Pace Law Review

Volume 11
Issue 1 *Fall 1990*

Article 2

September 1990

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DOI: https://doi.org/10.58948/2331-3528.1445

Products Liability: Principles of Justice for the 21st Century

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I. Introduction

Products liability law in recent decades has experienced an unparalleled explosion of doctrine and litigation.[1] Why this is so can be explained in part by the rapid development during this period of both science and technology, on the one hand, and manufacturing and marketing on the other, which together have provided an ever-escalating array of sometimes dangerous products to an ever-widening market of consumers. Another explanation lies in a general shift of attitudes concerning risk, from individual to collective responsibility. Changes in attitudes concerning corporate responsibility no doubt also have helped to fuel the rapid expansion of products liability law and litigation.[2] But whatever factors lie behind the great leap forward, products liability cases promise to demand an increasingly prominent place within the judicial system in the years ahead.

Developments in legal doctrine in this area of the law have tended to move sharply, sometimes one way, sometimes another, without firm foundations in social or moral theory. Most efforts to search for principle have been quite unhelpful, and the courts

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1. *See generally* W. KEETON, D. OWEN, J. MONTGOMERY, & M. GREEN, PRODUCTS LIABILITY AND SAFETY — CASES AND MATERIALS ch. 1 (1989).

2. *See generally* Hans, *The Jury's Response to Business and Corporate Wrongdoing*, 52 LAW & CONTEMP. PROBS. 177, 195-98 (1989); Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985); Owen, *The Intellectual Development of Modern Products Liability Law: A Comment on Priest's View of the Cathedral's Foundations*, 14 J. LEGAL STUD. 529 (1985).

and legislatures often have seemed to base their rules on little more than intuition, mirage, and rhetoric. It would be much better if, instead, the rules that will govern products liability into the twenty-first century were constructed on considered principles of justice set firmly upon a sound moral philosophy.[3]

The attempt here is to sketch out some preliminary thoughts on the moral foundations of products liability law. First to be examined are the affected things and parties — the products, manufacturers, victims, and other persons affected by various products of varying risks. The conventional justifications of products liability law — compensation, deterrence, and risk-spreading — are next critiqued. The focus then shifts to the central inquiry — an examination of several fundamental moral and social ideals and concepts, with strong foundations in moral philosophy, that inform the search for principle in devising an acceptable regime of products liability law. Finally, a tentative set of products liability principles — based upon the moral foundations examined previously — is offered for examination and debate.

II. The Products and the Parties

A. *The Products*

Products dominate our lives. Most people do not often reflect upon the extent to which daily life is built upon, controlled by, and lived through products of various types. This dependency on products begins from the moment a stereotypical "consumer" awakens in his pajamas to an alarm clock in his house, the air temperature of which is adjusted by a thermostatically controlled heater or air conditioner, and continues as he rolls off his spring mattress and foam pillows (covered by sheets, blankets and pillowcases), to stand upon the polyester carpet covering a synthetic pad and wooden floor. The consumer may then don his glasses, bathrobe, and slippers, and proceed to his bath-

3. My inquiry into this topic began in Owen, *Rethinking the Policies of Strict Products Liability*, 33 VAND. L. REV. 681 (1980) [hereinafter *Rethinking the Policies*], and continues in Owen, *Freedom and Community in Products Liability Law: Searching for First Principles* (forthcoming). An especially valuable recent exploration is Attanasio, *The Principle of Aggregate Autonomy and the Calabresian Approach to Products Liability*, 74 VA. L. REV. 677 (1988).

room where he may put to use such products as an area rug, a light bulb, a light fixture, a toothbrush, toothpaste, water, a sink, mouthwash, a washcloth, a towel, a toilet, toilet paper, a water heater, soap, shampoo, powder, a razor, pre-shave lotion, shaving cream, after-shave lotion, a styptic pencil, a Band-Aid, facial tissue, a cotton swab, a comb, a brush, and a radio — to say nothing of the building material products he also "consumed": tile, grout, cabinets, a mirror, a fan, paint, wallpaper, sheetrock, two-by-fours, plywood, insulation, wire, pipes, faucets, and electricity. And this is all within the first twenty-five minutes of popping into a state of conscious awareness of himself and the world (of products) around him, and before he even shuffles back to the bedroom to begin to don his various habiliments and ornaments, or out into the kitchen to prepare (with a stove, and toaster, and knife, and butter) his morning fuel. Thus, before a person in modern society even thinks about entering the workaday world, to do battle on the freeways, factories, and offices of life, he has already "consumed" hundreds of different products — all serving various needs, and all presenting various risks.

Throughout each day, we all interact in countless ways with myriad products. Men and women create tangible things — machines, chemicals, biologics, fabrics, foods, books, stereos — to do their work, to protect them, to educate them, to provide recreation, and to nourish them, in body and in spirit. Products give to humans an opportunity to assert their individuality, to exercise their separate wills according to their separate goals, to help them do and become what they choose to do and be — to help them protect, define, and nourish their unique personalities in a world of billions of other persons.[4] Interre-

4. "The point, in justice, of private property is [that it] enhances [the owner's] reasonable autonomy . . . ." J. FINNIS, NATURAL LAW AND NATURAL RIGHTS 173 (1980). "The point of property is . . . to provide an external sphere for the operation of the free will." Weinrib, *Right and Advantage in Private Law*, 10 CARDOZO L. REV. 1283, 1291 (1989). The idea is Hegel's. G. HEGEL, PHILOSOPHY OF RIGHT paras. 41, 44, 44A (T. KNOX trans. 1949) (1821). A moral system of law respecting freedom, therefore, must provide for the creation and protection of property rights in products. In its promotion of autonomy, the state should encourage the production of products, and the protection of property rights therein, in order to increase the range of options available to consumers. "Autonomy requires that many morally acceptable options be available to a person." J. RAZ, THE MORALITY OF FREEDOM 378 (1986).

lating with (using) products (man-made and natural) and other persons, together with thinking, is how we live our lives. Thus, the invention, construction, and use of products are, generally speaking, good activities, and products themselves are good things.

But as the human mind and body are not perfect, products may cause suffering as well as happiness. Dynamite can move boulders in order to build towers; yet it may be used, by accident or by evil design, to destroy dwellings. Area rugs keep feet warm, feel good to the toes, and may bring pleasure to the eyes; but they may also slip and "cause" a broken bone. And so society has devised some rules for deciding what (if anything) to do, when a product turns from good to harm, to deal with the consequences of the harm. Sometimes such harmful consequences fall initially upon the person who is morally responsible for the harm, and at other times the initial harm falls upon some other person. The central purpose of the law of products liability ought to be to assure that the economic consequences of product misadventures fall upon those persons who deserve in moral theory to bear the loss.[5]

B. *The Parties*

The question of who should "justly" be required to bear the economic consequences, or "harm," of a product accident thus should be the ultimate issue in products liability law. The paradigm parties are the one who made the product — the manufacturer — and the one who initially suffers harm — the accident victim, who often is also the product purchaser and user. The justice of holding the manufacturer responsible may be quite clear, as when it conceals a dangerous condition in order to sell more products.[6] Sometimes the justice of leaving the harm upon the victim is self-evident, as when he is cut by flying glass

5. Even the economic theorists understand the need to root the economic analysis of law in moral theory. *See, e.g.*, Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487 (1980); *cf.* G. CALABRESI, THE COSTS OF ACCIDENTS 24 n.1 (1970) ("[F]airness becomes a final test which any system of accident law must pass.").

6. *E.g.*, Tetuan v. A.H. Robins Co., 241 Kan. 441, 738 P.2d 1210 (1987) (manufacturer of Dalkon Shield IUD concealed risks of pelvic inflammatory disease and septic abortions from doctors and consumers).

from a bottle he throws against a pole.[7] But there are many more difficult cases between these extremes, cases in which both the maker and the user proceed in all good faith, and sometimes both with all due care. It is cases such as these, involving good faith and, at worst, understandable mistakes, that the rules of products liability must fairly help to resolve, and it is to principles of moral philosophy that the rules should look for proper definition.

Often, perhaps usually, the quest for "the" appropriate party to bear the loss is complicated by the presence of parties, other than the maker and the user, who have played a morally significant role in the misadventure. Rather than the user, the victim may be another person, often called a bystander, sometimes "innocent"[8] and sometimes not.[9] Especially in the case of a serious accident, losses typically also fall upon the victim's family,[10] friends,[11] employer,[12] insurers,[13] other insureds,[14] observers,[15] and future potential users,[16] defendants,[17] and other

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7. Venezia v. Miller Brewing Co., 626 F.2d 188 (1st Cir. 1980) (particles of glass from discarded beer bottle that plaintiff threw against a telephone pole injured his eye).

8. *See, e.g.*, Osborne v. International Harvester Co., 69 Or. App. 629, 639, 688 P.2d 390, 397 (1984) (plaintiff's car struck by defective truck); Garst v. General Motors Corp., 207 Kan. 2, 484 P.2d 47 (1971) (worker run over by 40-ton earthmover at construction site).

9. *See, e.g.*, Moran v. Faberge, Inc., 273 Md. 538, 332 A.2d 11 (1975) (teenager burned when friend poured bottle of cologne on candle to "make it scented"; *id.* at 541, 332 A.2d at 13).

10. *E.g.*, Timms v. Verson Allsteel Press Co., 520 F. Supp. 1147 (N.D. Ga. 1981) (husband's fingers crushed in press); Siciliano v. Capitol City Shows, 124 N.H. 719, 475 A.2d 19 (1984) (parents' children injured and killed in amusement ride).

11. *E.g.*, Kately v. Wilkinson, 148 Cal. App. 3d 576, 195 Cal. Rptr. 902 (1983) (teenage girl suffered emotional distress from observing friend's body cut open by propeller of defective boat).

12. The law generally does not provide protection for the employer's losses, which are considered "merely" economic. *See generally* S. MADDEN, PRODUCTS LIABILITY ch. 22 (1988).

13. Although the victim's insurers may be subrogated to his legal claims, an insurer only rarely recoups its entire payout.

14. Insurers, in the long run, generally must pass on at least part of the cost of claims to insureds through higher premiums. *See* Epstein, *Products Liability as an Insurance Market*, 14 J. LEG. STUD. 645, 651 (1985).

15. Witnesses, for example, to tragic airplane accidents.

16. To the extent that manufacturers pass on to consumers past or anticipated costs through increased prices.

17. To the extent that the accident costs of one member of an industry affect the future cost of liability insurance throughout the industry.

members of society.[18] Behind the manufacturer lie many persons affected by the rules of products liability law, from employees and shareholders to creditors, insurers, and other insureds. Moreover, there typically are many parties other than a single "maker" responsible for getting the product to the ultimate user, from inventors, chemists, engineers, miners, raw material processors, and component part makers, to advertisers, the media, distributors, retailers, employers, doctors, disposal contractors, and sometimes predecessors to these enterprises. Although the moral responsibility of such parties as these is often attenuated, in certain circumstances it gains strength — as when the maker of a defective product is out of business, or beyond the court's long arm, and when the victim neither used the product nor caused the harm. The issues of fairness and efficiency in such situations are subtle and complex and call for rules of liability sensitive to the fundamental principles of social justice.

III. Failures in the Conventional Justificatory Regime

The conventional goals of tort law generally, and products liability law in particular, are "compensation," "risk-spreading," and "deterrence."[19] Although all three might be thought to be supported by moral footings, none of them can withstand serious moral scrutiny.[20] Nor do these traditional "policies" of products liability law help the effort to design meaningful principles or rules of products liability law. All three goals are explanatory only, for they merely describe the result of a judgment for the plaintiff. They are all, thus, fatally "one-directional," in that they suggest a judgment for the plaintiff in every case.[21] As such, these supposed goals or policies cause more harm than good, for

18. To the extent that the accident requires the use of public services, or disrupts productivity, or if it results in a lawsuit requiring the use of the judicial system.

19. These probably are the principal orthodox goals of modern products liability law. There are, of course, other, secondary goals. *See Rethinking the Policies*, *supra* note 3. *See generally* G. CALABRESI, *supra* note 5, at 24-33.

20. *See generally Rethinking the Policies*, *supra* note 3 (critiquing several conventional goals of products liability law).

21. *See id.* at 704, 709-10. The conventional policies are one-directional with respect to liability rules. As Stuart Madden pointed out to me, even these policies become "two-directional" once excuses, based upon the victim's conduct, are factored into the analysis.

their prominence tends to short-circuit further thought.

As seen above, sometimes it is just for the accident victim to win a products liability action, but sometimes the defendant should prevail. The purpose of products liability principles and rules, then, must be to help determine which party — the maker or the victim — should in justice win the lawsuit, and what the damages should be.[22] Being descriptive only, and one-directional, the conventional goals provide no guidance on how individual cases in justice should be decided.

A. *Compensation*

Compensation, as a legal goal or policy, is a notion that is completely devoid of moral content. A judgment for the plaintiff, of course, results in compensation to the plaintiff, but this result is sometimes good and sometimes bad. Surely principles of justice do not dictate that the products liability plaintiff must always win and that the defendant must always lose.[23]

The victim of a product accident, particularly a serious one, is very likely to be in need of money. But need alone cannot provide moral justification for requiring one person to compensate another. The fundamental problem in this world, of course, is that billions of people every day have unmet needs — for such basic things as food and clothing — yet there simply are too few resources to go around. If the law is going to order the payment of money to one needy person, it will have to order that it be taken from another; and the person from whom it is taken may be as needy as the person to whom it is given. One might argue that a product manufacturer, as a large business corporation, is always less in need of resources than the victim of a product accident, and that the product maker, therefore,

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22. The discussion in this essay principally concerns moral considerations relevant to the determination of liability for compensatory damages. On the moral underpinnings of punitive damages, see Chapman & Trebilcock, *Punitive Damages: Divergence in Search of a Rationale*, 40 ALA. L. REV. 741 (1989); Harris, *Rereading Punitive Damages: Beyond the Public/Private Distinction*, 40 ALA. L. REV. 1079 (1989); Kuklin, *Punishment: The Civil Perspective of Punitive Damages*, 37 CLEV. ST. L. REV. 1 (1989); Owen, *The Moral Foundations of Punitive Damages*, 40 ALA. L. REV. 705 (1989).

23. Empirical studies suggest that plaintiffs prevail in roughly half the cases. W. KEETON, D. OWEN, J. MONTGOMERY, & M. GREEN, PRODUCTS LIABILITY AND SAFETY — CASES AND MATERIALS 21-25 (2d ed. 1989).

always ought to compensate persons injured by its products. Before this argument slips into the risk-spreading rationale, which is critiqued later, several of its other weaknesses should be noted.

One formal problem with a needs-based rationale is that it is structurally out of place in a private products liability lawsuit. At least since Aristotle,[24] many theorists have considered that tort and contract disputes generated by some transaction between two parties involve principally issues of "corrective justice," of annulling wrongful gains and losses in the property holdings of the parties.[25] Because this perspective presumes the legitimacy of the initial distribution of resources between the parties, the law morally may require the defendant to transfer property to the plaintiff only if there is some good reason deriving from the transaction that gave rise to the dispute, and perhaps from the prior relationship between the parties. That the plaintiff owns less property than the defendant, or that he could by some measure put the defendant's property to better use than could the defendant, are insufficient reasons to destroy the defendant's entitlements to his own property.[26] Instead, fundamental principles of corrective justice require proof that the defendant wrongfully caused the plaintiff's harm before the defendant may be forced to rectify the harm with compensation. Limiting judicially ordered transfers of property in this manner

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24. ARISTOTLE, NICOMACHEAN ETHICS 150-57 (J. Welldon trans. 1987) (Bk. 5 chs. 5-7).

25. Some corrective justice theorists subscribe generally to this apt definition of the ideal. *See* Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421 (1982); *cf.* Weinrib, *Understanding Tort Law*, 23 VAL. U.L. REV. 485 (1989); Kiholm, *Corrective Justice as the Redress of Wrongful Gain*, 18 MEM. ST. U.L. REV. 267 (1988). More recently, Professor Coleman has been "inclined to the view that the duty of injurers to compensate their victims is not a matter of justice or of morality, but of utility or, broadly speaking, deterrence." Coleman, *Property, Wrongfulness and the Duty to Compensate*, 63 CHI.-KENT L. REV. 451, 465 (1987).

26. Richard Epstein may well be correct in asserting the necessary priority of a "baseline of property rights." *See, e.g.*, Epstein, *Causation — In Context: An Afterword*, 63 CHI.-KENT L. REV. 653, 664-66 (1987); Epstein, *Causation and Corrective Justice: A Reply to Two Critics*, 8 J. LEGAL STUD. 477, 501 (1979) ("Ownership and tort flow from a single conception of autonomy and inviolability."). *See also* Weinrib, *Causation and Wrongdoing*, 63 CHI.-KENT L. REV. 407 (1987). *See generally supra* note 4 and accompanying text. *But see* Coleman, *Property, Wrongfulness and the Duty to Compensate*, 63 CHI.-KENT L. REV. 451, 454-60 (1987).

finds strong support in the Kantian ideal of freedom, discussed below.

This is not to say that need is not relevant to a right to resources in a just society, for social justice does require provision for the most fundamental needs of every person. But such welfare needs are more fairly and efficiently dealt with as obligations of the community as a whole, more properly funded by some form of tax, and based upon the very different principles of "distributive," rather than "corrective," justice.[27] Thus, even when based on an accident victim's need, "compensation" by itself is an illegitimate goal in a moral system of products liability principles.

B. *Risk-Spreading*

While certain risks should be shared equally in a just society,[28] most risks probably should not. Persons often choose to encounter certain obvious product risks more or less voluntarily, in order to promote some objective of their own. For example, a person may be injured by a power saw, while cutting an old board filled with nails, when the saw strikes a nail and kicks back toward his body. When such a risk eventuates in harm, principles of individual responsibility may require that the victim personally bear the resulting accident costs, rather than shifting them onto others who did not benefit from his personal decision to take the risk. But consumers sometimes passively and unknowingly confront other product risks, as from toxic chemicals or defective pacemakers. In contexts such as these, many persons might well be risk-averse and so choose in advance to pay a fee to insure against the risk. The question then becomes how, most fairly and efficiently, the risk should be distributed — by the manufacturer, through a products liability

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27. *See, e.g.*, Epstein, *Products Liability: The Search for the Middle Ground*, 56 N.C.L. REV. 643, 659-61 (1978); Schwartz, *Economics, Wealth Distribution, and Justice*, 1979 WIS. L. REV. 799, 802-05; Englard, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEGAL STUD. 27, 68 (1980); Cane, *Justice and Justifications for Tort Liability*, 2 OXFORD J. LEGAL STUD. 30, 62 (1982) ("It may be that the demise of tort law is an inevitable result of placing more and more emphasis on the individual's responsibilities to society."). Aristotle is the source of the division of justice into its "distributive" and "corrective" forms. *See* ARISTOTLE, *supra* note 24.

28. As, perhaps, the risk of death in war.

lawsuit, or by the victim's own first-party insurers, firms that specialize in spreading risks of injury and in providing health and disability protection.

The products liability system indeed does serve as a form of third-party insurance mechanism, in which the manufacturer, at least theoretically, adds a component to each product's price — as a kind of insurance premium — to reflect anticipated future payouts for liability claims.[29] Loss-spreading is always achieved by a plaintiff's verdict in a products liability case, for the judgment will always be borne at least to some extent by the shareholders of the company. Assuming as we have that this distribution is appropriate on moral grounds in some situations but not in others, loss-spreading loses all power as a moral principle, for it points to liability in every case. Even if this structural deficiency were disregarded, the fact remains that the products liability system is both highly inefficient and quite unfair as an insurance scheme. Its inefficiency is reflected by the very high transaction costs involved in the processing of claims, represented by the high costs of litigation for both parties and the courts.[30] It is unfair, as George Priest has noted, because of the regressive manner in which consumers pay an equal "premium," as a part of the product's price, yet receive payouts based on sometimes greatly differing levels of lost income.[31] Coupling a private insurance system, tailored to the particular needs and wants of individual consumers, to a public welfare system that provides basic medical, disability, and rehabilitative support to persons outside the private system, would appear to be a much fairer and more efficient way of distributing the costs of accidents.[32]

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29. *See generally* Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521 (1987); Epstein, *supra* note 14. The system is backed up to a large extent, of course, by an actual third-party liability insurance system, which itself may be justifiable in moral (and economic) theory. *See generally* K. ABRAHAM, DISTRIBUTING RISK: INSURANCE, LEGAL THEORY, AND PUBLIC POLICY (1986); Schwartz, *The Ethics and the Economics of Tort Liability Insurance*, 75 CORNELL L. REV. 313 (1990).

30. *See* Priest, *supra* note 29, at 1556.

31. *Id.* at 1558-60.

32. *See generally* Sugarman, *Doing Away with Tort Law*, 73 CALIF. L. REV. 558 (1985); Priest, *supra* note 29, at 1586.

C. *Deterrence*

Products liability judgments are said to have a deterrent effect, and to some extent[33] they do. Products liability judgments tend to raise the cost of business for manufacturers, and product use (and, hence, accidents) should tend to be deterred to the extent that the increased costs are passed along to consumers as higher prices.[34] But this is always true, whether the product is good or bad, or whether the manufacturer in justice should pay or not. Thus deterrence, the final conventional products liability rationale, also suffers from being one-directional, and so in naked form cannot supply a moral basis for liability rules.[35]

What society morally should seek to deter is not the production of products generally, but rather the production of *defective* products, products that are by some measure "bad." And so deterrence *to a point* — "optimal" deterrence — is good. The problem here, then, is at least twofold: first, determining whether a particular product is good or bad; and second, determining the proper amount of damages that will provide the correct amount of deterrence. The naked deterrence concept, as the courts are wont to see it, is premised upon the assumption that the products to be deterred are bad. Yet the issue of how "defectiveness" should be defined by legal rule is the most central and difficult question in all of products liability law. By assuming away the most important issue, the deterrence rationale loses its moral force. There is a risk, moreover, that any rule or principle of products liability law will result in too much deterrence, reducing the availability of useful products.[36] To the extent that excessive deterrence does occur, consumers are deprived excessively of things that help them achieve their goals in life, as dis-

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33. Tort law probably has much less deterrent force than was assumed by courts and tort law scholars a generation ago. *See generally* Sugarman, *supra* note 32; Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Effectively*, 40 ALA. L. REV. 1053 (1989).

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

35. This argument concerns only liability rules for compensatory damages, since even a naked deterrence rationale provides some moral support to liability rules for punitive damages. *See* Owen, *supra* note 22; Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1257, 1282-87 (1976).

36. Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277 (1985).

cussed above.

An unconstrained policy of deterrence is troubling for another reason. A principled theory of products liability law probably should seek to take into account a manufacturer's ability to know that its product is good or bad, for reasons both practical and moral. The manufacturer is not likely to be much deterred from selling a product that reasonably appears to be a "good" one,[37] nor would society appear to be much helped by deterrence of this sort. From the moral standpoint, fairness appears to suffer if even a corporate actor can be held legally accountable for harm that it could not foresee or guard against, when its actions reasonably were expected to benefit, not harm, other persons.[38] Like the other conventional rationales, the simple notion of deterrence provides no help in the search for moral principle in products liability law.

IV. Searching for Moral Foundations

As the traditional policy bases of products liability law — compensation, risk-spreading, and deterrence — fail to provide a moral foundation to support the construction of sound products liability principles, the inquiry must be directed elsewhere. The following discussion considers the relevance of four sets of moral concepts: (1) freedom and equality; (2) truth, trust, and expectations; (3) utility and efficiency; and (4) power and risk control. These sometimes conflicting but often complementary ideals and concepts are fundamental to the development of a justifiable system of products liability law based on moral philosophy.

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37. Except to the extent that it may be encouraged to invest more in research before selling a product with potential, but unknown, risks. *See* Beshada v. Johns-Manville Prods. Corp., 90 N.J. 191, 447 A.2d 539 (1982). *But see* Schwartz, *Products Liability, Corporate Structure, and Bankruptcy: Toxic Substances and the Remote Risk Relationship*, 14 J. LEGAL STUD. 689 (1985) (liability for unknown risks reduces number of firms rather than increasing amount of research).

38. The truth of this proposition would be self-evident if the actor were a human. While moral theory does not require that corporations be accorded rights identical to those of human beings, such institutions are owned and operated by humans and so should be provided with a framework of rules within which to operate that is fundamentally fair. *See generally* Raz, *Legal Rights*, 4 OXFORD J. LEGAL STUD. 1, 20 (1984); M. DAN-COHEN, RIGHTS, PERSONS, AND ORGANIZATIONS: A LEGAL THEORY FOR A BUREAUCRATIC SOCIETY (1986).

A. *Freedom and Equality*

The paramount moral value for the law must be freedom, or autonomy. If a central purpose of law is to provide a framework of boundaries defining the scope of appropriate behavior for separate individuals living together in society, as surely it must be, then it presupposes that men and women have free will, that they are by nature free. Freedom is the most fundamental and important political value in society,[39] for it prescribes the moral right and obligation of each person to exercise his rationality[40] and his will to control his destiny, constrained only by a duty to respect the equal right of others.[41] This constraint, requiring persons to accord others an equal right of freedom, involves equality as an important but secondary[42] aspect of the freedom ideal. The predominant goal of an advanced society[43] should therefore be to provide in equal amounts the maximum possible amount of initial[44] freedom to each person.

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39. "Freedom (independence from the constraint of another's will), insofar as it is compatible with the freedom of everyone else in accordance with a universal law, is the one sole and original right that belongs to every human being by virtue of his humanity." I. KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE (RECHTSLEHRE) *237 (J. Ladd trans. 1965) (1797). *Cf.* Hegel: "The will is free, so that freedom is both the substance of right and its goal . . . ." G. HEGEL, PHILOSOPHY OF RIGHT para. 4 (T. Knox trans. 1952) (1821); Rawls' first principle of justice: "[E]ach person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others." J. RAWLS, A THEORY OF JUSTICE 60 (1971).

40. Freedom has value, and even meaning, only insofar as the person possesses "minimum rationality, the ability to comprehend the means required to realize his goals . . . ." J. RAZ, *supra* note 4, at 373. "Freedom — autonomy — is to be found in obedience to the moral law, to which reason gives us access. But because each person achieves autonomy by exercising his own critical, rational faculty, the moral law, though constraining, is not imposed . . . ." S. BENN, A THEORY OF FREEDOM 173 (1988). *See generally* R. FLATHMAN, THE PHILOSOPHY AND POLITICS OF FREEDOM ch. 7 (1987).

41. *See supra* note 39.

42. Of course, according equality only a weak, secondary role reflects an underlying preference for freedom as the primary social ideal. Contrast Dworkin, *Why Efficiency?*, 8 HOFSTRA L. REV. 563, 570 (1980) (arguing for "deep equality" from which society would devote an equal share of resources to the life of each member). Strengthening equality further would tend to weaken freedom, and eventually would force an untoward collapse of the corrective justice model into one of distributive justice. *See supra* notes 24-27 and accompanying text.

43. In a poor, hand-to-mouth society, the need to maximize basic utility (food and shelter) may sometimes supersede the ideal of freedom.

44. Persons acting freely generally should be able to contract away many of their freedoms.

If maximizing individual freedom of action in a crowded society thus is to be protected by law, the freedom boundaries of each person will push closely on all sides against the freedom boundaries of his neighbors. The resulting problem for society is that persons often extend their freedoms to the point of risking harm to, and sometimes harming, others. Thus, the problem for the law is to establish fair boundary definitions[45] and fair consequences for boundary breaches.[46]

In products liability law, the rules of liability, causation, damages, and defenses define the freedom boundaries of greatest import. Putting aside the difficult question of the extent to which the freedom rights of humans and corporations should be the same,[47] it may be helpful to examine how the goals of manufacturers and consumers coincide and conflict. The manufacturer's primary goal in a free enterprise economy is to maximize its profits, which means to make its products at the lowest possible cost and to sell them in the greatest possible number at the highest possible price. Sales and prices may be increased by making products safer and more useful, which benefits consumers, too. Yet sales and prices may also be increased by convincing consumers that a product is safer and more useful than it really is, or by failing to inform them of potential dangers; and costs may be reduced, at least in the short run, by reducing safety and utility in nonapparent ways. The consumer's objective is to buy the cheapest possible product that is most likely to accomplish his goals as easily and safely as possible. The law apart, many manufacturers would want to increase sales by selling cheaper, less safe products to consumers for use in tasks for which the products are marginally inappropriate and hence may be marginally unsafe. Many consumers would choose to buy such a product because of a misperception of the balance of the product's risks relative to its utility and its costs.[48] If a consumer

45. Which should be based upon an underlying system of property rights. *See supra* note 4 and accompanying text.

46. Nozick's "border crossing" metaphor illuminates the point. R. NOZICK, ANARCHY, STATE, AND UTOPIA ch. 4 (1974).

47. *See supra* note 38.

48. It is a fundamental fact that consumers always possess imperfect information on the risks and benefits of products they buy and use. *See* Twerski and Cohen, *Informed Decision Making and the Law of Torts: The Myth of Justiciable Causation*, 1988 U. ILL.

were injured while using such a product in such a manner, the freedom value would not initially appear to help resolve the question of who should bear the loss, for both parties in a sense chose freely to enter into the exchange transaction. This demonstrates that freedom cannot be viewed as a naked ideal, but that it must instead be informed by other moral notions.

B. *Truth, Trust, and Expectations*

To exercise his will rationally, a person must have knowledge of the world around him, which means that he needs to possess the truth. A person cannot decide rationally whether to act one way or another — whether to buy product *A* or product *B*, or whether to use product *C* with a guard or without one — unless he knows how *A*, *B*, and *C* probably will operate, the probable risks that each possesses, and his probable ability to control those risks. Knowledge, the possession of a true conception of how the person and the product will likely interact, is therefore an important condition to the rational exercise of freedom.

Yet the possession of the absolute truth is always an unattainable ideal, for the frailties of human perception and cognition are such that persons can obtain at best only fair approximations of the truth.[49] In striving to foster the ideal of freedom, then, a primary principle of products liability law should be to hold the manufacturer accountable for harm caused by representations about the product that the manufacturer should have known were untrue. Another principle should be to place responsibility for a product accident upon the party who had the best conception of the true balance of risks and benefits inherent in using the product to perform its task. Such principles would appear to require manufacturers to provide consumers with material information about predictable risks from predictable uses, to permit consumers to exercise their freedom as rationally as possible, yet would force consumers to take responsibility for the consequences of putting products to uses that are

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L. REV. 607, 626-41. Even with perfect information on a product's balance of risks and benefits, consumers with a preference for risk-taking sometimes would choose to purchase and use products containing an excess of risks over benefits. *Id.*

49. *See generally id.*

unusually adventurous.

These principles flow also from the consumer's expectations, which are based on trust. The rules of commerce have evolved over the centuries to the point that the law generally requires a basic parity in an exchange transaction: a fair product for a fair price. If a manufacturer withholds important risk information from consumers, who fairly expected such information to be revealed and reflected in the product's price, the manufacturer has cheated the consumer out of the truth.[50] The failure to provide such information shows disrespect for the dignity of the consumer, for withholding risk information from the consumer deprives him of the ability to make an informed choice on whether to exercise his freedom to buy a particular product, and how to use it thereafter.[51] Much more disrespectful of consumers are false statements concerning safety that a manufacturer knows or should know are false. Such statements violate the consumer's trust that the manufacturer will not deceptively and affirmatively place him in greater danger than he reasonably believes to exist.

Perhaps the most perplexing doctrinal problem in products liability law today is the question of who should bear responsibility for risks that neither party fairly could expect.[52] If a product's dangers are both unknown and unknowable at the time of manufacture, the manufacturer's comprehension of them, and its ability to prevent them, may be said to be beyond the "state of the art." In such cases, where neither party had any means to possess the truth concerning the product's dangers, the law fairly might revert to the naked freedom model, in which the parties exchanged a product that they both (mistakenly) believed was reasonably safe. As both parties would know that the possession of absolute truth by either one was unattainable, they both rationally should choose *ex ante* to make and price the deal efficiently, according to their (fair) expectations concerning risks

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50. The consumer's loss of his right to truth translates into a loss of safety, or a loss of the portion of the price he paid corresponding to his safety expectations.

51. *See generally* Madden, *The Duty to Warn in Products Liability: Contours and Criticisms*, 89 W. VA. L. REV. 221 (1987); Kidwell, *The Duty to Warn: A Description of the Model of Decision*, 53 TEX. L. REV. 1375, 1408 (1975).

52. *See generally* KEETON, ET AL., *supra* note 1, at 409-63; Symposium, *The Passage of Time: The Implications for Product Liability*, 58 N.Y.U. L. REV. 733 (1983).

of injury known and knowable at the time, rather than including in the product's price an excessive "premium" for insurance against such unknown risks as might eventuate in harm *ex post*.[53] From this perspective,[54] the freedom model thus appears to place responsibility for unknowable risks on the consumer rather than on the manufacturer.

If the enriched freedom model for products liability is based in part on consumer expectations, one must decide what types of expectations deserve protection.[55] There generally is no good reason in moral theory for the law to require manufacturers to protect the high safety expectations of a person with an idiosyncratic aversion to risk. To the contrary, such a person may not fairly demand to be subsidized by the manufacturer, nor, through higher prices, by other consumers with normal expectations. For the manufacturer occupies a kind of legislative posture in which it must select a level of safety that will approximate the expectations of most of its "constituents" most of the time. The expectations of the majority of ordinary consumers might be termed "fair" expectations, because most consumers understand and accept the necessity of trade-offs among safety, utility, and price. But the question of how to determine what expectations are "fair," beyond the raw notions of consumer perception of truth discussed above, requires a broadening of the inquiry from truth and freedom to certain very different concepts.

C. *Utility and Efficiency*

The search for a moral basis for products liability law now must turn to the philosophic ideal of utility, and the economic

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53. It appears self-evident that persons would choose *ex ante* to purchase the form of insurance that provided the best value for the dollar. On this basis, consumers generally would choose to purchase first-party health and disability insurance (and contribute through taxes to a social welfare system) rather than to participate in a more expensive and less fair third-party liability "insurance" system. *See supra* notes 29-32 and accompanying text.

54. This is only one perspective, of course, on a problem that is exceedingly complex. For a powerful set of arguments favoring enterprise liability for unknowable risks, see Stapleton, *Products Liability Reform — Real or Illusory?*, 6 OXFORD J. LEGAL STUD. 392 (1986).

55. *See generally Rethinking the Policies*, *supra* note 3, at 707-09.

goal of efficiency. Unlike Kantian ethical ideals such as freedom, which contain inherent value in and of themselves, the concepts of utility and efficiency look forward consequentially to the effects of acts and rules upon the aggregate welfare and wealth of the community, respectively. The moral value of an act or rule, as measured by the utilitarian, depends upon the extent to which it maximizes total, or average, happiness or utility. Similarly, economic efficiency, as variously defined, concerns maximizing wealth. And while happiness and utility are very different things from wealth, the economic theory of efficiency provides at least a partial, working tool to help measure and predict the aggregate, and average, effects of an action or rule across society.[56]

When the respective freedoms of manufacturers, product users, and accident victims collide, and when the notions of truth, trust, and expectations do not provide satisfactory answers to how the conflicts should be resolved, it is often helpful to turn to concepts of utility and efficiency to obtain another perspective on the problem. And unlike freedom, truth, and other moral values that are tremendously difficult to value and hence to compare, notions of efficiency at least provide one basis for comparative analysis that sometimes helpfully informs the resolution of a clash of interests.

So, in products liability law, when a consumer's prior expectations concerning product safety are fractured by an accident, and the manufacturer did not create the unmet expectations, principles of utility and efficiency may help define a moral basis for deciding liability. Stated otherwise, utility and efficiency concepts may help determine in this context which consumer expectations may be considered "fair."

The consumer's actual expectations must give way to fair and average ones, as discussed above, because the manufacturer must legislate for consumers as a group the proper mix of safety, utility, aesthetics, and price. By aggregating (and averaging) the desires of consumers generally, the manufacturer is forced to

56. *See generally* Kornhauser, *A Guide to the Perplexed Claims of Efficiency in the Law*, 8 HOFSTRA L. REV. 591 (1980). *Cf.* Posner, *supra* note 5, at 507 ("[E]nlightened utilitarianism will incorporate the sorts of constraints that [make] wealth maximization an appealing ethical norm.").

disappoint a minority of consumers who possess peculiarly high expectations of product safety or who are peculiarly risk-averse, clumsy, careless, or dull-witted. Assuming that the manufacturer has respected its informational obligations that rest on truth, the manufacturer should incorporate in the product — upon principles of utility, efficiency, and autonomy — the types and amount of safety expected by ordinary persons expected to use the product. For a consumer's expectations to be fair, he must accord an equal respect to the probable safety-mix choices that most others probably would choose *ex ante*, and such choices would probably be based upon, first, truth, and, second, efficiency. For even when the choice is between dollars and the risk of harm to life and limb in ordinary accidents, most persons might well consent *ex ante* to the selection of a liability rule that maximizes wealth,[57] at least as a secondary objective.

Even if an injured consumer's expectations of product safety have been fully met, so that he has no claim for violation of his right to freedom, utility may have an important role to play in liability decisions. For the principle of utility dictates that actors seek to maximize communal welfare and, commensurately, that they seek to minimize waste. So, even if a manufacturer and a buyer freely engage in a product exchange transaction with full and equal knowledge of the balance of the product's risks and benefits, their respective obligations to prevent waste still may have vital moral dimensions. If the consumer suffers injury from an inefficient product risk — one that was excessive for the benefits achieved — the manufacturer may be faulted on moral grounds for causing waste.[58] If, instead, the consumer causes an accident by using the product inefficiently, in a manner or for a purpose known to be improper, then the consumer is morally responsible — under principles of utility — for the waste. Economic theorists continue to debate the efficiency of various rules of liability and defense in various contexts, and the purpose here is not to join in that debate. It is

57. *See* Posner, *supra* note 5, at 492-93.

58. In the ordinary case of this type, however, the buyer may not appropriately be permitted to recover damages for his own injuries, because he possessed *ex hypothesi* full knowledge of the danger and, hence, he must take responsibility for choosing to encounter it. Nevertheless, the manufacturer in such a case should be liable for injuries to other persons, on principles of both freedom and utility.

instead to demonstrate that the principles of utility and efficiency have a proper and important place in a moral system of products liability law.

D. *Power and Risk Control*

The final concepts to be considered in this inquiry are power and risk control. Power is the control that one person has over another. The power of the first person mirrors the vulnerability of the other. As a person's power increases, so too does his responsibility to act appropriately to prevent his power from harming others. Moral theory suggests that "appropriate" action means according equal respect to the freedom and other rights of the vulnerable person.[59]

In the law of accidents, including product accidents, power is measured by risk control. When the ability to control the risk lies with the manufacturer, the manufacturer has moral responsibility for subsequent accidents. When the power to prevent an accident is controlled instead by the consumer, the consumer has moral responsibility for accident prevention. This principle, under which the parties who have power over risk control are morally accountable for accidents, flows naturally from the principle of freedom or free will. One can exercise one's will, of course, only if one has the means to do so. And the means to control events — the possession of resources, including truth — are the component parts of power.

So, in general, the party who has the dominant control over the risk — the party who is in the best position to discover a risk, and to discover and exercise an appropriate means to prevent an accident — is the party with the greatest moral responsibility to avert the harm. Utility and efficiency also should be promoted by requiring the best or cheapest cost avoider[60] to bear responsibility for the loss. Responsibility in products liability law, accordingly, often rests comfortably in moral theory

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59. *See* Owen, *The Moral Foundations of Punitive Damages*, 40 ALA. L. REV. 705, 716 (1989). *See generally* S. BENN, A THEORY OF FREEDOM 125-29, 140-49 (1988) (exploring the relationship between freedom and power).

60. The phrase, of course, is Dean Calabresi's. G. CALABRESI, THE COSTS OF ACCIDENTS 135 (1970). Dean Calabresi's cheapest cost avoider model is helpfully justified and elaborated, in terms of moral philosophy, in Attanasio, *supra* note 3.

upon the party with the greatest power to avert a product accident.

One might think initially that the manufacturer would almost always have more power than the consumer to avert an accident, as by improving quality control, design safety, or the information provided to consumers. Indeed, this is true concerning many products, especially those with subtle dangers, used properly by consumers. Yet when a consumer chooses to purchase a product containing an inherent danger that is obvious and unavoidable, or when he chooses to use a product beyond its apparent capabilities, the consumer then has obtained more power than the manufacturer to control the risk. As an autonomous person with the capacity for rational thought, and with responsibility to exercise his will in a morally correct manner,[61] a person who knowingly abuses his greater power of risk control by using a product improperly insults his human dignity. If this type of morally irresponsible behavior results in harm to the consumer, he cannot call upon the manufacturer for compensation without denying the equality of other consumers, who exercised their wills responsibly to curtail their freedom as to how they used the product, as well as the equality of the manufacturer's shareholders, who invested their savings in an enterprise making useful products that were safe for normal use. Such persons cannot in moral theory be required to subsidize, through higher prices and lost profits, the selfish and morally irresponsible consumer.[62]

V. Reconstructing a Durable Set of Products Liability Principles

Now that the moral foundations for a system of products liability law have been set, even if only tentatively, one may proceed with greater confidence to build a justifiable set of legal principles. That is what I now propose to do — to extract from the foregoing discussion of moral values some fundamental principles to guide decisionmaking in products liability lawsuits. The

61. "Autonomy is valuable only if exercised in pursuit of the good." J. RAZ, *supra* note 4, at 381.

62. *See* Holford, *The Limits of Strict Liability for Product Design and Manufacture*, 52 TEX. L. REV. 81, 89 (1973).

principles that follow are preliminary, and the explanatory justifications here are tentative and brief. Yet the effort must start somewhere,[63] and here it is:

PRINCIPLES OF JUSTICE

1. Manufacturers should tell the truth about product dangers.

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

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

PRINCIPLES OF LIABILITY

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

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

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

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

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

These principles of justice and liability flow logically from the foregoing discussion of moral theory. The first principle of justice is the most powerful, for it demands that manufacturers provide the most important (and often cheapest) resource to

63. It is continued in another essay, which is now in progress: Owen, *Freedom and Community in Products Liability Law: Searching for First Principles* (forthcoming).

consumers to permit them to exercise their free wills rationally and to make their own important choices for themselves as individuals. Knowledge is power, and the truth shall make consumers free.

The first two principles of liability follow from the manufacturer's obligation to tell the truth — the first principle, self-evidently, and the second principle because the product's safe appearance belies the presence of hidden and dangerous production defects. The second principle of liability derives also from the notions of power and risk control, and often from utility and efficiency, for the manufacturer always is in a better position than the consumer to prevent production defects, and often is in a better position to discover them.

The second principle of justice does not reflect an absolute moral imperative, as does the first, but, like the third, is instead a principle of balance. Once the manufacturer truthfully has disclosed all material risks that are knowable, its obligation rests on reason — to produce a product with the best mix of safety, utility, aesthetics, and cost. This design mix requires a consideration of consumer expectations concerning safety, but also concerns the other three components of the mix, which may be no less important to consumers. Utility, practicality, and freedom require that manufacturers make these design decisions legislatively for typical consumers and typical types of product use.

The third and fourth principles of liability derive largely from the second principle of justice. Ordinarily, of course, the manufacturer has the power to design out product hazards, and it is bound to do so on principles of utility if the apparent risks exceed the commensurate loss of utility. This is also expected by consumers, who have a right to trust manufacturers to exercise their legislative power rationally, fairly, and with respect for the consumer's right to freedom from wasteful product risks. The manufacturer's obligation to warn of product dangers is similarly justifiable, as it also is under the first principle of justice concerning truth. The fourth principle of liability is one of balance, like the third, but addresses products that contain hazards that cannot be eliminated and are morally excessive under the former principles. The manufacturer, of course, must bear responsibility for harm caused by such "outlaw" products, which also should be banned.

The final principles of both justice and liability concern the moral responsibility of consumers. Product accidents typically are a function of choices made by both manufacturers and consumers. When the primary power over risk control shifts to the consumer, who then knows more than the manufacturer about the risks of using a certain product with certain characteristics in a certain way, the moral responsibility for resulting harm shifts at least in part to the consumer, too. The consumer has no moral claim to force others to bear the harmful consequences of his actions taken in derogation of his dignity as an autonomous human being. For the freedom right possessed by consumers contains within itself the responsibility to act rationally and with due respect for the freedom right of other persons.

VI. Conclusion

Products liability law has too long foundered on policy bases devoid of moral content. It therefore should be no wonder that the liability issues have proved so perplexing to courts and legislatures and that the rules of law have developed aimlessly. It is time to inject moral principle systematically into this increasingly important field of law.

Moral foundations for a sound system of products liability law must first be set. Four sets of concepts provide just this sort of bedrock: freedom and equality; truth, trust, and expectations; utility and efficiency; and power and risk control. Principles of justice and liability can then be constructed upon moral footings, with at least some confidence in their justifiability. Principles of justice and liability should not be specific, for they should serve only as guiding principles — that in specific cases may conflict — rather than as rules of law.[64] The principles offered here are intended to provide a justifiable framework for decisionmaking, reflecting the relevant values that lie beneath, and within which a morally supportable system of rules may be developed. Much more thought must be devoted both to the principles of products liability law and to the underlying moral concepts. But it is time to start the dialogue, and the game is now afoot.

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64. *See* R. DWORKIN, TAKING RIGHTS SERIOUSLY ch. 2 (1977).