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SELECTED FEDERAL TORT REFORM AND RESTATEMENT PROPOSALS THROUGH THE LENSES OF CORRECTIVE JUSTICE AND EFFICIENCY

*M. Stuart Madden**

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I. INTRODUCTION

For the past decade, no accident law initiatives have held the stage so conspicuously as (1) the efforts to federalize substantial areas of tort and products liability jurisprudence, and (2) the crafting and publication of the *Restatement (Third) of Torts: Products Liability*.¹ The objective of this Article is to evaluate selected provisions of these two endeavors through the heuristic of the two leading rationales for modern accident law. The first and older rationale is that of corrective justice; the more contemporary approach is that of economic efficiency. This Article will examine whether these two facially incongruous constructs are actually more alike, in theory and in application, than their respective proponents ordinarily acknowledge.

After analyzing two illustrative sections of the most recently proposed federal reform legislation, The Product Liability Reform Act,² and one provision of the *Products Liability Restatement*, the Article concludes that (1) neither the corrective justice nor the economic efficiency analysis is more revealing than its theoretical counterpart; and (2) the merits and shortcomings of this sampling of *Products Liability Restatement* and Reform Act provisions are equally apparent under either analysis. Put another way, a tort rule that fails to do justice will likely lack the deterrent effect that is central to the argument of the economic efficiency school, and a rule that is arguably just in the result reached between the parties, but which disregards the burdens of administration or the likelihood that it will reduce risk-generating behavior, will be rejected as irrational, wasteful, or both.

The Reform Act and the *Products Liability Restatement* may be interestingly juxtaposed on numerous levels. The objective of the *Products Liability Restatement*, in keeping with American Law Institute (A.L.I. or Institute)³ tradition, is not to reform the law, but rather to rationalize it. It does so by reconciling to the extent

¹ RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY (Proposed Final Draft, Apr. 1, 1997) [hereinafter PRODUCTS LIABILITY RESTATEMENT].

² S. 648, 105th Cong. (1997).

³ The American Law Institute is a private body of judges, practicing attorneys, and legal scholars that drafts and publishes the *Restatements* of various fields of the law.

possible conflicting state standards and creating a unified presentation of products liability law that might, the hypothesis goes, prompt a state high court in a jurisdiction that had not ruled on the matter to adopt the *Restatement* position as the optimal rule of law.⁴

The federal tort reform proposals, introduced in each session of Congress for the past dozen years,⁵ differ in approach, as their pronounced objective is to "reform" a field within the civil justice system that proponents of the legislation believe no longer functions fairly or effectively.⁶ The logic, if not the particulars, of some proposals, such as those that would affect joint and several liability or liability of nonmanufacturing sellers, has been endorsed in tort reform legislation that has gained checkered adoption at the state level.⁷ The presence or absence of harmonious state reform endeavors, however, is not a predicate for congressional action.⁸

The *Restatement* and the federal tort reform activities differ not only in objective, but also in focus; i.e., in the selection of subjects addressed. While the *Products Liability Restatement* targets substantive standards of liability, such as plaintiff's prima facie case for manufacturing, design, or informational (warnings or instructions) defect claims,⁹ the most recent federal tort reform proposals have for the most part avoided substantive liability issues. Instead, the federal provisions have addressed matters of defenses (e.g., alcohol-related plaintiff misconduct);¹⁰ several

⁴ Cf. AMERICAN LAW INSTITUTE, THIS IS THE AMERICAN LAW INSTITUTE 1-4 (1996) (describing Institute's purpose, operations, and membership).

⁵ A recitation of the as-yet Sisyphean efforts of federal tort reform proponents, dating to 1985, is set forth in the Appendix, *infra* p. 1097.

⁶ The Reform Act is accompanied by a report of the Committee on Commerce, Science, and Transportation, S. REP. NO. 105-32 (1997). This report justifies federal legislation in this field: "[T]he current morass of product liability laws is a problem of national concern that requires Congressional action. The current system of compensating people injured by defective products is costly, slow, inequitable, and unpredictable." *Id.* at 2.

⁷ See generally STATE CAPITAL LAW FIRM GROUP, PRODUCTS LIABILITY: 50 STATE HANDBOOK (Jerome H. Kahnke & James A. Price eds., 1995) (providing description of law governing liability of nonmanufacturing sellers on state-by-state basis).

⁸ Modern legislation will pass substantive due process muster upon a showing that the legislature, in this case the United States Congress, has identified a legitimate state objective and that the legislation bears a "real and substantial relation to the objective sought to be attained." *Nebbia v. New York*, 291 U.S. 502, 525 (1934).

⁹ PRODUCTS LIABILITY RESTATEMENT, *supra* note 1, § 2.

¹⁰ S. 648, 105th Cong. § 104(a) (1997).

liability for noneconomic harm;¹¹ proper parties (e.g., nonmanufacturing sellers);¹² and damages (e.g., limitations upon and burden of proof for punitive damages).¹³

These very differences make the *Products Liability Restatement* and recent federal tort reform proposals an informative matrix within which to assess modern tort policy, whether from the private law perspective of the American Law Institute¹⁴ or the plenary reform authority of Congress.¹⁵ This examination will rely upon Senate Bill 648, as an exemplar of recent federal reform efforts, and the *Products Liability Restatement*. It is intended as a preliminary evaluation of how three illustrative provisions—pertaining to warning duties, nonmanufacturing seller liability, and joint and several liability for noneconomic harm—fare when measured against the goals of corrective justice-morality and efficiency-deterrence.

First, regarding the *Products Liability Restatement* treatment of warnings defects, the new *Restatement* puts doctrinal categories (strict liability, negligence, warranty) aside in favor of an omnibus definition of a warning or instruction defect.¹⁶ Second, the Reform Act limits the doctrine of joint and several liability in section 110, the provision addressing apportionment of noneconomic loss. Section 110 states: "In a product liability action, the liability of each defendant for noneconomic loss shall be several only and shall

¹¹ *Id.* § 110.

¹² *Id.* § 103.

¹³ *Id.* § 108.

¹⁴ In this connection, Guido Calabresi and Jeffrey O. Cooper tell the marvelous story in which Justice Cardozo is said to have leveraged the *Restatement (First) of Torts* position that "negligence in the air" will not suffice by his prediction to the Institute that the yet undecided *Palsgraf v. Long Island Railroad*, 162 N.E. 99 (N.Y. 1928), would soon take such a position. Guido Calabresi & Jeffrey O. Cooper, *New Directions in Tort Law*, 30 VAL. U. L. REV. 859, 867 (1996). Cardozo is said to have then employed the anticipated *Restatement* position to bolster his arguments in the majority opinion in *Palsgraf*. *Id.*

¹⁵ This Article will not discuss separately the Commerce Clause vulnerability, if any, of federal tort reform. See generally *United States v. Lopez*, 514 U.S. 549 (1995) (holding Gun-Free School Zone Act of 1990 beyond Congress's Commerce Clause power).

¹⁶ Section 2(c) states that, for purposes of determining liability under section 1, a product "is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller" PRODUCTS LIABILITY RESTATEMENT, *supra* note 1, § 2(c).

not be joint.”¹⁷ Third, under Reform Act section 103, nonmanufacturing sellers generally will be answerable in damages only upon a showing of negligence, intentional wrongdoing, or breach of an express warranty.¹⁸ The Reform Act provides that the plaintiff can, nonetheless, proceed against the nonmanufacturing seller as though it were a manufacturer¹⁹ (i.e., in strict liability) should the manufacturer not be amenable to *in personam* jurisdiction or upon the court’s determination that the manufacturer would be unable to satisfy a judgment.²⁰ The Act also alleviates statute of limitations problems that might arise due to delays in determining that a manufacturer would be unable to satisfy a judgment.²¹

Before analyzing these three provisions under modern tort law’s “root stock” principles of corrective justice and economic efficiency, I undertake in Part II to survey, briefly, these two constructs. This analysis necessitates examination of the argued distinctions between these divergent schools of torts thinkers: (1) those who claim that tort law’s objectives of reducing accident costs²² and

¹⁷ S. 648 § 110. The accompanying Senate Report explains: “[The Act] eliminates joint liability for ‘noneconomic damages’ (e.g., damages for pain and suffering or emotional distress). This means that each defendant will be liable for damages for pain and suffering in an amount proportional to its share of fault.” S. REP. NO. 105-32, at 56 (1997). The Reform Act also describes the trier of fact’s role in determining “percentage of responsibility” and a resultant levy of damages against a losing defendant. S. 648 § 110(b)(2). It provides that such damages shall be “allocated to the defendant in direct proportion to the percentage of responsibility of the defendant,” with the trier of fact assigning “the percentage of responsibility of each person responsible for the claimant’s harm, whether or not such person is a party to the action.” *Id.* § 110(b)(1)-(2).

¹⁸ S. 648 § 103(a)(1). “In general.—In any product liability action, a product seller other than a manufacturer shall be liable to a claimant *only* if the claimant establishes [the existence of one of three narrow sets of facts].” *Id.* (emphasis supplied).

¹⁹ *Id.* § 103.

²⁰ *Id.* § 103(b)(1)(A)-(B).

²¹ “[T]he statute of limitations applicable to claims asserting liability of a product seller as a manufacturer shall be tolled from the date of filing of a complaint against the manufacturer to the date that judgment is entered against the manufacturer.” *Id.* § 103(b)(2).

²² See, e.g., *Suter v. San Angelo Foundry & Mach. Co.*, 406 A.2d 140, 151 (N.J. 1979) (“Strict liability in a sense is but an attempt to minimize the costs of accidents and to consider who should bear those costs.”). *Suter* cites Guido Calabresi & Jon T. Hirschoff, *Toward a Test for Strict Liability in Torts*, 81 YALE L.J. 1055 (1972) [hereinafter Calabresi & Hirschoff, *Strict Liability*], and concludes: “Using this approach, it is obvious that the manufacturer rather than the factory employee is ‘in the better position both to judge whether the avoidance costs would exceed foreseeable accident costs and to act on that judgment.’” *Suter*, 406 A.2d at 152; see also *Insurance Co. of N. Am. v. Forty-Eight*

encouraging beneficial behavior are effectively validated through the economic model of efficiency;²³ and (2) those who urge that these objectives are best achieved through principles grounded in corrective justice and morality.²⁴ Part II also sketches the sporadic explicit judicial recognition of these doctrines.

Part III analyzes the selected *Restatement* and Reform Act provisions in terms of the claimed but inexact distinctions between the positions taken by the corrective justice and efficiency camps. Part IV assesses the conclusions supported by the comparisons made, and Part V renders preliminary conclusions regarding the overall operative homeostasis of simultaneous *de facto* application of corrective justice and efficiency principles to accident law. More precisely, Part V applies the Legal Pragmatist approach advanced by Holmes, James, and Posner²⁵ and concludes that efficiency and corrective justice principles alike hold measurable predictive value in gauging how tort cases have been and will continue to be decided.²⁶ Relieved of the notion that efficiency principles should

Insulations, 633 F.2d 1212, 1231 (6th Cir. 1980) (Merritt, J., dissenting) (“[A]ccident costs [can be] minimized by placing ultimate liability on the ‘least cost avoider.’ ” (citing GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970) [hereinafter CALABRESI, *COSTS OF ACCIDENTS*])).

²³ Various empirical evidence supports the conclusion that tort reform elevates overall societal productivity and wealth. See, e.g., THOMAS J. CAMPBELL ET AL., *THE CAUSES AND EFFECTS OF LIABILITY REFORM: SOME EMPIRICAL EVIDENCE* 27 (National Bureau of Econ. Research Working Paper No. 4989, 1995) (analyzing effect of tort reform upon industry liability; concluding “that liability-reducing reforms are associated with higher levels of output per worker and employment, in a broad range of industries”).

²⁴ See, e.g., *Procanik by Procanik v. Cillo*, 478 A.2d 755, 763 (N.J. 1984) (commenting, in context of *de novo* consideration of wrongful birth claim by impaired child for emotional distress and impaired childhood: “Also at work is an appraisal of the role of tort law in compensating injured parties, involving as the role does, not only reason, but also fairness, predictability, and even deterrence of future wrongful acts.”).

²⁵ See *infra* notes 296-298 and accompanying text (explaining view that any legal theory’s strength rests on its value for predicting future action).

²⁶ The surmise that the law and economics and the corrective justice approaches to accident law may, in fact, complement each other is neither original to the author nor to other theoretical motifs. See MARK F. GRADY, *CASES AND MATERIALS ON TORTS* xv (1994) (“Legal Realists often say that two opposing policies yield [a] legal rule that is just right.” (referencing Thomas C. Grey, *Langdell’s Orthodoxy*, 45 U. PITT. L. REV. 1 (1983))). Perhaps if, as it has sometimes been described in comparison to strict liability, negligence (as classically interpreted as a standard bearer of corrective justice principles) is hot, and economic models (at least to critics) are cold, then their mutual advancement of accident law is “just right.”

explain all or most of civil liability, or that corrective justice principles should do so, a Legal Pragmatist approach permits the adoption of both corrective justice and efficiency models as means or instruments of understanding modern tort principles and anticipating their effect.

Some have argued that both the *Products Liability Restatement* and the Reform Act are deficient in degree for lacking explicit objectives compatible with a public policy unaffected by business or plaintiffs' trial bar pressures. Be this criticism deserved or not, legal theorists have underserved the debate.²⁷ The legal academic community has mainly stayed on the sideline, declining to apply in a comprehensive way corrective justice, economic, or alternative theories in a broad-spectrumed manner to the leading tort initiatives of the day. In my view, legal change without an underlying defensible public ethic risks reflecting politics over jurisprudential processes, while philosophical exploration of tort law untied to any objective of examining or criticizing today's most important accident law issues is simple scholasticism.²⁸

²⁷ I elected this subject because of my overall dissatisfaction with the level of analysis revealed in the floor debate regarding the *Products Liability Restatement* and with congressional examination of federal reform proposals advanced over the past several years. Much of the dispute surrounding the Institute's consideration of the new *Restatement* concerned whether particular provisions favored or disfavored the competing interests of plaintiffs or defendants. See John F. Vargo, *The Emperor's New Clothes: The American Law Institute Adorns a "New Cloth" for Section 402A Design Defects—A Survey of the States Reveals a Different Weave*, 26 U. MEM. L. REV. 493, 507 (1996) (examining *Products Liability Restatement* and concluding that it represents "[m]ovement from [p]ro-[c]onsumer to [p]ro-[m]anufacturer"). Similarly, the legislative history of the current Reform Act and its predecessors has only rarely escaped the gravitational pull of politics and vested interest polemic.

I should add that the A.L.I. Reporters and its leadership sustained the process and Institute tradition above interest group arguments that threatened to turn the proceedings into a legislative session.

²⁸ In this regard I am pleased to see that I am not alone. See Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1810 (1997) (finding proportion of contemporary philosophy of law scholarship to be "highly abstruse and abstract").

II. SUMMARIZATION OF SELECTED TORTS CONSTRUCTS

A. GENERALLY

As tort observers have noted recently, two distinct schools of tort philosophy currently compete for the torts flag.²⁹ The older of the two approaches is commonly termed corrective justice, and its influential group of scholars hew to the position that the original and still primary goal of tort law, including the law of products liability, is righting wrongs caused by tortious behavior. With its strong overlay of moral obligation, and the annulment of a wrongdoer's unjust enrichment, the corrective justice approach posits that tort's principal *raison d'être* is to return parties suffering personal physical injury or property damage due to another's tortious conduct to the *status quo ante*, at least insofar as money damages can so do.³⁰

The more recently developed approach is one of economic efficiency, an evaluation that seeks to demonstrate that the appropriate measure of the success, or failure, of tort law ought to proceed under an economic analysis. Richard Posner and others call for a scientific ethic of efficiency, a so-called efficiency norm.³¹ Many have responded to this call, with one commentator concluding that "much (though by no means all) of modern tort law is at least

²⁹ "Currently there are two major camps of tort scholars. One understands tort liability as an instrument aimed largely at the goal of deterrence, commonly explained within the framework of economics. The other looks at tort law as a way of achieving corrective justice between the parties." *Id.* at 1801.

See generally John Borgo, *Causal Paradigms in Tort Law*, 8 J. LEGAL STUD. 419, 454-55 (1979) (commending "conception of tort law that rivals the dominant economic one," employing "notions of individual moral responsibility . . . logically excluded from the latter"); Matthew S. O'Connell, *Correcting Corrective Justice: Unscrambling the Mixed Conception of Tort Law*, 85 GEO. L.J. 1717, 1717 (1997) ("Generally accepted theories of tort law can be divided into two classes: instrumental theories, which view social cost and efficiency as the essential factors in evaluating rights and duties under the law, and noninstrumental theories, which view law as the vindication of a scheme of moral responsibility.").

³⁰ See JULES L. COLEMAN, *RISKS AND WRONGS* 197 (1992) (noting that one of two ways of "understanding tort law . . . emphasizes its role in rectifying for wrong done").

³¹ See generally Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980) (discussing efficiency norm and wealth maximization).

roughly consistent with . . . economic analysis."³²

Analytically distinguishable from these two approaches is the question of how to go about evaluating whether any given tort rule is socially beneficial as that term is defined by either (or both) of these constructs. Several observers have described forbearance of pure self interest as a touchstone of social obligation, with such forbearance operating to encourage positive and productive behavior and to discourage harmful or wasteful activity. That view suggests that all of tort law can be seen as an interlocking check against impulse,³³ and its too-frequent concomitant, the placement of one's interest above the interests of others.³⁴ Instrumentalists (or functionalists), be they corrective justice advocates or efficiency advocates, strive to identify effective "substantive ambitions or

³² Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 381 (1994). A deep reservoir of scholarly criticism is directed, however, at efforts to identify one ascendant model of analysis to the exclusion of others. *E.g.*, David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427, 433 (1993) ("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, an entire legal field, or even all of law.").

³³ Cf. BERTRAND RUSSELL, A HISTORY OF WESTERN PHILOSOPHY 15 (1945) ("Civilization checks impulse not only through forethought, which is a self-administered check, but also through law, custom, and religion.").

Of the role of nonimmediacy in the development of duty, Russell further observed:

The civilized man is distinguished from the savage mainly by *prudence*, or, to use a slightly wider term, *forethought*. He is willing to endure present pains for the sake of future pleasures, even if the future pleasures are rather distant. . . . True forethought only arises when a man does something towards which no impulse urges him, because his reason tells him that he will profit by it at some future date.

Id.

A personal responsibility predicate to action, including action not dependent upon a circumspect evaluation of the rights of others, was suggested by G.E. Moore in his short volume *Ethics*:

Our theory holds, then, that a great many of our actions are voluntary in the sense that we could have avoided them, *if*, just beforehand, we had chosen to do so. It does not pretend to decide whether we *could* have thus chosen to avoid them; it only says that, *if* we had so chosen, we should have succeeded.

G.E. MOORE, *ETHICS* 16 (undated).

³⁴ Cf. David G. Owen, *The Fault Pit*, 26 GA. L. REV. 703, 720 (1992) ("Equality as a social ideal may be defined in many ways, but within a free society may perhaps best be defined . . . as requiring an 'equality of concern and respect' for the interests of other persons." (citation omitted)).

purposes" in the law,³⁵ or, put differently, a causal connection between application of a rule of law and some beneficial effect upon social and business behavior.³⁶ A successful functional or instrumental rule will create incentives for socially acceptable behavior.³⁷ As Cardozo put it, "The final cause of law is the welfare of society."³⁸

Thus, there is general agreement that the key to measuring the success of tort law, be it statutory³⁹ or decisional, and be the approach nominally one of corrective justice or one of efficiency,

³⁵ COLEMAN, *supra* note 30, at 200.

³⁶ Ernest Weinrib, however, disputes the modern convention that tort principles must be validated through a "function" that such principles serve, such as "efficiency" or "corrective justice." ERNEST J. WEINRIB, *THE IDEA OF PRIVATE LAW* 1-21 (1995). To Weinrib, tort law can and should be understood on and within its own terms: a unitary, self-correcting dynamic onto itself, and not dependent upon any external logic or objective. *Id.* at 5. Weinrib nevertheless argues that Aristotelian concepts of restoration of equality found modern voice in Immanuel Kant's "equal rights" conception of law, and that the Aristotelian-Kantian philosophical continuum, discussed *infra* notes 56-60, 69-74 and accompanying text, constitute the core precepts of modern corrective justice principles. *Id.* at 20. In Weinrib's words: "Private Law makes corrective justice and Kantian right explicit by actualizing them in doctrines, concepts, and institutions that coherently fit together." *Id.* Thus, even while rejecting an explicit "instrumentalist" or, in Weinrib's term, "functional[ist]" approach to doctrinal evaluation, he would agree that application of modern corrective justice principles, more often than not, result in just and moral decisions. *See id.* at 8-16 (describing private law's imperatives towards "internal intelligibility," "coherence," and "unitary structure," as aided by the self-correcting processes of appellate review).

With Weinrib's view, compare RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 29 (1990):

Legal rules are to be viewed in instrumental terms, implying contestability, revisability, mutability. "Few rules in our time are so well established that they may not be called upon any day to justify their existence as means adapted to an end. If they do not function, they are diseased. If they are diseased, they need not propagate their kind. . . . In the endless process of testing and retesting, there is a constant rejection of the dross . . . the tide rises and falls, but the sands of error crumble."

(quoting BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 98-99, 177, 179 (1921)).

In seeming agreement with Weinrib, Holmes described his objectives in two key lectures anticipating *The Common Law* as an effort "to discover whether there is any common ground at the bottom of all liability in tort, and if so, what that ground is." OLIVER WENDELL HOLMES, *THE COMMON LAW* 63 (Mark DeWolfe Howe ed., 1963).

³⁷ Weinrib's self-imaging private law would achieve like results through its organic imperative towards "internal intelligibility." *See* WEINRIB, *supra* note 36, at 8-16 (applying internal, rather than functionalist, viewpoint to private law).

³⁸ CARDOZO, *supra* note 36, at 66.

³⁹ For example, a state codification of a liability standard for design defect.

reposes in examination of whether the liability analysis and conclusion has the ability to influence behavior.⁴⁰ In this Article I will employ the orthodox instrumentalist inquiry in evaluating whether the three provisions that are the Article's focus have the potential to shape behavior in ways that advocates of corrective justice and efficiency both view as favorable.⁴¹ An orientation to my hypothesis that the similarities in application and result (although not in ideation) between the corrective justice and efficiency approaches outweigh the distinctions, and that these similarities will be revealed in the evaluation of the new *Restatement* and Reform Act provisions, may prove helpful. To provide a brief example of the application of my theory, I suggest that if there exists any material divergence between the effect, in theory and in application, of the corrective justice-morality and the efficiency-deterrence analyses, such a variance would be manifested in either or both of two modern and widely-noted tort claims: (1) the products liability claim involving the scalding hot McDonald's coffee; and (2) the mass environmental catastrophe arising from the grounding of the Exxon Valdez.

Applying an instrumental or functional standard first to the coffee spill, the applicable tort rule of negligence would be successful if, following the plaintiff's verdict, fast food restaurants served coffee at lower temperatures. Regarding the oil spill, the doctrine of public nuisance⁴² would be considered successful, again from an

⁴⁰ COLEMAN, *supra* note 30, at 203. Weinrib, again, would agree that whether the objectives were generated externally (the instrumentalist or functionalist approach) or internally (Weinrib's contention), all private law is judged ultimately by whether it achieves a just result between the parties. WEINRIB, *supra* note 36, at 20.

Even in an environment of imperfect information, as society becomes ever more familiar with the corpus of such private law decisions, and is persuaded, ideally, by its fairness and morality, actors will predictably be influenced (if not directed) in their future behavior by their perception of how the civil justice system will resolve future disputes.

⁴¹ "[I]nstrumentalists believe that tort law has goals. We can distinguish among instrumentalists in terms of the goals each believes are appropriate to tort law. The important dichotomy is between moral and economic instrumentalists." COLEMAN, *supra* note 30, at 203.

⁴² RESTATEMENT (SECOND) OF TORTS § 821C(1) (1979); *see also* GERALD W. BOSTON & M. STUART MADDEN, LAW OF ENVIRONMENTAL AND TOXIC TORTS: CASES, MATERIALS AND PROBLEMS 46-47, 51-56 (1994) (recognizing importance of special injury requirement for public nuisance actions by private individuals); JOHN L. DIAMOND ET AL., UNDERSTANDING TORTS 380-82 (1996) (defining elements of public nuisance); M. STUART MADDEN, TOXIC TORTS DESKBOOK 37-38 (1992) (noting that plaintiffs who sustain special injuries are able

instrumental or functional perspective, if, following findings for plaintiffs, tanker owners commenced to be more probing in their evaluation of the fitness of vessel captains.⁴³

Taking the hypothetical one step further, the predicted behavioral modification of fast food restaurateurs could be claimed by corrective justice and efficiency adherents alike as a validation of their respective approaches. From the standpoint of corrective justice, and examining only the scalding coffee paradigm, compensation of the injured patron (1) satisfies tort law's victim-compensation objective;⁴⁴ (2) annuls McDonald's unjust enrichment at having cultivated a public perception that its coffee would remain hot longer (certainly a mere luxury) at the social cost of an increased risk of scalding incidents;⁴⁵ and (3) operates to deter continued fast food sale of unnecessarily hot coffee.⁴⁶

From an efficiency-deterrence standpoint, imposition of liability upon McDonald's would be economically rational as it (1) corrects McDonald's market misbehavior at having eluded a protocontractual agreement with patrons⁴⁷ (e.g., a sign beneath the Golden Arches stating "Scalding Coffee Sold Here"); (2) places liability upon the party in the position to most inexpensively detect, and perhaps correct, the risk;⁴⁸ and (3) in purely social cost terms, reaches a conclusion that has widespread if not universal approval that we assign a greater economic value (in the sense of reduced

to bring public nuisance actions as individuals rather than as representatives of public).

⁴³ Of course other risk reduction responses would be available to vessel owners, such as the double hulling of vessels. The costs of such risk reduction, however, might seem too great to achieve the elimination of episodic contaminant spills.

⁴⁴ See generally Richard W. Wright, *Right, Justice and Tort Law*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW* 159 (David G. Owen ed., 1995) (arguing that true foundation of tort law is corrective justice, not efficiency theory).

⁴⁵ Cf. Linda Ross Meyer, *Just the Facts?*, 106 *YALE L.J.* 1269, 1299 n.161 (1997) (describing "the difficulty in correlating a defendant's wrong with a victim's harm" (reviewing DON DEWEES ET AL., *EXPLORING THE DOMAIN OF ACCIDENT LAW: TAKING THE FACTS SERIOUSLY* (1996))). Annulment is conceptually distinct from corrective justice in that it could occur by civil fine rather than by victim compensation.

⁴⁶ See Schwartz, *supra* note 32, at 381-87, 403-13 (collecting literature analyzing success of tort law in deterring negligent conduct).

⁴⁷ Cf. Lynn A. Stout, *Are Takeover Premiums Really Premiums? Market Price, Fair Value and Corporate Law*, 99 *YALE L.J.* 1235 (1990) (examining *ex ante* and *ex post* models of stock pricing).

⁴⁸ See Sharlene W. Lassiter, *From Hoof to Hamburger: The Fiction of Safe Meat Supply*, 33 *WILLAMETTE L. REV.* 411, 418 (1997) (concluding that meat producer is least cost avoider).

accident costs) to relatively risk-free egress from fast food lanes than we do on the marginal social benefits of a small number of additional minutes during which our coffee remains hot.⁴⁹

Putting aside any need for agreement with the above premises, a like evaluation of the three provisions that are the subject of this Article should reveal preliminarily if what may have been a bona fide categorical distinction between efficiency and corrective justice principles has maintained its originating rationale; or whether, instead, the two approaches have with time come into rough alignment with one another. The following two Sections describe in a concise fashion selected constructs within both the corrective justice-morality approach and the efficiency-deterrence position that provide a means of comparing and contrasting the chosen Reform Act and *Products Liability Restatement* provisions.⁵⁰

B. CORRECTIVE JUSTICE-MORALITY

In general terms, corrective justice proponents advance the proposition that the judiciary should promote a rights-based jurisprudence grounded in moral precepts.⁵¹ Even among those

⁴⁹ See generally Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

⁵⁰ Application of analytical approaches other than these, such as distributive justice, is beyond the scope of this Article. Cf. JOHN RAWLS, *A THEORY OF JUSTICE* 73, 179 (1971) (stating that justice requires "mitigat[ion of] the influence of social contingencies and natural misfortune on distributive shares" and "an undertaking to regard the distribution of natural abilities as a collective asset so that the more fortunate are to benefit only in ways that help those who have lost out"), discussed in RICHARD A. EPSTEIN, *SIMPLE RULES FOR A COMPLEX WORLD* 54 (1995); Peter Benson, *The Basis of Corrective Justice and Its Relation to Distributive Justice*, 77 IOWA L. REV. 515 (1992) (reviewing different analytical constructs, including that of distributive justice).

⁵¹ See Vincent A. Wellman, *Conceptions of the Common Law: Reflections on a Theory of Contract*, 41 U. MIAMI L. REV. 925, 925 n.1 (1987) (citing RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 1-130 (rev. ed. 1977), in which Dworkin "propound[s] a rights-based theory of law and a corresponding obligation of judges to consider moral precepts when deciding significant cases"). Compare the following assertion made by Immanuel Kant:

I assume that there are pure moral laws which determine, purely *a priori*, (without regard to empirical motives, that is, to happiness) what is and is not to be done, that is, which determine the employment of the freedom of a rational being in general; and that these laws command in an *absolute* manner (not merely hypothetically, on the supposition of other empirical ends), and are therefore in every respect necessary.

IMMANUEL KANT, *CRITIQUE OF PURE REASON* 636-37 (Norman Kemp Smith trans., 1965).

observers who would not subscribe wholeheartedly to this proposition, there is probably a consensus that if moral precepts are not to be the primary values supported, justice and morality-based goals still form part of the foundation of modern tort law.⁵²

The moral authority of any law turns upon the perception that its tenets lead to just results.⁵³ Most contemporary observers would agree that a core consideration in any modern contemplation of "justice" would be the goal of "corrective" justice, i.e., a result that to the extent possible deprives the wrongful party of his gain, and restores the injured party to the position he enjoyed before the harm.⁵⁴ Holmes explained: "Be the exceptions more or less numerous, the general purpose of the law of torts is to secure a

⁵² It is agreed generally that only a wrong can transgress a moral imperative, in the sense that a harm befalling a plaintiff with no predicate negligence or violation of some other doctrinal imperative, such as liability for abnormally dangerous activities, creates no rectificatory duty of any actor. Weinrib might point to tort doctrine as common law in which wrongdoing is a necessary, but not individually sufficient, component of liability. See Martin A. Kotler, *Utility, Autonomy and Motive: A Descriptive Model of the Development of Tort Doctrine*, 58 U. CIN. L. REV. 1231, 1240 (1990) ("[W]rongdoing of a party is an essential factor in the decision to impose liability" (citing Ernest J. Weinrib, *The Morality of Tort Law*, Address to the Tort Law Section, Association of American Law Schools Annual Meeting (Jan. 9, 1988))). Cf. HENRY SUMNER MAINE, *ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS* 127 (1866) (suggesting that in primitive times, before individuals were generally "conceived as altogether separate" from family or community, "[t]he moral elevation and moral debasement of the individual appear to be confounded with, or postponed to, the merits and offen[s]es of the group to which the individual belongs").

⁵³ See READINGS IN JURISPRUDENCE 37 (Jerome Hall ed., 1938) ("As Augustine says (De Lib. Arb. i.5), that which is not just seems to be no law at all: wherefore the force of a law depends on the extent of its justice." (emphasis added)); cf. Randy E. Barnett, *Getting Normative: The Role of Natural Rights in Constitutional Adjudication*, 12 CONST. COMM. 93, 105-13 (1995) (arguing that for constitutional procedures to be legitimate, they must be of such a nature as to bind in conscience).

⁵⁴ Jules L. Coleman, *The Practice of Corrective Justice*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW, *supra* note 44, at 53 ("[C]orrective justice is the principle that those who are responsible for the wrongful losses of others have a duty to repair them, and that the core of tort law embodies this conception of corrective justice.").

[The civil] law nobody overlooks, the rewards and punishments that enforce it being ready at hand, and suitable to the power that makes it; which is the power of the commonwealth, engaged to protect the lives, liberties, and possessions of those who live according to its law; and has power to take away life, liberty, or goods from him who disobeys

John Locke, *Theory of Knowledge: Essay Concerning Human Understanding*, in LOCKE: SELECTIONS 203 (Sterling P. Lamprecht ed., 1928).

The term "corrective" in "corrective justice" has been considered synonymous with the terms "rectificatory" or "commutative." POSNER, *supra* note 36, at 313.

man *indemnity* against certain forms of harm to person, reputation, or estate, at the hands of his neighbors”⁵⁵

Although codification now plays a significant role in products liability law, the earliest judicial revelation of corrective justice principles was through common-law adjudication. The origins of the common law, in turn, can be traced at least from Aristotle⁵⁶ and Cicero⁵⁷ through the book of Exodus.⁵⁸ In Book V, chapter 2 of *Nicomachean Ethics*, Aristotle is credited with laying the cornerstone of the corrective justice principles of today’s common law.⁵⁹ Under the Aristotelian corrective principle of *diorthotikos*, or “making straight,” at the remedy phase the court will attempt

⁵⁵ HOLMES, *supra* note 36, at 115 (emphasis added). In addition, Henry Maine observes: Now the penal Law of ancient communities is not the law of Crimes; it is the law of Wrongs, or, to use the English technical word, of Torts. The person injured proceeds against the wrong-doer by an ordinary civil action, and recovers compensation in the shape of money-damages if he succeeds. . . . [All such Torts] gave rise to an Obligation or *vinculum juris*, and were all requited by a payment of money.

MAINE, *supra* note 52, at 370.

⁵⁶ See generally H.H. JOACHIM, ARISTOTLE: THE NICOMACHEAN ETHICS (D.A. Rees ed., Oxford Univ. Press 1955) (1951).

⁵⁷ Cicero describes with particularity a natural law-corrective justice deterrence objective: Of all these things about which learned men dispute there is none more important than clearly to understand that we are born for justice, and that right is founded not in opinion but in nature. There is indeed a true law, right reason, agreeing with nature and diffused among all, unchanging, everlasting, which calls to duty by commanding, deters from wrong by forbidding.

BENJAMIN FLETCHER WRIGHT, JR., AMERICAN INTERPRETATIONS OF NATURAL LAW: A STUDY IN THE HISTORY OF POLITICAL THOUGHT 5 (1931) (quoting CICERO, DE LEGIBUS II); see also SURYA PRAKASH SINHA, WHAT IS LAW? 57-58 (1989) (discussing Cicero’s philosophy of law).

⁵⁸ “The earliest reference to punitive damages can be found in Exodus 22:9, where it is prescribed that one found guilty of taking another’s property be required to pay back double what was taken.” James J. Restivo, Jr., *Insuring Punitive Damages*, NAT’L L.J., July 24, 1995, at C1, C1.

⁵⁹ [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 in this sense is unfair or unequal, and the endeavor of the judge is to equalize it.

ARISTOTLE, NICOMACHEAN ETHICS 154 (J. Welldon trans., 1987), discussed in David G. Owen, *The Moral Foundations of Punitive Damages*, 40 ALA. L. REV. 705, 707-08 & n.6 (1989). Jeremy Waldron has suggested that assignment of this important concept to Aristotle rests upon a slender reed, stating that “the attribution is based on a rather free and simplistic translation of a very obscure passage . . . in the *Nicomachean Ethics*.” Jeremy Waldron, *Moments of Carelessness and Massive Loss*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW, *supra* note 44, at 387, 392 (citing ARISTOTLE, NICOMACHEAN ETHICS 114-17 (W.D. Ross trans., 1954)).

to equalize things by means of the penalty, taking away from the gain of the assailant. For the term "gain" is applied generally to such cases, even if it be not a term appropriate to certain cases, e.g. to the person who inflicts a wound—and "loss" to the sufferer. . . . [T]he judge restores equality⁶⁰

Concepts of "natural law" likewise provide a tie between corrective justice and considerations of morality. One of the three alternative definitions of natural law offered by Benjamin Fletcher Wright, Jr., was that "natural law" comprised "principles of right, principles which are established or which should be established if justice is to prevail."⁶¹ The "morality" backdrop of natural law was noted by Posner in his characterization of "natural law" as "basic political morality."⁶²

As a corollary to its rectificatory goal of setting matters straight between the parties, the corrective justice model sets forth the broader societal objective of reducing the occurrence of similar wrongs in the future. The corrective justice objective of deterrence is evidenced in such early writings as that of one academic author, who in 1890 wrote of the goals of the negligence action in these words:

The really important matter is to adjust the dispute between the parties by a rule of conduct which shall do justice if possible in the particular case, but which shall also be suitable to the needs of the community, and tend

⁶⁰ 2 THE COMPLETE WORKS OF ARISTOTLE 1786 (Jonathan Barnes ed., 1984). "It is for this reason also," Aristotle continues, "that it is called just [*dikaion*], because it is a division into two parts [*dika*] . . . and the judge [*dikastes*] is one who bisects [*dichastes*] Therefore the just . . . consists in having an equal amount before and after the transaction." *Id.* at 1787. See generally EPSTEIN, *supra* note 50, at 91 (asserting that tort law "deals with how to protect the things that you have"); Richard W. Wright, *Substantive Corrective Justice*, 77 IOWA L. REV. 625 (1992) (discussing varied concepts of corrective justice).

⁶¹ WRIGHT, *supra* note 57, at 3; see also M. Stuart Madden, *The Vital Common Law: Its Role in a Statutory Age*, 16 U. ARK. LITTLE ROCK L.J. 555, 572 (1996) (discussing Wright's alternative definitions of natural law).

⁶² POSNER, *supra* note 36, at 230.

to prevent like accidents from happening in the future.⁶³

Critics of the corrective justice model turn regularly to the argument that a corrective justice-morality model does little to reduce accident costs as it does not deter risk-creating behavior in any material way,⁶⁴ if for no other reason than that risk-creating behavior resulting in no harm conventionally triggers no penalty for the actor. Upon closer examination, however, devaluation of the deterrence effect of the corrective justice-morality principles is overstated. Even those who question the level of the deterrent effect of tort law⁶⁵ concede that it delivers a "moderate amount of deterrence."⁶⁶ Thus, as the quantum of deterrent effect of corrective justice principles will continue to be questioned,⁶⁷ sound arguments can be made that tort law's corrective justice attributes carry with them a strong incentive to beneficial conduct, or put another way, a deterrence to substandard conduct. The decisional law with virtually no dissent repeats a deterrence role in accident law, without specifically assigning this result to the operation of either corrective justice or efficiency principles.⁶⁸ When those

⁶³ William Schofield, *Davies v. Mann: Theory of Contributory Negligence*, 3 HARV. L. REV. 263, 269 (1890); accord *Barrett v. Superior Court* (Paul Hubbs Constr. Corp.), 272 Cal. Rptr. 304, 308 (Ct. App. 1990) (interpreting term "wrongful act" in wrongful death statute to mean tortious act). The *Barrett* court commented further that by choosing not to limit the measure of damages, "California has chosen 'to strengthen the deterrent aspect of the civil sanction: 'the sting of unlimited recovery . . . more effectively penalize[s] the culpable defendant and deter[s] it and others similarly situated from such future conduct' . . . rather than to protect defendants from excessive financial burdens." *Barrett*, 272 Cal. Rptr. at 308 (citations omitted); see also *Pierce v. Pacific Gas & Elec. Co.*, 212 Cal. Rptr. 283, 291 (Ct. App. 1985) (stating one principal purpose of strict liability was "to provide an economic incentive for improved product safety").

⁶⁴ See, e.g., Heidi Li Feldman, *Harm and Money: Against the Insurance Theory of Tort Compensation*, 75 TEX. L. REV. 1567, 1601 (1997) ("[I]n demanding that the tortfeasor's payment go to the tort victim—rather than the state, for example—corrective justice remains distinct from deterrence.").

⁶⁵ E.g., Schwartz, *supra* note 32, at 379.

⁶⁶ *Id.*

⁶⁷ *Id.*; cf. Wright, *supra* note 60, at 626 (noting disagreement on effects of corrective justice principles).

⁶⁸ See, e.g., *Barrett*, 272 Cal. Rptr. at 309-10 (noting that one purpose of strict liability is "to provide an economic incentive for improved product safety" and that allowing heirs to recover under strict liability would operate "to deter foreseeable wrongful conduct and to allocate the cost of injury"); *Gantes v. Kason Corp.*, 679 A.2d 106, 111 (N.J. 1996) ("The goal

disputing the vitality of a deterrence role achieved by decisions tracking corrective justice principles are largely academicians, I am inclined to side with the conclusions of the judges who try the cases and read the records.

Furthermore, philosophical support for the incentive effect of corrective justice principles can be found in the "categorical imperative" or "equal rights" teaching of Immanuel Kant.⁶⁹ Kant's "moral philosophy" "takes as its central theme the idea of self-legislated law," i.e., the view that "[t]he democratic community stands in the same relation to the laws it makes as the moral individual does to his own self-determined imperatives of action."⁷⁰ To Kant, "pure reason's *first* practical function . . . is to make us cognizant of the moral law: the paradigm of universalizability to which maxims of objectively correct actions would conform."⁷¹ A law's "universalizability," i.e., its applicability to all persons however circumstanced in relationship or in relative empowerment, gives rise to an equal rights attribute to Kant's philosophy—specifically, Kant's "categorical imperative": "Act only according to that maxim whereby you can at the same time will that it should become a universal law."⁷²

of deterrence, acknowledged generally to be part of tort law, is especially important in the field of products-liability law. . . . [T]his state has a strong interest in encouraging the manufacture and distribution of safe products . . . and, conversely, in deterring the manufacture and distribution of unsafe products . . . "); *West Am. Ins. Co. v. Oberding*, 451 A.2d 239, 242-43 (Pa. Super. Ct. 1982) (noting "deterrent effect caused by product liability suits"); *Webb v. Navistar Int'l Transp. Corp.*, 692 A.2d 343, 346 (Vt. 1996) (explaining that strict liability "protects the consumer . . . by creating an incentive for manufacturers to produce safe products, . . . or as other courts have stated, a deterrence to producing unreasonably dangerous products" (citations omitted)).

⁶⁹ Weinrib suggests, indeed, that Kant's equality precepts represent the essential bridge between Aristotelian corrective justice and the modern "ethical foundation for tort law." POSNER, *supra* note 36, at 328-29 (discussing Ernest J. Weinrib, *Toward a Moral Theory of Negligence Law*, 2 L. & PHIL. 37 (1983)).

⁷⁰ Robert Paul Wolff, *Introduction to KANT: A COLLECTION OF CRITICAL ESSAYS* at xxi (Robert Paul Wolff ed., 1967).

⁷¹ Paul Dietrichson, *What Does Kant Mean by 'Acting from Duty'?*, in *KANT: A COLLECTION OF CRITICAL ESSAYS*, *supra* note 70, at 314.

⁷² Immanuel Kant, *Grounding for the Metaphysics of Morals*, in *ETHICAL PHILOSOPHY* 1, 30 (James W. Ellington trans., Hackett Publ'g Co. 1983) (1785); *accord* IMMANUEL KANT, *THE METAPHYSICAL ELEMENTS OF JUSTICE* 35 (John Ladd trans., 1965) ("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 . . .").

Paul Dietrichson writes that “the ‘legality’ requirement of [Kant’s] categorical imperative [is satisfied] if and only if our action is such that we could at any time consistently want a universal causal law of voluntary action to become modeled on the principle of our maxim of action.”⁷³ Unanswered in this proposition is the following question: What constitutes our incentive to conform our behavior to a premise of moral law categorically or universally applied? Kant seemingly suggests that our objectively correct conduct can spring not exclusively from subjective fidelity to duty (“from duty”), but likewise “according to duty,” which is to say from a “prudential” or pragmatic motivation or incentive.⁷⁴ And what is a pragmatic motivation or incentive but a deterrent from pursuing incompatible behavior?

A conspicuous component of tort law is its rich array of objective standards of conduct, in effect Kantian “duties.” While Kant attributes the relationship between law and behavior to each person’s internal sense of duty, the Legal Realist or Legal Pragmatist analysis suggested by Holmes departs from this explanation. Under this alternate approach, tort law’s imposition of external standards of conduct serves less to buy, affect or co-opt the moral position of the population than to put persons on notice of the behavior expected of them to avoid liability. In Holmes’s words:

The true explanation of the reference of liability to a moral standard . . . is not that it is for the purpose of improving men’s hearts, but that it is to give a man a fair chance to avoid doing the harm before he is held responsible for it. It is intended to reconcile the policy of letting accidents lie where they fall, and the reasonable freedom of others with the protection of the individual from injury.⁷⁵

⁷³ Dietrichson, *supra* note 71, at 315-16.

⁷⁴ *Id.* at 316. As Dietrichson elaborates:

An example [of prudential motivation] would be when a merchant abstains from cheating his customers because, and only because, he thinks cheating would be too risky for him. But Kant insists that any human being who can properly be called a person knows his actions should satisfy, not only the requirement of legality (objective correctness), but also the requirement of morality (subjective worthiness).

Id.

⁷⁵ HOLMES, *supra* note 36, at 115.

Just what is Holmes's "fair chance to avoid" behavior so as not to be held responsible for it? In tort, for example, the triggering event for imposition of responsibility for another's loss begins with "knowledge" as the "starting-point," followed by examination of the "circumstances" that "would have led a prudent man to perceive danger, although not necessarily to foresee the specific harm."⁷⁶ What are such "circumstances"—Holmes asks—and answers, "experience."⁷⁷

On a higher level of generality, corrective justice principles in tort are intended to minimize not only the personal physical injury effect of accidents but also to lessen the intrusions such accidents work upon others' autonomy and liberty interests. Corrective justice is suited to mediation of claims arising from unconsented-to intrusions upon personal autonomy and wrongful interference with individual freedom. Personal autonomy is stated repeatedly to be part of that bundle of modern citizenship rights, the perimeters of which law should mediate.⁷⁸ A dictionary defines "autonomy" as "independence or freedom."⁷⁹ If to "freedom" we add the correlative right of "liberty," which has been defined as "freedom from external control or interference, obligations, etc.; freedom to choose,"⁸⁰ Richard Epstein argues that among the first "task[s]" of a common-law doctrine such as torts "is to define the boundaries of individual liberty."⁸¹ In other common-law precincts, such as the laws governing private property, preservation of an actor's interests in liberty and freedom are recognized and justified as an enhancement of the owner's "reasonable autonomy."⁸²

⁷⁶ *Id.* at 117.

⁷⁷ *Id.*

⁷⁸ *E.g.*, *General Motors Corp. v. Saenz*, 873 S.W.2d 353, 363 (Tex. 1993) (Doggert, J., dissenting) ("The requirement that manufacturers provide adequate warnings serves the dual goals of risk reduction and the protection of individual autonomy in decision-making." (quoting *W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS* § 96, at 685 (5th ed. 1984)); see also *infra* notes 149-166 and accompanying text (describing warning requirements of *Restatement (Second) of Torts* and *Products Liability Restatement* and purpose of those requirements as allowing individuals to make informed choices).

⁷⁹ *THE RANDOM HOUSE COLLEGE DICTIONARY* 92 (Jess Stein ed., rev. ed. 1975).

⁸⁰ *Id.* at 772.

⁸¹ Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 203 (1973).

⁸² JOHN MITCHELL FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 173 (1980), discussed in David G. Owen, *Products Liability: Principles of Justice for the 21st Century*, 11 PACE L. REV. 63, 65 & n.4 (1990); cf. EPSTEIN, *supra* note 50, at 92: "The primary objective of the tort law is to allow people to live in peace (if not in harmony) with each other. It enforces the

In *The Morality of Freedom*, Joseph Raz writes that “[a]utonomy requires that many morally acceptable options be available to a person,”⁸³ a standard that imposes limitations upon an actor’s prerogatives to trammel such “morally acceptable” options as may be available to those affected by the actor’s conduct. By way of example, imagine that workers compensation laws precluded not only negligence-based suits against the employer, but also claims against a manufacturer or seller of an industrial product that carried inadequate warnings or instructions. Assume further that such inadequate warnings were the legal cause of a worker’s toxin-related injuries. If one were to take into account the fact that for most, nonemployment as opposed to employment is not a true option, the typical worker would be left in some measure coerced into tolerating the risk. Thus, the *ex ante* maintenance of a hazardous workplace would be, according to Raz, an invasion of or constriction of the worker’s autonomy interests.

The same analysis applies beyond the industrial product context, in the area of consumer sales. In evaluating a seller’s autonomy or liberty interests, the effect of the seller’s conduct on the buyer’s correlative autonomy and liberty interests must be determined. A product sold with inadequate warnings would breach the buyer’s autonomy interests by denying him the opportunity to make an informed choice as to whether the benefits enjoyed in encountering a risk exceeded the potential negative consequences. In the view of the reasonable purchaser, therefore, sale of a defective and unreasonably dangerous product would be a violation of an autonomy interest to which corrective justice principles would properly respond.

Our society’s commitment to protecting individual autonomy and liberty is expressed in the earliest of our legal system’s organizing principles in the Constitution.⁸⁴ As society has recognized a fundamental right to pursue lawful activity without wrongful interference of others, it has recognized similarly the right to do so

separate domains in which all of us, singly, can live our own lives as we see fit.”

⁸³ JOSEPH RAZ, *THE MORALITY OF FREEDOM* 378 (1986).

⁸⁴ In his dissent in the *Slaughter-House Cases*, 83 U.S. (16 Wall.) 36 (1872), Justice Field described the import of the Privileges and Immunities Clauses of U.S. Constitution Article IV, Section 2, and Section 1 of the Fourteenth Amendment, as ensuring that “which of right belong[s] to the citizens of all free governments.” *Id.* at 97 (Field, J., dissenting).

without undue risk of personal physical harm. Another's autonomy or liberty interest extends, as it were, to the tip of your nose and no farther. Epstein explains: "[T]he law of tort does not end with the recognition of individual liberty. Once a man causes harm to another, he has brought himself within the boundaries of the law of tort."⁸⁵ Congruently, a tort rule that gives notice that an actor may be liable in money damages for behavior that proceeds without due care for the autonomy interests of others, and that causes damage or injury thereby, serves the deterrence objective of corrective justice, noted by Holmes, of giving the actor a "fair chance to avoid."⁸⁶

In sum, in any evaluation of corrective justice, considerations of fairness are intertwined with those of autonomy and freedom. Fairness may have an individual or a collective focus. While a tort rule's impact upon aggregate fairness may bear upon society's perception of its justice,⁸⁷ corrective justice focuses primarily upon making specific injured parties whole, i.e., in reaching a fair and just result as to the parties before the court. Simply put, "the loss of freedom for some is [not] made right by a greater good shared by others."⁸⁸ To Gregory C. Keating, "[i]f 'the concept and language of justice [are] the test . . . by which any area of law must be judged,' then within the law of enterprise liability, the principle of fairness must have priority over the policy of wealth-maximization."⁸⁹

C. EFFICIENCY-DETERRENCE

Economic analysis of tort law is not limited to one analytical construct. One vantage point from which an economic observation

⁸⁵ Epstein, *supra* note 81, at 204. Epstein continues:

It does not follow, however, that he will be found liable in each and every case in which it can be show[n] that he caused harm, for it may still be possible for him to escape liability, not by an insistence upon his freedom of action, but upon a specific showing that his conduct was either excused or justified.

Id.

⁸⁶ HOLMES, *supra* note 36, at 115.

⁸⁷ *E.g.*, *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 871 (N.Y. 1970) (noting public law and private law initiatives regarding air pollution).

⁸⁸ Gregory C. Keating, *The Idea of Fairness in the Law of Enterprise Liability*, 95 MICH. L. REV. 1266, 1379 & n.257 (1997) (citation omitted).

⁸⁹ *Id.* at 1379-80 (citation omitted).

of products liability rules may be made, known as "utilitarian theory," invites the assessment of the relative social cost associated with favoring one course of conduct over another. Coase, with his example of the physician and the confectioner,⁹⁰ prompts application of utilitarian theory to the products liability context, in which the question might be posed this way: Is it worthwhile to restrict or encumber product availability in order to achieve marginally safer products, or, considering social cost, is it preferable to ensure a broader range of products, conceding that more products with marginally higher potential for harm will exist in the market? Thus seen, much of modern tort policy disagreement, be it described theoretically or in terms of tort rules' practical effect on plaintiffs and defendants as a whole, concerns how much social and economic cost we are prepared to incur in order to maintain product availability.⁹¹

⁹⁰ See Coase, *supra* note 49, at 13 (in setting where confectioner's operation causes disturbance to physician's practice, appropriate question not who should compensate physician in nuisance, but rather whether social costs and gains are best served by preservation of status quo, by cessation of confectioner's activities, or by cessation of physician's activities).

⁹¹ Perhaps on an inchoate level, the congressional authors of the Reform Act appreciated the need for an obeisance directed towards efficiencies over and above statements required to accompany federal legislation. Illustrative of such an efficiency-conscious justification is found in the authors' apparent conclusion that only economic benefits will flow from the proposed legislation. In the report accompanying the Reform Act, it is claimed:

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported.

NUMBER OF PERSONS AFFECTED

The purpose of this product liability reform legislation, as reported, is to provide greater certainty as to the rights and responsibilities of all those involved in product liability disputes, to reduce transaction costs, to relieve the burden imposed on interstate commerce by the present product liability litigation system, and to ensure the continued availability of biomaterials for implantable medical devices. It is anticipated that it will affect the conduct of those involved in product liability disputes by making a number of significant changes in the laws that are applicable to all product liability actions. This legislation does not change the jurisdiction of state or federal courts. Thus, the number of persons affected should be consistent with current levels.

ECONOMIC IMPACT

It is anticipated that this legislation will result in substantial cost and paperwork savings to all parties affected by product liability lawsuits. First,

Another perspective that has played an ascendant role in modern economic analysis of tort law involves the concepts of “wealth maximization” and “efficiency,” and the relationship between them. Michael D. Green describes the “wealth maximization”—“economic efficiency” relationship in these terms: “By economic efficiency [is meant] maximizing total societal resources, without concern for the distribution of those resources among members of society.”⁹²

With no presumption of stating more than the sparest outline of the efficiency approach to accident liability law, one of its most noteworthy constructs has been to “emphasize [tort law’s] role in substituting for efficient contractual exchange.”⁹³ To illustrate this approach, Posner has enlisted the law of battery—the common-law rule concerning liability for harmful or offensive touching. Quite apart from the corrective justice, moral and fairness attributes of tort liability for battery, the law and economics argument states that the doctrine should “dete[r] persons from engaging in activities that a reasonable person would view ahead of time to be socially wasteful.”⁹⁴

Posner illustrates with the decision in *Garratt v. Dailey*,⁹⁵ remembered as the case in which the nearly six-year-old Dailey

the legislation will bring greater predictability to this area of the law, and, thus, save time and money for manufacturers, product sellers and consumers alike, each of whom will be able to determine their rights more readily than under current law. The legislation should also foster product innovation and enhance the competitive position of U. S. product manufacturers in world markets.

PRIVACY

S. 648 will have no adverse impact on the personal privacy of the individuals or businesses affected.

PAPERWORK

S. 648 creates no new regulations and imposes no additional regulatory requirements at either state or the federal level. The legislation will not change the jurisdiction of state or federal courts.

S. REP. NO. 105-32, at 24-25 (1997).

⁹² Michael D. Green, *Negligence = Economic Efficiency: Doubts >*, 75 TEX. L. REV. 1605, 1607 n.12 (1997) (citing Richard A. Posner, *Wealth Maximization and Judicial Decision-Making*, 4 INT’L REV. L. & ECON. 131, 132 (1984)).

⁹³ COLEMAN, *supra* note 30, at 197.

⁹⁴ JAMES A. HENDERSON, JR. ET AL., *THE TORTS PROCESS* 29-30 (4th ed. 1994) (discussing RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 206-11 (4th ed. 1992)).

⁹⁵ 279 P.2d 1091 (Wash. 1955).

pulled away the lawn chair as his, until that point, affectionate aunt was in the process of sitting down.⁹⁶ Tort liability in battery would serve the efficiency objective, its proponent would argue, irrespective of whether Dailey received any psychological or material benefit from the act. If the harm to the aunt exceeded any benefits to Dailey, a simple utilitarian analysis would support imposition of liability. If, on the other hand, Dailey derived benefits that exceeded any physical or emotional injury to his aunt, pulling out the chair was wasteful or inefficient. Why wasteful? Because the transaction (the act and the harm) without the aunt's consent could, and probably did, generate substantial accident costs, not the least of such costs being a sizeable litigation process.⁹⁷ In Posner's words, such torts:

involve . . . a coerced transfer of wealth to the defendant occurring in a setting of low transaction costs. Such conduct is inefficient because it violates the principle . . . that where market transaction costs are low, people should be required to use the market if they can and to desist from the conduct if they can't.⁹⁸

Posner concludes that such bypassing of the market is inefficient and therefore should create liability in tort.⁹⁹ Transferred to a products liability context, what of the seller of a defective product that causes personal physical injury or property damage? Economists might recast the corrective justice goals of encouraging individual autonomy and liberty to efficiency-based objectives phrased in terms of discouraging involuntary transfers of wealth,

⁹⁶ *Id.* at 1092.

⁹⁷ Studies reveal that the more complex the litigation, the greater proportion tertiary accident costs bear to aggregate victim compensation. For example, a Rand Institute for Civil Justice study demonstrated that victims receive 52% of total litigation expenditures in automobile tort cases; 43% in nonautomobile litigation, such as products liability and medical malpractice claims; and 37% in asbestos cases. DEBORAH R. HENSLER ET AL., *TRENDS IN TORT LITIGATION: THE STORY BEHIND THE STATISTICS* 27-28 (1987), discussed in Robert L. Rabin, *Tort Law in Transition: Tracing Patterns of SocioLegal Change*, 23 VAL. U. L. REV. 1, 16 (1988). For a definition of primary, secondary and tertiary "accident costs," see note 103, *infra*.

⁹⁸ POSNER, *supra* note 94, at 208.

⁹⁹ *Id.* at 207-09.

market avoidance,¹⁰⁰ or imposition of negative externalities.¹⁰¹ A product purchaser has a societally-countenanced expectation, the argument goes, that the product will not create an unreasonable risk of harm if used for its reasonably foreseeable purpose.¹⁰² Should the product prove dangerously defective, and should the purchaser be injured or his property be damaged, the manufacturer has, in a sense, subverted the market and created accident costs¹⁰³ that might have been avoided had the manufacturer

¹⁰⁰ See Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 355 (1988) (supposing consumer sovereignty as dominant objective in transactions between contracting parties, under which norm: "the law should reflect the preferences of competent, informed consumers regarding risk allocation"), discussed in Kathryn Dix Sowle, *Toward a Synthesis of Product Liability Principles: Schwartz's Model and the Cost-Minimization Alternative*, 46 U. MIAMI L. REV. 1, 9 (1991).

¹⁰¹ Broadly speaking, a tort is a civil (seldom a criminal) wrong. Such a wrong occurs when one party, usually unintentionally, destroys another party's initial entitlement by imposing a negative externality on him. The courts can then provide a remedy in the form of damages. When externalities result in the forcible taking of initial entitlements—for example, when a slaughterhouse pollutes the air of the surrounding neighborhood—liability rules can be invoked. Concomitantly government assumes responsibility for the imposition of objectively determined compensation and its prompt payment to the party harmed.

WERNER Z. HIRSCH, LAW AND ECONOMICS: AN INTRODUCTORY ANALYSIS 127 (1979).

¹⁰² See PRODUCTS LIABILITY RESTATEMENT, *supra* note 1, § 2 Reporters' Note, cmt. a ("[S]trict liability has been justified on fairness grounds because the product containing a hidden manufacturing defect that causes harm disappoints the consumer's or user's reasonable expectations with regard to safety." (citing, *inter alia*, F. Patrick Hubbard, *Reasonable Human Expectations: A Normative Model for Imposing Strict Liability for Defective Products*, 29 MERCER L. REV. 465 (1978); Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109 (1974))).

¹⁰³ See CALABRESI, COSTS OF ACCIDENTS, *supra* note 22, at 35-129 (discussing loss spreading, general deterrence, and specific deterrence approaches to accident cost reduction). Stephen Sugarman has summarized Calabresi's cost-avoidance philosophy:

In *The Costs of Accidents*, Calabresi argued that society's policy towards accidents should be to minimize the sum of primary, secondary, and tertiary accident costs. Reducing primary costs concerns promoting safety (while not discouraging, if possible, socially desirable innovation). Reducing secondary costs concerns spreading the costs of compensation paid to accident victims. Tertiary costs are the transactions costs; these costs include the costs of lawyers' fees, insurance administration, the parties' time, and court costs.

Stephen D. Sugarman, *A Restatement of Torts*, 44 STAN. L. REV. 1163, 1167 (1992) (review essay).

Jules Coleman further explains the three types of costs attributable to personal injury or property damage torts:

simply bargained for pertinent product-related rights.

What rights might have been bargained for? It has been suggested that *actual* bargaining regarding the cost a product user might assign to, for example, loss of vision in one eye due to a defect in protective eyewear, would engender problems in arriving at a valuation. Moreover, the reliability of such a valuation, even if it could be agreed to preliminarily, might make an actual contractual objective infeasible.¹⁰⁴

Perhaps the best substitute for an actual-bargained-for exchange is a circumstance in which a buyer fully apprised of pertinent safety-related information and instructions for the safe operation of a product makes an informed decision to purchase the product for the buyer's use or for devotion to the use of others. Bearing in mind the precedent establishing that a warning, however effective, cannot vitiate a manufacturer's liability for injury or damage caused by a defectively designed product,¹⁰⁵ such a knowledgeable consent or choice model for sale of a product with a high risk level means, in a proto-contractual sense, that the seller has bargained for the right to sell it. In essence, the seller preserves the transaction within the market by conveying warnings sufficient to permit

Primary costs are the dollar equivalent of the damages caused by accidents. Secondary costs are the costs of bearing the costs of accidents. These are the costs associated with the various schemes for distributing the primary (and tertiary) costs of accidents. Secondary costs are reduced when they are spread maximally over persons and time, or when they are borne by those individuals in the best position to bear them. Tertiary costs are the administrative costs of any system, including the tort system, for determining who should bear the costs of accidents.

COLEMAN, *supra* note 30, at 204.

¹⁰⁴ Calabresi and Melamed describe the difficulty of actually bargaining for product-related rights:

If we were to give victims a property entitlement not to be accidentally injured we would have to require all who engage in activities that may injure individuals to negotiate with them before an accident, and to buy the right to knock off an arm or a leg. Such pre-accident negotiations would be extremely expensive, often prohibitively so And, after an accident, the loser of the arm or leg can always very plausibly deny that he would have sold it at the price the buyer would have offered.

Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1108-09 (1972), *discussed in* HIRSCH, *supra* note 101, at 166.

¹⁰⁵ See generally 1 M. STUART MADDEN, *PRODUCTS LIABILITY* § 8.5 (2d ed. 1988 & Supp. 1995, with Kathy Seward Northern) (collecting authority).

the purchasers to make informed choices whether or not to expose themselves to the risk.¹⁰⁶ Absent a bargain struck with an informed purchaser, the sale of a product defective for want of adequate warnings, and that proximately causes plaintiff's harm, represents an involuntary or coerced transfer of wealth from the injured party to the injurer.

As the above discussion illustrates, valuation problems cannot always be avoided via the warning mechanism; therefore, under an economic efficiency tort theory, some method must be employed to make such determinations. A primitive but greatly persuasive valuative standard was offered in a negligence context by Judge Learned Hand in the opinions in *United States v. Carroll Towing Co.*,¹⁰⁷ and *Conway v. O'Brien*.¹⁰⁸ In those two cases, the Second Circuit held that the degree of care appropriate to a given action or omission to act should be the result of a three-factor calculus: (1) the likelihood that the conduct will injure others, (2) multiplied by the seriousness of the risk if it happens, (3) balanced against the burden of taking precautions against the risk.¹⁰⁹ In formula, the calculation is known as B (Burden) $< P$ (Probability of Harm) $\times L$ (Magnitude of Loss Should It Occur).¹¹⁰ The Learned Hand approach can be conformed to a more modern utilitarian analysis by visualizing B , or the Burden upon the actor, as encompassing not only the particular burden of precautionary measures upon the actor, but also the burden upon society if the conduct must either be eliminated due to liability rules, or made more expensive if the precautionary measures are undertaken.¹¹¹

¹⁰⁶ See *infra* notes 149-166 and accompanying text (discussing present and proposed tort standards for warnings and policies behind those standards).

¹⁰⁷ 159 F.2d 169, 173 (2d Cir. 1947) (involving suit against barge and tugboat operators for barge's sinking).

¹⁰⁸ 111 F.2d 611, 612 (2d Cir. 1940) (involving automobile accident on rural Vermont road), *rev'd on other grounds*, 312 U.S. 492 (1941).

¹⁰⁹ *Id.*; see also 1 MADDEN, *supra* note 105, at 108 (explaining formulation of three factors by Judge Hand).

¹¹⁰ POSNER, *supra* note 94, at 164.

¹¹¹ Likewise, in keeping with a utilitarian economic view that transcends the concerns of the individual plaintiff and defendant, consideration of the factors P (Probability of Harm) and the L (Magnitude of the Loss should it occur) would be enlarged to contemplate the likelihood of harm to others identically or similarly situated, and the magnitude of the potential harm, not only in terms of the individual plaintiff but also to the population exposed to the risk.

Posner machined the Hand formulation into an efficiency principle by explaining that:

Hand was adumbrating, perhaps unwittingly, an economic meaning of negligence. Discounting (multiplying) the cost of an accident if it occurs by the probability of occurrence yields a measure of the economic benefit to be anticipated from incurring the costs necessary to prevent the accident. . . . If the cost of safety measures [including, perhaps, "eliminating the activity"] or of curtailment—whichever cost is lower—exceeds the benefit in accident avoidance to be gained by incurring that cost, society would be better off, in economic terms, to forgo accident prevention.¹¹²

What does the efficiency approach add to the far older utilitarian approach?¹¹³ Posner partially harmonized wealth maximization

¹¹² Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 32 (1972). Posner continues:

When the cost of accidents is less than the cost of prevention, a rational profit-maximizing enterprise will pay tort judgments . . . rather than incur the larger cost of avoiding liability. Furthermore, overall economic value or welfare would be diminished rather than increased by incurring a higher accident-prevention cost in order to avoid a lower accident cost. . . .

Perhaps, then, the dominant function of the fault system is to generate rules of liability that if followed will bring about, at least approximately, the efficient—the cost-justified—level of accidents and safety. . . . Because we do not like to see resources squandered, a judgment of negligence has inescapable overtones of moral disapproval, for it implies that there was a cheaper alternative to the accident. . . . Where, [alternatively,] the measures necessary to avert the accident would have consumed excessive resources, there is no occasion to condemn the defendant for not having taken them.

Id. at 33.

It should be noted that some scholars have speculated about the usefulness, in practice, of the B < PL approach. Mark Grady asks whether Posner, and Posner with Landes, "believe that judges actually refer to economic analysis, or rather that they behave as if they do?" GRADY, *supra* note 26, at 354 n.1 (citing WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 85-88 (1987) [hereinafter LANDES & POSNER, *ECONOMIC STRUCTURE*]). Grady continues: "Did Judge Hand behave as if he knew what thickness of barge planks combined with what quantity of whiskey maximizes social wealth?" *Id.* at 355 n.2.

¹¹³ See *supra* notes 90-91 and accompanying text (describing utilitarian approach). See generally James Barr Ames, *Law and Morals*, 22 HARV. L. REV. 97 (1908) (discussing utilitarian nature of old common law which sacrificed individual needs in order to meet reasonable needs of community).

with utilitarianism, writing: "[T]he economist, when speaking normatively, tends to define the good, the right, or the just as the maximization of 'welfare' in a sense indistinguishable from the utilitarian's concept of utility or happiness."¹¹⁴ Stephen G. Gilles adds that Posner's "wealth maximization" approach, interpreted as requiring a "willingness to pay," might "adopt the same strategy" as a "casual utilitarianism" analysis.¹¹⁵ To Gilles, "[i]n the context of negligence cases, . . . differences between the utilitarian and wealth-maximization approaches to cost-benefit analysis seem to disappear once the decision to employ the reasonable person as a heuristic is made."¹¹⁶

A leading exponent of the efficiency role of the common law of tort has been Guido Calabresi, who has argued persuasively that in matters of compensation for accidents, civil liability should ordinarily be laid at the door of the "cheapest cost avoider," the actor who could most easily discover and inexpensively remediate the hazard. Together with A. Douglas Melamed, and employing the setting of environmental harm, Calabresi asserts that considerations of economic efficiency dictate placing the costs of accidents "on the party or activity which can most cheaply avoid them."¹¹⁷

¹¹⁴ Richard A. Posner, *Utilitarianism, Economics, and Legal Theory*, 8 J. LEGAL STUD. 103, 119 (1979), discussed in Steven P. Croley & Jon D. Hanson, *The Nonpecuniary Costs of Accidents: Pain-and-Suffering Damages in Tort Law*, 108 HARV. L. REV. 1787, 1824 n.121 (1995). Posner continues: "But for my normative purposes I want to define the maximand more narrowly, as 'value' in the economic sense of the term or, more clearly I think, as 'wealth.'" *Id.*

Michael D. Green observes wryly: "According to Posner, tort law is and has been constructed since the late nineteenth century primarily so as to further economic efficiency." Green, *supra* note 92, at 1607 n.12.

¹¹⁵ Steven G. Gilles, *The Invisible Hand Formula*, 80 VA. L. REV. 1015, 1029 (1994) (citations omitted).

¹¹⁶ *Id.* at 1036-37.

¹¹⁷ Calabresi & Melamed, *supra* note 104, at 1096-97; see also MARK C. RAHDERT, COVERING ACCIDENT COSTS: INSURANCE, LIABILITY, AND TORT REFORM 29, 32-33 (1995) (analyzing rationale for insurance and addressing concern that cost-spreading function will divert compensatory responsibility away from least cost avoider).

One frequently-referenced validation of the "least cost avoider" can be found in *Union Oil Co. v. Oppen*, 501 F.2d 558 (9th Cir. 1974), a California coastal oil spill case in which the court allowed commercial fishermen to recover from defendant their business losses caused by lost fishing opportunity during a period of pollution. The court found justice and efficiency were served by placing responsibility for the loss on the "best cost avoider" (in this setting the defendant oil company), reasoning:

[T]he loss should be allocated to that party who can best correct any error in

Posner's harmonious observation has been that in the so-called alternative care indemnity damage shifting scenario, "we do not want both tortfeasors to take precautions; we want the lower cost accident avoider to do so."¹¹⁸

From another, yet still efficiency-influenced perspective, a products liability doctrine that passes efficiency muster probably would result also in a Pareto superior or even a Pareto optimal resolution.¹¹⁹ A rule is Pareto optimal when its effects benefit all

allocation, if such there be, by acquiring the activity to which the party has been made liable. . . . The capacity "to buy out" the plaintiffs if the burden is too great is, in essence, the real focus of Calabresi's approach. On this basis there is no contest—the defendants' capacity is superior.

Id. at 570 (citing CALABRESI, *COSTS OF ACCIDENTS*, *supra* note 22, at 150-52).

Calabresi and Hirschhoff provide a concise description of what the least cost avoider approach requires, both of private parties and of the government:

The strict liability test we suggest does not require that a government institution make . . . a cost-benefit analysis. It requires . . . only a decision as to which of the parties to the accident is in the best position to make a cost-benefit analysis between accident costs and accident avoidance costs and to act on the decision once it is made. The question for the court reduces to a search for the cheapest cost avoider.

Calabresi & Hirschhoff, *Strict Liability*, *supra* note 22, at 1060.

¹¹⁸ POSNER, *supra* note 94, § 6.8.

In some settings defendants themselves have sought to employ the cheapest cost avoider rationale to promote a finding of no liability when a consumer aware of product risks is, the argument goes, the party that can most cheaply avoid the accident costs. *See Dewey v. R.J. Reynolds Tobacco Co.*, 577 A.2d 1239, 1254 (N.J. 1990) (discussing defendant's argument that cigarette consumers are cheapest cost avoiders).

¹¹⁹ The Pareto criteria for wealth maximization analysis are summarized in DAVID W. BARNES & LYNN A. STOUT, *THE ECONOMIC ANALYSIS OF TORT LAW* 11 (1992):

A classification scheme designed by Vilfredo Pareto in the early 1900's provides one solution to [utility and wealth maximization analysis] and also to the analytical difficulties presented by the impossibility of interpersonal utility comparisons. . . . The first application of the Pareto criteria is to evaluate the desirability of *changes* in the distribution of goods. Pareto's system allows that evaluation without regard to the desirability of the *initial* distribution among individuals of either their abilities to pay or enjoy and without the need for interpersonal utility comparisons. Imagine a society in which all resources have already been allocated to particular individuals. Now imagine a change in allocations that left at least one person better off and no one worse off. Surely that change is desirable from any perspective. Economists refer to such a change in the allocation of resources as a *Pareto superior* change.

parties, in essence, a win-win proposition.¹²⁰ As summarized by Mark Seidenfeld:

An economic change is considered a Pareto improvement [or Pareto superior] if it makes some individuals better off without making any person worse off. A state of the economic system is Pareto optimal (or Pareto Efficient) if there is no Pareto superior state that society can reach. If we are using the Pareto criterion to evaluate our economic system, we say that a Pareto optimal state is "economically efficient."¹²¹

A sketch of potential Pareto optimal application to a seller's warning duties and potential liability can be found in a scenario in which an adequate warning accompanies a prescription pharmaceutical, providing sufficient information concerning risks and benefits to the health care professional. The health profession benefits by being able to most reliably and effectively prescribe pharmaceuticals to an appropriate class of patients with a risk that is not disproportionate to the therapeutic rewards.¹²² Individual patients within the class for whom the pharmaceutical is prescribed benefit therapeutically, and pharmaceutical companies benefit by avoiding the miring inefficiencies and tertiary accident costs of protracted civil litigation and regulatory problems associated with well-grounded civil or regulatory claims of failure to provide adequate warnings.

¹²⁰ *Id.* at 12.

[T]he Pareto principle . . . is that a change (including a change brought about by an accident or an intentional act) is good if it makes at least one person better off and no one worse off. This is a "liberal" principle akin to Kant's and Mill's principle that everyone is entitled to as much liberty as is consistent with the liberty of all other people.

Richard A. Posner, *Wealth Maximization and Tort Law: A Philosophical Inquiry*, in *PHILOSOPHICAL FOUNDATIONS OF TORT LAW*, *supra* note 44, at 99, 104 (citation omitted).

¹²¹ MARK SEIDENFELD, *MICROECONOMIC PREDICATES TO LAW AND ECONOMICS* 49 (1996). For a general description of Pareto optimality principles, see ROBIN PAUL MALLOY, *LAW AND ECONOMICS: A COMPARATIVE APPROACH TO THEORY AND PRACTICE* (1990).

¹²² See *PRODUCTS LIABILITY RESTATEMENT*, *supra* note 1, § 6 ("Liability of Seller or Other Distributor for Harm Caused by Defective Prescription Drugs and Medical Devices").

D. LIMITED EXPLICIT JUDICIAL ADOPTION OF CORRECTIVE JUSTICE OR EFFICIENCY IDEALS

Referencing a 1991 American Law Institute Reporters' Study,¹²³ Steven D. Sugarman noted tartly that "one of the last places to find lucid thinking about the desirable direction of tort law is in the published opinions of state and federal judges."¹²⁴ While his complaint surely represents hyperbole for effect, Sugarman is correct in observing that discussion of tort principles in the decisional law is frequently colloquial, with courts often doing no more than lumping together as coextensive such objectives as expeditious claims resolution, reduced transaction costs, and efficiency.¹²⁵ Congressional discussion and fact-finding, in turn, frequently have been more polemic than informative.¹²⁶

Explicit judicial adoption of the tenets of either corrective justice or law and economics has been sporadic, and even where mentioned in decided cases, either the expression or the application of the two theories is often inexact. An example of a judge's misinterpretation of doctrine is the peevish dissent of Judge Doggett in *Transportation Insurance Co. v. Moriel*,¹²⁷ where a punitive damages award was reversed in a suit by an injured worker against the workers' compensation carrier, alleging bad faith delay. Referencing the majority's caution regarding "overdeterrence," Judge Doggett wrote: "Perhaps the majority subscribes to that perspective which maintains that compensatory tort laws should not prevent wrongfully caused injuries, but rather encourage misconduct to the extent that its economic benefit outweighs its cost."¹²⁸

¹²³ AMERICAN LAW INSTITUTE, REPORTERS' STUDY: ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY (1991) [hereinafter REPORTERS' STUDY].

¹²⁴ Sugarman, *supra* note 103, at 1165.

¹²⁵ In Posner's words: "Lawyers are not only quick but unashamed to make emphatic assertions on matters of fact . . . without attempting, desiring, or even being willing to subject those assertions to an empirical test." POSNER, *supra* note 36, at 70, discussed in Philip Shuchman, *It Isn't That the Tort Lawyers Are So Right, It's Just That the Tort Reformers Are So Wrong*, 49 RUTGERS L. REV. 485, 512 n.136 (1997).

¹²⁶ See, e.g., *supra* note 91 (quoting discussion in accompanying Senate Report on effects of Reform Act).

¹²⁷ 879 S.W.2d 10, 38 (Tex. 1994) (Doggett, J., dissenting).

¹²⁸ *Id.* (Doggett, J., dissenting) (citing RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW, 147-52, 176-77, 191-95 (3d ed. 1986)).

Other courts, however, have consciously elevated their jurisdiction's awareness of economic concepts in fashioning tort law. Illustrative is the Third Circuit's decision in *Whitehead v. St. Joe Lead Co.*,¹²⁹ a lead poisoning case in which defendants included suppliers of lead to plaintiff's industrial employer. Reversing summary judgment for defendants,¹³⁰ the court observed:

"[I]t may well be that suppliers, acting individually or through their trade associations, are the most efficient cost avoiders." Certainly it could be found to be inefficient for many thousands of lead processors to individually duplicate the industrial hygiene research, design, and printing costs of a smaller number of lead suppliers.¹³¹

To like effect is the decision of the Wyoming Supreme Court in *Schneider National, Inc. v. Holland Hitch Co.*¹³² There the court explicitly relied upon Posner's "alternative care joint tortfeasor" evaluation to reach the conclusion that indemnity should not be available "where both actors have a 'joint care' obligation to avoid the injury."¹³³ The court noted, however, that when the actors' culpability varied, i.e., they were not *in pari delicto*, the higher relative fault of one defendant, the "lower cost avoider," would vest indemnity rights in the other tortfeasor.¹³⁴

¹²⁹ 729 F.2d 238 (3d Cir. 1984).

¹³⁰ *Id.* at 256.

¹³¹ *Id.* at 247 (citing, inter alia, Calabresi & Hirschoff, *Strict Liability*, *supra* note 22, at 1060-61); see also *Beauchamp v. Russell*, 547 F. Supp. 1191, 1197 n.6 (N.D. Ga. 1982) (citing with approval proposition that "in apportioning liability between a partmaker and an assembler, the cheapest cost avoider should bear full liability" (citation omitted)).

¹³² 843 P.2d 561 (Wyo. 1992).

¹³³ *Id.* at 575 (citations omitted). The court also noted enthusiastically that Posner's reformulation and expansion of the Learned Hand negligence (actually breach of duty) formula in *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947), "demonstrates a rationale for tort law policy choices which is precise and persuasive." *Id.* at 572 n.10; see also *supra* notes 107-111 and accompanying text (describing Hand formula).

¹³⁴ *Schneider Nat'l*, 843 P.2d at 575 (citing LANDES & POSNER, *ECONOMIC STRUCTURE*, *supra* note 112, at 206); see also *Ogle v. Caterpillar Tractor Co.*, 716 P.2d 334 (Wyo. 1986). There, the court stated:

When a defective article enters the stream of commerce and an innocent person is hurt, it is better that the loss fall on the manufacturer, distributor or seller than on the innocent victim. . . . They are simply in the best

In the insurance declaratory judgment context, the dissenting opinion in *Insurance Co. of North America v. Forty-Eight Insulations, Inc.*,¹³⁵ proposed a “discoverability” rule for triggering insurance carrier coverage of asbestos claims, asserting that this approach would, relying upon a least cost avoider rationale, provide incentives within the insured-insurer relationship that could hold the promise of reducing accident costs.¹³⁶ Specifically, the dissent reasoned that:

[t]he more “early” insurers that are liable upon a victim’s exposure, the more likely it is that the potential harm will be discovered and the public warned. If an insurer sees that the product poses some risks, he may raise premiums accordingly. This may ultimately cause the manufacturer to remove the product from the market or to give better warnings in order to lower insurance premiums. This in turn reduces accident costs.¹³⁷

Whichever gloss is placed upon economic analysis—its deterrent effect, or its ability to reduce accident costs—its concepts can be understood “even at the rudimentary level of jurists,” at least according to Judge Patrick Higgenbotham.¹³⁸ In *Louisiana ex rel. Guste v. M/V Testbank*,¹³⁹ a renowned vessel collision case involving claims for economic loss not accompanied by physical

position to either insure against the loss or spread the loss among all consumers of the product.

Ogle, 716 P.2d at 342.

Ogle was later described by the Wyoming Supreme Court as an indication of how strict liability “introduced economic analysis to tort law.” *Schneider Nat’l*, 843 P.2d at 580. The *Schneider Nat’l* court proceeded to analogize *Ogle*’s “risk allocation” theory to a “cheapest cost avoider” approach. *Id.* (citing LANDES & POSNER, *ECONOMIC STRUCTURE*, *supra* note 112, at 54-84); Gilles, *supra* note 115, at 1306; *see also* Wilson v. Good Humor Corp., 757 F.2d 1293, 1306 n.13 (D.C. Cir. 1985) (identifying but not pursuing cheapest cost avoider analysis in action brought by parents of child fatally injured while crossing street to meet ice cream vending truck).

¹³⁵ 633 F.2d 1212 (6th Cir. 1980).

¹³⁶ *Id.* at 1230-32 (Merritt, J., dissenting).

¹³⁷ *Id.* at 1231-32 (Merritt, J., dissenting).

¹³⁸ *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019, 1029 (5th Cir. 1985).

¹³⁹ *Id.*

damage to a proprietary interest, the Fifth Circuit Court of Appeals, per Judge Higgenbotham, justified its refusal to permit such recovery (and gave support to the court's continued adherence to the economic loss doctrine of *Robins Dry Dock & Repair Co. v. Flint*),¹⁴⁰ in part upon its reasoning that permitting liability for the "unknowable" amounts that might be posed as economic loss claims arising from any substantial mishap would erode the efficient deterrent effect of such a tort rule, as a rational, wealth-maximizing actor would be unable to gauge the optimal precautionary measures for avoidance of a predictable accident cost.¹⁴¹

Even without explicit recognition of economic, utilitarian or corrective justice concerns, influential decisions have adopted and promoted such precepts, sometimes distending these established tort principles into ungainly hybrids. In the setting of environmental harm, notions of corrective justice and utilitarianism have coexisted uneasily for decades. Originally, even the most economically powerless landholder could seek and secure an injunction against a neighboring activity that interfered substantially with the plaintiff's use of property. Numerous early decisions evidenced a judicial unwillingness to "balance" injuries, i.e., to weigh the defendant's cost and the community hardship in losing the industry against the often modest provable harm to plaintiff's ordinarily small and noncommercial property. As the New York Court of

¹⁴⁰ 275 U.S. 303, 309 (1927); see *People Express Airlines, Inc. v. Consolidated Rail Corp.*, 495 A.2d 107, 109 (N.J. 1985) ("[A] virtually *per se* rule barring recovery for economic loss unless the negligent conduct also caused physical harm has evolved throughout this century . . .").

¹⁴¹ In Higgenbotham's words:

That the [economic loss] rule is identifiable and will predict outcomes in advance of the ultimate decision about recovery enables it to play additional roles. Here we agree with plaintiffs that economic analysis, even at the rudimentary level of jurists, is helpful both in the identification of such roles and the essaying of how the roles play. Thus it is suggested that placing all the consequence of its error on the maritime industry will enhance its incentive for safety. While correct, as far as such analysis goes, such *in terrorem* benefits have an optimal level. Presumably, when the cost of an unsafe condition exceeds its utility there is an incentive to change. As the costs of an accident become increasing multiples of its utility, however, there is a point at which greater accident costs lose meaning, and the incentive curve flattens. When the accident costs are added in large but unknowable amounts the value of the exercise is diminished.

Testbank, 752 F.2d at 1029.

Appeals stated in *Whalen v. Union Bag & Paper Co.*,¹⁴² not granting the small landowner an injunction solely because the loss to him, in absolute terms, was less than would be the investment-backed loss to the nuisance-creating business and lost employment within the community, would "deprive the poor litigant of his little property by giving it to those already rich."¹⁴³

In contrast, the modern rule governing injunctions, including environmental injunctions, might seem coldly utilitarian. The *Restatement (Second) of Torts* section 936 lists factors for injunction issuance which expressly include weighing of "the nature of the interest to be protected,"¹⁴⁴ thus presumably inviting an elevation of plaintiffs' *bona fides* where the court considers the activity meritorious (perhaps a Camp Fire Girls campground) and a devaluation where the court deems it less valuable (perhaps an automobile scrapyard). Along similar lines, hardship to the defendant of ceasing or changing its activity, and "the interests of third persons and of the public" are proper considerations.¹⁴⁵

Representative of such an approach is the result reached in *Boomer v. Atlantic Cement Co.*,¹⁴⁶ which involved a large scale and conceded industrial nuisance in the form of airborne cement dust emanating from an upstate New York cement plant. In the lower court, a nuisance was found, and temporary damages awarded, but plaintiffs' application for an injunction was denied.¹⁴⁷ Recognizing that to deny the injunction would depart from *Whalen's* corrective justice, no balancing approach discussed above, the court nevertheless adopted a utilitarian approach that weighed the hardships imposed upon plaintiffs against the economic consequences of the requested injunction. The court explained: "The ground for denial of injunction, notwithstanding

¹⁴² 101 N.E. 805 (N.Y. 1913).

¹⁴³ *Id.* at 806. By "giving it," the court of course meant by requiring plaintiff to endure ongoing environmental servitudes imposed by defendant. *Id.* The court in *McCleery v. Highland Boy Gold Mining Co.*, 140 F. 951 (C.C.D. Utah 1904), reached a comparable corrective justice conclusion and granted the injunction against the defendant's mine and smelter. The court held, however, that because complainants delayed in applying for an injunction, it would only be granted if defendants refused to pay damages. *Id.* at 955.

¹⁴⁴ RESTATEMENT (SECOND) OF TORTS § 936(1)(a) (1979).

¹⁴⁵ *Id.* § 936(1)(e)-(g).

¹⁴⁶ 257 N.E.2d 870 (N.Y. 1970).

¹⁴⁷ *Id.* at 871-72.

the finding both that there is a nuisance and that plaintiffs have been damaged substantially, is the large disparity in economic consequences of the nuisance and of the injunction."¹⁴⁸

III. EVALUATION OF REPRESENTATIVE PROPOSALS THROUGH THE HEURISTIC DEVICE OF CORRECTIVE JUSTICE-MORALITY AND EFFICIENCY-DETERRENCE

A. WARNINGS

1. *Generally.* Independently of a manufacturer's design or manufacturing processes, the seller may be found liable in products liability if the product lacks adequate warnings regarding a genuine risk of harm or, where appropriate, instructions as to how to use the product without an unreasonable risk of harm.¹⁴⁹ These two informational obligations, i.e., to provide both (1)

¹⁴⁸ *Id.* at 872. Legitimate questions may be raised about the reach of *Boomer*. A competing conclusion was reached in *Little Joseph Realty, Inc. v. Town of Babylon*, 363 N.E.2d 1163, 1167-69 (N.Y. 1977), in which the same New York Court of Appeals issued an injunction against an asphalt plant operating contrary to zoning ordinances, and distinguished *Boomer* as a case involving "no zoning violation, or for that matter, [no] violation of any other statute."

¹⁴⁹ As the Reporters to the *Products Liability Restatement* explained:

[c]ommercial products sellers must provide reasonable instructions and warnings about risks of injury associated with their products. Instructions inform persons how to use and consume products safely. Warnings alert users and consumers to the existence and nature of product risks so that they can prevent harm either by appropriate conduct during use or consumption or by choosing not to use or consume.

PRODUCTS LIABILITY RESTATEMENT, *supra* note 1, § 2 cmt. i; see, e.g., *Astec Indus. v. Suarez*, 921 S.W.2d 794, 799-800 (Tex. Ct. App. 1996) (holding that manufacturer of asphalt materials handling system and its successor had duty to warn two asphalt plant workers that supporting part of handler's hopper could become dangerous once worn thin); see also *Conti v. Ford Motor Co.*, 743 F.2d 195, 197 (3d Cir. 1984) (holding that even where properly designed, product may be in unreasonably dangerous condition if manufacturer fails to warn of latent dangers in products); *Ragsdale Bros. v. Magro*, 693 S.W.2d 530, 536 (Tex. Ct. App. 1985) (holding that liability of seller can extend to nondefective product "placed in the flow of commerce without adequate warnings of its dangerous propensities or without adequate instructions for . . . use"), *rev'd on other grounds*, 721 S.W.2d 832 (Tex. 1986).

It was only at the turn of the nineteenth century that buyer-seller transactions recognized any significant departure from the general rule of caveat emptor. Prior to that time, the dominant rule of law required the purchaser "to take care of his own interests." *Barnard v. Kellogg*, 77 U.S. (10 Wall.) 383, 388-89 (1870).

adequate warnings; and (2) appropriate instructions¹⁵⁰ derive from two policy objectives: (1) risk reduction and reduction of accident costs;¹⁵¹ and (2) informed consent.¹⁵²

The widely-followed approach for many years has been to evaluate products liability claims, including warnings claims, under both their functional nomenclature (design, manufacture, or warnings defects) and their doctrinal category (negligence, warranty, and strict tort liability).¹⁵³ In contrast, the "functional" analysis adopted in the *Products Liability Restatement* promotes recognition of a claim of a "warnings" defect without regard to doctrinal application of negligence, warranty, or strict tort liability principles.¹⁵⁴ The *Products Liability Restatement* does not, however, change the substantive requirements of warnings obligations.

Be the approach doctrinal or functional, to be adequate under any theory of liability, a warning, when necessary, must by its size, location, and intensity of language or symbol, be calculated to impress upon a reasonably prudent user of the product the nature and extent of the hazard involved.¹⁵⁵ The language used (1) must be direct and should, where applicable, describe methods of safe

¹⁵⁰ For brevity, the informational obligation of providing adequate warnings and instructions may be referred to herein solely as the "warning" obligation.

¹⁵¹ See generally M. Stuart Madden, *Hazard Signs and Products or Toxic Tort Litigation*, 24 Prod. Safety & Liab. Rep. (BNA) 611 (1996) (discussing empirical research into effectiveness of hazard signs and how such research should affect legal warning standards).

¹⁵² See *infra* notes 160-166 and accompanying text (discussing informed consent objective); see also Marshall S. Shapo, *A Social Contract Tort*, 75 TEX. L. REV. 1835, 1839 (1997) (noting that "the concept of consent . . . bridges tort and contract").

¹⁵³ 1 MADDEN, *supra* note 105, §§ 10.2-.4 (explaining process of analyzing when legal duty to warn arises under these doctrines).

¹⁵⁴ PRODUCTS LIABILITY RESTATEMENT, *supra* note 1, § 2(c).

¹⁵⁵ In *House v. Armour of America, Inc.*, 886 P.2d 542 (Utah Ct. App. 1994), arising from the death of a law enforcement officer whose bulletproof vest was pierced by an assailant's bullet, the court held:

[F]or a warning to be adequate, it must completely disclose all the risks involved, as well as the extent of those risks. "A warning must (1) be designed so it can reasonably be expected to catch the attention of the consumer; (2) be comprehensible and give a fair indication of the specific risks involved with the product; and (3) be of an intensity justified by the magnitude of the risk." The overall adequacy of the warning . . . must be judged in light of the ordinary knowledge common to members of the law enforcement community.

Id. at 551 (citations omitted).

use;¹⁵⁶ and (2) must be timely and advise of significant hazards from reasonably foreseeable misuse of the product.¹⁵⁷

I have selected a subset of warnings issues that illustrate the *Products Liability Restatement's* substantial fidelity to the decisional law interpreted by its predecessor, the *Restatement (Second) of Torts*, and the conformity of these approaches with tort goals of corrective justice and efficiency. The three selected facets are the rules pertaining to a manufacturer's discharge of its warning duties (1) regarding open and obvious dangers; (2) upon sale of the product to an informed intermediary; and (3) upon sale of raw material to a downstream manufacturer. At the conclusion of these comments, I will address an area to which the decisional law will surely give continued focus: warnings regarding risks to children posed by products intended primarily for use by adults.

Warnings as to product hazards and instructions for reasonably safe use are established mechanisms of risk reduction, as they theoretically obligate manufacturers to achieve "optimal levels of safety."¹⁵⁸ "Optimal levels of safety," it must be noted, does not

¹⁵⁶ This requirement was described in *Stanley Industries v. W.M. Barr & Co.*, 784 F. Supp. 1570 (Fla. 1992):

The manufacturer must provide users with . . . adequate warning of a product's dangerous propensities. In short, a manufacturer must take reasonable precautions to avoid reasonably foreseeable injuries to the users of its products and thereby assumes a duty to convey to the users of that product a fair and adequate warning of the dangerous potentialities of the products so that the user, by the exercise of reasonable care, will have fair and adequate notice of the possible consequences of the product's use or misuse.

Id. at 1574 (citations omitted).

¹⁵⁷ *Brown v. Sears Roebuck & Co.*, 667 P.2d 750, 758 (Ariz. Ct. App. 1983). In *Brown*, a genuine issue of material fact existed as to the adequacy of warnings regarding, inter alia, use of a nongrounded extension cord with a power source. Noting that "[w]arnings are instructions as to dangers that might occur if the instructions are not followed," the court held that the manufacturer of an electrical extension cord had no duty to warn of dangers resulting if the cord were cut. *Id.* at 756.

¹⁵⁸ A comment to the *Products Liability Restatement* explains:

[Section 2] (b) and (c), which impose liability for products that are defectively designed or sold without adequate warnings or instructions and are thus not reasonably safe, achieve the same general objectives as does liability predicated on negligence. The emphasis is on creating incentives for manufacturers to achieve optimal levels of safety in designing and marketing products.

PRODUCTS LIABILITY RESTATEMENT, *supra* note 1, § 2 cmt. a.

mean total, or even maximum, safety.¹⁵⁹ The “informed consent” rationale reflects the societal judgment that a product user or consumer is entitled to make his own choice as to whether the product’s utility or benefits justify exposing himself to the risk of harm.¹⁶⁰

For example, in *T.H.S. Northstar Assocs. v. W.R. Grace & Co.*,¹⁶¹ a suit brought by a Minneapolis building center for clean-up and abatement, the plaintiff alleged that Grace’s Monokote 3 product contaminated the premises with asbestos. The federal appeals court affirmed an award of damages, entered by a jury that had been instructed as to a limited manufacturer’s continuing duty to warn in these words:

[I]f a manufacturer learns that a previously distributed product poses a danger to users, it must give additional warnings or instructions that will enable users to make informed decisions and use the product safely. . . . A manufacturer has no duty to warn, however, if the user is or should be fully aware of all of the dangers inherent in the product, but past experience or familiarity with a product does not necessarily alert a user to all of the dangers associated with the product.¹⁶²

As suggested in *T.H.S. Northstar*,¹⁶³ the key to evaluating the *Products Liability Restatement* and parallel state statutory and decisional law regarding warnings and instructions is in identifying the primary role of a seller’s informational obligation as one of

¹⁵⁹ Comment a clarifies: “Society does not benefit from products that are excessively safe—for example, automobiles designed with maximum speeds of 20 miles per hour—any more than it benefits from products that are too risky. Society benefits most when the right, or optimal, amount of product safety is achieved.” *Id.*

¹⁶⁰ See, e.g., *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1089 (5th Cir. 1973) (“[A] true choice situation arises, and a duty to warn attaches, whenever a reasonable man would want to be informed of the risk in order to decide whether to expose himself to it.”); *Graham v. Wyeth Lab.*, 666 F. Supp. 1483, 1498 (D. Kan. 1987) (holding that consumer has right to know risks so that he can make informed decision).

¹⁶¹ 66 F.3d 173 (8th Cir. 1995).

¹⁶² *Id.* at 176.

¹⁶³ *Id.* at 176-77.

informed consent.¹⁶⁴ From the standpoint of corrective justice, warnings adequate to permit a product user to make an informed decision as to whether to expose himself or others to the risk are central to preservation of a product user's autonomy interests.¹⁶⁵ From an efficiency perspective, informed decisionmaking by plaintiff permits the buyer-seller transaction to be fairly characterized as an *agreement* that avoids the extracontractual inefficiencies of involuntary wealth transfers.¹⁶⁶

Some critics of the *Products Liability Restatement's* warning provisions argue that section 2(c) and its commentary abandon fairness to victims in favor of economic and business expediency.¹⁶⁷ A partial response is that section 2(c) as interpreted by the Reporters faithfully reflects the law regarding sellers' informational obligations as that law has developed over the last several decades.¹⁶⁸ It is worth bearing in mind that it has never been the objective of tort law that every injury have a remedy at law or equity, but rather that only socially unacceptable injuries (as perceived by proponents of corrective justice, efficiency, or both) be remedied.¹⁶⁹

2. *Corrective Justice.* As a general proposition, a seller will not be liable for failing to provide warnings regarding product risks

¹⁶⁴ See also, e.g., *Glittenberg v. Doughboy Recreational Indus.*, 462 N.W.2d 348, 365 (Mich. 1990) (involving litigation arising from injuries suffered by diving into above-ground swimming pool).

¹⁶⁵ Conversely, a risk creator's interest in self autonomy diminishes to the extent that he has " 'already injected himself into the plaintiff's realm.' " *Andrulonis v. United States*, 724 F. Supp. 1421, 1494 (N.D.N.Y. 1989) (quoting Shlomo Twerski, Note, *Affirmative Duty After Tarasoff*, 11 HOFSTRA L. REV. 1013, 1025 (1983), modified on other grounds, 924 F.2d 1210 (2d Cir. 1990)).

¹⁶⁶ See *supra* notes 93-106 and accompanying text (discussing application of efficiency theory to products liability law as intended, in part, to discourage involuntary transfers of wealth).

¹⁶⁷ See generally Mark McLaughlin Hager, *Don't Say I Didn't Warn You (Even Though I Didn't): Why the Pro-Defendant Consensus on Warning Law Is Wrong*, 61 TENN. L. REV. 1125, 1172 (1994) (arguing that "current doctrine is excessively pro-defendant and should be reformed in a pro-plaintiff direction").

¹⁶⁸ See *supra* notes 3-4 and accompanying text (describing objectives and process of A.L.I. in drafting *Restatements*).

¹⁶⁹ Cf. Vernon Palmer, *A General Theory of the Inner Structure of Strict Liability: Common Law, Civil Law, and Comparative Law*, 62 TUL. L. REV. 1303, 1312 n.30 (1988) (discussing Roman principle of *injuria* under which "damage caused in the exercise of a right . . . was free from liability").

that are generally known or obvious. The rationale for not requiring warnings in such instances is found in *Products Liability Restatement* section 2 comment j, which states: "When a risk is obvious or generally known, the prospective addressee of a warning will or should already know of its existence. Warning of an obvious or generally known risk in most instances will not provide an effective additional measure of safety."¹⁷⁰

The *Products Liability Restatement* preservation of this "open and obvious" rule is supported by the position taken in a majority of jurisdictions that there exists no duty to warn of obviously hazardous conditions.¹⁷¹ The approach adopted in the decisions comprising this body of law is stated by one court in this language: "A manufacturer cannot manufacture a knife that will not cut or a hammer that will not mash a thumb or a stove that will not burn a finger. The law does not require him to warn of such common dangers."¹⁷²

In following this rule, the Reporters made no significant sacrifice in the corrective justice goal of risk reduction. The neutrality of the "open and obvious" rule is demonstrated by the difficulty in arguing that a person who would knowingly encounter an obvious risk would become less likely to do so if such risk were accompanied by a warning. Moreover, there is a social cost to overwarning. As stated by Henderson and Twerski in a formative analysis:

The most significant social cost generated by requiring distributors to warn against remote risks is the reduced effectiveness of potentially helpful warnings directed

¹⁷⁰ PRODUCTS LIABILITY RESTATEMENT, *supra* note 1, § 2 cmt. j. Comment j reasons that "warnings that deal with obvious or generally known risks may be ignored by users and consumers and may diminish the significance of warnings about non-obvious, not-generally-known risks. Thus, requiring warnings of obvious or generally known risks could reduce the efficacy of warnings generally."

¹⁷¹ See, e.g., *Ward v. Hobart Mfg. Co.*, 450 F.2d 1176 (5th Cir. 1971) (finding no liability on part of manufacturer of meat grinder in which plaintiff's hand became entangled); *Fanning v. LeMay*, 230 N.E.2d 182 (Ill. 1967) (finding no liability on part of manufacturer of shoes the soles of which became slippery when wet).

¹⁷² *Jamieson v. Woodward & Lothrop*, 247 F.2d 23, 26 (D.C. Cir. 1957). In *Jamieson*, the plaintiff had purchased an elastic exerciser that was essentially "an ordinary rubber rope, about the thickness of a large lead pencil, about forty inches long, with loops on the ends." *Id.* at 25. Plaintiff was injured when the extended exerciser slipped and struck her in the eye. *Id.*

towards risks which are not remote. Bombarded with nearly useless warnings about risks that rarely materialize in harm, many consumers could be expected to give up on warnings altogether.¹⁷³

Accordingly, the *Products Liability Restatement* rule gives appropriate recognition to the "human factors" concern that a different approach—one commending warnings for obvious risks—would encourage an environment of overwarning that would vitiate the effectiveness of warnings that are genuinely valuable and appropriate.

As suggested earlier, under both the *Restatement (Second) of Torts* and the *Products Liability Restatement*, a strong informed consent rationale pervades warnings analysis; a representative expression of when the duty to warn arises is "‘whenever a reasonable man would want to be informed of the risk in order to decide whether to expose himself to it.’"¹⁷⁴ Thus, a core attribute of the Reporters’ approach is one of vindicating the personal autonomy interest that underpins corrective justice.

With respect to warning obligations to intermediaries, no hardship is worked upon corrective justice principles by continuation of the nearly universal rule that a warning only to an intermediary will satisfy a seller’s obligations when, in the totality of the circumstances, it can be predicted that pertinent safety-related information will be effectively conveyed to the end user. In a scenario often involving risks of personal injury to workplace users of the product, the *Products Liability Restatement* preserves the

¹⁷³ James A. Henderson, Jr. & Aaron D. Twerski, *Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn*, 65 N.Y.U. L. REV. 265, 296 (1990). The authors continue:

[T]he few persons who might continue to take warnings seriously in an environment crowded with warnings of remote risks would probably overreact, investing too heavily in their versions of "safety." Given these limits on the capacity of consumers to react effectively to excessive risk information, the optimal, rather than the highest, levels of risk information, measured both qualitatively and quantitatively, are what is called for.

Id. at 296-97.

¹⁷⁴ *Moran v. Johns-Manville Sales Corp.*, 691 F.2d 811, 814 (6th Cir. 1982) (quoting *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1089 (5th Cir. 1973)); see also *Borel*, 493 F.2d at 1090 ("A product must not be made available to the public without disclosure of the dangers that the application of reasonable foresight would reveal.").

conventional rule regarding a seller's informational obligation to remote users. In the Reporters' words:

The standard is one of reasonableness in the circumstances. Among the factors to be considered are the gravity of the risks posed by the product, the likelihood that the intermediary will convey the information to the ultimate user, and the feasibility and effectiveness of giving a warning directly to the user.¹⁷⁵

This approach is in no material way unlike that suggested by the earlier *Restatement (Second) of Torts*, comment n,¹⁷⁶ and it is consistent with the protocol described in the leading case law.¹⁷⁷

A like conclusion can be reached in claims arising from use of, or contact with, raw materials. In terms of corrective justice, the sellers of raw materials, many of which are transformed into a seemingly limitless array of applications by downstream participants in the commercial chain, have not, in any meaningful way, caused a plaintiff's harm. As a plaintiff may pursue a remedy against the distributive participant who *did* work the allegedly harmful change or modification in the material that triggered a warning obligation, the principles of corrective justice likewise are preserved.

3. *Efficiency-Deterrence*. In the main, the *Products Liability Restatement's* treatment of warnings can be harmonized readily with both Posner's market efficiency and Calabresi's least cost avoider approaches.¹⁷⁸ By declining to take a position that suggests that a warning should be given even where the risk and

¹⁷⁵ PRODUCTS LIABILITY RESTATEMENT, *supra* note 1, § 2 cmt. i.

¹⁷⁶ See RESTATEMENT (SECOND) OF TORTS § 388 cmt. n (1979) (setting forth in far more particularized fashion approach recharacterized in comment i of *Products Liability Restatement*).

¹⁷⁷ A leading case on this point is *Dougherty v. Hooker Chemical Corp.*, 540 F.2d 174 (3d Cir. 1976). *Dougherty* states:

[L]iability arises when the seller, having reason to know that its product is likely to be dangerous for its intended use, and having no reason to believe that the intended user will realize its dangerous condition, nevertheless fails to exercise reasonable care to inform the user of the dangerous condition.

Id. at 177.

¹⁷⁸ See *supra* notes 92-118 and accompanying text for a discussion of these views.

the means of its avoidance are abundantly clear, the Reporters avoid adding unnecessary precautionary costs to the marketing of products of utility. The Reporters to the *Products Liability Restatement* observe that:

[f]rom a fairness perspective, requiring individual users and consumers to bear appropriate responsibility for proper product use prevents careless users and consumers from being subsidized by more careful users and consumers, when the former are paid damages out of funds to which the latter are forced to contribute through higher product prices.¹⁷⁹

While phrased in terms of fairness, this assertion speaks with equal persuasiveness in terms of efficiency.¹⁸⁰

Regarding the *Products Liability Restatement's* approach to warnings to intermediaries and with respect to raw materials, the influence of efficiency considerations is even more apparent. In confirming that the objective of *Products Liability Restatement* section 2(c) comment i is indistinguishable from that of *Restatement (Second) of Torts* section 388 comment n,¹⁸¹ the Reporters emphasize the *Products Liability Restatement's* goal of lowering accident

¹⁷⁹ PRODUCTS LIABILITY RESTATEMENT, *supra* note 1, § 2 cmt. a.

¹⁸⁰ But see Howard A. Latin, *Behavioral Criticisms of the Restatement (Third) of Torts: Products Liability*, 16 J. PROD. & TOXICS LIAB. 209 (1994). Latin argues:

[The Reporters suggest] that courts should avoid requiring warnings about "obvious product" risks. However, courts often disagree about which particular product hazards are obvious, and the Reporters offer no guidance on just how obvious a risk must be before courts should hold as a matter of law that warnings need not mention the risk. A hazard obvious to 80 percent of product users would not be evident to the other 20 percent, and the costs of providing a more complete warning to this minority group may be justified in comparison with the accident losses that could be prevented. Once it is acknowledged that human cognitive capacities and receptivity to new information vary widely, which is amply demonstrated by the social science evidence, there is no reason to assume that a risk "obvious" to many product users will be equally "obvious" to others.

Id. at 216. Latin sets forth considerable social science evidence supporting this assertion in Howard A. Latin, "Good" Warnings, Bad Products, and Cognitive Limitations, 41 UCLA L. REV. 1193 (1994).

¹⁸¹ Comment i of section 2(c) of the *Products Liability Restatement* and comment n of section 388 of the *Restatement (Second) of Torts* both pertain to warnings duties to third persons.

costs by recognizing that it is ordinarily the workplace supervisor who can most efficiently and effectively communicate risk information, particularly in settings involving bulk sales of potentially hazardous materials.¹⁸² Thus, the *Products Liability Restatement* promotes an efficient rule that would relieve the component or ingredient supplier of liability when the component or ingredient is not itself defective. In such circumstances, the component or ingredient supplier ordinarily has no meaningful control over the hazard level, if any, of the finished product.¹⁸³ As between the ingredient supplier and the downstream assembler or formulator, the proper conclusion is that the downstream formulator, with its superior (and often exclusive) knowledge of the product's end use, and which is responsible for ultimate design, formulation, packaging, risk information and marketing, should remain the principal locus of potential liability.¹⁸⁴

Illuminating in this regard is *Shell Oil Co. v. Harrison*,¹⁸⁵ a suit brought against the manufacturer of the chemical DBCP, which was sold to a formulator who used it as an ingredient of a

¹⁸² See PRODUCTS LIABILITY RESTATEMENT, *supra* note 1, § 2(c) Reporters' Note, cmt. i, No. 5 (explaining rationale behind rule and noting comment i's relationship to comment n of the *Restatement (Second) of Torts*). See generally M. Stuart Madden, *Liability of Suppliers of Natural Raw Materials and the Restatement (Third) of Torts: Products Liability—A First Step Toward Sound Public Policy*, 30 U. MICH. J.L. REFORM 281 (1997).

¹⁸³ Any substance can be hazardous. As the 16th century physician Paracelsus stated: "What is not a poison? All things are poison and none without poison. Only the dose determines that a thing is not a poison." Charles E. Erway, III, *The Ingredient Supplier Defense*, 16 J. PROD. & TOXICS LIAB. 269, 273 & n.15 (1994) (quoting AMERICAN CONFERENCE OF GOVERNMENTAL INDUS. HYGIENISTS, THRESHOLD LIMIT VALUES—DISCUSSION AND THIRTY-FIVE YEAR INDEX WITH RECOMMENDATIONS 332 (1984)).

¹⁸⁴ See, for example, *George v. Parke-Davis*, 733 P.2d 507 (Wash. 1987), an indemnification action brought by a pharmaceutical company against the supplier of the active ingredient diethylstilbestrol (DES). Finding no proper liability for the ingredient supplier, the court explained:

DES is not inherently harmful, and still is prescribed today for ailments not associated with pregnant women. Thus, it is the way in which the ingredient DES is used, and not DES per se, which is harmful. . . . [The FDA] requires the tablet manufacturers . . . to account for and warn of a drug's properties. . . . It would therefore be anomalous to require the raw [ingredient] manufacturer to conduct separate tests to determine the adverse effects of the [end product] when by federal statute, the [end product] tablet manufacturer bears this responsibility.

Id. at 515, *discussed in* Erway, *supra* note 183, at 274.

¹⁸⁵ 425 So. 2d 67 (Fla. Dist. Ct. App. 1982).

fumigant claimed to have injured farm workers. As the court stated: "[L]abeling and packaging requirements necessarily differ depending on the particular [end product] formulation and, thus, place the responsibility on the formulator for providing adequate warning to the public"¹⁸⁶

Similarly, and illustrative of application of the least cost avoider approach, is *Beauchamp v. Russell*,¹⁸⁷ involving the issue of the connection, if any, between an air valve component in a pneumatically-run pelletizer and the injury of plaintiff's spouse. The court suggested that the duty to warn should properly be placed upon the participant in manufacture with the greatest access to information and the easiest means of its dissemination.¹⁸⁸ In the words of the court:

The responsibility for information collection and dissemination should rest on the party who has the greatest access to the information and who can make it available at the lowest cost. Where a component part is incorporated into another product, without material change, the manufacturer of the part is in the best position to bear this responsibility.¹⁸⁹

¹⁸⁶ *Id.* at 70; see also *White v. Weiner*, 562 A.2d 378 (Pa. Super. Ct. 1989), *aff'd*, 583 A.2d 789 (Pa. 1991), a suit brought against Eli Lilly & Co. for failure to provide warnings on the chemical compound protamine sulfate, supplied in bulk to Upjohn Company and employed as an ingredient in a prescription drug sold by the latter. The Pennsylvania court held that Lilly had no tort duty to warn the end user, inasmuch as the end product producer was in a superior position to assess risks and decide upon the form and content of adequate labeling and instructions. *White*, 562 A.2d at 386.

Some components can be effectively labeled. For example, in *Fleck v. KDI Sylvan Pools, Inc.*, 981 F.2d 107 (3d Cir. 1992) the court held as a matter of law that the manufacturer of a replacement liner for an above-ground swimming pool is not relieved of the duty to warn—though the liner is considered a component part—because the liner manufacturer knew the “liner would ultimately be incorporated into a pool, and nothing else.” *Id.* at 118-19. Thus, the producer could “reasonably foresee the potential risk of failing to affix warning labels.” *Id.*

¹⁸⁷ 547 F. Supp. 1191 (N.D. Ga. 1982).

¹⁸⁸ *Id.* at 1197.

¹⁸⁹ *Id.*; see also RESTATEMENT (SECOND) OF TORTS § 402A cmt. q (1979) which, while not specifically addressing warnings, states with respect to strict liability generally: “It is no doubt to be expected that where there is no change in the component part itself, but it is merely incorporated into something larger, the strict liability will be found to carry through to the ultimate user or consumer.” The suggestion that in apportioning liability between a

Courts generally have responded to warnings issues involving raw materials by finding no warning duty absent a showing that the material itself—in its bulk form—was defective,¹⁹⁰ or by resort to several developed exceptions to seller warning obligations. These exceptions have included, without limitation, defenses pertaining to bulk sellers, extrapolations from the component part supplier defense, the ingredient supplier defense, the sophisticated user or sophisticated buyer defense, and the so-called learned (better termed “informed”) intermediary defense.¹⁹¹ Under one or

component part manufacturer and an assembler, liability should be assigned to the cheapest cost avoider is explained in Richard D. Cunningham, Comment, *Apportionment Between Partmakers and Assemblers in Strict Liability*, 49 U. CHI. L. REV. 544, 547 (1982):

Under this approach, the fact finder should simply ask who can more easily detect and correct the defect [T]he party with the lowest detection costs would bear full liability, but could shift this liability to the party with the lowest correction costs if it provided a full warning of the detected dangers.

¹⁹⁰ Ordinary, merchantable granite, for example, or aluminum of a particular gauge, would be representative examples of nondefective naturally occurring raw materials, as the propensities and the capacities of the materials are universally known.

¹⁹¹ The Reporters state in comment o to *Products Liability Restatement* section 2:

Raw materials are a subset of the broader category of component parts. Regarding the issue of defective design, it is difficult to say how a basic raw material such as sand, gravel or kerosine could be defectively designed. If there is an inappropriate design in the use of such materials, the failing ordinarily is not attributable to the seller of the raw material, but rather to the fabricator that put them to use. Regarding most raw materials, the manufacturer of the integrated product has such a large comparative advantage in this respect that raw material sellers are generally not subject to liability for defective design of the end product. The same considerations apply to failure-to-warn claims against providers of raw materials.

Many courts have invoked special doctrines such as the “raw material supplier defense” or the “bulk sales/sophisticated purchaser rule” to negate liability. Notwithstanding these judicial invocations, special rules are unnecessary to absolve sellers in appropriate instances. If the materials are not themselves defective within the terms of §§ 1 and 2, their sellers should not be liable.

PRODUCTS LIABILITY RESTATEMENT, *supra* note 1, § 2 cmt. o. In example 5 to section 2, comment o, the Reporters hypothesize:

LMN Sand Co. sells sand in a large bulk volume. ABC Construction Co. purchased one ton of sand to use in mixing cement. LMN is aware that improper mixture of sand with other ingredients can cause the cement to crack. ABC utilized LMN sand to form a supporting column in a home that it built. As a result of the improper mixture the cement column gave way during a mild earthquake and caused injury to the occupants of the home. The injured occupants have no cause of action against LMN. The sand sold by LMN is not defective within the meaning of Sec. 2.

a combination of such approaches, there should be no warning obligation placed upon the seller of a raw material that, during transit to an anticipated fabrication, allegedly causes injury at the intermediate stage. For example, in *Spellmeyer v. Weyerhaeuser Corp.*,¹⁹² a personal injury suit brought against the manufacturer alleging that it failed to prepare wood pulp bales properly for shipping, the court granted Weyerhaeuser summary judgment on the strict liability count, explaining:

Imposition of strict liability is premised on the sound policy consideration that the manufacturer who markets his product for use and consumption by the general public is best able to bear the risk of loss resulting from a defective product. The thrust of Section 402A is, accordingly, to protect the "ultimate user or consumer" of the product. . . . In the instant case, Weyerhaeuser produced and packaged a raw material in an intermediate state, which was stored awaiting shipment to another processor. It did not harm or endanger any "ultimate user or consumer;" only expert loaders and expert carriers were required to deal with it. We therefore conclude that, because of the character of the "product" and the status of the plaintiff, the policy considerations which support imposition of strict liability in other contexts are too severely diluted here and dismissal was correct as to the strict liability theory.¹⁹³

Congruent authority is found in *Pennwalt Corp. v. Superior Court*,¹⁹⁴ a case arising from injuries to an eighteen-year-old plaintiff while he was attempting to compound chemicals at home to create fireworks. The raw materials at issue included sodium chlorate, aluminum powder, and sulphur, and plaintiff brought suit against the manufacturer, distributor and retailer of each chemical.

Id. § 2 cmt. o, example 5.

¹⁹² 544 P.2d 107 (Wash. Ct. App. 1975).

¹⁹³ *Id.* at 109-10.

¹⁹⁴ 218 Cal. Rptr. 675 (Ct. App. 1985) (not officially reported).

The California Court of Appeals held that the bulk chemicals manufacturer could not be liable to plaintiff for the sale of a chemical that had been repackaged, relabeled, and distributed through a retailer over which the manufacturer had no control.¹⁹⁵

4. *Discrete Residual Issue of Children Injured by Products Intended for Adult Use.* The *Products Liability Restatement's* retention of a blanket rule that a seller need not warn of obvious dangers has long seemed inadequate with respect to one small but important plaintiff constituency: the child injured using a product intended for adults. In products liability law generally, a manufacturer may be relieved of responsibility for an injury associated with the use of or exposure to a defective product only where plaintiff's conduct is so unforeseeable as to constitute the sole legal cause of his injuries.¹⁹⁶ A manufacturer's duty to warn of risks is not

¹⁹⁵ As the Court explained:

[A] duty is only imposed on the manufacturer to warn the ultimate consumer in those cases that "involve tangible items that could be labeled, or sent into the chain of commerce with the manufacturer's instructions . . ." A bulk manufacturer "must be absolved at such time as it provides adequate warnings to the distributor who subsequently packages, labels and markets the product. . . ."

Sodium Chlorate has many legitimate uses, some of which involve using it in conjunction with other chemicals. Pennwalt cannot be expected to anticipate every possible use and issue warnings of any potential danger involved in each such use. To hold otherwise would place an impossible burden on a bulk manufacturer which would be tantamount to imposing absolute liability for injury resulting from use of a product not claimed to be otherwise defective.

Id. at 677 (citations omitted); see also *Walker v. Stauffer Chem. Corp.*, 96 Cal. Rptr. 803, 804-06 (Ct. App. 1971) (arising from plaintiff's injury caused by drain cleaner that exploded). Finding for defendant Stauffer Chemical, the bulk manufacturer of sulfuric acid (one of the ingredients of the cleaner), the court stated:

We are referred to no California case, nor has independent research revealed any such, extending the strict liability of the manufacture (seller) to the supplier of a substance to be used in compounding or formulating the product which eventually causes injury to an ultimate consumer. On the contrary this dearth of authority indicates to us a reluctance on the part of the Bench and Bar to consider such an extension necessary or desirable for the protection of the ultimate consumer.

Id. at 805-06.

¹⁹⁶ See, for example, *Kriz v. Schum*, 549 N.E.2d 1155, 1160-61 (N.Y. 1989), a suit brought by a swimmer rendered a paraplegic after sliding head first down a pool slide into an above-ground pool. Reviewing the Appellate Division's reversal of the trial court's grant of summary judgement, New York's highest court held that the swimmer's conduct in sliding into a pool of unknown depth was not an unforeseeable superseding cause. *Id.*

confined to risks involving intended uses of the product, but also foreseeable misuses.¹⁹⁷ Foreseeability “does not require that the particular circumstances of a given accident be foreseen,” but rather that an accident “of the type that [occurred was] objectively reasonable to expect.”¹⁹⁸

Although the risks attending incautious use of many ordinary products is obvious to practically all adults, examples abound in which (1) the product is sold routinely for use in settings where children may be expected; and (2) the risk is not so obvious to a child as it is to an adult. In such circumstances, courts routinely refuse to apply the open and obvious rule in a strict sense, instead shaping the foreseeability requirement to the specific situations of the cases before them.

Illustrative is *Strothkamp v. Chesebrough-Pond's, Inc.*,¹⁹⁹ the appeal of a trial court's judgment n.o.v. following an award of actual and punitive damages to a child who, at age five, severely injured his ear using appellee's Q-Tips brand cotton swabs. Reversing in part, and remanding for a new trial on actual damages, the court explained:

[A]s the foreseeable risk of injury increases so does the duty of care. The manufacturer or seller of products may satisfy this increasing duty of care in several ways; including a warning or packaging in child resistant containers.

Where the prudent manufacturer would foresee that a condition or propensity of the product is likely not to be fully known and appreciated by those using it, and that some use to which the article is likely to be put will

¹⁹⁷ For example, in *Trivino v. Jamesway Corp.*, 539 N.Y.S.2d 123 (App. Div. 1989), the court addressed an injury arising from the ignition of a child's Halloween costume crafted from cosmetic cotton-rayon puffs glued to a pajama costume exterior to simulate a fur coat. Reversing summary judgment granted to the puff manufacturer, the court explained: “While we agree that plaintiff's use of the cotton puff was a misuse in the sense that it was outside the scope of the apparent purpose for which the puffs were manufactured, we cannot agree that plaintiff's misuse was unforeseeable as a matter of law.” *Id.* at 124.

¹⁹⁸ *Yassin v. Certified Grocers*, 502 N.E.2d 315, 324 (Ill. App. Ct. 1986). In *Yassin*, a child's hand was injured in a grocery store meat tenderizer. *Id.* at 318-19.

¹⁹⁹ No. 60645, 1993 WL 79239 (Mo. Ct. App. Mar. 23, 1993).

be unreasonably dangerous without that knowledge, the duty of care requires a warning.²⁰⁰

In *Bean v. BIC Corp.*,²⁰¹ a wrongful death suit arising from a fire caused by a disposable butane lighter, the Alabama Supreme Court entertained the claimant's argument that the product's spare warning—"keep out of the reach of children"—was inadequate. In the court's words:

[T]he Beans argued that the warnings were inadequate because they (1) failed to warn about the attractiveness of the lighters to small children, (2) failed to warn that small children could easily operate the lighters, and (3) failed to warn of the serious danger of fires started by small children with lighters. The Beans argue that BIC failed to show the absence of a genuine issue of material fact to be determined by the jury. We agree.²⁰²

Telling as well is the decision in *Shaw v. Petersen*,²⁰³ a parental suit against a swimming pool owner emanating from injuries to a nineteen-month old child, in which the court stated: "The characteristics of children are proper matters for consideration in determining what is ordinary care with respect to them, and there may be a duty to take precautions with respect to those of tender years which would not be necessary in the case of adults."²⁰⁴

Appropriate, then, to the evaluation of a manufacturer's warnings obligations concerning a product intended for adult use, but which will in the ordinary course come into contact with children, is consideration of "the ability of the child to appreciate the risk involved."²⁰⁵ A *Restatement*-based interpretation that omits consideration of the specter of injury to children whose age, experience and judgment preclude full appreciation of risk, and

²⁰⁰ *Id.* at *4-*5.

²⁰¹ 597 So. 2d 1350 (Ala. 1992).

²⁰² *Id.* at 1353.

²⁰³ 821 P.2d 220 (Ariz. Ct. App. 1991).

²⁰⁴ *Id.* at 222 (quoting *Shannon v. Butler Homes, Inc.*, 428 P.2d 990, 995 (Ariz. 1967)).

²⁰⁵ *Id.* at 223.

therefore informed consent, fails the autonomy interest of warnings jurisprudence dating to *Borel*.²⁰⁶

B. SEVERAL LIABILITY FOR NONECONOMIC HARM

1. *Generally.* In general terms, under joint and several liability, a tort victim injured by two or more tortfeasors “may recover his total damages from any one of the actors, regardless of the portion of fault attributable to that tortfeasor.”²⁰⁷ Joint liability benefits the plaintiff by enlarging the likelihood of full recovery for proved harm when one or more of the joint tortfeasors are either insolvent or cannot be joined in the action.²⁰⁸

Aaron Twerski has described the conventional joint and several liability approach as “accentuat[ing] and exacerbat[ing] all the imperfections in the present tort compensation system.”²⁰⁹ A principal argument against retention of joint and several liability is that the doctrine provides an incentive for plaintiffs to collect

²⁰⁶ *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076 (5th Cir. 1973); see *supra* note 174 (discussing *Borel*).

²⁰⁷ Nancy L. Manzer, Note, *1986 Tort Reform Legislation: A Systematic Evaluation of Caps on Damages and Limitations on Joint and Several Liability*, 73 CORNELL L. REV. 628, 635 (1988); see also MICHAEL HOENIG, PRODUCTS LIABILITY: SUBSTANTIVE, PROCEDURAL AND POLICY ISSUES 191 (1992) (“At common law, the joint and several liability imposed upon joint tortfeasors was indivisible. Thus, any one of the joint tortfeasors was liable to the injured party for the entire damage.” (citing *Musco v. Conte*, 254 N.Y.S.2d 589, 593 (App. Div. 1954))). Hoenig further cites *Musco* as suggesting that “the common-law doctrine was aimed at deterring the commission of a single wrongful act by the concert of several persons who were proceeding in unison.” *Id.*

²⁰⁸ Richard W. Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. DAVIS L. REV. 1141, 1142-43 (1988).

²⁰⁹ Aaron D. Twerski, *The Joint Tortfeasor Legislative Revolt: A Rational Response to the Critics*, 22 U.C. DAVIS L. REV. 1125, 1143 (1989), discussed in Richard C. Ausness, *An Insurance-Based Compensation System for Product-Related Injuries*, 58 U. PITT. L. REV. 669, 703 & n.173 (1997).

The doctrine’s distortion of realistic settlement negotiations is described by HOENIG, *supra* note 207, at 193, in these words:

The more significant policy of encouraging reasonable settlements is undermined because realistic evaluations of true culpability need not impact upon the settlement demands. An artificially high range of settlement evaluations ensues. The tendency is to look at overall exposure, i.e., “how many millions will this jury possibly award to this plaintiff?,” rather than “how much of the potential award is really attributable to this defendant’s fault?”

their award from the party with the deepest pocket, not the party whose causal contribution to the harm may have been the greatest.²¹⁰

At the state level, joint and several liability has been modified or abolished by at least thirty-three states.²¹¹ Such reforms have ranged from total abolition, to abolition for defendants fifty percent or less liable, to abolition with limited exceptions.²¹²

Even with this widespread modification of joint liability, the Senate authors of the Reform Act claim that under the law of most states, joint and several liability translates into "deep pocket" litigation, meaning "that a defendant who is found only one percent at fault can be burdened with an entire damages award."²¹³ The A.L.I. *Reporters' Study: Enterprise Liability for Personal Injury* also recommended reforming the doctrine of joint and several liability.²¹⁴

The Reform Act proposes adoption of the so-called "California rule," under which defendants are liable only for their "fair share" of responsibility for noneconomic loss, such as pain and suffering.²¹⁵ The Reform Act would set no limits on noneconomic

²¹⁰ See Larry Pressler & Kevin V. Schieffer, *Joint and Several Liability: A Case for Reform*, 64 DENV. U. L. REV. 651, 652 (1988) (arguing that "plaintiffs often target persons they perceive to have the greatest resources from which to pay claims").

²¹¹ See Shuchman, *supra* note 125, at 491 & n.27 (referencing Insurance Information Institute figures as of 1994); see also VICTOR SCHWARTZ, *COMPARATIVE NEGLIGENCE* app. B (3d ed. 1994) (listing statutes).

²¹² BEACON HILL INST., SUFFOLK UNIV., *THE ECONOMICS OF MASSACHUSETTS TORT LAW* 17-18 tbl. 2 (Draft 1997).

²¹³ S. REP. NO. 105-32, at 55 n.202 (1997) (citing *Walt Disney World Co. v. Wood*, 515 So. 2d 198 (Fla. 1987)).

²¹⁴ 2 REPORTERS' STUDY, *supra* note 123, at 147.

²¹⁵ S. REP. NO. 105-32, at 55; see, e.g., CAL. CIV. CODE § 1431.2 (West 1982 & Supp. 1998) (enacting "California rule"); NEB. REV. STAT. § 25-21,185.10 (1995) (same).

This proposal differs from that of 2 REPORTERS' STUDY, *supra* note 123, at 128, which proposes the following approach:

[Where] the risk [exists] that one of several defendants is insolvent or unavailable[, this burden] should not be shouldered exclusively by solvent co-defendants or by the plaintiff. Rather, this risk should be shared by both the plaintiff and the defendants. Each solvent defendant would be liable for an insolvent or unavailable defendant's share of any judgment only in proportion to the solvent defendant's negligence or equitable contribution to the plaintiff's loss.

"This 'allocative' approach," the study concludes, "would more fairly apportion the risk of insolvency or unavailability than does either the traditional [joint and several liability]

harm, and the calculation of several liability would take into account the causal contribution of all entities, be they parties, nonparties, settling parties, or otherwise.²¹⁶ Joint and several liability would be retained with respect to economic damages.

Reform Act proponents have presented extensive evidence of the "extreme and unwanted consequences"²¹⁷ of joint and several liability. One particularly strong example of the negative impact of the doctrine is its effect upon suppliers of raw materials for a variety of products. At congressional hearings a sports equipment manufacturer executive testified that her company, one of only two domestic manufacturers of football helmets, did not manufacture a baseball safety product "because no raw material supplier would accept the potential liability of supplying components for the new safety product."²¹⁸

2. *Corrective Justice.* Opponents of the Reform Act's limitations on joint and several liability are primarily concerned that the proposed rule will fail to adequately compensate injured parties. The most conspicuous congressional critic of statutory modification of joint and several liability has been Senator Ernest Hollings, who castigates Senate Bill 648 as a reversal of the historical achievement of joint and several liability. The Senator lauds the doctrine in its full common-law application for its role in ensuring that "all persons involved in distributing and profiting from a dangerous or defective product, and who have engaged in irresponsible behavior that led to the plaintiff's injury caused by the product, [will] be held liable for the plaintiff's harm."²¹⁹

approach, which places this risk on defendants alone, or certain recent legislative modifications which impose this risk entirely on the plaintiff." 2 *id.* at 128-29.

²¹⁶ S. 648, 105th Cong. § 110 (1997); *accord* DaFonte v. Up-Right, Inc., 828 P.2d 140, 145 (Cal. 1992) (holding that California rule limits joint liability for noneconomic harm to defendant's causal share); *Fabre v. Marin*, 623 So. 2d 1182, 1184 (Fla. 1993) ("The obvious purpose of the statute was to partially abrogate the doctrine of joint and several liability by barring its application to non-economic damage. To exclude from the computation the fault of an entity that happens not to be a party to the particular proceeding would thwart this intent." (quoting *Messmer v. Teacher's Ins. Co.*, 588 So. 2d 610, 611-12 (Fla. Dist. Ct. App. 1991))), *overruled on other grounds by* *Wells v. Tallahassee Mem'l Med. Ctr.*, 659 So. 2d 249 (Fla. 1995).

²¹⁷ S. REP. NO. 105-32, at 55.

²¹⁸ *Id.* at 56 & nn.203-04.

²¹⁹ *Id.* at 70.

Those opposing placing limitations upon pure joint and several liability for noneconomic damages might endorse the comments of former California Chief Justice Bird, who once stated in dissent:

For a child who has been paralyzed from the neck down, the only compensation for a lifetime without play comes from noneconomic damages. Similarly, a person who has been hideously disfigured receives only noneconomic damages to ameliorate the resulting humiliation and embarrassment.

Pain and suffering are afflictions shared by all human beings, regardless of economic status. For poor plaintiffs, noneconomic damages can provide the principal source of compensation for reduced lifespan or loss of physical capacity. . . . [T]hese plaintiffs may be unable to prove substantial loss of future earnings or other economic damages.²²⁰

Thus, according to Bird, and presupposing identical accidents to two economically disparate plaintiffs, the less wealthy plaintiff must rely more heavily upon noneconomic damages to achieve just recompense for the harm. In this situation, the poorer plaintiff bears the brunt of the several liability for noneconomic harm provision, because he will be the plaintiff who bears the greater risk of achieving a verdict that fails to fully compensate him in the event that one or more of the tortfeasors are unavailable or insolvent.²²¹

²²⁰ *Fein v. Permanente Med. Group*, 695 P.2d 665, 689 (Cal. 1985) (Bird, C.J., dissenting), discussed in Andrew F. Popper, *A Federal Tort Law Is Still a Bad Idea: A Comment on Senate Bill 687*, 16 J. PROD. & TOXICS LIAB. 105, 124-25 (1994).

²²¹ Chief Justice Bird's concerns are illustrated by a question posed by Mark Grady: "Suppose a doctor makes an error in two cases. In one the patient is a person earning \$15,000 a year and in another it is a person earning \$150,000 a year. Which patient collects the larger benefit payment (damages award) from the doctor?" GRADY, *supra* note 26, at 432. Grady's question highlights the arguably regressive impact of a several damages for noneconomic harm reform. Apart from medical and rehabilitative costs, economic harm for accident-related loss is tied substantially to income level. Even assuming identical injuries, medical and rehabilitative expenses, and time out of work, those plaintiffs enjoying elevated incomes will, should they prevail at trial, receive more for their economic loss than will their lower earning counterparts. Thus, preservation of joint and several liability for economic harm only, while facially neutral, operates to the greater advantage of the wealthy. *Id.*

Similar concern for the plight of the poorer plaintiff is found in the Legal Realist argument "that one important reason for tort liability was to conscript the providers of economic goods and services to purchase insurance (third-party insurance) for the benefit of their customers."²²² As Grady explains, "Of course, the customers could purchase their own first-party insurance, but the Realists feared that many consumers, because of poverty or improvidence, would decide not to do so."²²³ Accordingly, if, as a class, poorer persons are less likely than wealthier persons to have procured first-party insurance, the risk of incomplete redress for noneconomic harm falls more heavily upon the poor. The wealthy may have first-party insurance which includes provisions for pain and suffering or quality of life compensation even prior to subrogated litigation against multiple tortfeasors. This hypothesis is not affected by the supposition that a legal change to several liability would push first-party insurance rates upwards, as higher first-party insurance rates would only accentuate the impact of already existing economic realities distinguishing those with such insurance and those without.

A further attack on the Reform Act rule is launched by Andrew F. Popper, who has written:

The mere fact that pain and suffering are difficult to quantify should not mean that plaintiffs are somehow not entitled to joint and several liability. . . . By making joint and several liability unavailable for noneconomic damages, those plaintiffs with the most devastating injuries would end up undercompensated, even though they have proved the liability of the defendant.²²⁴

In addition, Popper argues, tertiary accident costs are elevated by any several liability reform proposal, in that "[s]uch victims would be forced to pursue [in separate litigation] each party who had been in any way responsible for the victim's injury."²²⁵

²²² *Id.*

²²³ *Id.*

²²⁴ Popper, *supra* note 220, at 125 (criticizing several liability provision of earlier reform proposal).

²²⁵ *Id.*

The Reporters of the *Restatement (Third) of Torts: Apportionment*²²⁶ are advancing as one option for Institute evaluation a rule that would track the Reform Act in confining joint liability to economic harm while providing several liability under applicable comparative fault principles for noneconomic harm.²²⁷ The *Apportionment Restatement* Reporters suggest two reasons for preserving joint liability only for economic harm. The first rationale is that other compensation schemes, such as workers' compensation, do so.²²⁸ This option's reasoning fails to take into account that the workers' compensation scheme has always been visualized as a bargained-for exchange in which those suffering workplace injuries could recover economic loss without being subjected to the uncertainty and expense of tort litigation. The tort system remained available for recovery of other losses for which parties other than the employer are responsible. The employer, who for a finite and relatively predictable assessment in workers' compensation insurance coverage would be relieved of defending tort claims for greater amounts, would also benefit from this exchange.

Thus, within the workers' compensation system, both workers and employers relinquish something of value in order to achieve other benefits. To use the logic of workers' compensation as a justification for several liability for economic harm as a "reform" rings tinny, because unlike the respective sacrifices made by workers and employers when workers' compensation was created, the Reform Act and the potential *Apportionment Restatement* provision bring nothing to the bargaining table for plaintiffs. Rather than enjoying a filial bond with other economic-harm, strict-liability, social insurance schemes, the latter approaches are totally parasitic, as they reduce or eliminate potential claims and offer nothing in return.

The second rationale advanced by the authors of the *Apportionment Restatement* several liability option is based in part upon the assumption that "providing a damaged plaintiff with . . . economic

²²⁶ RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT (Council Draft No. 2, 1997) [hereinafter APPORTIONMENT RESTATEMENT].

²²⁷ *Id.* § 25E & cmt. c.

²²⁸ *Id.* § 25E cmt. c.

damages is more important than providing full recovery of noneconomic damages."²²⁹ That recovery of one dimension (economic loss) of plaintiff's damages may be more pressing than the other (noneconomic loss) scarcely justifies restricting plaintiffs' access to the latter and venerable avenue to full redress of plaintiffs' total proven harm. Furthermore, the Reporters offer no empirical evidence to support the supposition that injured plaintiffs as a group would more jealously guard a right of joint recovery of economic damages over noneconomic, or the reverse.

Able criticism of such proposed "reform" is raised by corrective justice proponents such as Richard W. Wright, who uses the paradigm of a coffee poisoning in which an intentional poisoner and a negligent poisoner each lace decedent's coffee with a lethal dose.²³⁰ Upon a jury finding that the intentional poisoner is 90% responsible, and the negligent poisoner 10% responsible, and assuming the unavailability or insolvency of the 90% culpable actor, Wright questions the fairness of a several liability approach that would confine the estate's claim to 10% recovery.²³¹ An important part of Wright's argument is its claim that the jointly liable party's successful or unsuccessful contribution or indemnity claim against another tortfeasor "is secondary to the plaintiff's prior and independent corrective justice claim against each tortfeasor."²³² In other words, even as between the injured plaintiff and the only slightly culpable defendant, principles of corrective justice dictate that compensating the plaintiff has priority over the slightly culpable defendant's quarrel with disproportionate liability.

²²⁹ *Id.*

²³⁰ Richard W. Wright, *The Logic and Fairness of Joint and Several Liability*, 23 MEM. ST. U. L. REV. 45, 59-62 (1992).

²³¹ *Id.* at 60.

²³² *Id.* at 61, discussed in *Lilly v. Marcal Rope & Rigging*, 682 N.E.2d 481, 488 (Ill. App. Ct. 1997); cf. *DIAMOND ET AL.*, *supra* note 42, at 228:

[Where] all of the joint tortfeasors, by definition, acted tortiously and actually and proximately caused the plaintiff's injury[,] [i]n most cases, under usual 'but for' causation analysis, the injury would have been totally avoided if any of the defendants had acted nonculpably. In this sense, the percentage allocation determined by the fact-finder is only a comparative measure of an ideal apportionment among wrongdoers, each of whom, it can be argued, should be fully liable to the plaintiff for all the plaintiff's losses because any one of them could have, by acting non-negligently, protected the plaintiff from any injury.

For its insight, Wright's argument seems limited by its premise that each poisoner "put enough poison in plaintiff's coffee to kill her."²³³ This scenario does not directly speak to the joint and several liability examples that proponents of several liability love to hate, i.e., when a defendant's substandard conduct contributes only minimally to plaintiff's harm, but imposition of joint and several liability burdens that defendant with the majority, or even the totality of plaintiff's proved damages. Emblematic of the problem is the notorious plaintiff's verdict in *Walt Disney World Co. v. Wood*,²³⁴ which involved an amusement park bumper car accident in which plaintiff's judgment-proof fiancé was adjudged 85% responsible, plaintiff 14% responsible, and Walt Disney World 1% responsible.²³⁵ Disney ultimately was held liable not only for its participation in the injury, but also for the lion's share of the insolvent tortfeasor's liability, leaving Disney responsible for 86% of the damages in a suit in which its causal contribution was but 1%.²³⁶

3. *Efficiency-Deterrence*. No substantial economic analysis seems to have been devoted to evaluating the efficiencies of specific "reform" measures abrogating common-law joint and several liability for noneconomic loss. A brief examination of the various economic views, however, reveals that the Reform Act provision would have mixed success in terms of its evaluation under economics principles.

The early California Supreme Court decision in *Ybarra v. Spangard*,²³⁷ understood ordinarily as a *res ipsa loquitur* case, demonstrates how economic principles can be argued to support

²³³ *Marcal Rope & Rigging*, 682 N.E.2d at 487.

²³⁴ 515 So. 2d 198 (Fla. 1987). The plaintiff in the case sustained injuries when the bumper car she was driving was rammed from behind by the car driven by her fiancé. She sued Disney, who then sought contribution from her fiancé. *Id.* at 199.

²³⁵ *Id.*

²³⁶ *Id.*; see also 2 REPORTERS' STUDY, *supra* note 123, at 151 n.28 (discussing *Disney*).

²³⁷ 208 P.2d 445 (Cal. 1949). *Ybarra* was a suit against the nurses and doctors in attendance during plaintiff's surgery, as well as the hospital at which the surgery took place. *Id.* Plaintiff was anesthetized for an appendectomy, but while he was unconscious, he suffered a partially paralyzing injury to a nerve in his shoulder. *Id.* at 445-46. Because plaintiff was unconscious and could not prove the cause of his injury, the court shifted the burden to the defendants to prove that they were *not* responsible. *Id.* at 447. Any defendant who could not so prove should, the court concluded, be held liable. *Id.*

retention of conventional joint and several liability. Of the various defendants, nurse Thompson is surely the attending health professional whose commissions or omissions were least likely to have been a substantial factor in plaintiff's paralysis and atrophy.²³⁸ Yet even conceding that of several tortfeasors it is most efficient to hold only the one who can most readily detect and correct the risk liable for failure to do so, nurse Thompson surely is a cheaper cost avoider than at least some of the other parties (e.g., the plaintiff or the hospital staff at large). Should one or more of the surgeons have exacted binding exculpatory agreements from plaintiff prior to the operation, or should they by demonstration of appropriate care be able to rebut the inference raised by application of *res ipsa loquitur*, the several liability approach advanced by the Reform Act would leave plaintiff able to recover only a fraction of his noneconomic damages. Certainly in this setting, principles of enterprise liability (a Rubicon reached and crossed years ago) commend retention of joint liability as to the remaining defendants, including nurse Thompson.

A saving efficiency argument favoring *some form* of reform along several liability lines (although not necessarily that contained in the Reform Act) is found in Calabresi's least cost avoider approach. As noted, Posner agrees that as to risk remediation, we do not want all joint tortfeasors to participate, but rather only the tortfeasor who can take action most efficiently. In the ordinary course, and whether the defendant is an automobile manufacturer or an environmental polluter, the tortfeasor whose contribution to a plaintiff's harm is the greatest will be the tortfeasor who can most readily and efficiently detect and remedy the risk.

Following this line of reasoning, the greatest incentives for efficient (and societally acceptable) conduct should ordinarily rest with the party that can foresee or remedy that wasteful or harmful conduct, while proportionately lesser incentives would be apparent to tortfeasors whose likely causal contribution would be less. To conclude otherwise would, in Judge Higgenbotham's *Testbank*

²³⁸ See RICHARD A. POSNER, *TORT LAW: CASES AND ECONOMIC ANALYSIS* 319 (1982) (discussing defendants' burden and implying that Thompson should be exculpated).

reasoning, make potential liability so great in relation to wrongdoing as to disassociate conduct from consequences.²³⁹ Accordingly, several liability's preservation of a proportionality between risk-creation and potential liability is probably the optimal approach to satisfaction of deterrence goals.

Nevertheless, simple efficiency principles seemingly support retention of joint liability in some form for noneconomic loss. Extrapolating from an example provided by Robin Paul Malloy,²⁴⁰ imagine a suburban water district and a residential water wholesaler together selling filtered well water to local residents. The water of six particular homes is uniquely affected by contaminants in such quantities that make the water responsible for mild intestinal illness in those who drink it. Suppose further that the personal injury value is \$100 per home, for a total of \$600. Two options exist for remedying the problem. First, a water filtering device can be installed at the district distribution point at a cost of \$300. Alternatively, each resident can be provided with a home water purifier at a cost of \$75 per home, at a total cost of \$450. Installing the filter at the distribution point eliminates total damages of \$600 at a cost of \$300, and represents the efficient economic solution.

Under the Reform Act approach to several liability for noneconomic damages, a resident enduring pain and suffering loss due to intestinal illness caused by the contaminated water would be unable to recover some proportion of his proven harm should one of the two arguable tortfeasors (the water district and the residential water wholesaler) be insolvent. In addition to the hardship imposed upon residents by this illness, such an approach invites several inefficiencies, not the least of which is that a several liability for noneconomic harm approach undermines the economic efficiency of the least cost avoider approach. Absent a rule of joint liability that would obligate acknowledgement that the capacity of either joint tortfeasor to recognize and remediate the risk was superior to that of plaintiffs, the potential tortfeasors and the

²³⁹ See *supra* notes 138-141 and accompanying text (discussing *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985)).

²⁴⁰ MALLOY, *supra* note 121, at 35-38. Malloy acknowledges the similarity of his example to that found in A. MITCHELL POLINSKY, *AN INTRODUCTION TO LAW AND ECONOMICS* 11-14 (1983).

potential victims alike are encouraged to undertake inefficient measures. The remaining tortfeasor that will be left answerable in damages knows at the very least that its liability will be for less than the entirety of plaintiff's loss, and thus has less incentive to remedy the risk than it would under conventional joint liability. The potential victims, in turn, recognizing that should illness occur, they will potentially be able only to gain reparation for a fraction of their noneconomic harm, may be prompted to take measures in their own hands, by, for example, adopting the inefficient course of installing filters in individual homes.

In long latency disease litigation, the Reform Act change in joint and several liability will actually *create* factfinding cost and complexity. Absent any authority for application of market share liability for asbestos claims or other claims not involving completely fungible characteristics, courts in asbestos cases particularly have frequently found expert testimony suggesting a zero tolerance for the substance, i.e., that exposure to any amount of the product sufficed to support a jury conclusion that each manufacturer in an ordinarily multiple defendant claim was jointly and severally liable for plaintiff's disease.²⁴¹ As is generally known, many of the original producers of asbestos products are now bankrupt. The Reform Act approach would resuscitate the incentive of any particular defendant to dispute a zero tolerance thesis, and to attempt instead to produce proof that plaintiff's exposure to its product was so limited in time, proximity and density that its contribution to plaintiff's harm was small when compared to the causal contribution of the products of other manufacturers. Such medical-legal issues would necessarily be resolved in mini-trials of some nature, at substantial cost to the parties and to the judicial system.²⁴²

²⁴¹ For example, in *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1094 (5th Cir. 1973), a plaintiff's suit against 11 asbestos manufacturers, the court stated that it was "impossible, as a practical matter, to determine with absolute certainty which particular exposure to asbestos dust resulted in injury to Borel."

²⁴² Interestingly, it was the New Jersey Supreme Court's opposition to the potential bumper crop of mini-trials regarding the state of scientific knowledge that led it in *Beshada v. Johns-Manville Products Corp.*, 447 A.2d 539, 545-49 (N.J. 1982), to rule that in asbestos cases, state-of-the-art would not be a triable issue.

Calabresi suggests that, absent a coherent application of comparative fault to joint and several liability circumstances, the fairness or unfairness of retaining joint and several liability cannot be gauged. Assume, Calabresi proposes, a 60% responsible defendant, a 10% responsible defendant, and a 30% responsible plaintiff.²⁴³ Assume further that the 60% responsible defendant is unavailable or bankrupt. The jury places 70% of responsibility on the 10% responsible defendant, and 30% responsibility upon plaintiff. If the jury intended that plaintiff, even though three times more responsible than the remaining defendant, recover 70% of the total harm from him, the result, Calabresi writes, "seems both unfair and contrary to what the jury found."²⁴⁴ If, on the other hand, the jury meant that the defendants together were 70% responsible, and that the 10%/60% allocation between them "was no more than an equitable split as to them, a split that did not concern their individual responsibility to plaintiff at all," then, Calabresi suggests, retention of joint and several liability in a comparative responsibility context "might be as fair as the previous hypothetical made it seem unfair."²⁴⁵ Until, Calabresi concludes, courts appreciate "the full consequences of the shift from an all or nothing rule to a splitting rule[,] . . . efforts at reform are bound to be haphazard and nonsensical."²⁴⁶

C. LIMITED IMMUNITY FOR NONMANUFACTURING SELLERS

1. *Generally.* It has been estimated that under the law of about twenty-nine states, nonmanufacturing sellers may be liable in products liability even though they contributed in no affirmative way to the claimed product risks.²⁴⁷ These sellers are, nevertheless, drawn into the maw of products liability litigation.²⁴⁸

²⁴³ Calabresi & Cooper, *supra* note 14, at 880-81.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 881; *see also* DIAMOND ET AL., *supra* note 42, at 228 (conceding that "from a compensation perspective, 'joint and several' liability better insures compensation to the plaintiff").

²⁴⁶ Calabresi & Cooper, *supra* note 14, at 881.

²⁴⁷ S. REP. NO. 105-32, at 33 (1997).

²⁴⁸ DAVID G. OWEN ET AL., *PRODUCTS LIABILITY AND SAFETY: CASES AND MATERIALS* 754-55 (3d ed. 1996).

Should they be found liable for plaintiff's harm, they must seek indemnification or contribution from the party, ordinarily the manufacturer, whose active substandard conduct bears a closer causal connection to plaintiff's harm than does the seller's. This approach, the Reform Act authors argue, "generates substantial, unnecessary legal costs, which are passed on to consumers in the form of higher prices. A more efficient approach would be for the claimant to sue the product seller only if the product seller is directly at fault."²⁴⁹

Numerous states have enacted statutes permitting nonmanufacturer liability only upon a showing of manufacturer insolvency or unavailability.²⁵⁰ Consistent with the approach taken in twenty-one states,²⁵¹ Reform Act section 103 " 'recognize[s] the unfairness and illogic of imposing "strict" liability upon retailers and wholesalers who neither participate in the design process for products they sell, nor create warnings or instructions for a product.' "²⁵²

Reform Act section 103:

would hold product sellers, such as wholesalers and retailers, liable only if they are directly at fault for a harm (e.g., misassembled the product or failed to convey appropriate warnings to customers), unless the manufacturer of the product is out of business or otherwise not available to respond in a lawsuit.²⁵³

²⁴⁹ S. REP. NO. 105-32, at 33.

²⁵⁰ *E.g.*, COLO. REV. STAT. § 13-21-402(1) (1987); TENN. CODE ANN. § 29-28-106 (Supp. 1995); WASH. REV. CODE ANN. § 7.72.040(1) (West 1992).

²⁵¹ The statutes of these states are collected in S. REP. NO. 105-32 at 33 & n.108: COLO. REV. STAT. § 13-21-402; DEL. CODE ANN. tit. § 18 7001 (1989); O.C.G.A. § 51-1-11.1 (Supp. 1995); IDAHO CODE § 6-1407 (1990); 735 ILL. COMP. STAT. 5/2-621 (West 1992); IOWA CODE § 613.18 (Supp. 1995); KAN. STAT. ANN. § 60-3306 (1994); KY. REV. STAT. ANN. § 411.340 (Michie 1992); LA. REV. STAT. ANN. § 2800.53 (West 1991); MD. CODE ANN., CTS. & JUD. PROC. § 5-311 (1982); MICH. COMP. LAWS § 600.2947(6) (1996); MINN. STAT. § 544.41 (1994); MO. REV. STAT. § 537.762 (1988); NEB. REV. STAT. § 25-21,181 (1995); N.J. STAT. ANN. § 2A:58C-9 (1995); N.C. GEN. STAT. § 99B-2 (1995); N.D. CENT. CODE § 28-01.3-04 (Supp. 1995); OHIO REV. CODE ANN. § 2307.78 (Anderson 1991); S.D. CODIFIED LAWS § 20-9-9 (Michie 1995); TENN. CODE ANN. § 29-28-106; WASH. REV. CODE ANN. § 7.72.040.

²⁵² S. REP. NO. 105-32, at 33 & n.107 (quoting Madden, *supra* note 61, at 570).

²⁵³ *Id.* at 33-34.

As the Senate authors explain, Reform Act section 103(b)(1):

provides that a product seller shall be treated as the product manufacturer and shall be liable for the claimant's harm as if the product seller were the manufacturer if (A) the manufacturer is not subject to service of process under the laws of any state in which the action might have been brought by the claimant, or (B) the court determines that the claimant would be unable to enforce a judgment against the manufacturer.²⁵⁴

By way of illustration, the accompanying Senate Report states:

a judgment would be unenforceable if the court finds that the manufacturer is bankrupt, insolvent, or otherwise unable to pay. A claimant may recover from the product seller for harms that were caused by the manufacturer if one of the two provisions applies, and if the claimant proves that the manufacturer would have been liable under state law.²⁵⁵

The Reform Act also precludes liability based upon assignment of an absence of due care (negligence) to a product seller where the seller's conduct consisted solely of an alleged failure to inspect a product where there was no reasonable opportunity to inspect the product in a manner which would, in the exercise of reasonable care, have revealed the aspect of the product which allegedly caused the claimant's harm.²⁵⁶

2. *Corrective Justice-Morality.* Senate Bill 648 would affect, but in no meaningful way diminish, a plaintiff's access to money damages for tortiously-caused harm. The only two claims that

²⁵⁴ *Id.* at 35.

²⁵⁵ *Id.* As regards statute of limitations implications for the suit in which manufacturer's insolvency is not discovered until such time as the limitations period has run, section 103(b)(2) provides that "the statute of limitations applicable to claims asserting liability of a product seller as a manufacturer shall be tolled from the date of the filing of a complaint against the manufacturer to the date that judgment is entered against the manufacturer." *Id.*

²⁵⁶ S. 648, 105th Cong. § 103(a)(2)(B) (1997).

characteristically might be pursued *solely* against the retailer, intentional torts and breach of express warranty,²⁵⁷ are preserved.²⁵⁸

The Reform Act provision jump starts the litigation process by providing that only the genuine parties in interest will, as an initial matter, appear before the court. Where insolvency or lack of personal jurisdiction vitiates the ideal of requiring plaintiffs to proceed against the manufacturer, Senate Bill 648 circumstances plaintiffs as they were before: they may proceed against the nonmanufacturing seller as though it were the manufacturer. Indeed, the practical effect of the federal Reform Act is more favorable to the plaintiff than the current laws of the many states that provide only for negligence-based causes of action against nonmanufacturing sellers.²⁵⁹ In those states, an absent or insolvent manufacturer can leave plaintiff totally without a remedy absent a showing of negligence on the part of the wholesaler or the retailer.

3. *Efficiency-Deterrence.* In the words of Richard Ausness, "the imposition of liability upon nonmanufacturers provides only marginal benefits to accident victims while unnecessarily increasing litigation costs for everyone."²⁶⁰

An oft-cited rationale for holding nonmanufacturing sellers liable as though they were manufacturers is that wholesalers and retailers susceptible to such liability would influence manufacturers to make reasonably safe products.²⁶¹ It has, however, never been

²⁵⁷ See 1 MADDEN, *supra* note 105, §§ 5.2-.5 (describing cause of action for breach of express warranty).

²⁵⁸ S. 648 § 103(a)(2).

²⁵⁹ See 2 Prod. Liab. Rep. (CCH) ¶ 90,000 (June 1993-June 1997) (collecting statutes, many of which reject strict liability standard for nonmanufacturing sellers).

²⁶⁰ Ausness, *supra* note 209, at 705. Ausness continues:

For example, nonmanufacturers who are sued by accident victims cannot rely on the product manufacturer to look out for their interests, but must participate in any litigation that occurs. In addition, wholesalers and retailers frequently have to bear the expense of a second lawsuit in order to obtain indemnity from responsible manufacturers. In the interest of reducing administrative costs, therefore, nonmanufacturers should not ordinarily be held liable to injured consumers.

Id. (citations omitted).

²⁶¹ See, e.g., *Vandermark v. Ford Motor Co.*, 391 P.2d 168, 171-72 (Cal. 1964) (holding that both retailer and manufacturer may be strictly liable, with costs allocated among defendants).

successfully explained what marginal improvement in safety is gained when compared to the safety levels that follow from a manufacturer's already existing incentives to avoid liability costs associated with suits against it directly, as practically all modern products liability suits proceed.

Likewise, the argument that no fairness is lost in such a system because an affected nonmanufacturing seller can always seek indemnification from the upstream manufacturer²⁶² fails to recognize important economic practicalities. The reality is that such sellers, who are ultimately liable for perhaps five percent of the damages paid out in products liability verdicts and settlements,²⁶³ must routinely spend sizeable amounts of money to escape from their ordinarily nominal inclusion in suits that normally only involve liability issues between the injured plaintiff and the manufacturer. Thus seen, a substantial aspect of the efficiency argument favoring the nonmanufacturing seller provision of the Reform Act is its reduction in the tertiary accident costs associated with having such sellers defend suits in which they will be required to respond in damages in only a small percentage of cases.

IV. ASSESSMENT OF APPLICATION OF CORRECTIVE JUSTICE AND EFFICIENCY PRINCIPLES TO SELECTED RESTATEMENT AND TORT REFORM PROVISIONS

In this Section, I seek to summarize the qualities and the defects, in terms of both the corrective justice-morality and the efficiency-deterrence models, of the selected *Products Liability Restatement* and Reform Act provisions discussed above.

²⁶² See, e.g., ARK. CODE ANN. § 16-116-107 (Michie 1987) (providing seller cause of action for indemnity from manufacturer); *Hales v. Monroe*, 544 F.2d 331-32 (8th Cir. 1976) (upholding indemnity from manufacturer to seller and distributor in claim alleging negligent failure to discover defect); *Litton Sys., Inc. v. Shaw's Sales & Serv., Ltd.*, 579 P.2d 48, 50 (Ariz. Ct. App. 1978) (finding distributor appropriately indemnified by manufacturer where latter was timely notified but failed to appear in first action), *discussed in* S. REP. NO. 105-32 at 34 n.109 (1997).

²⁶³ See *The Product Liability Fairness Act of 1995: Hearing on S. 565 Before the Subcomm. on Consumer Affairs, Foreign Commerce and Tourism of the Senate Comm. on Commerce, Science, and Transp.*, 10th Cong. 361-62 (1995) (testimony of M. Stuart Madden) (noting studies demonstrating that after taking into account actions for indemnification, sellers ultimately are liable for only five percent of damages).

The new *Restatement's* treatment of warnings fares well under both corrective justice and efficiency principles. The core consideration under both analyses is the model of informed consent, a tenet the *Products Liability Restatement* carries forward with fidelity to the decisional law. With the requirement that a seller provide adequate warnings or instructions where necessary to permit the user a true choice as to whether to use the product or to have others use it, the *Restatement* recognizes the personal freedom and autonomy requisites of the morality basis of corrective justice.²⁶⁴ The cognitive limitations-based "obvious risk" quarrels raised by Howard Latin²⁶⁵ arise only at the periphery of warnings factfinding, and must be assumed to be resolvable and within the ken of jurists and jurors, with the aid of expert evidence as appropriate. Mark Hager²⁶⁶ misperceives the task of a *Restatement* as being to reform a body of law along one philosophical orientation or another.²⁶⁷

From an efficiency perspective, the rule regarding adequate warnings should be applied to manufacturers, but not necessarily to other sellers. Absent substandard conduct on the seller's part in failing to warn concerning a risk known to it but not to the manufacturer, the manufacturer will typically be the creator of the risk, and therefore logically responsible for taking measures that will allow a user or consumer to make an informed choice, obviating all or most extra-contractual inefficiencies. Likewise, a manufacturer will ordinarily be the least cost avoider, in that it, rather than the purchaser or the intermediate seller, is presumed to be an expert in all knowable properties of the product²⁶⁸ and

²⁶⁴ Regarding warnings, the *Products Liability Restatement* and the state law it reflects seem consistent with Sir Isaac Berlin's concept of "positive liberty," that is, that liberty "which harnesses and concentrates freedom to achieve a higher good." Paul Johnson, *A Low Risk Philosopher*, N.Y. TIMES, Nov. 12, 1997, at A31 (providing retrospective of life and work of the late philosopher).

²⁶⁵ *Supra* note 180.

²⁶⁶ *Supra* note 167.

²⁶⁷ The author confesses vulnerability to the same pull in suggesting that the majority rule regarding risks open and obvious to adults but not to children be refashioned to take into account the scenarios described *supra* at notes 196-204 and accompanying text. I claim as support for this proposition, however, a substantial body of decisional law.

²⁶⁸ See *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1089 (5th Cir. 1973) (holding manufacturer of asbestos to knowledge and skill of expert).

will therefore ordinarily be in a better position than the user or consumer to know and, as appropriate, remedy the risks.

Limited liability for nonmanufacturing sellers likewise proves favorable from both corrective justice and efficiency points of view. In terms of corrective justice, the Reform Act leaves a claimant with the full range of remedies available *ex ante*. A suit against a product manufacturer may proceed as before; should that suit be frustrated by reason of manufacturer unavailability or insolvency, recourse may be had against a nonmanufacturing seller as if it were the manufacturer. Potential statute of limitations snares are removed, as appropriate, as time expended in proceeding to judgment against the absent or insolvent manufacturer is forgiven. Express warranty and fault-based remedies against the seller are preserved.

As regards efficiency, the arguments in favor of limiting nonmanufacturing seller liability are also seemingly unassailable. At no cost to the plaintiff, the approach avoids the substantial tertiary accident costs of bringing into the litigation as an initial matter a seller who will not ordinarily be ultimately responsible in damages, either through exculpation or through operation of indemnity or contribution. The Reform Act's nonmanufacturing seller rule seems, for these reasons, Pareto superior.²⁶⁹

Senate Bill 648's several liability treatment of noneconomic damages is more troublesome. With respect to corrective justice, if one subscribes to the view that joint and several liability was employed initially to prevent the injustice of leaving a plaintiff with only a partial remedy, or no remedy at all, against tortfeasors acting in concert,²⁷⁰ its forced retrenchment may not seem facially unjust, as only the rare modern products liability claim involves concerted activity liability. Wright's poisoned coffee paradigm, on the other hand, frames squarely the issue of the seeming injustice of relieving all or part of the burden of compensatory redress from the shoulders of the less culpable tortfeasor whose conduct nevertheless was a sufficient cause of plaintiff's harm.²⁷¹

²⁶⁹ See *supra* notes 119-121 and accompanying text (explaining Pareto principles).

²⁷⁰ See *supra* note 207 and accompanying text (discussing joint and several liability).

²⁷¹ See *supra* notes 230-232 and accompanying text (discussing fairness of joint and several liability).

Moreover, Calabresi notes correctly that how several liability for noneconomic damages fares in terms of corrective justice turns upon reconciling a jury's ordinarily unscrutinized intent with a judgment's unambiguous effect.²⁷² From a Kantian perspective of equal rights—or what is sauce for the goose should be sauce for the gander—the proposed approach evidences Posner's "political morality"²⁷³ observation with great emphasis on the "political" and scant recognition of the "morality." In addition, just as the contemporary multipoint analysis for evaluating "defect"²⁷⁴ has been seen as an elaboration upon Hand's algebraic evaluation of breach, so too comparative fault operates, in a significant way, simply as a more polycentric methodology for measuring and contrasting the parties' contribution to the harm, more supplely and more fairly than the crude operation of the contributory fault bar. Seen in this light, the advent of comparative fault gives no rise to any imperative for a course correction regarding joint and several liability.

An efficiency perspective of limiting joint and several liability to economic damages may, as Calabresi suggests, shed little light, unless we proceed to a different level of generality and put the question as one of whether unfettered joint and several liability can be considered wasteful. The least cost avoider approach, with the premium placed on imposing liability upon the actor who can remedy a risk least expensively²⁷⁵ permits the conclusion that it is wasteful to require all tortfeasors, even those minimally at fault, to comport themselves as though they may bear responsibility for the totality of a harm. As Judge Higgenbotham suggested in *Testbank*,²⁷⁶ once a tort rule's burden of potential liability bears no intelligible relation to actions through which a party can reduce risk, the deterrence attribute of the tort rule evaporates.²⁷⁷

²⁷² See *supra* notes 243-245 (noting that fairness of jury's decision depends on what they intended and is therefore hard to discern from verdict alone).

²⁷³ *Supra* text accompanying note 62.

²⁷⁴ See *Roach v. Kononen*, 525 P.2d 125, 128-29 (Or. 1974) (listing seven factors used to determine whether defect existed; factors aid "court in balancing the utility of the risk against the magnitude of the risk").

²⁷⁵ See *supra* note 117 and accompanying text (discussing attributes of least cost avoider approach).

²⁷⁶ *Louisiana ex rel. Guste v. M/V Testbank*, 752 F.2d 1019 (5th Cir. 1985).

²⁷⁷ *Id.* at 1029; see *supra* notes 138-141 and accompanying text (discussing *Testbank*).

Both corrective justice and efficiency tenets would be better served by a solution such as that adopted in many states providing for alleviation of joint and several liability when defendant's contribution to the harm is less than a defined amount.²⁷⁸ The least cost avoider approach and discouragement of *post hoc* coerced transfer objectives would remain intact under such a modified approach. At the same time, the plaintiff's paramount right to compensation for proved tortious harm would not be stemmed arbitrarily at the line separating economic versus noneconomic harm, but rather at a more logical threshold based upon the defendant's actual contribution to the harm. The deterrence objectives of both corrective justice and efficiency would, in fact, be best served by such a modified approach, as actors anticipating conduct (or omissions to act) routinely gauge planned action not upon considerations of potential liability for economic harm as opposed to noneconomic harm, but rather upon evaluation of the level at which their behavior is likely to be deemed a legal cause of plaintiff's overall harm.²⁷⁹

In addition, a rule imposing several liability only for noneconomic harm would seem to have no "justice" rationale whatsoever in states where there remains the contributory negligence bar. This rule imperils the plaintiff's recovery for proved harm by stripping the claimant of a remedy upon evidence of plaintiff's incautious conduct, even where that conduct bears only a small relation to the overall causal sequence. Lastly, total abolition of joint liability for noneconomic harm is a more drastic remedy than is necessary to lessen the likelihood of a bizarre result such as that reached in *Disney*.²⁸⁰ A confinement of joint liability to situations where a defendant's contribution to the harm exceeds, for example, fifty percent, would preclude the facially unjust imposition of a liability judgment bearing no relation whatever to a defendant's participation in the wrongdoing. In the end, *Disney* should stand for no

²⁷⁸ *E.g.*, ARK. CODE ANN. § 16-64-122(b) (Michie 1987).

²⁷⁹ The author must admit to taking a different position in testimony before the House of Representatives and the Senate in the course of hearings on predecessor reform bills during the 104th and 105th Congresses. Based on my additional study of competing policy objectives, however, I concluded that it was necessary to change my position.

²⁸⁰ *Walt Disney World Co. v. Wood*, 515 So. 2d 198 (Fla. 1987). Recall that *Disney* is the case in which Disney was held liable for 86% of plaintiff's damages, though it was found only 1% responsible for the harm. *Supra* notes 234-236 and accompanying text.

proposition more broad than that odd cases make for bad legislation.

V. CONCLUSIONS REGARDING HARMONIZATION OF APPROACHES IN EVALUATION OF RESTATEMENT AND TORT REFORM PROVISIONS

Corrective justice principles emphasize rectification, while economic efficiency emphasizes wealth maximization. The approaches are in accord that "[t]he ultimate goal [of accident law] is to deter reckless or careless behavior[, as] [a]ny approach that deviates from this goal threatens to defend or to generate a useless set of rules."²⁸¹ This Article demonstrates that while corrective justice may achieve deterrence only secondarily to its goal of victim compensation, and while efficiency principles may recognize victim compensation only as a corollary to an economic ideal, each is a necessary aspect of optimal tort policy.

From either an economic or a corrective justice perspective, tort law "sets limits within which individuals may permissibly act."²⁸² Corrective justice, appropriately applied so as to hold liable in money damages parties whose acts or failures to act were a legal cause of a plaintiff's proved harm, satisfies societal objectives of fairness and morality without which the law's coercive authority would be repudiated. Moreover, despite frequent claims to the contrary, corrective justice principles have been recognized repeatedly by commentators and by courts as an engine of deterrence, and encouragement of the actor's "fair chance to avoid" of which Holmes spoke.²⁸³

Efficiency principles, whether they embody "wealth maximization" principles or any alternative construct, undoubtedly signal the social opprobrium assigned to preventable accident costs.²⁸⁴ Counsel advising clients in any business sector of significance already discuss economic principles of liability and the advisability of behavior consistent with such liability risks. Calabresi's accident cost rubric and cheapest cost avoider analysis is ordinarily

²⁸¹ Keith N. Hylton & Steven E. Laymon, *The Internalization Paradox and Workers' Compensation*, 21 HOFSTRA L. REV. 109, 124 (1992).

²⁸² Jules L. Coleman, *Legal Theory and Practice*, 83 GEO. L.J. 2579, 2587 (1995).

²⁸³ HOLMES, *supra* note 36, at 115.

²⁸⁴ *Supra* note 112.

operative without the need for empirical factfinding, and can be applied readily by jurists not possessed of formal economics training.²⁸⁵ Identification of liability rules, pursuant to these standards and generally understood, can operate to make third-party insurance acquisition more rational, and, where appropriate, the need for first-party insurance more apparent and less wasteful.

The potential disjunction between rational business behavior and ethics has long been recognized,²⁸⁶ and it is therefore not surprising that the objectives and effects of American Law Institute initiatives have been questioned,²⁸⁷ as have the objectives and

²⁸⁵ See *supra* notes 138-141 and accompanying text (discussing *Testbank*).

²⁸⁶ For example, cost-benefit analysis has been castigated as amoral in products claims for chattel ranging from the Ford Pinto to the Dalkon Shield. See generally RONALD J. BACIGAL, *THE LIMITS OF LITIGATION: THE DALKON SHIELD CONTROVERSY* (1990). Bacigal records that in the Dalkon Shield litigation, Judge Lord provided counsel for the manufacturer with a copy of a speech he made containing the observation that "the only reason offered for corporate behavior was a bottom-line oriented cost-benefit analysis." "For example," Judge Lord continued, "if the cost to society from Dalkon Shield injuries totaled \$50 million, and the cost of making the Shield safer was \$100 million, then improving the Dalkon Shield was not cost effective." *Id.* at 29 (citing *Hawkinson v. A.H. Robins Co.*, 595 F. Supp. 1290, 1309 (D. Colo. 1984)).

²⁸⁷ Cf. Steven L. Schwarcz, *A Fundamental Inquiry into the Statutory Rule Making Process of Private Legislatures*, 29 GA. L. REV. 909 (1995). Schwarcz's evaluation of the *Uniform Commercial Code* revision processes could, with the substitution of "American Law Institute Restatement projects" for "the Code," be applied for equal insight into the *Products Liability Restatement* and other Institute pursuits:

Dozens, sometimes hundreds, of lawyers and academics periodically meet, usually for days at a time, to debate the myriad of rulemaking proposals that are advanced. This effort goes on for years. It takes anywhere from three to five years for a statutory change to have been studied, drafted, and first proposed for legislative enactment. This requires an enormous devotion of human and professional capital. . . .

Another flaw in the rulemaking process is that it creates an unintended momentum for change. Although at no point within the process is change technically a foregone conclusion, the investment of time represented by the creation of a study committee, its solicitation of comments and suggestions, and its preparation of a report, create an incentive to revise the UCC, even where, objectively, change may be unnecessary.

Id. at 917-19 (citations omitted). Schwarcz adds, importantly, the arguments of Robert E. Scott, *The Policies of Article 9*, 80 VA. L. REV. 1783, 1816-21 (1994), that UCC rulemaking processes are "susceptible to pressure from cohesive interest groups." *Id.* at 919 & n.26.

Calabresi and Cooper predict, I think incorrectly, that the *Products Liability Restatement* will fail to gain widespread adherence in the judiciary: "[T]he Restatement's influence depends upon whether courts pay attention to it, which in turn depends on whether the Restatement actually reflects what is happening in the courts. And it is doubtful that this particular Restatement has much support in the courts." Calabresi & Cooper, *supra* note 14,

potential effects of federal tort reform legislation.²⁸⁸ Yet, conceding such imperfections, it follows that in neither the corrective justice-morality analysis nor the efficiency-deterrence analysis do we reasonably expect perfect justice or perfect efficiency. Rather, the objective is to identify optimal achievable objectives in both.²⁸⁹

The so-called dichotomy between the corrective justice-efficiency analyses is by no means clear.²⁹⁰ In substantial measure, efficiency principles promote autonomy, and corrective justice principles promote deterrence. The autonomy interests conventionally associated with the corrective justice-morality synthesis are furthered by the liability and deterrence components of the Hand formulation, as stated originally or as reconceptualized as a modern economic principle, and will ordinarily be vindicated in a finding of liability against an actor found to be the cheapest cost avoider.²⁹¹ Likewise, an efficiency-based interpretation of a finding of negligence can be harmonized with societal disapproval of wasteful conduct.²⁹² Gary Schwartz has noted that tort's goal of deterrence, "seen as a way of achieving the somewhat austere goal of economic efficiency, . . . also has deep roots in a humane and compassionate view of the law's functions."²⁹³ Calabresi, in turn, concedes that "compensation remains a fundamental aim of

at 866-67 (citations omitted).

²⁸⁸ See generally Shuchman, *supra* note 125 (discussing various criticisms of present system of tort reform).

²⁸⁹ Cf. PRODUCTS LIABILITY RESTATEMENT, *supra* note 1, § 2 cmt. a ("The emphasis is on creating incentives for manufacturers to achieve optimal levels of safety in designing and marketing products.").

²⁹⁰ See Schwartz, *supra* note 28, at 1820.

²⁹¹ John B. Attanasio, *The Principle of Aggregate Autonomy and the Calabresian Approach to Products Liability*, 74 VA. L. REV. 677, 707-08 (1988). Attanasio explains:

In a real way, [the Calabresian] theory appeals to autonomy. In Calabresi's world, the law is simply attempting to strike a propitious balance between liberty and order to preserve autonomy for as many individuals in society as possible. Both the best decider and internalization theories afford primary importance to the physical integrity of the individual. . . . Calabresian theory overtly appeals to autonomy.

²⁹² See *supra* note 112 (discussing Posner's efficiency theory of liability law).

²⁹³ Schwartz, *supra* note 28, at 1802; cf. G.W.F. HEGEL, REASON IN HISTORY 92 (Robert S. Hartman trans., 1953) ("[T]he highest point of a people's development is the rational consciousness of its life and conditions, the scientific understanding of its laws, its system of justice, its morality.").

accident law."²⁹⁴ Ideally, this Article has contributed to rebutting the argument of some that economic or utilitarian concerns have so submerged modern tort, and perforce, products liability analysis so as to render discussion of corrective justice or morality almost quaint.²⁹⁵

It may be stated broadly that for such accident litigation that is not preempted by statute, resolved by a regulatory compliance defense, or mediated by private or public insurance, there is a seeming societal and judicial acceptance that the highest and best objectives of tort law are a reduction in accident costs and the achievement of justice between and among the parties. As stated in the introduction to this Article, concepts of legal pragmatism provide a meaningful opportunity to reconcile corrective justice and efficiency principles. In early observations on the centrality of a pragmatic assessment of law, Holmes stated: "*The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.*"²⁹⁶

²⁹⁴ CALABRESI, COSTS OF ACCIDENTS, *supra* note 22, at 44.

²⁹⁵ E.g., George L. Priest, *Products Liability Law and the Accident Rate*, in *LIABILITY: PERSPECTIVES AND POLICY* 184 (Robert E. Litan & Clifford Winston eds., 1988). Priest asserts:

Virtually all courts and commentators have embraced the goals of accident reduction and insurance that correspond to the principal economic effects of the law. There are only two important economic effects of any legal rule: a rule can provide incentives to reduce the accident rate and, for accidents that cannot be prevented, a legal rule can provide a form of victim compensation insurance tied to product sales. Although there are occasional references to fairness and equity, courts in products cases have largely focused on these two economic goals alone in their elaboration of the law.

Id. at 185 (citations omitted).

²⁹⁶ Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 457 (1897), *reprinted in* *PRAGMATISM: A READER* 145, 145 (Louis Menand ed., 1997) (emphasis added). In Holmes's words:

The reason why [law] is a profession, why people will pay lawyers to argue for them or to advise them, is that in societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared.

Id. Posner comments approvingly upon Holmes's development of pragmatic analysis. Richard A. Posner, *A Pragmatist Manifesto*, in *THE PROBLEMS OF JURISPRUDENCE* 454, 463-64 (1990), *reprinted in* *PRAGMATISM: A READER*, *supra*, at 418, 429-30. As Posner states,

In the context of describing the tenets of "pragmatism," William James defined "truth" in these terms: "[I]deas (which are themselves but parts of our experience) become true just in so far as they help us to get into a satisfactory relation with other parts of our experience."²⁹⁷ To be regarded as "true," an idea or a philosophy need only be true "in so far forth," i.e., for so far as the idea goes.²⁹⁸ It follows that both corrective justice and efficiency principles must be regarded as "true" in that they hold significant, albeit nonexclusive, predictive value in anticipating the development of tort jurisprudence. Legal pragmatism permits us to recognize the importance of corrective justice principles even while conceding that the approach has marginal limitations in its deterrent effect. Similarly, efficiency principles are true and valuable from the standpoint of legal pragmatism as they provide an underlying rationale for numerous modern accident cases, even though issues of individual justice or community consensus as to the morality of conduct may not be at the leading edge of the economist's interests.

Individual tort rules, be they the three discussed in this Article or others, must satisfy broader civil justice goals than simple efficiency or corrective justice. Such a broader tort goal may be the conjunction of law and economics principles with those of corrective justice and morality. In the end, a tort rule that annuls a defendant's unjust enrichment and compensates a wrongfully injured plaintiff but only at an extravagant societal cost, will be rejected as irrational, as will a tort rule, however efficient and broadly utilitarian, that fails to dispense justice to the injured party.²⁹⁹ Thus seen, efficiency and corrective justice principles

"Holmes's prophecy of 1897 is in process of being fulfilled at long last." *Id.* at 466 n.5.

²⁹⁷ WILLIAM JAMES, *PRAGMATISM* (1907), reprinted in *PRAGMATISM: A READER*, *supra* note 296, at 93, 100 (emphasis omitted).

²⁹⁸ *Id.* "Any idea upon which we can ride, so to speak; any idea that will carry us prosperously from any one part of our experience to any other part, linking things satisfactorily . . . is true for just so much, true in so far forth, true *instrumentally*." *Id.*

²⁹⁹ Epstein's idea-experiment that for simple plaintiff-defendant tort claims in which both parties are partially at fault, a 50-50 proportionate responsibility could be applied across the board, and without regard to individual adjudication of comparative fault, might fall into the category of a broadly utilitarian but too frequently individually unjust rule. See EPSTEIN, *supra* note 50, at 98-99 (discussing utility of equal apportionment).

operate and will continue to operate in a beneficial symbiosis,³⁰⁰ each a check and a balance upon the other, with each as a necessary, but neither a sufficient,³⁰¹ rationale for modern accident law objectives.

³⁰⁰ Werner Z. Hirsch also argues that these two theories frequently dovetail: [Seemingly] fundamental differences in premises and approach [between orthodox tort analysis and efficiency principles] turn out to be reconcilable and can often be brought into harmony. For example, it can be argued that the 'rational' man in seeking his self-interest takes into consideration the effect of his decision on others to the extent that their reaction makes an impression. In this manner, we can explain how a person can be rational and at the same time altruistic. In the more technical language of the economist, we would say that the effect of one person's decision on others can enter as an argument into the first person's utility function.

HIRSCH, *supra* note 101, at xviii.

³⁰¹ Cf. Bobby Jindal, *Relativism, Neutrality, and Transcendentalism: Beyond Autonomy*, 57 LA. L. REV. 1253, 1270 (1997).

APPENDIX

Senate Report 105-32 sets out this description of the twelve-year effort to pass broad-spectrum tort and products liability reform legislation:

LEGISLATIVE HISTORY

"S. 648 was introduced on April 24, 1997 by Senators Gorton, Ashcroft, McCain, Lott and Abraham. Although S. 648 is similar to S. 5, which bears the same title, there are important differences. S. 5 was introduced on January 21, 1997, by Senators Ashcroft, McCain and Lott. The text of . . . S. 5 is identical to that of the Conference Report of the product liability bill from the 104th Congress. That Conference Report was vetoed by President Clinton.

"On March 4, 1997 Senator McCain chaired a Committee hearing on product liability reform. On March 6, 1997, Senator Ashcroft chaired a hearing of the Subcommittee on Consumer Affairs, Foreign Commerce and Tourism to explore the success of the General Aviation Revitalization Act of 1994. That bill provided a statute of repose for general aviation aircraft.

"The Committee on Commerce, Science and Transportation favorably reported S. 648 by a roll call vote of 11 to 9.

"The Committee has a long history of involvement with product liability reform. In the Committee's early treatment of the subject, it reported three bills, each of which was introduced by Senator Kasten. S. 2631 was reported by the Committee in the 97th Congress (S. Rep. 97-670), and S. 44 was reported by the Committee in the 98th Congress (S. Rep. 98-476). Congress adjourned without Senate action on either of these measures.

"At the beginning of the 99th Congress, on January 3, 1985, Senator Kasten introduced S. 100, the Product Liability Act. This bill preempted state law to impose uniform federal rules and standards of liability governing the recovery of damages for injuries caused by defective products. The legislation was substantially the same as S. 44, which had been reported by the Committee during the 98th Congress.

"A Consumer Subcommittee hearing on S. 100 was held on March 21, 1985 (Serial No. 99-84) and the bill was reviewed by the Committee at an executive session on May 16, 1985. At that session, the motion to report the bill was defeated by an 8-8 vote.

"Prior to the May 16, 1985 executive session, two amendments in the nature of a substitute to S. 100 had been introduced. One of these amendments (S. Amdt. No. 16) was introduced by Senator Dodd on March 19, 1985, and the other (S. Amdt. No. 100) was introduced by Senator Gorton on May 14, 1985. These amendments were complete substitutes for S. 100 that preempted certain aspects of state law and also established alternative expedited claim systems for limited recovery of damages in product liability cases. Hearings on the Dodd and Gorton amendments were held by the Consumer Subcommittee on June 18 and June 25, 1985 (Serial No. 99-177).

"After these hearings, the Committee staff was instructed by the Chairman of the Commerce Committee, Senator Danforth, to draft a proposal that combined elements of all these measures. After review of extensive comments received from the public in connection with the Committee's first draft, a second draft was released on November 20, 1985. This draft was formally introduced by Senator Danforth on December 20, 1985, as S. 1999. This bill was the subject of two days of hearings before the Consumer Subcommittee on February 27 and March 11, 1986.

"On April 30, 1986, Senator Kasten introduced an amendment in the nature of a substitute for S. 100 (S. Amdt. No. 1814). This amendment embodied recommendations for product liability reform that had been made by the administration's Tort Policy Working Group.

"On May 12, 1986, Senator Danforth introduced an amendment in the nature of a substitute for S. 1999 (S. Amdt. No. 1951). This amendment replaced the expedited claim system of S. 1999 with an expedited settlement system and made a number of other changes in S. 1999. On May 20, 1986, Senator Gorton introduced an amendment in the nature of a substitute to the Danforth amendment (S. Amdt. No. 1968). On May 19 and 20, 1986, the Consumer Subcommittee held hearings on the Kasten amendment, the Danforth amendment, and the other product liability measures before the Committee.

“On June 3, 1986, the Committee began its markup of product liability legislation. The markup draft bill was an original bill that embodied the provisions of the Danforth amendment to S. 1999. On June 12, the Committee adopted an amendment in the nature of a substitute for the original markup draft bill. On June 12, 19, 24, 25 and 26, 1986, the Committee continued its consideration of the amendment and added a number of other amendments before reporting S. 2760 as an original bill. S. 2760 came before the full Senate on September 17, 1986. On September 25, the Senate agreed to the motion to proceed to S. 2760 by a vote of 84 to 13. The bill was returned to the Senate Calendar, and no further action was taken.

“The primary activity on federal product liability legislation in the 100th Congress occurred in the House of Representatives. On February 18, 1987, Congressmen Bill Richardson and Thomas A. Luken introduced H.R. 1115, which was referred to the House Energy and Commerce Committee. The Subcommittee on Commerce, Consumer Protection and Competitiveness held extensive hearings on the need for federal product liability reform and on specific issues in the bill on May 5, May 20, June 18, July 21, August 6, October 7, and December 17, 1987. The Subcommittee met to mark up the bill on November 18, 19, and 20, and December 3 and 8, 1987. H.R. 1115 was reported by the Subcommittee, as amended, on December 8, 1987, by a vote of 11 to 3. On May 10, 12, 18, 19, and 24, June 1, 2, 8, 9, and 14, 1988, the Energy and Commerce Committee met to mark up H.R. 1115, voting on June 14 to report H.R. 1115, as amended, favorably by a recorded vote of 30 to 12. H.R. 1115 then received a sequential referral to the House Committees on the Judiciary and on Education and Labor. The Education and Labor Committee held a hearing on September 27, 1988, on provisions in H.R. 1115 that affected workplace safety. The House Judiciary Committee took no action on the bill in the 100th Congress. The sequential referral ran through the end of the session, so the 100th Congress adjourned without considering H.R. 1115 on the floor of the House.

“During the 101st Congress, the Committee held three hearings on S. 1400, the Product Liability Reform Act, introduced by Senator Kasten (S. Hrg. 101-243). On May 22, 1990, the Commerce Committee reported an amendment in the nature of a substitute to

S. 1400 by a roll call vote of 13 to 7 (S. Rep. 101-356). The full Senate took no action before the adjournment of the 101st Congress.

"In the 102nd Congress, Senator Kasten introduced S. 640 on March 13, 1991. There were 36 cosponsors of the bill, including seven members of the Committee. On September 12, 1991, the Consumer Subcommittee held a hearing on S. 640 and the full Commerce Committee held a second day of hearings on S. 640 and S. 645, The General Aviation Accident Standards Act of 1991, on September 19, 1991. On October 3rd, the Committee favorably reported S. 640 by a roll call vote of 13 to 7.

"On May 7, 1992, the provisions of S. 640 were incorporated into an amendment offered by Senator Kasten to S. 250, the National Voter Registration Act. On May 14, the amendment was tabled by a vote of 53 to 45. On June 26, the bill was sequentially referred to the Committee on the Judiciary until August 12. The Judiciary Committee held a hearing on August 5th but took no further action. Under the terms of a unanimous consent agreement, on September 8, the Senate began consideration of a motion to proceed to consider S. 640. On September 10, the Senate failed to invoke cloture on the motion to proceed by a vote of 57 to 39. A motion to reconsider that vote was agreed to by a vote of 57 to 39, and a subsequent cloture vote failed 58 to 38. No further action was taken.

"In the 103rd Congress, Senators Rockefeller and Gorton introduced S. 687, The Product Liability Fairness Act, on March 31, 1993. The Consumer Subcommittee held a hearing on S. 687 on September 23, 1993 (S. Hrg.103-490). On November 9, 1993 the Committee ordered S. 687 favorably reported by a roll call vote of 16 to 4. The bill was taken to the floor and on June 28, 1994 a motion to invoke cloture failed 54 to 44. On June 29, 1994 a second motion to invoke cloture failed 57 to 41.

"In the 104th Congress, Senators Jay Rockefeller and Slade Gorton introduced, on March 15, 1995, S. 565, the Product Liability Fairness Act. On March 10, 1995, the House of Representatives had passed legislation, H.R. 956, the Common Sense Product Liability and Legal Reform Act of 1995, by a vote of 265 to 161. On April 3 and 4, 1995, the Subcommittee on Consumer Affairs, Foreign Commerce and Tourism held hearings on S. 565 (S. Hrg. 104-435). At the Committee executive session on April 6, 1995, the

Chairman of the Commerce Committee, Senator Pressler, offered an amendment in the nature of a substitute that maintained the original content of S. 565 but, among other things, incorporated as Title II, S. 303, The Biomaterials Access Assurance Act. S. 303 was introduced by Senators Lieberman and McCain on January 31, 1995, and was referred to the Commerce Committee. On April 6, 1995, the Senate Committee on Commerce, Science, and Transportation favorably reported S. 565 as amended by the Chairman's mark by a roll call vote of 13 to 6 (S. Report 104-69). The bill was taken up by the Senate on April 24, 1995 and was approved by a vote of 61 to 37 on May 10, 1995.

"A Conference Report, H.R. 956 the Common Sense Product Liability and Legal Reform Act of 1996 was issued on March 14, 1996. The Conference Report was very similar to the bill originally passed by the Senate. The Senate approved the Conference Report by a vote of 59 to 40 on March 21, 1996. The House of Representatives passed the Conference Report on March 29 by a vote of 259 to 158. The President vetoed the bill on May 2, 1996." S. REP. NO. 105-32, at 15-19 (1997) (citations omitted).