system, suggesting that liability rules should be grounded in principles of fault rather than strict liability, is illuminated by a hypothetical consent analysis.[280] Suppose that a

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275 *See* Schwartz, *supra* note 253; *infra* note 277.

276 *See generally* Sugarman, *supra* note 252.

277 Some 85% to 90% of persons in this nation are covered by first-party health insurance, private or governmental. BUREAU OF THE CENSUS, DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1990 100, tbl. 152 (1990) [hereinafter STATISTICAL ABSTRACT]. Moreover, workers' compensation and other employer insurance programs compensate the victims of most workplace accidents, which account for roughly half of all product accidents. *See* KEETON ET AL., *supra* note 2, at 22.

278 By which I mean distributive injustices. *See supra* notes 63-69 and accompanying text.

279 *See generally* Schwartz, *supra* note 10. The problem of responsibility for unknowable risks is explored from the perspectives of *truth*, *supra* notes 149-53 and accompanying text; *equality*, *supra* note 175 and text accompanying note 196; and *utility*, *supra* notes 237-44 and accompanying text.

280 In part because argumentation by hypothetical consent proceeds easily to conclusions mirroring utility and efficiency, *see, e.g.*, Posner, *supra* note 113, it recently has come under attack by scholars unsympathetic to such aggregative, social welfare approaches. *See* Peter A. Bell, *Analyzing Tort Law: The Flawed Promise of Neocontract*, 74 MINN. L. REV. 1177

user and a maker negotiate for the exchange of a product,[281] such as a prescription drug,[282] that they both believe to be safe but realize may possess some unknown risk of harm. The parties might well agree, and so price the product accordingly, that the maker should accept the risk of dangers that an ordinary maker should discover through reasonable research, and probably all risks of production defects, for the variety of reasons discussed above.[283] The question then would be who, as between the maker and the user, should bear the risks of other dangers, generic to the product's design, that are both unknown and unknowable at the time of sale. Since harm from such risks by hypothesis is unforeseeable and, hence, unavoidable, there appears to be no good reason in social justice to require makers to be responsible. Particularly if the possible danger is very large, such as death, or malformations in the user's offspring,[284] probably neither party would be willing to accept the entire risk, nor feel justified in forcing it on the other party. The victim of such catastrophic harm simply would be unable to bear it all alone, and the manu-

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(1990); Jean Braucher, *Contract versus Contractarianism: The Regulatory Role of Contract Law*, 47 WASH. & LEE L. REV. 697 (1990); Robert M. Hayden, *Neocontract Polemics and Unconscionable Scholarship*, 24 LAW & SOC'Y REV. 863 (1990). Despite its facility for manipulation, hypothetical contractarian analysis can generate conclusions of quite a different sort that powerfully inform the search for fundamental fairness. This point is best demonstrated by Rawls' paradigm of the original condition, in which his social contractors are shielded from knowledge of their positions in the world by a "veil of ignorance." RAWLS, *supra* note 41, at 11-12, 136-42. The basic hypothetical consent assumption here, that persons would choose to maximize average wealth (with a floor constraint), has been validated empirically. *See* Norman Frohlich et al., *Choices of Principles of Distributive Justice in Experimental Groups*, 31 AM. J. POL. SCI. 606 (1987).

281 If the user and maker were behind a true Rawlsian veil of ignorance, they would not know in advance which party they would be, requiring them to decide the issue fairly.

282 Prescription pharmaceuticals are the paradigmatic type of product involving dangers of this type. Toxic substances of other types, such as pesticides and asbestos, also sometimes pose such risks. *See supra* note 239.

283 The parties' willingness to have the manufacturer bear the risk of all manufacturing defects should derive from the variety of moral considerations discussed above. It may also spring from the assumption that most such defects in fact result from the maker's negligence, together with an assumption that particularized proof of specific events of negligent manufacturing that occurred long in the past is ordinarily too expensive to obtain and otherwise practicably unavailable to most victims of accidents caused by such defects. *See supra* note 233 and accompanying text.

284 This was alleged in the cases involving the drug diethylstilbestrol (DES). *See, e.g.*, Enright v. Eli Lilly & Co., 570 N.E.2d 198 (N.Y. 1991); Brown v. Superior Ct., 751 P.2d 470 (Cal. 1988); Sindell v. Abbott Lab., 607 P.2d 924 (Cal.), *cert. denied*, 449 U.S. 912 (1980).

facturer, not being in the insurance business,[285] would have to raise the drug's price inordinately or stop selling it altogether.

Thus, most persons probably would prefer that unknowable risks of this type be shifted to the community at large, through the fairest and most efficient (and hence the cheapest) forms of insurance.[286] Consumers generally can obtain affordable insurance against unknown (and thus unpredictable) product risks, in types and amounts that suit their individual preferences, from private insurance firms. This type of personalized and reasonably priced first-party insurance must be contrasted to the very rough, incomplete, and expensive kind of third-party insurance obtainable from manufacturers in the products liability litigation system.[287] Accordingly, most persons hypothetically would probably choose to leave such risks initially with the user as the better conduit to individualized and efficient insurance mechanisms, and to price the product accordingly without a guarantee against such unknown risks.[288]

Finally, it should be noted that the burden sharing concept is analytically incapable in most contexts of helping devise specific principles of product accident law grounded in sound moral theory. This is because such blunt notions of moral value point blindly in one direction only—toward a rule of strict liability and other rules that assure that manufacturers will be held accountable in every case.[289] The ideals of freedom and even community contain much richer and more powerful moral perspectives on conflict resolution for accidents in general, and products liability in particular. Freedom, truth, equality, utility, and efficiency, especially in combination, provide moral guidance that is far superior to

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285 Even a private insurer might be reluctant to insure against unforeseeable risks in products possibly containing particular risks that are specifically unforeseeable but likely, such as prescription pharmaceutical and other products comprised of powerful chemical formulations.

286 A best-insurer rationale, which implements the aggregative welfare concerns of utility and economic efficiency, is turned to here as a helpful, but only as a final, "default" principle. Such a principle could, of course, be extended as a form of justification for all products liability law. This would simply be an economic metatheory, however, that would conflict with the premises of this Article. *See supra* notes 11-16 and accompanying text.

287 *See generally* Epstein, *supra* note 7; Priest, *supra* note 7.

288 Notwithstanding the inherent force of this argument, the moral dimensions of this issue are numerous and complex such that the conclusion in the text is necessarily tentative. *See supra* note 153.

289 Owen, *supra* note 7, at 68-72; Owen, *supra* note 6, at 703-07.

crude notions of burden sharing in formulating most principles of products liability law.

F. Aggregate Autonomy

In an important article that probed deeply into the moral philosophy of products liability law, John Attanasio develops the notion of "aggregate autonomy."[290] Dean Attanasio builds his aggregate autonomy model upon Guido Calabresi's seminal work applying economic theory to the law of accidents.[291] Attanasio concludes that Dean Calabresi's model of responsibility, in which the "cheapest cost avoider" internalizes the costs of accidents, best protects the ideals of autonomy and community. The cheapest cost avoider, in Calabresian theory, is the party "in the best position to make the cost-benefit analysis between accident costs and accident avoidance costs and to act on that decision once it is made."[292] Attanasio argues that the Calabresian liability model promotes the most important autonomy interests of the greatest number of persons, while promoting utility and efficiency in the process. Attanasio thus provides a moral justification for, and hence completes, Calabresi's liability model. The result, then, is the Calabresi-Attanasio ("C-A")[293] model of products liability theory.

The C-A model is an attractive theory for more than one good reason: it does indeed promote freedom and efficiency, and hence utility, to a large extent; and it is very simple, at least to state. Its creators in their writings capably describe the model's strengths which need not be recanvassed here. Yet the purpose of this Article is to inquire into the principles of moral philosophy that underlie a just system of products liability law, which also was the purpose of Dean Attanasio's article. If he is right, therefore, in concluding that the C-A model best promotes the most important

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290 *See* Attanasio, *supra* note 9.

291 CALABRESI, *supra* note 116; Calabresi & Hirschoff, *supra* note 116. *See also* Guido Calabresi & Alvin K. Klevorick, *Four Tests for Liability in Torts*, 14 J. LEGAL STUD. 585 (1985).

292 Calabresi & Hirschoff, *supra* note 116, at 1060 (emphasis omitted). John Attanasio substitutes the phrase "best decider" for Guido Calabresi's "cheapest cost avoider," and earlier term, "best briber." Attanasio, *supra* note 9, at 706-07. Regardless of the term employed, Calabresi's exercise was to find the party that might best meet the goal of "accomplishing an optimal reduction of primary accident costs," Calabresi & Hirschoff, *supra* note 116, at 1085, through "a minimization of the sum of the accident costs and of accident avoidance costs." *Id.* at 1084.

293 This abbreviated acronym for the Calabresi-Attanasio-Cheapest-Cost-Avoider model may be preferable to the fuller version.

moral values, then there would be little reason to inquire into the matter further, except to refine the model's justification, definition, or application. Yet, while the C-A model is very helpful, it fails—as would any single theory, test, or model—to provide a satisfactory resolution to the vast array of products liability problems in several important ways. Only a few of the C-A model's more troubling aspects will be sketched out here. A full and fair critique would take a book.

An important, preliminary problem with the C-A model lies in its breadth. It is in its conception a model of strict, rather than fault-based, liability. Fault-based systems of liability rest largely upon the ideal of freedom, because persons generally are held accountable only for the harmful consequences that reflect, at least to some extent, their wills. By contrast, strict liability places legal accountability on persons for harmful consequences which they in no way willed, or which were a necessary price for greater good, and for which actors consequently are not morally to blame. By its nature, therefore, strict liability appears to deny the equal worth of actors compared to victims. Losses inevitably result from the manufacture and use of products, as from any action, as previously discussed. If such losses are unforeseeable, or if they result necessarily from the use of products which are on balance good, it simply is morally inappropriate to place legal responsibility on the maker, and the burden of the loss on the maker's owners and customers.[294] Requiring these latter persons to bear the loss deprives them of autonomy without good reason, and it diminishes utility by requiring that the products liability system provide insurance, which it is poorly equipped to do.[295]

Dean Attanasio explains this preference for the autonomy of victims partly by contrasting the profound autonomy infringements of severely injured persons to the slight monetary infringements of autonomy caused by spreading losses among many shareholders and consumers. His thesis at heart appears to be that members of

294 A cheapest cost avoider approach could be interpreted to find users, rather than manufacturers, to be the best deciders of whether to encounter inherent and unknowable risks. So interpreted, the C-A model would conform much more closely to the principles developed in this essay. Yet Calabresi argues for a category approach to liability decisions, Calabresi & Hirschoff, *supra* note 116, at 1070, and Attanasio asserts that the C-A model is "far more protective of accident victims than negligence," Attanasio, *supra* note 9, at 712, suggesting that the C-A model would hold manufacturers responsible for both these forms of unavoidable risks.

295 *See supra* notes 259-61 and accompanying text.

the greater group should surrender small chunks of property (and hence autonomy) to help relieve the devastating losses suffered by victims of serious accidents.[296] There is much profoundly appealing about a communal sharing ethic of this type, and one might well insist upon some such social welfare scheme in formulating a just community. But, in a fair society, the law should not favor victims of product accidents over victims of other types of misfortune; nor should investors and consumers of apparently good products be singled out to shoulder all such losses. Indeed, many chunks of property are needed to help all sorts of victims across society from all sorts of harm—from malnutrition, disease, fire, flood, and every type of accident. In this respect, the C-A thesis is too narrow. What society truly needs in order to help the victims of unavoidable calamities is a set of well-constructed insurance mechanisms that distribute proper amounts of welfare to deserving victims, funded by fair and efficient methods for collecting premiums or taxes.[297] What society surely does not need is an unfair and inefficient liability insurance mechanism, which only reduces aggregate autonomy through its waste.

Attanasio offers a corrective justice explanation for the C-A model, arguing that manufacturer liability is necessary to annul the wrongful gains to makers and consumers from selling at low prices products that cause accidental harm: "many will realize lower prices or higher profits by shunting the accident losses of a product onto its victims."[298] Alluring at first glance, this argument proceeds to its conclusion by characterization, and it begs the essential questions of who really is doing the "shunting," who should be doing it, and who truly are the "victims." As Holmes argued more than a century ago, accidental losses generally should be left to lie where they fall, unless there is some good reason for the government to shunt the loss onto someone else.[299] So, in the absence of wrongdoing by the maker, the "shunter" really is the accident victim, on whom the loss has fallen initially at the least, not the maker's owners or other consumers. To search for a reason for shunting the loss onto the latter groups in low prices or high profits is to miss the mark: both autonomy and utility gen-

296 *See* Attanasio, *supra* note 9, at 724, 734 n.243.

297 This should be combined with fair and efficient mechanisms for minimizing excessive risks. *See generally* Owen, *supra* note 266; Sugarman, *supra* note 252.

298 Attanasio, *supra* note 9, at 747.

299 *See* HOLMES, *supra* note 45, at 94-96.

erally are promoted by reducing prices as much as practicable, and profits generally are fairly earned by making products efficiently that people want and can afford. If Attanasio's point is that makers should be responsible for their inefficient and therefore wrongful[300] choices, he is largely right. But a general scheme requiring manufacturer insurance for the great bulk of losses hardly seems a fair or efficient way of allocating losses from product accidents.[301]

Two secondary problems with the C-A model may be mentioned briefly here: (1) its generally regressive nature, and (2) its exclusion of the jury from substantive decisionmaking. The regressivity problem results from the higher level of product prices that the model seeks by forcing manufacturers to internalize the costs of *all* accidents, rather than only accidents that result from *excessive* product risks. That a manufacturer should indeed be required to internalize all appropriate costs was discussed above. But to be appropriate, cost internalization must be limited by principles of optimality; like many things that are good in moderation,[302] it is an evil in excess.[303] This problem with the C-A model is most severe for necessary products that have inherent dangers, such as automobiles. If car prices truly reflected all costs of all automotive accidents, cars would be priced far beyond the reach of many persons, and certainly the poor.[304] To insist upon a system that deprives poor people of basic transportation is brutally unfair and regressive[305] to say the least.[306]

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300 *See supra* notes 109-18, 217-30 and accompanying text.

301 *See supra* notes 259-89 and accompanying text.

302 As exegeses in moral theory.

303 As the law itself. *See* David G. Owen, *Respect for Law and Man: The Tort Law of Chief Justice Frank Rowe Kenison*, 11 VT. L. REV. 389, 407 (1986).

304 If automobile manufacturers internalized all costs of automotive accidents, the cost of basic cars would roughly double. On average, Americans purchase approximately 14 million automotive vehicles (cars and light trucks) per year. AUTOMOTIVE NEWS, Jan. 7, 1991, at 33. The direct economic costs of automotive accidents in this nation total roughly $100 billion each year. STATISTICAL ABSTRACT, *supra* note 277, at 606, tbl. 1035 (1990) (extrapolated from 1988 to 1993). These figures combine to generate an accident cost per vehicle of approximately $7,000 which almost equals the present cost of a basic automobile. If pain and suffering and other noneconomic costs are included in the calculation, the accident cost per car increases substantially.

305 On the regressivity of the third-party liability system generally, see *supra* note 261 and accompanying text. *See* Richard L. Abel, *Should Tort Law Protect Property Against Accidental Loss?*, *in* THE LAW OF TORT 155, 163 (M. Furmston ed., 1986).

306 Forcing such persons to rely on friends or public transportation also does obvious violence to their autonomy.

Second, the C-A model is hardly sensitive to the communal ideals of self-determination or community by depriving the jury of the opportunity to review the acceptability of a manufacturer's decisions on product safety.[307] Notwithstanding the many problems with the jury system in complex products liability cases,[308] juries undoubtedly serve an important role as guardians of the freedom rights of accident victims, and the utility interests of the community when they are "legislated" away improperly by manufacturers. One might well argue that the law should jealously guard the community's prerogative consciously to decide the significant moral question of how much product safety is enough.[309] By committing such questions to the jury, the law ensures that important issues of product safety "legislation" are subjected to a rigorous process of communal oversight. By this process, safety decisions affecting the community are tested publicly and explicitly, through jury assessments of responsibility for loss, rather than secretly and indirectly, through the sterile economic formula of the cheapest cost avoider.

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307 It is not a satisfactory answer to argue that consumers may cast their votes in the open market, for all the reasons that real-world markets fail. *See supra* notes 223-26.

308 For a sampling of the more general debate concerning the use of juries in complex litigation, compare Dan Drazan, *The Case for Special Juries in Toxic Tort Litigation*, 72 JUDICATURE 292, 298 ("jurors are being asked to digest information that is beyond their reach") with Richard O. Lempert, *Civil Juries and Complex Cases: Let's Not Rush to Judgment*, 80 MICH. L. REV. 68 (1981). *See generally* Montgomery Kersten, Note, *Preserving the Right to Jury Trial in Complex Civil Cases*, 32 STAN. L. REV. 99 (1979); Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 HARV. L. REV. 898 (1979). On various problems with jury trials in products liability cases, see generally Henderson, *supra* note 159; Owen, *supra* note 28, at 10-12; Aaron D. 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 (1982).

309 Despite its diminished use outside this country, the jury in the United States retains a vital, constitutional role designed to permit persons in the community to protect and govern themselves. *See, e.g.*, Phoebe C. Ellsworth, *Are Twelve Heads Better Than One?*, 52 LAW & CONTEMP. PROB. 205 (1989) (jury reflects "the perspectives, experiences, and values of the ordinary people in the community" implied in the democratic ideal); Valerie P. Hans, *The Jury's Response to Business and Corporate Wrongdoing*, 52 LAW & CONTEMP. PROB. 177, 203 (1989) ("juries in business cases play an important political role" and "reflect in their verdicts contemporary norms about appropriate business standards and responsibilities"); Patrick E. Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEX. L. REV. 47, 58 (1977) ("the jury's verdict provides the judicial process with a contemporaneous expression of the community values"); Wells, *supra* note 7, at 2349 (tort system "with its reliance on jury verdicts and its emphasis on public accountability—has served as a deeply democratic symbol of the state's commitment to individualized justice"); Alan Howard Scheiner, Note, *Judicial Assessment of Punitive Damages, The Seventh Amendment, and the Politics of Jury Power*, 91 COLUM. L. REV. 142 (1991).

Notwithstanding these quite troubling aspects of the C-A model, John Attanasio's justificatory investigation of the Calabresi liability model substantially advances the level of understanding of how moral theory may be applied to products liability law. The C-A model may possibly provide the best single test to capture justice for the many problems of products liability law. But, like the world in general, both the practical and the moral problems of products liability law are at once too important and too complex to allow a single, simple, and mechanical test of right or wrong to shove aside explicit decisions by human beings applying principles of law grounded in a diversity of relevant moral theories.

G. Ordering Freedom and Community

The moral ideals of freedom and community may be contrasted to one another as polar opposites.[310] Whether one views their opposition as partial or complete, their application to products liability law sometimes produces conflicts which must be resolved. A clear example of such a conflict concerns responsibility for manufacturing flaws. As seen above, truth[311] and equality[312] both support a strict liability rule for production defects, whereas the optimality principles of utility[313] suggest a rule of balance, such as negligence. Such variances in result arise because of the very different underlying moral concepts: truth and equality lie at the heart of freedom, as seen above, while optimality lies at the center of economic efficiency and utility. Freedom celebrates the separate value of every human person, while utility aggregates all interests of all persons and hence denies the value of their separateness. At bottom, therefore, the freedom values inherent in truth and equality and the community values inherent in utility and efficiency are directly opposed.

Because such conflicts do arise, it should be helpful to have a general principle of preference between the two. At least because of the logical priority of freedom to community, explained earlier,[314] but also because of the greater essential moral power of freedom (and its component values of truth and equality), it may

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310 *See supra* note 96 and accompanying text.

311 *See supra* notes 153-56 and accompanying text.

312 *See supra* notes 186-90 and accompanying text.

313 As elsewhere in this Article, the perspective here is upon act rather than rule utility. *See supra* note 229, 232-34 and accompanying text.

314 *See supra* note 32 and accompanying text.

be postulated that freedom should take precedence to community as a general principle when the two values significantly conflict.[315]

Notwithstanding freedom's general claim to prior moral value, utility remains an essential moral value to respect. Indeed, rather than shunting utility to the rear as an inferior moral principle, the law instead should promote it (together with its economic surrogate, efficiency) to a controlling status in many instances—those in which the guidance it can provide is strong, and that of freedom weak. The guidance provided by the freedom ideal may be weak because the values it sustains are implicated only slightly, or because this abstract value (more frequently than efficiency) simply cannot provide a principled, determinate solution to a particular problem. In cases such as these, where utility (or efficiency) by contrast is able to provide guidance that is clear and strong, freedom should give way to the community ideals.[316] This secondary, but very important, role for utility and efficiency—in providing moral substance to accident decisionmaking when freedom fails to provide an answer—might aptly be called a "default" role.[317]

Conflicts between freedom and community often turn out to be minor, or indeterminate, on both sides (and sometimes turn out upon close inspection to be mirages). When this occurs, when neither ideal is implicated significantly or coherently, the law justifiably may turn instead to practicality, which is based on both freedom and utility. Where the significance or relevance of morals of any type is hard to ascertain, the law should seek two results: first, to provide persons with freedom to adjust their own affairs as they deem best, on grounds of personal interest and practicality, without fear of undue legal intervention; and, second, to devise simple rules that are easy for persons to understand and apply.

The moral theorizing on products liability problems throughout this Article may be ordered lexically according to these principles. This form of ordering suggests that a manufacturer, when it

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315 *See generally* CALABRESI, *supra* note 116, at 24-26; R. DWORKIN, *supra* note 51, at xi (rights as "trumps"); KANT, ELEMENTS OF JUSTICE, *supra* note 25, at *331; RAWLS, *supra* note 41, at 243-48. *But see* RAZ, *supra* note 28.

316 Since efficiency itself promotes equality, R. DWORKIN, *supra* note 9, at ch. 8, and since equality is a vital component of freedom, *supra* notes 40-41 and accompanying text, the promotion of efficiency indirectly promotes freedom, at least to some extent.

317 For an analogous use of the default notion in tort law generally, see Martin A. Kotler, *Competing Conceptions of Autonomy: A Reappraisal of the Basis of Tort Law*, 67 TUL. L. REV. 347 (1992).

legislates on product safety, first should seek to maximize conditions that enhance the autonomy and equality of its various constituencies. Next, it should attempt to maximize their welfare (with due respect to the interests of each), particularly in economic terms. Finally, when moral theory fails to provide a helpful guide for decisionmaking on product safety, the manufacturer should be left to make decisions based upon self-interest (that of shareholders) and practicality.

A user's conduct also should be judged according to these standards. Thus, first, the user should bear moral responsibility for the foreseeable consequences of the voluntary, deliberative decisions, by which the user affirmatively exercises his will in selecting from among alternative courses of action. Second, the user should be required to respect the equal worth of others by bearing responsibility for product accidents resulting from his own unreasonable behavior. Third, if the manufacturer has revealed all hidden danger and has legislated safety levels that reflect the greater communal good (based upon principles of utility, efficiency, and practicality), then the user generally should accept the risks of accidents, and personally insure against them. Finally, the user should be able to order personal affairs as much as possible in terms of practicality, by relying on the truth of a manufacturer's safety assurances and on impressions of safety reasonably conveyed by a product's appearance. In sum, justice should be promoted in a products liability system that constructs its principles first on freedom, truth, and equality, then on utility and efficiency, and, finally, on practicality.[318]

V. TOWARD FIRST PRINCIPLES OF PRODUCTS LIABILITY LAW

Moral theory is helpful in both explaining and justifying the law of products liability. Like technology, the parent of most products, products liability law is generally very new. And like much of modern technology, the law of products liability is changing rapidly. Only in the last few years have the legislatures in the United States,[319] Europe,[320] and Japan[321] begun to focus on products

318 Practicality here may include pure self-interest. *See generally* R. DWORKIN, *supra* note 9, at ch. 8.

319 Many state legislatures have tinkered with a variety of products liability rules over the last few years, *see* 2 Prod. Liab. Rep. (CCH) ¶¶ 90,000-95,270, and Congress contin-

liability law, and the courts continue to struggle over a large variety of doctrinal issues. Particularly in the short run, political expediency and ignorance, especially in the legislatures, may conspire to generate unjust rules of products liability law.[322] In times like these, especially as the American Law Institute begins to reexamine this area of liability,[323] it is vitally important for the law to look to principles based in moral theory.

This Article has thus far inquired generally into moral values underlying products liability problems and has offered a preliminary ordering of the major values. The enterprise now shifts to a search for enduring principles, following from the inquiry above, that may support a moral system of products liability rules. Constructing the rules themselves or, more accurately, adjusting the current rules to fit the moral structure, must remain a major future task that far exceeds the objectives of this Article. The objective here is to propose first principles,[324] reflecting the moral considerations developed earlier, that may provide a theoretical

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ues to debate the issue.

320 After nine years of intense debate, the twelve-nation European Economic Community in 1985 adopted Directive 85/374/EEC of 5 July 1985 Concerning Liability for Defective Products, 1985 O.J. (L 210) 29. *See generally* Fernando Albanese & Louis F. Del Duca, *Developments in European Product Liability*, 5 DICK. J. INT'L L. 193 (1987); Anita Bernstein, *A Duty to Warn: One American View of the EC Products Liability Directive*, 20 ANGLO-AM. L. REV. 224 (1991); Geraint G. Howells, *Implications of the Implementation and Non-Implementation of the EC Products Liability Directive*, 41 N. IR. L.Q. 22 (1990); Jane Stapleton, *Products Liability Reform—Real or Illusory?*, 6 OX. J. LEGAL STUD. 392 (1986).

321 *See* Susumu Hirano, Note, *Drafts of the Japanese Strict Product Liability Code: Shall Japanese Manufacturers Also Become the Insurers of their Products?*, 25 CORNELL INT'L L.J. 643 (1992).

322 *See generally* Harvey S. Perlman, *Products Liability in Congress: An Issue of Federalism*, 48 OHIO ST. L.J. 503 (1987); Joseph Sanders & Craig Joyce, *"Off to the Races:" The 1980s Tort Crisis and the Law Reform Process*, 27 HOUS. L. REV. 207 (1990).

323 *See supra* note 8 and accompanying text.

324 Consider Aristotle's conception of the importance of first principles:

> [T]here are various ways of discovering first principles; some are discovered by induction, others by perception, others by what may be called habituation, and so on. We must try to apprehend them all in the natural *or appropriate* way, and must take pains to define them satisfactorily, as they have a vital influence upon all that follows from them. For it seems that the first principle or beginning is more than half the whole, and is a means of arriving at a clear conception of many points which are under investigation.

ARISTOTLE, *supra* note 41, at 25-26 (footnote omitted).

structure for products liability law. The following set of principles appears justifiable in moral principle:

FIRST PRINCIPLES OF PRODUCTS LIABILITY LAW

PRINCIPLES OF JUSTICE

1. Manufacturers should seek and tell the truth about product dangers.

2. Manufacturers should make products as safe as reasonably possible.

3. Consumers should use products as safely as reasonably possible.

PRINCIPLES OF LIABILITY

1. Manufacturers should be responsible for foreseeable harm caused by their misrepresentations.

2. Manufacturers should be responsible for foreseeable harm caused by their production defects.

3. Manufacturers should be responsible for foreseeable harm that reasonably could have been prevented by (a) designing out unreasonable dangers, or (b) providing danger information.

4. If foreseeable harm cannot be reduced to a reasonable level by redesign or the provision of danger information, and if the harm is likely to be unexpected by consumers or excessive when balanced against the product's benefits, the manufacturer should be responsible, and the product should be banned.

5. Users should be responsible for foreseeable harm caused by product uses that they should know to be unreasonably dangerous.

Although these guiding principles flow quite naturally from the analysis above, they may briefly be explained further here. The first principle of justice and the first and second principles of liability are cast in terms of absolute obligation.[325] In other

325 One partial exception is the duty to seek the truth, which is absolute for purposes of misrepresentation and manufacturing flaws, but is based on reason for purposes of unknowable risks in design. "Absolute" here concerns the maker's prima facie responsibility, subject among other things to the possibility that responsibility may be shared with the user, under the last principle of justice and the last principle of liability. *See infra* notes 336-37 and accompanying text.

words, liability should be strict for cases in which a manufacturer's misrepresentations and production errors cause product accidents. Sometimes a manufacturer's representations will prove false, and its products will be produced with defects despite its best efforts and the reasonableness of those efforts. But in the great majority of cases, both false assertions of product quality and manufacturing flaws in product quality are attributable to the manufacturer's fault in failing to invest as much as prudence dictates in controlling the quality of research, production, or communication.[326] Even if a manufacturer were able to prove that it exercised the highest care in such cases, the attitudes of consumers and even manufacturers have evolved into a background expectation of guarantees for the truth of statements concerning product safety and the physical integrity of manufactured products. Consumers thus have come to rely on manufacturers for such truth and quality, and expect to pay fair value for such guarantees. Both freedom and equality, therefore, require that consumer autonomy be protected in such cases.[327]

The second principle of justice and the third and fourth principles of liability are principles of balance, unlike the principles first examined. Absolute safety simply is not possible in the design and warnings contexts, and a legal rule that required it would elevate improperly the victims of product accidents to a preferred position over consumers generally and over persons who invest their savings in manufacturing enterprises. Principles of equality require that manufacturers legislate levels of product safety that accord due and equal regard to the interests of all affected parties, none of whom is morally entitled to preferential treatment. Reasoning from a hypothetical consent perspective also suggests that a rule of negligence is morally superior to a truly strict rule of accountability in this context. Behind a Rawlsian veil of ignorance,[328] bargainers "blinded" as a group probably would be risk neutral and would ask only that a manufacturer's design and warning "legislation" be as safe as reasonably possible in light of risks that were foreseeable at the time of manufacture.[329] Such blind

326 This suggests that utility and efficiency also support the manufacturer's responsibility in such cases.

327 Thus, the first principle of justice trumps the second in the case of manufacturing defects. This is one instance of freedom predominating over utility and efficiency.

328 *See supra* note 280.

329 Assuming, as we may, *see infra* note 334, the existence of at least minimally adequate private and social insurance mechanisms to protect victims against the economic

bargainers probably would require product makers to be legally responsible for the harmful consequences[330] of their negligent mistakes, but not for "proper" legislative choices that the manufacturer could only do its best to make and price for the general benefit of the community as a whole. Principles of freedom, truth, equality, utility, and efficiency all support a principle that places on potential victims the risk of harmful consequences that inevitably flow from reasonable efforts of manufacturers to protect the public good.[331]

Once manufacturers were so protected against legal responsibility for unavoidably causing harm, one might expect the blind bargainers to shift their concern to protecting the economic interests of the victims of morally and technologically unpreventable product accidents through efficient insurance mechanisms. Because most consumers can provide themselves with accident insurance more efficiently and better reflecting their individual preferences than can manufacturers, the blind bargaining group should prefer a principle of liability that would place responsibility for first-party insurance upon the victims of such inevitable and unavoidable accidents.[332] Likewise, they should prefer placing the responsibility for supplemental public insurance mechanisms upon the state. Such an approach would at once promote the ideals of truth, equality, and utility, and would tend to maximize aggregate autonomy[333] and to minimize the waste of communal wealth.[334]

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consequences of harms from unforeseeable risks and risks from "proper" design decisions.

330 Within the responsibility construct developed in this Article, I generally assume the existence of a causal nexus between an actor's conduct and the victim's harm. As Stephen Perry notes, my model would be more complete were I to provide a formal justification for requiring such a nexus. I concede this point, but note that it conflicts with the lexically prior principle of "stoppage," which by now is long past due.

331 Except for accidents resulting from the manufacturer's misrepresentations and manufacturing defects, where the risk should be on makers. *See supra* text accompanying notes 325-27.

332 And on their employers. *See* Sugarman, *supra* note 252.

333 *See supra* note 290 and accompanying text.

334 It should be noted that the first principles proposed above assume ideally the presence of first party and social welfare insurance mechanisms that widely and sufficiently protect most persons. *See supra* notes 275-77 and accompanying text. To the extent that this assumption fails, certain sharing arguments supporting a rule of fault (in preference to one of strict liability) in the third and fourth principles of liability weaken. But the premise that such insurance programs (at least in terms of medical insurance) are at least minimally available to most persons in the United States in the 1990s appears to be true, so that the sharing arguments appear to be grounded in empirical reality. Moreover, the third and fourth principles derive most of their moral force from values apart from soft notions of communal sharing. Thus, because there appears to be a sub-

For similar reasons, the principles of liability are framed in terms of harm that is foreseeable.[335]

The final principles of justice and liability concern the consumer's responsibility for using products safely. The standard of responsibility is cast in objective terms of balance, requiring consumers to bear responsibility for harm that results from uses that fall below a norm that fairly may be expected of ordinary persons.[336] At first glance, it may appear odd and perhaps regressive to propose a principle that resembles contributory negligence in a modern products liability system based on moral principles. But most consumers are generally capable of acting reasonably, and so their failure to conform their conduct to normal, proper standards ordinarily reflects a moral failure of responsibility. To hold otherwise would derogate the dignity of consumers as autonomous beings who are morally accountable for the harmful consequences of their chosen actions that they should know to be unsafe. Consumers cannot fairly demand to be relieved of the harmful consequences of mistakes attributable to their moral failures, nor to have such harm imposed instead upon other persons free of moral blame. Shifting and spreading losses in such cases would deny the equal worth of other, blameless persons, and it would deny as well the moral responsibility of the careless consumer. But moral responsibility for product accidents often is shared between the user and the maker, for often product accidents are attributable to moral failings of both parties. In such cases, legal responsibility generally should be apportioned according to some fair and practicable standard of comparative fault.[337]

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stantial (if imperfect) basis for the insurance mechanism assumptions, the basic construct of the moral theory and first principles developed here should rest on valid premises. And with improvements in public and private insurance mechanisms in the years ahead, the integrity of the system of products liability principles outlined here should strengthen further.

335 Similar, that is, to the reasons for preferring negligence to strict liability. Limiting responsibility for the consequences of one's actions to those that are foreseeable best comports with notions of moral agency. And freedom and utility are both accommodated best by leaving responsibility for insuring against such consequences with potential victims and the state.

336 For a moral justification of objective standards of behavior in accident law, see R. DWORKIN, *supra* note 9, at ch. 8.

337 By hypothesis, comparative fault assigns legal responsibility on the basis of moral (fault-based) responsibility and, thus, appears grounded in moral theory. Elaboration of this point must await another day.

VI. CONCLUSION

Drawing upon the variety of moral perspectives examined earlier, the final section of this Article offered and briefly explained certain first principles applicable to products liability problems. Constraints of space have limited the application of the principles to the most important problems lying at the heart of products liability theory that concern the basis of responsibility of both manufacturers and consumers. It is necessary even here to postpone a consideration of the effects on specific doctrine, substantive and procedural, that the principles imply. Yet the principles are widely applicable to the vast array of perplexing issues in the law of products liability and provide a moral structure for their proper resolution.

Products liability law is very young, and it is groping as an adolescent for meaning and identity. Ultimately, the final shape of products liability law should be defined by moral values. Among such values, the most fundamental are freedom, including truth and equality, and community, including utility and sharing. Emerging from these underlying moral concepts, first principles of justice and liability provide a framework for the principled development of products liability law.