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Heirs of Leonardo: Cultural Obstacles to Strict Products Liability in Italy

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ABSTRACT

In this Article, Professor Bernstein and Mr. Fanning argue that strict products liability, a legal rule recently adopted in the European Union, clashes with the culture of one of its large Member States, Italy. Using a wide array of source material—history, political sociology, literature, and numerous interviews—the authors begin with Italian traditions, exploring their implications for legal change. Strict products liability conflicts with these traditions. The doctrine is collectivist, tending to regard individuals in terms of group membership. Italians reject this aggregation, and affirm the singularity of a product design. The authors conclude that the EU attempt to harmonize its law of products liability will continue to evoke dissonance in Italy.

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I. INTRODUCTION

The Italian man understands himself[1] as part of a race of superior organizers, designers, builders, and visionaries, stretching back to the Romans. It was his ancestors who codified law, invented concrete, built aqueducts and roads whose ruts still define the standard gauge of railroads, and civilized the rude tribes of Europe.[2] More recently, Italians defined architecture, rediscovered Classicism and created the Renaissance, introduced perspective to painting, invented opera and polyphonic music (indeed, most of the language of music), wrote the literature that inspired Shakespeare, and taught the French to cook. Marco Polo brought back gunpowder from China, Sforza foundries cast

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1. In this paper we use masculine pronouns deliberately and do not intend a generic meaning thereby. The literature about Italian social and political culture is a literature about Italian men. We cannot apply what is known about Italian culture to both sexes; the extent to which generalizations about "Italians" pertain to Italian women is unclear, but plainly Italian women are cut off—more so than women in other industrialized states—from public life, political and institutional participation, and shared understandings about the legal system. *See* GIUSEPPE DI PALMA, APATHY AND PARTICIPATION: MASS POLITICS IN WESTERN SOCIETIES 133-38 (1970); Joseph La Palombara, *Italy: Fragmentation, Isolation, and Alienation*, *in* POLITICAL CULTURE AND POLITICAL DEVELOPMENT 282, 287 (Lucian W. Pye & Sidney Verba eds., 1965); MARIA WEBER, ITALIA: PAESE EUROPEO? UNA ANALISI DELLA CULTURA POLITICA DEGLI ITALIANI IN PROSPETTIVA COMPARATA 131-34 (1986). Maria Weber, having posed the question, *"Esiste una cultura politica femminile?"*, concludes that only a reinterpretation of the term political culture would permit an affirmative answer to the question. *See* WEBER, *supra*, at 134-36.

Because Italian private law is no less male-controlled than the rest of Italian society, we believe that it is appropriate to combine generalizations about private law with generalizations about culture in the context of Italy. We are aware, however, that gender division in Italy and an incomplete social science literature have forced us to write a paper with an important omission.

2. *See* PAUL HOFMANN, THAT FINE ITALIAN HAND 43-44 (1990).

cannon, and Borgia captains revolutionized warfare. Machiavelli wrote the most enduring study of government and diplomacy, Italian popes authoritatively defined matters of faith and morals for the largest Western religion, Florentine bankers and Venetian merchants dominated international trade. An Italian, Columbus, has been credited with the discovery of the New World; an Italian, Vespucci, named it; and an Italian, Rodrigo Borgia, Pope Alexander VI, determined who should exploit it.

In this Italian understanding, the quintessential figure is that of Leonardo da Vinci, who could, with equal facility and genius, paint masterpieces; design fortifications, locks, canals, and machinery; and even anticipate air conditioning and aircraft. The modern Italian man sees himself and, perhaps more important, sees the industrial, artistic, and commercial leaders of post-World War II Italy as the rightful heirs of Leonardo. In the Italian mind, for designers and builders to offer shoddy and ill-conceived products would be to traduce this heritage. Moreover, the ordinary man should not need the intervention of an officious legal system to tell him how to distinguish good products from bad.

Using this important image of Leonardo as a beginning, we will argue that strict products liability raises problems of cultural context in Italy. Pursuant to its membership in the European Union (EU), Italy has acceded to a rewriting of its formal rules of products liability, replacing old laws of fault and contract with "liability without fault on the part of the producer."[3] This change imports into Italy certain policy bases[4] or assumptions that

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3. Council Directive 85/374 of 25 July 1985 on the Approximation of the Laws, Regulations and Administrative Provisions of the Member States Concerning Liability for Defective Products, 1985 O.J. (L 210) 29 [hereinafter the Directive]. We refer to this European Union law as "the Directive," although strictly speaking it has almost lost that status and been absorbed into the national laws of the Member States. As of this writing, ten out of twelve states have implemented the Directive. Interview with Hans Claudius Taschner, Head of Directorate-General III, Commission of the European Communities, in Brussels, Belgium (Oct. 29, 1992).

4. *See generally* Thomas A. Cowan, *Some Policy Bases of Products Liability*, 17 STAN. L. REV. 1077 (1965). Like all industrialized states, Italy has a law of products liability. Sections of its civil code have been applied to the subject, and its highest court, the *Corte di Cassazione*, has issued several opinions in products liability cases. *See* GUIDO ALPA ET AL., LA RESPONSABILITÀ DEL PRODUTTORE (1989). Our contention is not that products liability does not exist in Italy, but rather that the beliefs, goals, and premises that accompany strict products liability are in tension with the culture of the state, especially when this doctrine is presented as legal reform.

underlie strict products liability as it is understood in the United States, its place of origin.[5]

Here we explore the clash between Italian culture and these policy bases, of which we identify five. A first assumption, which is in our view a normative one, is that the production of goods is an activity that can be explained and understood according to the laws of microeconomics. We include in this category much of the traditional justification of strict products liability in the United States—cost internalization, risk shifting, loss spreading—because these concepts derive from economics.[6] The second policy basis emphasizes the need to protect consumers. The third expresses a belief in the benevolent powers of central government, the institutions that mediate a system of liability and execute its economic goals. The fourth stands for progress through private (transactional) law. The fifth, which we label with a bit of European Union jargon, "harmonization," refers to the goal of synthesis and unity among legal systems.

In describing Italian obstacles to products liability we rely mainly on a literature known as psychocultural, cultural/psychological, or descriptive of "national culture."[7] Straddling the disciplines of political science, anthropology, and sociology, this approach looks for meaningful generalizations about attitudes, beliefs, and traditions within a state. It includes the classic works of Montesquieu and Tocqueville, as well as more recent efforts to generalize carefully and accurately about states.[8] Although this cultural/psychological approach to law is perhaps most important to those lawmakers of the European Union who

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5. *See* Wolfgang Wiegand, *The Reception of American Law in Europe*, 39 AM. J. COMP. L. 229, 241 (1991). For analysis of this influence in fashioning products liability law in Europe, see Anita Bernstein, *L'Harmonie Dissonante: Strict Products Liability Attempted in the European Community*, 31 VA. J. INT'L L. 673 (1991) [hereinafter Bernstein, *L'Harmonie*]; Gary T. Schwartz, *Product Liability and Medical Malpractice in Comparative Context*, in THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION 28 (Peter W. Huber & Robert E. Litan eds., 1991) [hereinafter THE LIABILITY MAZE].

6. In a thoughtful contrast to much academic writing about products liability, David Owen has described the subject with reference to an array of principles, arguing that reliance on only economics, or indeed any one approach, leads to an impoverished understanding. *See* David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 NOTRE DAME L. REV. 427, 429-30 (1993).

7. *See* GABRIEL A. ALMOND & SIDNEY VERBA, THE CIVIC CULTURE: POLITICAL ATTITUDES AND DEMOCRACY IN FIVE NATIONS 3-4 (1965).

8. For examples of work in this tradition, see RUTH BENEDICT, THE CHRYSANTHEMUM AND THE SWORD (1946); HEDRICK SMITH, THE NEW RUSSIANS (1990); RICHARD REEVES, AMERICAN JOURNEY (1982); GARRY WILLS, UNDER GOD (1990).

have sought to achieve a single common market, it also has been used with distinction in the United States.[9]

We rely on sources described by the label "political culture," based on the understanding that the function of private-law rules is in a direct sense political.[10] We have studied the available empirical data obtained through traditional social science methods. Forewarned that myths and stereotypes are ineradicable and that observers of Italy and the United States do not speak in *un discorso univoco*,[11] we rely nonetheless on interviews with Italian informants and other sources of insight into Italian culture. A picture emerges.

The contrast between the heirs-of-Leonardo tradition and strict products liability offers implications beyond Italy. Our thesis suggests the existence of a continuum of national culture, in which Italian traditions and the United States-derived notion of strict products liability lie at opposite poles. Although we are not considering the relationship between strict products liability and the culture of any nation other than Italy (except, indirectly, the United States), we present in this paper a few traits about one state that are germane to a larger inquiry. Of the handful of nations that have been said to resemble the United States, some (Germany, France) are favorably inclined toward strict products liability, whereas others (Britain, Japan) appear more skeptical. Thus we have identified a matrix along which national cultures can be located and studied. Further generalizations may follow. Our preliminary attempt to understand products liability in one state thus can contribute to a growing effort in legal scholarship to articulate the meaning of this doctrine.[12]

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9. The best-known example of the use of this approach is Brown v. Board of Education, 347 U.S. 483 (1954), in which the Supreme Court based its decision in part on its understanding of the cultural and psychological effects of racial segregation.

10. For distinctions between "political culture" and "national culture," see ALMOND & VERBA, *supra* note 7, at 11-14.

11. CARLO CHIARENZA, *Introduzione*, *in* IMMAGINARI A CONFRONTO: I RAPPORTI CULTURALI TRA ITALIA E STATI UNITI: LA PERCEZIONE DELLA REALTÀ FRA STEREOTIPO E MITO 11 (Carlo Chiarenza & William L. Vance eds., 1993).

12. *See* Owen, *supra* note 6, at 431-37 & nn. 6, 7 & 9 (citing sources).

II. PRODUCTION AS ECONOMIC ACTIVITY

Although writers dispute the precise meaning of the term strict products liability,[13] all explanations retain some common premises. The first is that the existence of a separate legal category for product-caused injuries indicates that products are different from other agents of harm. Second, strict products liability acknowledges some special nature of products that justifies additional benefit for a plaintiff, and additional detriment for a defendant, than these parties otherwise would have in tort or contract litigation. Third, product manufacturers are presumptively more culpable than other defendants who accidentally cause harm—because of a notion of "enterprise liability,"[14] or because it is especially difficult to prove the existence of a defect in a product,[15] or because producers make tacit or explicit representations of safety to the consumer,[16] or because they are generally in the best position to avoid the cost of the injury,[17] or because of their ability to distribute the risk or cost of injury among all consumers.[18] Commitment to this view of production as economic activity is most evident in scholarship that refers expressly to the tenets of economics but is apparent also in other explanations for the existence of a separate legal category for products.

Common themes unite these diverse rationales and explanations. Foremost is that each product manufacturer is viewed as a member of an entrepreneurial aggregate; and the reason for manufacture is profit. Defended by some writers as a

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13. For suggested explanations of "strict products liability" and allusions to the rich academic debate, see Anita Bernstein, *Looking at Europe for the Difference Between Strict and Fault-Based Liability*, 14 J. PROD. LIAB. 207 (1992); James A. Henderson, Jr. & Aaron D. Twerski, *A Proposed Revision of Section 402A of the Restatement of Torts (Second)*, 77 CORNELL L. REV. 1512, 1527-28 (1992); William Powers, Jr., *A Modest Proposal to Abandon Strict Products Liability*, 1991 U. ILL. L. REV. 639; George L. Priest, *The Invention of Enterprise Liability: A Critical History of the Intellectual Foundations of Modern Tort Law*, 14 J. LEGAL STUD. 461 (1985); Gary T. Schwartz, *Foreword: Understanding Products Liability*, 67 CAL. L. REV. 435 (1979).

14. *See, e.g.*, Priest, *supra* note 13.

15. *See* William C. Powers, Jr., *Distinguishing Between Products and Services in Strict Liability*, 62 N.C. L. REV. 415, 425-27 (1984).

16. *See* Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 VA. L. REV. 1109, 1228-51 (1974).

17. *See* GUIDO CALABRESI, THE COST OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 26-31 (1970).

18. *See* Escola v. Coca Cola Bottling Co. of Fresno, 150 P.2d 436, 440-41 (Cal. 1944) (Traynor, J., concurring).

source of innovation, employment, and consumer abundance,[19] and attacked by others as manipulative and indifferent to the suffering of persons,[20] the product manufacturer is unanimously regarded as a wealth-maximizer who chooses to make and sell products because this is its best method of gaining money. To some writers, this pursuit of wealth is no worse than morally neutral, and strict products liability unfairly punishes the producer for unblameworthy behavior. To others, this pursuit of wealth is at the expense of the consumer, and warrants intervention through legal rules.

In a widely-held Italian view, by contrast, production is comparable to the creation of art, and the designer-maker of products is regarded as a visionary leader. For Vasari, biographer of the Renaissance artists, the designer-maker was the earthly incarnation of God, a contemporary Creator who starts with a void, and builds.[21] This view has endured throughout the years in Italy. "The designer is the artist of our time," wrote the twentieth-century designer Bruno Munari. "This is not because he is a genius, but because his work connects once again the world of art with the public, as in older ages, when artists worked for, and were understood by, everybody."[22] Adds Luigi Barzini: "In other words, the Italian designer thinks he is carrying out a revolution."[23] In the Renaissance classic, *The Book of the Courtier*, speakers debate the relative merits of painting and sculpture and conclude that "both spring from the same source, namely, good design."[24]

That the creator-designer-maker earns a profit from his activity does not diminish the aesthetic importance of his work. For example, even mundane, money-oriented radio advertisements received aesthetic scrutiny in Italy during the age of radio: in an announcement to advertisers in 1937, the trade association of radio broadcasters and manufacturers, EIAR, declared a

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19. *See, e.g.*, PETER W. HUBER & ROBERT E. LITAN, *Overview, in* THE LIABILITY MAZE, *supra* note 5, at 1-25; RICHARD NEELY, THE PRODUCT LIABILITY MESS: HOW BUSINESS CAN BE RESCUED FROM THE POLITICS OF STATE COURTS (1988); PETER W. HUBER, LIABILITY: THE LEGAL REVOLUTION AND ITS CONSEQUENCES (1988).

20. *See, e.g.*, Joan Claybrook, *The Consumer Stake in Product Liability*, 5 Toxics L. Rep. (BNA) No. 37, at 1178 (Feb. 20, 1991); Shapo, *supra* note 16; Ralph Nader, *The Assault on Injured Victims' Rights*, 64 DENV. U. L. REV. 625 (1988).

21. See GIORGIO VASARI, THE LIVES OF THE ARTISTS 25 (George Bull trans., 1965) (1550).

22. LUIGI BARZINI, FROM CAESAR TO THE MAFIA 250 [hereinafter BARZINI, FROM CAESAR].

23. *Id.*

24. BALDESAR CASTIGLIONE, THE BOOK OF THE COURTIER 78 (Charles S. Singleton trans., 1959) (1528).

partial ban on commercials, but went on to qualify that ban: "Advertising, in its most modern manifestation, turns increasingly towards original, brilliantly inventive forms. These, which have a direct relation with art and which the public enjoys, will not only be warmly received but will be favoured and encouraged."[25] Italian employment law prohibits discrimination on the basis of sex in hiring, with an exception only for jobs where the sex of the employee is relevant "for artistic or fashion reasons."[26]

Indeed, the element shared by all domains in which Italians have achieved world fame is the prominent role of appearance. In architecture, decoration, landscape gardening, the figurative arts, pageantry, fireworks, opera, fashion, and the cinema, among other areas, Italians have dazzled the world with their designs. Articles made by the hands of Italian artisans—pottery, copper pots, braziers, elegantly carved furniture, wrought-iron grills—are enduringly popular items.[27]

Fiction describing Italian life is replete with the theme of reverence toward designers and makers. Fucini's short story, *La Fonte di Pietrarsa*, describes the construction of a fountain. An engineer refuses to deviate from his plan to build one kind of design, even though to do so would settle a dispute simply. "[W]hy dishonor Pietrarsa with three disgraceful columns of stone," he says, "when there are enough funds to have one of marble with dolphins, lions and everything?"[28] Irving Stone attributes to Michelangelo great admiration of Tuscany, based on a belief that the Arno Valley was a "sculptured landscape" designed by the "supreme carver."[29]

The modern Italian industrialist is an heir to this tradition that acclaims design. Since 1901 Italy has been honoring selected industrialists with a national prize called the *Cavaliere di Lavoro*. Recipients, all entrepreneurs, are chosen for their traits

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25. DAVID FORGACS, ITALIAN CULTURE IN THE INDUSTRIAL ERA 1880-1980, at 67 (1990).

26. *See* FERDINAND VON PRONDZYNSKI, IMPLEMENTATION OF THE EQUAL TREATMENT DIRECTIVES 45 (1987). Contrast this with the United States concept of bona fide occupational qualifications. *See* 42 U.S.C. § 2000e-2 (1988 & Supp. III 1991).

27. BARZINI, FROM CAESAR, *supra* note 22, at 241.

28. Renato Fucini, *La Fonte di Pietrarsa, reprinted in* ITALIAN STORIES/NOVELLE ITALIANE 150, 160-61 (Robert A. Hall ed., Dover Publications 1989) (1960). The original is more vehement in tone: *"Eppoi perché disonorare Pietrarsa con tre indecenti pioli di sasso quando ci sono i mezzi per averne una di marmo coi delfini, coi leoni e ogni cosa?" Id.* at 160.

29. IRVING STONE, THE AGONY AND THE ECSTASY 41 (1961).

of inspiration and vision.[30] The public adds its own awe. One of us, invited to a reception in Florence featuring a routine speech by Fiat head Giovanni Agnelli, arrived ten minutes early, engraved invitation in hand, and was turned away, because a massive crowd had taken every seat to listen to one of Italy's most famous citizens.[31]

A complementary generalization pertains to the areas in which Italians have achieved a different and less positive kind of world fame. The popular image of Italian soldiers is "not undeserved," according to one writer.[32] "In 'big' wars, let's face it," said Giorgio Bocca, a journalist and veteran of the anti-Nazi resistance, "we have always cut a mediocre figure."[33] In the opinion of several Italian political theorists, the country is an undistinguished example of legislative democracy.[34] Mail and telephone communications in Italy fall short of an international standard for wealthy states.[35] These areas where the Italians have not excelled all demand an irreducible amount of plodding—they require the repetition of routine work, and lead to achievements that cannot be attributed to the dazzle of a maker.

Related to the Italian admiration for visual design and its creators is admiration for the design of one's life. *Fare il signore* stands for the notion of distinction as an expression of human dignity.[36] "An Italian," writes Barzini, "considers it a duty to cultivate such illusions in fellow human beings, but, above all, he considers it a duty to himself."[37] A good image includes dressing well, displaying good manners, showing hospitality, conversing with skill, acting cleverly, and more.[38] "The dramatic act," Stuart Hughes writes, "the colorful scene, the *bel gesto*—these are the

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30. Telephone interview with Anna-Elisa Zaffi of the Italian Ministry of Foreign Affairs (Dec. 10, 1992).

31. We have heard, as a criticism of our thesis, that this acclaim is exploited by industrialists so as to maintain a privileged position; thus our heirs-of-Leonardo concept identifies a deliberate strategy rather than a true cultural phenomenon. Considering the Agnelli experience and the widespread popular respect for other designer-entrepreneurs such as Pininfarina, Olivetti, and Ferrari, we can only respond, along with Galileo, "*Eppure, si muove*. . . ." Manipulation of popular belief and cultural predilection does not negate them: rather, it validates their power.

32. H. STUART HUGHES, THE UNITED STATES AND ITALY 36 (1979).

33. HOFMANN, *supra* note 2, at 200.

34. *See generally* GUILIO BOLLATI, L'ITALIANO: IL CARATTERE NATIONALE COME STORIA E COME INVENZIONE (1983); CARLO TULLIO-ATLAN, LA NOSTRA ITALIA: ARRETRATEZZA, SOCIOCULTURALE CLIENTELISMO E RIBELLISMO DALL'UNITÀ AD OGGI (1986).

35. *See* HOFMANN, *supra* note 2, at 48.

36. *See* LEONARDO OLSCHKI, THE GENIUS OF ITALY 462 (1949).

37. LUIGI BARZINI, THE ITALIANS 79 (1964) [hereinafter BARZINI, ITALIANS].

38. *See* EUGENE K. KEEFE ET AL., AREA HANDBOOK FOR ITALY 59 (1977).

sources of unfailing delight." Casanova was "unmistakably Italian: he stage-managed his life as a work of art."[39] Although the admiration of the well-styled life may explain the appeal of Mussolini, "[m]ore usually it expresses itself as reverence for creative genius."[40] In this tradition of *virtuoismo*, ordinary people and artists alike applaud the display of prowess.

This reverence is consistent with a pervasive elitism within Italian society as well. Centuries of rule by nobility have allowed this class to retain its influence long after the abolition of titles and the decades of democratic rule following World War II. One observer notes the relative scarcity of satire, or of comic ridicule of elites, in a culture replete with other combinations of humor and art.[41] Another writer notes the similar absence of a tradition glorifying peasants or tillers of the soil, such as exists in Germany.[42] As we discuss in more detail below, there is no myth of the common man in Italy: the ideal of the hero-maker-designer is barely tempered with humor or irony.

For the Italian, the producer's higher purpose, in sum, is a motive entirely different from the goal of *homo economicus*. Thus the producer does not fit comfortably within the assumptions of strict products liability. By viewing production as economic activity, strict products liability presumes that the value of a product, the damage that results from the defective nature of the product, and the opportunity of the manufacturer or the user to avert harm may all be expressed in terms of money. In Italy such assumptions are of dubious explanatory force, especially when the injured user is a consumer rather than a worker or bystander.[43] An Italian consumer who concluded that a particular designer-maker had created a product out of motives that were purely commercial, not aesthetic and innovative, would react with distaste. Such a designer-maker would be out of sympathy with the Italian tradition and the consumer would, both instinctively and judgmentally, reject his products.

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39. BARZINI, FROM CAESAR, *supra* note 22, at 37.

40. HUGHES, *supra* note 32, at 36.

41. *See* PETER NICHOLS, ITALIA, ITALIA 161 (1973).

42. *See* KEEFE ET AL., *supra* note 38, at 58.

43. As we view the heirs-of-Leonardo thesis, it is most compelling in cases involving consumer products designed, manufactured, and selected for use by Italians, yet it retains some power even in peripheral situations—for example, products made by foreigners, or products where the elements of design and selection are attenuated, such as prescription drugs. Italians are repelled by products liability, we argue, because of its implicit understandings of maker, user, and the state. This response helps to explain the paucity of lawsuits, even though many products do not fit within an ideal of design. We thank Fred Bosselman and Stephen Sugarman for pressing our analysis on this point.

The result is a tacit critique of the production-as-economic-activity policy basis of strict products liability. When the maker of a product has no higher purpose than money-making, the user will not have a higher purpose either. Therefore, according to this critique—which is fundamental to the Italian perception of the fallacy of a doctrine of strict products liability—the maker does as cheap a job as he can get away with, abjuring any responsibility to the idea of quality in the product or in himself as maker. With no sense of responsibility to himself, he cannot conceive of his responsibility to the using public. The consumer, who recognizes the careless nature of the thing, uses it in an unreflective, careless way because it is unworthy of his concentration. Strict products liability buttresses this relationship: to an Italian, the solution becomes a reinforcement of the underlying wrong thinking.[44]

III. CONSUMER PROTECTION

In its preamble, the European Union products liability directive (the Directive) announces its goal of protecting product users.[45] Consumer protection was both the motive behind the creation of the Directive and its stated basis of jurisdiction under the EEC Treaty. The Directive grew out of the initiative of consumer groups in the 1970s.[46] It is cited as a major achievement by the European consumers' lobby[47] and is a model for other consumerist legislation in progress.[48] For purposes of jurisdiction, proponents of the Directive argued successfully that because of divergent products liability rules throughout Europe, a

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44. The Italian rejection of products liability is linguistic as well; the phrase has no equivalent in the Italian language. The most common translation is *responsabilità del produttore*, but that expression seems widely-recognized only among Italian lawyers. We sometimes have to resort to a paraphrase, *responsabilità per danno da prodotti difettosi*, when we discuss our work with lay people. In our reading we have also encountered *responsabilità del produttori* and *responsabilità del fabbricante*. The absence of one accepted phrase, as exists in English and other languages, suggests that in Italy the concept is alien.

45. *See* Directive, *supra* note 3.

46. *See generally* Kathleen M. Nilles, Note, *Defining the Limits of Liability: A Legal and Political Analysis of the European Community Products Liability Directive*, 25 VA. J. INT'L L. 729 (1985) (discussing the legislative history of the Directive).

47. Interview with Virginia Graham, Director of Communications, Bureau Européen des Unions du Consommateurs, Brussels, Belgium (Oct. 30, 1992).

48. Interview with Monique Bernard, Attorney, Consumer Protection Unit, Commission of the European Communities, Brussels, Belgium (Oct. 29, 1992).

common market for consumers did not exist and therefore the measure was necessary.[49]

Strict products liability in the United States shows the same preoccupation with the inconsistencies of consumer laws from jurisdiction to jurisdiction. One founder of the doctrine, Justice Roger Traynor of the California Supreme Court, sought to spare consumers from "the intricacies" of the laws of contract that would condition victims' remedies on warranty rules.[50] The major justifications for, and explanations of, strict products liability all refer to a perceived need to protect consumers. A strong form of the justification relies on the superior power of the manufacturer to prevent injury, pay for it when it occurs, and diffuse the costs of harm through insurance and raised prices. A complementary consumer protection justification is the creation of incentives to safety: if the manufacturer is forced to pay for a greater share of the costs of injuries caused by defective products, it will be impelled to discover and cure hazards before they cause injury. A weaker form of the consumer protection explanation emphasizes the inability of product users to overcome the burden of proof established by negligence law. Whether approving or skeptical, discussions of consumer protection in products liability all agree that the theme of protection is preeminent.

The notion of consumer protection inherent in strict products liability clashes with several elements of Italian culture. An Italian ideal stresses responsibility for oneself—the male as hero, the man of brio—while strict products liability perceives the consumer as disadvantaged and in need of benevolent intervention. The context of products liability litigation requires plaintiffs to confess this need. Consumer protection in general relies on a leveling view of consumers that is effectively criticized in the tort reform literature.[51]

To regard oneself as a member of this leveled collective is foreign to a deep Italian tradition. One exemplar of the Italian male as man of brio is the poet-warrior Gabriele D'Annunzio, who inspired Italians with his bravery, his plans to revive the glory of Roman days, and his elevation of "personal qualities of heroism and genius."[52] In August 1918, at the age of 55, D'Annunzio led

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49. *See* Report of the Legal Affairs Committee, 1978-1979, EUR. PARL. DOC. (No. 246) 7 (1978).

50. *See* Greenman v. Yuba Power Products, Inc., 377 P.2d 897, 901 (Cal. 1962).

51. *See* RICHARD A. EPSTEIN, MODERN PRODUCTS LIABILITY LAW (1980); HUBER, *supra* note 19.

52. MICHAEL A. LEDEEN, THE FIRST DUCE ix (1977).

a military flight over Vienna to drop propaganda leaflets that he had written. He risked death, as one biographer put it, to fulfill the cultural commandment, *fare la bella figura*.[53] Although the most popular sport in Italy is soccer, the quintessential Italian sports celebrity is the race car driver, an individual whose daring, singular effort overshadows the collective work of his team. The Italian counterpart to, and contemporary of, Babe Ruth is the racer Tazio Nuvolari, honored on a commemorative postage stamp. In postwar Italy, front pages of newspapers recounted the exploits of household-name racers: Farina, Ascari, Musso, Villoresi, Taruffi. Formula Junior and Formula Fiat offered sandlot opportunities, unavailable in other states, for boys who would emulate these men. The man of brio in Italian culture, from Leonardo through D'Annunzio to the latest star of Formula One, is an individual standout who has mastered control of a complex technological object.

The plaintiff in a products liability action, by contrast, defines himself as ordinary, or even worse than ordinary. Litigants in the United States have told the courts how they rode a vacuum cleaner astride like a toy horse, poured cologne on a lighted candle, removed safety devices, and blinded themselves with champagne corks. To the extent that they deviate from an ideal, plaintiffs testify that they are less intelligent, less knowing, or more careless. A "sophisticated user defense" is controversial,[54] and the role of plaintiff's negligence in precluding recovery unclear.[55] The "ordinary consumer" is enshrined in the *Restatement (Second) of Torts* as the standard that a seller of products must bear in mind.[56]

The good plaintiff in a products liability action has behaved in a reasonable, ordinary way. He used the product in a manner consistent with its proper purpose, with no imaginative deviations and no expression of a unique relationship between himself and the object. In litigation he is a member of a group, as is the defendant seller—undistinguished, a person defined by purchase and use. "Nobody in Italy," meanwhile, "ever confesses to being 'an average man'; everybody persuades himself that he is, sometimes for intricate and improbable reasons, one of the gods' favoured sons."[57] The posture of a plaintiff in a strict products liability action would provoke discomfort and dissonance in Italy.

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53. *Id.* at 2.

54. *See generally* Robert E. Powell et al., *The Sophisticated User Defense and Liability for Defective Design: The Twain Must Meet*, 13 J. PROD. LIAB. 113 (1991).

55. *See* EPSTEIN, *supra* note 51, at 130.

56. *See* RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965).

57. BARZINI, ITALIANS, *supra* note 37, at 79.

Forced to characterize himself as an ordinary consumer, a plaintiff tacitly endorses an ideal of the common man that has no place in Italy.

The Italian vision of the common man is pejorative. In a state where a wide gap exists between rich and poor, and with rigid class stratification, the common man regards his lot with anger and resignation rather than with pride.[58] The uncommon man expects admiration. "Surrounded by the esteem of his fellow-citizens, he (our hero) will consider it quite natural that he should lead a life radically different from theirs."[59] In bright contrast to the United States view of the consumer as a fungible user of a product and as an average person, this Italian dichotomy posits a demeaned majority below and a tiny elite above.

Related to the theme of the common man is the concept of conformity inherent in strict products liability. A product that departs from the manufacturer's design and causes injury as a result of that deviation is said to be defective, and this sort of occurrence creates the strictest subdivision of strict products liability—that of manufacturing defect. All products must conform to a notion of reasonable safety. In the subregions of design defect and failure to warn, the manufacturer usually must conform to the standard of reasonableness used in negligence law, which compares the risk of harm with the utility of the manufacturer's conduct in designing the product or warning about it. This standard emphasizes consistency and uniform behavior.

Regarding conformity in Italy, however, one writer argues that the only time when Italians were coerced into an outward manifestation of this mien, during the fascist era, they responded with "internal emigration."[60] The theme of conformity is alien to the land of bad soldiers, an unruly parliament, and an emphasis on personal development as the means of lifting one's life above senseless repetition.[61] Mussolini, who was later to impose conformity on his countrymen, dreaded the thought when he was young: "Imagine an Italy in which thirty-six millions should all think the same, as though their brains were made in an identical mold," he wrote in 1918, "and you would have a madhouse, or rather, a kingdom of utter boredom or imbecility."[62]

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58. *See* La Palombara, *supra* note 1, at 309-16.
59. HUGHES, *supra* note 32, at 36.
60. JAMES D. WILKINSON, THE INTELLECTUAL RESISTANCE IN EUROPE 3 (1981).
61. *See* HUGHES, *supra* note 32, at 34.
62. JOHN GUNTHER, PROCESSION 25-26 (1965).

IV. A BENEVOLENT CENTRAL GOVERNMENT

Admiration of nonconformity is one expression of the unique Italian political culture, mordantly summed up in Joseph La Palombara's phrase: a world of "fragmentation, isolation, and alienation."[63] Empirical data support the conclusion that Italians feel disconnected from politics, civic involvement, and the state;[64] although many of these findings are decades old, they have largely stood up to more recent re-examination.[65] This attitude toward central government clashes with strict products liability.

Implicit in strict products liability is an endorsement of centralization at several levels. In his landmark opinion in *Greenman v. Yuba Power Products, Inc.*, Justice Traynor expressly favored strict liability in tort over sales law as a basis for mediating product-caused injuries.[66] The differences between strict products liability and doctrines grounded in sales law are essentially the difference between centralized and decentralized rules. Sales law labels the parties as buyer and seller. They are persons united voluntarily, by a transaction. The heart of this transaction is their agreement and related shared understandings, whether explicit or tacit. In determining the rights and liabilities of the parties, courts are expected to look at the particular agreement. To the extent that this process is controlled by centralizing legal rules, courts are expected to apply these rules in a way most consistent with the parties' unique bargain.[67]

In contrast, strict products liability establishes rules independent of the individual sale of a good. The world of product manufacture and distribution is viewed as a whole universe, filled with categories of actors. Individual deviation is suspect, or not taken into much account. Purchase and sale are not pivotal events; rather the rules of accidental harm apply, whereby every actor is charged with a duty to refrain, globally, from causing an unreasonable risk of harm to others. In this world nobody bargains; private contracts have little force, and the domain of central law expands correspondingly.

This centralizing view derives from the premise that production is economic activity. Economic analysis conceives of incentives imposed on a class of people who are identified only by

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63. La Palombara, *supra* note 1.

64. *See id.* at 287; ALMOND & VERBA, *supra* note 7, at 83; DI PALMA, *supra* note 1, at 16.

65. *E.g.*, TULLIO-ATLAN, *supra* note 34; WEBER, *supra* note 1.

66. *See* Greenman v. Yuba Power Products, Inc., 377 P.2d 897 (Cal. 1962).

67. *See* U.C.C. §§ 2-314, 2-315 (1978).

what sort of wealth-increasing behavior they pursue. The loop that Traynor envisioned—injury, followed by loss charged to the manufacturer, followed by the manufacturer's assessment of its need for insurance, followed by an increase in the price of the product, followed by sale, followed by injury—is an example of economic analysis, albeit a rather naive sort. Microeconomics uses categories and aggregates to explain behavior, predict outcomes, and give direction for policymaking; the concept of *homo economicus* asserts that human beings are, or ought to be viewed as if they were, motivated primarily by financial self-interest. Whatever else may be said about this concept,[68] it is a unifying one, maintaining that people are fundamentally alike. From this homogeneity it becomes easy to build centralized approaches to the application of legal rules.

The products liability literature thus describes a centralized system, necessarily attached to a powerful government. Partially in response to this theme, products liability scholarship of recent decades has been dominated by libertarian antipathy to strict products liability. Critics have argued that United States strict products liability arms the government, and deprives individuals of the products liability rules that best suit their interests. Richard Epstein views one major doctrine of products liability law, risk-utility balancing, as a source of unprincipled and expanding power for judges and juries.[69] In place of risk-utility balancing, Epstein has argued for various constraints on the powers of courts to resolve disputes involving product-caused injury.[70] Peter Huber, an airplane pilot as well as a tort reform scholar, would insulate airplane manufacturers from some liability exposure, based on his argument that his (and the public's) interests are better served by a reduced opportunity to recover for injury, if such a reduction would protect or increase consumer access to small airplanes.[71] George Priest has argued that expanded liability rules have worked to the detriment of the most vulnerable consumers—poor and working-class product users—because the principle of cost internalization increases the cost of products, while regressive principles of damages law allow the rich to recover much more than the poor given the same

68. Attacks are numerous. For a sample, see BEYOND SELF-INTEREST (Jane J. Mansbridge ed., 1989); Richard H. McAdams, *Relative Preferences*, 102 YALE L.J. 1 (1992); Amartya K. Sen, *Rational Fools: A Critique of the Behavioral Foundations of Economic Theory*, 6 PHIL. & PUB. AFF. 317 (1977).

69. *See* EPSTEIN, *supra* note 51; Richard A. Epstein, *The Risks of Risk/Utility*, 48 OHIO ST. L. J. 469 (1987).

70. *See* Epstein, *supra* note 69; EPSTEIN, *supra* note 51.

71. HUBER, *supra* note 19, at 161.

physical injury.[72] Thus to critics of United States products liability law, strict products liability offers a bad kind of consumer protection, whereby the state protects consumers by expanding its own powers, sometimes to the detriment of consumer interests.

In their defense of strict products liability, other writers do not downplay the role of a strong government in enforcing the consumer protection of strict products liability. Joan Claybrook, a leading defender of strict products liability, views the doctrine as an important adjunct to a strengthened federal regulatory system.[73] Ralph Nader, famous as a champion of regulation and government protection of consumer interests, has offered a similar defense of United States products liability law.[74] Another connection between products liability and an endorsement of a government active in consumer protection appears in the advocacy of the Consumers Union, an organization that works in favor of strengthened regulation, and against congressional efforts at products liability reform aimed at weakening the position of product users in litigation.

Thus strict products liability presumes that a central government can be a force for progress and improvement. Government steps in to cure a problem between manufacturer and user; the user has been harmed by a defective product, but cannot gain redress because older principles of law raise hurdles. Accordingly, government arrives to interfere in the transaction by lowering these hurdles.

This approval of intervention by a benevolent central government is evident in other aspects of strict products liability. Strict products liability invites courts to contemplate and adjudge product design and its tradeoffs, an area some have regarded as best left to experts.[75] Moreover, the rhetoric of strict products liability promotes increased rights-consciousness in consumers, who come to believe that they are entitled to safe products; such a right can be enforced ultimately only by government.

Transported to Italy via the products liability directive, this faith in the benevolent power of central government faces a

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72. *See* George L. Priest, *The Current Insurance Crisis and Modern Tort Law*, 96 YALE L.J. 1521, 1566-70 (1987).

73. *See* Claybrook, *supra* note 20; DAVID BOLLIER & JOAN CLAYBROOK, FREEDOM FROM HARM: THE CIVILIZING EFFECT OF HEALTH, SAFETY, AND ENVIRONMENTAL REGULATION 194-97 (1986).

74. Nader, *supra* note 20.

75. *See* James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 COLUM. L. REV. 1531 (1973); Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277, 278 (1985).

remarkable degree of cultural antagonism. From the days of the Roman republic, when Cicero denounced a provincial governor appointed by Rome in his famous Verrine orations, Italians have displayed a unique distrust of, and contempt for, the central government. Although skepticism about government is found everywhere in the world, surveys have shown that among industrialized nations Italy is filled with unusually alienated citizens. By European standards, Italians are relatively ill-informed about current events and are relatively unlikely to vote; although recent years have marked some improvement in these areas, Italians still lag behind most other Europeans.[76] Recent data confirm that Italians are relatively low consumers of newsprint.[77] As Joseph La Palombara points out, lack of engagement in politics does not prevent Italians from "making evaluative judgments of the political system and its output—evaluative judgments that are frequently negative and destructive."[78]

In their classic study of political culture in five industrialized nations, Gabriel Almond and Sidney Verba reported that Italians scored lowest in the percentage of those who believed an individual could do something about an unjust regulation; that Italians routinely expect poor treatment from the government, especially the police; and that Italians were in general the most alienated from government.[79] In this "Hobbesian"[80] posture, Italians stress "the danger and futility of immersing oneself in politics."[81] To them politics can appear "simultaneously either instrumental, partial and capricious, or distant and impersonal."[82]

This stance derives to some degree from the political history of Italy. Although Italian identity has existed for centuries, the unified Italian state is of recent origin. Unification almost did not occur. The nineteenth-century *Risorgimento* was never a mass movement: unification attracted mainly the middle and upper classes of the north, and Italy became a nation with only half-hearted support from the southern populace, no mass participation, and fierce hostility from the Church.[83] The gap in

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76. *See* WEBER, *supra* note 1, at 131-32.
77. *See* FORGACS, *supra* note 25, at 25-26.
78. La Palombara, *supra* note 1, at 287.
79. *See* ALMOND & VERBA, *supra* note 7, at 106-09, 167-70, 185; *see also* DI PALMA, *supra* note 1, at 14-16.
80. La Palombara, *supra* note 1, at 297.
81. ALMOND & VERBA, *supra* note 7, at 92.
82. DI PALMA, *supra* note 1, at 14-15.
83. *See* FORGACS, *supra* note 25, at 26; La Palombara, *supra* note 1, at 298.

income between north and south grew wider in the post-unification years.[84] After the fall of fascism, a new republic was declared, and Italy had to begin again the task of becoming a centralized state.

Today Italy is still a land of divisions. Its official language is indigenous to only a small area (Tuscany and Umbria) and dialects persist, "often unintelligible beyond a radius of a few kilometers."[85] Wealth disparity in Italy is particularly striking when viewed as a discrepancy between north and south; in 1988 the gross domestic product of southern Italy was 58% that of the rest of Italy.[86] In their political memberships Italians display a high degree of partisan fragmentation, with political antagonisms carried over into their personal lives.[87]

In addition to division and fragmentation, skepticism about grand principles keeps Italians distrustful of their government. Vivid folk sayings attest to this attitude.[88] Almond and Verba suggest that in "the brief century" of the Italian state, "Italians have learned to associate nationalism with humiliation, and constitutionalism and democracy with ineffectiveness."[89] According to Stuart Hughes, it is "[t]he practical wisdom of centuries" that makes Italians doubtful of "fine words and large-sounding phrases."[90] *The Prince*, a much-maligned work, may deserve some of the blame or credit for its expression of practical politics.[91] Academics frequently explain the rise of the Mafia as an expression of resistance to government—a buffer, to some, between the individual and the state. Though careful scholarship stresses the limits of this explanation, there is reason to believe it is accurate.[92]

In their skepticism Italians prefer to identify themselves as members of smaller units, especially families, towns, or regions.[93]

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84. *See* GIANNI TONIOLO, STORIA ECONOMICA DELL'ITALIA LIBERALE 1850-1918, at 146 (1988).

85. La Palombara, *supra* note 1, at 300.

86. GIANNI TONIOLO, AN ECONOMIC HISTORY OF LIBERAL ITALY 1850-1918, at 233 (1990).

87. ALMOND & VERBA, *supra* note 7, at 296-97.

88. Anton Blok quotes and translates some of these phrases: "*Chi ha denaro ed amicizia va nel culo della giustizia*" ("He who has money and friends fucks justice in her ass"); "*Fatta la legge nasce l'inganno*" ("When the law is made fraud comes forth"). ANTON BLOK, THE MAFIA OF A SICILIAN VILLAGE 1860-1960: A STUDY OF VIOLENT PEASANT ENTREPRENEURS 78 n.14 (1974).

89. ALMOND & VERBA, *supra* note 7, at 308.

90. HUGHES, *supra* note 32, at 33.

91. NICCOLÒ MACHIAVELLI, THE PRINCE (Quentin Skinner & Russell Price eds., 1988) (1532).

92. *See* BLOK, *supra* note 88, at 215.

93. *See* CARLO SFORZA, ITALY AND ITALIANS 1-2, 5 (Edward Hutton trans. 1949).

A smaller unit is more visible, more accountable, and closer than the far-off government. Only persons in the smaller unit can be trusted. A British observer and long-term resident of Italy was struck by what he perceived as the absence of "corporate morality" outside the family and similar small units: Italians refuse to accept "what elsewhere would be regarded as the obligations of living in a community."[94] In this setting, the Italian has no precedent and no good reason to call on a central government to legislate in his behalf.

V. PROGRESS THROUGH PRIVATE LAW

As described by its principal author at the European Commission, the products liability directive was part of a larger design to achieve progress through the improvement of private law in many diverse areas, such as environmental law and bankruptcy.[95] Much of this design was never achieved, however, and some writers have questioned its premise. Can a change in private law have significant effect in a continent with limited access to courts and a traditional distaste for litigation?[96]

In interviews, lawyers at the European Commission and other observers elaborated on their affirmative answer to this question, describing the EU vision of progress through private law with specific reference to the aims of the products liability directive. The Directive is monitored and used as a model in the *Service Politique des Consommateurs* (Consumer Protection Unit). This Unit seeks to promote consumer safety and confidence, and to provide for an even level of consumer protection within the Union, consistent with its jurisdictional right and duty to reduce national barriers in Europe. Changes in private law are part of a pattern aimed ultimately not at increasing consumers' financial position vis-à-vis manufacturers or corporations in lawsuits, but rather at preventing harm and promoting consumer awareness.[97] One major job description for a lawyer in the Consumer Protection Unit perceives this role as encompassing "access to justice, class actions, rights of the citizen, transborder litigation, postsale warranties, transborder consumer rights, advertising,

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94. NICHOLS, *supra* note 41, at 309.

95. Taschner Interview, *supra* note 3.

96. *See* Bernstein, *L'Harmonie*, *supra* note 5; *see also* Patrick Thieffry et al., *Strict Product Liability in the EEC: Implementation, Practice and Impact on U.S. Manufacturers of Directive 85/374*, 25 TORT & INS. L.J. 65, 88 (1989) (predicting that effect of the Directive is likely to be modest).

97. Graham Interview, *supra* note 47.

[and] privacy rights"—a comprehensive blend of substance and procedure.[98] Thus the Consumer Protection Unit concerns itself almost equally with the revision of substantive law and the procedural problem of access to justice in the EU, viewing the activities as related and equally necessary to its aims of preventing harm and mandating a consistent level of consumer protection throughout the Union. Along with its revisions to the law of accidents and of contracts, for instance, the Consumer Protection Unit has proposed informally the introduction of contingency fees in the EU. This idea was immediately dismissed as a United States style disaster in the making, but the Unit has experienced some success with its plans to promote the dissemination of EU consumer law, and with a hortatory effort to increase the Member States' spending on legal aid.[99] In this approach, private law is viewed functionally as part of a comprehensive scheme of consumer policy.

With litigation relatively unexploited in the EU, progress through private law does not emphasize the redistributive benefits of litigation *ex post*, but rather the didactic effects that a private-law change can have. One observer who has studied the Directive for years says that although as law it cannot create radical change, it does serve to promote the concept of products liability in states lacking a body of law in this area, and to increase consumer awareness of the responsibility of producers.[100] But private-law reformers in the Commission do expect their new laws to be used. Total desuetude would defeat even the modest goals of education and publicity. For example, a possible successor to the Directive in the Consumer Protection Unit is another private-law measure, imposing products-liability-like duties on suppliers of services; its principal author professed to be aware of the limitations of private-law reform in the EU but maintained that the measure would "harmonize something, although it will not harmonize everything."[101]

As a species of private law, strict products liability itself is identified with an effort to achieve progress. When Edward Levi sought to illustrate the development of law in the United States

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98. In the original French: "[a]ccès à la justice, actions collectives, droits du citoyen, litiges transfrontaliers, garanties et services après-vente, droit du contrat transfrontalier du consommateur, publicité, protection de la vie privée." Telephone Interview with Marco Gasparinetti, Attorney, Consumer Protection Unit of the Commission of the European Communities (Jan. 11, 1993).

99. Interview with Marc Jeuniaux, attorney, Consumer Protection Unit of the Commission of the European Communities, in Brussels, Belgium (Oct. 29, 1992).

100. Interview with Ellen Vos, Ph.D. candidate, European University Institute, in Florence, Italy (Oct. 25, 1992).

101. Bernard Interview, *supra* note 48.

and the meliorative, moving-forward function of legal reasoning, he chose as his example the proto-strict products liability case of *MacPherson v. Buick Motor Co.*, in which Judge Cardozo reconceived the defect in an automobile as a proper subject for tort rather than contract principles.[102] In United States legal education, the history of strict products liability is presented as a story of genesis and reinterpretation.[103] Writers who oppose the legal rules that emerge at the end of the story nonetheless agree with the description of products liability as a story of progress attempted.[104] The principles of risk distribution, cost internalization, incentives to safety, and insurance all have in mind some vision of progress. Other conceptions of strict products liability, which reject these aims, favor an understanding of products liability that would enable injured parties to reach the courts.[105] Thus these views too are grounded in the premise that products liability law can promote improvement.

As has been suggested, the idea of progress through private law is alien to some degree throughout Europe, at least when compared to the function of litigation as a source of change in the United States,[106] but the idea is especially foreign to Italy. Most European states share a tradition of barriers to litigation. Rules often found in Europe, such as a ban on contingency fees and the shifting of fees or costs to the losing party, discourage lawsuits. What makes Italy exceptionally improbable as a site of progress through private law are its cultural notions of progress, its views concerning communal obligations, its system of higher education, and its approach to the study and practice of law.

To the Italian, improvement and progress do not result from government policymaking. This conclusion emerges from the observations about Italian culture offered above; it is supported also by reference to the players of the *dopoguerra*, the postwar period when an "Italian economic miracle" propelled Italy to near the top among world states. No one can attribute progress in Italy to any postwar government (of which there were many) or post-Mussolini democratization of the laws. Economic progress is

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102. *See generally* EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING (rev. ed. 1962).

103. *See* Anita Bernstein, *A Model of Products Liability Reform*, 27 VAL. U. L. REV. 637, 637 n.1 (1993).

104. *E.g.*, EPSTEIN, *supra* note 51.

105. *E.g.*, Powers, *supra* note 15.

106. For descriptions of this function of litigation in the United States from opposite political stances, see Nader, *supra* note 20, at 630-31; WALTER K. OLSON, THE LITIGATION EXPLOSION: WHAT HAPPENED WHEN AMERICA UNLEASHED THE LAWSUIT 339-48 (1991).

usually attributed rather to the efforts of industrialists: Agnelli, Olivetti, Gucci, Lamborghini, Ferrari, and others.[107] Laws and governments receive, and deserve, little credit for progress in Italy.

The connection drawn between private law and consumer protection within European Union institutions, particularly the Consumer Protection Unit of the European Commission, shows that behind the Directive lies the belief that private law is a device to be used to protect consumers in a common market. This normative guide to policymaking clashes with the Italian cultural aversion to comprehensive consumer protection. Despite increasing awareness of the subject and some grassroots activism, Italy lacks a tradition of governmental protection of consumers.[108] The notion conflicts with the enduring Italian themes of daring and brio. Consumer protection affirms the ordinary, undistinguished, average product user; Italian culture celebrates the opposite type. Accordingly, if private law reform is justified (as it is in the Union) mainly as an instrument of consumer protection, it remains unjustified to the Italian.

Mistrust of central government also explains resistance to the idea of progress through private law: Italians are as a group skeptical of people they do not know, distrustful of high-flown principles, and antagonistic toward Roma. In the view of Italians a new law, especially one believed to originate in remote places (the United States and Brussels) will not ameliorate any of life's hardships.[109]

Moreover, the idea of progress through products liability law requires a certain set of players: first the aggrieved, hapless user, a self-labeled victim who, though eager to win money through a lawsuit, also believes in the disinterested rightness of his cause; his lawyer, who acts out of a similar mix of self-interest and crusade; and employees of the manufacturer who are expected to

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107. *See* HOFMANN, *supra* note 2, at 215. Again a contrast to the United States is instructive. One can speak of presidential eras in United States history, all produced by party politics and a party system—the eras of Lincoln, both Roosevelts, Kennedy, and Reagan. To think of Italian leadership eras, however, is to recall men initially outside the system—Garibaldi, D'Annunzio, Mussolini—each of whom created a political system tailored to his own personality.

108. Interview with Cinzia Baker Masieri, head of *Regione Toscana Comitato Regionale Consumatori e Utenti* (Tuscany Region Consumers Association), in Florence, Italy (May 28, 1993).

109. *See supra* text accompanying notes 76-94. Reacting to the Treaty of Versailles, D'Annunzio made a similar point with characteristic flash: "My comrades and I do not desire to be Italians in an Italy enfeebled by transatlantic purgatives from Doctor Wilson and amputated by the transalpine surgery of Doctor Clemenceau." LEDEEN, *supra* note 52, at 15.

care how they will look to ordinary, unknown others (particularly a jury) when their conduct becomes known. These people are simply not Italians, as Italians have been described by themselves and foreign observers. The products-liability players believe in what Peter Nichols aptly called corporate morality[110]—an idea that includes obligations to strangers, a "community" stretched in great distances of geography and time, and the belief that large numbers of other people significantly resemble oneself. A lawsuit in a sense unites people: it may be that the hostility that La Palombara reports Italians feel for one another[111] paradoxically lessens their desire to litigate. The encounter of a lawsuit presumes that the litigants can achieve resolution. Such a union is alien to Italy.

If Barzini is right that for Italians law is preferably to be ignored, and if it cannot be ignored, then neutralized or deceived,[112] the notion of progress through private law becomes most implausible in Italy. In this view the only thing to be said in favor of private law is that unlike the police, the importuning official, or the bureaucratic obstacle, it can be ignored, unless one is a defendant or witness. Accordingly when Italians choose to be plaintiffs they are probably free from any thought of social progress. "The current rule is never to sue when one is in the right," Barzini declares. "It is too risky. One should go to court only when one knows one is in the wrong and on the defensive."[113]

Many Italians study law at the university, but a notion of law-as-progress does not follow. Consistent with the European tradition, law is an undergraduate subject, and a degree in the field is only the first of several credentials required for the practice of law.[114] Thus much of this enrollment in pursuit of a law degree is roughly comparable to the popularity of subjects

110. NICHOLS, *supra* note 41, at 309.

111. *See* La Palombara, *supra* note 1, at 309.

112. BARZINI, ITALIANS, *supra* note 37, at 194.

113. *Id.* at 104. Civil cases routinely take ten years to be resolved in the courts. Interview with Marco Ricolfi, Professor of Commercial Law of the University of Lecce, and practicing attorney, in Turin, Italy (Jan. 14, 1993). This fact of Italian life discourages many potential plaintiffs, both in the right and in the wrong, from suing, and it is the conventional explanation for the paucity of products liability lawsuits in Italy. But an additional theory, such as the one we offer in this paper, is necessary for two reasons. First, certain lawsuits other than products liability cases—residential property disputes, for example—are common in Italy. Second, and perhaps more important, endemic delays are not a fixed law of nature. Societies can make products liability litigation easy or forbidding, as they choose. Obstacles to litigation derive from a deeper cultural antipathy.

114. *See* G. LEROY CERTOMA, THE ITALIAN LEGAL SYSTEM 43-45 (1985).

such as political science in American colleges. Most laureates never practice. According to La Palombara, many of the students trained in law are destined for careers as corrupt bureaucrats, yellow journalists, "free lancers," and malevolent, anti-democratic leaders.[115] In Italy, moreover, education is presented and understood as theoretical. Few question the gap between theory and practice.[116] Thus the notion of using the law for progress, or for any change at all, would be alien in Italy. Indeed Giuseppe Di Palma contends that the aim of the Italian educational system is "to perpetuate or to co-opt a social and political elite rather than to create professional experts."[117]

Some writers, notably La Palombara, connect the authoritarianism of the Italian educational system with a pervasive authoritarianism[118] that would retard the force of private law as a source of progress. In rejecting the authority of higher government, Italians accept other sources of authority that are not democratic. The family, for instance, is authoritarian (although to La Palombara not rigidly patriarchal), and in it decisions are not made democratically: "when complaint does occur it is likely to be in the form of an emotional protest, or even in the form of violent behavior."[119] In Anton Blok's western Sicily, the rural poor live under the jackboot of the Mafia and feel ambivalent about liberation from its force, partially because of their belief that authoritarianism is inevitable.[120] To the extent this observation about Italians is true, it suggests that the progressive role of private law is hampered by a conservative tradition within Italian institutions, and specifically by a cultural disinclination toward change initiated by injured persons from below.

Legal education in Italy rests on the principle that wisdom comes from above. In large lecture halls, students write down what they hear from their professors, who instruct from a remote distance.[121] Interruption and discussion are regarded as dilatory at best and often impertinent. Efforts to leaven this style of teaching with seminars and case studies have had very little

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115. *See* La Palombara, *supra* note 1, at 314-15.
116. *Id.*
117. DI PALMA, *supra* note 1, at 170.
118. La Palombara, *supra* note 1, at 317-20.
119. *Id.* at 318.
120. *See* BLOK, *supra* note 88.
121. *Cf.* Silvia Pagani, *Lezioni senza Confini*, IL MONDO, Jan. 11-18, 1993, at 90 (recounting enthusiastic reaction of Italian university students in the United States to accessibility of their professors).

effect.[122] Professors "give" graduate students their dissertation topics in all subjects, including law, and relations between the professor and student are mediated by an assistant.[123] One need not venture to judge the merits of this system to understand that it is at odds with the challenging and subversive nature of an innovative lawsuit. Italian legal education cannot train students to become plaintiffs' advocates. It is fundamentally conservative, built to maintain itself.

Consistent with this conservative and hierarchical view of law, Italy provides scant support to impecunious litigants. Although Article 24(3) of the Republican Constitution of 1947 provides that appropriate institutions are to be established to provide legal aid for the bringing and defending of actions, this provision has remained "a dead letter."[124] Litigants cannot obtain free advice until after the commencement of formal proceedings, and in order to be represented on appeal they must reapply and requalify for aid.[125] The Consumer Protection Unit of the European Commission regards a vital legal aid system as an essential component of progress through private law, and thus of consumer protection.[126] Because the Commission lacks the authority to require Member States to provide meaningful legal aid, however, its reforms are correspondingly weakened in states such as Italy.

This conservatism carries over into Italian substantive law. Unlike some of their counterparts elsewhere in Europe, Italian judges apply the civil law narrowly. In products liability, the consumerist, "liberal" Directive makes a greater change in Italy than in several other European states.[127] Before the Directive, for instance, French law had expanded the civil-law concepts of warranty and guardianship to create a virtual equivalent of strict liability in tort,[128] and German judges have for several years been exceptionally innovative in their conception of duties and

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122. *See* Vittorio Olgiati & Valerio Pocar, *The Italian Legal Profession: An Institutional Dilemma*, *in* 2 LAWYERS AND SOCIETY: THE CIVIL LAW WORLD 336, 345 (Richard L. Abel & Philip S.C. Lewis eds., 1988).

123. *See* La Palombara, *supra* note 1, at 320.

124. CERTOMA, *supra* note 114, at 50.

125. *See* Olgiati & Pocar, *supra* note 122, at 354.

126. Jeuniaux Interview, *supra* note 99.

127. *See* Francesco Gianni, *Product Liability Law in Italy*, *in* EEC STRICT LIABILITY IN 1992: THE NEW PRODUCT LIABILITY RULES 117 (Practising Law Institute ed., 1989); Frank A. Orban III, *Product Liability: A Comparative Legal Restatement—Foreign National Law and the EEC Directive*, 8 GA. J. INT'L & COMP. L. 342, 354-56 (1978).

128. *See* Bernstein, *L'Harmonie*, *supra* note 5, at 697-99 (citations omitted).

plaintiffs' burdens of proof.[129] Although Italy is noted for its sheer quantity of laws,[130] few of these laws are noticed, and fewer still used as instruments of change.

VI. HARMONIZATION

In the EU the term "harmonization" is used to describe the simultaneous improvement and reconciling of the law. Although the two efforts may work at cross purposes, harmonization consists of both bringing together the different laws of the Member States toward common ground, and changing to a new law if progress warrants revision.[131] Harmonization is an effort that seeks to take the best of European law and impose it, smoothly, on Member States where such an imposition would improve the functioning of the common market. Under this approach, radical innovation ought to be kept to a minimum, at least in theory.[132] Thus the norms that underlie harmonization are clear: progress through the explication of established principles, unification of disparate traditions, respect for limits as contrasted with innovation, and improvement from above, by a supranational government.

The products liability directive represents harmonization in two senses. First, harmonization is its express, stated goal; second, harmonization is inherent in all types of products liability reform. The first meaning is patent: All directives in the European Community (now the European Union) must purport to advance harmonization.[133] In its text, the products liability directive alluded to divergences and uncertainties in the laws of

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129. Taschner Interview, *supra* note 3. The pre-Directive Italian products liability law was mixed. On the one hand, in 1964 the *Corte di Cassazione* liberalized the burden of proof for plaintiffs in tort-based products liability actions; on the other hand, in contracts-based cases, Italy clung conservatively to the archaic privity rule that Judge Cardozo disposed of in New York in 1916. The pre-Directive Italian law was difficult to characterize because products liability cases can be brought in tort or contract or both, depending on their facts. Ricolfi Interview, *supra* note 113. The relative scarcity of lawsuits has kept the conflict of doctrine largely theoretical.

130. *See* BARZINI, ITALIANS, *supra* note 37, at 103-04.

131. *See* Bernstein, *supra* note 103, at 648-56.

132. In an interview, the principal author of the Directive maintained that his measure did not constitute a rewriting of European law, but came rather from a tradition going back to the principles of sales law he recalled learning at the University of Freiburg in the 1950s. Taschner Interview, *supra* note 3.

133. *See* TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY] arts. 100, 189.

the Member States.[134] It promised a resolution of these conflicts, which were evident in the varied case law of the Member States.

Harmonization in the second sense describes not just the products liability directive but other efforts of reform in this area. According to a model of products liability reform in industrialized democracies, reform movements all announce similar goals—uniformity, adjusted costs of marketing products, enhanced consumer welfare, and freer flow of goods—and go through predictable stages of compromise and retreat until they conclude, with partial results. Proponents of reform simultaneously believe in progress through harmonization and deploy the rhetoric of harmonization for their instrumental and political purposes.[135] Unification, leveling, and resort to ideals are all crucial elements of products liability reform.

We have seen that Italians disdain the notion of progress through principles; that they regard unification—particularly their own national unification—as somewhat chimerical; that they applaud innovation and feel no admiration for rote virtues; and that they distrust government, especially at its highest levels. But the subject warrants a little more elaboration, because of the apparent resemblance of harmonization to the concept of *sistemazione*, which by contrast is an important principle in Italy.

As explained by Barzini and others, *sistemazione*, inadequately translated as "regularization," "arrangement," or "settlement," is an overwhelming mission for Italians. To Barzini it accounts for much in Italian culture: the ever-present geometrical patterns, the perfectly tamed gardens, Dante's precise *Divine Comedy* (three parts, each with thirty-three cantos, which each end with the same word) and the widespread yearning for a secure job or a reliable husband.[136] To an observer of EU lawmaking, it may explain Italy's paradoxically good record in the enactment of directives: in 1988 the Italian parliament, acknowledging its general inability to enact implementing legislation, devised a streamlined legislative procedure whereby directives become law with minimal debate and delay.[137] System—the control of nature or of rebellion—gives reassurance. In Italian *sistemare* is a transitive verb: objects of the action can be "mountain torrents, marshy lands, wild animals, spoiled children and unruly populations."[138]

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134. *See* Directive, *supra* note 3, pmbl.

135. *See* Bernstein, *supra* note 103.

136. BARZINI, ITALIANS, *supra* note 37, at 111-14.

137. *See Italy Seeks to Clean Up Bad Boy Image in Europe*, The Reuter Library Report, Nov. 9, 1988, available in LEXIS, Nexis Library, Wires File.

138. BARZINI, ITALIANS, *supra* note 37, at 113.

The resemblance between *sistemazione* and harmonization is superficial; on a closer look the two concepts support contrary goals. At least to the leaders of Italian manufacture and design, *sistemazione* is a means rather than an end. Unlike harmonization, which is an effort aimed at ultimate principles—a search for truth—*sistemazione* builds a base for artistry. It acknowledges that dull, repetitive, necessary work must get done, without making an end of the dull work itself. *Sistemazione*, which can facilitate the introduction or testing of new ideas, supports rather than inhibits the brio of a leader.

"I took the view," Enzo Ferrari wrote, "that a racing car should be the compendium of the work of a small auxiliary workshop, well fitted out and with its own specialized staff, so that the ideas and designs of the engineers might rapidly be translated into reality."[139] In an ideal system, even the factory worker on the shop floor remains creatively concentrated on his work, because he understands his role to be between the design and creation of a finished product.[140] Working within a system, even a laborer can share in brilliance and improvisation.

By contrast harmonization, as expressed in the products liability directive, seeks to contain and tame creativity, especially the innovations of the Member States' high courts. As was mentioned, individual judges in Germany have deployed the bland language of the German Civil Code to create an equivalent of strict products liability; French judges also have improvised a law of strict products liability out of various traditions, including Roman sales law; and other Member States have built similar, if less imaginatively-conceived, substantive equivalents of the Directive. All of these individual state innovations have now been gathered together and put on one level through the promulgation of the Directive.

The effect of the Directive is not to build a system that could support brilliance, but rather to identify important common denominators. Consistency, distributive justice, publicity of

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139. PETE LYONS, FERRARI: THE MAN AND HIS MACHINES 39 (1989).

140. After a lengthy visit to the Ferrari manufacturing plant in Maranello, our impression is fairly consistent with this ideal. We were struck by the number of women on the shop floor (a greater proportion than we found at Fiat and even at the Volvo plant in progressive Sweden). The women workers appeared to be as engaged in their work as Enzo Ferrari would have liked; our use of masculine pronouns seems unwarranted here. Ferrari once told an interviewer that he was "not opposed to having feminine employees, providing they form about half the work force. It's when you have just a few that they tend to form little cliques and to have a disturbing effect on the rest of the workers." Griffith Borgeson, *An Audience With the King*, *in* FERRARI: THE MAN, THE MACHINES 330, 335 (Beverly Rae Kimes & Stan Grayson eds. 1975).

consumers' rights, clarity, lowered barriers to commerce, and, above all, predictability are the goals here. *Sistemazione*, however, is about turning improvisation into good design, and trying to assist brilliance to produce unpredictable results.

VII. CONCLUSION

We return to Leonardo. The vision of this master maker shaped the modern world, especially during its progress through industrialization and beyond. One writer notes that during the industrial era, between 1869 and 1919, an average of one full-length book per year was published in Europe on the subject of Leonardo da Vinci.[141] Paul Valery summarized the vision: Leonardo, he wrote, "this ruler of his own resources, this master of design, of symbols, and of calculations, had found the central attitude from which all the enterprises of learning or science and all the operations of art are equally possible."[142]

Leonardo is the universal genius because he, better than any other person who ever lived, expressed the power of design. Beginning with design, Leonardo advanced anatomy, botany, engineering, art, and principles of science: everything in his life's work flowed from design. Modern Italy honors the memory of this great citizen in its approach to design and the men who make estimable objects.

Whether or not the modern Italian is a legitimate heir of Leonardo, he retains a belief in the unity of vision, design, and the useful purpose of an object. A manufactured thing whose appearance and function satisfy the observer's criteria has an integrity that to the Italian commands respect. The innovation and aesthetic purpose embodied in the product influence the behavior and values of the person who acquires it. Product design connects maker and user.

Strict products liability, in contrast, breaks a connection between maker and user. What unites all its policy bases—production as economic activity, consumer protection, a belief in the benevolent powers of central government, a commitment to progress through private law, and harmonization—is their tendency to sever this connection, by the intervention of the state. The state injects itself into the relationship between maker and user to express the needs of a

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141. *See* GIANCARLO MAORINI, LEONARDO DA VINCI: THE DAEDALIAN MYTHMAKER 272 (1992).

142. *Id.* at 2.

larger society. When invited, courts will judge any product: its safety, the conscious design choices of its manufacturer, the errant ideas about misuse that it might inspire, its dangers balanced against its benefits. Strict products liability law has redesigned countless products, and removed others from the market altogether. In the world that the products liability directive seeks to create throughout the EU, a liability system will mediate between maker and user, substituting its judgment for an original design.

Yet the outcome of the Directive, despite its early implementation in Italy, remains unresolved. European Union law required Italy to enact strict products liability, but it cannot compel Italians to accept it into their culture. The Leonardo trope will resist a written law imposed from outside Italy; products liability case law of the future will show the degree to which Italians retain their Leonardo ideal in response to harmonization.

Injured persons can choose to blame a manufacturer for their injury, or they can maintain in their minds an ideal that exonerates him. Courts can require producers to pay a greater share of the loss occasioned by their products, or they can refuse to view manufactured products as a medium of distributive justice. As a species of private law, products liability depends on the cooperation of manipulable individuals and their access to courts. We believe that Italian civil courts may someday open up to permit the full development of strict products liability in Italy. But the obstacles are venerable. Much of Italian culture stands opposed to the meliorative purposes of strict products liability, and a directive cannot wash away a glorious myth.

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