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CHILDREN'S LIVES, INDONESIANS' LIVES, AND GENERIC LIABILITY

PETER A. BELL*

Dear Lauren and Natalie,

I begin this letter riding in a product—in this case, one made by the creme de la creme of product manufacturers: Mercedes-Benz. I am in a stunning traffic jam, somewhere in Central Java, Indonesia, on the overnight bus from Salatiga to Jakarta. I was wondering, as we

* Professor of Law, Syracuse University College of Law. I write this while a visiting professor at Universitas Kristen Satya Wacana, in Salatiga, Indonesia, for the 1995-1996 academic year, thanks to sabbatical leave support from Syracuse University. I write it imbued with the memory of my friend, Peter A. Sandwall, who died suddenly this past year. Peter helped teach me, among other things, the importance of looking at the impacts of adult actions and decisions from the viewpoints of children.

1. Lauren and Natalie Rogers-Bell, 12 and 6 years old respectively at this writing, are two extraordinarily wonderful children whom it is my joy to parent. I write this Article in the form of a letter to them for several reasons. First, my time this year in Indonesia has reminded me that friends—even legal academic friends—enjoy reading my letters much more than anyone seems to have enjoyed reading my law review articles. I thought, therefore, that if I forced myself to draft this Article in letter form, I might write in a fashion more agreeable to you who happen upon this piece. Second, by writing this as a letter to my children, I hope to remind myself to focus my attention more fully on the future and on the more vulnerable in our society when I write about tort law herein. I need that reminder because I, like most persons involved in policymaking processes, focus most easily on the most immediate situations and policy effects. Also, like most persons involved in tort debates these days, I hear most loudly and frequently the voices of tort law's "reformers," the companies and professionals who disproportionately consist of society's wealthier and more powerful members.

Third, I expect that writing this to my children will enhance my efforts to focus on the realities of the relationships between products liability law and the lives of people in the United States and other parts of the world. By trying to understand what rules about generic liability will probably mean for the people and situations closest to me as I think and write, I hope to make a contribution to consideration of the issues involved which does not tread the same ground in the same way as the fine work of others who have focused on this subject, such as the editor for this Symposium, its other contributors, and those who have worked so thoughtfully on the drafts of the American Law Institute's Restatement (Third) of the Law of Torts: Products Liability.

Fourth, focusing on my children's lives in this writing should increase the chances that my prescriptions for products liability law laid out herein will coincide with the consumer sovereignty norm's prescriptions, namely that the law be that which competent, informed consumers most would prefer. See infra notes 13-15 and accompanying text.

Finally, by writing to my children, the quality of whose lives seems more important to me than the quality of my own, I expect I will bring as much intellectual rigor and honesty to my thinking and writing about generic liability as I can muster.

2. Mentioning my "extraordinarily wonderful" children in the preceding note, I remembered that a parent often has a view of the world that is very skewed, insofar as it involves his or her children. While most people find my children agreeable, in truth probably only my wife and I find them "extraordinarily wonderful." I think some call this "being perspected."

Anyway, being aware of how our perspectives influence our understanding of the world, as well as of particular children, I think that my understanding of products liability law might be
passengers sit here going about thirty meters a minute, with a stream
of gaudy buses passing us on the rocky, inclined shoulder of this road,
whether Mercedes should be liable if, built as superbly as I expect this
bus is, a court concluded that it in some way was unreasonably dan-
gerous, and that its unreasonably dangerous characteristic caused
someone’s injury.

I was wondering this because a law professor I know asked me
several months ago to think about one of the issues in product liability
law, one called generic liability. Since I had never before focused par-
ticularly on that issue—the question of whether a company could
properly be held liable for harm caused by its product just because the
product was more dangerous than it was useful—I hoped that think-
ing and reading about it a lot, with you two and our Indonesian setting
firmly in mind, would help me reach a sensible conclusion.

I was wondering about this generic liability issue in relation to
Mercedes, because it seems to me that one of the reasons many peo-
ple are hostile to tort law in the United States these days is that they
suspect that loony juries will sock companies with big products liabil-
ity damage awards no matter how good their products are. For peo-
richer and that I might broaden the thinking offered in this Symposium if I focus on the ques-
tions at hand from a view of what their resolution might mean in Indonesia, where I live and
work with my family this year. Notwithstanding the opening paragraphs of this Article, which
were in fact drafted during my bus trip, it was not entirely written on one bus journey.

Because I write this from the small city of Salatiga, in Central Java, where my access to the
writings of others about products liability is severely curtailed, I will not be able to attribute
ideas as fully to others nor reference readers to other works as I would if writing in the United
States. To those scholars whose writings have influenced my thinking about tort law over the
past 18 years, and who do not find themselves cited herein, I offer my apologies.

3. This issue has been referred to as one of “generic” liability, see Carl T. Bogus, War on
the Common Law: The Struggle at the Center of Products Liability, 60 MO. L. REV. 1 (1995), or
“product category” liability; see James A. Henderson, Jr. & Aaron D. Twerski, Closing the Amer-
ican Products Liability Frontier: The Rejection of Liability Without Defect, 66 N.Y.U. L. REV.
1263 (1991). At the heart of the issue is the question whether injured users or consumers can
recover damages in a products liability lawsuit if they prove that a product’s social utility is
outweighed by the product’s social costs (i.e., risks of harm). Some scholars claim that a court
should impose liability for the way a product is deliberately made only when it has evidence of a
safer way of making the product. See id. Others would permit a court to hold a product-maker
liable in such situations if it decides the product’s risks outweigh its utility, regardless of whether
there is a safer way to make the product. See, e.g., Bogus, supra. This Article will focus only on
products which might fail a risk-utility balancing test. It will not deal with other possible bases
for generic liability, such as abnormal danger, political disdain, or ease of implementation, which
some authors have suggested. See, e.g., Henderson & Twerski, supra, at 1307.

4. See, e.g., Robert M. Hayden, The Cultural Logic of A Political Crisis: Common Sense,
Hegemony and the Great American Liability Insurance Famine of 1986, 11 STUD. IN LAW, POL.
& Soc’y 95, 99-100 (1991) (offering anthropological and political explanation for such attitudes).
Based on my contacts with corporate officers and their lawyers at a couple of conferences and on
the statements from such officers and lawyers which I have read or have read about, I under-
stand corporate officers to share that belief to a considerable extent.
ple of my baby-boom generation, the Mercedes brand name is synonymous with quality and safety (and high price). Often, authors who turn their attention to generic liability do so in the context of products which lots of “university” types, like me, think are “bad” products. These include products such as handguns, cigarettes, and asbestos. That should not surprise anyone. Tort litigation in which a plaintiff seriously claims, or a court seriously considers, that an injury-causing product by its very nature poses greater risks than benefits to society rarely occurs with respect to any but the most nasty products. I, for example, would be quite cheerful if handguns, cigarettes, and asbestos disappeared from markets everywhere tomorrow. However, since a lot of people pay considerable sums of their hard-earned money for those products, I am confident that many do not share my aversion to these products.

Concerned that my personal distaste for these products—because of their danger to you and me and their failure to amuse me in any way—may influence my judgments about the broader generic liability issue, I will try also to focus my thinking in this letter on products which I do appreciate, but which might become subject to generic liability claims. Mercedes buses, cars, and trucks seem too close to the head of their class to be threatened seriously by generic liability. So, let’s try to keep in mind, as we read and write this, ice cream. All of us love ice cream, perhaps even more so this year, since it is available in such limited forms in our part of Indonesia. Schooled as I am in tort litigation about the hazards of toxic substances, I can imagine litigation in which a person were able to prove that probably her physical disabilities were primarily caused by her regular ingestion of the fats, cholestrol, and chemical additives inherent in ice cream. This

5. A considerable part of the sizeable body of motor vehicle products liability litigation in the United States consists of design defect cases, which rely on risk-utility balancing standards. See Restatement (Third) of Torts: Products Liability § 2 cmt. c, Reporters’ Note at 50-73 (Tentative Draft No. 2, 1995). Therefore, a focus on motor vehicle products herein might confuse the generic liability issue.

6. In the area in Central Java where we live this year, ice cream is readily available only in the packaged cones and ice-creams-on-a-stick which many stores and roving vendors sell from small freezers. While some markets carry ice cream one-liter containers, in very limited flavors, the tiny size of our refrigerator freezer makes purchasing ice cream in larger quantities impractical. At home in the United States, it is common for our family to have four or more half-gallons of ice cream in our refrigerator freezer at any one time. There, in the words of the Coneheads, we consume “mass quantities.”

7. Since I am writing to my daughters, concerned primarily about potential harms to them, I will refer to tort plaintiffs generally as though they were female. All such references would be equally applicable to someone’s sons.

8. In discussing ice cream in this letter/article, I am referring only to that which shows up in stores and vendors’ carts as “ice cream.” I invite the reader to assume with me that there is no
focus should help me think better about how willing we should be to have some player(s) in the legal system—judge or jury—conclude that the risks of a product we really like outweigh its utility to us and others who have long consumed it aware that it was not good for us. Keeping ice cream in mind should help me be more sure that my appreciation of tort's strengths does not blind me to the hazards generic liability might pose to products that will enhance your lives.

Even with my focus on ice cream, and the notion that some group of knuckleheads—for that, surely, is what I would then call them—on a jury or appellate court could label its societal risks greater than its benefits, I believe that courts should be able to impose generic liability. That could mean the disappearance of ice cream from our table. If it does, I will join you in whatever anger rituals we think appropriate. And, I will still believe that a proper court should be able to make a manufacturer—including, obviously, an ice cream manufacturer—pay for the injuries caused by its product's unreasonably dangerous characteristics.

"That's nice, Dad," I suspect you might be thinking, "but why write to us about this?" Well, I explained some of the reasons in an earlier footnote. I also want this letter/article to offer other readers some insight into consumer preferences by focussing on us as consumers. Many modern tort theorists have concluded that products liability law should mirror the risk allocation agreements consumers would feasibly make, if they feasibly could, with producers of the products they buy, readily available substitute, with less of ice cream's dangerous fat and cholesterol characteristics, along the lines of the "light" and "fat-free" versions of ice cream which are common in the United States. That assumption will assist me to think about the possible generic liability of a product my family finds very attractive. It is not a completely unrealistic assumption, given that the only ice cream available to us in Indonesia is that old-time "real" fat-filled ice cream and given that I do not generally find reduced-fat varieties of ice cream or frozen yogurt to be acceptable substitutes for "real" ice cream.


10. Don't worry, I don't think it will mean that, as I explain later.

11. As you will see later in this Article, I want to hedge my bets in allowing courts to do in ice cream. In turning important power over to a court, I get nervous that the court will be one of those rare weird ones that think bizarrely about the product at risk. That's one of the advantages of writing as though generic liability were a threat to a product I really like. As a result, I will suggest that the composition of the court which can decide a question of generic liability be determined by special procedures which reduce to tiny the chance of a bizarre decision about the relative risks and utility of the product in question. See infra Part II.A.

12. See supra note 1.
with respect to product-related injuries. In other words, the law should see to it that people get what they really want when they buy products, as much as possible. By focusing on your lives—and, to a lesser extent, those of our friends here in Indonesia—and what kinds of legal protections against product-related injuries I want you to have at what costs, I hope to give readers, including law makers, a firmer feel for the preferences of rational consumers in this regard. I am also writing to you because, having found blissful the extensive close contact we have here in Salatiga, I want to include you more in my work.

Because this letter is appearing in a law review, I will explain the reasons why I reach the conclusion in favor of generic liability in a series of sections, to which I will affix headings that I hope will help your and others' understandings of what I am saying. I will first talk about what I think is most important for your future lives, and for those of our Indonesian friends, related to the kinds of risks with which tort rules deal. Then, we will play. I will paint a section with you: a picture of generic liability in its social operations as a fairy godmother might have created it—the “Cinderella-at-the-ball” picture of generic liability, with “life happily ever after” consisting of the lives which I have described in Section I. Following that, we will visit, bringing along our Cinderella picture, the Cave of the Henderson and Twerski. There we will see the elaborately drawn cave paintings of


14. I expect readers to obtain that “firmer feel” by hearing the expression of my carefully thought out preferences as a consumer, primarily the preferences which I have for my children, but also those which I have for myself. I recognize that “ask Peter Bell” would not be the methodology chosen by most legal scholars to locate consumer choice about products liability law. Nevertheless, given the imperfections inherent in the models scholars use to make guesses about what informed consumers would prefer, see Croley & Hanson, supra note 13, at 713, the expressed and carefully explained preferences of this informed consumer may assist others in ascertaining what competent informed consumers in general would want. If I lay my preferences out clearly enough in this Article and can explain clearly why I have those preferences, you, the reader, can judge for yourself the typicality of what I want in safety from product makers.

15. James A. Henderson, Jr. & Aaron D. Twerski, law professors at Cornell University and Brooklyn Law School, respectively, are the Reporters for the American Law Institute’s Restatement (Third) of Torts: Products Liability. They are also the foremost academic critics of the idea of generic liability, both in scholarly writing and in their work producing the Drafts of the new Restatement. See Henderson & Twerski, supra note 3. By referring to the “Cave of the Henderson and Twerski,” I mean to evoke the dark and monstrous image they offer of generic liability, much the kind of image which authors of stories for young people evoke with cave-dwelling monsters. I know Professor Henderson personally, due in large measure to the proximity of our workplaces. He is an unusually warm, considerate, and reflective man, who resembles in no way
generic liability as an Ugly Stepsister. In the face of uncertainty about with whom and what we are dealing when we confront generic liability, we will take the glass slipper of Section I—the detailed discussion of what we want from products liability law—and, in classic fairytale tradition, see if it fits the generic liability foot.

All of this "play" is quite serious. Back in America, a group called the American Law Institute ("ALI")—sort of a "royal family" of tort lawmaking—is on the verge of proposing new rules about generic liability. A major debate rages among "contractarians," "regulators," and tort adherents about the merits of any form of products liability. Here in Indonesia, asbestos and tobacco products, as well as a multitude of dangerous vehicles, can be found almost everywhere, contributing to an accident carnage that would appall American society and which has led to calls for drastic action. If decisions about the existence or shape of generic liability law can have any significant impact—positive or negative—on the lives of you and others, now seems the time to deal with them.

I. WHAT I WANT FROM TORT LAW FOR YOU (AND OUR INDONESIAN FRIENDS)

Before I focus directly on generic liability, it seems to me that I should talk to you about what I want, for you and for our Indonesian friends, from products liability law. When I teach law, I begin most

my images of a cave-dwelling monster. While I seem destined to disagree with him about many issues in tort law, I can only aspire to Professor Henderson's personal and professional excellence. I have met Professor Twerski, but only briefly. I have no reason to think him monstrous either.

16. The American Law Institute (ALI) proposed in 1991 a project to write a new Products Liability Restatement as a part of a Restatement of the Law (Third) of Torts. Professors Henderson and Twerski, the project's Reporters, have produced two full Tentative Drafts of the Restatement, the most recent of which, Tentative Draft No. 2 (March 13, 1995) is referred to in this Article. This Draft expressly addresses the issue of generic (product-category) liability.

17. See Crole & Hanson, supra note 13, at 713-66, for a summary of the debate.


19. I do not propose in this article/letter to delve deeply into the significance of the decision for or against generic liability. Because such a decision could affect several industries dramatically, it is quite important to some product sectors. Because the generic liability issue will never be raised to a court for the overwhelming majority of products, the decision for or against it will have limited significance in the products liability world in general.

20. I thought about talking about what Indonesians in general might seek from tort law, given that my conclusions about products liability rules would affect all Indonesians were they miraculously to become law here. I felt, however, that it would be more consistent with the tone of this Article and with the method I am using to try to force myself to think thoroughly and concretely about generic liability issues if I think and talk about our Indonesian friends. Those
of my courses by asking my students to focus on the goals they think important in the area of law we are to study. If they and I can think well about what we realistically want from any piece of law, then we can work backwards to try to determine what particular legal rules will get us most of what we think we and others should have. Interestingly (to me), what I sense to be the main stream of recent products liability scholarship seems to encourage that approach. Those writers stress that the law should reflect how people really want legal liability for product injuries to be ordered.\textsuperscript{21}

These scholars also seem to tell me that I would want most of all autonomy from products liability rules. In this context, autonomy for me and you and our friends means that the law delivers what we would agree to have it deliver, if we could make such agreements with product distributors. It's sort of like a pizza: if we are going to pay for and get a pizza, we certainly would value most delivery of the pizza we want.\textsuperscript{22}

While the prominence of autonomy seems intellectually "right" in thinking about products liability law, my thoughts more instinctively, and powerfully, turn to other possible "goods" which the law might provide. When I am asked, "what pizza do you want?”, I do not instinctively respond, "the one I choose."\textsuperscript{23} From products liability law—including its rules about generic liability—I want, above all else, friends include children, university faculty and students, dokkar (horse-pulled carriage) drivers, basketball and tennis coaches and players, schoolteachers, artists, household assistants, young ministers, and neighbors. They do not include many of the least well-off in Indonesian society, although they surely include people who are below average in their financial well-being.

21. This "main" stream of recent scholarship wants products liability law to consist of what people would agree to with product distributors about the risks of product-related injuries were they able to settle the terms of the agreements without cost. The law, in other words, should reflect the preferences of competent and informed consumers regarding risk allocation. See, e.g., Croley & Hansen, supra note 13, at 713; Alan Schwartz, The Case Against Strict Liability, 60 FORDHAM L. REV. 819 (1992).

22. Of course, not everyone would be so thrilled to receive the double-cheese, peppers, and pepperoni pizza that we like. Law, being a social good, must be delivered the same to all (with some possibilities for individualization which will be discussed below in Section IV, when we examine the possibilities I suggest for the use of disclaimers of liability). Products liability theorists, therefore, speak about a collective autonomy which exists in the same quasi-theoretical, quasi-empirical sense as the "popular will." Nevertheless, the principles they advance lead me to emphasize autonomy as a first desire for us all with respect to law.

23. I recognize that this "instinctive" response with respect to pizzas is heavily influenced by my experiences since childhood. I have all that time been able to choose the kind of pizza I, or my group, wanted. Having taught in China in 1987-1988, I recognize that there are people who have grown up with little choice—even about what they get to eat. When asked "what kind of pizza do you want?", such persons might more instinctively respond, "the one I want." The mainstream legal scholars I describe in the text quite probably feel they have grown up with a (tort) law dictated by others without attention—or at least without sufficient attention—to what the law's consumers want. Regardless of differences in our initial instinctive responses, these scholars and I probably get to the same place when we order pizza. I suspect we get to the same
safety for you. Then, safety for others. I also want the law about risks and injuries—which is what tort law is—to provide you more, rather than less, control over your own lives. While I would prefer that tort rules enhance your financial security and opportunity and your sense of justice, I don’t really count on tort law for much of that. Somewhere mixed in throughout, I want the law to provide those things to all of us at an acceptable price—just as for the pizza.

A. Safety, Above All Else

I begin by discussing my desire for safety, rather than autonomy, because it is clear to me once I start thinking about accidents that this is my preeminent concern for you. When we talk about products liability law, we are talking about products which pose some risks of danger to you. Speaking of generic liability means talking about products that are particularly risky to you and others.24

I want you to be safe. I would like others, especially our friends, to be safe, too. For you, however, I want that safety with a passion as strong as any I have or have had. More than anything I can think of, I want you safe, safe from serious injury or death.25 Let’s knock this deep into the reader’s consciousness: I WANT MY CHILDREN SAFE! I think most people have that as a rock-solid top priority with respect to those they love and risky products.

“How safe?” I love that question. I use it all the time with my students in a tort or environmental law course, particularly the self-place—ordering the products liability law that we want—in our analysis of generic liability as well.

24. No sensible plaintiff’s lawyer, nor any court, will raise or deal with the idea that a product maker should be liable for the dangers inherent in the very nature of its product unless that product poses considerable risks of harm. For ice cream—one of our foci in this letter/article—the inherent risks of harm to consumers would have to be extremely high in order to offset its yumminess.

25. I state this “want” strongly. I could spend pages trying to explain and illustrate it. I do not do so because I believe that my feelings of love and concern for my children are similar to those of most parents—in the United States, in Indonesia, or elsewhere—and, therefore, my safety concerns for them do not need explaining to you, the reader. I imagine that the overwhelming percentage of parents, worldwide, would give the same answers I would to priority-exploring questions such as: “Would you rather have great wealth or have your children free from serious injury or death?”; or, “Would you rather have deep and satisfying adult loves and friendships or have your children free from serious injury or death?”; or, “Would you rather have tremendous achievements in your life or have your children free from serious injury or death?” If asked to elaborate on such questions, I would probably define “serious injury” as injury which would be physically or psychologically crippling in a significant fashion for longer than some substantial period of time, such as a year.

In stating this core passion, I mean to imply that it is widely shared, throughout the world. Therefore, for the law to satisfy this “want” would satisfy the consumer sovereignty norm referred to above. See supra text accompanying notes 13-14.
righteous ones who, like me, start from a “human-life-is-sacred” orientation.

“How safe do I want you to be?” I hate that question. I don’t know the answer. I certainly don’t know the answer in general. I have a little bit better idea of the answer in particular situations. I will let you, Lauren, cross busy Jalan Diponegoro by yourself, but won’t let Natalie, because it is too unsafe. I will let you, Lauren, go shopping in downtown Salatiga with your friend, Claire, but I won’t let you two go on your own with Claire to Yogyakarta, the big city nearly three hours from here by public bus. Too unsafe. I won’t let either of you ride a bike around this small city, even if the Davis and Fosdahl kids, who are your ages, can.

These touching expressions of concern and confusion, common to all parents, probably are not helping Professors Henderson and Twerksi figure out what to do about generic liability law as they work on the latest drafts of the new Restatement. So, let me try to say something relevant in response to that key question: “How safe?” While I am not sure how safe I want products to be which may have an impact on your lives, I am confident that I want you to be safer in that regard than other people do. I can accept, albeit somewhat grudgingly, the behavior of other children in exposing themselves to dangers in situations in which I would not accept such behavior from you. So, too, I can accept risks that other people’s behavior poses to those children where I would not accept that (or at least would oppose it more strongly) were the risks of harm to you.

This has the following implication for products liability law: If a court or jury, in a decision that is acceptable to reviewing authorities, were to determine that the risks of a particular product were greater

26. I do not mean to suggest by these statements that I am more risk-averse than other people. Despite my greater-than-average awareness of risk—seemingly an occupational hazard (so to speak) for a torts teacher who reads regularly about risks which come to fruition—I understand myself overall as either risk-neutral or slightly on the side of risk-preferring, given my age. That perception found some confirmation in the reactions of many friends and acquaintances to your mom’s and my decision to come (and bring you) to Indonesia for a year, particularly after we informed them of all the immunizations we thought it wise to obtain before we came.

Rather, by these statements I mean to emphasize that, whatever my level of risk tolerance, it is lower for you than for other people’s children. I can tolerate a risk for Martin Schaefer, your six-year-old playmate, Natalie, that I would not accept for you. I expect that is a common phenomenon. Martin’s parents, I assume, would allow you to engage in even riskier behavior than they allow Martin (if they thought that our wish) even though they give him a freer risk rein than I would give you. Probably, all that I am reminding readers of here is the tendency of parents to worry most about their own children. Economists would understand this as the rational tendency of persons to demand less chance of a result as the gravity of its harm increases.
than its benefit to society, then I would believe that product too unsafe for you.

"Even ice cream, Dad?" "After all," you and others might well argue, "judges and juries surely can come up with estimates of a product’s dangers or its advantages that differ from yours. They certainly would arrive at a different sense with respect to the benefits and risks involved in living in Indonesia for a year."

"True, but..." would be my answer. It is extremely unlikely that there would be such a judicial decision in the area of generic liability—at least not one which would provide us with more safety than I want. Under the basic legal doctrines of products liability, which I do not contest here, there will be a legal decision for generic liability only where the court concludes, with respect to a product which could not be made more safely and still retain its essential character, that the product’s risks to the population at large outweigh its social value.27 That kind of risk-benefit calculus is one with which I would be very surprised to disagree in terms of the safety I want for you. These sorts of familiar products come into a courtroom with a strong presumption of legitimacy because of their widespread legal use. In addition, they will be assured of receiving a strong defense,28 which is likely to do an optimal job of presenting to the decisionmaker a rosy picture of the product’s “great” social benefits and its “really-not-so-big” social costs. Under these circumstances, it is extremely unlikely that I would...
disagree with a court's decision that the product under review was too unsafe, particularly with its effects upon you in mind.

You might further raise the question as to whether I am overemphasizing safety for you. A recent interaction makes me think not. As you know, I partly tore my Achilles tendon near the end of the rainy season here in Indonesia. Now you all know that as someone who reads a lot about medical malpractice, I am very "careful"—some might say "nervous"—in dealing with health care providers. My ordinary level of concern was highlighted when, a week after being placed in a half-cast by Dr. Timotius, my leg went through a five-day period of swelling, pain and considerable bruise-like discoloration. My concerns manifested themselves in a conversation I had with one of my Satya Wacana University law students, who accompanied me on my return visit to Dr. Timotius, to serve as a translator. The student, Arifin, had just returned from a semester in the United States at Beloit College.

On our way to the doctor's office, I was telling Arifin about how careful I am in using doctors in the United States, and about how nervous I was making use of Indonesian health care professionals when I could neither communicate directly with most nor had any substantial sense of the background or reputation in the medical community of the doctors whom I visited. Arifin nodded sagely and asked: "You feel better in America because you can sue the doctor if there is malpractice?"

I reacted immediately and strongly, emphasizing that the possibility I could get money if I were mistreated had absolutely no part in my thinking. I wanted to be safe, to avoid injury, I told Arifin forcefully. I had no concern about being able to sue someone if in fact my leg stayed bad or got worse because the doctor mistreated me. The fact that this has been my only concern in thinking about my own medical treatment suggests to me that I am not overemphasizing safety for the two of you.

29. A doctor in a nearby town, recommended to me by an expatriate friend as a foreign-trained doctor with some specialization in "bone" cases. Dr. Timotius spoke some, albeit little, English with me. I neither speak nor understand Bahasa Indonesia (Indonesian language) beyond the most rudimentary level.

30. That is not to say that if I were a victim of malpractice I would not then want to have some legal recourse against the wrongdoer. From my (relatively) unmangled perspective, money simply could not make up for any kind of serious injury. Even were I to be the victim of someone's misfeasance, I would be quite reluctant—knowing the tort system pretty well—to become involved in a lawsuit to any significant extent. Tort lawsuits appear to me to be pretty unpleasant activities, for all concerned.
While wanting safety for you, I do not want to ignore what you want for yourselves and what others want for themselves. The strand of legal/political scholarship which emphasizes that the imposed rules which govern people's lives should reflect as much as possible the choices people would make for themselves if they had the chance is both long and impressive. One of the leading modern legal philosophers, John Rawls, thought the appropriate starting point for a just legal system to be the choices people would make with respect to law if they were creating a society from behind a veil of ignorance which would not allow them to see the particular positions they themselves would occupy in the society. If you got to choose the legal rules that govern products liability, you could order up from the tort system whatever it had that you really wanted in the way of safety, wealth, justice, or insurance.

I know already that you two girls like to make your own decisions about matters that affect your lives. I believe that your strong wills increasingly will lead you to assert your "right" to make your own decisions as you move into your teenage years, and accede less willingly to our maternalism and paternalism. Even if I could, I would not withhold from you the same right to lead your own lives that I treasure for myself. I hope you will do even better with your choices than I have.

I am not quite so enthusiastic about having legal rules, at least in the area of products liability, that reflect the choices you would make if you were able to bargain directly with a product provider whose product created a risk of harm to you. I say that knowing how attractive it would be to me to have such legal rules coincide with the choices I would make in such a bargaining situation. I want the legal rules to be those which would best provide you what will be important to your lives, and I fear that you might choose wrongly.

Am I being hypocritical? Real choice for me but constricted choice for you? Well, yes and no. Let me try to explain. I would like legal rules about products liability to reflect my choices about product safety, fairness, insurance, and any other relevant factors. I would also like them to reflect what is best for me. I would certainly protest if I were not allowed to make my own choices. After all, who knows

31. See the discussion of and citations to the "contractarians" collected in Croley & Hanson, supra note 13, at 713-35.
better than I what is best for me? On the other hand, it is quite clear to me, looking back as a fifty-one-year-old, that at many stages in my life I did not know what was best for me, or if I really did, I was unwilling or unable to do what was best for me. I know more and can do better now. More humbling still, I am confident that I will look back in ten or twenty years and understand that some of my early choices of today would have been beneficially different had I possessed the greater understanding (not foreknowledge) and perspective that I then will have.

Knowing this, if I thought my choices about product risk allocation or about anything else were being interfered with for my own good, I probably would do no more than grumble, especially if the person interfering were someone who loved me dear.33 I would think

33. Understand that I say this having a great deal of disrespect for those in power here in Indonesia who postpone democracy with all sorts of vacuous talk about the need for the wise rulers to make choices which will benefit the unsophisticated people. See, e.g., Democratization Developing Fast Enough: Expert, JAKARTA POST, Feb. 26, 1996, at 2. I also say this being firmly on the side of greater patient autonomy in the context of medical relationships about which I teach. I don’t generally like people telling me or others what is best for us.

Given that mindset, I am not easily convinced that a choice which conflicts with the one I would make myself is “best” for me. Nevertheless, there are several factors at work in my life that remind me that this is not infrequently the case. First, as I indicate in the text, I see clearly now my own failings in making choices that were best for me earlier in my life. I say that without a belief that I am the prisoner of earlier bad choices. Rather, I am a fortunate escapee from bad choices I would have made if I had been allowed to make them, as well as the lucky beneficiary of choices I made either because I deferred to the better judgment of my parents, spouse, or sager friends or because my untutored instincts led me luckily. Second, I have been participating more actively in the past decade in formal and informal discussion groups, in which people who know, respect, and trust each other to an acceptable degree talk about readings or experiences they share. That experience has emphasized to me how limited are my understandings of the world and how dependent are the choices I make on my particular life background and narrow understandings.

Third, this year in Indonesia has brought me into close contact with many people who have very different ideas about choices—for their own lives and for social policy—than do I. My Indonesian law faculty colleagues approach their teaching jobs quite differently from the way I do. My Indonesian friends and students make quite different—often hair-raising, to me—choices in regard to personal risk. Most of the expatriate community here is made up of Christian missionaries, for most of whom God has much more of an active, foregrounded position in daily life than is the case for me. Many of those missionaries are fundamentalist Christians, whose choices about public behavior and social policy tend to differ far more from my own than do the choices of most people in my primary communities in the United States. My respect for and emotional attachment to many of these Indonesian and expatriate people often leads me again to question the wisdom of choices, even important choices, that I made last week, last year, or last decade. Speaking of decades reminds me of a discussion we had in a Salatiga discussion group several months ago, centered on a short article by Mary Ann Glendon about the 1950s in Chicago. See Mary Ann Glendon, Lost in the Fifties, FIRST THINGS, Nov. 1995, at 46-49. Professor Glendon’s basic point, in her review of a book about the changes in certain Chicago neighborhoods from the fifties to the nineties, was that the autonomous choices of the people who lived in spiritually and emotionally rich, albeit limited, communities 40 years previously had led to the evaporation of community and that such evaporation has meant a decline in the quality of people’s lives. See id. Most people in the discussion group felt her characterization of people’s choices as ultimately misguided to have been appropriate.
I knew what was best for me, but would recognize that I might not. Of course, it is much easier for me to recognize that with respect to you two girls: I have become acquainted with you in your childhood, a time when your weaknesses at knowing what is best for you are most obvious. Moreover, like many parents, I am much more aware of the fragility of your health and life than I am of my own, or you are of your own.

So, I would like to have a legal rule about generic liability that reflects the choices a loving parent would make in bargaining with a product supplier whose product posed risks to his children. After all, even the legal scholars who seek to fashion legal rules on the basis of what people would choose—the autonomy principle—are working from their understandings of what others would think best for themselves. To the extent that they are "imagining" choice, through the medium of their own imaginations or through some other medium, such as consumption patterns, such scholars are working from their notions of what your choices would be, not from those choices themselves. I am going only slightly further. I want to determine legal rules on the basis of the choices I think you would make if you had the fuller understandings of your world, of your value as a human being, and of your limitations that a loving parent has. While I still find the principle of autonomy an attractive guide to which products liability rules we should have, my experiences with you—and in Indonesia,

Finally, living in an intensively Christian community, in which the presence of God in people's lives is focused on to a much greater extent both publicly and privately than I am used to, has exposed me to a different kind of choice-making process. In this community, most people seek to make their choices not so much on the basis of their own needs and wants as on the basis of God's will. Our friends devote considerable time and energy to prayer, meditation, and to other attempts to understand the will of God, on what I think of as minor, as well as major, matters. In such an atmosphere, I tend to be less dogmatic about my own knowledge of what choices are best for me.

34. See, e.g., Richard A. Epstein, Products Liability as an Insurance Market, 14 J. Legal Stud. 645, 668-69 (1985) (defining what most informed and competent parties would want in a liability standard by examining market behavior). It has been official government policy in the environmental area to determine how much people value human life by examining how much they are willing to pay for that life. See, e.g., Robert V. Percival et al., Environmental Regulation: Law, Science and Policy 528-29 (1992). That has been determined through various methods, including the examination of wage rates in occupations which are thought more dangerous to life than others. See id.

35. Such a position from which to determine legal rules finds somewhat further exposition in the writing of scholars who focus on "connection" as the predominant reality of human existence rather than on "individuality." See, e.g., Leslie Bender, Feminist (Re)Torts: Thoughts on the Liability Crisis, Mass Torts, Power, and Responsibilities, 1990 Duke L.J. 848; Leslie Bender, A Lawyer's Primer of Feminist Theory and Tort, 38 J. Legal Educ. 3 (1988); Carrie Menkel-Meadow, Portia in a Different Voice: Speculations on a Women's Lawyering Process, 1 Berkeley Women's L.J. 39 (1985). Such thinkers not surprisingly place less emphasis on "autonomy" as the meta-principle to guide the formation of legal rules.
where I sense massive unawareness of the dangers inherent in many activities in which people engage—lead me to find the principle of a loving parent's choice at least equally attractive. In some ways, it may be even more attractive because it ameliorates some of the shortcomings of individual choice regarding risk that are revealed in scholarship about cognitive psychology.

Moreover, with respect to many of the products that would be affected by the rules of generic liability, an agreement about risk allocation between you and the product distributor is a chimerical notion. While you might well strike a generalized agreement with the makers of ice cream or, God forbid, cigarettes that you consume, the dangers to you from handguns, asbestos products, or dum-dum bullets, none of which you are likely to purchase yourself, are immune to your bargaining power. Since you would not wish to own or use either the handgun or the bullet—and, hopefully, not the cigarette—even a hypothetical bargain between you and the product distributor would demand legal rules with as high a level of safety as possible. In regard to such products it is difficult to know how to service autonomy concerns through legal rules. It is less difficult to relate legal choices to safety concerns.

I would add a final word of caution, lest you chafe too angrily under what feels like parental usurpation of your right to guide your own life. This notion of autonomy as a determinant of product liability rules should not be limited to answering the question: "How would most consumers allocate the risks of harm to themselves if they were able to bargain costlessly with the product manufacturer?"

36. See, e.g., Zatni Arbi, Why Shouldn't We Operate a Nuclear Plant in Indonesia?, JAKARTA POST, Feb. 10, 1996, at 5. Having traveled not infrequently between cities in Java this year, I share the widely held view that motor vehicle transport here is far more dangerous than it is in any of the 50 states I have visited in the United States. Nevertheless, a minuscule portion of Indonesian car drivers or passengers use seatbelts. A much higher percentage of Indonesians than Americans travel these dangerous highways on motorcycles, frequently at night, usually with one or more passengers, often without lights. On several occasions I have encountered workers who work with asbestos products or with pesticides. Not one has used any special protection, other than the gloves worn by the pesticide-sprayers. My limited experience suggests that Indonesian people are no less unhappy about being seriously injured—or about having death or serious injury befall their loved ones—than are American people.


38. I confess to being somewhat uncertain here about how the consumer sovereignty norm would play out with respect to persons at risk as bystanders—persons who neither buy nor use a product, but are nonetheless at risk when it is used. While I expect that autonomy scholars would subsume the wishes of this group in the broader consumer consensus about what they want from products generally in the way of risk allocation, the application of autonomy principles to rules governing the rights of bystanders seems less clearly appropriate than their application to determine the liability rights of consumers and users.
omy/consumer sovereignty in this regard can also be served by legal rules which reflect how consumers would want a product maker to interact with persons who were injured by the company's product. We are not just our consumption patterns. In addition to being people who want and demand value for your money, you are generous, compassionate people. You will, I expect, grow up to be people who vote for public officials whose policies will take your money, by taxes, and return it not to you but to those less fortunate than you. Products liability law should honor your choices in life by reflecting those parts of you as well.

In the end, I will not ignore in this article your legitimate concern with autonomy: the ability and means to design and follow your own life plan. Ultimately, my proposal regarding generic liability will provide you—and others—a safety valve for escaping a loving parent's preferences for the law's allocation of generic product risk. Nevertheless, the autonomy you will start with in the law vis-a-vis product risks will be that which comprises the choices a loving parent would make to maximize his/her children's chances for having the ability and means to design and follow their own life plans.

C. Wealth: Security and Opportunity

I also want you to have wealth, but only secondarily. I recognize that while wealth may not be a precondition to formulating a life plan, some measure of it is usually required for you to be able to follow such a plan. I want you to have as good a chance as you can get to avail yourselves of what is important to you in life. That means—to

39. This truncated description of autonomy is borrowed from David Owen's much richer description in David G. Owen, The Moral Foundations of Products Liability Law: Toward First Principles, 68 NOTRE DAME L. REV. 427, 438 (1993). Professor Owen seems to contradict my grant of highest priority to my children's safety interests. He says, for example, that "the first and most important function of the law is to protect and promote freedom or autonomy." Id. at 439. He later speaks skeptically of "the common assertion that safety interests of potential victims are inherently of a higher order than the interests of actors in 'mere' money and convenience," id. at 469, and approvingly of the "choice-harm principle" which says that society should give no initial preference to security over action. See id. at 444. It must be remembered that Professor Owen's writing focuses on the creation of a system of social justice, while my focus in this Section is on defining what people who buy products really want from the law. Moreover, because I see freedom from serious injury or death as a prerequisite to exercise of the sort of life-planning and goal-achieving which Professor Owen describes as autonomy, perhaps we do not disagree so much. John Attanasio, who has written thoughtfully about the importance of autonomy, seems to share that view. See John B. Attanasio, The Principle of Aggregate Autonomy and the Calabresian Approach to Products Liability, 74 VA. L. REV. 677 (1988).

40. I will propose that distributors of generically liable products be able to disclaim that liability in return for selling the product at a lower price, under certain conditions. See infra Part II.A.
some extent—your having optimal access to monetary wealth, which you can use in exchange for many of the things you will want. Perhaps more significantly, I want you to be protected from catastrophic assaults on your financial security. Like most people, I imagine, I see a descent into financial ruin as far more important than a ticket to travel up the financial ladder, even where each trip is financially equidistant from your starting point.  

I am not too concerned about this aspect of your lives in relation to tort rules, however. I simply do not think your particular level of wealth—at least insofar as tort law will affect it—will have much to do with the quality of your life, which is my real concern. I acknowledge that the product liability rules we choose will influence somewhat overall levels of financial well-being in America, Indonesia, or wherever such rules are imposed. The costs of paying claims and of reaching decisions about whether and how much to pay must be borne by product distributors. Depending on such things as the competitive market structure and the nature of the demand curve(s) with respect to a product found defective, some, much, or all of those costs will be added to the prices consumers pay for the product. Insofar as the legal rules increase the costs associated with deciding about and paying claims for compensation for injury, products will cost more. That will decrease people’s wealth, in that it will decrease the purchasing power of the money they have. Rules which decrease the costs associated with deciding about and paying such claims will increase societal wealth.

That having been said, I certainly would prefer a tort system which diminished as little as possible the wealth available to you and, perhaps more importantly, to our Indonesian friends who live much closer to survival standards than you are likely to live. Nevertheless, the extent to which the tort system at its clumsiest will diminish the wealth available to you seems small. Even in the heavily litigated

41. This may be thought to expose my lack of entrepreneurial spirit. I confess to having less of that than most entrepreneurs I know. However, it seems to me that entrepreneurs take chances of financial ruin either with the belief that the odds distinctly favor their success or with a sense that they have a financial safety net under them—if only in the generosity of family or friends—that will stop their tumble into financial ruin. I suspect few regard the prospect of a financial rise as just as appealing as a financial fall, of equal distance, into poverty.

42. Indonesia is a poor country. The average annual income per person was only $605 in 1993. See JAVA, GARDEN OF THE EAST 296 (Eric Oey ed., 2d ed., 1995). A Swiss friend here in Salatiga, who owns a fish-farming business, told us that he could not afford to establish such a business in the nearby Philippines because the cost of labor there was too high. Conversation with Rudi Lamprecht, in Salatiga (Dec. 31, 1995). Here in Indonesia, he said, a company needed to pay its unskilled workers the equivalent of $1.50 per day. See id.
medical practice field, doctors on average pay only a small portion of their total overhead for liability insurance. An increase of one or two dollars in the cost of a visit to the doctor would not be pleasant, but would hardly make for a significant shift in the quality of your life. Perhaps more to the point, if the stricter tort rules which cause product prices to rise also increase product safety, as recent research suggests they do, then overall social wealth might actually increase as fewer resources were wasted on the care of injured persons and as more persons were able to contribute their full productive resources to society.

Even if such clear differences as choices between no manufacturer liability and strict manufacturer liability were at stake—the kind of choice most likely to have an impact on wealth available in the society—I doubt that the quality of your life would be much affected. Wealth, it must be remembered, is just a surrogate for utility—happiness, quality of life. That is what I am really concerned about, for you and others. I don’t believe small variations in wealth will make any significant difference in the quality of your lives. Indeed, I am not even sure gross variations will make much of a difference. When one of the pan-Asian organizations surveyed citizen life satisfaction a few years ago, Indonesians ranked number one in Asia, even though they were poorer on average than most Asians. Japanese ranked lowest, even though they were the richest outside of the Middle East. Dis-

43. See Peter A. Bell, Legislative Intrusions into the Common Law of Medical Malpractice: Thoughts About the Deterrent Effect of Tort Liability, 35 SYRACUSE L. REV. 939 (1984). Having neither this article nor other empirical work available to me here in Indonesia, I have to rely on my possibly faulty memory, that other studies have also shown that liability insurance premiums—or self-insurance reserves—add at most a few percentage points to the costs of products and services. That is not true of all products: I have been told by an executive of a company that makes ladders that an extraordinarily high percentage of a ladder’s cost is attributable to liability costs. My concern, however, is for the overall diminution of my children’s and friends’ wealth due to varying liability rules.

Insofar as liability insurance premiums are used to actually pay compensation to injured persons, it is not appropriate to regard them as diminishing the overall wealth available to any of the rest of us. Moreover, even the most radical differences among liability rules would not approximate the difference between tort law and no tort law which most of the remainder of a liability insurance premium represents (other than the administrative costs equivalent to those which some other compensation system would entail).

Accordingly, it substantially overstates tort law’s overall wealth diminution potential to equate it to even the small diminution in wealth represented by the percentage of a product’s price due to its maker’s liability insurance costs.

44. See Gary T. Schwartz, Reality in Economic Analysis of Tort Law: Does Tort Law Really Deter?, 42 UCLA L. REV. 377 (1994) (comprehensive recent analysis of theoretical and empirical information about tort law’s impact on safety). For a fuller discussion of the safety effects which can be expected to flow from generic liability, see infra Part III.A.

45. See, e.g., Most Asian Poor Happy, ROCKY MOUNTAIN NEWS, May 27, 1993, at 42A; Joanna Pitman, Have a Nice Day—in Tokyo, TIMES (London), June 1, 1993. The investigation,
cussions here in Salatiga among expatriates from Australia, Europe, and North America have been nearly unanimous in the belief that Indonesians seem happier in general than do citizens of our (substantially wealthier) home countries. As a family, we have certainly made do with substantially less in the way of wealth-dependent amenities this year than we do in the United States, yet our levels of life satisfaction have been unusually high.

I say all this not to dismiss tort law’s effects on wealth: all of us would prefer legal rules which have more positive wealth effects, other things being equal. Rather, I say it to remind readers why these differing wealth effects need not be of great concern as we make choices among possible liability rules.

1. Financial Security

My concern is greater, however, when faced with the prospect that choosing one tort rule as opposed to another might leave you significantly less protected from the risk of financial ruin in the event you are seriously injured. Serious injury can disable you and cause you to run up mammoth medical expenses. A products liability lawsuit can gain you compensation for those injuries, such that you will end up financially better off than you were before the accident, even after you pay your attorney.46 This is often referred to as tort law’s “insurance” function.47 In the context of generic liability, the law is providing you insurance against the possibility that you will be injured by a product whose inherent risks outweigh its social utility.

You seem at risk in this regard. Significant numbers of Americans go without adequate health insurance for substantial periods of time in their lives. While you two—both healthy, intelligent, and achievement-oriented, as well as the children of upper-middle-class parents—have a better-than-average chance of having good long-term health insurance coverage, I cannot be confident that you will escape large uninsured medical bills. I am even less confident that you will

by Survey Research Hong Kong, found 94% of Indonesians described themselves as “happy.” while only 64% of Japanese did so. The research firm’s managing director quoted an old Chinese saying with the survey release: “You can be content even if you are poor, but if you are not content, you will be unhappy even if you gain riches.”

46. You could be financially better off after full tort compensation from an accident because a damage award would contain substantial sums attributable to your pain and suffering. Estimates are that nearly 50% of tort awards are attributable to noneconomic loss. See II AMERICAN LAW INSTITUTE, REPORTERS’ STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 201 (1991) [hereinafter, ALI REPORTERS’ STUDY].

have a form of disability insurance to replace your income if you are permanently disabled. Most people do not have such insurance against long-term wage loss.

Moreover, while I write particularly to you, to enhance my focus on reality and on what I really want from tort law, I must not thereby ignore the realities of most people’s lives where they may be less privileged than yours. Quite simply, serious injury or illness, without adequate health or disability insurance, is a horror which cannot be ignored. In Indonesia, the risks of uninsured serious injury are much higher. Indonesian society is far more dangerous—in both health and accident terms—than is American society. Few Indonesians seem to have health insurance. The social safety net has a lot more holes: there is no equivalent of even the Social Security Disability Insurance

48. I do not have access to comparative accident statistics from the two nations. Such statistics would not mean too much in any event, given the highly unreliable nature of many government-generated statistics here in Indonesia. However, I can assure the reader that it is the unanimous confident opinion of every person with whom I have spoken in Indonesia—both Indonesian and expatriate—who has significant experience in both countries that Indonesia is more dangerous, with respect to illness and injury, than is America. I will recounts some of the observations which lead me to believe that. First, in ordinary travels around Salatiga, a city comparable in size to that in which I live in the United States, I have seen far more near-miss traffic accidents than I would have seen in a comparable time period in Syracuse, my United States home. Second, even in the face of what everyone seems to agree is a pretty high risk of traffic accidents (blind passing, on the main two-lane roads, particularly by the multitudes of intercity buses, seems to be the norm), I have seen only one Indonesian citizen (a Cornell-educated Jakarta sophisticate who is married to an American) put on a seat belt while riding in a car this year. In most vehicles in which I have ridden seat belts have been removed or disabled. The rate at which men smoke here—and the incidence of public smoking—far exceeds that in the United States. Children regularly join their parents on the family motorbike/motorcycle, so that it is common to see three persons riding on a motorcycle and not unusual to see a family of four. Workers applying pesticides to crops in the spectacular terraced fields of the Dieng Plateau near here did so with no masks or protective clothing other than gloves, with chemicals dripping out of the tanks they wore on their backs and the hoses which enabled them to hand-spray the crops. Young men and boys regularly hang out the doors of the moving buses and small vans which provide public transportation throughout Central Java.

49. In one of my Corporate Law: Civil Liability classes at Satya Wacana University this semester, as I was discussing first- and third-party insurance, I asked the class of about 80 students how many of them had health or any other sort of insurance that would pay their medical bills if they were seriously ill or injured. Not one student raised his/her hand. In the face of my incredulity, no one would change her response. The young law faculty member who translates for me in that class then reported that neither he nor other members of the faculty had such insurance.

Admittedly, medical care in Indonesia is remarkably inexpensive. For example, my entire treatment for a partially torn achilles tendon, which included two casts and three visits to the doctor, cost less than $40. Nevertheless, medical care for serious injuries can be very expensive: extensive surgery on the leg of a Satya Wacana student who was injured by an out-of-control car at the same time that car struck one of my expatriate colleagues ran his immediate medical bills close to $800. The student had to depend on extensive fund-raising from a local church and from a society for students from his island in eastern Indonesia in order to defray the two-thirds of his bills that had been paid as of this writing, two months after the accident.

This anecdotal evidence received some support from a recent article in Indonesia’s national English-language daily newspaper, reporting that developing nations account for only five per-
that provides you two a modicum of protection in the event of serious long-term disability.\textsuperscript{50}

Ordinarily, therefore, I would want some protection against such possible financial ruin for you and others from tort law. While I am quite sanguine about the effects of minor wealth decreases on the quality of your lives, short or long periods in poverty would, I expect, make your lives fairly grim. Even the incomplete insurance which tort law affords—only against accidental injuries caused by another’s fault—would be welcome. Unfortunately, tort law’s insurance comes very dear. You would be paying a lot more for the same amount of health or disability insurance if you obtained it through the tort system than you would if you bought it elsewhere, through similar first-party coverage.\textsuperscript{51} So, were I to demand of the tort system that it insure you and others against medical costs and lost wages which might ruin you and others, I would be demanding a number of what seem to be silly things: (1) that you and others buy a good (health and disability insurance) that you all would not buy on your own accord; (2) that the good I require you to buy is useful in only a small percentage of the cases in which it is needed (those serious injuries caused by another’s provable fault); (3) that when you do buy the good, you have to buy it with expensive trappings (insurance against noneconomic harms) that even I don’t care that you have; and (4) that you have to buy the good at what is by far the most expensive store in town.\textsuperscript{52} On the other hand, to cast away the idea of getting even this limited, too-expensive insurance from tort law, consigns you and many Americans to a risk of impoverishment, and almost all Indonesians to financial ruin, if you or they happen to be one of the unlucky victims of serious injury from another’s tort.

In the end, as the above discussion suggests, I am equivocal about asking products liability law for insurance protection for you and

\textsuperscript{50} For a reminder of the inadequacies in even the more extensive public aid programs for persons without private health and disability protections injured accidentally in the United States, see Peter A. Bell & Jeffrey O’Connell, ACCIDENTAL JUSTICE: THE DILEMMAS OF TORT LAW, ch. 3 (Yale Univ. Press 1997).

\textsuperscript{51} Whereas first-party health insurance pays out to sick or injured persons about 85-90\% of what it takes in in premiums, liability insurance—the source of insurance payments obtained through the tort system—pays out to injured people more in the neighborhood of 50\% of what it takes in in premiums. See, e.g., George L. Priest, The Current Insurance Crisis and Modern Tort Law, 96 YALE L.J. 1521 (1987).

\textsuperscript{52} Not even to mention that by making you buy this good at the “tort store,” I require you to shop where the seller provides lower-income people than you with a much less useful good and higher-income people a much more useful good, yet charges all of you the same price.

\textsuperscript{51} See Disasters Get More Disastrous, JAKARTA POST, Apr. 1, 1996, at 5.
others. For you, I mostly don't want it: your chances of having adequate resources and caution to buy sufficient health insurance and poverty-denying disability insurance\(^5\) are pretty good. I want it lukewarmly for others, particularly our Indonesian friends, who are not likely to be so fortunate. Just as it will take some time for the "culture" here to adapt to wearing seatbelts, the prevalence of first-party insurance will arrive, I am confident, long after it has become something which "rational" consumers would want. Even for these others, I only want tort-provided insurance if the state cannot be convinced to provide more of a safety net to the sick and injured.\(^5\) The needs of people who I believe would be willing to pay for more health and disability insurance if they understood the economic risks and benefits better, combined with the knowledge that the high cost of tort-based insurance results somewhat from its provision of safety as well as insurance,\(^5\) move me to this point of equivocal reaching-out to tort's insurance function.

D. Justice

I am, if anything, even more equivocal about wanting much justice for you and others from the tort system. I say that not being at all equivocal about justice: I think legal rules must not be unjust.\(^5\) I think the tort system in America offers more in the way of justice than many legal institutions.\(^5\) I applaud and admire the efforts of many to examine the meaning of justice in the tort system and prescribe its

53. In other words, disability insurance something like I have through my work: enough to keep my head above the poverty waters in the event of long-term disability, but not much more. Private disability insurance supplements, which I investigated once, were quite expensive (suggesting, I expect, that my vision of my own chances of being disabled is woefully optimistic).


55. Because the tort system provides safety, through its deterrence of dangerous behavior, see infra Parts II.B, III.A, persons receive not just insurance, but also safety when they pay for its operations. Therefore, the much greater administrative costs which are taken out of the liability insurance premium dollar, in comparison to first-party premium insurance dollars, must be understood as a result of the former's provision of more than just insurance. In the same fashion, your Uncle Chris, who sells life insurance, among other things, would not automatically tell his clients to buy term life insurance rather than whole life insurance just because the former costs substantially less for the same amount of insurance protection. Whole life insurance provides something more than just insurance (it provides savings), just as tort-based insurance does.

56. I even feel strongly enough about the place of justice in the legal system that I joined six faculty colleagues at Syracuse to create and implement a mini-course on justice which we integrated into the first-year course of study on an experimental basis about four years ago.

57. See, e.g., Bell & O'Connell, supra note 50, ch. six.
implementation. I just don't know how important it is for you and others to get justice, per se, from the tort system.

As best as I can figure it out, justice has primarily psychic significance for us and others. While I do not belittle psychic satisfactions, those psychic benefits which we or others will receive from tort rules being more just rather than less just seem small. If just, legal rules—and thus the world as a whole—will make more sense to each of us. Those of us who work hard to follow Golden Rules of just behavior—among whom you are more likely than average to be numbered—will feel somewhat demoralized by a legal system that seems to reward the inconsiderate and careless as much as the considerate and careful. Those of us who feel strongly that humans should follow the paths laid out by a Divine Being may feel offended by tort laws which are not just and thus seem to reject God.

Nevertheless, the reactions I see around me to injustices far more profound and, often, more personal than any which will emanate from the tort system suggest to me that the psychic dissatisfaction produced in most of us by even substantial injustice in products liability rules will not be great. Indonesians live in a world far more obviously full of injustices than do Americans. Islam is a strong social force here.

58. For a thoughtful recent article examining justice in the products liability area, with copious citations to many who have devoted their thinking to justice issues in tort law, see Owen, supra note 39.

59. See, e.g., Bell, Bell Tolls, supra note 9. More than other torts scholars of whose work I am aware, I have focused on the extent to which people involved as parties to tort lawsuits are likely to obtain some kind of important personal satisfaction in the course of their litigation against an entity they think responsible for their serious personal injuries. See, e.g., BELL & O'CONNELL, supra note 50, ch. 7; Peter A. Bell, Tort Law's Neglected Meaning (1995) (unpublished manuscript, on file with author). Among the potentially personally significant aspects of a tort litigant's experiences, a tort lawsuit may: (1) allow a victim to assert power over her injurer by calling it into court, making it listen and respond to her, and making it explain its alleged wrongdoing; (2) allow the victim revenge, by making the injurer suffer publicly and pay; (3) allow the victim with the help of her lawyer to try to make sense of what has happened to her life; (4) allow the victim to tell her story of what has happened to her life, in an environment of formal respect and attention; and (5) allow the victim to take some positive steps in reaction to the serious damage to her life. See BELL & O'CONNELL, supra note 50; Bell, supra.

60. I am trying with this phrasing to include followers of most major religions. Situated as I am close to a strongly Christian enclave in a 90% Moslem country, I clearly mean to include Christians and Moslems.

61. Indonesia has been ranked by at least one survey of major countries as the most corrupt nation in the world. Cf., e.g., Importers Say Bribery Rampant at Tanjung Priok, JAKARTA POST, Apr. 19, 1996, at 1. In the form of the need to pay people in authority in a situation—especially government officials—some amount of extra money in order to obtain what one wants or avoid what one does not want, this corruption is widespread, so much so that it has become just another expected cost of getting things done, a part of the routine. Discrimination on the basis of religion, gender, and ethnic origin is much more open in Indonesia than in the United States. See, e.g., Arief Budiman, Indonesia and Malaysia Face Racism Allegations, JAKARTA POST, Apr. 19, 1996, at 1. While not all of what I understand to be injustices are so regarded by Indonesians,
Yet, for the most part, Indonesians do not display significant unhappiness about what they are perfectly willing to acknowledge are injustices. As best I can make out from daily newspaper reading and from conversations with Indonesians and long-resident expatriates, the Indonesians most likely to be motivated to some kind of verbal or physical action against injustices are those who are hurt materially by the injustice. Indonesians seem generally willing to accept systemic injustices so long as the public systems seem to enhance their material standard of living. For the most part, Americans seem to react similarly to injustice: they don’t like it, but most seem to accept injustice without major outrage unless it impacts fairly directly on them or on their group.62

With respect to the products liability rules with which this letter is concerned, I suspect that the degree of justice in them won’t have much significance even where they impact directly on us. If you girls are ever involved in a products liability lawsuit, the rules’ injustice probably will not bother you a whit unless you lose. Then, I imagine, the injustice of your treatment will seem like salt being rubbed in a wound. However, my experience with litigants who lose lawsuits is that they regularly feel their treatment by the legal system was unjust, even when just rules were being applied. In short, the degree of actual justice in the legal rules does not seem to be the key variable in the degree of unhappiness of those most affected by the rules.

Since the point of this discussion is to assess how important it will be for you to get justice from the tort system, let me offer one piece of personal testimony that probably also influences my conclusions. I grew up believing that the United States was basically a just society. I no longer believe that. That saddens me when I focus on it. Never-

62. I recognize these are pretty sweeping statements. While I could cite here many examples that would support my conclusions, I am sure others could cite examples that would dispute these conclusions. Having looked, with the help of research assistants for studies assessing the importance to people of certain kinds of treatment within the judicial system in conjunction with other work I have done, see supra note 59, and having found none, I feel that I must rely on my general impressions about the importance of justice in the abstract to people in the United States and Indonesia. I have tried to examine my own background for bias in this judgment. Since I and my American friends have been, in our work and volunteer activities, more involved than most people in advocacy for “rights” of disadvantaged groups to which we do not belong (we would be put in the “liberal do-gooder” group by most observers), it seems that my bias would be more in the direction of seeing massive outrage about injustice when that outrage was not present, rather than vice versa. In the end, I recognize that my reasoning in the text will not be convincing to those who do not share this general impression.

63. I recognize that many people would disagree with what I say here, if they were able to figure out what I meant. This statement is relevant to the discussion in this letter/article, how-
theless, I do not think that this belief has any significant impact on my overall level of psychic well being.

In light of the above thinking, I have to conclude ultimately that the amount of justice which tort rules furnish is not, in itself, particularly significant. You, I, and most others would clearly prefer just tort rules to unjust ones. Nonetheless, thinking about my tort preferences for you, I would not trade any decrease in safety for an increase in justice. I doubt if I would even relinquish any expected wealth increase or security in return for a justice increase.

E. At An Acceptable Cost

As with the pizza I spoke of at the outset of this Section, I want products liability law to deliver all these “goods” to you at an acceptable price. I want safety for you above all, but I am not willing to make you wear a protective helmet when you walk and ride to school each day: little extra safety; significant cost. While this concern can be absorbed into our desire for wealth opportunity, I thought it important to state it separately, as a constant check on our resort to products liability law for satisfaction of our wants with respect to the risks of injury from products.

Whether generic liability can provide what we want at an acceptable price will be the subject of the following sections.

II. The Beautiful Picture—At the Ball

So much for what I, you, and our Indonesian friends want from the law about accident risks and personal injuries. Now, we must bring those wants to bear on the issue that provoked this Symposium:

ever, not because of its rightness or wrongness as a matter of societal judgment, but because it reflects my understandings. Living in Indonesia this year, and having lived and worked in China in 1987-1988, I can certainly appreciate that the United States is a more just society in my eyes than many, if not most.

64. In my mind, the cost is not so much the purchase price of the helmet as it is the discomfort and humiliation attendant on wearing such a helmet around Salatiga and at the school. Given that one of you has already suffered a concussion at school this year, I am not entirely ignorant of the safety advantages of regular helmet usage. You girls reach school each day here by walking four blocks to a busy street, where you are picked up by a van and driven to school by the driver of your friends Jay Shvi and Jenani.

65. Please understand that the notion of an “acceptable price” expressed herein includes the idea that the price of what we get from the tort system should not be higher than the price of those goods elsewhere. I am willing to pay $12.95 for a large pizza with extra cheese, pepperoni, and peppers at the Pizza Hut in nearby Semarang. I am not aware of another source of pizza within two hours of our home. I am not willing to pay $12.95 at our home in Syracuse, N.Y., because I can get an equally good such pizza for $10.95 at Varsity Pizza.
Should a product's distributors be held liable where the risks of their product outweigh its benefits, absent some reasonable alternative design?

As long as I am writing to you, I would like to play a little with that question in a context familiar to you and other readers: the story of Cinderella. Some of the appeal of that story for us has lain in the transformation of the outer trappings of Cinderella—a downtrodden young woman—in such brilliant ways that it allowed all around her, including the Prince, to perceive how beautiful she was. Products liability law certainly seems downtrodden at the moment. It is assailed by critics both within and without academia and has been the subject of widespread state and federal legislation to curtail its reaches. Generic liability is so completely downtrodden that it seems to be visible only in an occasional, quickly suppressed court decision or in academic circles such as these. In this Section, we will look at what could be the beauties of this much-maligned legal doctrine—something as the Prince looked at Cinderella at the Ball. This will help us understand better whether the search with the glass slipper—representing what I want for you and others from products liability law—is worth undertaking in the face of claims that generic liability is more akin to an Ugly Stepsister than to a downtrodden beauty.

A. Your Carriage and Six White Horses

I told you in the introductory part of this letter that I think court-imposed generic liability is the best vehicle for getting you what I want for you from the law. Since, however, I get to play the fairy godmother role in the fable part of this letter, I will tinker somewhat with the standard-issue coach, six white horses, and Cinderella. The ge-

66. In using the term “product distributors” in this letter/article, I mean to refer primarily to product manufacturers and secondarily to those who are responsible for a product's progress through the chain of distribution from manufacture/assembly to users and consumers. I do not wish to express any opinion in this article on questions about who, in addition to the product maker, appropriately should be held liable for injuries caused by product defects.
68. See Restatement (Third) of Torts: Products Liability § 2 cmt. c, Reporters’ Note at 94-97 (Tentative Draft No. 2, 1995); Bogus, supra note 3; Henderson & Twerski, supra note 3, at 1314-28.
69. In referring to the “standard-issue” six white horses, I refer to the number and kind of horses which the fairy godmother created from mice to take Cinderella to the Royal Ball in the classic Cinderella story. Somehow, the idea has taken root in my mind that the coach was pulled by six white horses. Having been unable to locate a copy of Cinderella here in Salatiga, I cannot
eneric liability which I think can approach the positive status of Cinder-
ella has some slight variations from that which has been adopted or
proposed in the past. Generic (product-category) liability in general
will be imposed by a court when it concludes that the social risks of a
product outweigh its social utility. I would vary this formulation
marginally.

1. The Special Court

My version of generic liability law would first require a federal
law to be enacted which would establish a special judicial mechanism
for handling generic liability claims. That law should require that
claims of generic liability be decided only by a federal three-judge
court, to which the claim would be removed when a plaintiff in a
products liability lawsuit raises it in either state or federal court. The
three judges could be selected by the Judicial Panel on Multidistrict
Litigation, much the way single judges are now selected to oversee
consolidated multidistrict litigation. All cases involving claims of ge-
neric liability against the same product category—such as cigarettes or
ice cream—would be consolidated before this court. The three-judge
panel would decide solely the issue of generic liability—the product’s
inherent risks compared to its utility. The decision on that issue with
respect to that category of product would be binding on all federal
and state courts, unless overturned by the Supreme Court. The court
of origin would decide other liability issues, which might arise in the

confirm my recollection. Having asked several expatriate families here what they remembered
on this point, and having received several different answers—also without available authority—I
have proceeded to use my recollection. Since the precise number of horses matters not at all to
the points I make about generic liability, please attribute any error in this regard to my desire to
err on the side of the colorful in the stories I tell my children.

70. In this proposal, the judges would sit without a jury and act as the triers of fact. I do not
make this suggestion because I think poorly of juries as decisionmakers. In fact, I find convinc-
ing the evidence marshalled in support of the conclusion that juries generally do as good a job of
decisionmaking as any institutional decisionmaker, including a judge. See, e.g., Michael J. Saks,
*Do We Really Know Anything About the Behavior of the Tort Litigation System — and Why
Not?*, 140 U. PA. L. REV. 1147 (1992). One reason I choose to have a three-judge court make
the decisions about the central risk-utility issue is to garner the advantages of group decision-
making that are one of the jury’s strengths.

Ultimately, despite my confidence in jury decisionmaking, I have chosen not to include it in
this proposal because: (1) it will make the proposal more politically palatable, given that many
who dislike the tort system find it most worrisome when juries are involved; (2) the public and
the legislature, conditioned by years of influential attacks on jury decisionmaking to be skeptical
about aberrance from juries, are more likely to give credence to a decision by a carefully selected
group of federal judges that a product is so dangerous that its risks outweigh its social utility.
Accordingly, the carefully considered decisions by the special court are more likely to remain
undisturbed and be accepted; and (3) unlike the three-judge court, a jury cannot be reconvened
to decide either the same question again, if necessitated by the existence of different litigants, or
to weigh the significance of new scientific evidence.
case, but would have no jurisdiction to decide the issue of generic liability.\footnote{71}

With respect to the litigation itself, the new law would encourage the three-judge court to allow intervention where the court thought it helpful to assure a full and fair presentation of evidence and argument concerning the relative risks and utility of the product in question. The three judges would be given the same authority to determine the adequacy of lead counsel for both the plaintiff(s) and the defendant(s) that Federal Rule of Civil Procedure 23(a) provides for class actions. The court would be encouraged to appoint its own experts pursuant to Federal Rule of Evidence 406 in order to optimize the quality of evidence and analysis of evidence presented to it. There would be no jury. Appeal from the court’s decision on the generic liability issue would lie directly to the United States Supreme Court, with that Court free to hear or not hear the case at its discretion. In the absence of substantial new evidence, the three-judge court’s decision concerning the product’s risk-utility balance would preclude relitigation of that issue in subsequent lawsuits concerning the product.\footnote{72}

This proposal aims to remedy concerns that makers of dangerous products will face a multitude of generic liability lawsuits, that they will face inconsistent liability judgments, and that their products will be misjudged by wild-eyed decisionmakers. The special generic liability court procedure recommended herein should ensure that the generic liability issue—whether a product’s inherent risks outweigh its utility—will be decided in one judicial proceeding, at one time, for the

\footnote{71. As a matter of judicial economy, the three-judge panel could, in its discretion, also decide issues related to a defendant’s generic liability in the case at hand, such as causation, defense, and damages issues. The court should have complete discretion in this regard to avoid having peripheral issues interfere with its primary job of determining whether the product’s inherent risks outweigh its inherent utility. With respect to such peripheral issues which would cause the plaintiff to fail on her claim regardless of her success on the generic liability issue, the three-judge panel would proceed to hear evidence and rule on the generic liability issue so long as it was satisfied that the plaintiff or intervenors on the plaintiff’s side did (or were likely to) fully and fairly present evidence from the injured person’s perspective concerning the relative risks and utility.

72. To further assure the conclusive nature of the three-judge court’s risk-utility balancing determination, and to prevent regular court battles over what constituted “substantial new evidence,” the new law might place a complete bar on relitigation of the central generic liability issue for two or more years. Insofar as this preclusion or that referred to in the text were barred by constitutional due process requirements (I neither remember nor have the ability to investigate from Indonesia the precise parameters of the Due Process Clause with respect to issue preclusion), similar preclusive power could effectively be given the three-judge panel’s findings by requiring that any subsequent case raising the issue of the generic liability of that product be referred to that same three-judge panel for resolution. Plaintiffs and defendants would rather quickly learn it was not wise to relitigate the issue.}
foreseeable future. While that would assuredly be expensive litigation, it would neither recur nor would it permit inconsistent verdicts.

The special generic liability court procedure would also minimize the chance that an erratic—and wrong—decision would be made about a product's risk-utility balance. Liberal intervention rules and the "final" nature of the court proceedings should assure that evidence about risks and utility will be presented fully and well by the parties. The requirement that there be three judges on the deciding court markedly reduces the chances that the risk versus utility decisionmaker will have reactions to the evidence outside the normal range. The decisionmakers will be federal judges, each of whom has gone through a reasonably rigorous examination when nominated which should reduce the chances that s/he is aberrant in any significant way. Moreover, the Judicial Panel on Multidistrict Litigation will be choosing the judges to staff the decisionmaking panel, thereby minimizing the chances that any of the judges on the panel will have displayed bizarre decisionmaking patterns. Finally, the requirement that the decisionmaking court consist of three judges brings with it the moderating effects of group decisionmaking, which even further reduces the chances of an "outlier" decision. Review by the United States Supreme Court further reduces the now-very-tiny chances of an obviously wrong decision. While that Court will not hear most appeals made to it, the widespread implications of most generic liability decisions, when combined with the relative rarity of such decisions, may make such review a significantly greater likelihood than that of most kinds of cases, if the Supreme Court feels that some clear wrong has been committed by the three-judge court. The expedited appeals process should reduce substantially traditionally high tort transaction costs.

2. The Disclaimer Defense

A second variation, with respect to a claim of generic liability, would make available to the product's producer and distributor(s) the limited defense of plaintiff's express disclaimer of defendant's respon-

73. The generic liability determination could be reopened only upon the determination by a court that substantial new evidence relevant to the product had been discovered.

74. I intend to use the term "outlier" here to describe a decision which would lie outside the normal distribution of decisions by rational decisionmakers in response to a certain body of evidence. That is how I understand statisticians to use the term.
sibility for the product’s inherently dangerous characteristics. This would exist in addition to other defenses commonly available to tort defendants, such as statutes of limitations and immunities. The limited disclaimer defense would be available only in circumstances where the plaintiff: (1) was the purchaser or an explicitly foreseen user of the product; (2) had signed a clearly written waiver of tort rights in the presence of, and after risk counselling by a consumer counsellor employed by a state’s consumer protection agency, after all material risks generic to that kind of product had been explained to the purchaser/user by both the written document and the counsellor, and after the amount(s) of the price reduction(s) for the product with the waiver(s) by the purchaser and expected users had been set; and (3) had reached the age at which automobile liability insurance companies first reduce substantially the premium for young male drivers. A central clearinghouse would be established for the maintenance of these written waivers. For products that consumers typically buy many times, such as cigarettes or ice cream, purchasers who had executed a liability waiver with respect to that kind of product would be issued a “(Kind of product) Waiver Card.” They would have to show

75. This would be in addition to traditional defenses of comparative fault usually available to defendants in design defect cases. See Restatement (Third) of Torts: Products Liability § 12, Reporters’ Note at 304-06 (Tentative Draft No. 2, 1995).

76. The state consumer protection agency would be authorized by the law to charge product manufacturers for the counselling services required for these waivers. The law would authorize a national public agency, such as the Consumer Product Safety Commission, to set standards which would govern how such charges were set. Those standards would be governed by the principle that product makers should bear the reasonable costs of providing such waiver counselling, in fair proportion to the share of the counselling that is directed to waivers of liability with respect to their products.

The consumer counsellors would provide counselling designed to repair as fully as possible the information and risk appreciation shortcomings which their counsees bring to the disclaimer process, of the sort identified in Section III.B., infra. Since such counselling would go on all across the United States, repeatedly, for a limited range of products, there will be ample opportunity and incentive for the development of first-rate counselling aids and techniques about the products.

77. The “material risks” would be those risks generic to the product which an ordinary purchaser or user would want to know about in deciding whether to buy or use the product. Cf. Canterbury v. Spence, 464 F.2d 772, 786-87 (D.C. Cir. 1972) (setting a similar patient-oriented standard with respect to health care providers’ ability to obtain “informed consent” to the provision of medical services or products); Scott v. Bradford, 606 P.2d 554, 558 (Okla. 1979). Of course, the express waiver of tort liability would apply only to those dangers about which the plaintiff had been informed.

78. My recollection is that this is around 25 or 26 years of age. I choose this as the standard to determine an age before which waivers cannot be executed because it represents a judgment by experts as to an age at which a substantial portion of the population has become more safe in their behavior than in their teenage years when a large percentage of the population is notoriously well below average in its ability either to appreciate dangers or to act to avoid those dangers.
this card to a retailer in order to obtain the reduced "waiver" price for a product.\textsuperscript{79}

This variation on traditional products liability doctrine\textsuperscript{80} is a safety valve, a market-based check on legal and academic (my) error. It is a bow in the direction of your (and others') autonomy, in case you feel strongly\textsuperscript{81} that the increased costs associated with a product's generic tort liability are not worth the increased safety, wealth, and justice that such liability is likely to provide.

Just as I want to maximize the chances that the basic generic liability decision will be made correctly—by having a special tribunal decide if the product's risks outweigh its social benefits—I also want to maximize the chances that your personal risk-utility balancing will be made correctly as you decide whether to forego tort protection when you buy a product. Accordingly, I have required the disclaimer procedure to have an extensive, individualized risk-counselling component. This counselling should minimize the chances that when you or others execute a waiver you will do so on the basis of a misunderstanding of the relative risks or benefits or of the applicability of those risks and benefits to your life. The individualization and the requirement that the counsellor be a government employee should reduce the chances that companies will unduly influence people to waive their tort rights by mass information and persuasion strategies.\textsuperscript{82} These counsellors will develop an expertise with respect to communication about product risks to a variety of individuals which, over time, can be expected to lead to optimal consumer understandings. The requirement that

\begin{itemize}
  \item \textsuperscript{79} For such repeatedly purchased products, manufacturers and other distributors would clearly need to create a system whereby the different product prices paid to the retailer by consumers who had waived their generic liability rights and by those who had not waived their rights would be accounted for in the differing amounts paid by the retailer to the manufacturer or other distributor. While this might be complicated, it hardly seems beyond the capabilities of a product distribution system which already copes smoothly with such complications as coupons and recycling.
  \item \textsuperscript{80} Courts generally will not allow disclaimers to bar persons from maintaining personal injury actions against the distributors of products which have injured them. \textit{See Restatement (Third) of Torts: Products Liability} Reporters' Note at 312 (Tentative Draft No. 2, 1995).
  \item \textsuperscript{81} Rather than just "grumbly." \textit{See supra} text accompanying note 33.
  \item \textsuperscript{82} There remains, nonetheless, a serious danger that the careful, informed consumer choice implicit in the disclaimer system that I propose herein will be disrupted by strong product distributor efforts to convince masses of consumers to waive their product liability rights. I understand that large numbers of smokers, ice cream eaters, handgun buyers, and the like, could end up traipsing into the consumer counsellor's office so primed by manufacturer information to execute the disclaimer that they would neither listen to nor hear what the counsellor had to say to them. If that scenario developed, I would recommend either the promulgation of rules requiring a balance of information presentation concerning the merits of consumers' waiver of their tort rights (if that could be done consistent with the First Amendment), or withdrawal of the option I propose here allowing the manufacturers to disclaim liability.
\end{itemize}
you or others be at least the age at which automobile liability insurance rates first go down significantly for young men is designed to have you make the choice at a point when people generally begin to better appreciate the meaning of risk information in their lives.  

Moreover, disclaimers make sense in connection with generic liability where they might not with respect to other branches of products liability. Because the material risks associated with a product will be identified clearly in the litigation which originally establishes a product's generic liability, those risks can be easily identified and communicated to consumers for the whole product category. Being told at the time of waiver exactly what their price advantage will be (e.g., "$1.00 less per pack"), consumers should be able to assess the costs and benefits to them of tort protection with much more precision than with respect to other product disclaimers. Product distributors, who will obtain in one transaction a waiver for all of their products in a particular category that they sell for years to come to a consumer, will find it worth their while to pay for the complex disclaimer process outlined herein. Consumers, who will obtain significantly reduced prices for a product each time they buy it for years to come, will find it worth their while to devote the time, expense, and energy necessary to undergo the process, perhaps with respect to several product categories in the course of one visit to a consumer counsellor.

83. I set the minimum disclaimer age at that at which automobile liability rates are first lowered significantly for young male drivers because that age seems a good surrogate for a time of life at which people begin to have a better ability to avoid dangers, whether that happens because of an enhanced appreciation of risks or because of an increased ability to control one's impulses. The existence of either such reason would suggest that the consumer is better able to work with risk information. At such an age, and following such an individualized counselling process, consumers are significantly more likely than they otherwise would be to understand and appreciate the risks for them and those close to them associated with a product's purchase. They also are better able to understand the real meaning to their lives of the lower product prices which will result from their execution of the disclaimer. The failure to understand and appreciate the meanings of risks has been identified as a common obstacle to "real" meetings of the mind in disclaimers or other risk-related transactions. See, e.g., Latin, supra note 37, at 1208, 1225-41, 1243, 1245.

Setting the age minimum at that where auto insurance premiums for young men first goes down makes many people, especially young women, wait longer to acquire disclaimer capability than it takes them to reach the degree of risk appreciation possessed by the average 25- or 26-year-old male driver. Since the disclaimer permits individuals to vary the legal rule that seems best overall for society, making some people wait a year or two longer than necessary before they are allowed to take on what society thinks are unwise risks does not seem a particularly harsh restriction on their autonomy.

84. Since generic liability will probably apply only to unusually dangerous products, which will cause quite a few injuries, it can be expected to add a considerable amount to the cost of producing and selling those products. Where that liability is waived by a consumer, the product manufacturer should be able to pass on a substantial portion of its cost savings in the form of a price reduction.
B. The Ball (and Life Happily Ever After)

With the contours of this magically imagined generic liability in mind, we can proceed to the Ball, where we can try to see just how dazzling this creature can be. We need to take an initial look at her, in light of what we want in a law, to see if she might be so attractive as to have real potential for life happily ever after.

At first glance, generic liability looks like a real Cinderella. It looks as though it will provide a healthy increase in the safety with which I am most concerned, and will be just. Moreover, it will not interfere substantially with my desire for autonomy and my more lukewarm desire to maximize wealth protection and opportunity for you.

The most attractive aspect of generic liability is the safety it promises you. Generic liability should be a powerful force in the reduction of risks from some of the most dangerous products around. It will do so in several ways. It will cause such increases in the price of a dangerous product that the product's sales will be dramatically reduced or completely curtailed. Also, by these price increases, generic liability will create strong market demand for safer substitute products, thereby stimulating their development, sale, and use. Imposition of generic liability should also result in greater information about the product's dangers being made available to the public, who can take steps to reduce their exposure to such risks.

When the world of generic liability operates well, all of us will be substantially safer. When a claim that a product distributor should be liable because of the dangers inherent in the nature of its product arises it will be referred immediately to the generic liability court. Capable lawyers for all the parties will do a good job of presenting the most salient evidence concerning the dangers of the product and its social value.\(^{85}\) Capable experts—including neutral court-appointed experts—will assist the judges to understand the significance of that evidence in the context of the risk-utility balancing the judges must

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\(^{85}\) The high stakes of the litigation and its all-or-nothing quality with respect to the imposition of generic liability should assure that the product distributor(s) mounts the best possible defense. The quality of plaintiff representation is always a more questionable proposition in this kind of “mass” tort case. See, e.g., Peter H. Schuck, Agent Orange on Trial: Mass Toxic Disasters in the Courts 37-53, 73-76, 120-21 (1987). Nonetheless, the potential for substantial contingency fees in this and future cases involving the challenged product, the liberal intervention rules, the consolidation of all tort cases involving the product before the special court, and the requirement that the special court make an independent determination of the adequacy of lead plaintiffs' counsel all increase the chances that the lawyering work on the victim/potential victim side will be as capable as can be hoped for in this or any other forum.
Capable questioning, by opposing lawyers and by the court, will uncover the real value of the evidence proffered by the parties. The three-judge court will examine impartially all the evidence about a product—say handguns, cigarettes, or ice cream—will deliberate carefully and reach a clearly explained conclusion concerning whether the risks of harm to people (and/or property) from the product outweigh its social utility. Even if the court concludes that the product is a net detriment to society it will not ban the product from continued sale or use. Rather, a product distributor held liable in tort for these harms will end up paying large sums of money in damages, since, for the most part, products subject to generic liability are those the use of which causes many injuries or illnesses.69

86. Expert evidence can be expected to include presentations by experts in the structures of the markets for the product being attacked who would be able to testify concerning the expected behavior of the product's consumers and users if the product is judged generically liable. Therefore, the special court would be able to consider in its weighing process the risks that accompany the substitute products and behaviors to which consumers and users would turn in the event the challenged product were forced off the market or its price dramatically increased by the imposition of generic liability.

87. I choose handguns and cigarettes as examples because they seem to be the primary targets of advocates of generic liability and are also used by opponents of the doctrine to illustrate its flaws. See, e.g., Bogus, supra note 3, at 46-64; Henderson & Twerski, supra note 3, at 1305-08. I thought it would be most helpful to readers to discuss the doctrine in the context of situations in which it realistically might arise. As mentioned in the introduction to this article/letter, I discuss ice cream to keep readers and myself honest in dealing with generic liability doctrine, lest personal antipathy to the products which are some of its main targets lead us to gloss over the real difficulties inherent in the doctrine.

88. I use this cautionary phrase because the authors of the draft Restatement refer in an example that seems the same as the generic liability they reject in their textual comments to an injury caused by an exploding cigar at a birthday party. Restatement (Third) of Torts: Product Liability 23, illus. 5 (Tentative Draft No. 2, 1995). The illustration emphasizes the extremely low utility of the product in concluding that it would expose the manufacturer to liability even if those risks of injury were inherent in the product. While the illustration says that the risks of injury are high, it is unclear to me that exploding cigars begin to approach in their dangerousness the products usually mentioned in connection with generic liability, such as cigarettes, handguns, alcohol, above-ground swimming pools, and asbestos. See Bogus, supra note 3, at 37-64.

89. For an assessment of the massive numbers of injuries and illness associated with asbestos, tobacco, and handguns, three of the prime candidates for generic liability, see Bogus, supra note 3, at 38-63.

Product distributors will pay out substantial sums in damages for such harms, even if it were to be assumed that the product's victims regularly settled their claims for amounts less than their full damages. Once generic liability was established for a product, the only substantial issues that would remain in most tort suits against its maker would be causation and damages. While these might be substantial issues, particularly in the case of claims against cigarette makers, plaintiffs clearly would have a better chance of winning such suits than they do most current products liability lawsuits. Their improved chances of success could reasonably be expected to result in a higher percentage of claimants among persons injured by generically liable products than exists among persons injured by products liability now. Likewise, plaintiffs suing makers of generically liable products will probably settle for a higher percentage of their actual damages than do most products liability plaintiffs now.
Facing a final judicial ruling that its product is generically liable, a product distributor seems most likely to respond one of two ways. Each way would contribute substantially to the prospects for safety for you girls and others. First, the distributor may simply stop making and selling the product. Second, the distributor may raise the price of the product substantially, to a point where its income from sales of the product will increase sufficiently to make up for the massive financial outflow attributable to tort damage claims. At the same time, the distributor and potential competitors will begin to search for safer products that the public might largely accept as substitutes for the now-expensive generically liable product.

By definition, safety, at an acceptable cost, will be served if the product is taken off the market. Having considered all relevant evidence that the most interested persons could offer, an impartial tribunal will have determined that the product cost society—including you and all our friends—more in harm to persons and property than it gave society in any kind of benefits. Chances are that the court will have reached that decision without valuing your lives and well-being as highly as would a loving parent. The product's disappearance means you will be safer, to an extent well justified by the relatively smaller loss in the product's social benefits.

So, too, safety will be served if the product remains on the market, but at the much higher price which reflects to a considerable extent its injury/illness costs. If there is any elasticity in the demand for

90. In fact, prices of generically liable products can be expected to rise by more than the amount which the maker spends on defending against and paying for damage claims. As the product price goes up, there will be some decline in its sales. Depending on the product distributor's fixed costs, the product price on the units that continue to be sold will need to rise to make up for lost profits from those lost sales if the distributor is to be able to maintain the rate of return it considers necessary or desirable on its investment.

91. Public bodies, which would include the special generic liability court, are notoriously likely to use methods for valuing people's lives which undervalue those lives compared to the values a loving parent would give them. For example, public agencies have tended to evaluate lives using "willingness to pay" ("WTP") methodology. The evaluator, for example, tries to extrapolate from the increase in wages paid in particularly dangerous occupations and the increase in risk of death in those occupations how much a worker really values his/her life. See, e.g., PERCIVAL, supra note 34, at 528-29. Were public bodies even to use a "willingness to accept" ("WTA") methodology, their estimates of the value of human life would generally be higher. See id. at 534-35. I certainly do not here want to jump into the middle of a highly technical debate about which is the best methodology for a public body, such as the special court, to use in evaluating human life and health. Nowhere have I seen methodologies suggested that take into account the kinds of expenditures—of time, psychological concern, effort, and money—which parents incur in the cause of keeping their children safe. Accordingly, if there is any bias built in to the risk-utility balancing done by the special court, it seems to me that it is a bias against safety, in that the court is likely to undervalue the risks to human life and health, in comparison to the value that I would put on those risks from the loving parent perspective.
the product whatsoever—and it would be rare if there were not—fewer people will buy or use the product after a finding of generic liability than did before the court ruling. Insofar as the product might injure you as a bystander—as might cigarettes (secondhand smoke) and handguns—that decreased use by others will make you safer at virtually no cost to yourself. Insofar as you buy the product, you will probably buy less of it, thereby making you safer.

Generic liability will also promote safety by increasing your and the public’s information about product safety. The trial and verdict in a generic liability case seem likely to generate considerable publicity in whatever country they occur. Many product users and consumers are likely to learn about the product’s dangers from this media coverage. In addition, the sharply increased prices for the product will also help to signal consumers and users about its dangers. This information is important: consumers and users are often aware of the utility of a product to them, yet quite unaware of its dangers. For example, we have four modes of public transport available to us for getting around Salatiga this year: intercity buses, angkotas (small vans, running fixed routes within the city), becaks (bicycle rickshaws), and dokars (horse-pulled carriages). We have chosen which to use at which times largely on the basis of convenience, speed, and price. We have heard, by word of mouth during the course of the year, that some becaks have tipped over while carrying large foreigners. Similarly, one of my Indonesian law faculty colleagues cautioned me about having you girls travel to and from school by dokar, because they have been involved in accidents not infrequently. In both instances, this information has altered our use of the vehicle. Had fares for any of these forms of transport risen suddenly—as would have been the case had any of them been held generically liable—we would have inquired as to why. Upon finding that the price rise was linked to the product’s dangerousness, we would have terminated or sharply curtailed our use of that mode of transport.

92. The centralized decisionmaking function performed by the special three-judge court fits nicely into media needs: an event easily noticed, because the case(s) will be assigned to the special court well in advance of trial, and easily covered, because the events happen in one place on a regular schedule. Given this fit, and the threat the lawsuit poses to a widely used product, considerable media coverage of the generic liability case can be expected.

93. At 6'5" and 190 pounds, I am a giant by Javanese standards. Even your mom, only slightly taller than average by American standards, dwarfs her Javanese counterparts. Until we heard the stories told by a heavyset American woman who has lived in Salatiga for three years, we had no idea there was a risk that becaks could tip over. We had never seen that happen, nor had we experienced any tippiness during our rides.
Generic liability should lead to increased safety information becoming available to product makers as well, at a particularly crucial time. Knowing that they may be liable if they manufacture a product the dangers of which are particularly serious—even if there is no reasonable alternative design—manufacturers will have an incentive to look for possible dangers quite early in the process of developing a new technology or product.\(^\text{94}\) Initial research and development processes are often biased against careful attention to dangerous side effects because innovators' financial and personal incentives lead them to focus on product efficacy. Yet, because the nature of the products available on the market depends considerably on the early paths that have been taken in technology research and development, safety may be most enhanced if innovators can be moved to look hard for possible dangers as well.\(^\text{95}\) The threat that a manufacturer will be held liable for its product's dangers, regardless of its uniqueness, could well enhance that attention to such dangers at the early research and development stages.

In a related, but less direct fashion, generic liability should also contribute to a greater sense of responsibility for safety on the part of producers. As that sense develops, as more of an ethic of responsibility for the untoward consequences of product manufacture grows within the producing community, we should find more care to avoid people's injuries being taken at all phases of the product development and manufacturing process. I have become more sensitive to the importance of the development of this ethic of responsibility during this year in Indonesia because so much of the commentary on serious accidents which have occurred here stressed the need for Indonesians to develop a greater sense of responsibility for the harms done to others.\(^\text{96}\) I am less sure how much such development is possible

\(^94\) See Mary L. Lyndon, *Tort Law and Technology*, 12 *Yale J. on Reg.* 137, 149 (1995) ("Without some signal from the law that research on side effects has value, incentives to incorporate safety research are limited, and research on latent or uncertain effects will either be overlooked or postponed.").

\(^95\) See id. at 148-53.

\(^96\) See, e.g., Zatni Arbi, *supra* note 36, at 5 (noting that when some kind of disaster occurs, there is a rush to blame others or nature, the author concludes: "We are not accustomed to taking full responsibility for our mistakes, or preventing them in the first place. ... Should we rush ahead and operate a nuclear power plant in our primitive culture? Perhaps not now. Perhaps later, when we have developed a culture of safety."); Editorial, *The Art of Confusion*, *Jakarta Post*, Apr. 8, 1996, at 4 ("The sense of responsibility for wrongdoings is said to be a rarity in this country."); Editorial, *Fires and Supervision*, *Jakarta Post*, Apr. 13, 1996, at 4 (in speaking about fires in public places and the lack of cities' enforcement of their fire codes, the newspaper concluded: "The lack of responsibility stems from a lack of supervision and the indifference of fire victims and their families, usually poor people, who see any accident as the hand of fate."); Editorial, *A Matter of Responsibility*, *Jakarta Post*, Feb. 5, 1996, at 4 ("It is sad, but
through tort law in the United States. The United States already has a strong system of accountability for negligence. Nonetheless, it is a country in which the most famous “tort story” of the past three years remains that of the woman injured by spilling hot coffee on her lap who sued McDonald’s—and won! Where a company that had previously been notified of hundreds of incidents in which customers had been scalded by spills of its unusually hot coffee can convince the American public that it was a travesty of justice that it should be stuck with any responsibility for an elderly woman’s severe injuries there seems room for improvement in the ethic of responsibility held by American product distributors as well. Generic liability will make a strong statement that producers who market especially dangerous goods will have to bear their share of responsibility for the injuries which result, even if we as a society are willing to tolerate the presence of those products on the market. It is certainly possible that this statement of legal responsibility will filter into the thinking of the public and of corporate managers. Insofar as it does, there is likely to be a ripple effect enhancing safety at all stages of the product development and manufacturing process.

Finally, generic liability may increase safety by creating a market for safer products that can substitute for—provide nearly the same kinds and amounts of utility as—the product found generically liable. Once the price of a product such as handguns, cigarettes, or ice cream goes through the ceiling, the discovery, development, and marketing of safer substitute products becomes much more feasible. The safer product can suddenly be sold at a much higher price and still be powerfully price-competitive with the now higher-priced generically liable product. Knowing this, product makers will be more willing to spend the substantial amounts necessary to develop, produce, and market new products which might satisfy the desires which underlay purchase of the more dangerous products. This is obvious with respect to ice cream: some products which don’t contain its most dangerous characteristics have already been developed. Similarly, if assured they could market their product at a high price, product makers might develop a small weapon that thoroughly stunned its victims but did not do them permanent harm that could take over the market from handguns which had been made much more expensive by generic liability. The same could be true for the development and pro-

true that we, Indonesians, are better known for our nonchalance when it comes to acting to prevent accidents that could, though may not, cause loss of human life. We think the time has come for us to develop a greater sense of civic responsibility.”).
duction of less noxious cigarette substitutes. While there are no guarantees such safer substitute products will be developed, generic liability certainly increases the chances of such development.

In short, generic liability seems to provide a considerable amount of the safety which is the principal output I want for you from the tort system. It may result in the withdrawal of the most dangerous products from the market. Where it does not, it assures either that there will be a substantial decline in the use of these most dangerous products or that there will arise substantial market incentives likely to result in the development of at least some safer substitute products.

You and others should notice that this increased safety is provided by tort law in a way which interferes as little as possible with your autonomy. Unlike most direct government regulation of a product, tort law will allow you to continue to use the unreasonably dangerous product so long as you are willing to bear (by paying for them) your fair share of the social costs of your use of the product. If the product has extraordinary utility for you or poses inordinately low risks to you—as might ice cream, which you love and against the dangers of which you may be somewhat protected by our family's hereditarily low cholesterol and fat levels—you can either pay the greatly increased price or execute the generic disclaimer outlined above and pay only a slightly increased price.

Incidentally, generic liability will provide you some significant wealth protection if you are injured by the product. The American Law Institute's study early in this decade estimated that the average accident victim in the United States ends up bearing thirty-eight percent of her economic losses. Were you injured seriously, you could easily be impoverished by having to bear such a share of your losses. You could also be injured at one of those times in your lives when your private insurance coverage is weak or nonexistent. While this wealth protection would come at a higher cost than would first-party

97. Admittedly, the substantial price hike for a product required by generic liability may drive it from the market, thus interfering with your consumption choices. However, the product would in such circumstances be no different from any potential product which does not have a big enough market given the costs of its production to evoke product manufacture. That is not normally regarded as an interference with consumer autonomy.

98. Even those who execute the generic liability waiver for a product will probably pay more for the product than they would in the absence of generic liability. For consumers of ice cream, that increase would probably be small, reflecting the costs inherent in some general measures taken by a firm to deal with generic liability. For consumers of products which injure bystanders, such as asbestos, handguns, and cigarettes, the price increase will be more substantial, even with the waiver.

99. See ALI REPORTERS' STUDY, supra note 46, at 59.
insurance providing the same sort of protection, some of each dollar you pay for that “insurance” will also be buying you safety by knocking up the price of the dangerous product and thus reducing its overall use. Moreover, the higher cost of this tort-provided “insurance” might not be so great in generic liability cases because transaction costs of deciding liability might be lower than in the average tort case, given that the principal question of the product’s “defectiveness” will already have been decided by the special generic liability court. In addition, if you happen to be one of the persons whose wealth opportunities are most interfered with by the imposition of across-the-board liability on the product, you can always protect yourself from generic liability’s greatest anti-wealth effects by executing the generic disclaimer.

Finally, generic liability at the Ball looks extremely attractive because it wears a little touch of justice. That justice lies in requiring companies which gain the benefits of producing and marketing products which they know will cause many injuries or illnesses to bear their fair share of the injury costs which inevitably accompany the products. The product distributors will pay only where they have been judged to be wrongdoers in the classic tort sense that they have taken actions (the production and distribution of the product) which have created unreasonable risks to society—that is, risks which outweigh

100. This is not to say that generic liability cases will not have significant transaction costs, of the sort that make insurance garnered through a third-party insurer so much more expensive than insurance obtained from a first-party insurer. For some of the products most likely to be claimed against on generic liability grounds—such as cigarettes, asbestos products, and even the ice cream which we use as an example in this letter—there are likely to be complex issues of causation, which will consume substantial amounts of lawyer time and evidence-obtaining expense. A plaintiff claiming she was injured by cigarette smoke or by the fats or chemical additives in ice cream will find it daunting to prove that this exposure was what probably caused her injuries. With respect to all the generically liable products, tort suits will have to deal with complicated issues about the nature and extent of the plaintiff’s damages.

However, these issues are present in more ordinary products liability lawsuits as well. Difficult causation issues are not so likely to come up often with some generic liability cases—such as those involving handguns or above-ground swimming pools. Regardless, by removing from the full range of generic liability cases the key issue as to whether the product distributor is liable for the injuries caused by its product, generic liability tort cases can expect to be simpler, quicker, and less expensive to resolve than the ordinary run of products liability cases.

101. Because generic liability as I propose it here will retain the defense of comparative fault ordinarily available in products liability actions, injured persons themselves will be required to bear some—perhaps the major—share of their own loss, where they have been negligent in their use of the product. This would be perhaps most obvious in lawsuits brought by cigarette smokers or by ice cream eaters for illnesses/injuries which were well known effects of the product’s consumption. The product distributor in such cases might bear some, but not all, of the responsibility for its product’s dangers.
the social benefits of their actions.\textsuperscript{102} The careful and innocent in society will be compensated for the harms that have befallen them at the expense of the careless.

\section*{III. The Ugly Picture—Stepsister or Cinderella?}

So, at least at first glance, damsel generic liability looks pretty darn good: a nice big helping of the safety I want most, with little dollops of the wealth protection, autonomy, and justice which I would also like the tort system to provide you. Now, however, let us assume that the Ball has ended, leaving us with the glass slipper of "What I Want From Tort Law?" It is time to take the harder look we must take to be confident that the legal rules of generic liability truly are the ones with which life will truly be "happily ever after." Just as the Prince searched throughout the kingdom for the person whom the glass slipper would fit, we must look very carefully at this damsel generic liability to make sure the slipper fits her. We do not want to end up with an Ugly Stepsister.\textsuperscript{103}

We must, therefore, examine the theories of those who implicitly or explicitly take issue with the idea of generic liability. Implicit are the contractarians and the regulators,\textsuperscript{104} who trust markets and governments, respectively, ahead of courts. Explicit are Professors Henderson and Twerski, who have certainly been the most influential and comprehensive of generic liability's critics. The latter pull no punches in portraying generic (product-category) liability as an unforgivingly hideous stepsister, whose foot would have no chance of fitting into an appropriately made glass slipper. If some aide were to find a way to fit a glass slipper to her foot, they would say, the Prince and the kingdom would live far from "happily ever after."\textsuperscript{105}

\textsuperscript{102} This is the classic negligence formulation, as expressed by Judge Learned Hand in \textit{United States v. Carroll Towing Co.}, 159 F.2d 169 (2d Cir. 1947), and as adopted in sections 291-293 of the \textit{Restatement (Second) of Torts}. \textit{Restatement (Second) of Torts} \textsection s 291-293 (1977).

\textsuperscript{103} As a teacher of Family Law, I want to apologize if using the Cinderella story in this way in any fashion perpetuates unhappy stereotypes about step relatives. I want you girls to be aware that siblings or a parent "new" to a family are as likely to be joyous additions as are the original models.

\textsuperscript{104} These are the short-hand terms which Professors Croley and Hanson use to describe the market-enthusiast and more regulation-enthusiast schools of tort law's critics. \textit{See} Croley \& Hanson, supra note 13, at 714-15.

\textsuperscript{105} \textit{See} \textit{Restatement (Third) of Torts: Products Liability} \textsection 2, Reporters' Note 66-73, 88-97 (Tentative Draft No. 2, 1995); Henderson \& Twerski, supra note 3.
A. Things Won't Be Much Safer, If At All

At the center of my affection for generic liability is its potential to decrease the chances that you girls, my Indonesian friends, and the population as a whole will get hurt or killed. The critics say you and others I care about won't get anything much in the way of safety from imposing liability on entire categories of products, either because (1) tort law has little or no effect on potential injurers’ behavior,106 or (2) where generic liability does affect product makers’ behaviors, it will lead them to behaviors that are less safe, not more safe.107

1. Tort and Deterrence

Several scholars, Stephen Sugarman most notable among them, have questioned the conventional wisdom, articulated in Section II above, that tort liability will deter potential injurers from unsafe behavior.108 These scholars have based their attack on tort’s deterrent value on a variety of factors. They particularly point to the widespread existence of liability insurance as removing any significant “sting” from a tort judgment. Furthermore, they point to psychological factors which make it unlikely that the unsafe behavior is changeable109 and to factors, such as ignorance or risk blindness which make it unlikely that tort law will change unsafe behavior. They also point to basic human decency, fear for one’s own person, and government regulation as factors which make the tort deterrent superfluous.110

However significant such factors may be in blunting the deterrent power of tort law in most situations, they have virtually no significance in vitiating the safety-enhancing power of generic liability. Liability insurance certainly won’t act as a barrier against liability’s sting. Many product manufacturers self-insure. Those with liability insur-

106. This is essentially the position of Stephen Sugarman. See Sugarmam, supra note 54. For other scholars who cast doubts on the deterrence value of tort judgments, see Schwartz, supra note 44, at 381-83.


108. See Schwartz, supra note 44, at 381-83, for a brief compilation of the writings of the main critics. I have read and made use of the work of most of those authors. See, e.g., Bell & O’Connell, supra note 50, ch. 4; Bell, supra note 43. Since, however, I do not have those works available to me here in Indonesia, I will rely primarily on Professor Gary Schwartz’s fine article, which is with me, for citations. Schwartz’s article accurately reports the main ideas of the antideterrence theorists, to the best of my recollection.

109. William Rodgers’ work has highlighted the inefficacy of legal sanctions in dealing with inadvertent, or non-conscious behavior, which makes up a sizeable portion of the negligence which tort law will sanction. See, e.g., William H. Rodgers, Jr., Negligence Reconsidered: The Role of Rationality in Tort Theory, 54 S. CAL. L. Rev. 1 (1980).

110. See Schwartz, supra note 44, at 382-83.
ance tend to have significant deductibles and caps.\textsuperscript{111} Regardless, once generic liability is imposed on a product, the manufacturer will pay insurance premiums which approximate the injury risks the product creates, since there will no longer be a question that it will be liable for the injuries its product causes. The psychological obstacles to deterrence certainly won't exist: product makers will have no difficulty noticing that their products are generically subject to liability, and will be very alert to the likely scope of that liability. Fear for one's own safety as a primary goad to safe behavior does not operate for product manufacture and sale. Furthermore, the dangerous product's presence on the market demonstrates that neither manufacturer morals nor government regulation serve to deter the dangerous conduct.

The absence of logical obstacles to tort law's safety-enhancing power in the generic liability context has even greater significance in light of recent research which seems to show that even in those areas where the logical obstacles exist, tort law still significantly deters unsafe behavior. Professor Gary Schwartz has published the most recent comprehensive effort aimed at assessing tort law's effects on safety behavior.\textsuperscript{112} His conclusions rely much less on theoretical models—which he attempts to critique from a real-world, empirical perspective—than they do on his canvass of a multitude of empirical and quasi-empirical\textsuperscript{113} studies relevant to his question: "Does tort law really deter?" Professor Schwartz concludes: "there is evidence persuasively showing that tort law achieves something significant in encouraging safety."\textsuperscript{114}

2. Generic Liability and the Theory of the Second Best

Thus, while there is every reason to believe that the "beautiful picture" of generic liability as a producer of greater safety for you and

\textsuperscript{111} See id. at 385.
\textsuperscript{112} See id.
\textsuperscript{113} Among the sources of information relied on by Professor Schwartz to make some assessment of tort law's deterrent effects were several reports about the risks present in New Zealand life. As described by Schwartz, those reports seemed largely anecdotal. See id. at 420-22. While they may provide useful information—as I hope this Article's observations about conditions in Indonesia will do—to style such informed observations as "empirical" seems to slight the work of serious scholars who employ careful social science methodologies and collect carefully selected amounts and kinds of data in efforts to test one or more clear hypotheses. I therefore refer to such reports as "quasi-empirical."
\textsuperscript{114} Id. at 423. Professor Schwartz noted that this conclusion seemed to apply across the board, to medical malpractice, teen and adult driving, and, of special relevance to this article, product design. See id. at 423, 405-413.
others survives unmarred the concerns theorists have about the law’s deterrent power in other areas of tort law, we cannot quite so quickly conclude that generic liability is safety-lovely. On the other critical sideline, Professors Henderson and Twerski portray generic liability as very effective in changing behaviors, but as changing them in dramatically nasty ways. Remember that I promised you earlier in this letter to take you to the Cave of the Henderson and Twerski.\textsuperscript{115} Well, I describe their writings thus because these two men—the ones most in charge of reshaping modern products liability law in America\textsuperscript{116}—describe generic liability much the way I might describe a scary cave in a story to you. They speak of it as unexplored territory, the contents of which may look hospitable at first, but in fact are rather hideous as you proceed further into dimly seen areas, wherein lie “market distortions of gigantic proportions.”\textsuperscript{117}

Of course, Professors Henderson and Twerski do not in fact dip into such Platonic similes in telling the scary story of generic liability. Rather, they talk about such liability falling into the trap described in the “theory of the second best.”\textsuperscript{118} In that theory, the imposition of generic liability will unwittingly have a host of untoward effects, several of which will make life less safe for you and others. Increased liability for products which cannot be altered to avoid that liability will just lead to other, less safe, methods by which the demand for that product will be satisfied. Black markets in the product will develop, in which clandestine and financially irresponsible\textsuperscript{119} “hit-and-run” product makers will emerge, who make even less safe variants of the particular product.\textsuperscript{120} Less safe used products will be used more. Consumers will use products more carelessly.\textsuperscript{121}

\begin{itemize}
  \item \textsuperscript{115} See supra text accompanying note 15.
  \item \textsuperscript{116} As Reporters for the Restatement (Third) of Torts: Products Liability, Professors Henderson and Twerski will have been the most influential shapers of the Restatement when it is adopted in its final form by the American Law Institute. The ALI’s Restatement has been, and seems likely to continue to be, the single most influential statement of what the law of products liability should be.
  \item \textsuperscript{117} Henderson & Twerski, supra note 3, at 1314.
  \item \textsuperscript{118} Id. at 1310. “Second-best” problems are those which arise when targets of expensive government regulation (including tort liability) take actions to avoid being subject to that regulation/liability. See generally Peter Huber, Safety and the Second Best: The Hazards of Public Risk Management in the Courts, 85 COLUM. L. REV. 277 (1985). Those actions are thought to be counterproductive to the aims of the regulation/liability. See id.
  \item \textsuperscript{119} “Financially irresponsible” companies are those which have few assets and little or no insurance, so that they would basically disappear before they were able to pay anywhere near the tort damages their products are expected to cause.
  \item \textsuperscript{120} See Henderson & Twerski, supra note 3, at 1311-12.
  \item \textsuperscript{121} See id. at 1310-14.
\end{itemize}
Well, girls, don't necessarily believe them: it is, after all, just a story they are telling. The Restatement Reporters and I agree that generic liability will result in substantially higher prices. That is the one way in which they—otherwise strikingly quiet on the topic—talk about the many injuries primarily attributable to these products. Basic economics makes it pretty clear that except for products universally regarded as necessities, a substantial price increase will usually result in some significant decrease in product consumption. That is at the heart of my conclusion that generic liability will lead to greater safety for you.

On the other hand, the Restatement Reporters' conclusions that these safety pressures will have all sorts of "distorted" effects are based on pure conjecture. We all agree that days will be dark for the handgun, cigarette, or ice cream industry if its product is found to be generically liable. They, however, see all sorts of monsters running around in that dark. I do not. Moreover, even if they turn out to be right and I wrong, that is the time to change the law to account for the monsters, not now when they are only imagined.

I challenge the monstrous visions of Professors Henderson and Twerski in three respects. First, I do not foresee the development of substantial "black markets" in the products judged generically liable, in which much "clandestine" or "hit and run" production takes place. Moreover, even if such producers did appear, the law can easily deal with their untoward effects. Certainly, a significant increase in liability costs will encourage current and potential producers to look for ways to avoid that liability. That is tort's deterrent effect at work. At the same time, those liability costs will, by forcing down sales, create considerable excess capacity in the product market. Many of these...

122. They devote only two paragraphs to generic liability's positive safety effects in the 68-page law review article in which they set forth most comprehensively the reasoning that has led to their rejection of it in the Restatement drafts. See id. at 1273-74. They write those two paragraphs in the context of strict liability for products generally. See id. In the second main part of their article, where they discuss generic (product-category) liability directly, the Restatement Reporters devote four paragraphs (comprising two full pages) to the ways generic liability will detract from safety, including more than a full page about how generic liability will encourage risky consumer behavior. See id. at 1312-13. The authors spend virtually no time on the monstrously large numbers of injuries, illnesses, and deaths caused by the unusually dangerous products which they recognize as likely to attract the generic liability sanction. For an author who does notice those injuries, see Bogus, supra note 3, at 38-43, 47-48, 60-62.

123. In fact, Professors Henderson and Twerski describe the prices of products subject to generic liability as rising "dramatically." See Henderson & Twerski, supra note 3, at 1311. Since the courts would continue to reduce tort awards in proportion to the plaintiff's fault, the dramatic price rise would reflect the extent to which the product itself was primarily responsible for injuries.
product markets—such as those for asbestos products and above-ground swimming pools—will require sufficient capital assets for new entrants that the opportunity for financially irresponsible new producers does not exist. Without such financial irresponsibility, new entrants will have no competitive advantage in liability costs unless they can make themselves legally invisible to persons in the public whom they injure. Established product makers have a completely legal way to do that: the disclaimer process outlined in Section II.A. If some of them, or new entrants, try to become "stealth" distributors, they will not be able to make use of the protections from suit afforded them by the disclaimer process. Perhaps more significantly, these stealth distributors will encounter both competitors and a substantial segment of the consuming public eager to reveal who is behind a particular brand of the product which begins to enjoy any significant volume of sales (and begins to cause a significant volume of injuries). As was not the case with Prohibition or cigarette taxes, clandestine bootleggers of dangerous products face powerful competitors and substantial numbers of consumers whose radar is constantly sweeping the market to locate them.\textsuperscript{124} If the worst comes to pass, and some substantial share of some generically liable product becomes supplied by unsafe hit-and-run producers, the government can simply require that product to bear a label giving its manufacturer and its American business address before any distributor can sell it to the public. A couple of well-publicized prosecutions of retailers under such a law would quickly drive up the costs of clandestine hit-and-run producers to the point where they would not be competitive with the legitimate, in-the-open producers.\textsuperscript{125}

\textsuperscript{124} The Restatement Reporters rely on the examples of Prohibition (when the product could not be legally sold, period) and cigarette-bootlegging between states with substantially different tax rates to boost their claims that there would be substantial black-marketeers able to evade liability. \textit{See id.} In neither of those instances was the black-marketeering cutting into any company's market share. In neither of those instances were the buyers of the product likely to have an interest in pointing the black-marketeer out to the authorities, as would injured persons, their friends and relatives, and any member of the public likely to respond to a "reward" offered by plaintiffs' lawyers for such information. Where both conditions exist, as with generic liability, "stealth" producers better have a more impressive distribution technology than any I can imagine if they really wish to remain undetected. And, if they do have such a technology, their anti-detection costs are likely to be so high that they will eventually be unable to compete against the legitimate manufacturers who can avoid liability costs with respect to many sales by using the disclaimer process.

\textsuperscript{125} The black-marketeers about whom Henderson and Twerski write would have to be both clandestine \textit{and} hit-and-run (financially irresponsible). Because it is making a product which is by definition both likely to cause and be liable for accidents, any manufacturer will face substantial tort damages. Without resources, the hit-and-run product maker will go under pretty quickly, unless it cannot be found. As the text and previous footnote explain, hiding will not be easy where there are so many seekers.
Second, while I agree that there may be some increase in the length of use of some of these very dangerous products which were purchased before the generic liability ruling, I do not worry about the increased danger therefrom. Many of the products most often mentioned as candidates for generic liability—cigarettes, alcohol, even ice cream—do not have a long life. Some of those which might have a longer life—such as handguns and bullets—may in fact be safer as they age, rather than more dangerous. Advances in gun technology seem to make them more efficient for killing, which should more than offset any increase in safety to the gun-wielder. Should generic liability be applied to any durables other than above-ground swimming pools, there is the possibility that such products will be used longer than they would otherwise have been, and will, as a result, cause some injuries that a new pool would not have caused. Any increase in injuries from this cause seems likely to be small, and likely to be infinitesimal in comparison to the lives saved and injuries avoided because fewer such dangerous products are bought and/or because safer substitutes are developed.

Finally, while I agree with the Henderson and Twerski analysis that under a generic liability system product users and consumers will bear accident costs less closely in relation to their amounts of product usage, I do not expect that to make any significant difference in your or others' safety. Regarding product safety, what the Restatement Reporters are saying, to the best of my understanding, is that

126. Carl Bogus has suggested escalators as a possible subject of generic liability. See Bogus, supra note 3, at 37-38, 38 n.156 (reporting one case). None of the other authors I have read have mentioned other products, although the authors of the new Restatement give the appearance of having signed on to generic liability for exploding cigars, at least if they inherently produce enough heat to ignite facial hair. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 illus. 5 (Tentative Draft No. 2, 1995).

127. See Henderson & Twerski, supra note 3, at 1312-13. According to their analysis, if a product maker is held liable, the cost of the injuries resulting from an accident ends up being reflected in the price of the product(s) it makes and sells. When consumers and users buy the product, they pay the tort costs (and the tort "insurance") on a per-product basis. In other words, each consumer more or less pays the same price for the product. In theory, a consumer/user who uses the product more often than another has a higher risk of being injured by the product. Yet, having paid for whatever insurance against injury tort law provides when s/he bought the product, the consumer/user supposedly has no incentive to moderate use of the product. If there were no product liability, the consumer/user supposedly would find an incentive to use the product less in the risk that s/he would not receive tort compensation if it injured him or her.

Because the authors also speak of this state of affairs as a fairness concern, see id. at 1313; see also RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. a, at 15 (Tentative Draft No. 2, 1995). I am unclear if they mean seriously to suggest that generic liability is likely to contribute to greater danger by encouraging greater use of products which are dangerous to their users (the only situations in which the above analysis is operative).
people will use products more often—albeit no less carefully, since
generic liability doesn't help them if they use the product carelessly—
if those products are subject to generic liability, because they can be
confident of being compensated by the tort system if they get hurt.
Well, there may indeed be some people out there in the world who
will be motivated to use a product more often than they otherwise
would by the knowledge that compensation is coming their way if they
are seriously injured. May be.128 Realistically, whatever number of
such persons exist will be small in comparison to those who use the
product less as a result of the publicity about the product's danger that
comes with a trial about and finding of generic liability. Even that
larger group will be quite a bit smaller, I expect, than the group that
ceases to use the product altogether upon a finding of generic liability
due to the product's unavailability, increased cost, or more widely
known risks.

While I thus conclude that the scary "second-best" tales spun by
the Restatement Reporters are quite unlikely to be true, I recognize
that I cannot be completely sure. Were their story of generic liability's
distortions to come true, the doctrine would need reevaluation. There
is, of course, only one way to find out who is right: permit generic
liability. If the doctrine is permitted, there are places along the way to
avoid the "distortions." Defendants will have the opportunity to pres-
et the three-judge court with evidence from experts in the market
structures and economics of the industry whose product is being chal-
lenged. Such experts will help the judges determine if any significant
distortion effects are likely to occur if generic liability is imposed on
the particular product.129 Then, of course, if generic liability is im-
posed on the product, those experts and all of us theorists will have

128. I confess to skepticism about the widespread existence of a kind of thinking which: (a)
actually focuses on the dangers of injury associated with a product—a use-deterring focus — and
(b) then thinks about the tort system—a system that gives me, at least, the shivers when I think
about being a plaintiff therein—and then (c) decides that the chances of getting adequate money
from the tort system if he is injured are so good that he is going to go out and use that product
even more than he had originally planned.

129. Such evidence about possible distortion effects would be relevant to the core risk-utility
balancing the court must do because part of a product's utility consists of the risks that do not
exist as a result of its place in the market. See, e.g., Huber, supra note 118. The risk-utility
analysis for ice cream should include the risky activities or foodstuffs which ice cream's presence
on the market displaces. Including such factors in the risk-utility calculus will make the court's
decisionmaking even more difficult. However, if the Restatement Reporters believe it is too
difficult for a court to consider these factors in the context of a particular product and with the
help of experts knowledgeable about the industry and its market, then the Reporters should
certainly acknowledge their own incompetence to make any such judgments about products with
no expert help. It would be odd for the American Law Institute in its Restatement to foreclose
even the possibility of generic liability on the basis of unexamined hunches about distortion
the chance to gather data that would show us whether distortion effects result and what they are. *That* would seem to be the appropriate time to abandon generic liability—at least for that product or kind of product. Should such distortion effects occur as the Restatement Reporters speculate, we can feel confident that Congress will waste little time overturning the generic liability finding.130

**B. We Will Pay Too Much for What We Want.**

If generic liability gives you safer products, as I think it will, that would be great. I would be happy. Happy, that is, unless I found out that you could get the same amount of safety at a place down the street for half the price.131 But this, claim some contractarian theorists about products liability,132 is precisely what would be going on in the absence of tort liability. Producers would provide the levels of safety people really wanted, levels they were willing to pay for, without having to pay the huge costs gouged out of them by the tort system just to process claims for compensation for defective products.133 Producers would provide warranties, promising the levels of safety people wanted.

While this line of argument applies to all rules of liability for defective products, the contractarians would point out that it is especially appropriate with respect to the products subject to generic liability. There, product distributors are already providing the level of safety people want. After all, they would ask, is there anyone around who is unaware of the grave dangers of cigarettes, handguns, or asbestos products? Ice cream? Well, they would say, if it were really suffi-

130. The Restatement Reporters are well aware of legislatures' willingness to revoke court findings of generic liability. See Restatement (Third) of Torts: Products Liability Reporters' Note at 96 (Tentative Draft No. 2, 1995).

131. I am perhaps more conscious than usual of this "rip-off" effect in our purchases this year. It is common in Central Java for Indonesian friends and acquaintances to ask us how much we paid whenever they see us with something new. Not surprisingly, when we tell them honestly what we paid, they commonly respond with a knowing, "you paid too much," sometimes followed by a precise accounting of what they or their friends paid for the same product. We are ever conscious that we are being charged "foreigner" prices for things. We try hard to bargain that down to "basic foreigner" price levels as opposed to "rich, stupid, tourist foreigner" prices. Regardless, we are very attuned to the possibility that others are getting the same thing we are, and paying substantially less for it.

132. The best recent collection I have found of contractarian thought on this point is in Croley & Hanson, *supra* note 13, at 714-35.

133. See, e.g., James S. Kakalik & Nicholas M. Pace, *Costs and Compensation Paid in Tort Litigation* (1986); Saks, *supra* note 70, at 1282 (of dollars spent in auto and non-auto tort litigation, the plaintiffs received 52% and 43%, respectively).
ciently dangerous to become a realistic candidate for generic liability, people would know about the danger. If people wanted insurance—in the form of a warranty—against being injured by the product, and were willing to pay for it, the manufacturers would gladly give it to them. Who needs tort law?

Nice try, contractarians. Looks good on paper, but it just doesn’t work that way in real life. Impressed as I am with the value of autonomy which underlies most of the contractarian work, I do not expect product sales contracts to give you girls the nature and amount of personal injury protection you really want. One reason I don’t expect that is because it has not seemed to happen. Before the 1960s, when product distributors generally had the legal right to refuse to provide insurance to consumers for product-related injuries, all manufacturers disclaimed any liability for personal injuries in their warranties. In fact, those products which are very dangerous, but for which manufacturers have not been held liable—like cigarettes—still do not offer any warranty or other protection to their consumers for some increase in price.

Other reasons I do not expect product sales contracts to provide desired safety are more structural. Because of the costs of obtaining and processing information regarding risks during product purchases, many consumers do not become informed either of the dangers inherent in a product or of the protections offered or withdrawn in a warranty. Because many consumers already have some form of first-party insurance, they will not demand efficient warranties or efficient

134. Remember, my principal analytical approach in this article seeks to determine the proper legal rule for inherently too-dangerous products by asking what rule the loving parents of product consumers/users would choose. See supra notes 22, 32-41 and accompanying text. Remember also that by recommending a process by which a product distributor can validly disclaim responsibility for product injuries, see supra notes 75-84 and accompanying text, I ultimately permit buyers and sellers to handle risks of personal injury by contract.

135. See Croley & Hanson, supra note 13, at 727.

136. Contractarians could argue that this reflects the fact that no consumer wants such “insurance.” I find it hard to believe that no significant group of smokers would like to be insured against the risk that they will be disabled because of smoking. Contractarians could respond that there probably are such persons, but that the costs of contracting with them about protection against personal injury in the context of cigarette sales are too great for such “warranties” to occur. Given that for products which are bought repetitively, the manufacturer could sell such “insurance” against all cigarette-related injuries in one transaction, contracting costs should not be so high as to prohibit all such agreements if product makers truly were willing to supply them.

137. See Croley & Hanson, supra note 13, at 770-79 (information costs prevent consumers from knowing warranty terms and from estimating risks well); Latin, supra note 37, at 1227-45 (offering various psychological reasons people do not understand or act on warnings of danger, several of which reasons would also apply to make people unlikely to purchase, before an accident, the level of safety and insurance they really want).
levels of product safety. Because manufacturers are most sensitive to their marginal consumers and those marginal consumers tend to demand less in the way of warranty provisions and investments in safety than do average consumers, product makers will tend to underestimate the amount of safety and insurance that consumers really want.

While contractarian arguments at least make sense—even if ultimately they are not persuasive—in the context of consumers, they fall flat when applied to the substantial number of bystander injuries. People who are the victims of another consumer’s handgun, cigarette smoke, or drinking cannot buy the safety and insurance they want in the market because they are not making contracts with the product distributors at all. Knowing very little about her risk of harm from many of the products that are prime candidates for generic liability, the potential bystander victim’s costs of contracting with the manufacturers who create risks to her are prohibitively high.

In short, the levels of safety, insurance, and justice which you can get from generic liability do not really seem to be available to you for a price you are willing to pay. For the time being, the market should wait on the imposition of generic liability. Once it is established, if it is not what some people really want, they can turn to the market to modify it through the disclaimer process described in Section II.A above.

C. Courts Should Not Make These Decisions: The Polycentric Puddle

Despite the wide variety of difficulties the Restatement Reporters see in a product world with generic liability, their opposition to generic liability in the end hinges on their judgment that courts simply cannot do the job of weighing a product’s social costs against its social benefits. They picture generic liability as an unseaworthy doctrinal ship which “surely would founder” upon “the shoal” of “polycentric”

138. For a fuller explanation of how consumers’ first-party insurance leads to this result of encouraging manufacturers to “write one-sided warranties and produce inefficiently unsafe products,” see Croley & Hanson, supra note 13, at 785-86.

139. See id. at 779-81.

140. When the disclaimer process is put into practice, the state-employed consumer counsellors would do well to familiarize themselves with Professor Howard Latin’s impressive list and description of factors which get in the way of people’s abilities to process information about product-created risks. See Latin, supra note 37.
decisionmaking.\textsuperscript{141} In other words, courts are so poorly equipped to make the kinds of gross risk-utility decisions about products which generic liability would require that the doctrine will be unworkable.

No one should be surprised that this is where the Restatement Reporters make their stand against generic liability. More than any tort scholar of the past quarter century, Professor Henderson has focused on the nature of judge/jury decisionmaking as a key factor in choices among legal rules.\textsuperscript{142} Moreover, in arguing for real strict liability for manufacturing defects in the new Restatement, the authors begin the substantive sections of that document by accepting many of the rationales for products liability rules that apply equally in favor of generic liability: safety enhancement through increased product prices, fairness in holding manufacturers liable for deliberate choices in favor of inflicting injury, and fairness in requiring consumers who get the benefits of products without being harmed to share those products' unavoidable injury costs.\textsuperscript{143} If products liability can achieve all these ends, then opposition to it in the context of especially dangerous products must be founded elsewhere.

The essence of the polycentrism argument—that courts are not suited to the making of decisions which involve the weighing of complex interrelated factors—would, if widely accepted, force courts to

\textsuperscript{141} Henderson & Twerski, supra note 3, at 1305 (emphasis added). The authors signal at the outset of their article that this is their central objection to generic liability, as well as to “across-the-board” strict products liability:

[Liability without defect never will become part of the products liability mainstream. Our pessimism stems not from the fact that liability without defect is politically unacceptable . . . . Rather, we demonstrate that defect is the conceptual linchpin that holds products liability law together; a system of liability without defect is beyond the capacity of the courts to implement.]

\textit{Id.} at 1267. The authors regard imposing generic liability as a form of imposing liability without defect.


\textsuperscript{143} See \textit{RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY} § 2 cmt. a (Tentative Draft No. 2, 1995).

\textsuperscript{144} Henderson and Twerski do not explain the notion of polycentricity to any great extent in their article attacking the concept of generic (product-category) liability. See Henderson & Twerski, supra note 3, at 1305. However, in his initial prominent piece on the subject, Professor Henderson described polycentric decisions as those in which a decisionmaker must place “relative values upon a multitude of factors. The decisions he must make regarding those factors are as interrelated and interdependent as the strands of an intricate web.” Henderson, \textit{Judicial Review, supra} note 142, at 1540. Henderson sees courts' decisionmaking in these polycentric contexts as subverting the judicial process, because litigants would be reduced to making speeches instead of their traditional roles of offering proofs and arguments for a decision according to law. See \textit{id.} Dealing with polycentric problems, “the adjudicative process would become nothing more than an elaborate masquerade.” \textit{Id.}
abandon most of the role they have played in the common law of tort for the past century. One need not have advanced beyond the basic first-year Torts course to recognize that courts make essentially the same decision whenever they hear a negligence case that they are making in deciding a generic liability claim. Listen to the basic Restatement formulation of negligence:

Where an act is one which a reasonable man would recognize as involving a risk of harm to another, the risk is unreasonable and the act is negligent if the risk is of such magnitude as to outweigh what the law regards as the utility of the act or of the particular manner in which it is done.\(^{145}\)

In Professor Henderson's Torts casebook, he or his coauthor comments that:

The balancing of costs and benefits suggested by Learned Hand in *Carroll Towing* has come to be recognized as the core question in determining whether an actor has been negligent.\(^{146}\)

Professor Henderson, at least, is not unaware that the basic negligence rules fit uncomfortably snugly into his notion of polycentrism. In his most detailed explanation of that concept, he noted the lack of meaningful decisional guidelines in the standard of reasonable care, suggested that the "reasonable man" instruction and the jury had submerged that polycentrism, and concluded:

Nonetheless, the administration of the negligence concept over the last one hundred years is ultimately consistent with my hypothesis, for it must be conceded that it has been accomplished only with notable signs of strain and difficulty.\(^{147}\)

While Professor Henderson did not, of course, condemn the courts in that article for making negligence decisions, he did then (in 1973) condemn the courts for ruling on claims in products liability cases involving conscious design defects.\(^{148}\) Having twenty years more of experience with courts managing quite-nicely-thank-you with the adjudication of such design defects, Professor Henderson now admits

145. Restatement (Second) of Torts § 291 (1965). The Restatement explains in the next two sections some of the factors which courts must consider in doing this risk-utility balancing.


148. See id. at 1539-42.
that those risk-utility balancing decisions are not "too" polycentric, and authors the Restatement section which tells courts to go ahead.\textsuperscript{149}

Negligence and design defect cases are hardly the only paths of "polycentrism" the courts regularly walk. The doctrine of strict liability for abnormally dangerous activities (ADA strict liability) requires courts to weigh a host of factors in order to decide whether an entire activity—such as blasting, transporting gasoline in tanker trucks, or manufacturing and shipping a dangerous chemical—is abnormally dangerous.\textsuperscript{150} This seems the same sort of decision for activities that generic liability entails for products. The Henderson Torts casebook refers at length to the idea that this venerable pocket of strict liability in tort law can also be understood as a determination of negligence (risks greater than utility, remember) at the "activity level."\textsuperscript{151} Given these striking similarities, it is somewhat surprising that the Reporters ignore ADA strict liability when they discuss generic liability's too-great polycentrism.\textsuperscript{152}

I confess I hate having these public disagreements with Professor Henderson about whether a particular kind of legal decision is too "polycentric" for courts to make. In one of the earliest articles of my academic career\textsuperscript{153} I found myself disagreeing with him on precisely these grounds in arguing for tort recovery for emotional distress damages. My arguments then were a lot like my argument here: "You say

\textsuperscript{149} See Restatement (Third) of Torts: Products Liability § 2 (Tentative Draft No. 2, 1995); Henderson & Twerski, supra note 3, at 1305 n.154. Professor Henderson's switch of position on courts' competence to decide conscious design defect cases, in conjunction with his comments about negligence quoted above, make me suspect that he would have likewise condemned negligence on grounds of polycentrism had he been writing when that doctrine was new.

\textsuperscript{150} See Restatement (Second) of Torts §§ 519-20 (1977). Section 520 states:

\begin{itemize}
  \item[(a)] existence of a high degree of risk of some harm to the person, land or chattel of others;
  \item[(b)] likelihood that the harm that results from it will be great;
  \item[(c)] inability to eliminate the risk by the exercise of reasonable care;
  \item[(d)] extent to which the activity is not a matter of common usage;
  \item[(e)] inappropriateness of the activity to the place where it is carried on; and
  \item[(f)] extent to which its value to the community is outweighed by its dangerous attributes.
\end{itemize}

Id. § 520.

\textsuperscript{151} Henderson et al., supra note 146, at 554-55.

\textsuperscript{152} The Reporters, of course, are aware of the doctrine. They discuss it in one section of their primary writing about generic liability, but do so in the context of explaining how the doctrine has been reserved for activities, rather than for products and why that makes sense. See Restatement (Third) of Torts § 2, cmt. a, at 48 (Tentative Draft No. 2, 1995). Nowhere do they even mention that the kinds of decisions courts are making in strict liability about the liability of an entire category of activity involve the same kinds of "polycentrism" that would accompany a decision about the liability of an entire category of product.

\textsuperscript{153} See Bell, Bell Tolls, supra note 9, at 379-80.
courts are unsuited to make this kind of decision, but, look, look at all those kinds of decisions you are perfectly willing to have them make, which are essentially the same at this kind.” Now, that is a somewhat unsatisfactory kind of argument, because I suspect that Professor Henderson might in turn say “those kinds of decisions are polycentric, too,” or “those kind of decisions are polycentric, too, but not fatally so.” However, it is difficult to make any different argument against the Henderson designation of a category of cases as polycentric, because it is virtually impossible (at least for me\textsuperscript{154}) to define which decisions are polycentric, and which are not, and which have a “degree of,” but not too much polycentricity. That is not exactly a shock, given his definition of polycentric problems:

They consist of elements that are connected to one another as are the strands of a spider’s web, so that a decision with regard to any element affects the decisions with regard to all the others.\textsuperscript{155}

Without any clearer standard by which to decide which court decisions are polycentric, or too polycentric, and which are not, I have trouble fashioning the argument that generic liability decisions are not polycentric. Oddly, by the very amorphousness of the concept he uses Professor Henderson probably gives me a better feel for the difficulties in what he speaks of as polycentrism. I understand it better as the difficulty of working with legal standards about which I am very unclear.

Regardless of what polycentrism might mean to others, and in other situations, it hardly has any particular applicability to the core generic liability situation. The standard for liability is very clear: “Do the product’s risks as designed outweigh its social utility?” Lawyers can present evidence and structure proof to meet this standard. They confront it all the time in the negligence, products liability, and strict liability cases referred to above. If a defendant ice cream manufacturer can present evidence to a court showing that the social utility of ice cream outweighs its risks—a conclusion towards which the court

\textsuperscript{154} Me, that is, having sought assistance in the writings of others who I have at times hoped might aid me to understand more clearly the concept that is at the center of so much of Professor Henderson’s writing about tort. I have sought such assistance in vain.

\textsuperscript{155} Henderson & Twerski, supra note 3, at 1305. In his germinal article articulating the polycentric critique of products liability law, Professor Henderson expounded at greater length on the concept, giving examples which included a football coach’s line-up decisions. See Henderson, Judicial Review, supra note 142, at 1534-42. He did not, however, define the concept more clearly there, other than to note that polycentric problems created participation difficulties for litigants because their lawyers would not be able to address themselves to one issue at a time, independent of the others, with some claim that the facts of their case entitled them to a decision in their favor on each of those issues. See id. at 1535-36.
will lean because of its long familiarity with the challenged product—the manufacturer will win the case. Its lawyer can present evidence seriatim: first on the risks versus utility issue, then on the causation issue, then on any defense issues, and then on damages.

The Restatement Reporters have decided, however, that this risk-utility balancing becomes too polycentric once a plaintiff is not claiming that the product would have been fine with a particular alternate design. In fact, evidence about the benefits and risks of a vehicle without a roll bar as opposed to the same vehicle with a roll bar is much less likely to be available than is evidence about the risks, and even the utility, of an entire product line, such as handguns. Lawyers have a hope of accessing data about, or experts familiar with, the harms done nationally by handguns, the numbers of them in circulation, and the benefits which their users enjoy. Similar data is unlikely ever to have been compiled about particular aspects of a product, such as a particular kind of handgun safety catch, as opposed another kind of safety.

Admittedly, the decision about whether the inherent risks of a product outweigh its inherent utility often will not be an easy one. The three-judge court will likely be presented with a tremendous amount of evidence. Yet lawyers will structure that presentation to make it comprehensible in the framework of the risk-utility balance. That is their job, as it has been the job of lawyers in complex civil and criminal cases for decades. Unlike judges in design defect cases, the judges in generic liability cases will not have to imagine the risks and utility of some proposed alternate design that has never existed. They will simply be able to look at the product that exists and, in all probability has existed for a long time, leaving a considerable trail of evidence as to its social costs and benefits. The experienced trial judges who will be hearing a generic liability claim as part of the special court I propose will have had substantial experience in other tort litigations.

156. Did the product, for example, the ice cream, cause the injuries/illness about which the plaintiff complains? Occasionally, in cases where questions arise about the foreseeability of the plaintiff's injuries, about the bizarre way those injuries came about, or about intervening causes, the lawyers may also need to address the issue of proximate, or legal, cause. The standards for determining proximate cause would seem to qualify for Hendersonian condemnation as polycentric if any would. See, e.g., Restatement (Second) of Torts §§ 431-33 (1977) (discussing how courts can determine "legal cause").

157. When Professors Henderson and Twerski consider how parties would attempt to prove a generic liability claim, they present a picture of a case in which the claimant is not even clear what product s/he is attacking—a mistake a competent trial lawyer is not going to make—and in which the claimant has to struggle with issues about the extent of the product liability in the face of an intervening cause. See Henderson & Twerski, supra note 3, at 1280-82. The picture painted here of proof at a trial on the core risk-utility balancing issue seems more realistic.
gation with the difficulty of weighing harm to health and life against human pleasures in using or eating the product. While all these factors will not make the generic liability decision easy, they do suggest that the group of judges would be operating well within their traditional competence when making that decision.

In the end, as with any human decision, it is possible that the judges will get it wrong. They may decide the product's risks outweigh its social benefits, when it is really the other way around. We will never know that they were wrong—or that they were right—there being no agreed-on measure of risk, or of utility. The only situation in which we can be confident that the courts will get it wrong is if they refuse to decide any of the generic liability claims. Then, some products will escape liability, and thus be treated as though their benefits were greater than their risks, even where their risks outweigh their social benefits. Of course, that is what the Restatement Reporters would have the courts do.

Not only would the Restatement position thus assure error in the risk-utility weighing, but it would also assure that the courts err in the direction that is least likely to be corrected by other institutions. If a court imposes generic liability on a product whose benefits in fact exceed its risks there are two correctives: first, as the Reporters themselves point out, legislatures have very reliably stepped in to correct such court findings in the past; second, the market itself will repair the error. Products held generically liable will merely bear the costs of some of the accidents they cause. When their price goes up, reflecting this increased liability, those products will still be worth their cost to most people, because those people will be getting more benefit from the product than its risks, as reflected in its costs.159

1. Other Institutions Will Do It Better

While somewhat lonely in their insistence on "polycentrism" as a reason for courts to cease trying to make certain decisions, the Restatement Reporters are by no means alone in making the related

158. See Henderson & Twerski, supra note 3, at 1315, 1318; see also Restatement (Third) of Torts: Products Liability 96 (Tentative Draft No. 2, 1995).

159. Supposedly, in the market, people will pay for a good so long as they get more from the product than it costs them. If there are market imperfections which prevent products from being able to capture their full benefits by being priced higher, the government can always provide the product a subsidy, which will reflect the extent to which the product's social benefits exceed its benefits which can be reflected in its price.

These corrective forces are backstopped even further in the proposal I make in this article by the disclaimer process.
claim that administrative agencies will do a better job of giving us what we want than will court-administered tort law. They emphasize, however, that the legislature also will deal better with the issues posed by inherently dangerous products, in part because “the risks identified by product-category liability claims are highly visible and relatively few in number.”

Professors Henderson and Twerski seem to have firmly fixed in their minds the classical social studies model of the legislative or administrative processes, burned into my mind in high school in the 1960s. In that model, legislatures hold extensive hearings on such things as the dangers of cigarettes or handguns, listen to a full range of expertise on the matter, deliberate carefully how best to deal with the problems they have uncovered, and then enact legislation suitably tailored to protect the legitimate interests involved. Administrative agencies can behave similarly, except they have “experts” in the relevant area doing the information gathering and evaluation job.

Modern legislative proceedings, at least as far as tort matters are concerned, bear about as much resemblance to this classic model as a Westminster Kennel Club show champion bears to a junkyard dog. One need look no further than last year’s efforts at tort reform in the United States House of Representatives to recognize how the world has changed. Major tort reform legislation was passed by the House mere months after it was introduced. Various medical and business groups added themselves to the special protections being afforded products distributors via floor amendments that never even received committee attention. Or, look at the forty-plus legislatures which passed Good Samaritan legislation fifteen to twenty years ago, protecting doctors from tort liability for emergency treatments administered in public places, at a time when the federal government’s health

160. See authorities collected in Lyndon, supra note 94, at 138 n.1.
161. See Henderson & Twerski, supra note 3, at 1306-08, 1330-31.
162. Id. at 1331.
163. Aware that Americans were not enamored of the tort system, the House Republican leadership included provisions promising tort reform in their “Contract With America” that formed the basis for much of their success in the 1994 midterm elections. As soon as the new Congress convened, with its first Republican majority in nearly three decades, the Republican leadership pushed hurry-up action on that tort reform, along with many of the other provisions of its “Contract.” While the legislation which finally emerged from a House-Senate Conference was much closer to the products liability reform which had been under longer consideration by the Senate, see Martha M. Hamilton, Conferees Agree on Limits To Product Liability Awards; Judges Would be Able to Override Caps, WASH. POST, Mar. 14, 1996, at A1, the precipitous actions by the House of Representatives, a body with much greater resources and a much longer deliberative tradition than state legislatures, indicates that old models may not be applicable in the context of the newly politicized tort law of the late twentieth century.
agency could not find a single case in which a doctor had been successfully sued in such circumstances.\textsuperscript{164} More recent models of the administrative process portray agencies as "captured" by the interests they regulate, or as especially sensitive to political winds and interest group pressures.\textsuperscript{165}

In the matter of legislative or administrative decisions about the merits of a product's continued presence on the market, the interests of potential victims will be like a house of straw in the face of the Big Bad Wolf huffing and puffing. The interests threatened by a ban on a product category are those of wealthy and politically powerful corporations, who will be aware of the stakes involved in the agency or legislative determination and who will marshal their considerable lobbying and financial resources to fight a ban. The interests of the public who will be exposed to the dangerous product will not be so forcefully represented. The exposed public will not know that their interests are at stake: most, rightfully, will believe they are not going to be hurt by the product in question. The majority of people with an above-average interest in products considered for a ban will be those who buy them, who have already decided that they want the products. Plaintiffs' trial lawyers, a group who have provided the most organized lobbying force on the side of potential injury victims in many legislative battles, will have few of the same incentives to spend their resources in seeking a product ban, given that such legislative action would merely deprive them of a source of future income.

Evidence will be presented in legislative or administrative hearings, of course. However, those who oppose the product's continued existence will not be able to use pretrial discovery to collect much of the evidence about the product that is in the hands of its manufacturer. The evidence will not be presented under oath. Witnesses will not be subject to cross-examination by carefully prepared attorneys. No person or group of persons will be in charge of coordinating the presentation of evidence to the administrative or legislative body, nor will anyone coordinate rebuttal of the evidence. In the legislature, the decisionmakers may hear some, little, or none of the evidence. The administrator may be so swamped by repetitive submissions that s/he has to ignore many.

More acute minds than mine have grappled with the question of whether administrative agencies and legislatures do a better job of

\textsuperscript{164} See, e.g., Bell, \textit{supra} note 43, at 983.
\textsuperscript{165} See, e.g., \textit{PERCIVAL ET AL.}, \textit{supra} note 34, at 187-90.
regulating dangers in our society than do courts.\textsuperscript{166} There is certainly no scholarly consensus either that administrative bodies should replace courts, or vice versa, with respect to dealing with product or other dangers. Because of the way in which I think evidence will be presented and listened to in the special generic liability court, I prefer it to legislatures and administrative agencies as an information-gathering and information-evaluation system in the context of the decision about generic liability. I also prefer it as a decision-making system—over the legislature, because we are more likely to get a decision on the merits of the risk versus utility balancing from the court, so that if a product is more dangerous to you girls than it is beneficial, you have a chance to get some protection from it. I prefer the court over the administrative agencies because the judges will be much more free from the influences that parties with political power, money, and ongoing relationships with the agency can bring to the decisionmaking process. I do not say administrative agencies are incompetent to make the risk-utility comparisons that the generic liability court would make. I just say that the courts are competent, too, perhaps even more competent in this area.

Finally, on this point as well, allowing courts to make the generic liability decision leaves the system with a safety valve. If the legislature, the elected articularators of the public will, anathematize a court decision imposing generic liability, it has the power to overrule that decision. The legislature is also likely to have the political will. It is much more likely to address the merits of the issue if a court holds a product generically liable than if the courts never deal with the issue.\textsuperscript{167}

2. Insurmountable Problems With Other Tort Issues

In a final, almost reflexive, challenge to courts’ competence to make the generic liability decision, Professors Henderson and Twerski

\textsuperscript{166} See, e.g., Bogus, \textit{supra} note 3, at 65-86 (discussing, with a rich set of anecdotes, some of the failings of legislative and administrative systems in dealing with dangerous products, and linking the stories to the issue of institutional competence); Croley & Hanson, \textit{supra} note 13, at 743-58 (discussing work of the “regulators,” W. Kip Viscusi, Susan Rose-Ackerman, and Stephen Sugarman on administrative versus tort solutions to product dangers); Lyndon, \textit{supra} note 94, at 156-70 (discussing relative strengths and weaknesses of courts and regulators in dealing with the risks of technology).

\textsuperscript{167} The balance of political power on most generic liability issues is likely to be such that an industry whose product is declared generically liable should be able to get a fairly rapid hearing in the Congress. Such rapid hearings have frequently followed court decisions holding powerful forces liable. See, e.g., \textsc{Restatement (Third) of Torts: Products Liability} 94-96 (Tentative Draft No. 2, 1995); Bogus, \textit{supra} note 3, at 44-46.
claim that the doctrine’s adoption would create significant problems for courts trying to resolve issues of contributory fault, useful product life, and causation. While these issues may be problematic for courts if they adopt the across-the-board strict liability that those authors were also addressing in their principal attack on generic liability, they deserve short shrift as obstacles to the adoption of generic liability because the basic issues should be no more nor less difficult than in the context of traditional design defect litigation.

Other than an unsubstantiated worry about judicial nullification, the Restatement Reporters’ worry in regard to issues of plaintiff fault is that courts will have a harder time knowing how much plaintiff foolishness to forgive. It may be true that some traditional design defect cases—particularly those involving products allegedly unsafe because they did not protect against anticipated consumer/user foolishness—make the decision about how much plaintiff foolishness to forgive relatively easy. However, plenty of traditional products liability cases—such as those challenging the crashworthiness of cars and poorly designed tampons, kayaks, or hot coffee—do not make that decision any easier than in a generic liability case. Courts are accustomed to comparing “bad” manufacturer conduct with “bad” plaintiff conduct across a fascinating range of product cases.

With respect to the issue of useful product life, the Reporters worry that producers will be liable beyond the product’s useful life. They offer the collapse of an aged above-ground swimming pool as an example; yet, it seems unlikely that generic liability would even apply in that example, since the dangers which make such pools inherently too risky do not include the danger of metal fatigue. The real question posed by this issue is how long manufacturers should be responsible for injuries caused by their products. The reasons to cut off manufacturer liability after a certain time—as, for example, a statute

169. See id. at 1276-87. Those problems may not be all that significant even if that context. See Geistfeld, *supra* note 47, at 1162-69.
170. The authors surmise that once a court finds that the product’s risks outweigh its benefits, it may be “tempted to conclude that the plaintiff’s fault should play no role at all.” Henderson & Twerski, *supra* note 3, at 1301. In the face of long-standing judicial practice of applying comparative fault in products liability cases, many of which will have involved far more blame-worthy manufacturer conduct than the mere offering of a familiarly dangerous product for sale, this surmise seems groundless.
171. See id. at 1301-02.
172. See id. at 1302.
173. See Geistfeld, *supra* note 47, at 1162-64 (explaining how traditional proximate cause analysis would limit a manufacturer’s liability to those risks which made the product subject to liability in the first place).
of repose would do—or to continue that liability for the foreseeable life of the product, or for its whole life, continue to be valid whether the design defect arises out of the failure to use an alternate design or out of the inherent danger of the only possible design.\(^{174}\)

With respect to causation, Professors Henderson and Twerski raise a number of worries about verifiability, multiple causation, and proximate cause, at least one of which they admit could be solved through the application of traditional legal concepts.\(^{175}\) Professor Mark Geistfeld thoroughly met those worries in a brief response to the Reporters' principal article.\(^{176}\)

**D. An Unfair Turn**

At first blush, generic liability looks like a paragon of corrective justice. Innocent injured consumers, users, and bystanders\(^{177}\) recover for the harm inflicted on them by the unreasonable behavior of a product distributor, a product distributor who has subjected all of us to unusually grave danger.\(^{178}\) While distributively less neat,\(^{179}\) even that aspect of justice gets better service from generic liability than it does from most of the rest of tort law.

Nevertheless, Professors Henderson and Twerski still see Ugly Stepsister written all over generic liability. The doctrine operates unfairly, they claim, because it forces "careful" product users to subsidize "careless" ones. Generic liability does this, they say, by allowing the careless injured to collect tort damages that the careful never get a shot at even though they, too, pay the freight.\(^{180}\) In addition, accord-

\(^{174}\) See id. at 1168-69.

\(^{175}\) See Henderson & Twerski, supra note 3, at 1303-04. The authors admit that the proximate cause worry would be taken care of simply by having liability be determined by the scope of the risks which made the court hold the defendant's product generically liable in the first place. See id. at 1304. Yet, with no apparent reason, the authors say "[s]uch analysis would be difficult nonetheless." Id. at 1305. That conclusion seems surprising, given that courts regularly decide proximate cause issues that way. See Geistfeld, supra note 47, at 1163.

\(^{176}\) See Geistfeld, supra note 47, at 1162-66.

\(^{177}\) If they are not innocent, they will have their recovery reduced according to their comparative fault. See Restatement (Third) of Torts: Products Liability § 12, at 300-05 (Tentative Draft No. 2, 1995).

\(^{178}\) Behavior in marketing a product whose social risks outweigh its social utility would generally be regarded as unreasonable. See, e.g., Restatement (Second) of Torts § 291 (1965).

\(^{179}\) See discussion infra Part III.D.1.

\(^{180}\) See Restatement (Third) of Torts: Products Liability § 2 cmt. a, at 15-16 (Tentative Draft No. 2, 1995). The drafters explain their view that product risks in a reasonably designed product appropriately are transferred to product users that are "in a better position than the manufacturer to manage those risks efficiently." Id. at 16. It is in the context of consumers and users bearing responsibility for such proper product use that the authors worry about the careful users subsidizing the careless.
ing to Henderson and Twerski, even among the careful users those who use the dangerous product less frequently in a sense subsidize those who use the product more frequently.\textsuperscript{181} Both groups pay the same price for the product, but the product’s price under generic liability reflects the greater amount of injury generated by those who make more frequent use of it.

There are some difficulties even with these claims of unfairness through forced subsidies. The careless users will not be in a better position than the careful, for they will pay in proportion to their carelessness under the comparative fault doctrine.\textsuperscript{182} Moreover, it might be worth noticing in this fairness calculus that the “careful” users would not trade places with the “careless.” If there is a subsidy, it is more like the subsidy of those who toss liferopes to those who have fallen into the sea than like the deliberate subsidy of an activity dangerous to others, such as the subsidy programs that have been provided by the United States government to tobacco farmers.

More importantly, the Restatement Reporters ignore much more significant parallel fairness problems in a world without generic liability. In such a world, when manufacturers distribute products whose injury costs are higher than their social utility, yet pay nothing for those expected injuries when they occur,\textsuperscript{183} the law subsidizes their careless behavior. Completely innocent consumers, users, and bystanders injured by a dangerous product subsidize those who are not injured, because the injury costs inherent in the product—that is, after all, why its risks outweigh its utility—are not required to be included in the product price, thanks to the injured having to pay their own injury costs. Injured bystanders, who never even get the benefits of the product, have to subsidize consumers and users.\textsuperscript{184} The blatant subsidization of the wrongdoers by the innocent, of the fortunate by the unfortunate, and of product beneficiaries by those who gain nothing from the product but devastated lives seems to call out much more loudly for a system of generic liability than the whispered unfairness that might exist among consumers who use a product ten times a week instead of only five. This seems somehow more deserving of commen-

\begin{footnotesize}
\textsuperscript{181} See Henderson & Twerski, \textit{supra} note 3, at 1312-13.
\textsuperscript{182} See, e.g., \textit{Restatement (Third) of Torts: Products Liability} § 12, at 300-02 (Tentative Draft No. 2, 1995).
\textsuperscript{183} Expected by the manufacturer, not by the consumer, user, or bystander.
\textsuperscript{184} Professors Henderson and Twerski recognize this subsidy aspect explicitly early in their principal article, when they are making their cursory list of the benefits of broad products liability. See Henderson & Twerski, \textit{supra} note 3, at 1275. However, they do not mention it again when they are discussing the unfair subsidy which occurs when generic liability is imposed.
\end{footnotesize}
tators' fairness condemnation than even consumer/user careless behavior, which inadvertently risks harm to oneself.185

Furthermore, when Professors Henderson and Twerski concentrate on the unfairness inherent in generic liability's forcing—as does all product liability—i

1. Tort's Wretched Regressiveness

One area of unfairness which will emanate from the imposition of generic liability, yet is not mentioned by the Restatement Reporters, is its regressive effects. Like all tort law, generic liability helps the well-off significantly more than it helps the poor. Everyone will pay equally into the tort system per product. Everyone will get about the same amount of safety-per-dollar-paid, but people with high wages will get more insurance than those with low wages because tort judgments replace income lost due to injury, whether it be high or low.188

I do not know, now, whether you girls will be economically poor when you grow up. Even if you are, I doubt that this unfairness will have any substantial significance for you. It seems unlikely to have much wealth effect on your lives. Were it possible to calibrate generic liability's insurance charge to the income of a product purchaser, the change in product price would be fairly small.189

185. I am sure you girls appreciate this moral difference, even if some legal commentators seem not to. You sometimes feel foolish when you do something that is unsafe for yourself. Your mom and I may scold you when you do such things, sometimes with a note of panic in our voices and a fervently expressed wish that you be more careful. When you do something that risks harm to others, you sometimes feel foolish and you sometimes feel you have done something bad. Your mom and I may scold you when you do those things, too. The tone of that scolding more often is one of censure and we are more likely to fervently demand that you be more careful.


187. For a fuller explanation of the operation of this first-party insurance externality, see Croley & Hanson, supra note 13, at 785-86.

188. For additional description of regressiveness in the context of enterprise liability generally, see Geistfeld, supra note 47, at 1171.

189. Given the extremely small chance of injury attendant upon the sale of even quite dangerous products, the part of the purchase price of a particular product which reflects the cost of
Besides, there are a couple of factors unique to generic liability which actually may reduce the general regressiveness of tort law. First, because liability suits against a particular producer will become much simpler once the three-judge court has determined its product qualifies for generic liability, more persons with relatively small economic loss—poorer people—will be able to find lawyers willing to represent them on a contingency fee basis. More products liability cases will be worth bringing when the costs of bringing such suits go down. Second, insofar as the poor are less likely than their wealthier co-victims to have adequate first-party insurance, the insurance provided by the tort system will provide them with significant protection while it provides the wealthier with little more than they already have. Finally, less able to afford higher product prices, poorer people may be more likely than the wealthy to execute the disclaimers, because they will then be able to buy the product at a price that does not include the regressive tort “tax.” In that sense, generic liability is less regressive than the product liability system as a whole, where disclaimers are much less permitted.190

Conclusion

So, it seems, the damsel generic liability who looked so good at the Ball did not turn out to be the Ugly Stepsister that her detractors suggested. The glass slipper fits. It fits primarily because the doctrine will deliver a substantial additional amount of safety to your lives. That is what I am most concerned about for you, and for our Indonesian friends. It has to stand head and shoulders above other concerns in importance in choosing a products liability rule. The rumors that might tarnish generic liability’s resplendent safety image fail to ring true.

The cost? No injustice. But, you might end up losing access to something you really like, at least until you are old enough to execute one of those disclaimers. Or, you could end up paying a lot more for some goods than you did before, for some wealth protection that you could certainly get more cheaply elsewhere. Even then, the damage liability insurance can be expected to be small. That part which reflects the difference in awards to wealthier versus poorer persons will be much smaller, except at the extremes. With respect to products which persons repeatedly purchase, such as cigarettes and ice cream, these small amounts will add up over time. Even then, poorer people will probably just stop buying the product before they feel any pinch from the unfair price difference. They then, at least, will be safer than the wealthier consumers.

to your pocketbook, and, more importantly, your life satisfaction, won't be much. A small amount for the safety you get out of the deal.

I finish this months after that opening bus ride, also at night, in our lovely little Indonesian home. You are asleep. I have pretty well convinced myself that your lives and other peoples' will be better if the generic liability system I have talked so much about comes to be. Cautious, however, for your sake, I am particularly happy that this system has so many built-in devices to correct things if I turn out to be wrong. That wouldn't happen any other way.

Sleep tight. Always.

Love,
Dad