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IS THERE A DOCTRINAL ANSWER TO THE QUESTION OF GENERIC LIABILITY?

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PROLOGUE

Sometimes trying to solve a problem tells us more about how we solve problems than about the problem itself. So it is with the problem of generic liability.¹ We can ask a variety of interesting questions

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1. The term "generic liability" refers to products liability based on a claim that an overall product, not just a particular design feature, is unreasonably dangerous. Under a claim of generic liability a plaintiff need not claim that the manufacturer should have used an alternative design. It is enough for the plaintiff to claim that merely putting the product on the market was unreasonably dangerous. Thus, for example, a plaintiff could claim that cigarettes, in and of themselves, are defective because they pose unreasonable health hazards. *See, e.g.*, *Kotler v. American Tobacco Co.*, 926 F.2d 1217 (1st Cir. 1990); *Roysden v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230 (6th Cir. 1988); *Gilboy v. American Tobacco Co.*, 582 So. 2d 1273 (La. 1991); *Hiite v. R.J. Reynolds Tobacco Co.*, 578 A.2d 417 (Pa. Super. Ct. 1990). *See generally*, Carl T. Bogus, *War on the Common Law: The Struggle at the Center of Products Liability*, 60 Mo. L. REV. 1, 46-59 (1995) [hereinafter Bogus, *War on the Common Law*]; Harvey M. Grossman, *Categorical Liability: Why the Gates Should Be Kept Closed*, 36 S. TEX. L. REV. 385, 394-95 (1995). Sometimes this type of liability is called "product category" or "categorical" liability. *See* Bogus, *War on the Common Law, supra*; Grossman, *supra*; James A. Henderson & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Fault*, N.Y.U. L. REV. 1263, 1297 (1991).

The issue of generic liability arises within the law of *design* defects. It does not arise within the law of *manufacturing* defects (flaws) or *marketing* defects (failure to warn). A claim of manufacturing defect or marketing defect always involves a claim that the manufacturer should have produced a safer alternative, that is, a product without the flaw or a product with an adequate warning.

Nearly all courts use some version of the consumer expectation test or the risk-utility test to determine whether a product's design is unreasonably dangerous and therefore defective. *See, e.g.*, *Gray v. Manitowoc Co.*, 771 F.2d 866 (5th Cir. 1985) (interpreting Mississippi law) (consumer expectation test); *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 885 (Alaska 1979) (risk-utility test); *Phipps v. General Motors Corp.*, 363 A.2d 955, 959 (Md. 1976) (risk-utility test); *Brawner v. Liberty Indus., Inc.*, 573 S.W.2d 376 (Mo. Ct. App. 1978) (consumer expectation test); *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033, 1036-37 (Or. 1974) (risk-utility test); *Turner v. General Motors Corp.*, 585 S.W.2d 844, 851 (Tex. 1979) (risk-utility test); *Keller v. Welles Dep't Store*, 276 N.W.2d 319 (Wis. Ct. App. 1979) (consumer expectation test); RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1977) (consumer expectation test). *See generally* William Powers, Jr., *A Modest Proposal to Abandon Strict Products Liability*, 1991 U. ILL. L. REV. 639, 652-59 [hereinafter Powers, *Midwest Proposal*]. Claims of generic liability usually arise in the context of the risk-utility test. *See, e.g.*, *Shipman v. Jennings Firearms, Inc.*, 791 F.2d 1532, 1534 (11th Cir. 1986); *Perkins v. F.I.E. Corp.*, 762 F.2d 1250, 1272-75 (5th Cir. 1985); *Patterson v. Gisellschaft*, 608 F. Supp. 1206 (N.D. Tex. 1985); *Baughn v. Honda Motor Co.*, 727 P.2d 655, 660 (Wash. 1986). *See generally* Grossman, *supra*, at 393-98. The important feature of generic liability, however, is not the precise test a court uses to evaluate design defects. It is that the plaintiff can apply the test to the entire product, not just a particular design feature. The important point is that the plaintiff need not argue that the manufacturer should have used an alternative design.

about generic liability. We can ask whether it would promote product safety, a Kantian or Aristotelian conception of justice or consumer autonomy; whether it would stifle business activity; and so on. I want to pose a different question, a more mundane and old-fashioned question. In a jurisdiction that has not specifically addressed the issue of generic liability by statute² or caselaw,³ do traditional doctrinal arguments⁴ point to a reasonably clear answer to the question of whether a

To put it mildly, generic liability has been controversial. Compare JOHN S. ALLEE, *PRODUCT LIABILITY* § 2.05(2)(e), at 2-48 to 2-49 (1986), Grossman, *supra*; Henderson & Twerski, *supra* at 1297, Michael Hoening, *Preventing 'Stretched Liability': The Challenge to Bench and Bar*, BNA Prod. Safety & Liab. Rep. 49, 53-54 (1991); *Reporters' Study: Compensations and Liability for Product and Process Injuries*, Proposed Council Draft No. 1, 34-65 (1991) [hereinafter *Reporters' Study*]; Donald E. Santarelli & Nicholas E. Calio, *Turning the Gun on Tort Law: Aiming at Courts to Take Products Liability to the Limit*, 14 ST. MARY'S L.J. 471, 507-08 (1983); Victor E. Schwartz, *Liability for 'Defectless' Products*, 18 BNA Prod. Safety & Liab. Rep. 1104, 1106-07 (1990); Gregory P. Taxin, *Tobacco Industry Liability for Cigarette-Related Injuries: "Smokers Give It Up!"*, 16 J. Prod. & Toxic Liab. 221 (1994); and Note, *Handguns and Product Liability*, 97 HARV. L. REV. 1912 (1984) (all rejecting generic liability) with Carl T. Bogus, *Pistols, Politics and Products Liability*, 59 U. CIN. L. REV. 1103, 1148 (1991); Bogus, *War on the Common Law*, *supra*, Marc Z. Edell, *Risk Utility Analysis of Unavoidably Unsafe Products*, 17 SETON HALL L. REV. 623, 625-26 (1987), Windle Turley, *Manufacturers' and Suppliers' Liability to Handgun Victims*, 10 N. KY. L. REV. 41, 61 (1982), Iveson, Note, *Manufacturers' Liability to Victims of Handgun Crime: A Common Law Approach*, 51 FORDHAM L. REV. 771, 773 (1983); Andrew O. Smith, Comment, *The Manufacture and Distribution of Handguns as an Abnormally Dangerous Activity*, 54 U. CHI. L. REV. 369, 370, 379 (1987) (all advocating generic liability). Generic liability has been one of the most controversial topics for the American Law Institute in drafting the *Restatement (Third) of Torts: Products Liability*. See RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 & cmt. d (Tentative Draft No. 2, 1995). For a more complete account of this controversy, see Grossman, *supra*, at 398-99 n.62.

2. All of the statutes addressing generic liability reject it or severely limit its application. See, e.g., CAL. CIV. CODE § 1714.45 (West Supp. 1996); LA. REV. STAT. ANN. § 9:2800.51-.59; MD. CODE ANN., Art. 27, § 36-I(h) (1992); MISS. CODE ANN. § 11-1-63(b) (Supp. 1996); N.J. STAT. ANN. 2A:58C-3 (West 1987); TEX. CIV. PRAC. & REM. CODE § 82.005 (Supp. 1996).

3. Most courts that have considered generic liability have rejected it. See, e.g., *Kotler*, 926 F.2d at 1224-26; *Moore v. R.G. Indus., Inc.* 789 F.2d 1326, 1327 (9th Cir. 1986); *Armijo v. Ex Cam, Inc.*, 656 F. Supp. 771, 773 (D.N.M. 1987); *Gunsalus v. Celotex Corp.*, 674 F. Supp. 1149, 1158 (E.D. Pa. 1987); *Patterson*, 608 F. Supp. at 1214; *Hilberg v. F.W. Woolworth Co.*, 761 P.2d 236, 240-41 (Colo. Ct. App. 1988); *Baughn*, 727 P.2d at 661. A few courts have recognized generic liability. See *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110 (La. 1986); *Kelley v. R.G. Indus., Inc.* 497 A.2d 1143 (Md. Ct. App. 1985); *O'Brien v. Muskin Corp.*, 463 A.2d 298 (N.J. 1983). Each of these decisions was later overturned or severely limited by statute. See N.J. STAT. ANN. 2A:58C-3; MD. CODE ANN., Art. 27, § 36-I(h); LA. REV. STAT. ANN. § 9:2800.51-.59. Two other courts have supported generic liability in dictum. See *Carter v. Johns-Manville Sales Corp.*, 557 F. Supp. 1317, 1320 (E.D. Tex. 1983); *Wilson v. Piper Aircraft Corp.*, 577 P.2d 1322, 1328 n.5 (Or. 1978). The suggestion in *Carter* is now precluded by statute. See TEX. CIV. PRAC. & REM. CODE § 82.005; see also *Caterpillar, Inc. v. Shears*, 911 S.W.2d 379 (Tex. 1995).

4. By "doctrinal argument" I mean an argument by analogy to previous legal decisions based on the announced or perceived rationales underlying those decisions. Doctrinal argument relies on policies and purposes, but it purports to take those policies and purposes from existing precedents. See generally HENRY M. HART, JR. & ALBERT M. SACKS, *THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW* 145-58 (William N. Eskridge, Jr. & Philip P. Frickey eds. 1994). An interpreter has to make choices about which analogies are apt, and in doing so may bring his or her own values to the task. Analogy is at least partially in the eye of the beholder. Nevertheless, doctrinal analysis at least purports to eschew having an inter-

court should recognize generic liability? Put another way, could a judge facing the question of generic liability in a case of first impression give reasonably clear doctrinal reasons for deciding one way or the other? I will suggest that a judge could muster plausible doctrinal arguments either way and, consequently, could render a legitimate⁵ decision either for or against generic liability.⁶

DIALOGUE

An opponent of generic liability could argue, *ex hypothesis*, that no court in the particular jurisdiction has recognized generic liability. Products liability law has been around for three decades, so if courts wanted to recognize generic liability, they would already have done so. It is not the business of courts to create entirely new theories of liability from whole cloth.⁷ That is the role of the legislature. The role

preter *simply* decide an individual case based on his or her own values. One might ask why we should be interested in doctrine. One reason is that it is a staple of everyday lawyering. From a phenomenological perspective, it is difficult to understand the discourses of lawyering without taking the discourse of doctrine seriously.

5. I borrow the notion of legitimacy from Philip Bobbitt. A legitimate decision is one for which the *reasons* of decision can be translated into an accepted mode of analysis in our legal system, regardless of whether the *result* is just, according to some external conception of justice. See PHILIP C. BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991).

6. Debate about the determinacy of doctrinal debate is, of course, well-known. It is a standard claim of critical legal theory, and of legal realism before it, that, for every principle we can construct to explain a line of cases, we can construct a counter-principle that will point the other way. See, e.g., ROBERTO MANGABEIRA UNGER, *THE CRITICAL LEGAL STUDIES MOVEMENT* 60-75 (1986). In an abstract sense, this claim of indeterminacy is clearly correct. Just as we can construct an infinite number of mathematical functions to account for any finite number of points of a graph, we can construct an infinite number of principles to account for a finite number of precedents. See SAUL A. KRIPKE, *WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE* 7-9 (1982); LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 201 (G.E.M. Anscombe trans. 1953). Put another way, we can always find some basis for distinguishing an earlier case. From the perspective of everyday interpretation, however, the interesting question is whether we can construct intuitively plausible counter-principles. Principles that are unduly convoluted or that do not draw on plausible human goals are unlikely to garner support in an actual doctrinal debate.

On the other hand, there is a widely-shared urge for uniquely right answers about our legal rights and obligations. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 81-130 (1977). Under this view, one account of our legal and social practices puts them in their best light and therefore provides a principle for ascertaining uniquely right answers in apparently novel cases. A problem with this view is that, while we *might* agree on such an account, we also might not.

A problem with both of these views is that their abstractness limits their power to account for detailed judgments about doctrinal analysis. Each attempts to make global account of doctrinal discourse in its entirety. Thus, neither helps much in accounting for the widely shared experience that *some* questions of doctrine are fairly well determined, whereas others are not. For example, courts often contrast issues that have been decided and issues of first impression. My hope in examining doctrinal debate about generic liability is to shed light on one important source of indeterminacy in everyday doctrinal debate: sometimes debate about doctrine straddles a fundamental division in the types of doctrinal discourse available to lawyers.

7. See, e.g., Grossman, *supra* note 1, at 405-10.

of the courts is to apply law as it exists. In any event, if a court does adopt generic liability, it will have to recognize that it is creating new law, not applying existing law.

A proponent of generic liability has a convincing doctrinal response. The opponent misstates both the current state of existing law and the role of courts. While it is true, *ex hypothesi*, that no court in the particular jurisdiction has addressed the narrow question of generic liability, courts have decided the broad principles upon which generic liability is based. Cases applying the risk-utility test to run-of-the-mill design defect claims provide a good analogy and, therefore, a good precedent for generic liability.⁸ Thus, generic liability is not a novel theory cut from whole cloth. It merely applies ordinary principles of products liability law, already embodied in the risk-utility test, to a new situation. To be sure, the new situation is the limiting case for the risk-utility test—because the jury is asked to compare the entire product with no product at all rather than to compare a product's actual design with a proposed alternative design—but the principles are not meaningfully different. The jury is still asked, under the risk-utility test, whether the product is unreasonably dangerous. Applying principles embodied in earlier cases to new situations is precisely what courts are supposed to do.⁹

The fact that a court has not already recognized generic liability does not mean that the court has rejected generic liability. It just means that the court has not been asked to decide one way or the other. That should not be surprising. The problem of generic liability understandably comes late in the evolution of products liability law. From its inception in *Greenman v. Yuba Power Products, Inc.*¹⁰ and section 402A,¹¹ strict products liability has paraded under a false banner. It has never been "true" strict liability in the sense that a plaintiff

8. See, e.g., *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871 (Alaska 1979); *Phipps v. General Motors Corp.*, 363 A.2d 955 (Md. 1976); *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033 (Or. 1974); *Turner v. General Motors Corp.*, 585 S.W.2d 844 (Tex. 1979).

9. See, e.g., *Norway Plains Co. v. Boston & Maine R.R.*, 1 Gray 263 (Mass. 1845) (L. Shaw, C.J.) ("It is one of the great merits and advantages of the common law that, instead of a series of detailed practical rules . . . common law consists of a few broad and comprehensive principles. . . . [A] consequence of this expansive character of the common law is, that when new practices spring up, new combinations of facts arise, and cases are presented for which there is no precedent in judicial decision, they must be governed by the general principle, applicable to cases most nearly analogous . . ."); see HART & SACKS, *supra* note 4, at 372-77.

10. 377 P.2d 897 (Cal. 1962).

11. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

need prove only that the defendant's product caused injury.¹² Both *Greenman* and section 402A—as well as every case applying strict products liability—make clear that the plaintiff must prove that the offending product was defective. In early cases, including *Greenman* itself, the question of what constituted a defect was not difficult because the case involved a manufacturing flaw, such as an impurity, a loose or missing bolt, and so on. When plaintiffs began suing for defectively designed products, however, the question of what constituted a defect became paramount. Courts grappled with the relative merits of the consumer expectation test versus the risk-utility test, with most courts eventually choosing the risk-utility test.¹³ Thus, courts asked jurors to determine whether the risks posed by a particular design feature—such as the absence of a safety guard—outweighed benefits of the design feature in terms of performance, countervailing safety concerns, and product cost.¹⁴

It behooves a plaintiff in a design case to make it as easy as possible for a jury to conclude that the risks of a product feature outweigh its benefits. Thus, in most cases plaintiffs argue that a minor alteration in the product's design would have significantly reduced the product's risks. This strategy makes it more difficult for a defendant to argue that the product's actual design was sufficiently useful to outweigh any risks. Although this strategy is constrained by the plaintiff's need to show that the proposed design alternative would have prevented the accident, it nevertheless creates a strong incentive for plaintiffs to attack a narrow design feature rather than taking on the additional burden of attacking the entire product. It is not surprising that few courts have had to confront the issue of generic liability because plaintiffs generally try to avoid this uphill battle. Consequently, the fact that a court has not yet confronted a claim of generic liability does not mean that the court is hostile to such a claim. The fact that plaintiffs rarely have an interest in attacking an entire product does not mean that the principles underlying the risk-utility test should be interpreted to preclude a plaintiff from trying.

12. See generally Powers, *Modest Proposal*, *supra* note 1, at 652-65; William Powers, Jr., *The Persistence of Fault in Products Liability*, 61 TEX. L. REV. 777, 781-97 (1983) [hereinafter Powers, *Persistence*].

13. See generally Powers, *Modest Proposal*, *supra* note 1, at 654-55.

14. See, e.g., *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 885-86 (Alaska 1979); *Phipps v. General Motors Corp.*, 363 A.2d 955 (Md. 1976); *Phillips v. Kimwood Mach. Co.*, 525 P.2d 1033, 1036-38 (Or. 1974); *Turner v. General Motors Corp.*, 585 S.W.2d 844, 857 (Tex. 1979); see also W. Page Keeton, *The Meaning of Defect in Products Liability—A Review of Basic Principles*, 45 MO. L. REV. 579 (1980); W. Page Keeton, *Products Liability—Liability Without Fault and the Requirement of Defect*, 41 TEX. L. REV. 855 (1963); Powers, *Persistence*, *supra* note 12.

Put another way, generic liability asks a court to apply the risk-utility test to the case in which the best way to improve a product's safety is not merely to change its design, but instead to forego putting the product on the market at all. The plaintiff's proposed "alternative design" in such a case is no product at all. Again, the plaintiff might have an uphill battle under the risk-utility test to demonstrate that this alternative is reasonable, but, so the argument goes, there is nothing in the underlying theory of the risk-utility test that prevents the plaintiff from trying. Only an arbitrary new rule that immunizes this limiting case from scrutiny would prevent a plaintiff from trying, and the logic of the risk-utility test itself does not contain such an arbitrary limit.¹⁵

This is nothing more than a standard doctrinal argument, an argument by analogy. It claims that any differences between the two sides of the analogy are superficial. It claims that there is no good reason to distinguish between applying the risk-utility test to compare an existing product feature with a proposed alternative design and applying the risk-utility test to compare an existing product feature with the alternative of no product at all. The argument does not make a direct, explicit appeal to external claims of justice or efficiency. Rather, whatever arguments about justice and efficiency that cause courts to use the risk-utility test for run-of-the-mill cases are just as forceful in claims of generic liability. That is just what it means to say that the principles supporting generic liability are already present, albeit inchoately, in existing law.

This leaves an opponent of generic liability with two options for making a doctrinal attack on this line of argument. First, the opponent can claim that the analogy is inapposite, that is, making a risk-utility comparison of an entire product and no product at all is significantly different from making a risk-utility comparison of a product and a proposed alternative design.¹⁶ Second, the opponent can claim that another analogy, as good or better than the first, points in the opposite direction. As it turns out, these two lines of argument are actually the same.

15. Under this view, a court's decision to recognize generic liability would be a less dramatic "extension" of "existing" law than was the decision to use the risk-utility test rather than the consumer expectation test in the first place, or the decision to apply strict products liability law at all to claims of design defect and failure to warn rather than only to claims of manufacturing flaws.

16. See *Reporters' Study*, *supra* note 1, at 34-65.

First consider a search for a competing analogy. Run-of-the-mill contract cases give the parties autonomy to make their own choices. As long as a seller does not hide a product's features, the ordinary principles of contract law give individuals autonomy to choose which products to buy.¹⁷ These principles do not address whether a product's costs and benefits are worthwhile. Whereas the internal logic of the risk-utility test assigns a jury the power to evaluate a product's risk and utility, the ordinary principles of contract law forbid jurors to second-guess the parties' judgment about whether, all things considered, their deal was worthwhile.

A proponent of generic liability might object that run-of-the-mill contract cases provide a poor analogy because they do not involve a product that caused personal injury. Run-of-the-mill contract cases do not even mention products liability law. The problem with this objection is that we could just as easily say that run-of-the-mill design defect cases—the cases the proponent relies on—do not involve claims of generic liability and, in fact, do not even mention generic liability. Structurally, the two arguments are mirror images.

The cases embodying both analogies can be distinguished from the case at issue because the whole point of an analogy is to extend the line of cases to a new factual setting. The question for each proposed analogy is whether to apply the principles embodied in a particular line of cases to the new factual situation. The question is simply: Which analogy is better? Is a claim of generic liability more like a claim that a product should have had an alternative design? Or is it more like a market transaction involving issues other than personal

17. Specific features of contract law sometimes depart from these ordinary principles of party autonomy, but specific features of law about the risk-utility test also sometimes depart from the ordinary principles of comparing risk and utility. See, e.g., *Verge v. Ford Motor Co.*, 851 F.2d 384 (3d Cir. 1978) (multipurpose chassis not subject to ordinary risk-utility analysis); *Caterpillar Inc. v. Shears*, 911 S.W.2d 379 (Tex. 1995) (multipurpose machine not subject to ordinary risk-utility analysis); *Grundberg v. Upjohn Co.*, 813 P.2d 89 (Utah 1991) (prescription drugs not subject to ordinary risk-utility analysis); RESTATEMENT (SECOND) OF TORTS § 402A cmt. k (1965) (unavoidably unsafe products not subject to ordinary risk-utility analysis). It is still the case that run-of-the-mill contract cases do not evaluate the "reasonableness" of the parties' deal. Thus, the ordinary principles of contract law run counter to the ordinary principles of the risk-utility test. See generally William Powers, Jr., *Border Wars*, 72 TEX. L. REV. 1209 (1994) [hereinafter Powers, *Border Wars*]. It is the ordinary principles of each line of cases that support the competing doctrinal analogies.

Professor Bogus has recognized these competing principles as a tension between what he calls Abinger's Paradigm—taken from Lord Abinger's opinion in *Winterbottem v. Wright*, 10 M & W 109, 152 Eng. Rep. 402 (Ex. 1842), and representing a claim that market solutions should control product liability cases—and what he calls Cardozo's Paradigm—taken from Justice Cardozo's opinion in *MacPherson v. Buck Motor Co.*, 111 N.E. 1050 (N.Y. 1916), and representing an appeal to tort principles to give manufacturers incentives to make safer products. See Bogus, *War on the Common Law*, *supra* note 1, at 9-30.

injury? Translated into the rubric of distinguishing cases, the question is which distinction is more significant: the distinction between product liability cases involving personal injury and run-of-the-mill contract cases, or the distinction between applying the risk-utility test to compare a narrow product feature with an alternative design and applying the risk-utility test to compare an entire product with no product at all.¹⁸ We have just come full circle. The search for a competing analogy just turns out to be the same question as whether the original analogy is a good one after all.

Recognizing that conflicting lines of cases are a major source of ambiguity in doctrinal analysis is hardly new.¹⁹ The standard doctrinal response is to try to resolve the conflict by referring to purposes and policies that are drawn from a broader legal context and that transcend the conflicting lines of cases.²⁰ But a problem arises with these particular competing lines of cases—products liability and contract autonomy—because the conflict occurs so deep in the structure of legal doctrine.²¹ If two lines of conflicting cases occur within a single body of law—for example, tort law or contract law—a judge can at least try to find overarching purposes and policies in that body of law. The judge might or might not succeed. It might turn out that the particular body of law is already too broad to reveal unifying purposes and policies, or that it is too riddled with arbitrary compromises to reveal unifying purposes and policies. Even if a judge could succeed in this task

18. A proponent of generic liability might respond that courts have already decided this issue by routinely applying the risk-utility test rather than ordinary principles of contract law to products liability cases. This response begs the question, however. Courts routinely apply the risk-utility test to products liability cases involving claims of alternative design, not to products liability cases involving claims of generic liability. Again, the question remains whether cases involving claims of generic liability are better analogized to products liability cases involving claims of alternative design or to run-of-the-mill contract cases.

19. See, e.g., *The Case of the Faithless Fiduciary*, in HART & SACKS, *supra* note 4, at 383-97. The actual case is *Berenson v. Nirenstein*, 93 N.E.2d 610 (Mass. 1950). It involved the question whether the defendant's oral promise to buy stock for the plaintiff as the plaintiff's agent was governed by a line of cases applying the statute of frauds or by a line of cases creating constructive trusts, notwithstanding the statute of frauds. See *id.*

20. See, e.g., HART & SACKS, *supra* note 4, at 396; see also Lon L. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353 (1978).

21. The theoretical problems with the approach are well known, and are real. Nevertheless, judges and lawyers routinely engage in the analogical reasoning of doctrinal analysis. It constitutes an established rhetoric of our legal system, whatever its logical status. It is important to a phenomenological understanding of law to try to understand this mode of discourse on its own terms. The important point here is that the doctrinal conflict presented by the problem of generic liability poses special problems for doctrinal analysis, even on its own terms. See *supra* note 6. See generally UNGER, *supra* note 6, at 43-90. In the context of a general critique, Unger addresses the specific conflict between the ordinary principles of fairness and the ordinary principles of contract. See *id.* at 66-75. That is structurally similar to the conflict here between the ordinary principles of the risk-utility test and the ordinary principles of contract law.

within a discrete body of law, however, resolving the conflict between the ordinary principles of risk-utility and the ordinary principles of contract autonomy is more difficult because the conflict occurs across the very doctrinal boundaries that define the most basic legal rhetorics we use.

The risk-utility test and the principle of contract autonomy represent fundamentally different ways of talking about social and legal arrangements.²² The risk-utility test employs the rhetoric that products should be reasonable under the circumstances, defined primarily by a cost-benefit conception of reasonableness.²³ It assigns power to juries. It reflects the ideology of utilitarianism. The principle of contract autonomy, on the other hand, employs the rhetoric that individuals should be able to decide for themselves how to balance the costs and benefits of their own decisions.²⁴ It assigns power to private markets. It reflects the ideology of freedom and consent.²⁵ Since these two distinct rhetorics fracture legal discourse at its very foundation, it is difficult to construct doctrinal arguments that transcend them. Doctrinal argument, after all, requires an appeal to purposes that are deeper than, and therefore transcend, competing lines of cases.²⁶ If the conflict straddles fault lines at doctrine's most fundamental level, we have

22. See Powers, *Border Wars*, *supra* note 17.

23. The risk-utility test is similar in this respect to the basic rhetoric of negligence. Although the risk-utility test supposedly differs from negligence because it purports to evaluate the defendant's product, not the defendant's conduct, *but see* Powers, *Modest Proposal*, *supra* note 1, at 652-59, it is similar to negligence in that it assigns to a jury the task of determining, after the fact and under roughly a cost-benefit test, whether a risk was reasonable.

24. Sometimes contract law departs from this basic rhetoric, such as when it holds that a contract is unconscionable. See, e.g., *Hennigsen v. Bloomfield Motors, Inc.*, 161 A.2d 69 (N.J. 1960); U.C.C. § 2.302 (1970). This is a departure from ordinary principles of contract law, however. Party autonomy remains the core of contract rhetoric. See *supra* note 23. I do not claim that the "core" of contract rhetoric and the "periphery" (or the "rule" and the "exception") occur naturally. They are products of the way lawyers talk about law. We can deconstruct them when we want to, but we can also recognize them when we want to do that. See Powers, *Border Wars*, *supra* note 17, at 1211-12 n.14.

25. Contract autonomy and the cost-benefit conception of reasonableness are not the only basic rhetorics of law. Property law's basic rhetoric gives people entitlements to property and then lets them decide how to use the property. It assigns power to property owners and reflects the ideology of property rights. Furthermore, legislative regulation, of which criminal law is an example, assigns power to the legislature and is supported by the ideology of democracy. These basic rhetorics are not totally independent. For example, property rights are more valuable if they can be traded. But the rhetorics themselves are fundamentally different. The fact that these fundamental, yet competing, rhetorics define basic divisions in the first-year law school curriculum is no accident. See generally Powers, *Border Wars*, *supra* note 17.

26. It is interesting to note the metaphors employed to represent doctrinal analysis. Hart and Sacks employ the "Great Pyramid of the Legal Order." See HART & SACKS, *supra* note 4, at 286-87. Dworkin employs the idea of "gravitational force." See DWORKIN, *supra* note 6, at 81-130. Both metaphors suggest convergence. My suggestion here is that, while transcending policies and purposes *might* lead to convergence on "local" doctrinal issues, we do not necessarily continue to converge as we delve deeper into legal discourse. At some point we might discover

nothing left other than to choose the "logic" of one of the competing rhetorics.

But maybe it is too early to give up. Maybe the existing structure of these two competing rhetorics reveals a hierarchy that we can employ to select a method of choosing one over the other. In fact, I have suggested elsewhere that there is such a hierarchy.²⁷ In hard cases, such as cases involving generic liability, contract principles and risk-utility principles seem to conflict. In easy cases,²⁸ however, courts regularly use the rhetoric of contract autonomy to trump jury determinations of reasonableness. These cases are so easy that we do not even see them as presenting a conflict of fundamental principles.

Consider an ordinary contract to sell wheat, with a contract price of one dollar per bushel. If the seller does not deliver, the buyer's remedy is measured (roughly) by comparing the contract price with the buyer's cover price.²⁹ We take the contract price as a benchmark. We do not let the jury determine, in cost-benefit terms, whether the buyer (or seller) acted reasonably in setting the contract price at one dollar per bushel. That is just what a real commitment to the cost-benefit rhetoric of reasonableness would demand. We might have to suspend disbelief to apply the rhetoric of reasonableness to a problem that should obviously be governed by contract principles, but this merely shows how easily we have come to accept the notion of contract autonomy trumping reasonableness. Nothing in the internal logic of the rhetoric of reasonableness eschews reference to a cost-benefit analysis to set a reasonable "contract price" and therefore to calculate the buyer's remedy. A decision to apply contract principles to this case is a decision—albeit an implicit one—to privilege contract autonomy over reasonableness. We can find hundreds of run-of-the-mill contract cases that do the same thing.

The converse, however, is not true. Although courts sometimes privilege reasonableness over contract autonomy, they do not do so routinely. Every contracts case privileges contract law over tort law, because nothing else can explain the outcome. Nothing internal to the rhetoric of reasonableness precludes it from governing a case. Put an-

irreconcilable discontinuities, which create problems for doctrinal analysis, even on its own terms.

27. See Powers, *Border Wars*, *supra* note 17, at 1223-29.

28. We often can learn more about the legal system from easy cases than from hard cases. See, e.g., Frederick Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399, 407-10 (1985).

29. See, e.g., *Acme Mills & Elevator Co. v. Johnson*, 133 S.W. 784 (Ky. 1911); U.C.C. §§ 2-711, 2-712 & 2-713 (1970).

other way, the rhetoric of reasonableness never turns itself off.³⁰ Only a decision from the outside to privilege another rhetoric turns off the rhetoric of reasonableness. On the other hand, most tort cases do not even present a conflict between the rhetoric of reasonableness and the rhetoric of contract autonomy because most tort cases involve strangers. In cases involving strangers, the internal logic of the contract rhetoric turns itself off without any help from the outside. Since most tort cases do not involve a "real" conflict between the rhetoric of reasonableness and the rhetoric of contract autonomy, a decision to use reasonableness does not tell us anything about the hierarchy of the two principles. Thus, it seems that the principles of contract autonomy and reasonableness are not on equal footing. The principle of reasonableness takes a back seat to contract autonomy, waiting to fill in when contract autonomy gives up of its own accord, that is, when the parties do not have a contract or when there has been some other form of perceived market failure.³¹

A proponent of generic liability has an easy doctrinal answer to this argument. Even if the deep structure of contract and tort law suggests, as a general matter, that the rhetoric of reasonableness takes a back seat to the rhetoric of contract autonomy, this is not true in products liability cases. Routine products liability cases are precisely where courts apply the principles of reasonableness to a market transaction. Routine products liability cases are precisely the cases in which the rhetoric of reasonableness trumps the rhetoric of contract autonomy. Conversely, an opponent of generic liability can then respond that this is true only in routine product liability cases—that is, in cases involving claims that the manufacturer should have used an alternative design.

So we are right back where we started. We still do not know which line of authority is the exception and which is the rule. We still do not know whether to privilege the rhetoric of contract autonomy or the rhetoric of reasonableness.³² Not only have we not resolved the

30. The rhetoric of reasonableness never fails by its own terms. Left to its own devices, it would swallow up the entire world of legal discourse. Whatever boundaries it has are imposed from outside its own internal logic. That is not true of law's other basic organizing rhetorics. By their own terms, contract, legislative, and property rhetorics give up of their own accord when there is no agreement, statute, or property owner, respectively. See Powers, *Border Wars*, *supra* note 17, at 1225-26 n.54.

31. See HART & SACKS, *supra* note 4, at 209-32; Powers, *Border Wars*, *supra* note 17, at 1226-29.

32. We might resort here to the perceived purposes that lie behind this structure. For example, we might privilege contract autonomy generally on the ground that it better allows parties to plan their affairs than does an after-the-fact, ad hoc jury determination of reasonableness. Con-

issue, we have not made any progress at all. We are still faced with the same question that began our inquiry: Should the market or juries resolve the relative costs and benefits of a product's overall design?

Maybe a proponent of generic liability can return to more local terrain surrounding cases involving generic liability. We know that run-of-the-mill product liability cases, that is, cases involving claims of alternative design, refuse to privilege contract autonomy over reasonableness. According to the previous argument, law generally privileges contract autonomy over reasonableness and applies reasonableness only when the rhetoric of contract autonomy has given up on its own accord. This must mean that, in run-of-the-mill design defect cases, contract autonomy has given up on its own accord. This is just a recognition that we cannot trust the market to provide solutions in these cases. The only feature that can possibly distinguish run-of-the-mill design defect cases from run-of-the-mill contract cases is the nature of the plaintiff's injury. Thus, run-of-the-mill design defect cases must reflect a recognition that the predicate conditions for consumer autonomy are missing when the issue is evaluating a risk of personal injury. Since this feature is also present in cases involving generic liability, the analogy to run-of-the-mill design defect cases, not run-of-the-mill contract cases, is the appropriate one.

But, alas, an opponent of generic liability can still offer a plausible counter-principle. True, run-of-the-mill design defect cases involving a claim of alternative design reflect a preference against a market solution. If the only salient feature of those cases is that they involve personal injury, courts should also eschew a market solution in cases involving claims of generic liability. But personal injury is not the

versely, we might just intrinsically value autonomy. *See supra* note 24. Whatever specific purposes we attribute to privileging contract autonomy over reasonableness, the deep structure of legal doctrine suggests that we "really" prefer contract solution over jury determinations of reasonableness. We resort to jury determinations of reasonableness only when contract principles give up on their own accord and on their own terms. Similar purposes could be ascribed to the priority of property principles and the legislative solutions over the tort solutions. Legislatures sometimes do not act. Property entitlements sometimes do not work (for example, it is difficult in advance to assign property entitlements to be free from risk, pollution, and emotional harm). When these paradigms fail on their own accord, we resort to the less preferable approach of evaluating conduct after the fact by way of the vague standard of reasonableness. However, it is only when these other paradigms fail that we do this. *See Powers, Border Wars, supra* note 17, at 1224-25. But, alas, this doctrinal move also fails to resolve the issue. A proponent of generic liability again will argue that it is just a rejection of market solutions that explains why we rely on the risk-utility test in run-of-the-mill design defect cases. The reason we do not trust a market solution is that courts, for whatever reason, do not trust the market when it comes to personal injury. This explanation is just as applicable to claims of generic liability. Thus, we are right back where we started.

only salient feature of run-of-the-mill design defect cases. It is not the only plausible source of a preference against a market solution.

The problem with relying on a market solution in run-of-the-mill design defect cases is not that consumers cannot evaluate risks of personal injury. Consumers do that when they make choices about non-defective products that nevertheless pose risks of personal injury.³³ The real problem is that consumers have a hard time making market choices when one of the choices is unknown to them. How can they compare the relative costs and benefits of a product as it is actually designed with the costs and benefits of the same product with an alternative design if they do not have any idea what the alternative would be? The problem for a market solution is that one side of the consumers' "choice" is unknown to the consumer. This problem is not present in a case involving generic liability. When the "alternative design" is no product at all—or substituting a second product for the first³⁴—the consumer knows about the alternative. Thus, so the argument goes, the source of market failure in run-of-the-mill design defect cases is not present in cases involving claims of generic liability.³⁵

A proponent of generic liability can still find doctrinal support in an unlikely place. Some courts have held that the mere fact that a manufacturer offers a nondefective version of a product does not insulate from scrutiny of the risk-utility test the version of the product

33. A real distrust of the market to evaluate information about personal injury risks would internalize all personal injury costs into the price of the product. See Powers, *Modest Proposal*, *supra* note 1, at 648 n.38. However, that would be true strict liability, not liability based on defect. See *supra* notes 12-14 and accompanying text. Because courts have rejected true strict liability, this rationale has a difficult time explaining the cases.

34. Rejecting generic liability would raise the problem of determining what constitutes an alternative design of the same product and what constitutes a different product altogether. Are four-wheel all terrain vehicles an alternative design of three-wheel all terrain vehicles, or are they a different product altogether? Are sedans an alternative design of convertibles or a different product altogether? The rationale discussed in text could be used to help answer these questions. To the extent that a plaintiff's proposed alternative design is already on the market (as in the case of sedans and convertibles), the plaintiff's claim would constitute a claim of generic liability.

A proponent of generic liability could argue that these problems of line drawing give us an independent pragmatic reason to reject a rejection of generic liability.

35. The question here is not whether consumers are "really" able to evaluate these issues. It is whether one rationale or the other constitutes a plausible account for previous decisions. The task here is one of hermeneutics, not one of social science.

A proponent of generic liability might find support in *language* that refers to the special nature of personal injuries as explaining run-of-the-mill design defect cases. An opponent could respond, however, that these statements were in the context of cases involving claims of alternative design and that the courts never addressed or mentioned whether the situation would be different in a claim of generic defect. So the problem remains. The opponent of generic liability can still distinguish run-of-the-mill design defect cases, *including the language contained in them*, based on a plausible rationale.

actually sold.³⁶ Such a holding seems to be incompatible with a claim that lack of information about alternative designs is what explains a decision to eschew market solutions in run-of-the-mill design defect cases. The consumer does know about the alternative design when the seller actually offers it to the consumer, but these courts still reject a market solution.

An opponent of generic liability seems to be in a doctrinal corner here, but he is not without weapons. Most jurisdictions have not specifically addressed the issue, so the opponent's proposed explanation of run-of-the-mill design defect cases is still available. Even in a jurisdiction that has decided such a case, the case simply might be wrong, that is, wrong for the very reason that it misreads the proper rationale, discussed above, underlying run-of-the-mill design defect cases.³⁷ Nevertheless, a case applying the risk-utility test when the consumer was offered an option provides a doctrinal embarrassment to an opponent of generic liability. In a jurisdiction that has decided such a case, the proponent of generic liability seems to have the better doctrinal argument.³⁸ In a jurisdiction that has not decided such a case, both sides have plausible doctrinal arguments because both sides can construct plausible principles to explain existing cases. One reason for this is that the competing principles—risk-utility and contract autonomy—occur at the very foundation of legal discourse.³⁹

36. See, e.g., *Bilotta v. Kelley Co.*, 346 N.W.2d 616 (Minn. 1984). *Bilotta* involved a dockboard, which is a device used to bridge the gap between a warehouse loading dock and the bed of a truck being loaded. See *id.* at 619. The defendant sold a version with a safety device to prevent the dockboard from falling if the truck pulled away from the dock. See *id.* The plaintiff's employer chose to buy a less expensive dockboard without the safety device. See *id.* at 620. The court held that offering the option did not insulate the dockboard without the safety device from scrutiny under the risk-utility test. See *id.* at 624. This does not necessarily mean that a dockboard with the safety device was compelled by the risk-utility test. It just means that offering the option did not insulate the dockboard without the option under the risk-utility test.

37. An opponent of generic liability could also argue that *Bilotta* can be explained on the ground that the employer, not the plaintiff, bought the dockboard. Thus, the plaintiff's interests, by definition, were not represented in the market transaction. This argument raises the general issue of recovery by bystanders in products liability cases. See, e.g., *Elmore v. American Motors Corp.*, 451 P.2d 84 (Cal. 1969). Bystanders are never represented in a market transaction, so the rhetoric of contract autonomy, by its own terms, does not apply. This suggests that, whatever rules apply to consumers, bystanders should be able to rely on claims of generic liability.

38. Maybe an opponent can come forward with different principles to explain the cases. He can certainly do so in theory. See *supra* note 6. Whether he can construct intuitively attractive principles is another matter, however.

39. While it is true that, in theory, we can always construct competing principles to explain existing cases—and therefore doctrinal debate is always inconclusive—in practice, doctrinal debate sometimes reaches closure because we reject some of the proposed principles as being intuitively implausible. But sometimes it does not. This depends on the nature of the doctrinal debate, including how deep in the structure of legal discourse the debate takes place. As it turns out, the Balkanized structure of legal discourse at its foundation renders doctrinal discourse more difficult, not less difficult, the deeper it occurs. Thus, the metaphors of convergence used

Some people may be impatient at this point. All of this just shows, they would claim, that doctrinal analysis is impoverished. Conflicts between basic legal rhetorics, such as contract autonomy and risk-utility, show the arbitrary nature of our legal rhetorics. The way out of this mess is to turn to a more sophisticated, more powerful, and deeper normative discourse, such as a theory of justice⁴⁰ or, more likely, economic theory.⁴¹

A turn to "deeper" normative theories to resolve doctrinal disputes, or to account for an area of law generally, is a natural outgrowth of the legal process school.⁴² An important tenant of the legal process school is that, although law has ambiguities on the surface, courts can and should resolve them with reference to law's purposes.⁴³ If this method can resolve local ambiguities by referring to local purposes, why should it not also be able to resolve global ambiguities by referring to global purposes? The only task is to ascertain law's global purposes. Prime candidates, of course, are economic efficiency and various conceptions of justice. Not only can we use these normative theories to *critique* legal decisions, we can use them to *account* for existing legal decisions, thus resolving seemingly ambiguous doctrinal results. Under this view, these normative theories are not just external to law, they are part of law. They are part of the very method of doctrinal analysis.

My purpose here is not to evaluate which of these normative theories provides the best account of our legal practices. In fact, I do not think our legal practices are in need of any foundational account of the type these theories purport to provide.⁴⁴ Even on their own terms, however, these normative theories are highly overrated in their ability to perform the function of bringing closure to an otherwise indeterminate doctrinal analysis.⁴⁵ Consider economics. Can it provide

by Hart and Sacks and by Dworkin are misleading. See *supra* note 26. Doctrinal analysis is a technique of legal analysis that is better-suited to local issues, not global issues.

40. See, e.g., Ernest J. Weinrib, *Non-Relational Relationships: A Note on Coleman's New Theory*, 77 IOWA L. REV. 445 (1992).

41. WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* (1987).

42. See, e.g., HART & SACKS, *supra* note 4; Lon L. Fuller, *Positivism and Fidelity to Law—A Reply to Professor Hart*, 71 HARV. L. REV. 630 (1958).

43. See, e.g., HART & SACKS, *supra* note 4, at 150-52; Fuller, *supra* note 42, at 661-66.

44. See, e.g., BOBBITT, *supra* note 5; William Powers, Jr., *On Positive Theories of Tort Law*, 66 TEX. L. REV. 191 (1987) (reviewing LANDES & POSNER, *supra* note 41).

45. This does not mean that these theories are not useful in providing critiques of specific legal doctrines or in providing information that is useful to lawyers. It just means that these theories cannot perform the role of resolving doctrinal disputes of the sort presented by the question of generic liability.

an overarching account of our legal practice that resolves conflicts between Balkanized doctrinal rhetorics of more traditional doctrinal analyses such as reasonableness and contract autonomy? I think not. Economic theory is just as indeterminate as doctrinal analysis, not just because it is itself ambiguous, but because it too is Balkanized along precisely the same lines as the doctrinal rhetorics.⁴⁶

Economists can construct a well-recognized argument that a case-by-case jury determination of reasonableness (in cost-benefit terms) promotes efficiency.⁴⁷ This argument, however, depends on an implicit claim that juries are well-equipped to evaluate conduct under a cost-benefit test and that private actors can predict, with reasonable accuracy, what juries will do.⁴⁸ On the other hand, economists can also construct competing arguments to support freedom of contract.⁴⁹ These arguments depend on an implicit claim that private market transactions reflect true social costs and benefits reasonably well, that is, that externalities are low.⁵⁰ In terms of predictability and costs of adjudication, each competing model also makes different implicit assumptions about the tension between short-term gains from having juries adjudicate individual cases correctly and long-term gains from allowing parties to fix their obligations by contract.⁵¹ An economic analysis of a doctrinal problem provides closure only if these competing assumptions about juries and markets can be resolved.

The problem is not just that economic analysis does or does not provide closure; it is that economic analysis does or does not provide closure for exactly the same reasons doctrinal analysis does or does not provide closure. Each system depends on exactly the same question: which better reflects true social costs and benefits, jury decisions

46. See Powers, *Border Wars*, *supra* note 17, at 1220-23.

47. See, e.g., Jennifer H. Arlen, *Reconsidering Efficient Tort Rules for Personal Injury: The Case of Single Activity Accidents*, 32 WM. & MARY L. REV. 41, 44-45 (1990); John P. Brown, *Toward an Economic Theory of Liability*, 2 J. LEGAL STUD. 323, 338-43 (1973); Richard A. Epstein, *Products Liability: The Gathering Storm*, REG. 15, 19-20 (Sept. - Oct. 1977); Richard A. Posner, *Strict Liability: A Comment*, 2 J. LEGAL STUD. 205, 206-07 (1973).

48. See Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 409-10 (1988).

49. See *id.*; Randy E. Barnett, *The Sound of Silence: Default Rules and Contractual Consent*, 78 VA. L. REV. 821, 841-49 (1992).

50. See, e.g., John Cirace, *A Synthesis of Law and Economics*, 44 SW. L.J. 1139, 1198 (1990); Daniel R. Mandeker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1, 4 (1993).

51. See, e.g., LANDES & POSNER, *supra* note 41, at 143-46; RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* § 3.1, at 32 (4th ed. 1993); Mark S. Broden, *Accuracy, Efficiency, and Accountability in the Litigation Process—The Case for the Fact Verdict*, 59 U. CIN. L. REV. 15, 36 (1990); Duncan Kennedy & Frank Michelman, *Are Property and Contract Efficient?* 8 HOFSTRA L. REV. 711, 759 (1980).

about reasonableness in individual cases or market transactions? Just as our legal rhetorics and ideologies organize themselves around markets and juries, so too do competing economic rhetorics and ideologies. So we are right back where we started. Our normative world, legal or otherwise, is just fractured in ways that are difficult to transcend. We recognize this feature of legal discourse because legal scholars have spent much time and energy studying the nature of legal rhetoric. If as much time and energy were spent deconstructing economic rhetorics, we would be more familiar with the fractured nature of those rhetorics as well.⁵²

Thus, there may be no uniquely convincing doctrinal answer to the question of generic liability. Or, more accurately, there may be two convincing doctrinal answers, each pointing in the opposite direction. A court could write a legitimate doctrinal opinion to support either result.⁵³ This is true, not because of any theoretical claim about law's indeterminacy (though that may be true too), but because of the particular Balkanized nature of legal discourse in our system of legal practice.⁵⁴

EPILOGUE

Should we recoil from this situation or embrace it? In one sense, we have no choice but to embrace it, at least if we want to avoid paralysis. In Lon Fuller's rightly famous *Case of the Speluncean Explorers*, five judges confronted a problem involving explorers who were trapped in a cave and who killed a colleague to eat and thereby save their own lives.⁵⁵ The question was whether they should be convicted of murder. Three of the judges—Keen, Foster, and Handy—wrote ex-

52. Economists *might* be able to provide an algorithm to resolve its own Balkanized structure by providing a general theory to determine when juries and when markets contribute more to overall efficiency. See, e.g., LANDES & POSNER, *supra* note 51, at 143-46. In theory, an economic analogue to Dworkin's Hercules could make all the calculations necessary to give a "right" answer. But this new Hercules would be subject to all the problems of Dworkin's Hercules. In hard cases, it would be only Hercules, and not we, who would know the answer.

We might bow to other normative systems, such as various conceptions of justice, but they too are likely to be just as fractured as legal rhetoric. See Powers, *Border Wars*, *supra* note 17, at 1222-23; William Powers Jr., *Constructing Liberal Political Theory*, 72 TEX. L. REV. 443, 448-49, 457-59 (1993) (reviewing JOHN RAWLS, *POLITICAL LIBERALISM* (1993)), and T.K. Seung, *INTUITION AND CONSTRUCTION* (1993)).

53. See BOBBITT, *supra* note 5.

54. See *id.* Bobbitt claims that our legal practice is fractured along methodological lines. Judges have at their disposal six legitimate modes of legal rhetoric: doctrinal, ethical, prudential, historical, structural, and textual. See *id.* Sometimes these modes reach conflicting results. Thus, judges have choices in which they rely on conscience and faith. See *id.* My claim is that law's rhetorics are also fractured along substantive lines, to the same effect.

55. Lon L. Fuller, *The Case of the Speluncean Explorers*, 62 HARV. L. REV. 616 (1949).

tremely sophisticated and convincing opinions. A reader might nod approvingly reading each one. Yet because each judge employed a different legal rhetoric, they reached different conclusions. A fourth judge—Judge Tatting—then recused himself.⁵⁶ He could not decide which rhetoric was correct, so he could not responsibly decide the case without just making a choice. Paralysis in the face of choice is not any answer. When we reach a fork in the road, we should take it!

We should do more than take forks in the legal road, we should relish them. The fractured structure of our legal and social rhetorics is just what provides room for choice. It is one of the things that gives each generation the ability to create its own legal regime.⁵⁷ Why we would want it otherwise is a mystery. In the end, however, it is beyond my power or purpose here to argue that we are better off with a vision of doctrinal analysis that sometimes forces choices. I can only offer a few comments on these choices.

First, it is worth repeating that the source of choice here is not a theoretical claim that all normative systems are indeterminate. That claim has a certain truth as well, but we at least *experience* many normative arguments as being determinative on their own terms, notwithstanding any theoretical understanding to the contrary. Put another way, language usually seems to work. The source of choice here is an additional one. It is that our doctrinal rhetorics just happen to be Balkanized in the ways I have described.

A hallmark of post-modern thought is that there is no single, meta-narrative that makes all of our beliefs hang together in a coherent way. Instead, we understand the world through competing, local narratives.⁵⁸ Theoretically, there could be an infinite number of competing narratives. In practice, however, we experience life through a few such narratives, such as physics, law, economics, religion, and so on. Thus, it is useful to study how the narratives that actually dominate discourse operate. My claim is that, in doctrinal analysis at least, the competing rhetorics of contract autonomy, reasonableness, and so on (along with their associated social institutions and ideologies) are

56. The fifth judge—Judge Truepenney—had little interesting to say other than to set the stage.

57. As a practical matter, judges routinely disagree about the meaning of cases. Sometimes they are even willing to overrule specific precedents. Each of these provides for play in the joints. Play in the joints, however, is not just the result of disagreement among individual, human judges. It is built into the very structure—the fractured structure—of legal rhetoric. See BOBBITT, *supra* note 5.

58. See JEAN FRANCOIS LYOTARD, *THE POST MODERN CONDITION: A REPORT ON KNOWLEDGE* (Geoff Bennington & Brian Massumi trans., 1984).

bedrock narratives of doctrinal discourse, and that there is no overarching meta-narrative to adjudicate among them.

Second, the mere fact that doctrinal arguments do not always give definitive answers to conflicts between law's basic rhetorics—for the very reason that doctrinal arguments are themselves the products of these rhetorics—does not mean that other forms of argument cannot give interesting accounts of these choices. For example, the sociologist Alvin Gouldner—who spent much of his scholarly effort giving a Marxist account of Marxism⁵⁹—might have had interesting things to say about these competing rhetorics. Turning the tools of Marx's analysis⁶⁰ on Marxism itself, Gouldner concluded that intellectuals are drawn to Marxism not because it empowers the working class but because it empowers intellectuals and technocrats.⁶¹ By taking questions of social organization out of the hands of the bourgeoisie and the aristocracy and putting them in the hands of the intellegenia, socialism is the West's version of Mandarin organization.

Similar consequences are at stake, to a more limited degree, in choices among law's basic rhetorics. As we have seen, the rhetorics of property rights and contract autonomy empower property holders and individuals who succeed in the market. Not only do they disempower the poor, they disempower the Mandarins. It is not surprising that, at least in my experience, teachers of Contracts law and Property law are far more likely to teach "against" the topic—by showing how contract rights and property rights are part of a complex web of social interaction⁶²—than are teachers of Torts. Entrepreneurs would be more likely to have it just the other way around. It is easier for intellectuals to recognize the class biases of entrepreneurs than to recognize the class biases of intellectuals.⁶³

59. See ALVIN W. GOULDNER, *THE FUTURE OF INTELLECTUALS AND THE RISE OF THE NEW CLASS* (1979) [hereinafter GOULDNER, *THE FUTURE*]; ALVIN W. GOULDNER, *THE TWO MARXISMS: CONTRADICTIONS AND ANOMALIES IN THE DEVELOPMENT OF THEORY* (1980) [hereinafter GOULDNER, *TWO MARXISMS*].

60. See, e.g., KARL MARX, *THE GERMAN IDEOLOGY* (C. Arthur ed., 1979).

61. See GOULDNER, *THE FUTURE*, *supra* note 59; GOULDNER, *TWO MARXISMS* *supra* note 59.

62. See HART & SACKS, *supra* note 4, at 231.

63. Of course, there are exceptions to this general observation. Law and economics scholars who valorize the market are obvious exceptions. Moreover, the class interests of the intellegensia are changing rapidly. Information and analysis themselves are increasingly important forms of property and market power. Thus, pervayers of information—such as lawyers, accountants, bankers, and consultants—are becoming increasingly important market players. It is also interesting to note that intellectuals have a special rhetoric—academic freedom and freedom of speech—for insulating themselves from scrutiny under a standard of reasonableness.

Finally, the availability of competing rhetorics has an interesting effect on law's relationship to religious faith. Very few legal theorists today espouse a strong view of natural law, that is, a view that law is a product of the moral and spiritual order God imprinted on the structure of the world. What then is the role of religious faith in the secular legal world of positivism. If secular normative theories, such as economic efficiency, resolve all of the ambiguities and gaps left by positive law, there is no room in our normative discourse for faith. Some people prefer it that way. But if the borders of the fractured legal rhetorics provide opportunities of real choice, there is room for faith after all.⁶⁴ Even from a secular perspective, conflicts among the basic conflicting rhetorics of doctrinal analysis provide options from choice. They are part of what gives *us*, not our *theories*, control over our normative future.

Sometimes we just have to choose.⁶⁵

64. See BOBBITT, *supra* note 5.

65. See FYODOR DOSTOYEVSKY, *NOTES FROM UNDERGROUND* (Richard Pevear & Larissa Volokhonsky trans., 1994).