Unavoidably Unsafe Products: A Modest Proposal

Ellen Wertheimer
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INTRODUCTION

This Article concerns unavoidably dangerous products and how courts should handle the injuries they cause. Unavoidably dangerous products are products that injure a certain percentage of those who use them competently and that cannot be made safe.¹ In other words, a certain percentage of the nonnegligent consumers of these products will be injured by them, and there is no way either to reduce the numbers of those who will be injured or to predict who they will be.²

There are three basic categories of products that contain unavoidable dangers. Products in these three categories are dangerous when competently used; by definition, there is no alternative reasonable design that would eliminate the danger.³ These three categories are as follows:

1. dangerous products the utility of which outweighs their dangers and which are available and in use for the good of society generally (such as vaccines);⁴
2. dangerous products the utility of which outweighs their dangers and which are available and in use as needed by certain members of

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². The policy concerns that are raised in this Article and the proposals that are suggested are not intended to apply to those consumers who are injured by unavoidably dangerous products as a result of consumer misuse of the product or consumer negligence. See Maiorino v. Weco Prods. Co., 214 A.2d 18, 20 (N.J. 1965) (holding that misuse of product bars recovery under strict products liability theory); see also Fleming James, Jr., General Products—Should Manufacturers Be Liable Without Negligence?, 24 TENN. L. REV. 923, 926 (1957) (“[T]his does not mean that the maker would be held for all injuries caused by his products.”); Page Keeton, Products Liability—Liability Without Fault and the Requirement of a Defect, 41 TEX. L. REV. 855, 858 (1963) (stating that consumer is responsible for injury resulting from product misuse).

³. For a discussion of the propriety of admitting or requiring evidence of an alternative reasonable design in design defect cases, see infra notes 75-77, 80 and accompanying text.

⁴. See discussion infra Part II.
society (such as ladders and prescription medications other than vaccines); and
(3) dangerous products the dangers of which outweigh their utility
(such as cigarettes).

The problem posed by the first two of these categories is that the
products in these categories are not defective. They pass any applicable
cost-benefit test—their utility outweighs their costs. Thus, as the
law now stands there is no basis for imposing liability on their manu-
facturers for injuries caused by them because manufacturers are only
liable for products which are defective, that is, that fail the applicable
risk-utility test.

The fact that these products are not defective means that those
who are injured in the course of using them nonnegligently are not
compensated for their injuries. This is highly unfair to those injured
by these products. These injured consumers are compelled to pay for
the availability of these products and for the benefit that society re-
ceives from their use (first category) or for the benefit of those who
need the products involved (second category). There is no way for
them to avoid injury; these products inevitably injure a certain per-
centage (albeit low) of those who use them nonnegligently.

The utility of a product outweighs its dangers when it is suffi-
ciently useful or necessary to make the price of its availability, in
terms of the injuries it causes, less than its utility to those who benefit
from its presence on the market. It seems highly unfair to allow this
price to fall on those who happen to be among the unfortunates in-
jured by the product and to allow those who benefit from its availabil-
ity to avoid paying the costs of that availability.

The answer is straightforward: The fact that the products in the
first two categories are not defective should not foreclose compensa-
tion for those injured by them. In other words, where consumers are

5. See discussion infra Part III.
6. See discussion infra Part IV.
7. Courts have created various methods for ascertaining “defectiveness”. See, e.g., Cater-
inevitably involves a cost-benefit test. See Aller v. Rodgers Mach. Mfg. Co., 268 N.W.2d 830, 835
(Iowa 1978) (conducting cost-benefit test with consumer expectations test); Page Keeton, Product
Liability and the Meaning of Defect, 5 St. Mary's L.J. 30, 39 (1973) (“There is no way to
avoid a risk-benefit analysis in passing upon designs.”).
8. A manufacturer is held liable if the product in question is defective; a product is defec-
(Or. 1974). The distinction between such a balancing test and a negligence inquiry is that the test
focuses on the nature of product rather than the reasonableness of the manufacturer's behavior.
injured in the name of the greater good of society, or of a substantial portion thereof, those consumers should be fully compensated for their suffering. Both the justification for this position and the mechanism of recovery are the subjects of this Article.

The products in the first two categories set forth above are not defective because they pass any applicable risk-utility test. The products in the third category, on the other hand, are defective because their utility is outweighed by their costs. With respect to this third category, the Article contends that, as defective products, these products should simply be treated like any other defective products. In other words, the absence of an alternative reasonable design should have no impact upon the application of strict products liability law to these products.10 If they fail the cost-benefit test, they are defective and should be treated as such.

I. THE UNAVOIDABLE BACKGROUND AND ON BEYOND DEFECT

Strict products liability doctrine first explicitly appeared in the 1950s, and represented a change in the focus of the law.11 Simply put,
strict products liability represents a commitment to the idea that the manufacturer of a product should pay for the injuries caused by the product even if the manufacturer was not negligent in the design or marketing of the product. Instead of requiring that the plaintiff prove negligence on the part of the manufacturer in order to recover, strict products liability took the position that the consumer should recover for his or her injuries even if the manufacturer exercised "all due care" in developing and marketing the product.

Uncovering the purpose behind strict products liability is vital to an understanding of the doctrine, because "where the reason stops, there stops the rule." Conversely, the rule should extend to all cases which the reason covers. If the rationale behind the adoption of strict products liability applies in a given arena, strict products liability should as well.

If the purpose of strict products liability was to increase product safety, the doctrine would be in large part unnecessary. This is be-

§ 12.4, at 754-55. In the area of product-related injuries, James specifically advocated the elimination of the requirement of blameworthiness through imposition of a strict liability system that would better accomplish the goal of compensating injured consumers and bystanders. See id. § 28.15, at 1569; James, supra note 2, at 923-24, 927.

Arguments such as those raised by Professor James suggesting the need for alternatives to fault-based liability gained wider acceptance throughout the 1950s and were joined with the contention that the manufacturer of a product should be held accountable for the harm that the product causes. See William L. Prosser, Handbook on the Law of Torts § 84, at 506 (2d ed. 1955) (indicating that "social policy demands that the burden of accidental injuries caused by defective chattels be placed upon the producer"). Indeed, Dean Prosser, the Reporter to the Restatement (Second) that would later codify strict products liability in tort, concluded by 1960 that the principle of liability solely based upon fault was "out of date in this day and generation." William L. Prosser, The Assault Upon the Citadel (Strict Liability to the Consumer), 69 Yale L.J. 1099, 1122 (1960). The commentary of prominent legal scholars such as James and Prosser helped to provide the impetus for change in products liability law that was later realized in the 1960s.

12. See James, supra note 2, at 927 ("[T]he risk of loss from dangerously defective products would be put upon (and distributed by) the producer rather than upon the consumer or innocent bystander, even where the producer is also innocent."). For a discussion of the policy goals served by this doctrine, see infra notes 18-25 and accompanying text.

13. This approach to products liability was incorporated in the Restatement (Second) of Torts § 402A and subsequently adopted in the majority of jurisdictions. Restatement (Second) of Torts § 402A(2)(a) (1965) ("The rule... applies although... the seller has exercised all possible care in the preparation and sale of his product... ").


15. Some courts and commentators have mistakenly concluded that strict products liability doctrine exists primarily to encourage the manufacture of safer products. See, e.g., Nesselrode v. Executive Beechcraft, Inc., 707 S.W.2d 371, 375 (Mo. 1986) ("The core concern in strict tort liability law is safety."); Hoven v. Kelble, 256 N.W.2d 379, 389 (Wis. 1977) (quoting Harry Kalven, Jr., Tort Law—Tort Watch, 34 J. Am. Trial Law. Ass'n 1, 57 (1972)) ("[L]iability is imposed in the quest for safety and accident prevention . . . ."); see also William A. Worthington, The "Citadel" Revisited: Strict Tort Liability and the Policy of Law, 36 S. Tex. L. Rev. 227, 258 (1995) (stating that strict tort liability fails to provide potential defendants with guidance as to design choices).
cause a manufacturer who has failed to adopt an existing product feature to make its product safe has acted unreasonably, and therefore negligently. Negligence-based liability suffices to insure that such a manufacturer pays for its errors. If the purpose of the doctrine were to deter other forms of manufacturer misconduct, there would be no need to make it a fault-free basis of recovery. So the goal of strict products liability must lie elsewhere.

All the evidence points to strict products liability as combining a fairness and economic set of goals. The economic goal is to spread the costs of injuries among users of a product by holding the manufacturer liable for the injuries that its product causes. If the manufacturer is held liable in this way, the manufacturer will raise the costs of the product and pass the costs of injuries caused by a product on to all users of that product. But why spread

The position that strict products liability exists primarily to provide an incentive for enhanced safety has given those who are opposed to strict liability ammunition in their quest for its abolition. Proponents of a return to fault-based liability have argued that strict products liability should be abandoned because the doctrine does not efficiently promote safety. If this were the primary reason for the doctrine, the assertion that the doctrine should be abandoned because of its failure to promote product safety would have some merit. See, e.g., William Powers, Jr., A Modest Proposal to Abandon Strict Products Liability, 1991 U. ILL. L. REV. 639, 644 n.18, 644-45. Professor Powers notes that negligence is the appropriate standard for optimizing product safety. See id. at 644 n.18. He takes this position in the context of his argument that one of the main purposes of strict products liability—promoting product safety—has been undermined. See id.

If, on the other hand, strict products liability is not primarily motivated by a concern for enhanced product safety, the fact that it is not necessary for this purpose does not justify abandoning it.

16. See, e.g., Metzgar v. Playskool, Inc., 30 F.3d 459 (3d Cir. 1994). Metzgar involved the choking death of a child on a toy block. Id. at 460. The case involved both negligent and strict liability design defect claims. See id. In addressing the negligence issue, however, the court focused upon whether the toy manufacturer acted unreasonably in its design choice by failing to modify the toy block's design so as to eliminate the toy's foreseeable choking potential. See id. at 462.

17. See Davis, supra note 11, at 1223 (stating that negligence-based liability evaluates decision-making of manufacturers).

18. This goal is based upon the premise that society as a whole suffers more economically when individuals must bear the full burden of their losses and face potential financial ruin. See HARPER & JAMES, supra note 11, § 13.2, at 763 & n.7. As a result, distribution of the costs of injury among all consumers of a particular product prevents the serious repercussions of individual disaster. See id.; see also Guido Calabresi, Some Thoughts on Risk Distribution and the Law of Torts, 70 YALE L.J. 499, 517 (1961) (contending that it is preferable to charge all consumers a small price increase than to allow one injured consumer to suffer substantial damages).

19. See Calabresi, supra note 18, at 505. Judge Calabresi argued that “the loss should be placed on the party which is most likely to cause the burden to be reflected in the price . . . .” Thus, the imposition of liability on the manufacturer is not grounded in a conclusion that the manufacturer is at fault. Rather, in accordance with Judge Calabresi’s argument, holding the manufacturer liable places the costs on the party that can most easily alter the product’s price to distribute those costs. See id.; see also Helene Curtis Indus., Inc. v. Pruitt, 385 F.2d 841, 849 (5th Cir. 1967) (“[M]anufacturers are superior risk-bearers because they have the capacity to distribute the losses of the few to the many by the price mechanism.”); PROSSER, supra note 11, § 84, at 506 (“[T]he producer] is best able to distribute the risk to the general public by means of
the costs at all? Why not let the loss remain where it initially lands?20

Prior to the development of strict products liability, of course, the costs of injury would fall on the injured party, and would remain there in the absence of some fault to justify transferring the cost to the manufacturer. There are those who advocate that this result be reinstated.21 Even though the manufacturer in a strict liability suit cannot be said to have been at fault in the negligence sense, however, that manufacturer is still responsible for the presence of the product on the market in the form in which it was sold. The manufacturer has made the decisions about designing, labelling, and marketing the product, and has made the product. Strict liability was designed to compel the manufacturer to stand behind its product, a justification that has nothing whatsoever to do with negligence. The true costs of a product include the costs of the injuries it causes. Strict products liability law advocates the result that a nonnegligent consumer should be compensated for the injuries caused by products, even where the manufacturer has not been negligent.

Thus, under strict products liability law, the loss does not remain on the consumer. Simply put, leaving the loss on the consumer is unfair.22 The manufacturer has designed, made, and marketed the prod-


20. See David G. Owen, The Moral Foundations of Products Liability Law: Toward First Principles, 68 Notre Dame L. Rev. 427, 451 (1993), who essentially advocates such a result for faultless injuries. Professor Owen contends that imposing liability upon a faultless party for another's injury is an inequitable policy decision that favors the injured party's interests at the faultless party's expense. See id. at 449. However, when the costs of a product-related injury are shifted to a faultless manufacturer, the economic process of strict products liability does not come to a halt there. Instead, the manufacturer then distributes the burden through price alteration to those who benefit from the product's availability. See supra notes 18-19 and accompanying text.

Owen claims that freedom and equality necessitate his conclusion that strict liability is inappropriate. See Owen, supra, at 452-53. In particular, he insists that such principles require that the victims of faultless product injuries bear the costs as “background risks” of life. See id. at 451. This determination ignores the notions of fairness that underlie and affirm the doctrine of strict products liability. See infra notes 23-25, 29 and accompanying text for a discussion of the fairness justification for the doctrine.

21. See, e.g., Owen, supra note 20.

22. Strict products liability doctrine centers around a desire to lessen the social problems that are created when victims of unpredictable and often inevitable product-related injuries go uncompensated. See Helene Curtis, 385 F.2d at 848 (“Americans now enjoy the conveniences of many modern and beneficial products. These benefits to the many, however, have come at a high cost to a few.”); Harper & James, supra note 11, § 13.2, at 762 (“[The injuries] bring[ ] great hardship upon the victims themselves and cause[ ] unfortunate repercussions to society as a whole.”); K.N. Llewellyn, On Warranty of Quality, and Society: II, 37 Colum. L. Rev. 341, 404 (1937) (arguing that limitations on warranty liability to unwholesome food products ignore the
uct, and profits from its availability. Why, then, should the risk of loss shift to the consumer? The answer is that the risk should remain with the manufacturer, just as the profits of the product do.

The thought which underlies [strict liability] law is not that the defendant has not conformed to norms of reasonably careful behavior respecting his own activities that secondarily, though perhaps inevitably, affect the life or property of another. It is the fact that he has deliberately chosen to cast his loss or the risk of loss onto another. It may be that defendant was wholly innocent in his appropriation of plaintiff's interest. Nevertheless, he must pay for deliberately assigning risk of loss to another in damages appropriate to his "wrongful" conduct.23

Thus, as the party responsible for the product, the manufacturer should pay for the injuries it causes.24 The costs of the injuries resulting from its availability are part of the costs of the product itself. Any calculation which fails to take such costs into account allows the manufacturer to reap the benefits of the product without having to confront its costs.25

Thus, the first reason for a strict products liability approach is that fairness requires that manufacturers stand behind their products. Once this concept is adopted, other aspects of strict products liability follow. In a strict products liability case, the plaintiff need not prove


24. See Lartigue v. R. J. Reynolds Tobacco Co., 317 F.2d 19, 36 (5th Cir. 1963) (“Public policy demands that the burden of any accidental injuries caused by such products be placed upon those who produce and market the products . . . The consumer of such products is entitled to a maximum of protection . . . .”); see also Woodill v. Parke Davis & Co., 402 N.E. 2d 194, 202 (Ill. 1980) (Moran, J., concurring and dissenting) (stating that the manufacturer should be “held answerable for injuries to someone for whom its product is intended, who uses it in the manner in which it was intended to be used, and whose injuries were proximately caused by an inherent danger in the product of which the user was unaware”); Harper & James, supra note 11, § 28.16, at 1573 (advocating manufacturer liability despite lack of privity with the consumer because “it is the maker who creates the risk and reaps the profit.”). See generally Cowan, supra note 23, at 1087-92. This conclusion is also given as the first justification for strict products liability among those listed in comment c of section 402A of the Restatement (Second) of Torts. Restatement (Second) of Torts § 402A cmt. c (1965).

25. The policy of distributing the costs of product injuries by holding the manufacturer liable serves to compel the manufacturer to take into account the real costs of the product. When the manufacturer alters a product's price to cover the costs of the injuries caused by the product, the price then demonstrates the product's true cost to society. See Rahdert, supra note 19, at 33; Calabresi, supra note 18, at 505. This result is desirable because it allows consumers to better appreciate the true costs of a particular product and consequently decide whether or not to purchase it. See Calabresi, supra note 18, at 514. In contrast, if a product's price does not reflect its societal costs, consumers will tend to purchase more of the product than they would if they were aware of the product's true cost. See id.; see also Gilbert Sandler, Strict Liability and the Need for Legislation, 53 Va. L. Rev. 1509, 1511 (1967) (“[T]he present [liability] system, based on the "fault" concept, understates the actual costs of products . . . .”).
that the manufacturer was negligent. Rather, the plaintiff need only prove that the dangers of the product as marketed outweigh its utility. Thus, the elimination of negligence doctrine is designed to ensure that the manufacturer remains responsible for the products it sells, whatever the nature of the conduct that led to the promulgation of the product. Moreover, there is a readily available mechanism for the imposition of strict products liability: manufacturers can spread the costs of the injuries caused by the product to the users of the product generally, simply by raising the selling price to reflect compensa-

26. See, e.g., Aller v. Rodgers Mach. Mfg. Co., 268 N.W.2d 830, 834 (Iowa 1978) ("Proof of the particular seller's or manufacturer's negligence in the making or handling of the product is not required since the strict liability in tort doctrine eliminates . . . negligence.").
27. See supra note 8.
28. In addition, a strict liability system grants consumers legal relief by eliminating the unfair financial obstacle of proving negligence on the part of the manufacturer. See Jeffrey O'Connell, Balanced Proposals for Product Liability Reform, 48 Ohio St. L.J. 317, 319 (1987) ("Finding fault . . . is often an extremely expensive business in both simple and complex product liability cases."); Cowan, supra note 23, at 1087.
tion costs. Strict products liability also arguably provides an incentive for increased product safety.

29. See supra note 18 and accompanying text. One aspect of cost-spreading deserves individual mention here: the problem presented by the incompatibility of cost-spreading with liability for dangers unknowable at the time of manufacture or sale. The cost-spreading rationale, which requires spreading the costs of injuries before those injuries occur, does not work particularly well in the context of dangers unknowable at the time of sale because it is difficult to insure against an unknowable risk, and impossible to spread the costs of an unknowable danger before that danger materializes. See James A. Henderson, Jr. & Aaron D. Twerski, Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn, 65 N.Y.U. L. Rev. 265, 274 (1990) (arguing against imposition of strict products liability for unknowable risks because "manufacturers cannot . . . insure against risks that even reasonably careful persons do not know exist"). This fact alone cannot justify abolition of the doctrine, unless cost spreading was the only or primary justification for the adoption of strict products liability in the first place, which it was not. Cost spreading is a mechanism for implementing strict products liability, not a justification for its existence. See Guido Calabresi & Jon T. Hirschoff, Toward a Test for Strict Liability in Torts, 81 Yale L.J. 1055, 1084 (1972) (fairness goal of strict products liability is achieved through cost distribution). Indeed, when commentators suggest that strict products liability should be abandoned because it lacks efficiency in regard to unknowable risks, they are reaching the incorrect conclusion that courts impose liability mainly out of economic considerations. See id.; see also Ellen Wertheimer, Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back, 60 U. Cin. L. Rev. 1183, 1186 (1992) ("[T]he choice to place liability on the manufacturer is not dictated by economic theory alone."). In the process, these commentators reveal their unwillingness to recognize the primary justification for the doctrine of strict products liability—fairness. See Beshada v. Johns-Manville Prods. Corp., 447 A.2d 539, 546 (N.J. 1982) ("When the defendants argue that it is unreasonable to impose a duty on them to warn of the unknowable, they misconstrue both the purpose and effect of strict liability. . . . [I]f a product was in fact defective, the distributor of the product should compensate its victims for the misfortune that it inflicted on them."); see also John F. Vargo, Caveat Emptor: Will the A.L.I. Erode Strict Liability in the Restatement (Third) for Products Liability?, 10 Touro L. Rev. 21, 32-33 (1993). Professor Vargo frames the issue in regard to unknowable risks: neither the manufacturer nor the consumer can discover the dangers so that "the only question remaining is one of policy; who between these two innocent parties should bear the loss?" Vargo, supra, at 33. Thus, strict products liability is based upon a policy decision that the manufacturer can bear the loss better than the individual consumer. See infra note 31 (citing Judge Traynor). The doctrine should attach because human life and well-being should not be subject to, and are more important than, concerns about efficiency, even in those few instances where the risk was truly unknown. For a further discussion of fairness as the basis behind the development of strict products liability, see supra notes 21-23, 27 and accompanying text.

30. See Escola v. Coca Cola Bottling Co., 150 P.2d 436, 442 (Cal. 1944) (Traynor, J., concurring) (stating that strict products liability advances the public interest in greater consumer protection because it makes the manufacturer "guarantee the safety of his product"); Turner v. General Motors Corp., 584 S.W.2d 844, 853 (Tex. 1979) (Campbell, J., concurring) (indicating that one reason that strict products liability is imposed is to encourage the manufacturer to "test for and guard against" product risks); David G. Owen, Rethinking the Policies of Strict Products Liability, 33 Vand. L. Rev. 681, 711-13 (1980) (claiming that the imposition of strict liability on manufacturers promotes product safety by creating a financial incentive for manufacturers to reduce the dangers of their products); cf. Mark M. Hager, The Emperor's New Clothes Are Not Efficient: Posner's Jurisprudence of Class, 41 Am. U. L. Rev. 7, 46 (1991) (arguing that strict liability should be retained because market forces alone will not promote optimal product safety as long as safety measures require greater expenses).

Negligence law arguably does an adequate job to encourage product safety: a manufacturer which fails to adopt known safety devices is arguably negligent. See supra notes 15-17 and accompanying text. To the extent that strict products liability makes recovery by injured plaintiffs easier, however, it can act as an incentive for safer products, because the plaintiff will not need to prove negligence on the part of the manufacturer. See Phipps v. General Motors Corp., 363 A.2d 955, 958 (Md. 1976) (indicating that product safety is furthered more effectively through
Strict products liability doctrine represents a societal judgment that, as between a nonnegligent manufacturer and a nonnegligent plaintiff, the loss should fall on the party responsible for the presence of the product on the market: the manufacturer. In the majority of cases, the manufacturer has performed a preliminary cost-benefit analysis on the product, and has decided, in the face of that analysis, to market the product. Since many products have the potential to cause injury, the decision to market the product requires that the manufacturer also decide that a certain level of risk to the consumer is acceptable. Before any product is marketed, the manufacturer must have decided that the risk level is one the manufacturer is willing to accept. This risk, however, is not a risk to the manufacturer at all, but a risk to the consumer. The manufacturer has decided that the product involves a certain risk of harm to some consumers, and that the product is worth selling anyway. In the following passage, Professor Cowan points out the contradiction—indeed the unfairness—in allowing the manufacturer to create a risk and then avoid paying for its consequences:

Now the question arises, why should the manufacturer be allowed to pass the so-called consumer's risk on to the consumer at all? Especially the risk of property loss or serious bodily injury arising from a defective product? The answer of the manufacturer that he must pass some risk on to the consumer is now met with the reply: then pay for the damages. This is not absolute liability. It has nothing to do with insurance. It has nothing to do with subjective fault. It has to do with compensation for a loss resulting from a deliberately assigned risk—assigned, that is, to the other fellow.

When the manufacturer assigns the risk of harm to the consumer, the manufacturer should pay for the injuries caused by its decision. The harm falls on the consumer; however, the costs of that harm should not.

strict liability rather than negligence or warranty theories of recovery); Lynda J. Oswald, *Strict Liability of Individuals Under CERCLA: A Normative Analysis*, 20 B.C. ENVTL. AFF. L. REV. 579, 598 (1993) ("Strict liability increases the likelihood that the defendant will be held liable and thus increases the incentive for the defendant to undertake measures to reduce the risks associated with the product ... "). Yet this observation does not mean that the sole or main reason for imposing strict products liability is to encourage the creation of safer products. See supra note 15 and accompanying text (discussing those authorities who mistakenly assume that the main reason for imposing strict products liability is to encourage product safety).

31. Once a loss has occurred due to a product injury, one party must bear the loss, and the manufacturer is generally in a better position to do so. See Escola, 150 P.2d at 441 (Traynor, J., concurring) ("The cost of injury and the loss of time or health may be an overwhelming misfortune to the person injured, and a needless one, for the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.").

The problem with this analysis, and with strict products liability law generally, is that recovery by the injured consumer is limited to recovery for injuries caused by defective products. This approach does not go far enough. The fact that the manufacturer has assigned the risk to the consumer has nothing to do with the defectiveness of the product; it has to do with the risk assigned. If the product is dangerous, the manufacturer has assigned the risk to the consumer. This has nothing to do with whether the product passes the risk-utility test or not. If it is appropriate to make the manufacturer pay for the risk assigned to the consumer, then whether the product is defective or not should be irrelevant.

As the law stands now, before a plaintiff can recover in strict products liability, the plaintiff must prove that the product was defective, that is, that its costs outweighed its benefits. The fact that the product's benefits outweigh its costs, however, has nothing to do with the assignment of risks in the product. Why should the fact that the product is nondefective mean that the manufacturer is free to pass on the risk to the consumer? The Cowan rationale for imposing liability on the manufacturer of a defective product applies equally well to dangerous nondefective products. The assigned risk of a dangerous product is the same whether the product is defective or not, and the arguments that justify imposing liability on the manufacturer of a defective product work equally well when the product is dangerous but nondefective.

Restricting liability to defective products makes a mockery of the whole concept of cost-benefit analysis. If the utility of a product outweighs its costs, it means that the injuries the product will cause are worth undergoing, from both the point of view of the consumers of that product and of the manufacturer. It also means that the product is not defective. Thus, the manufacturer, who has based its decision on whether to produce the product on the fact that the benefits of the product will outweigh its costs, will not have to pay for that portion of the costs attributable to consumer injuries. In other words, after calculating the costs of injuries the product will cause and using that

33. See Caterpillar Tractor Co. v. Beck, 593 P.2d 871, 879 (Alaska 1979) ("A product must be defective as marketed if liability is to attach... "); see also Dart v. Wiebe Mfg., Inc., 709 P.2d 876, 881 (Ariz. 1985) (quoting Phillips v. Kinwood Mach. Co., 525 P.2d 1033, 1036 (Or. 1974) ("To impose liability there has to be something about the article which makes it dangerously defective without regard for whether the manufacturer was or was not at fault.") ); Phipps, 363 A.2d at 962 ("Although the plaintiff need not prove any specific act of negligence on the part of the seller... proof of a defect... must still be presented."). For a discussion of the cost-benefit analysis for determining whether a product is defective, see supra note 9.
amount in deciding whether to produce the product, the manufacturer, if the calculations are correct, will not have to pay the amount because the product is not defective. This sum then represents extra, and in a very real sense unearned, profit to the manufacturer. If the jury concludes that the manufacturer performed the weighing test correctly, the manufacturer will not have to pay the costs that the weighing process itself envisioned the manufacturer paying.

Thus, a strong argument can be made that the requirement of a defect undercuts the validity of the weighing process through which all products must go before they reach the market. This Article is more limited in scope, however; this Article merely contends that consumers should be compensated for injuries caused by certain unavoidably dangerous products in the absence of a defect in the product. These are dangerous, but nondefective, products, and with respect to certain of these products the fairness rationale behind strict products liability leads us further into the realms of true strict liability. "Where the reason stops, there stops the rule." However, where the reason extends, the rule should extend also.

II. UNAVOIDABLY DANGEROUS PRODUCTS THAT BENEFIT SOCIETY GENERALLY

Products that benefit society generally at a substantial cost to a few present the most compelling case for a change in the law to compensate those who are injured. Products in this category include vaccines and other medicines which arrest the progress of contagious diseases. It is in the interests of society to have as many people as possible vaccinated against contagious diseases; indeed, many states

34. See discussion infra Parts II, III.
35. See discussion infra Parts II, III.
36. A vaccine is a medium containing a foreign substance that, when administered to the patient, creates an immune system response against a particular disease. See S.A. Sturges, Comment, Vaccine-Related Injuries: Alternatives to the Tort Compensation System, 30 ST. LOUIS U. L.J. 919, 920-21 (1986) (citing J. KIMBALL, INTRODUCTION TO IMMUNOLOGY 9 (1983)). Typically, the substance used to elicit the immune response is a killed or inactivated form of the actual virus or a strain of the virus that does not produce the disease. See id. at 921 & nn.13-14.
37. A specific disease is controlled most effectively when an extremely high percentage of the general population is immune. See Arnold W. Reitze, Jr., Federal Compensation for Vaccination Induced Injuries, 13 B.C. ENVTL. AFF. L. REV. 169, 208 (1986). This societal condition is often termed "herd" immunity. See id. Experts believe that the existence of "herd" immunity against a particular disease eliminates the possible development of an epidemic. See id.

Society as a whole benefits when a degree of "herd" immunity is achieved and the threat of an epidemic is greatly reduced. With unavoidably dangerous vaccines, however, the individual may then have an incentive to decline immunization in order to avoid the risk of injury or contracting the disease. See PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES 182 (1988); Reitze, supra, at 208. This is because the individual may simply benefit
have enacted statutes requiring that all children be vaccinated against certain diseases before they are allowed to enter kindergarten. Vaccinations cannot be made entirely safe, but even with their dangers they are not defective because their utility outweighs the risks that they involve. The problem lies in how to handle the injuries that from the immunity of others. See Huber, supra, at 182; Reitze, supra, at 208. Yet if many people chose to behave in this manner, the goal of vaccinating as many individuals as possible would be defeated, and society would not attain "herd" immunity. See Reitze, supra, at 208. Hence society, through the government, often requires that individuals receive immunizations. See id. The United States Supreme Court has explicitly recognized the right of the state to subject an individual's liberty to the societal goal of immunity against a disease. See Jacobson v. Massachusetts, 197 U.S. 11, 26, 35 (1905) (holding that "[t]here are manifold restraints to which every person is necessarily subject for the common good" so that "the legislature has the right to pass laws which, according to the common belief of the people, are adapted to prevent the spread of contagious diseases").


A majority of the states have certain narrow exceptions to this rule for those whose religion forbids vaccinations. See Okianer Christian Dark, Is the National Childhood Vaccine Injury Act of 1986 the Solution for the DTP Controversy?, 19 U. Tol. L. Rev. 799, 799 n.3 (1988); e.g., N.Y. Public Health Law § 2164(9).

39. See Mary Beth Neraas, Comment, The National Childhood Vaccine Injury Act of 1986: A Solution to the Vaccine Liability Crisis?, 63 Wash. L. Rev. 149, 149 & n.3 (1988). Some of the inevitable risks involved (despite proper preparation of the vaccine) are as follows:

Polio contracted from oral polio vaccine is estimated to occur once in 3.2 million doses, leading to an estimated five cases each year. Encephalitis (swelling of the brain) following the administration of the diphtheria, tetanus, and pertussis . . . vaccine is estimated to occur 3.2 times per million doses, leading to an estimated 43.2 cases each year. Encephalitis following measles vaccination is estimated to result in about 10 cases each year. Deaths due to anaphylactic shock from all vaccines is estimated to be one in 10 million doses for a total of five to six cases each year.

Id. at 149 n.3 (quoting Vaccine Injury Compensation, 1984: Hearings on H.R. 556 Before the Subcomm. on Health and the Environment, 98th Cong. 140 (1984) (statement of Dr. Alan R. Nelson, Member, Board of Trustees, American Medical Ass'n)).

40. See Gregory C. Jackson, M.D., Pharmaceutical Product Liability May Be Hazardous to Your Health: A No-Fault Alternative to Concurrent Regulation, 42 Am. U. L. Rev. 199, 233 & n.233 (1992). This Article deals solely with vaccines that are as safe as possible, that is, those for which there is no safer, alternative design.

The current use of the Sabin oral polio vaccine is the result of a risk-utility decision. There are two forms of polio vaccine. See Sturges, supra note 36, at 921 n.16. The Salk vaccine is administered by injection, while the Sabin vaccine can be given orally to the vaccinee. See id. Along with a more convenient administration, the Sabin vaccine also is believed to have the advantage of longer effectiveness. See id. Yet, unlike the Salk vaccine, the Sabin vaccine contains actual live polio viruses that lead to contraction of the disease in a few patients. See id. Despite its known and serious risk, the Sabin polio vaccine is the form currently given in the United States. See id. Therefore, public health officials made a decision that the ease of administering the Sabin vaccine and its long-lasting effects outweighed its small, but inevitable risks that are avoidable with the Salk vaccine. See Marc A. Franklin & Joseph E. Mais, Jr., Tort Law and Mass Immunization Programs: Lessons from the Polio and Flu Episodes, 65 Cal. L. Rev. 754, 766 (1977).

The overall benefits of immunizations are undeniable. See Neraas, supra note 39, at 149 n.2 (listing the dramatic decreases in the total occurrences of diphtheria, tetanus, pertussis, measles, mumps, rubella, and polio since vaccination for those diseases became common). Indeed, the vaccination efforts against smallpox were so successful that the disease has been eliminated
inevitably result from the vaccination process. Under existing law, manufacturers cannot be held liable for the injuries caused by vaccines because they are not defective. But in light of the societal benefit that accrues from vaccinations and the statutory requirements that persons be vaccinated, it seems appalling to leave the costs of injuries from such vaccines where they fall.

The resolution to this problem lies in the reason for vaccinations in the first place. Where a statute requires the vaccination, that statute stands as a statement by the relevant governmental authority that the public interest mandates that the vaccination be administered. It therefore is highly unfair that the percentage of persons inevitably injured by the vaccine are left to bear the cost. If vaccines are administered in the name of society, then society should compensate those who are injured by the vaccines. This rationale extends beyond statutorily mandated vaccines to all vaccines designed to enhance immunity: society profits from the highest levels of immunity against the most diseases possible, whether required by statute or not.

Thus, this Article proposes that those injured by vaccinations be compensated for those injuries by the group that benefits from vaccinations: society generally. There is no basis for holding manufacturers of the vaccines liable, because the vaccines, the utility of which outweighs their dangers, are not defective. Nor is it appropriate to leave the loss where it falls, upon the individual. Such a result is throughout the world. See Huber, supra note 37, at 182; David S. Fedson, M.D., Adult Immunization Summary of the National Vaccine Advisory Committee Report, 272 JAMA 1133 (1994). Such a result is the goal of those who advocate mandatory immunization.

41. Deaths and adverse reactions to vaccines are uncommon. See supra note 40. Yet this fact should not diminish the urgency involved in determining the most just and effective way to assist those who fatefuly suffer for society's benefit. See Sturges, supra note 36, at 919 ("Adverse reactions to vaccines, although rare, must not be ignored by a responsible society.").

42. See supra note 38 (citing state statutes); see also Fay F. Spence, Note, Alternatives to Manufacturer Liability for Injuries Caused by the Sabin-Type Oral Polio Vaccines, 28 WM. & MARY L. REV. 711, 736 (1987) ("State legislatures already have made a policy decision in favor of public health and against personal autonomy by requiring school children to be vaccinated against polio.").

43. See Reitze, supra note 37, at 209 ("[J]ustice requires that those receiving the benefits of having their fellow citizens vaccinated must share in the cost of caring for those whom fate or malpractice has decreed will be victims.").

44. In other words, under a strict products liability analysis, the benefits of vaccines outweigh their costs. See supra note 8.

From a fairness standpoint, holding the manufacturer liable for a properly prepared vaccine is problematic. In strict liability generally, the manufacturer decides to allocate risk to the consumer. In the context of vaccinations, however, it is society, through legislative enactment, that has decided to compel its membership to face certain dangers. See supra note 38 and accompanying text.

45. Under current law, the loss remains with the individual in many instances. For those vaccinees who attempt to sue the manufacturers, the explicit designation of a vaccine as an "un-
completely arbitrary, since the only prediction that can be made is that a given percentage will be injured by the vaccines, not who within that group will be injured. Moreover, the individual has no real choice whether to undergo the vaccination or not, especially where state statutes require vaccines as a precondition to beginning school.

avoidably unsafe” product in comment k of section 402A of the Restatement (Second) of Torts often prevents recovery. Restatement (Second) of Torts § 402A cmt. k (1977); see, e.g., Mazur v. Merck & Co., 964 F.2d 1348 (3d Cir. 1992) (holding that vaccine falls within comment k as “avoidably unsafe”); Toner v. Lederle Lab., 732 P.2d 297 (Idaho 1987) (applying comment k to diphtheria-tetanus-pertussis vaccine). Comment k is an exception to the strict products liability rule of the Restatement (Second) for those products that are socially desirable yet “quite incapable of being made safe for their intended and ordinary use.” Restatement (Second) of Torts § 402A cmt. k (1965). Due to their great importance, the Restatement contends that such products are not defective. See id.

The only way in which a plaintiff can recover for an injury caused by an “avoidably unsafe” product is to demonstrate that the product was prepared improperly or contained inadequate warnings. See id. In these cases, the focus of the inquiry is the reasonableness of the manufacturer’s behavior. See Mazur, 964 F.2d at 1354 (stating that vaccine supplier was not subject to strict liability but must exercise reasonable care); see also Johnson v. American Cyanamid Co., 718 P.2d 1318 (Kan. 1986) (evaluating reasonableness of manufacturer’s warning on polio vaccine). Hence, the practical effect of comment k is to require plaintiffs to prove manufacturer negligence when the product involved is deemed “avoidably unsafe”. See Ferrigno v. Eli Lilly & Co., 420 A.2d 1305, 1318 (N.J. Super. Ct. Law Div. 1980) (stating that comment k rules are “merely rules of negligence embodying the long-standing concepts of lack of due care and foreseeability of the risk”). Limiting recovery only to those occasions in which the manufacturer is at fault is particularly tragic in the vaccination context where a serious injury can occur despite proper preparation of the vaccine. See supra note 39; e.g., Johnson, 718 P.2d at 1323-24 (holding that parent who acquired poliomyelitis from child given polio vaccine cannot recover from manufacturer if product is unavoidably unsafe with known, reasonable risks); White v. Wyeth Lab., Inc., Nos. 52108, 52564, 1987 WL 14953 *7 (Ohio Ct. App. July 30, 1987) (child with brain damage from DTP vaccine denied recovery because comment k applied to vaccine and manufacturer’s warning was reasonable).

46. For the rates of injury, see supra note 39.

47. See Sturges, supra note 36, at 928 (indicating that alternatives for most of the required vaccines do not exist).

The mandatory aspect of receiving these vaccinations, combined with the benefits of immunity, render any assumption of the risk argument baseless. See, e.g., Kenneth W. Simons, Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference, 67 B.U. L. Rev. 213, 276 (1987). Professor Simons argues that “in those strict liability cases in which [the] defendant cannot make the product or condition safer, it may be especially clear that [the] plaintiff fully preferred the risk.” Id. Yet, assumption of the risk only works as a defense where an individual voluntarily decides to confront a known danger. See, e.g., Rush v. Commercial Realty Co., 145 A. 476 (N.J. 1929). Even after a warning of the vaccine’s risks, the vaccinee does not have the right to decline receipt of the vaccination. See supra note 38. Moreover, an individual is reasonable in seeking immunity from diseases such as polio. Thus, any assumption of the risk argument would be met by the response that reasonable assumption of the risk is not a defense. See Young v. Aro Corp., 111 Cal. Rptr. 535, 537 (Cal. Ct. App. 1973) (denying application of the assumption of risk defense when plaintiff acts reasonably); Blackburn v. Dorta, 348 So. 2d 287 (Fla. 1977) (holding that reasonable assumption of risk does not bar recovery); Cartel Capital Corp. v. Fireco, 410 A.2d 674 (N.J. 1980) (holding that only voluntary and unreasonable assumption of risk serves as defense in strict liability). Indeed, if the recipient is unreasonable in deciding to undergo the vaccination, surely the manufacturer is unreasonable (and therefore negligent) in providing the vaccination in the first place.

48. See supra note 38 (citing state statutes).
thus, leaving the loss on the individual penalizes that person for obeying the law.\textsuperscript{49}

The only entity that can fairly compensate the injured individual in this category is the government.\textsuperscript{50} This is because the population generally benefits from the highest proportion of immunity possible.\textsuperscript{51} Therefore, either state or federal governments should set up a funding system that will fully compensate all those injured in the name of the greater good of mankind. While the federal government has made limited efforts in this direction in the form of the National Childhood Vaccine Injury Act of 1986,\textsuperscript{52} this statute is woefully inadequate in every respect, including the ends it seeks to accomplish, the means to those ends, the vaccines to which it applies, the injuries it covers, and the entities it taxes.\textsuperscript{53}

\textsuperscript{49} The penalties that a recipient may face for compliance with the law can include death or a serious adverse reaction such as encephalitis. See supra note 39 (identifying rates of major adverse reactions to vaccines).

\textsuperscript{50} See Reyes v. Wyeth Lab., 498 F.2d 1264, 1294 n.57 (5th Cir. 1974) ("It can also be argued, of course, that since all society benefits from universal immunization against infectious disease, the loss should be borne by the local, state or federal government."); see also Sturges, supra note 36, at 934 ("[A] government that requires its citizens to be immunized should also provide compensation to those who are injured by required immunization."). Allowing recovery from the government would end the inequities that were produced when the courts held a manufacturer liable or denied an injured vaccinee compensation for failure to prove negligence. See supra notes 44-45 and accompanying text.

\textsuperscript{51} For a discussion of the benefits of a high percentage of immune individuals within the general population, see supra note 37.

\textsuperscript{52} 42 U.S.C. § 300aa-10 to -34 (1994).

\textsuperscript{53} The National Childhood Vaccine Injury Act of 1986 ("the Act"), 42 U.S.C. § 300aa-10 to -34 (1994), was not intended primarily as a vehicle for compensation at all. Rather, Congress specifically passed the Act to address the problem of decreasing vaccine supplies caused by manufacturer withdrawals from the market. See Victor E. Schwartz & Liberty Mahshigian, National Childhood Vaccine Injury Act of 1986: An Ad Hoc Remedy or a Window for the Future?, 48 OHIO ST. L.J. 387, 388-89 (1987). For this reason, the Act does not adequately address the goal of achieving greater compensation for injured vaccinees by requiring that society pay the costs involved.

The Act's coverage is limited to adverse reactions to only three designated groups of vaccines. See 42 U.S.C. § 300aa-14(a) (DTP; measles, mumps, and rubella; and polio). Yet states often require vaccinations against additional diseases prior to admission in school. See, e.g., CAL. HEALTH & SAFETY CODE § 322.8 (Deering 1995) (influenza type b); N.Y. PUBLIC HEALTH LAW § 2164 (McKinney 1995) (hepatitis B and hemophilus influenza type b); VA. CODE ANN. § 32.1-46 (Michie 1994) (hepatitis B and hemophilus influenza type b). Vaccinees injured due to the unavoidable side effects of these mandatory vaccines, therefore, are not within the purview of the statute.

Moreover, an individual seeking compensation under the Act must show that a particular injury or death occurred within a specified time period. See 42 U.S.C. § 300aa-14(b). Although some form of time limitation is arguably necessary, a rigid enforcement of the Act's time periods or injury requirements may defeat what should be the greater objective: compensating those obviously harmed by a vaccine. See, e.g., Hodges v. Secretary of Dep't of Health and Human Servs., 9 F.3d 958 (Fed. Cir. 1993) (denying compensation to parents whose child died less than four hours after DPT inoculation because parents failed to prove death resulted from particular adverse reaction designated in the Act). These requirements can make proceedings under the Act no different (or no less difficult) than a tort lawsuit. See id. at 963, 968 (Newman, J., dissent-
Governmental compensation for all vaccinations and injuries caused by their competent administration will accomplish more than protecting injured consumers. If such a system is enacted, it can replace lawsuits against manufacturers. Arguably, it is appropriate as the law now stands for plaintiffs to lose lawsuits against manufacturers based on the administration of a nondefective vaccine. But even if the plaintiff loses, the threat of such lawsuits is oppressive for manufacturing.

As a result, dissatisfaction of injured vaccinees with the Act has led to a recent increase in appeals of rejected claims and, more significantly, lawsuits against manufacturers. See Robert L. Rabin, Some Thoughts on the Efficacy of a Mass Toxics Administrative Compensation Scheme, 52 Md. L. Rev. 951, 960 n.53 (1993); Carole A. Loftin, Note, Expansion of the Government Contractor Defense: Applying Boyle to Vaccine Manufacturers, 70 Tex. L. Rev. 1261, 1268 & n.58 (1992).

By allowing injured vaccinees the option to reject the Act's recovery scheme and initiate a civil suit against the vaccine manufacturer, the Act essentially defeats itself. See 42 U.S.C. § 300aa-21(a) (permitting party to file civil action for damages after judgment under the Act is rendered). Proponents of the Act argue that this option is not a problem because the Act provides disincentives to tort actions. See Dark, supra note 38, at 849. Indeed, the Act does modify state tort law to some extent in the manufacturer's favor. See 42 U.S.C. § 300aa-22 (barring civil recovery for injury or death caused by unavoidable side effects of vaccine; creating presumption of proper warnings if manufacturer complied with federal labelling laws; barring recovery based upon failure of manufacturer to directly warn recipient). Yet, as long as the Act does not serve as the exclusive means of recovery, lawsuits against the manufacturers will continue. See Rabin, supra; Loftin, supra. Although many of these civil actions will fail due to the enhanced restrictions on tort law contained in the Act, manufacturers will nonetheless be forced to endure the expenses of defending a civil lawsuit. This result will consequently limit the extent to which the Act can fulfill its main purpose: reducing the legal expenses of vaccine manufacturers so as to guarantee an adequate vaccine supply. See Schwartz & Mahshigian, supra.

Limitations on who may sue under the Act also pose a problem. The Act prevents those who have received an award or settled an action for damages from a vaccination injury or death from suing. See 42 U.S.C. § 300aa-11(c)(1)(E). This provision thus bars those parties who sought compensation before Congress passed the Act from bringing a claim, even if the party accepted a minor settlement that fell far short of adequate compensation. See Theodore H. Davis, Jr. & Catherine B. Bowman, No-Fault Compensation for Unavoidable Injuries: Evaluating the National Childhood Vaccine Injury Compensation Program, 16 U. Dayton L. Rev. 277, 310-11 (1991) (discussing Wiggins v. Secretary of Dep't of Health & Human Servs., 17 Ct. Cl. 551 (1989), aff'd, 898 F.2d 1572 (Fed. Cir. 1990)). In the process, the provision favors those individuals who originally did not sue for their injuries and later chose to seek compensation under the no-fault scheme of the Act. See id.

Individuals who do succeed in attaining compensation under the Act may find that certain provisions of the statute limit their recovery. In particular, the Act grants the estate of a vaccine recipient killed by an adverse reaction a set amount of $250,000. See 42 U.S.C. § 300aa-15(a)(2). In addition, for those individuals who must live with their vaccine-related injury, the Act limits the damages available to them for actual and future pain, suffering, and emotional distress to $250,000. See 42 U.S.C. § 300aa-15(a)(4). By placing restrictions such as these on recovery, the Act may foreclose the chance that some injured recipients (or their estates) will truly attain full compensation for their damages.

The most fundamental flaw of the Act is its failure to force society to pay for the injuries caused by mandatory vaccinations. As it stands, the Act requires that any compensation payments be made from a trust fund. See 42 U.S.C. § 300aa-15(i)(2). The money available in this trust fund, however, is collected from specified excise taxes placed on the vaccines. See 26 U.S.C. § 4131(a)-(b) (1994). This taxation scheme, therefore, does not tax all of society as it should. See Sturges, supra note 36, at 945-46. Instead, the scheme places the costs of the vaccines where they were before—one either the manufacturer or the vaccinee. See id.
ers. In any event, not all such lawsuits are lost. In the absence of a governmental decision as to which injuries will be compensated, the jury decides whether a vaccination is defective or not on a case-by-case basis. Sometimes the jury or court decision is wrong, in the sense that a plaintiff recovers for a dangerous, but not defective, vaccination.\footnote{For a discussion of the confusion between dangerous and defective products, see Ellen Wertheimer, Azzarello Agonistes: Bucking the Strict Products Liability Tide, 66 \textit{TEMP. L. REV.} 419, 437-38 (1993).} A governmental compensation system can avoid this problem by designating which vaccines are covered, and by replacing tort liability. Manufacturers also contend that the threat of lawsuits, whether ultimately successful or not, stifles the development of new vaccines, thereby harming society generally. This argument would completely lose any force it has if there were an exclusive governmental compensation system.\footnote{The mechanism for such a system is beyond the scope of this Article. Clearly, the governmental entity would need to designate the vaccines covered by the statutory scheme. The system would also need fully to compensate injured plaintiffs, and would need to be exclusive.}

In the absence of a system whereby government compensates injured vaccinees directly, the next best alternative would be to impose the costs of injuries on manufacturers. In the absence of legislative action, the courts could accomplish this themselves through changes to the existing law of strict products liability. This would at least spread the costs somewhat, and over a long period of years would operate similarly to governmental compensation. Spreading the costs to all persons undergoing the vaccination ultimately spreads the costs to all of society over a long enough period of time. It would be far more efficient, however, and possibly fairer to manufacturers, to enact a governmental system to accomplish directly what it would otherwise take years to accomplish: the compensation of vaccination injuries by society as a whole.

\section*{III. Unavoidably Dangerous Products Used by Some Members of Society}

The products in this category are dangerous but so useful that their utility outweighs the risk they bring with them. The dangers inherent in these products cannot be entirely eliminated by careful use, by a change in design, or by the development of an alternate product. Their utility, however, makes them reasonably dangerous.
As with vaccines, the products in this category are not defective because their utility outweighs their dangers. But the dangers remain, and a certain percentage of persons who use these products competently will be injured by them. One example of such a product is the ladder. Ladders remain dangerous even if used nonnegligently. They cannot be designed so as to eliminate their dangers, but are so useful that their complete absence from the marketplace would pose a substantial hardship. Ladders do not rise to the level of societal necessity that vaccines do, but are nonetheless too useful to be eliminated entirely (indeed, that is the basis for finding them nondefective).

Again as with vaccines, and assuming no negligence on the part of the consumer, it seems highly inappropriate to leave the loss where it has fallen. This is because, in a very real sense, those who are

56. See supra note 40 and accompanying text. For a discussion of the cost-benefit analysis for determining "defectiveness," see supra note 8.

57. See Malcolm E. Wheeler, In Pinto's Wake, Criminal Trials Loom for More Manufacturers, Nat'l J., Oct. 6, 1980, at 30 n.10. For a discussion of the problem created by these products that have significant utility but still cause inevitable harm, see Michael B. Metzger, Corporate Criminal Liability for Defective Products: Policies, Problems, and Prospects, 73 Geo. L.J. 1, 39-40 (1984). Metzger indicates that attempts to reduce the unavoidable injuries of such products often make the products too expensive or unsafe in other ways. See id. at 39-40 & nn.250-51.

58. Another group of products which falls into this category is therapeutic prescription drugs (in other words, prescription drugs used to cure specific conditions, as opposed to vaccines). A defective drug, one the utility of which does not outweigh its dangers, should be treated just as any other defective product is treated. But even nondefective prescription drugs bring undesirable side effects with them. Since no governmental body has shown itself willing or able to establish a health care system that would compensate those injured in the name of the continued availability of such drugs, the tort system should step in to do so. Of course, the simplest system would be to have manufacturers spread the costs of the drugs to all users thereof by charging an amount for the drug that leaves enough to compensate those injured by its use, thus treating such products as though they were defective.

For information on ladders and the like, see Wheeler, supra note 57. Indeed, there is a wealth of similar products for individual outdoor use. Chain saws, lawn mowers, and the like embody dangers which cannot be entirely eliminated. See id. (listing other common household products that inevitably create injuries to users). But such products are distinguished from vaccines because all members of society do not benefit equally from their availability, and no statute requires their use. See supra note 37 (discussing vaccinations and general, societal benefit of immunity from dangerous diseases); supra note 38 (citing state statutes that make vaccination prerequisite to mandatory school attendance). Instead, the consumers who buy these particular products benefit from their availability.

59. Obviously, the dangers that products like ladders embody can be minimized by the use of safety features and directions. However, the dangers cannot be eliminated entirely.

60. The loss, however, often does remain with the user of these products. What effectively prevents these plaintiffs from obtaining compensation is their inability to prove such products defective. See Sandler, supra note 25, at 1510 ("[T]he numerous victims of non-defective dangerous products . . . must frequently bear their own losses because the present law specifies a product defect as a prerequisite to recovery."); see also Gary T. Schwartz, The Beginning and the Possible End of the Rise of Modern American Tort Law, 26 Ga. L. Rev. 601, 630-31 (1992). As an example, Schwartz states that over 417,000 knife injuries occur each year that result in hospi-
injured in the competent use of the products in this category are paying the price of the general availability of these products to all those who need or use them. The dangers inherent in the use of such products will fall on some users; tolerating them is a price that all users should pay. “If a certain type of loss is the more or less inevitable by-product of a desirable but dangerous form of activity it may well be just to distribute such losses among all the beneficiaries of the activity . . . .”

How to accomplish this goal is the next question. The products in this category are not defective because their utility outweighs their dangers. Thus, there is no basis in strict products liability law for im-

tal visits. See Schwartz, supra, at 630. Yet Schwartz points out that few if any claims are brought against knife manufacturers because the defect requirement will foreclose recovery. See id. at 630-31. Thus, a knife that is sharp and intended to cut is not likely to be found defective when it cuts a user. Instead, the user must bear the injury alone. Additionally, the knife will not be found defective because its danger is considered inherent in the device itself. See id. at 630. This “inherent danger” argument is another way in which recovery is denied to consumers injured by these unavoidably dangerous products. See, e.g., Todd v. Societe Bic, S.A., 21 F.3d 1402, 1407 (7th Cir. 1994) (quoting Hunt v. Blasius, 384 N.E.2d 368, 372 (Ill. 1978)) (denying recovery to father of child killed in fire started by cigarette lighter lacking child-resistant feature because “[i]njuries are not compensable in products liability if they derive merely from those inherent properties of a product which are obvious to all who come in contact with the product”).

61. See Keeton, supra note 2, at 856 (“Thus there has come about a wider acceptance for the view that when the benefits to the many come at a high cost to the few, the many should pay for these losses.”).

There are those who would argue that ladder-users are assuming the risk of any dangers inherent in their use, and should therefore be barred from recovery. These individuals may concur in Professor Owen’s view of the accident victim:

[Even a “passive” accident victim may be considered the responsible “cause” of the harm he suffered. This is because the victim . . . made a series of deliberate choices . . . at some time prior to the accident that were necessary antecedents to its eventuality. Nothing inherent in the victim’s mere “passivity” at the precise moment of the accident is a shield from bearing moral responsibility for the intended or foreseeable consequences of such prior choices.

Owen, supra note 20, at 452 (footnotes omitted). While it may be true that ladder-users choose to confront known dangers, this fact should not affect the result here. Reasonable assumption of risk has never operated as a defense. See supra note 47 (discussing assumption of the risk and inappropriateness of the doctrine’s application to vaccination injuries). An individual who elects to use a ladder and who acts competently in doing so is acting reasonably. If that were not the case, then the argument could be made that the manufacturers are acting unreasonably in making ladders available in the first place. If the choice to use a ladder is a reasonable one, then assumption of the risk is not available as a defense. If this were not the case, and if the choice to use the ladder were unreasonable, then one might well argue that the manufacturer’s decision to make the ladder is likewise unreasonable. This is the same argument that would meet a fast-food chain seeking to use an assumption of the risk argument in defending itself against a consumer who has been burned by coffee sold through a drive-through window. If a consumer acts unreasonably in purchasing coffee at a drive-through window, the fast food facility which sells the coffee in such a manner is likewise acting unreasonably by selling the coffee.

62. HARPER & JAMES, supra note 11, § 13.2, at 763. Here, however, it is a product rather than an activity that is unavoidably dangerous yet desirable. Therefore, those individuals who benefit from the availability of the nondefective product, the entire group of the product’s consumers, should compensate those particular consumers who are injured at the expense of the product’s availability.
posing liability on the manufacturer.63 But requiring that those who are injured bear the burden for all those who need or use these products is likewise unfair.64

One way to handle the problem is to create what amounts to an insurance fund for all those who use the products in this category.65 This would require that all who purchase ladders (for example) pay a surcharge, which would then be pooled by the manufacturer into a fund for the compensation of those who are injured while competently using ladders.66 Essentially, this amounts to treating ladders as though they were defective for the purpose of compensating the injuries they cause. The traditional justifications for strict products liability apply to nondefective products as well as to defective ones, as long as a vehicle exists that allows the manufacturers to spread the costs to consumers of the product.

One problem that would immediately arise is that not all users of ladders are also purchasers of ladders.67 The fund would need to com-

63. In other words, these products are not defective. See David G. Owen, Problems in Assessing Punitive Damages Against Manufacturers of Defective Products, 49 U. CHI. L. REV. 1, 16 (1982). Professor Owen correctly indicates that the manufacturer of these nondefective products should not be held liable simply because the manufacturer is aware with statistical certainty that the products will cause injuries. See id.

64. See supra note 61 and accompanying text (discussing unfairness of forcing individual who competently used product to bear consequences of injury).

65. Professor James noted that a form of insurance available to compensate injured persons is the more appropriate way of dealing with accidental injuries or injuries not attributable to fault. See Fleming James, Jr., Accident Liability Reconsidered: The Impact of Liability Insurance, 57 YALE L.J. 549, 569 (1948). Likewise, an insurance fund would better assist those consumers who cannot recover for their losses because the product that injured them was nondefective. See Marshall S. Shapo, A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment, 60 VA. L. REV. 1109, 1376 (1974) ("Such a system would eliminate inequality of treatment for the victims of various kinds of fortuitously caused harms . . . "). Indeed, nondefective products which create a identifiable number of injuries are ideal for the loss-spreading effect of insurance. See Schwartz, supra note 60, at 631 ("[T]he larger the number of foreseeable injuries, the more important . . . loss distribution . . . becomes."). But see Owen, supra note 30, at 706-07 (asserting that private health insurance, "free medical care on a welfare basis," and workers' compensation are better methods for taking "the economic sting out of accidental injuries.").

66. Compare Sandler, supra note 25, at 1517, who argues that a tax should be added to the prices of certain desirable products that cause unavoidable accidents. This tax would force those who purchase (and benefit from) the product to pay for the injuries that the product creates. See id.

67. Pro-defense commentators would also argue that eliminating the defect requirement will force "occasional product users . . . [to] pay for the injuries suffered by product abusers." James A. Henderson, Jr. & Aaron D. Twerski, Closing the American Products Liability Frontier: The Rejection of Liability Without Defect, 66 N.Y.U. L. REV. 1263, 1313 n.188 (1991); see also Owen, supra note 30, at 707 (stating that such an insurance plan would "penalize the prudent consumer . . . by forcing him to pay again through higher prices to overinsure himself and also to insure his less prudent neighbors."). Such fears, however, are misplaced here. As indicated supra note 3, this proposal does not involve those consumers injured by product misuse or negligence.
pensate such users as well as purchasers. But this problem does not defeat the idea. Although it might arguably lead to a higher than warranted surcharge on purchasers (because the purchaser would be paying a surcharge to cover not only the purchasers, but also other users) the loss would still fall more equitably than it would were it left on the injured party. It is indisputably true that this system would cause price increases. However,

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\text{[i]t is crucial... to keep in mind that this [surcharge] is paying to alleviate the hardship and distress of people who suffer injuries. Yes, it raises prices. But the higher prices ensure that we pay close to the true social costs of the goods and services we enjoy. We could buy things more cheaply by refusing to compensate victims... But then the low costs would represent a subsidy we enjoy at the expense of suffering victims—unless, of course, we find ourselves among the victims.}^{68}
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Moreover, those who purchase ladders for use by their employees already pay a surcharge for their use in the form of workers’ compensation insurance.\(^{69}\)

Essentially, the result of the above system would be that the products in this category would be treated just as defective products are already treated. The manufacturer, by imposing a surcharge, would spread the costs of the injuries inflicted by the products to

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69. Another type of product which is not designed for individual use but which might usefully be viewed as belonging to this category is represented by the escalator. See, e.g., Hunt v. City Stores, Inc., 387 So. 2d 585, 588 (La. 1980) (indicating that certain type of injury is likely to occur with escalators despite modern design and conformity with safety standards). The proposed system for compensation could deal with products purchased for the use of others in either one of two ways. The purchaser of the escalator (a department store, mall, or the like) could agree with the manufacturer to indemnify the manufacturer for all injuries caused to the actual nonnegligent users of the escalator. In the alternative, the purchaser could simply pay a surcharge which would cover the same costs as the indemnification was designed to cover. The department store owning the escalator in Hunt was held liable for the injury it caused. See id. Yet, in imposing strict products liability on the store, the court deemed the escalator defective simply because the injury involved in Hunt was “an unusual occurrence in itself which would not have happened had [the] escalator not been defective.” Hunt v. City Stores, Inc., 375 So. 2d 1194, 1196 (La. Ct. App. 1979), amended by and aff’d, 387 So. 2d 585 (La. 1980) (quoting Marquez v. City Stores Co., 371 So. 2d 810 (La. 1979)). Rather than distorting strict liability law and struggling to find a product defective despite the product’s proper design and conformity with safety standards as the Hunt court did with the escalator, the proposed system acknowledges that some products are not defective but still do create injuries. Adoption of the system would then avoid the problem created by the current law requiring a finding of a defect in order to allow the plaintiff to recover. Instead, the system would stand for the principle that the costs of the inevitable injuries should be borne by those parties who benefit from the product’s availability—the store and its clientele.
those who purchase them, and would use this money to compensate injured consumers.\textsuperscript{70}

The system proposed here will have several results. The first is that it will fairly distribute the costs of a product which benefits a broad spectrum of society. Those unlucky enough to fall into the inevitable percentage of consumers injured by the product will be compensated for their injuries in the name of allowing the product to be available generally. It seems counterintuitive to weigh the costs of a product against its utility, and then to decide that the loss will lie where it has fallen simply because the product's costs are outweighed by its benefits. The consumer is in no position to spread the costs. It seems inappropriate to preclude cost-spreading, and to leave the loss on the individual, where a broad spectrum of society benefits from the availability of a particular product. Indeed, such a situation cries out for cost-spreading, but the very usefulness of the product prevents the losses from being shared by those who benefit from the product's availability. Such a result is untenable and would be avoided by requiring that the losses from such products be shared.

A second benefit from this system lies in the fact that it will reduce resorting to the courts in cases which fit the criteria for compensation. Given that the losses under discussion here are not compensated under the current tort system, the government must act to set up the solution proposed here. Such governmental action should include an exclusivity provision as well as a list of the products covered. A solution which insures deserved compensation but which reduces the transaction costs that litigation imposes surely deserves consideration.\textsuperscript{71}

A third benefit lies in the greater legal clarity that will inhere in providing uniformity and certainty of result. Some cases will continue to end up in the courts. In the past, courts have had to resort to subterfuges in order to compensate consumers in cases where justice requires compensation but the law, literally applied, would not.\textsuperscript{72} Where the facts mandate compensation but the law does not, courts wrestle with the need to make the law serve the common sense needs of the judicial system. These wrestling matches lead to an increase in litigation, both by encouraging plaintiffs to file lawsuits in the hope of

\textsuperscript{70} See supra note 20 and accompanying text (discussing superior position of manufacturer as loss allocator).

\textsuperscript{71} See RAHDERT, supra note 19.

\textsuperscript{72} See, e.g., Hunt v. City Stores, 387 So. 2d 585 (La. 1980). For a discussion of the Hunt decision, see supra note 69.
recovery or settlement, and by providing an incentive to defendants to fight liability tooth and nail because the possibility that defendants will not have to pay damages exists. The subterfuges in which the courts engage to lead to the socially appropriate finding of liability promote a lack of certainty of result that further stimulates litigation because the parties will have no incentive not to fight the case to the end. A lack of certainty increases transaction costs, and thus is to be avoided if possible. The system proposed here creates a close to absolute certainty of result and channels funds to injured parties, not into transaction costs. Because the scheme will include a list of covered products, the courts will no longer have to try even the question of whether a product is defective or not. The temptation to find a product defective, even if its utility outweighs its costs, in order to provide compensation, consequently will be eliminated.

IV. UNAVOIDABLY DANGEROUS PRODUCTS THAT FAIL THE RISK-UTILITY TEST

Products that fail the risk-utility test applied to all products are defective. Unavoidably dangerous defective products should be treated no differently. Thus, the products in this category constitute perhaps the easiest of the three categories to handle. Strict products liability law, if interpreted correctly, already covers them.73

Unavoidably dangerous products embody risks that cannot be eliminated by the adoption of an alternative reasonable design. I have argued elsewhere that the lack of an alternative reasonable design should in no way affect the risk-utility weighing process applied to all products nor its conclusion. If the utility of a product is outweighed by its dangers, the manufacturer should be liable for the injuries caused by the product because that product is defective. These are products "for which no alternative exists" and which are "so dangerous and of such little use that under the risk-utility analysis, a manufacturer would bear the costs of liability of harm to others."74

73. See supra note 9.
A substantial number of products liability scholars and defense attorneys contend that a product should only be ruled defective if there was an alternative available design which would have eliminated the danger and which the manufacturer failed to adopt. Of course, if there were such an alternative available, the manufacturer would be liable under a negligence theory for acting unreasonably, and strict liability would be unnecessary. But putting that aside, it seems

Carl T. Bogus, War on the Common Law: The Struggle at the Center of Products Liability, 60 Mo. L. Rev. 1, 45 (1995) ("Some products impose undue risks on society-at-large despite the best possible design, construction, and warnings."). Some, such as vaccines and ladders, are unavoidably unsafe but also are not defective because their utility outweighs their risks. See supra Parts II-III. Thus, traditional strict products liability should not attach for these products. Others, on the other hand, are unavoidably dangerous and fail the risk-utility test. The cigarette is an excellent example of such a product. See J.D. Lee & John F. Vargo, Products Liability Practice Guide § 42.07[4]-[6] (1996) (recognizing practical impossibility of a "safer cigarette"); Wertheimer, supra, at 1443.

For a discussion and criticism of those commentators who argue that a plaintiff must demonstrate the availability to the manufacturer of a reasonable, alternative design in order to recover, see infra notes 75-80 and accompanying text.


Due to the efforts of the pro-defense consensus, a section of the proposed Restatement (Third) of Torts: Products Liability includes a requirement that the plaintiff show the existence of a "reasonable alternative design" that would have reduced the product-induced injury. Restatement (Third) of Torts: Products Liability § 2(b), at 13 (Tentative Draft No. 2, 1995). For a discussion of this new requirement in the Restatement, see David G. Owen, Defectiveness Restated: Exploding the "Strict" Products Liability Myth, 1996 U. Ill. L. Rev. 743 (1996); Frank J. Vandal, The Restatement (Third) of Torts: Products Liability Section 2(b): The Reasonable Alternative Design Requirement, 61 Tenn. L. Rev. 1407 (1994). Refuting the claims of the Reporters for the Restatement (Third), Professor Vandall demonstrates that the majority of courts do not currently require the plaintiff to present evidence of a reasonable alternative design as an element of the plaintiff’s prima facie case. See id. at 1408-21. Moreover, Vandall illustrates how the requirement contradicts the policies that underlie strict products liability. See id. at 1421-24; see also John F. Vargo, The Emperor’s New Clothes: The American Law Institute Adorns a “New Cloth” for Section 402A Products Liability Design Defects—A Survey of the States Reveals a Different Weave, 26 Memphis L. Rev. 493 (1996) (cases cited by Reporters to third Restatement do not support the changes in the third Restatement).

76. Focusing on the manufacturer’s design choices in light of an alternative design shifts the inquiry to considerations of reasonableness that are associated with negligence. See Hager, supra note 68, at 561 (pointing out that requiring proof of a design alternative “is tantamount to finding negligence in the choice to implement the inferior design instead of its feasible alternative”); Vargo, supra note 29, at 23-42 (asserting that adding a reasonable alternative design re-
ironic in the extreme that many of those who argue for this approach are economists who normally support allowing the market to operate as freely as possible.\footnote{77} The irony lies in the fact that in this one arena, that of so-called product category liability,\footnote{78} these economists are unwilling to allow market forces to operate.\footnote{79} If cigarette manufacturers

requirement is “simply a return to negligence”); Wertheimer, supra note 29, at 1243 (1992) (indicating that “the alternative feasible design doctrine transforms products liability law into a negligence-based doctrine” because “[t]he doctrine asks whether it was feasible to redesign the product”).

Not surprisingly, the pro-defense legal scholars and the defense attorneys who are developing the Restatement (Third) are well aware of what the reasonable alternative design requirement does to products liability law. See Restatement (Third) of Torts: Products Liability cmt. c (Tentative Draft No. 2, 1995) (stating that the requirement is the standard that is “also used in administering the traditional reasonableness standard in negligence”).

Returning design defect liability to negligence standards is highly undesirable from the injured consumer’s perspective. First of all, the change would mean that plaintiffs would once again face the daunting evidentiary (and thus financial) obstacles of a negligence claim. See Rahmig v. Mosley Mach. Co., 412 N.W.2d 56, 81 (Neb. 1987) (“A requirement that a plaintiff prove feasibility [of alternatives] . . . in a case based on strict liability . . . is restoration of the exact burden to be avoided by the doctrine of strict liability in tort for a product’s design defect.”); see also supra note 28 (discussing the benefits to the consumer of eliminating a negligence standard). Furthermore, a reasonable alternative design requirement will exempt unavoidably unsafe, low-utility products from the scope of strict liability. See Wertheimer, supra note 74, at 1442-43. In particular, existing case law demonstrates that such an exemption will occur with dangerous products such as cigarettes. See Kotler v. American Tobacco, 926 F.2d 1217 (1st Cir. 1990), vacated, 505 U.S. 1215 (1992) (refusing to hold tobacco company liable for cigarettes under risk-utility test unless alternative feasible design is shown). For a discussion of the application of the risk-utility test to cigarettes, see infra note 84 and accompanying text.

77. See infra note 79.

78. Product category or generic liability is defined as manufacturer liability for products that “remain unreasonably dangerous despite the best possible construction, design and warnings” because the products “have a greater social cost than social benefit.” Bogus, supra, note 74, at 8. Product category liability can attach despite the lack of proof of an alternative reasonable design. See Wertheimer, supra note 74, at 1440. For a discussion of the debate surrounding product category liability, see infra note 79.

79. Instead of directly asserting their unwillingness to allow the market to operate, these commentators disguise their opposition in arguments that product category liability is an anomaly of strict products liability law. See Grossman, supra note 75, at 397 (addressing product category liability cases as deviations from “traditional” products liability); Henderson & Twerski, supra note 67, at 1263 (associating product category liability with non-traditional “liability without defect”). The fallacy of these arguments is that product category liability holds the manufacturer liable for a nondefective product. To the contrary, product category liability is the result of the risk-utility analysis conducted to determine defectiveness. See Wertheimer, supra note 74, at 1439-40 (stating that the product must still undergo the risk-utility test). If an unavoidably unsafe product has more utility than costs, it is not defective. See supra Parts II-III. But if a product, such as a cigarette, fails the test, why should liability not attach as with other products? It is here that these commentators argue that the requirement of an alternative feasible design, the method of eliminating product category liability, is a component of traditional design defect analysis. See Grossman, supra note 75, at 391 (stating that “traditional defect doctrine” places the presence of a reasonable alternative design at “the threshold of analysis”). Granted, some jurisdictions do require the plaintiff to show the existence of a feasible design alternative before the plaintiff can recover. See, e.g., L.A. REV. STAT. ANN. § 9:2800.56 (West 1991) (obligating the plaintiff to demonstrate the existence of alternative feasible design at time product left defendant’s control to recover on design defect theory); Habecker v. Clark Equip. Co., 942 F.2d 210, 215 (3d Cir. 1991) (holding that design cannot be “defective” unless an “alternative feasible
UNAVOIDABLY UNSAFE PRODUCTS

(for example) were compelled to pay the costs of their product by compensating those injured by the availability of cigarettes, the price of cigarettes would rise. But these jurisdictions do not constitute a majority. See Vandall, supra note 76 (discussing cases). More significant, there is nothing traditional about a reasonable alternative design requirement in defect analysis. First of all, the most influential work of modern products liability, section 402A of the Restatement (Second), does not place a burden on the plaintiff to prove the existence of a reasonable alternative design. See Wertheimer, supra note 74, at 1429 (citing Restatement (Second) of Torts § 402A (1965)). In addition, a requirement that returns design liability to negligence standards betrays the purposes behind strict products liability and is anything but traditional. See authorities cited supra note 76 (stating that reasonable alternative design doctrine brings design defect analysis back to negligence-based liability); supra notes 12-13 and accompanying text (illustrating that strict products liability law was created for greater consumer protection and thus does not focus on amount of care exercised by manufacturer).

Opponents of product category liability (and strict products liability in general, for that matter) may relish the inclusion of a reasonable alternative design requirement in the proposed Restatement (Third) of Torts: Products Liability and the document’s explicit rejection of categorical liability. Restatement (Third) of Torts: Products Liability, § 2(b) cmt. c (Tentative Draft No. 2, 1995); see ALL Hesitates on Lawyer Liability, Product Liability Restatement Efforts, 62 U.S.L.W. 2734, 2736 (May 31, 1994) (quoting Professor Aaron Twerski) (stating that reasonable alternative design requirement of Restatement (Third) will apply even to unavoidably dangerous products such as tobacco and alcohol). Yet as Professors Henderson and Twerski, the Reporters to the Restatement (Third), have correctly indicated, “[c]ourts are free to disagree with restatement positions and do so with considerable frequency.” James A. Henderson, Jr., & Aaron D. Twerski, Will a New Restatement Help Settle Troubled Waters: Reflections, 42 AM. U. L. REV. 1257, 1263 (1993). Certainly, for the sake of those individuals who will be injured by unavoidably unsafe, defective products, one can only hope that most courts will recognize the fallacy underlying the reasonable alternative design requirement and choose to reject the Restatement (Third).

In other words, the costs of the product’s injuries would become a part of the cost of production. This result is one of the goals of strict products liability. See Escola v. Coca Cola Bottling Co., 150 P.2d 436, 441 (Cal. 1944) (stating that the costs of the injuries that the product creates can become “a cost of doing business”); Restatement (Second) of Torts § 402A cmt. c (1965) (“Public policy demands that the burden of accidental injuries caused by products . . . be treated as a cost of production . . . .”). For the smoker, the higher price of a pack or carton of cigarettes would more accurately reflect the product’s actual costs. See Windle Turley & Cliff Harrison, Strict Tort Liability of Handgun Suppliers, 6 HAMLIN L. REV. 285, 291 (1983) (“Through higher consumer prices . . . the true product cost to society is . . . known.”). In general, this result is favorable because it allows a consumer to make a more informed choice when purchasing a product. See Calabresi, supra note 18, at 514.

enough to enable him to compensate those he injures and still make a profit."

Such a system would allow the market freely to operate: cigarette manufacturers would be paying the true costs of their product, and the marketplace would decide the question of continued production. Exempting cigarette manufacturers from paying the true costs of their product constitutes a subsidy of that product in the form of staggering health care, industrial, and other costs the product generates. The costs of cigarette smoking fall not only on smokers themselves, but also on society generally. It is unusual, to say the least, to find those who advocate a free market system supporting such a direct subsidy to industry.

The products that fall into this category are defective, and their manufacturers should pay for the injuries they cause. The fact that there is no alternative feasible design that would eliminate the danger does not justify treating these products differently from any other defective product. To the contrary, the products in this category com-

82. Calabresi, supra note 81, at 717. Of course, deaths from cigarette smoking can hardly be classified as occasional, but the quotation remains apt. See Richard A. Posner, A Theory of Negligence, 1 J. LEGAL STUD. 29, 33 (1972) ("When the cost of accidents is less than the cost of prevention, a rational profit-maximizing enterprise will pay tort judgments . . . ."). Product category liability, therefore, does not necessarily remove the product from the market, and it is not simply a form of "judicial outlawry" or "product prohibition," as it has been described. See Grossman, supra note 75, at 386, 391. Rather, product category liability is imposed because there is no legitimate reason to deviate from the policies behind true strict products liability or create an exception to the rule just because a product is unavoidably dangerous and defective. See supra note 79.

Strict products liability shifts the costs of the injuries that a particular product causes to the manufacturer and consumers of that product. Using the cigarette example, this means that tobacco companies and smokers would pay for the costs that cigarettes create. See Bogus, supra note 74, at 51 (stating that "[t]he real question is whether the costs of tobacco-related diseases should be borne by those who benefit from tobacco or by society-at-large" and that "there is strong sentiment that tobacco companies and smokers should bear those costs"). As it stands now, of course, cigarette manufacturers are heavily subsidized by nonsmokers. Passive smokers pay higher premiums and general health expenses to cover costs generated by exposure to cigarettes. See Larry Margasak, Proposed Curbs On Smoking Gain Key Endorsement, PHILA. INQUIRER, Feb. 8, 1994, at A3 (stating that nonsmokers pay $1.5 to $3 billion in earnings and health costs a year due to passive smoke). Government agencies are charged with paying the medical costs of those smokers who cannot afford them. See Bogus, supra note 74, at 51. These costs consequently reach all taxpayers through Medicaid or Medicare. See id. Overall, all nonsmoker adults of a working age pay around $100 extra in taxes and health-care premiums each year to cover medical care for smokers. See Kenneth E. Warner, Ph.D., The Economics of Smoking: Dollars and Sense, 83 N.Y. ST. J. OF MED., 1273-74 (1983). In addition, employers endure higher absentee rates generated by cigarettes. See Thomas D. MacKenzie, M.D., et al., The Human Costs of Tobacco Use (Second of Two Parts), 330 NEW ENG. J. MED. 975, 975 (1994) ("Cigarette smokers are absent from work approximately 6.5 days more per year than nonsmokers."). The Office of Technology Assessment concluded that smoking in 1990 created some $47 billion in lost worker productivity and earnings. See id.

83. See supra notes 74-79.
bine the highest danger level with the lowest utility of any products. They are so dangerous that their dangers cannot be reduced, and they possess no societal utility to counterbalance their risk of injury.

**CONCLUSION**

Strict products liability was designed in part to remove the moral element of fault from certain cases by eliminating the need for the injured consumer to prove negligence on the part of the manufacturer. It also was designed to introduce into tort law a different moral proposition: that when dangerous products are placed on the market, those who derive profit and benefit from the products should pay for the accident costs those products generate. Unfortunately, the courts were not ready for the idea that liability should exist in the absence of fault, and persisted in reinjecting fault concepts into the cases before them. This has led to the erosion of strict products liability and has profoundly interfered with its capacity to fulfill the goals it was designed to meet.

This Article has proposed that strict products liability be allowed to serve the purposes for which it was developed. The goal of strict products liability is to compensate those injured by products in the manner least likely to produce unfair results. In the case of a defective product, it makes sense to impose liability on the manufacturer and to base that liability on the nature of the product, not on the conduct of the manufacturer. If the product is defective and causes injury, what difference does it make that the manufacturer was or was not negligent, where the manufacturer is the party who has profited from the availability of the product?

In the case of nondefective, dangerous products, there is no defect to justify imposing the cost on the manufacturer. But there is likewise no way to justify imposing the cost on the nonnegligent consumer, except the fortuity that that consumer happened to be injured. Dangerous nondefective products by definition have passed a risk-utility test, and the bases for concluding that they pass the test also justify shifting the costs of the injuries they cause onto the groups to whom the product is useful. This Article simply proposes doing just that.

84. See Gilboy v. American Tobacco Co., 582 So. 2d 1263, 1264 (La. 1991) ("Since normal use of cigarettes causes lung cancer, the risk from smoking cigarettes is enormous, while its utility is virtually nil."); Bogus, supra note 74, at 49 ("Do cigarettes fail a risk-utility test? The answer unequivocally must be yes.").
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