Vanderbilt Law Review

Volume 50
Issue 3 *Issue 4 - May 1997*

Article 1

4-1997

Reconceptualizing Strict Liability in Tort: An Overview

Martin A. Kotler

VANDERBILT LAW REVIEW

VOLUME 50 APRIL 1997 NUMBER 3

Reconceptualizing Strict Liability in Tort: An Overview

*Martin A. Kotler**

* Professor of Law, Widener University School of Law. I would like to thank my present and former colleagues, Professors Barry Furrow, Robert Lipkin, Nancy Plant, Michael Risinger, Andrew Strauss, and John Wherry for their insightful comments on earlier drafts.

I. INTRODUCTION

In a series of books and articles, Professor Marshall Shapo has developed the idea of American tort law as a "cultural mirror"[1]—a legal system reflecting cultural norms that serves as the "intellectual and practical foundation for society's response to injuries."[2] The "cultural mirror" metaphor captures both the notion that there is a substantive normative basis for tort law that exists within society and the procedural notion that tort law ensures that those underlying norms are reflected in the resolution of tort disputes.[3]

Although I believe Professor Shapo's description to be fundamentally correct, it is also incomplete, and, as a result, somewhat misleading. It is correct in the sense that the moral intuitions of society form the underlying basis of tort law.[4] It is misleading, however, in that it views twentieth-century American society as a single entity possessing a unitary or common "culture" that can be reflected in the law. In fact, our culture is enormously diverse in terms of conventional indicators such as race, religion, and ethnicity. More importantly, our society consists of many different groups—both within and cutting across various subcultures—that can be identified based on function. These functionally classified groups—professionals such as doctors, engineers, or product sellers (including insurers), for

1. See Marshall S. Shapo, *In the Looking Glass: What Torts Scholarship Can Teach Us About the American Experience*, 89 Nw. U. L. Rev. 1567 (1995); Marshall S. Shapo, *In Search of the Law of Products Liability: The ALI Restatement Project*, 48 Vand. L. Rev. 631, 647 (1995); Marshall S. Shapo, *Products Liability and the Search for Justice* 198-99 (Carolina Academic Press, 1993).

2. Shapo, *Products Liability* at 19 (cited in note 1).

3. Shapo, 89 Nw. U. L. Rev. at 1588-89 (cited in note 1).

4. Martin A. Kotler, *Utility, Autonomy and Motive: A Descriptive Model of the Development of Tort Doctrine*, 58 U. Cin. L. Rev. 1231 (1990).

example—can be identified by commonality in knowledge, experience, expectation, and perception. In addition, they can sometimes be distinguished from non-group members by disparities in these same factors.[5] In short, individuals view the world differently depending on their knowledge, training, experience, and professional socialization, and on the peculiar slants imparted by membership in communities or in racial and ethnic groups.[6]

In this Article I maintain that explicit recognition of these differences in perception and expectation is the key to the proper resolution of tort cases. Specifically, I advance a number of claims. First, tort law must be understood essentially as a system in which individuals assess other individuals' conduct. As a result, most traditional tort cases turn on the answer to questions such as the following: Did the defendant impose an unacceptably high risk on others?[7] Was the defendant motivated by something that is considered improper?[8] Did the defendant intend to do harm or take unfair advantage?[9] Although we have, from time to time, lost sight of this essential characteristic of the system (most notably in early attempts to impose strict liability on the sellers of products), judging conduct

---

5. For the sake of convenience, in this Article "non-group" members such as product consumers, medical patients, and insureds will often be identified as though they are distinct groups. This is done simply to avoid the more precise, but awkward, identifications of "non-manufacturer, non-doctor, or non-insurer." Under the analysis presented here, however, the relevant factor is that non-members do not share the other groups' perspectives because they lack the knowledge, training, experience, and professional socialization that group membership typically entails.

6. See Pitirim A. Sorokin, *Society, Culture, and Personality: Their Structure and Dynamics* (Harper & Brothers, 1947). Sorokin explains:

> Each occupation tends thus to remake its members in its own image. And the longer an individual stays in the same occupation the deeper is the transformation.
>
> A long-time professor of physics looks at the world in a way fundamentally different from that of a long-time priest; both view it differently from a long-time factory worker, a druggist, a farmer, a sailor, a banker, a king, a prostitute.

Id. at 211. See also Joseph Bensman and Robert Lilienfeld, *Craft and Consciousness: Occupational Technique and the Development of World Images* (Walter de Gruyter, 2d ed. 1991).

7. For a discussion of tort law in terms of level and type of risk to which one exposes another, see George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 Harv. L. Rev. 537 (1972).

8. I have discussed the role of motivation in Martin A. Kotler, *Motivation and Tort Law: Acting for Economic Gain as a Suspect Motive*, 41 Vand. L. Rov. 63 (1988), and Kotler, 58 U. Cin. L. Rev. at 2860-67 (cited in note 4).

9. Kotler, 58 U. Cin. L. Rev. at 1254-60 (cited in note 4).

remains at the heart of tort law—even in many "strict liability" cases.[10]

Second, an individual's perception and assessment of conduct, whether it be his or her own or that of others, is deeply influenced by membership in "groups" as that term is explained above. While there are undoubtedly certain types of behavior that would be universally praised or condemned, attempts to understand the tort system without recognizing the existence of widespread, honest disagreements as to how an act should be judged will inevitably be unsuccessful.

Third, as a purely descriptive matter, our existing tort system contains numerous examples of legal doctrine that recognize, or at least permit recognition of, what I will call the "group selection problem." This phrase describes the need for the judiciary to recognize explicitly that a different result may be achieved in a given case depending on which group's perspective is used to view harmful conduct. Unfortunately, because the problem is rarely articulated, judges often miss the issue entirely or make group selection decisions based purely on intuition. The result is that cases are frequently decided incorrectly, or correct outcomes are reached for the wrong reasons. This Article argues that the judiciary must explicitly address the problem and make group selection decisions in a principled manner.

I posit that our commitment to majoritarian politics provides the principled basis upon which judges can and should resolve the group selection problem. Armed with this insight, I will offer a reconceptualization of the idea of strict liability in tort. While I recognize the familiar notion that strict liability is a body of doctrine developed to accomplish instrumentalist resource allocation goals, I make the case that there is a second type of strict liability that can and should be understood in terms of judging one person's conduct by another's standard.

Finally, I seek to illustrate how the model of tort law developed in this Article can be used both to analyze some of the more difficult issues of modern products liability law and to criticize other visions of the tort system. Specifically, I will explain why I believe the drafters of the Restatement (Second) of Torts took the wrong path in drafting section 402A[11] and why I believe that the drafters of the Restatement

10. I shall later argue that there are two distinct forms of "strict liability." One of them, properly understood, is actually a form of assessment of conduct. See notes 127-43 and accompanying text.

11. Restatement (Second) of Torts § 402A (1965).

(Third) of Torts: Products Liability[12] are repeating the error in the course of trying to correct it.

II. TORT LAW AS THE ASSESSMENT OF CONDUCT

The goals of tort law have been the subject of intense debate since the nineteenth century.[13] On the one hand, some view tort doctrine as a vehicle for judging the adequacy of human conduct in particular cases based on some more or less idealized after-the-fact vision of how one ought to have behaved.[14] Regardless of whether tort law measures conduct based on an external objective standard such as the "ordinary reasonable prudent person" standard or based on a subjective "best efforts" standard, adherents to this model view the imposition of tort liability as the consequence of a behavioral shortcoming—that is, the failure to perform adequately some act or make some decision. Under this view, tort law, like criminal law, is retributory in nature, seeking both to punish past actions and to deter future bad conduct.[15] In essence, a tort judgment for the plaintiff declares that the defendant ought not to have done something or ought to have done something better.[16]

On the other hand, other participants in the debate subscribe to a competing conception of tort. This view led to the development of tort doctrine that imposes liability based either on a particular relationship between the parties or on an assessment of "things" independently from the conduct that created them.[17] This doctrine im-

---

12. Restatement (Third) of Torts: Products Liability ch. 1 (Proposed Final Draft, Preliminary Version, Oct. 18, 1996).

13. See, for example, Oliver Wendell Holmes, Jr., *The Common Law* (Little, Brown, 1946). See generally Lawrence M. Friedman, *A History of American Law* (Simon & Schuster, 2d ed. 1985); Charles O. Gregory, *Trespass to Negligence to Absolute Liability*, 37 Va. L. Rev. 359 (1951); Robert L. Rabin, *The Historical Development of the Fault Principle: A Reinterpretation*, 15 Ga. L. Rev. 925 (1981); Gary T. Schwartz, *Tort Law and the Economy in Nineteenth-Century America: A Reinterpretation*, 90 Yale L. J. 1717 (1981); G. Edward White, *Tort Law in America: An Intellectual History* (Oxford U., 1980).

14. Holmes, *The Common Law* at 108-09 (cited in note 13).

15. This argument is set forth in some detail in Kotler, 58 U. Cin. L. Rev. at 1233-35 (cited in note 4).

16. See Shapo, *Products Liability* at 8 (cited in note 1).

17. According to Dean Prosser, vicarious liability dates back to primitive law. See W. Page Keeton, Dan B. Dobbs, Robert E. Keeton, and David G. Owen, *Prosser and Keeton on the Law of Torts* (West, 5th ed. 1984).

> The idea of vicarious liability was common enough in primitive law. Not only the torts of servants and slaves, or even wives, but those of inanimate objects, were charged against their owner. The movement of the earlier English law was away from such

poses liability vicariously on parties for the harmful conduct of others, or because of their relationship to injury-causing products or involvement in high-risk activities, to name the most obvious.

Regardless of what may have been the basis for the early strict liability cases, today the adoption of an approach that imposes liability regardless of conduct normally represents an instrumentalist view of tort. Liability is imposed to further some policy unrelated to the parties' behavior. As such, strict liability may be viewed as a cost allocation system intended to achieve various goals,[18] such as wealth redistribution, efficiency, autonomy, and so on.

Notwithstanding the theoretical possibility of linking the imposition of liability to something other than behavior, however, it is overwhelmingly clear that there historically has been enormous hostility to the imposition of liability absent human fault.[19] Although a detailed analysis of this phenomenon is well beyond the scope of this Article, one need only look at the abnormally dangerous activity cases to see the pattern. While the First Restatement of Torts may have contemplated the imposition of liability based on the inherently dangerous nature of certain activities, by the time the American Law Institute ("ALI") adopted the Second Restatement, the focus had shifted to conduct—to the social acceptability of engaging in the

---

> strict responsibility, until by the sixteenth century it was considered that the master should not be liable for his servant's torts unless he had commanded the particular act. But soon after 1700 this rule was found to be far too narrow . . . and the courts began to revert to something like the earlier rule . . . .

Id. at 500 (footnote omitted). See also Anita Bernstein, *How Can a Product Be Liable?*, 45 Duke L. J. 1, 9 (1995) ("[The] concept of product dynamism pervades the legal traditions that have shaped American law.").

18. Keeton, Dobbs, Keeton, and Owen, *Prosser and Keeton on the Law of Torts* at 500-01 (cited in note 17).

19. See William C. Powers, Jr., *The Persistence of Fault in Products Liability*, 61 Tex. L. Rev. 777, 815 (1983) ("Fault's tenacity in products cases is not merely a reflection of courts' attraction to familiar concepts or their political unwillingness to abandon fault. Fault is deeply embedded in the doctrinal structure of strict products liability itself . . . ."). Common law and statutory vicarious liability stand out as notable exceptions to this hostility toward strict liability. Additionally, statutory compensation schemes such as worker's compensation are now generally accepted, although they initially encountered resistance. See, for example, *Ives v. South Buffalo Railway Co.*, 201 N.Y. 271, 94 N.E. 431 (1911) (holding New York's 1910 worker's compensation statute to be an unconstitutional taking without due process).

In my opinion, Professor Coleman offers the most interesting explanation for the adoption of instrumentalist strict liability in some cases, but its rejection in others. He argues that the central issue is whether or not the imposition of liability is seen as an unfair stigmatization. If instrumentalist strict liability is openly imposed, it is accepted. If, however, strict liability is accomplished through an irrebutable presumption of negligence, "an unwarranted imputation of fault reflects unfavorably and unfairly on the character of the accused." Jules L. Coleman, *The Morality of Strict Tort Liability*, 18 Wm. & Mary L. Rev. 259, 280-82 (1976).

activity in the particular place and time and in light of the activity's utility.[20]

More importantly for our purposes, the trend has been the same in products cases. Although "strict product liability" cases often contain language asserting the irrelevance of the manufacturer's or designer's conduct,[21] courts and commentators have increasingly acknowledged that the majority of cases do, in fact, turn on conduct.[22] As one court stated:

> Although many courts have insisted that the risk-utility tests they are applying are not negligence tests because their focus is on the *product* rather than the manufacturer's *conduct*, the distinction on closer examination appears to be nothing more than semantic. As a common-sense matter, the jury weighs competing factors presented in evidence and reaches a conclusion about the judgment or decision (*i.e. conduct*) of the manufacturer.[23]

---

20. See the comments made by Professor Epstein in *Session One, Discussion of Paper by Richard Epstein, University of Chicago*, 10 Cardozo L. Rev. 2227 (1989):

> The Restatement Second rule for abnormally dangerous activities involved a six part balancing test for determining whether an activity was ultrabazardous. The older definition was essentially a list: spraying for termites, blasting, airspraying on crops, and so forth.... The older rule, while arbitrary, made for much more certainty than the new and unpredictable balancing test makes for.

Id. at 2241-42 (footnote omitted).

21. See, for example, *Caterpillar Tractor Co. v. Beck*, 593 P.2d 871, 889 (Alaska, 1979) (focusing on the product); *Phipps v. General Motors Corp.*, 278 Md. 337, 363 A.2d 955, 958-59 (1976) (noting the irrelevance of the defendant's conduct); *Phillips v. Kimwood Machine Co.*, 269 Or. 485, 525 P.2d 1033, 1036 (1974).

22. In the course of explaining the decision te retain the use of "strict liability" language to describe the proposed conduct assessment treatment of design and warning cases, the drafters of the Third Restatement observe that:

> These latter categories of cases require determinations that the product could have reasonably been made safer by a better design or instruction or warning. Sections 2(b) and (c) rely on a reasonableness test traditionally used in determining whether an actor has been negligent.... Nevertbeless, many courts insist on speaking of liability based on the standards described in §§ 2(b) and (c) as being "strict."

Restatement (Third) of Torts: Products Liability § 1, cmt. a (Proposed Final Draft). See also David G. Owen, *The Moral Foundations of Products Liability Law: Toward First Principles*, 68 Notre Dame L. Rev. 427 (1993) (arguing that principles of freedom and equality mandate a fault standard in design and warning cases).

23. *Prentis v. Yale Manufacturing Co.*, 421 Mich. 670, 365 N.W.2d 176, 184 (1984) (citations omitted). See also Sheila L. Birnbaum, *Unmasking the Test for Design Defect: From Negligence [to Warranty] to Strict Liability to Negligence*, 33 Vand. L. Rev. 593, 609-10 (1980) (quoted by the *Prentis* court); Powers, 61 Tex. L. Rev. at 791-92 (cited in note 19) ("Without the addition of arbitrary distinctions, defectiveness under the risk-utility approach is merely an evaluation of a manufacturer's conduct in the guise of an evaluation of the product.").

The fact that behavior is being judged in these cases largely explains how some courts have disregarded the logical inconsistency that would otherwise exist and have permitted the imposition of a comparative fault defense in a strict liability products case. See, for example, *Daly v. General Motors Corp.*, 144 Cal. Rptr. 380, 575 P.2d 1162, 1178 (1978) (Jefferson, J.,

If Professor Shapo is correct in his assertion that tort law is a "cultural mirror," then the foregoing is really not surprising at all. For better or worse we have come to think of tort law in terms of punishment, and any change in this perception will not happen quickly.

Next, one must consider the issue of process. The jury decisionmaking process, central to the decision of tort cases, has long been viewed as the appropriate manner of determining whether an individual's conduct has conformed with the community's standards of behavior.[24]

Although the eighteenth-century conception of the jury as finder of the law evolved into our modern conception of the jury as finder of fact, with the lawmaking function being vested in the judge or legislature,[25] one important exception survived. In cases not

---

concurring and dissenting) (noting the logical inconsistency). See also notes 155-56 and accompanying text.

24. This is not te say that everybody agrees that these decisions *should* be turned over to juries. See, for example, James A. Henderson, Jr., *Expanding the Negligence Concept: Retreat from the Rule of Law*, 51 Ind. L. J. 467 (1976); James A. Henderson, Jr., *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 Colum. L. Rev. 1531 (1973). Professor Henderson argues that cases are given to the jury as a means of disguising the "polycentric" nature of the decision which must be made. He defines "polycentric problems" as

> many-centered problems, in which each point for decision is related to all the others as are the strands of a spider web. If one strand is pulled, a complex pattern of readjustments will occur throughout the entire web.... A lawyer seeking to base his argument upon established principle and required to address himself in discourse to each of a dozen strands, or issues, would find his task frustratingly impossible.

Id. at 1536. Professor Henderson continues:

> [T]he courts early declined to adjudicate answers to the polycentric question, "How much quality control is enough?" They eschewed that task by simply deciding that defendant manufacturers owed no duty of care to injured consumers with whom they had not dealt contractually.... [B]y adopting the no-duty approach, the courts succeeded in protecting themselves from the polycentricity inherent in attempting to establish specific standards with which to review the reasonableness of manufacturers' efforts at quality control. In effect, they solved the institutional problems inhering in the general reasonableness standard by refusing to apply it.

Id. at 1544-45 (footnote omitted).

In the course of discussing Dean Wade's seven part risk/utility balancing test for product design defect, Professor Epstein commented:

> The balancing criteria turn out to be so utterly plastic and fluid that any given result is consistent with any given outcome. This in turn leads to the relative dominance of the jury and the relative decline of the law. The older law of products liability was a denser assemblage of rules and doctrines. A reasonableness-under-the-circumstances test swallows up all of these details.

10 Cardozo L. Rev. at 2241 (cited in note 20).

25. For an historical background of the shifting conception of jury function, see William Edward Nelson, *The Americanization of the Common Law: The Impact of Legal Changes on Massachusetts Society, 1760-1830* (Harvard U., 1975); William E. Nelson, *The Eighteenth-Century Background of John Marshall's Constitutional Jurisprudence*, 76 Mich. L. Rev. 893 (1978).

controlled by statute, under the rubric of deciding "mixed questions of law and fact," juries have largely retained the power not only to determine whether a party, in fact, performed a certain act, but also to judge the culpability of the parties' conduct.[26]

In defining behavioral norms and determining whether a party has conformed with them, it is important to remember that juries do not necessarily equate a group's actual practices with norms of behavior—that is, with how group members should behave. People often condemn behavior that they engage in themselves,[27] a fact which has long been accorded formal recognition within the legal system. Norms thus represent a somewhat idealized version of appropriate behavior.[28] The "ordinary, reasonable, prudent person," for example, is considerably more careful and is possessed of considerably more foresight than mere mortals.[29] Along the same lines, tort law generally has refused to make compliance with group custom dispositive on the question of negligence.[30] Rather, the existence of negligence tends to turn on whether or not there is an after-the-fact

---

26. See generally Martin A. Kotler, *Reappraising the Jury's Role as Finder of Fact*, 20 Ga. L. Rev. 123, 133 (1985) (discussing the jury's decisionmaking function); Dale W. Broeder, *The Functions of the Jury Facts or Fictions?*, 21 U. Chi. L. Rev. 386, 405 (1954) (discussing "mixed questions of law and fact"). See also David Millon, *Juries, Judges, and Democracy*, 18 L. & Social Inquiry 135 (1993) (reviewing Shannon C. Stimson, *The American Revolution in the Law: Anglo-American Jurisprudence before John Marshall* (Princeton U., 1990)). Professor Millon argues that the historical shift in the role of the jury from law maker to fact finder represented "the emergence of a strong sense of hostility toward popular involvement in the adjudicatory process, prompting elite legal professionals to advocato a sharp curtailment of the jury's role." Id. at 153-54. See also Nelson, *Americanization of the Common Law* at 8 (cited in note 25) (arguing that juries were stripped of the lawmaking function during the nineteenth century because of the business community's need for consistency in decisionmaking).

27. But see Harry Kalven, Jr. and Hans Zeisel, *The American Jury* 291-93 (Little, Brown, 1966) (concluding that in some cases jurors may be reluctant to punish defendants for having engaged in conduct in which they themselves engage).

28. Keeton, Dobbs, Keeton, and Owen, *Prosser and Keeton on the Law of Torts* at 174-75 (cited in note 17) (describing the "reasonable person" as a fictitious, idealized, and mythical person).

29. Id. (quoting A. P. Herbert, *Misleading Cases in the Common Law* 12-16 (G.P. Putnam's Sons, 1930)). The idealized nature of the standard is magnified by the fact that conduct is invariably judged after it has already resulted in harm. Psychologists who have studied this phenomenon agree that there is a human tendency to overestimate the foreseeability of consequences after those consequences have occurred. See Baruch Fischhoff and Ruth Beyth, *"I Knew It Would Happen": Remembered Probabilities of Once-Future Things*, 13 Organizational Behavior and Human Performance 1 (1975); Baruch Fischhoff, *Hindsight ≠ Foresight: The Effect of Outcome Knowledge on Judgment Under Uncertainty*, 1 J. of Experimental Psychology: Human Perception and Performance 288 (1975).

30. *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir. 1932). See also *Helling v. Carey*, 83 Wash. 2d 514, 519 P.2d 981, 983 (1974). But see *Alevromagiros v. Hechinger Co.*, 993 F.2d 417, 422 (4th Cir. 1993) (insisting that the plaintiff prove noncompliance with industry standards).

willingness to endorse the custom in light of all information about the conduct at issue, including alternative courses of action.[31]

In any event, one of the great strengths of the tort system is that the institution of the jury permits assessment of conduct on a case-by-case basis.[32] This results in enormous flexibility since the standard of behavior is not crystallized into a rule having precedential value and thus does not become binding on later generations, who remain free to define and redefine norms of behavior as times and circumstances change.[33]

III. THE GROUP SELECTION PROBLEM

A. Recognizing the Problem

Even if one is prepared to acknowledge the existence of behavioral norms within the community and to accept that it is the function of tort law to use those behavioral norms as the basis for decisionmaking in tort cases, an enormous, though often-ignored, problem continues to exist. What if the litigants honestly disagree as to what behavior was acceptable under the circumstances?

When such a conflict exists, it is critical that the court determine whether the disagreement represents a clash between an individual's judgment and that of the larger community,[34] or whether it represents a conflict between the norms of behavior held by larger groups or subgroups within the community. If it is the former, our legal tradition and commitment to majoritarian rule dictate that the

---

31. For an explanation of the favorable legal treatment of rescuers in terms of after-the-fact endorsement of the laudatory conduct, see Kotler, 41 Vand. L. Rev. at 106 (cited in note 8).

32. In writing this Article, I find myself in the somewhat uncomfortable position of having to retreat from a position taken some years ago arguing that the jury's power should be restricted. See Kotler, 20 Ga. L. Rev. at 168-69 (citod in note 26).

33. We have, of course, come to accept that a judge's or jury's determination of a "mixed question of law and fact" has no precedential value. This proposition has been challenged in the past. See *Commonwealth v. Sullivan*, 146 Mass. 142, 15 N.E. 491, 494 (1888) (Justice Holmes declaring that a jury's earlier decision was stare decisis).

34. See, for example, *Vaughan v. Menlove*, 132 Eng. Rep. 490, 493 (1837) ("Instead, therefore, of saying that the liability for negligence should be co-extensive with the judgment of each individual, which would be as variable as the length of the foot of each individual, we ought rather to adhere to the rule which requires in all cases a regard to caution such as a man of ordinary prudence would observe."). See also Holmes, *The Common Law* at 77 (cited in note 13) ("[W]hen A assaults or slanders his neighbor, or converts his neighbor's property, he does a harm which he has never consented to bear, and if the law makes him pay for it, the reason for doing so must be found in some general view of the conduct which every one may fairly expect and demand from every other, whether that other has agreed to it or not.").

standards of the community must prevail.[35] If it is the latter, however, in the absence of legislation, courts are neither empowered to make the overtly political determination of which group's norms are to be preferred,[36] nor, even if willing to engage in such an illegitimate process, equipped from a practical standpoint to make such a determination.[37]

An illustration may serve to clarify the problem. Assume a particular political community is made up of two clans. Clan A believes that all food should be thoroughly cooked. Clan B believes

---

35. I intentionally exclude from this discussion the entire issue of constitutionally protected rights.

36. The extent to which it is permissible for judges to engage in overtly "legislative" policymaking is a hotly debated topic, discussion of which is beyond the scope of this Article. In the context of tort law, Dean Prosser openly accepted this role for the judiciary. See, for example, William L. Prosser, Palsgraf *Revisited*, 52 Mich. L. Rev. 1, 15 (1953) ("There is a duty if the court says there is a duty; the law, like the constitution, is what we make it."). See also White, *Tort Law in America* at 163 (cited in note 13) ("In his conception of tort law as an exercise of social engineering Prosser hinted that policy considerations were decisive in the decision of Torts cases; the popularity of Prosser's treatise suggested that a 'policy' approach to Torts had become acceptable.").

On the other hand, demonstrating that the judiciary has been engaged in an illegitimate exercise of political power has been one of the central aims and accomplishments of the Critical Legal Studies movement. See, for example, Morton J. Horwitz, *The Doctrine of Objective Causation* in David Kairys, ed., *The Politics of Law: A Progressive Critique* 101 (Pantheon Books, 1982).

For an objection to judicial "lawmaking" from a freedom of contract perspective, See Richard A. Epstein, *The Unintended Revolution in Product Liability Law*, 10 Cardozo L. Rev. 2193 (1989). As Epstein explains:

> [A]ll efforts to find better ways to sell and market products are cut off before they are born, so that new information about product liability terms cannot be generated by voluntary transactions. Today all doctrinal innovation has to come from the courts, where the technical lags and information deficits are at their highest. Yet there is no alternative forum, save legislation, in which to override judgments when they have proved mistaken; indeed, there is no way to find out whether they are mistaken at all.

Id. at 2202-03 (footnote omitted). For commentary staking out a middle ground that judicially imposed policies should be at least indirectly hased on legislative pronouncement, see Hans A. Linde, *Courts and Torts: "Public Policy" without Public Politics?*, 28 Valp. U. L. Rev. 821 (1994). Judge Linde argues that "[u]nless a court can attribute public policy to a politically accountable source, it must resolve novel issues of liability within a matrix of statutes and tort principles without claiming public policy for its own decision. Only this preserves the distinction between the adjudicative and the legislative function." Id. at 855. See also William Powers, Jr., *Judging Judging*, 28 Valp. U. L. Rev. 857 (1994) (commenting on Judge Linde's paper).

37. See Guido Calabresi, *A Common Law for the Age of Statutes* (Harvard U., 1982). Judge, then Dean, Calabresi argued that judges'

> capacity to figure out what current majorities wish is surely limited, and their memory of what was wanted when they were appointed or elected is bound to fade. Their terms are too long, their staffs are too limited, and their manner of selection too bizarre to give much support to the notion that judges work well as makers of the common law because they seek to follow the wishes of the majority. . . .

Id. at 94. But see Shapo, 89 Nw. L. Rev. at 1575 (cited in note 1) (arguing that there are cases "in which judges are truly better representatives of culture than legislatures").

equally strongly that all food should be uncooked. Each is convinced that its preference represents the moral, healthful, and socially appropriate conduct and that the other's is immoral, unhealthy, and disgusting. Members of Clan A would never serve sushi at a clan gathering because to do so would result in intense social disapproval.[38]

One possible way to deal with the conflict, of course, is for the larger group, being the political majority, to lobby the clans' common legislative body to pass a statute requiring that only (un)cooked food be served in the community and further providing for civil liability if anyone is made ill by (un)cooked food. Such legislation would be legitimate by definition, having been duly enacted by the legislative body notwithstanding the fact that it interferes with the social norms and expectations of the minority group. However, such a statute's wisdom and fairness seem quite questionable since it unnecessarily imposes alien norms on the minority clan.[39]

Now assume that a rebellious Clan A teenager chooses to attend a social function sponsored by individuals in Clan B, where he is served and consumes raw fish. Although the quality of the food is perfectly acceptable to the Bs, the young man becomes ill because he is unaccustomed to eating raw food. He then files a civil action against the individuals who provided him with the food.

If there is a legislative mandate, of course, it will dictate the outcome.[40] In the absence of legislation, however, how should the court deal with the case? The judge could, of course, impose his or her own view. Doing so, however, raises serious legitimacy concerns[41]

---

38. For a discussion of the relationship between informal social sanction and formal legal institutions, see Robert C. Ellickson, *Order Without Law: How Neighbors Settle Disputes* (Harvard U., 1991).

39. It is important, of course, not to confuse legitimacy and wisdom. As I have pointed out elsewhere, "inconsistent or unwise lawmaking does not offend majoritarian political theory." Kotler, 20 Ga. L. Rev. at 164 (cited in note 26).

40. This is not to say that judicial interpretation of legislation creates no legitimacy problems. Clearly courts can utilize the opportunity to "interpret" legislation to pursue social policies. See Jane S. Schacter, *Metademocracy: The Changing Structure of Legitimacy in Statutory Interpretation*, 108 Harv. L. Rov. 593 (1995) (discussing the theories of legitimacy in the context of interpretation). Assuming the judge acts to interpret the legislation so as to give effect to the legislature's intent, however, the problem is not one of legitimacy, but one of accuracy. See also *Boys Markets Inc. v. Retail Clerks*, 398 U.S. 235, 257 (1970) ("The Court undertakes the task of interpretation . . . not because the Court has any special ability to fathom the intent of Congress, but rather because interpretation is unavoidable in the decision of the case before it.") (Black, J., dissenting).

41. Perhaps the most common argument for the legitimacy of judicial lawmaking is that legislatures can abrogate judge-made law should they disagree. See, for example, John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 4-5 (Harvard U., 1980) ("[I]n nonconstitutional contexts, the court's decisions are subject to overrule or alteration by ordinary statute. The court is standing for the legislature, and if it has done so in a way the legislature does not approve, it can soon be corrected."). However, as Judge Calabresi pointed out, this

and, if it later turned out that the judge was a member of the clan favored by the decision, the integrity of the judicial system might be questioned.[42]

The judge might also attempt to guess how the community would have legislated, had it chosen to do so, and decide the case accordingly. However, a judicial attempt to reflect public attitude necessitates a prediction based on empirical questions that courts are ill-equipped to answer, and, even if they could, any such decision would have to be reconsidered whenever the relative clan population changed or attitudes within the clans changed.[43]

Our traditional tort approach only partially solves the problem. The question of whether the defendant's conduct was reasonable or unreasonable would be viewed as a "mixed question of law and fact" and, therefore, a question to be resolved by the jury as representatives of the community.[44] However, the jury will need more guidance than an instruction simply to decide the reasonableness of the conduct. It is necessary for them to go a step further by resolving an additional question: reasonable according to whom—clan A or clan B?

Analogous problems arise frequently in the real-world context of tort litigation. Consider, for example, the well known case of *Canterbury v. Spence*.[45] That case involved the issue of informed consent within the context of the provision of medical services. It was

---

argument proves too much: "[T]aken literally, it can justify any law, however instituted or arrived at, so long as a legislature or other majoritarian body can reject it." Calabresi, *A Common Law* at 92 (cited in note 37).

42. A finding that the case was not justiciable would serve to implement the norms of clan B, but it would not solve the problem of determining whose norms should control.

Nevertheless, in cases involving disputes that arise within private social organizations, one can observe a body of doctrine counseling judges not to get involved. See *Dawkins v. Antrobus*, 17 Ch. D. 615 (1881) (discussed in Zechariah Chafee, Jr., *The Internal Affairs of Associations Not for Profit*, 43 Harv. L. Rev. 993 (1930)). The subject is discussed and illustrated in some detail in Henry M. Hart, Jr. and Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* 357-65 (Foundation Press, 1958). See also Norman Dorsen, Paul Bender, and Bert Neuborne, 1 *Political and Civil Rights in the United States* 1316 (Little, Brown, 4th ed. 1976) ("Courts have traditionally refrained from reviewing disciplinary actions against members of social as distinguished from professional associations.").

43. But see Shapo, 89 Nw. U. L. Rev. at 1575 (cited in note 1) (arguing that in some cases judges are "better representatives of culture than legislatures . . . because in certain circumstances . . . [they can] capture the moral sense of society in a way that legislatures, necessarily prone to compromise, cannot").

44. See Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L. J. 1131, 1183-99 (1991) (arguing that the jury provisions in the Bill of Rights sought to ensure a form of direct participatory democracy). For a discussion of the jury's role as a political institution, see also Millon, 18 L. & Social Inquiry (cited in note 26).

45. 464 F.2d 772 (D.C. Cir. 1972).

the plaintiff/patient's contention that he had not been advised of a one percent risk of paralysis inherent in the performance of a laminectomy. The procedure was performed and paralysis resulted.[46] The defendant/physician claimed that his failure to disclose the risk was in keeping with the "reasonable physician" standard.[47] That is, doctors in his community actually or tacitly agreed that the risk was too remote to warrant mention, and that revelation of its existence might discourage individuals from having a procedure which normally would be beneficial.

The court determined that utilization of the reasonable doctor standard (judged from the perspective of the medical profession) was inappropriate.[48] The correct standard was the "reasonable patient" standard, under which the sufficiency of a doctor's disclosure was to be judged in light of patients' reasonable expectations.[49] The dispute thus obliged the court not only to identify the relevant groups (doctors and patients),[50] but also to decide against which group's norms the physician's conduct would be measured.[51]

The need for courts to make group selection decisions also arises in cases in which a defendant's behavior is theoretically not at issue. For example, the problem can be seen in the context of the implied warranty of merchantability under the Uniform Commercial Code. UCC section 2-314 defines "merchantability," in part, in terms of whether the goods "(a) pass without objection in the trade . . . and (c) are fit for the ordinary purposes for which such goods are used . . . ." The first incorporates a merchant norm.[52] The second

---

46. Id. at 776-78.
47. Id.
48. Id. at 783-85.
49. Id. at 787.
50. The identification of the relevant groups among which the court must choose typically does not create a difficult problem. Normally, the nature of the particular dispute before the court will identify the relevant groups and whether the conflict is between the norms of a subgroup and larger umbrella group of between two more or less separate groups. For example, in a case involving snake handling during a religious service, the relevant group norms will be those of the religious group and the larger community. See *State ex rel. Swann v. Pack*, 527 S.W.2d 99 (Tenn. 1975). In a dispute over an insurance contract or over the disclosure of risks inherent in a medical procedure, insurer-insured or doctor-patient readily present themselves as the appropriate choices.
51. As will become apparent, however, the court reached the right decision for the wrong reason. In *Canterbury*, the court determined that patients norms were to control because this would promote the dignitary interest of patients. 464 F.2d at 784. By making the group selection decision turn on the judgment that a patient's autonomy was the paramount value, the court either imposed its own values on the community or attempted to guess at what values were held by the community. The first is illegitimate and the second is teo chancy. See notes 157-60 and accompanying text.
52. See James J. White and Robert S. Summers, *Handbook of the Law Under the Uniform Commercial Code* 294 (West, 1972); *Kassab v. Central Soya*, 432 Pa. 217, 246 A.2d 848 (1968).

often, though not always, represents a consumer norm.[53] When a product meets the expectations of merchants, but disappoints the expectations of a consumer, whose norms should apply?

Coffer v. Standard Brands, Inc.[54] is illustrative. In that case, the consumer damaged his teeth when he bit into the hard shell of a filbert nut that was in a container of otherwise shelled nuts. The court focused on whether the product with an occasional shell would pass without objection in the trade and found that it would.[55] Interestingly, the court never explicitly considered the possibility that consumers and merchants might have differing opinions about the appropriateness of the defendant's conduct. Since the court failed to address the group selection issue, the result reached is open to question.

It is absolutely critical that courts recognize the potential for conflicting norms or expectations in these situations. When courts ignore the issue, an inaccurate analysis of the conflicting claims often results. For example, in *Phillips v. Kimwood Machine Co.*[56] the court attempted to reconcile a consumer expectation test and an industry standard test of product defect. The court asserted that reasonable consumers expect what reasonable manufacturers produce.[57] The truth of this assertion depends on the assumption that consumers and manufacturers share the same perspective when judging behavior. Given the disparity in knowledge about manufacturing, however, this assumption is often patently false.[58]

---

53. See White and Summers, *Uniform Commercial Code* at 295 (cited in note 52) (arguing that "merchantability" represents a standard which is often "nearly synonymous" with "defective condition unreasonably dangerous" to the user or consumer under the Restatement (Second) of Torts § 402A). Comments g and i to § 402A define a "defective condition" as one that is "unreasonably dangerous" in terms of a consumer expectation test.

54. 30 N.C. App. 134, 226 S.E.2d 534 (1976).

55. Id. at 537-38.

56. 269 Or. 485, 525 P.2d 1033 (1974).

57. 525 P.2d at 1037. See also *Welch v. Outboard Marine Corp.*, 481 F.2d 252, 254 (5th Cir. 1973) ("We see no necessary inconsistency between a seller-oriented standard and a user-oriented standard when, as here, each turns on foreseeable risks. They are two sides of the same standard.").

58. See Birnbaum, 33 Vand. L. Rev. at 617 (cited in note 23). In *Ryder's Estate v. Kelly-Springfield Tire Co.*, 91 Wash. 2d 111, 587 P.2d 160 (1978), the jury was given an instruction advising the jurors to determine whether a product met consumer expectations by applying a risk-utility tost. In criticizing this approach, Professor Birnbaum noted:

> Before tbe jurors bave a chance to figure out the worrisome question of what the "ordinary knowledge common to the community" is concerning the progression of fatigue cracks in the gutter area beneath a removable flange, they receive another instruction purportedly telling them how to make this determination. Unfortunately, this second instruction has nothing to do with knowledge that can in any realistic sense be said to

Recognition of the potential for conflicting perspectives on behavior does not completely resolve the problem. When the defendant's group memberships overlap,[59] courts have to decide how broadly to define the relevant defendant group, particularly when the behavioral norms of a subgroup fail to conform to the norms of some larger umbrella group. For example, in *Morrison v. MacNamara*,[60] the court was faced with deciding whether a local standard or national standard of care should be utilized in a medical malpractice case. In *Morrison*, a medical laboratory in the District of Columbia followed local custom and routinely performed a urethral smear test with the patient standing. The plaintiff was injured when he fainted and fell.[61] The appellant's evidence demonstrated that the national standard of care required that the patient sit or lie down during the test.[62]

Once the trial judge has made the "selection decision"—that is, identified and defined the groups and determined which group's standard of care is to be used as a yardstick—the fact finder's function is to determine the content of the relevant group's behavioral norm and to judge the party's conduct against that relevant standard. It is important to understand that conduct should never be judged out of context. If, for example, the case involves the issue of automobile design, the relevant question will almost invariably be what the designer should have done. However, this inquiry raises the additional question of "according to whom?" If the group selection decision is that a consumer expectation test applies, this should mean that the designer's conduct is judged from the consumers' perspective. If, on the other hand, an industry standard applies, the designer's conduct is judged from the industry's perspective.[63]

---

be "common to the community." Rather, the instruction urges the trier of fact to evaluate the specific technical data offered at trial.

Birnbaum, 33 Vand. L. Rev. at 617 (cited in note 23).

59. By overlapping memberships I mean nothing more than the problem of deciding how specifically or generally the group should be defined—doctors or neurosurgeons, State X's doctors or all American doctors.

60. 407 A.2d 555 (D.C. App. Ct. 1979).

61. Id. at 558-59.

62. Id. at 559.

63. One obvious effect of this is evidentiary. Whether a traditional negligence "reasonable manufacturer" standard or the "reasonable consumer expectation" standard is chosen may well determine the relevance of proffered evidence. See, for example, *Lenhardt v. Ford Motor Co.*, 102 Wash. 2d 208, 683 P.2d 1097, 1098 (1984) (holding that evidence of industry custom was not relevant to the reasonable expectations of the ordinary consumer. See also, Kathleen M. Doyle, Note, *Relevance of Industry Custom in Strict Products Liability*, 60 Wash. L. Rev. 195, 197 (1984) ("The central issue in this case involves the orientation of the trier of fact. . . . [E]vidence of industry custom (which might show that vans of other manufacturers also slip from park to

B. Resolving the Problem

1. Where Only One Group Has a Relevant Norm

When a dispute exists between members of different groups, only one of which has certain expectations, there is no choice but to formulate an instruction that makes it clear that the defendant's conduct is to be judged in light of those existing expectations. Consider, for example, *Heaton v. Ford Motor Co,*[64] a products liability case that involved the question of whether a pickup truck axle should have been designed so as to withstand the impact of hitting a five or six inch stone while the vehicle was traveling at highway speeds.[65] If we assume that the axle in question was sufficiently strong to satisfy

---

reverse) would shift the jury's focus from the consumer's expectations to the manufacturer's actions.").

That courts and commentators are failing to make this distinction has become apparent in the context of the redrafting of the Restatement (Second) of Torts § 402A by the American Law Institute. This is illustrated by comments made by Geoffrey C. Hazard, Jr., Director of the ALI. He has observed:

> Other critics have said that, rather than "reasonable alternative design," the bettor formulation would be in terms of "consumer expectations." This alternative has been carefully debated in the deliberations leading to this draft. A question about this alternative is: "Expectations concerning exactly what?" In thinking about this question, the Director at least keeps coming back to an answer in terms of a design that would be less dangerous. But that answer is the equivalent, at least logically, of "reasonable alternative design."

Geoffrey C. Hazard, Jr., Forward to Restatement (Third) of Torts: Products Liability at xvi-ii (Tentative Draft No. 2, Mar. 13, 1995).

As noted in the text, however, not only must we consider "expectations concerning what," but also "according to whom?" An assumption that a consumer's expectations of how a reasonable manufacturer will bohave are the same as a manufacturers' may well not be warranted. See notes 56-58 and accompanying text.

64. 248 Or. 467, 435 P.2d 806 (1967). See also John E. Montgomery and David G. Owen, *Reflections on the Theory and Administration of Strict Tort Liability for Defective Products*, 27 S.C. L. Rev. 803 (1976). As Montgomery and Owen explain:

> [A]n attompt to determine the consumer's reasonable expectations of safety concerning a technologically complex product may well be an exercise in futility, for the consumer may have at most only a generalized expectancy—perhaps more accuratoly only an unconscious hope—that the product will not harm him if he treats it with a reasonable amount of care.

Id. at 823 (footnote omitted). See also Powers, 61 Tex. L. Rev. at 796-97 (cited in noto 19) (arguing against the "consumer expectations test"). In this context, it is important not to confuse consumers' expectations regarding product quality and/or safety and consumers' expectations regarding manufacturers' conduct. Even though consumers may have no familiarity with a technologically complex product, they may well have very clear expectations of how knowledgeable people should bebave when confronting either the decision whether to sell the product at all or how much safety to incorporate inte a particular design.

65. *Heaton*, 435 P.2d at 807.

industry standards, given the relative risks and utilities of this axle as compared to other feasible designs,[66] and we assume further that product consumers have no discernible expectations as to what a designer should have done under these circumstances, then the court correctly identified truck manufacturers as the appropriate group and employed the correct standard of behavior, that of the reasonable truck manufacturer (according to truck manufacturers).[67]

The same is probably true in most professional malpractice cases. Laymen will often have no definable expectations regarding the performance of many activities that require the exercise of professional judgment or high levels of expertise. Therefore, it will normally be necessary to assess the professional's conduct against the relevant professional standards. This is, of course, the approach normally taken by courts in these cases.

For example, in medical malpractice cases, not only does the professional standard control, but it must be established by expert testimony.[68] The primary exception to this rule comes into play when the circumstances make it clear that the defendant-physician's conduct is culpable as a matter of common knowledge within the layman's experience.[69] In other words, the group selection issue arises only when both parties are able to formulate expectations.

2. Where All Parties Share Behavioral Norms

The case in which one party belongs to a group that has a behavioral norm relevant to the conduct at issue while the other does not must be distinguished from the case in which both parties are either members of the same group or of different groups that share the same expectations.[70] Falling into the latter category are those

---

66. I assume, *arguendo*, that risk-utility represents the norm among manufacturers. See notes 212-18. Any jury instruction should, however, be flexible enough to permit the jury to determine the content of the group norm so that they can assess the defendant's conduct in light of that norm. Counsel for the parties should, of course, have wide latitude in establishing what the norm is.

67. As previously noted, the group's norm is not defined entirely by group practices. See notes 27-31 and accompanying toxt.

68. Keeton, Dobbs, Keeton, and Owen, *Prosser and Keeton on the Law of Torts* at 188 & n.49 (cited in note 17).

69. See, for example, *Welte v. Bello*, 482 N.W.2d 437 (Iowa 1992).

70. This is really a group definition problem and will depend on the particular circumstances of the case. For example, if the case turns on whether it was necessary to determine whether a warning need be given to a "sophisticated purchaser," the court would have to resolve whether a manufacturer and sophisticated purchaser are really members of the same group.

The same type of group definition problem can be seen in cases in which courts imputo the knowledge of an expert to a product manufacturer. Suppose, for example, that the risk inherent

cases in which the court seeks to determine which of several defendants within the same group should have acted when, in fact, none did. For example, if harm was caused by everyone's failure to take certain safety precautions, norms within a group may identify a single individual as being responsible.

In *Verge v. Ford Motor Co.*,[71] for example, a garbage truck did not have a backup warning device. Ford manufactured the cab and chassis and Leach Company manufactured and mounted the trash compactor unit. Which of the two defendants had the responsibility to add the warning device was made to turn on "trade custom," the defendants' "relative expertise," and "practicality"—that is, the stage of production at which installation of the safety device would have been most feasible.[72] In other words, assuming Ford and Leach share norms of manufacturer behavior, analysis of the three factors seems to aid in determining which of the two violated the common norm. This type of case therefore does not turn on the problem of group selection.

Likewise, traffic accidents in which the drivers' conduct is at issue, perhaps the most common class of tort cases, do not normally raise a group selection problem. This is true since, generally speaking, expectations among drivers regarding driver behavior tend to be broadly fixed throughout society.[73]

3. Where Norms Conflict

A much more difficult problem is presented when parties are members of different groups with significantly different expectations regarding behavior, such that a particular act will be condemned by

---

in a particular drug is known within the scientific community, but unknown to a particular pharmaceutical company. When one defines the group to which the company belongs, it may well be appropriato to include pharmacologists. In fact, courts have accomplished this by holding manufacturers to tbe standard of an expert. See Fowler V. Harper, Fleming James, Jr., and Oscar S. Gray, 5 *The Law of Torts* § 28.4 (Little, Brown, 2d ed. 1986).

In a commercial contoxt, it is common to find that the parties are members of the same group; thus, no conflict between group norms is likely to exist. See, for example, *Delta Air Lines Inc. v. Douglas Aircraft Co. Inc.*, 238 Cal. App.2d 95, 47 Cal. Rptr. 518 (1965) (upholding contractual disclaimers of liability where the parties had equal knowledge of risk).

71. 581 F.2d 384 (3d Cir. 1978).

72. Id. at 387.

73. Interestingly, it has been demonstrated that automobile insurers have their own distinct norms regarding driver behavior that are not entirely consistent with drivers' norms. See H. Laurence Ross, *Settled Out of Court: The Social Process of Insurance Claims Adjustments* (Aldine, 1970).

one group but not the other. The well-known case of *Grimshaw v. Ford Motor Co.*[74] serves to illustrate the issue.

In *Grimshaw,* Ford, having done a cost-benefit analysis, concluded that the relatively small per unit cost increase that would result from changing the gas tank design of the Pinto was not cost justified in the aggregate.[75] Specifically, Ford determined that the design change would cost roughly three times more than reducing the number of deaths and injuries associated with the existing design.[76]

From an industry perspective, it is hard to criticize Ford's conduct. Cost-benefit analysis is both a necessary and a standard practice among product designers.[77] Consumers, however, are not used to thinking about lives and injuries in economic terms and therefore deemed Ford's conduct to be egregious.[78]

Cases such as *Grimshaw,* which involve different groups with conflicting expectations as to the defendant's conduct, raise two critical questions: (1) Which group's perspective should be utilized in assessing the defendant's conduct?; and (2) How does one make such a determination? The remainder of this Part addresses these issues.

a. The Default Rule

Initially, it is necessary to identify a default rule which is to be generally applied in the absence of some compelling reason dictating a contrary choice. Our legal tradition reflects the choice that a person's conduct is to be judged by reference to the norms of the group in which the individual is a member, not by the norms of some other group. Such a rule is supported initially by the perceived unfairness that results from judging conduct by alien norms.[79]

---

74. 174 Cal. Rptr. 348 (1981).

75. Id. at 369-70. See also Gary T. Schwartz, *The Myth of the Ford Pinto Case,* 43 Rutgers L. Rev. 1013, 1020 (1991).

76. Schwartz, 43 Rutgers L. Rev. at 1020 (cited in note 75).

77. Id. at 1037.

78. The jury found Ford liable for compensatory damages and $125 million in punitive damages. In response to a motion for a new trial, the trial judge reduced the punitive damage award to $3.5 million. 174 Cal. Rptr. at 358.
See Michael D. Green, *The Schizophrenia of Risk-Benefit Analysis in Design Defect Litigation,* 48 Vand. L. Rev. 609, 625-27 (1995) (recognizing the problem, but not really resolving it). Professor Schwartz describes the Pinto litigation as "an instance of a 'two cultures' problem. A culture has developed around public policy analysts that see the risk-benefit criterion as obviously acceptable; but the culture of public opinion itself tends to regard that criterion as distressing." Id. at 1044 (footnotes omitted).

79. This notion is clearly reflected in those cases which define the standard of care for those with physical disabilities. The standard of care is the reasonable person having the same disability as the defendant. See Keeton, Dobbs, Keeton, and Owen, *Prosser and Keeton on the Law of Torts* at 175-76 (cited in note 17).

Consider, for example, the well known case of *Smith v. Lampe*.[80] In that case, the defendant, seeking to warn a tug boat that it was approaching the shore, honked the horn of his automobile. Unfortunately, the defendant was unaware that this was a prearranged signal to the tug boat captain to go in the direction of the horn. The captain, thinking he was hearing the prearranged signal, steered toward the sound, causing a towed barge to strike bottom and sink.[81]

The two relevant groups, mariners and non-mariners, could be expected to act differently under the circumstances. Recognizing the defendant to be a non-mariner, the court concluded that this standard would apply to the defendant's conduct, and, judging his conduct by this standard, he was found not liable.[82]

b. Departure from the Default Rule

Although a "fairness" justification for the default rule seems intuitively correct, to understand both the rule and the justifications for departing from it, we must examine the assumptions that underlie that intuition.

Majoritarian theory within a pluralistic society such as ours envisions groups and individuals dealing with one another given a certain level of equality.[83] The requisite equality does not deal with bargaining power, which we know may be unequal, but rather with equality of access to the political system. If one can participate, one can, at least in theory, organize, form various alliances, and lobby for legislation that changes the existing relationships with other groups.[84]

If the fairness of the default rule depends on this notion of equality, any interference with or failure to assure the ongoing existence of this equality may well justify an abandonment of the default rule and the holding of an individual or group to another's behavioral norms. More specifically, the decision to assess one person's conduct

---

80. 64 F.2d 201 (6th Cir. 1933).

81. Id. at 202.

82. Id. at 203. Aside from the potential unfairness that would result from judging one by another's standard, it would clearly be inefficient to require members of one group to familiarize themselves with the norms of members of a group with whom they do not normally interact. Furthermore, imposing such a high knowledge requirement on individuals may well constitute an excessive interference with their freedom of action. Indeed, it is difficult to come up witb any justification, on these facts, for holding one to the unknown customs or standards of another group.

83. Ely, *Democracy and Distrust* at 78-80 (cited in note 41).

84. Id.

in light of another's expectations or norms must turn on a general master principle that requires open and honest dealings between groups and their members.

At this point, one might well question the choice of honesty as the basic principle as opposed to some other social value. Why not individual autonomy, or efficiency, or corrective justice, for example? The answer lies, I think, in the role of the judiciary and in the lack of consensus regarding values in our society.[85] While one can make the case that goals such as efficiency or autonomy should form the basis of the tort system, there does not appear to be any social consensus as to which should govern. Even if there were such a consensus, there is no assurance that it would hold over the long run.[86]

There is, however, a consensus insisting on a fundamental commitment to majority rule, except in those cases that contain implications for some other fundamental or constitutionally recognized right. Although it is axiomatic that judges should not attempt to impose their values or seek to give political preference to one group over another,[87] the judicial imposition of rules that seek to reinforce open and honest dealings between groups and between individuals is mandated by the commitment to majoritarian rule in a way that other social values are not. It is analogous to the importance of the First Amendment in the electoral process.

Just as free speech and a free press serve to ensure the existence of an informed electorate participating in the political process,[88]

---

85. The search for a core value which can form an appropriate basis of a legal system and the choice of honesty, rather than efficiency, autonomy, or some other substantive value are far too involved to lay out completely in this Article. Very briefly, however, I contend that the legitimate role for the judiciary requires that judges implement existing social norms, rather than impose their values or the values of small segment of the community. The question that then arises in the context of this Article is: Given the judicial need to make the "group selection" decision, can this decision be made in a "norm-implementing" rather than a "norm-imposing" manner? For a judge to make the group selection decision by seeking te promote a particular value—efficiency or autenomy, for example—would be "norm-imposing." However, for the judge to seek to promote a particular process (such as majority rule) by which the community could adopt whatover substantive beliefs its members hold, is norm-implementing.

This argument is set out in length in an article currently in progress that is tentatively entitled *Social Norms and Judicial Rulemaking* (on file with the Author).

86. Elsewhere, I have argued at considerable length that societal conceptions of values do, in fact, change over time. See Martin A. Kotler, *Competing Conceptions of Autonomy: A Reappraisal of the Basis of Tort Law*, 67 Tulane L. Rev. 347 (1992). See also James W. Ely, Jr., *The Guardian of Every Other Right: A Constitutional History of Property Rights* (Oxford U., 1992). But see Richard A. Epstein, *The Static Conception of the Common Law*, 9 J. Legal Stud. 253 (1980) (arguing that the claim of changing common law is often overstated).

87. See notes 36-37 and accompanying text.

88. Professor Ely argues that:

> The expression-related provisions of the First Amendment—"Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people

honesty in communication between groups ensures that groups are aware of what other groups are doing. This allows them to enter the political arena and employ the normal political processes to effect a change if they are dissatisfied with another group's conduct and its real or imagined consequences. Dishonesty in dealings masks the true nature of the intergroup or interpersonal interaction and makes it more difficult, or even impossible, for the disadvantaged group to alter the status quo.[89]

In common law adjudication, this master principle of open and honest dealing manifests itself in the tort, contract, and related equitable doctrines that impose various consequences for misrepresentation, concealment, and nondisclosure.[90] More importantly for our purposes, if one has affirmatively misled another or knowingly failed to correct another's misperception of the true dealings between them, application of the same basic principle serves as the basis for determining when it is appropriate to depart from the default rule and judge one's conduct by the standards of another group.

Although the possible variations in dealings between members of different groups are far too numerous to catalog here, it is useful to look at a few common situations where these issues arise.

---

peaceably to assemble, and to petition the Government for a redress of grievances"—were centrally intended to help make our governmental processes work, to ensure the open and informed discussion of political issues, and to check our government when it gets out of bounds.

Ely, *Democracy and Distrust* at 93-94 (cited in note 41).

89. But see Owen, 68 Notre Dame L. Rev. at 427 (cited in note 22). Professor Owen views honesty as essential to the promotion and protection of a vision of individual autonomy.

> The first key to enriching freedom . . . lies in truth. People's conceptions of the true world, their expectations as to how the future will unfold in relation to their choices and their actions, depend to a large extent on what other people say and do. Truth and expectations, rooted deeply in autonomy, therefore play a major role in determining moral accountability for product accidents.

Id. at 462.

90. Although the old rule of *caveat emptor* once limited the consequences of "mere nondisclosure" in tert cases, this rule has been largely rejected in that context. See note 101. A blanket rule against basing an action on nondisclosure has existed to a much lesser degree when equitable remedies have been sought, particularly in the context of rescission of insurance contracts. Some courts permit rescission based on negligent or inadvertent failure to disclose material facts. See, for example, *Dinkins v. American National Insurance Co.*, 154 Cal. Rptr. 775, 781 (1979); *Pioneer National Title Ins. Co. v. Lucas*, 155 N.J. Super. 332, 382 A.2d 933, 936 (1978); *United States Life Ins. Co. v. Coulson*, 560 S.W.2d 211, 215 (Tex. Civ. App. 1977); *MacKenzie v. Prudential Ins. Co. of America*, 411 F.2d 781, 782 (6th Cir. 1969) (applying Kentucky law).

i. Intentional Misrepresentation

Returning for a moment to Clans A and B, I assume that most people's initial reaction was that the young man who consumed Clan B's raw food and became ill should lose his tort action. The hypothetical did not provide the basis for finding any misrepresentation, concealment, or nondisclosure. He knew that he was at a Clan B social function and was aware of their customs. Thus, the default rule would apply and, since serving wholesome raw food conformed with the behavioral norms of Clan B, there would be no basis for imposing liability.

Assume, however, that some Clan B folks decided to open a restaurant. Recognizing that they could increase business by selling to Clan A customers, they began an advertising campaign pitched to Clan A members using the slogan "meals like mom made." The ads did not mention that the restaurateurs were from Clan B. Assume that while close inspection of the food would reveal that it was uncooked, most Clan A customers did not notice and only those who became ill realized what had happened.

It seems clear that the advertising campaign should influence the case's outcome. The restaurant owners, having effectively misrepresented not only what they were selling, but also the group to which they belonged, can now fairly be held liable for violating the norms of behavior of Clan A even though they were not, in fact, members of that group.

Many similar cases exist in which one's representations affect the group selection process. Perhaps the clearest example is when, by word or conduct, an individual misrepresents group membership by falsely pretending to possess some professional qualification. When this occurs, courts routinely hold that the standard of care is that of the reasonable person who actually *is* a member of the relevant professional group. In such a situation, it is appropriate to judge the conduct of the defendant by reference to the standards of the group to which the individual, in fact, does not belong. Utilizing this approach, courts have held that the conduct of an unlicensed psychologist should be judged by the reasonable psychologist standard,[91] and that the

91. See, for example, *Corgan v. Muehling*, 167 Ill. App. 3d 1093, 522 N.E.2d 153, 155 (1988). See also Keeton, Dobbs, Keeton, and Owen, *Prosser and Keeton on the Law of Torts* at 187 (citod in noto 17) ("[It is] the minimum common skill which is to be looked to. If the defendant represents himself as having greater skill than this, as where the doctor holds himself out as a specialist, the standard is modified accordingly." (footnotes omitted)).

behavior of an attorney who claimed to specialize in maritime law should be assessed with reference to that of true specialists.[92]

In keeping with these cases, the Restatement (Second) of Torts explains,

> An actor undertaking to render services may represent that he has superior skill or knowledge, beyond that common to his profession or trade. In that event he incurs an obligation to the person to whom he makes such a representation, to have, and to exercise, the skill and knowledge which he represents himself to have.[93]

Other areas of law also address misrepresentation as to group membership, although the precise effect may not be as clear. When one group consciously sets out to represent expressly or tacitly that it adheres to the standards of behavior of another group, abandonment of the default rule may be justified.

The insurance industry's advertising is illustrative. Consider State Farm's "Like a good neighbor, State Farm is there," Nationwide's "Nationwide is on your side," or dozens of other image-presenting slogans and ad campaigns. Such advertising reflects a marketing strategy deliberately designed to create the belief in a prospective policy holder that the insurer will, if necessary, behave like a somewhat idealized neighbor, friend, or member of the insured's community. When the insured suffers a loss and makes a claim, it seems entirely appropriate to judge the insurer's conduct from a policy holder's perspective rather than an insurance industry perspective. In fact, to a significant extent this is what has occurred. Although many courts continue to apply traditional contract law and enforce policy language as written, numerous decisions have expressly sought to satisfy the reasonable expectation of the insured even in the face of policy language that would otherwise mandate a different result.[94]

---

92. There appears to be a split in authority as to whether attorneys holding themselves out as specialists should be held to a higher standard. In *Wright v. Williams*, 121 Cal. Rptr. 194 (1975), the court held that "a lawyer holding himself out to the public and the profession as specializing . . . must exercise the skill, prudence, and diligence exercised by other specialists." Id. at 199. In an older line of cases exemplified by *Olson v. North*, 276 Ill. App. 457 (1934), however, the courts found that a general practitioner standard was applicable to a criminal defense attorney. The issue is discussed in Richard J. Schnidman and Mark J. Salzler, *The Legal Malpractice Dilemma: Will New Standards of Care Place Professional Liability Insurance Beyond the Reach of the Specialist?*, 45 U. Cin. L. Rev. 541 (1976).

93. Restatement (Second) of Torts § 299A cmt. d.

94. For a discussion of the "reasonable expectation of the insured," see generally Robert E. Keeton, *Insurance Law Rights at Variance with Policy Provisions*, 83 Harv. L. Rov. 961, 967

While behavioral image advertising is more common among service firms[95] than product sellers, concern about this type of misrepresentation often lurks below the surface in product liability cases. To understand the issue fully, however, it is critical to distinguish the argument being made here from another view of the role of misrepresentation, namely that of Professor Shapo.[96] His "representational theory" of products liability focuses on product sellers' implicit and explicit representations about the products they sell—that is, "product portrayal."[97] While this approach frequently offers enormous insight into product liability law, it understates what I believe to be the issue. The fundamentally important implicit or explicit representations do not deal only with such things as the

---

(1970) (asserting that the reasonable expectation principle "incorporates the proposition that policy language will be construed as laymen would understand it and not according to the interpretation of sophisticated underwriters"). To a significant extent, Judge Keeton's argument for honoring the reasonable expectation of the insured was based on "expectations created by policy language and structure and by marketing patterns and general practices" of the insurers. Id. at 973.

See George B. Trubow, Dubosz v. State Farm Fire & Casualty Co.: *Representations in Insurance Advertising Brochures as Part of the Insurance Contract*, 17 John Marshall L. Rev. 969 (1984) (discussing the effect of advertising brochures); *Dobosz v. State Farm Fire & Casualty Co.*, 120 Ill. App.3d 674, 458 N.E.2d 611 (1983) (holding that advertising brochure was part of insurance policy and controlled over inconsistent language in the policy itself); *Sparks v. Republic National Life Ins. Co.*, 132 Ariz. 529, 647 P.2d 1127 (1982) (finding that advertising brochure should be considered as it will affect the ordinary person's understanding of the meaning of the words in the policy itself); *Vogel v. American Warranty Home Service Corp.*, 695 F.2d 877 (5th Cir. 1983) (holding insurer estopped from asserting the existence of policy language which was inconsistent with language in an advertising brochure on which insured relied). But see *Merseth by Merseth v. State Farm Fire & Casualty Co.*, 390 N.W.2d 16, 18 (Minn. Ct. App. 1986) (stating that reliance on an advertisment was not enough to overcome clear exclusion); *Hackethal v. National Casualty Co.*, 189 Cal. App.3d 1102, 234 Cal. Rptr. 853 (1987) (finding terms in brochure were "succinct" but not in conflict with actual torms of the policy); *Mason v. State Farm Mutual Automobile Ins. Co.*, 148 Ariz. 271, 714 P.2d 441 (1985) (finding that no reasonable person reading the sales brochure could believe there was coverage); *Suarez v. Life Ins. Co. of North America*, 206 Cal. App.3d 1396, 254 Cal. Rptr. 377 (1988) (finding that failure to specify in advertising brochure that the policy covered only actual loss of a hand or foot, and not loss of use, was not fraudulent).

95. Banks and other financial institutions come to mind. "You'll find a friend at Chase Manhattan" is one example.

96. See Marshall S. Shapo, *A Representational Theory of Consumer Protection: Doctrine, Function and Legal Liability for Product Disappointment*, 60 Va. L. Rev. 1109 (1974).

Professor Shapo, however, does not see the importance of representations as resting on a commitment to majoritarian politics. As he asserts in a recent article critical of the proposed Restatement (Third) of Torts: "A products restatement should declare, in blackletter when possible, the importance of the factors of information and sophistication relative to both sellers and consumers. This is important because these factors, which prove crucial in so many products cases, provide a meeting ground for considerations of both morality and efficiency." Shapo, 48 Vand. L. Rev. at 697 (cited in note 1).

97. Shapo, 60 Va. L. Rev. at 1113 (cited in note 96). Product portrayal is "broadly defined as ranging from specific performance claims to subtle utilization of the social consensus concerning product function as a background for sales messages." Id. at 1115.

product's quality, safety, or physical properties. Rather, the representations that may be most important are those which, directly or indirectly, say something about behaviorial norms.[98]

Thus, for example, when Michelin shows the image of children riding in an automobile and announces that it is aware that "so much is riding on your tires," it is not only asserting that its tires are of high quality but is also making a statement of concern for the families of purchasers. Such images represent that the purchasers (if only they knew) would feel that the manufacturer is exercising a high level of care to protect their loved ones.

Given the difficulty of establishing a causal link between this type of general advertising and the occurrence of a specific harm alleged to be compensable, it is not surprising that mention of image-creating advertising rarely, if ever, provides the explicit justification for the decision in products cases. Nevertheless, as Professor Shapo has observed in the course of discussing representations of product performance:

> Generalized assurances form an important thread in many products frustration decisions. Occasionally they may create the action; often they provide crucial background support; one surmises that they lie inarticulate behind many decisions; and one suspects that effective advocacy could have brought out their thread in quite a few cases in which no mention of them appears.[99]

ii. Nondisclosure of Group Norms

More basic than outright misrepresentation, however, is the question of whether a conscious decision to engage in a business transaction with another group, knowing that behaviorial norms are not shared and that the other group's members are probably ignorant of that fact, justifies a departure from the default rule. Such a result certainly does not seem unfair. When one exploits a known inequality by doing business with a group with different norms of behavior and fails to lay out the behavioral ground rules in advance, one should not

98. Returning, for a moment, to the insurance cases, when State Farm creatos the belief that they will act "like a good neighbor," they are not saying anything specific about the product they are selling, but about the level of regard they have and will show for their custemers should the occasion arise.

99. Shapo, 60 Va. L. Rev. at 1202 (cited in note 96) (footnote omitted).

be permitted to complain that he or she is being treated unfairly when judged from the other's perspective.[100]

Even more importantly, the failure to correct a known misperception has the effect of interfering with the other's ability to enter the political process in the same way as outright deception. Thus, the commitment to majoritarian principles requires that this failure to correct be treated the same.[101] Interestingly, this theoretical justification for abandoning the default rule in cases of nondisclosure is mirrored by the development of legal doctrine that can be explained in terms of the courts doing exactly that.

Consider, for example, the sale of mismanufactured goods to consumers and the virtual unanimity that surrounds the decision to impose liability when injury results.[102] Manufacturers are aware that, depending on the level of quality control adopted, a certain percentage of products will fail to meet the manufacturer's own specifications.[103]

---

100. Thus, for example, a business operating outside of its own country can fairly be judged under the law and within the culture of the other country unless some arrangements to the contrary are agreed upon in advance.

Elsewhere, I have argued at length that tort law could be understood in terms of punishment of those who engaged in what I termed "insider trading."

> [T]here is a community sense that it is unfair to use knowledge which is solely in one's possession or at least, as a practical matter, available only to one, for one's own advantage, generally pecuniary. This community sense has long been reflected in the development of formal tort doctrine. Thus much of tort law as it affects deliberative conduct, motivated by a desire to benefit oneself, can be seen as a ban on a certain form of "insider trading": a means by which a certain species of fraud is punished by the imposition of damages or by the development and application of harsher legal doctrine.

Kotler, 58 U. Cin. L. Rev. at 1255 (cited in note 4).

101. Increasingly, it has been the trend to recognize such nondisclosure as the equivalent of affirmative misrepresentation. See, for example, *Jenkins v. McCormick*, 184 Kan. 842, 339 P.2d 8, 11 (1959) (finding an obligation to disclose defects in property which are not known or easily discoverable by the buyer). See also the Restatoment (Second) of Torts § 551 which provides, in part, as follows:

> (1) One who fails to disclose to another a fact that he knows may justifiably induce the other to act or refrain from acting in a business transaction is subject to the same liability to the other as though he had represented the nonexistence of the matter that he has failed to disclose, but only if, he is under a duty to the other to exercise reasonable care to disclose the matter in question.
>
> (2) One party to a business transaction is under a duty to disclose to the other before the transaction is consummated . . .
>
> > (e) Facts basic to the transaction, if he knows that the other is about to entor into it under a mistake as to them, and that the other, because of the relationship between them, the customs in the trade or other objective circumstances, would reasonably expect a disclosure of those facts.

102. See, for example, Powers, 61 Tex. L. Rev. at 782-83 (cited in note 19) (noting that products with "[f]laws have usually been considered to be per se defective . . ."). See also Restatement (Third) of Torts: Products Liablity, Reporters' Note to § 2, cmt. b (Proposed Final Draft) (collecting cases, statutes and commentary).

103. Whether a manufacturer's conscious decision to set quality control levels is analogous to conscious design choice is a matter that is the subject of some disagreement. The Restatement (Third) of Torts: Products Liablity § 2, cmt. a (Proposed Final Draft), asserts that

Nevertheless, from a manufacturer's perspective, a given quality control decision may be entirely reasonable.

Consumers, on the other hand, having far less information about manufacturing, may well expect everything they buy to be free of manufacturing defects and often will infer culpability from the fact of defect.[104] Given that marketing considerations normally preclude manufacturers from disclosing information about the likelihood of mismanufacture,[105] the nondisclosure necessary to require abandonment of the default rule will often exist. Thus, if manufacturers are judged under a manufacturer standard, there will likely be no basis for the imposition of liability. Nevertheless, the opposite result occurs because the defendant is being judged from the consumers' perspective.

Along the same lines, in the unfit food cases a majority of jurisdictions have adopted a consumer expectation test.[106] While commercial food producers may recognize the inevitability of chicken bones in pot pies and cherry pits in cherry pies, absent an adequate warning it is easy to find an industry-wide failure to correct unrealistic expectations held by consumers.

---

the two are not analogous. Professor Shapo disagrees. See Shapo, 48 Vand. L. Rev. at 660 (cited in note 1).

104. As Dean Prosser has stated:

> When seeking a recovery on the theory that a product was defective when sold by the defendant, plaintiff has substantially the same proof problems for recovering on a theory of strict liability as he does on a theory of negligence. Under both theories plaintiff must establish to the satisfaction of the jury a defect at the time of sale. Once the proof is sufficient te get te the jury on the existence of a defect, there is generally a basis for an inference of negligence.

Page Keeton, *Annual Survey of Texas Law: Torts*, 23 Sw. L. J. 1, 1 (1969).

105. Professor Shapo observes:

> Consumers typically still have very little knowledge about the production processes that send even simple products to market, for example, the tests used to detect defects in shatterable bottles. Moreover, most product sellers would not be inclined to provide relevant statistics ("Caution: Under the testing system used in this plant, one bottle in 50,000 will explode in normal use").

Shapo, *Products Liability* at 52 (cited in note 1). Epstein further explains:

> There are very few occasions in which the manufacturer would want to contract out, precisely because any disclaimer—"not responsible for botulism," or "not responsible for exploding bottles that cause serious bodily injuries in ordinary use"—*does* convey to the consumer all the information that he needs to have in order te decide to buy elsewhere.

Epstein, 10 Cardozo L. Rev. at 2203 (cited in note 36). In fact, the truth is not only undisclosed, but may well be concealed by advertising campaigns, often seek to portray manufacturers as expending an unrealistically high level of attention to the pursuit of perfection.

106. See Stacy L. Mojica, Note, *Breach of Implied Warranty: Has the Foreign/Natural Test Lost Its Bite?*, 20 Memphis St. U. L. Rev. 377, 394 n.90 (1990) (providing a state-by-state breakdown).

Thus, as the foregoing discussion demonstrates, an application of the group selection process would result in the utilization of a consumer expectation test rather than an industry custom test.[107] This outcome is entirely consistent with legal doctrine.

c. Reestablishing the Default Rule

For the same reasons that nondisclosure of behavioral norms in the face of inequality of knowledge between groups may justify holding a party to the standards of a group to which he or she does not belong, adequate disclosure provides sufficient reason for demanding that the default rule be applied. This intuitively obvious conclusion is illustrated by the approach taken by the drafters of the Restatement (Second) of Torts in the case of "unavoidably unsafe" products.[108] As I will explain below, section 402A reverses the traditional approach of judging a defendant's conduct by his or her own group's standard and generally mandates that judgments be made from the consumer's perspective.[109] In comment k, however, the drafters allow the manufacturer to change the standard to an industry standard by providing the consumer with an adequate warning.[110]

---

107. Of course, use of a consumer expectation test does not ensure that the plaintiff will recover. As one court has noted,

> There is a distinction between what a consumer expects te find in a fish stick and in a baked fried fish, or in a chicken sandwich made from sliced white meat and in a roast chicken. The test should be what is reasonably expected by the consumer in the food as served . . . .

Betehia v. Cape Cod Corp., 10 Wis. 2d 323, 103 N.W.2d 64, 68-69 (1960).

108. Restatement (Second) of Torts § 402A cmt. k.

109. See text accompanying notes 199-203.

110. This, however, raises another question that has not been adequately resolved. While a warning serves to eliminate a claim of concealment or nondisclosure that might justify rejecting the default rule, when a case turns on the adequacy of a warning, from whose perspective is "adequacy" addressed? The manufacturers? The consumers? Or someone else's? See notes 223-27 and accompanying text.

Examination of the "learned intermediary" cases leads one to believe that it is the manufacturer's perspective. Although the manufacturer must warn doctors in the case of prescription drugs and consumers in the case of over-the-counter drugs, industry custom seems to be the prevailing test. Of course, industry custom takes into consideration the expertise and sophistication of the target consumer group. See generally Barbara Marticelli McGarey, Comment, *Pharmaceutical Manufacturers and Consumer-Directed Information—Enhancing the Safety of Prescription Drug Use*, 34 Cath. U. L. Rev. 117, 122-29 (1984); M. Stuart Madden, *The Duty to Warn in Products Liability: Contours and Criticism*, 89 W. Va. L. Rev. 221, 285-98 (1987). See also George L. Priest, *Strict Products Liability: The Original Intent*, 10 Cardozo L. Rev. 2301 (1989). Professor Priest, discussing the warning requirement established by comment j to section 402A asserts:

> Comment j represented a small step toward addressing consumer losses [resulting from design defects] which otherwise were denied under the founders' strict liability

Courts have followed the same type of approach in many insurance policy cases.[111] Consider, for example, *Collister v. Nationwide Insurance Co*,[112] in which the court had to decide whether to enforce the language of a conditional receipt given to an applicant for life insurance. The conditional receipt specifically provided that there would be no coverage provided until the applicant satisfactorily completed a physical examination.[113] The applicant died in an automobile accident before he was able to have the exam.[114]

In finding that the insurer's acceptance of a premium payment from the applicant created a temporary contract of insurance, the court specifically looked at what applicants expect given the social realities of a meeting with an insurance salesman. The court observed:

> The payment marks the beginning of performance.... At that point, the consumer is put in a position, of either accepting the receipt as a receipt and nothing more, or put in a position in which he must ask the insurance agent to remain silent so that he, the consumer, might have an opportunity to read and study the document. Furthermore, the consumer might be reluctant to read the document aware that such conduct might imply a mistrust of the person with whom he has already made an agreement, generally after lengthy and personal discussions.[115]

Having adopted a "reasonable expectation of the insured" approach to the applicant's rights under the policy, the court, in effect, determined that the insurer's conduct was to be judged from the perspective of insureds. The court specifically noted, however, that the insurer could successfully defend if it could show that the applicant had actually been told of the conditional nature of the coverage that the insurer intended to provide.[116]

In general, then, the complete disclosure mandated by the honesty principle will ensure the application of the default rule.

---

approach. According to Comment j, though generally free from liability without negligence, a manufacturer knowing that there exists some set of particularly susceptible consumers is required to provide a warning reporting the product's ingredients.

Id. at 2323-24.

111. For a discussion of the similarities in marketing insurance and "more tangible products," see Shapo, *Products Liability* at 75 (cited in note 1).

112. 479 Pa. 579, 388 A.2d 1346 (1978).

113. Id. at 1346.

114. Id.

115. Id. at 1354.

116. Id. at 1354-55.

IV. NEGLIGENCE AND STRICT LIABILITY: TRADITIONAL APPROACHES AND GROUP SELECTION

To this point, I have been discussing the assessment of conduct in terms of a default rule whereby one's conduct is measured against norms established by the group in which one is a member and the "political" rationale for rejection of that rule. The default rule is, in fact, a fairly traditional version of negligence doctrine under which an individual's conduct is judged by a community standard, professional standard, or some other behavioral norm established by the group of which that person is a member.[117] Which group that will be, of course, depends on the context in which harm was caused to another.[118]

There is, however, enormous linguistic and doctrinal confusion within traditional negligence law.[119] Although one is normally judged by reference to one's own group norms, there are numerous cases in which a member of one group is judged by another group's standard. Consider, for example, the traditional tort rule that refuses to recognize a party's insanity in evaluating his or her conduct,[120] or the rule that holds children to an adult standard of care under some circumstances.[121] Each represents the imposition of liability without conventional fault, although conduct is still the issue. In effect, these cases impose what can be called "behavioral strict liability" even though this strict liability is hidden within the terminology of negligence.[122]

The same issue may arise within the context of contributory negligence. Consider Dean Prosser's query:

> Suppose the individual has led a life that has not brought him into contact with information common in the particular community. A city dweller who never has seen a bull or a mule, or heard anything about their characteristics,

---

117. Keeton, Dobbs, Keeton, and Owen, *Prosser and Keeton on the Law of Torts* at 184 (cited in note 17).

118. In the abstract, the group selection process may appear more problematic than it actually is. The nature of the litigation will normally identify the relevant groups. Where one is injured by a product that he or she purchased, for example, the relevant groups are probably manufacturers and consumers. The fact that the consumer may also be an accountant, a Protestant, and a member of the Rotary Club would have no apparent significance. See also note 50.

119. See also Powers, 61 Tex. L. Rov. at 790-91 (cited in note 19) (discussing the problem of linguistic confusion in the judicial attempts to distinguish negligence and defectiveness).

120. Keeton, Dobbs, Keeton, and Owen, *Prosser and Keeton on the Law of Torts* at 176-77 (cited in note 17).

121. Id. at 181 (using an adult standard where the child "engages in an activity that is normally one of adults only . . .").

122. Clarence Morris and C. Robert Morris, Jr., *Morris on Torts* 51 (Foundation Press, 2d ed. 1980).

> visits a friend in the country, and makes a misguided attempt to fraternize with the animals.[123]

Although the city dweller's conduct is entirely reasonable from his perspective, a "contributory negligence" defense is allowed. "[T]he standard of ordinary knowledge will still be applied, and it is the individual who must conform to the community, rather than vice versa."[124] The effect is once again a form of behavioral strict liability—the utilization of the plaintiff's faultless (from his perspective) conduct as a defense.

This type of linguistic and doctrinal confusion is compounded in the "strict liability" cases. The so-called "pockets of strict liability"[125] found throughout tort law contain remarkably diverse bodies of legal doctrine—trespassing cattle, wild animals, abnormally dangerous (or ultrahazardous) activities, defective product liability, vicarious liability (common law and statutory), and statutory compensation systems, for example. Notwithstanding the enormous surface diversity of these cases, a close examination reveals that apart from those cases that are simply traditional negligence cases that have been mislabeled,[126] there are primarily two separate bases for imposing liability.

The first and most common way of thinking about strict liability can be termed "non-behavioral" strict liability. It can be understood in purely instrumental terms—the imposition of liability for reasons completely divorced from any assessment of the parties' injury-causing conduct. For example, scholars discussing this theory of strict liability may utilize a concept of liability without fault where causation by itself is sufficient to shift a loss from the plaintiff to the

---

123. William L. Prosser, John W. Wade and Victor E. Schwartz, *Cases and Materials on Torts* 153 n.4 (Foundation Press, 8th ed. 1988) (citing *Tolin v. Terrell*, 133 Ky. 210, 117 S.W. 290 (1909)).

124. Keeton, Dobbs, Keeton, and Owen, *Prosser and Keeton on the Law of Torts* at 184 (cited in note 17). See also Clarence Morris, *Custom and Negligence*, 42 Colum. L. Rev. 1147 (1942); Fleming James, Jr. and David K. Sigerson, *Particularizing Standards of Conduct in Negligence Trials*, 5 Vand. L. Rev. 697 (1952).

125. The phrase is taken from Fletcher, 85 Harv. L. Rev. at 542 (cited in note 7).

126. The common law rule that the possessor of a domestic animal was subject to "strict liability" is a good example of a mislabeled negligence case inasmuch as "[t]o be strictly liable, the possessor must have known or had reason to know of a dangerous propensity or trait that was not characteristic of a domestic animal of like kind." Keeton, Dobbs, Keeton, and Owen, *Prosser and Keeton on the Law of Torts* at 542 (citod in noto 17).

defendant.[127] Thus understood, non-behavioral strict liability represents an instrumental cost-allocation decision that a particular enterprise or class of defendants should bear the costs of certain types of harms, regardless of whether a particular defendant could have avoided or even foreseen that the loss might have occurred.[128]

Under this approach, holding the master liable for the torts of his servant internalizes the accident costs generated by employees' employment-related activities into the enterprise benefitting from those activities.[129] Worker's compensation legislation serves to internalize workplace injury costs.[130] Similarly, in some of the dangerous activity cases, the enterprise that generates the harm must pay compensation as part of the cost of doing business because this cost allocation serves some other goal.[131]

Although a non-behavioral strict liability approach has become part of the accepted legal landscape in the vicarious liability and worker's compensation cases, courts have demonstrated an extraordinary reluctance to adopt such an approach in the dangerous activity and products cases.[132] In fact, in both of these areas one can observe

---

127. See, for example, A. Mitchell Polinsky, *An Introduction to Law and Economics* 41 (Little, Brown, 2d ed. 1989); Richard A. Posner, *Strict Liability: A Comment*, 2 J. Legal Stud. 205 (1973); Steven Shavell, *Strict Liability Versus Negligence*, 9 J. Legal Stud. 1, 2-3 (1980).

128. See generally 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). See also Albert A. Ehrenzweig, *Products Liability in the Conflict of Laws—Toward a Theory of Enterprise Liability Under 'Foreseeable and Insurable Law, II,'* 69 Yale L. J. 794 (1960); Polinsky, *Introduction to Law and Economics* at 41 (cited in note 127). But see Richard A. Epstein, *A Theory of Strict Liability*, 2 J. Legal Stud. 151 (1973) (developing a theory of strict liability to protect individual autonomy).

Professor Henderson sees the courts' adoption of strict liability as a way of avoiding having to make polycentric decisions regarding product safety. He has argued:

> In terms of its effect on the courts' capacity to adjudicate the issues, the strict liability rule is identical to the no duty rule. Under both, courts avoid the necessity of establishing product safety standards by refusing to pass judgment upon the reasonableness of defendants' efforts at quality control; but by substituting manufacturers' liability for manufacturers' immunity, the substantive policy objections te the no duty-privilege approach are overcome.

Henderson, 73 Colum. L. Rev. at 1546 (cited in note 24).

129. See, for example, *Fruit v. Schreiner*, 502 P.2d 133, 141 (Alaska 1972) ("The basis of *respondeat superior* has been correctly stated as 'the desire to include in the costs of operation inevitable losses to third persons incident to carrying on an enterprise, and thus distribute the burden among those benefited by the enterprise.' ") (quoting Young B. Smith, *Frolic and Detour*, 23 Colum. L. Rev. 716, 718 (1923)).

130. Keeton, Dobbs, Keeton, and Owen, *Prosser and Keeton on the Law of Torts* at 573 (cited in note 17) ("The human accident losses of modern industry are to be treated as a cost of production, like the breakage of tools or machinery. The financial burden is lifted from the shoulders of the employee, and placed upon the employer, who is expected to add it to his costs, and so transfer it to the consumer.").

131. Id. at 556.

132. See notes 19-23 and accompanying text.

an initial endorsement of a non-behavioral approach by some courts followed by a retreat from this approach in favor of linking the imposition of liability to the assessment of the parties' conduct.[133]

It is important to understand, however, that the widespread rejection of a non-behavioral approach has not signaled a return to traditional negligence. Instead, the prevailing conception of "strict liability," as it has been employed by the courts, has moved from a conception of no-fault enterprise liability to a conception of "behavioral strict liability." Under this approach, an individual's conduct is judged against an identifiable group norm, even if the person being judged is not a member of the group from whose perspective his conduct is assessed. In other words, this approach also embraces a fault-based concept representing, in the language used here, a rejection of the default rule.

Consider, for example, *Guille v. Swan*,[134] an early-nineteenth-century dangerous activity case heavily relied upon by Judge Posner in *Indiana Harbor Belt Railroad Co. v. American Cyanamid Co.*[135] In *Guille*, the defendant's hot air balloon landed in the plaintiff's New York City garden, which was subsequently trampled by rescuers. As Judge Posner observed, "[t]he owner of the garden sued the balloonist for the resulting damage, and won. Yet the balloonist had not been careless. In the then state of ballooning it was impossible to make a pinpoint landing."[136]

To consider the case using the terminology employed here, the defendant balloonist's conduct had complied with the balloonist standard of care. From the New York City gardener's perspective, however, flying around out of control may not have been so reasonable and perhaps the finding of liability reflected that judgment.[137]

Whether the case was correctly decided under the model developed here is a separate question and is debatable. The basis for

---

133. See Birnbaum, 33 Vand. L. Rev. at 593 (cited in note 23) (tracing the shift in products cases); Epstein, 10 Cardozo L. Rev. at 2227 (cited in note 20) (discussing the shift in the imposition of strict liability for abnormally dangerous activities from the First to Second Restatements of Torts).

134. 19 Johnson's Rep. (N.Y.) 381 (1822).

135. 916 F.2d 1174 (7th Cir. 1990).

136. Id. at 1177.

137. A common source of confusion in cases such as this lies in the failure to distinguish the various factual theories of liability which may be available. Both the analysis and outcome may vary depending on whether the conduct that is alleged to give rise to liability is identified as the the decision to go ballooning in a particular place, as distinct from how tbe ballooning was actually done thereafter.

abandoning the default rule—that is, rejecting traditional negligence and adopting behavioral strict liability—is nondisclosure or concealment that interfered with the gardener's ability to enter the political process to seek protection, presumably legislative restrictions on hot air ballooning. If the ballooning activity had been kept a secret or if there had been some misrepresentation about the potential dangers, perhaps the case was correctly decided.[138]

In any event, the same "behavioral versus non-behavioral strict liability" split also is apparent in the products cases. There is certainly much academic literature explaining the imposition of strict liability in tort for product-related harm purely in instrumentalist terms,[139] and an occasional lonely voice is still heard to urge the wisdom of totally disregarding the parties' conduct.[140] The courts[141] and most commentators, however, have become hostile toward this view, often deriding it as "absolute liability,"[142] or, according to one commentator, "strict, strict liability."[143]

---

138. Arguably, the language in the Restatement (Second) of Torts § 520(e) making the appropriateness of the area where the activity is done a factor in determining whether the conduct gives rise to liability in tort has some bearing on this. If one cannot anticipate that an activity will be engaged in or appreciate the risks involved, this may evidence a form of nondisclosure that justifies abandonment of the default rule.

139. See, for example, Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 Yale L. J. 499, 500-07 (1961); Marc A. Franklin, *Tort Liability for Hepatitis: An Analysis and Proposal*, 24 Stan. L. Rev. 439, 462-72 (1972); Milton Katz, *The Function of Tort Liability in Technology Assessment*, 38 U. Cin. L. Rev. 587, 636-62 (1969).

140. See, for example, Ellen Wertheimer, *Unknowable Dangers and the Death of Strict Products Liability: The Empire Strikes Back*, 60 U. Cin. L. Rev. 1183 (1992).

141. The two most obvious illustrations of courts moving toward instrumentalist strict liability are *Beshada v. Johns-Manville Products Corp.*, 90 N.J. 191, 447 A.2d 539 (1982) and *Cunningham v. MacNeal Memorial Hospital*, 47 Ill. 2d 443, 266 N.E.2d 897 (1970). See also *Little v. PPG Indus., Inc.*, 19 Wash. App. 812, 579 P.2d 940 (1978); *Dougherty v. Hooker Chemical Corp.*, 540 F.2d 174 (3d Cir. 1976); *Jackson v. Coast Paint and Lacquer Co.*, 499 F.2d 809 (9th Cir. 1974). *Beshada* was effectively overruled by *Feldman v. Lederle Laboratories*, 97 N.J. 429, 479 A.2d 374, 386 (1984). *Cunningham* was legislatively overruled. See Ill. Ann. Stat. § 5102 (Smith-Hurd, 1988).

142. Henderson, 73 Colum. L. Rev. at 1554 (cited in note 24) ("Despite the institutional advantages it might hold, absolute manufacturers' liability has been unanimously and emphatically rejected by the courts."). Another commentator has asserted:

> [T]he evolution of standards in both design and warning cases have been strongly directed by the concepts of risk distribution and cost internalization. The direction of this influence has been toward absolute liability. [The drafters of section 402A] stated with great emphasis that the strict liability standard that they were proposing stopped far short of absolute liability.

Priest, 10 Cardozo L. Rev. at 2326-27 (cited in note 110). See also Wertheimer, 60 U. Cin. L. Rev. at 1189 (cited in note 140) ("[S]trict products liability is not now, and never was intended to be, absolute liability."); James A. Henderson, Jr. and Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. Rev. 479 (1990) (demonstrating that courts have moved from a strict liability test towards utilization of negligence principles).

The primary exception to the movement away from non-behavioral strict liability, of course, is found in the vicarious liability cases, in which courts have come to accept that the relationship between the primary tortfeasor and some other party forms a sufficient basis for

The linguistic and doctrinal confusion in strict product liability law was further compounded in the 1960s and 1970s by the development of the so-called "hindsight" test for design defects. The problem arose as courts and commentators attempted to deal with injuries caused by products that appeared to be reasonably safe when made, but which later turned out to be relatively unsafe. The change in perception regarding safety may arise because the product contained some generic danger that was unrecognized when it was manufactured; because people began to use the product in a way or for a use that was not originally anticipated; or because changes in technology permitted similar, but safer, products to be developed and marketed some time after the product in question.[144]

During the 1960s and 1970s, it was first proposed that the "defectiveness" of such products could be determined by assessing the actual danger of these products in light of all that was known at the time of trial, regardless of whether information regarding the full extent of risk was known or even knowable at the time the product was first sold.[145] Particularly in the "generic risk" cases, many courts sought to assess the manufacturer's liability by imputing knowledge of the actual dangerousness of the product to the manufacturer and then assessing the manufacturer's hypothetical negligence. In the language of *Phillips v. Kimwood Machine Co.*:[146]

> A dangerously defective article would be one which a reasonable person would not put into the stream of commerce *if he had knowledge of its harmful character.* The test, therefore, is whether the seller would be negligent if he sold the article *knowing of the risk involved.* Strict liability imposes what amounts to constructive knowledge of the condition of the product.[147]

---

holding that other party liable to the plaintiff. See generally Keeton, Dobbs, Keeton, and Owen, *Prosser and Keeton on the Law of Torts* § 69 at 499 (cited in note 17).

143. Victor E. Schwartz and Liberty Mahshigian, *A Permanent Solution for Product Liability Crises: Uniform Federal Tort Law Standards*, 64 Denver U. L. Rev. 685, 687-89 (1988).

144. David A. Fischer and William Powers, Jr., *Products Liability: Cases and Materials* 218 (West, 2d ed. 1994).

145. W. Page Keeton, *Products Liability—Inadequacy of Information*, 48 Tex. L. Rev. 398, 408-09 (1970); W. Page Keeton, *Manufacturer's Liability: The Meaning of "Defect" in the Manufacture and Design of Products*, 20 Syracuse L. Rev. 559, 568 (1969); John W. Wade, *Strict Tort Liability of Manufacturers*, 19 Sw. L. J. 5, 15-16 (1965).

146. 269 Or. 485, 525 P.2d 1033 (1974).

147. Id. at 1036 (footnotes omitted). This issue is not only clearly illustrated by the "unknowable generic risk" products design cases, but on occasion in a failure to warn context as well. In *Beshada*, 447 A.2d at 539, the court assumed that the risks of asbestos were unknowable when the product was marketed but known at the time of trial. Nevertheless,

The attempt to utilize the language of conduct assessment as the analytical tool for imposing non-behavioral strict liability, however, did not clarify "strict liability." Instead, it exacerbated the confusion that already existed as a result of the use of the phrase "strict liability in tort" to describe two very different approaches to tort law.[148] This confusion is clearly evidenced by the most common objection to the hindsight approach—namely, that it is unfair.[149] Since the defendant could not have known of the danger, the defendant could not have designed that danger out of the product or warned about it. Therefore, it would be unfair to impose liability on this basis.[150]

But criticism of this sort misses the point.[151] The Wade/Keeton approach was not intended to assess the culpability of the defendant's conduct, but rather to use the defendant's hypothetical negligence as an analytical tool to determine the existence of a "defect." Once the "defect" was established, however, strict liability could be imposed in furtherance of goals unrelated to any assessment of conduct.[152] To criticize this approach as unfair erroneously presupposes that it was intended to be a vehicle for the assessment of conduct.

Additionally, the mere fact that the charge of unfairness has been repeatedly leveled against the "imputation of the unknowable" or "hindsight" approach reveals the existence of a deeply held belief or

---

using a "hindsight" test, the court imputed knowledge of the danger to the defendant and, since the lack of a warning made the product unsafe, found the product to be defective.

148. See Epstein, 10 Cardozo L. Rev. at 2198-99 (cited in note 36) (arguing that Professor Wade's "hindsight" test contributed to the "inadvertent way in which product liahility doctrine has grown up").

149. See, for example, Restatement (Third) of Torts: Products Liability § 2, cmt. a (Proposed Final Draft) ("[M]anufacturers may persuasively ask to be judged by a normative behavior standard to which it is reasonably possible for manufacturers to conform. For these reasons, Subsections (b) and (c) speak of products being defective only when risks were reasonably foreseeable.").

150. See note 19 (discussing Professor Coleman's explanation of this type of objection).

151. See Shapo, *Products Liability* at 49 (cited in note 1) ("To the rejoinder that this is an imposition of liability without a showing that the defendant should or even could have known of the risk, the response is: Yes, that is the meaning of strict liability.").

152. I do not mean to suggest that Dean Wade developed the "hindsight" test with the intention of establishing an instrumentalist tort regime, although that may have been a consequence. See John W. Wade, *On the Effect in Product Liability of Knowledge Unavailable Prior to Marketing*, 58 N.Y.U. L. Rev. 734 (1983). As Dean Wade stated:

> I now would be inclined to think that there is no longer any particular value in using the assumed-knowledge language. Its usefulness, I thought, was in explaining the concept of strict liability when it was new by clearly contrasting it with negligence in which the defendant's actual culpability in failing to learn of the dangerousness of the product had to be shown. It always had overtones of fiction, and, like all fictions, it can create difficulties if taken literally.

Id. at 764 (footnote omitted).

tacit assumption that conduct should be the central concern of tort law.[153] If Professor Shapo's "cultural mirror" metaphor is correct—and I believe that it is—the rejection of a non-behavioral strict liability approach is not surprising. As long as the dominant perception of the tort system is punishment of unacceptable conduct, the imposition of liability absent such culpability is sure to meet with disapproval.

Just as it is clear that non-behavioral approaches have failed to gain acceptance, however, it is equally clear that some liability regime other than traditional negligence is being implemented. I submit that the model explicated in this Article captures the notion of strict liability that has emerged in design defect cases such as *Grimshaw* and the manufacturing defect cases previously discussed.[154]

Moreover, understanding that behavioral strict liability is being utilized in many products cases allows one to make sense of those decisions permitting the utilization of a comparative fault defense.[155] While critics of the defense maintain that it is logically incoherent to ask a jury to compare the fault of the plaintiff to the no-fault strict liability of the defendant,[156] such criticism loses all force when one realizes that a defendant's liability in those cases is not instrumentalist non-behavioral strict liability, but rather depends on an assessment of the defendant's conduct. When seen in this light, no logical impediment to the comparison of the parties' behavior exists.

More importantly, aside from its value as a description of the tort system, I submit not only that there are defensible reasons for preferring the group selection model developed here to either non-

---

153. See, for example Andrew T. Berry, Beshada v. Johns-Manville Products Corp.: *Revolution—or Aberration—in Products Liability Law*, 52 Fordham L. Rev. 786 (1984) (criticizing the "hindsight approach"); John E. Keefe and Richard C. Henke, *Presumed Knowledge of Danger: Legal Fiction Gone Awry?*, 19 Seton Hall L. Rev. 174 (1989) (arguing for the abandonment of the "Wade-Keeton approach"); William R. Murray, Jr., Comment, *Requiring Omniscience: The Duty to Warn of Scientifically Undiscoverable Product Defects*, 71 Geo. L. J. 1635 (1983); Nicholas B. Simonetta, Note, *Defeat for the State-of-the-Art Defense in New Jersey Products Liability:* Beshada v. Johns-Manville Products Corp., 14 Rutgers L. J. 953 (1983). But see Wertheimer, 60 U. Cin. L. Rev. at 1183 (cited in note 140) (supporting the hindsight test).

This is not to say that the "hindsight" test has been completely abandoned. Particularly in the so-called "generic risk" cases, the approach continues to have some vitality. See, for example, *Habecker v. Clark Equipment Co.*, 942 F.2d 210 (3d Cir. 1991); *Robertson v. General Tire & Rubber Co.*, 123 Ill. App. 3d 11, 462 N.E.2d 706 (1984); *Carter v. Johns-Manville Sales Corp.*, 557 F. Supp. 1317 (E.D. Tex. 1983).

154. See text accompanying notes 75-78 and 102-107.

155. See, for example, *Daly*, 575 P.2d at 1162.

156. Id. at 1178. See also id. at 1178 (Jefferson, J., concurring and dissenting) (arguing that a comparative fault defense is logically inconsistent with a strict liability cause of action).

behavioral strict liability or traditional negligence approaches, but that a fundamental commitment to majoritarian rule demands it. Certainly there are powerful justifications for an instrumentalist approach to tort law. Cost internalization may well result in the most efficient allocation of resources, promote individual autonomy, or further some notion of corrective justice or some other personal moral principle.[157] The problem, however, is that in the absence of a legislative mandate, the underlying goal of an instrumentalist approach will not necessarily be shared by the community upon whom it is being imposed. Unless one believes that there is a broad social consensus or underlying principle on which value should be promoted, and views the judiciary as a representative lawmaking body,[158] the judicial imposition of the goals underlying non-behavioral strict liability raises serious legitimacy concerns.

Since the utilization of a traditional negligence approach vests the lawmaking function in the jury, it does not raise the same legitimacy concerns.[159] However, the traditional negligence approach does not serve majoritarian rule as well as the model developed here since the traditional approach judges individuals by the norms of their own group without recognizing that this should not be the case when an individual has engaged in disenfranchising conduct—that is, conduct that either interferes with one's ability to enter the political process to effect change or that hides the necessity to do so.[160]

V. APPLICATION OF PRINCIPLE: PRODUCT DEFECTS UNDER THE SECOND AND THIRD RESTATEMENTS OF TORTS

Having sketched the outlines of a model of tort decisionmaking and provided a brief glimpse of its descriptive value and normative underpinnings, I will now demonstrate how this model can be applied to some of the more difficult product liability issues presently confronting us. Specifically, I will use this model as the basis of commenting on the approaches taken by the Restatement (Second) of Torts, section 402A and the proposed revisions of section 402A

157. For a description of much recent tort scholarship as the expression of personal value statements, see Whito, *Tort Law in America* at 213 (cited in note 13).

158. This is apparently the view taken by Professor Shapo. See note 43.

159. Amar, 100 Yale L. J. at 1183-99 (cited in note 44) (explaining jury decisionmaking as a form of direct participatory democracy).

160. See toxt accompanying notes 85-89.

contained in the draft Restatement (Third) of Torts: Products Liability.

Perhaps because so many judicial decisions purported to adopt section 402A,[161] the approach of the Third Restatement's drafters has drawn both criticism and support from many of the most highly respected commentators on product liability issues.[162] The model set forth in this Article offers a new framework for considering both section 402A and the proposed revisions.

A. The Basics

Section 402A purports to set forth a rule of strict liability in tort that applies to commercial product sellers. Before the seller will be held strictly liable, however, the injury-causing product must be found to have been "in a defective condition unreasonably dangerous to the user or consumer or to his property . . . ."[163]

Section 402A defines "defective condition" as "a condition not contemplated by the ultimate consumer, which will be unreasonably dangerous to him."[164] The definition of "unreasonably dangerous" is "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics."[165]

The proposed revisions in the Third Restatement would discount the importance of consumer expectations in making the all-important determination of product "defectiveness."[166] Instead, fol-

---

161. See Robert D. Hursh and Henry J. Bailey, 1 *American Law of Products Liability* § 4:41 (Lawyers Cooperative, 2d ed. 1974 & Supp. 1985) (containing a state-by-state analysis of decisions regarding the adoption of strict liability for defective products). Of course, the actual test of "defect," particularly in design cases, varies significantly from state to state.

162. See, for example, *A Symposium on the ALI's Proposed Restatement (Third) of Torts: Products Liability*, 61 Tenn. L. Rev. 1043 (1994); *Symposium, The Revision of Seetion 402A of the Restatement (Second) of Torts: Occasion for Reform of Product Liability Law?*, 10 Touro L. Rev. 1 (1993); *Special Issue: Review of the System of Products Liability Law*, 36 S. Tex. L. Rev. 227; Shapo, 48 Vand. L. Rev. at 631 (cited in note 1); Howard A. Latin, Memorandum to ALI Council and Members, *Behavioral Criticisms of the Restatement (Third) of Torts: Products Liability* (June 6, 1994) (on file with the Author).

163. Restatement (Second) of Torts § 402A.

164. Id. cmt. g.

165. Id. cmt. i.

166. The Proposed Final Draft of the Restatement (Third) of Torts: Products Liability provides:

> Subsection (b) states that a product is defective in design if the omission of a reasonable alternative design renders the product not reasonably safe. A broad range of factors may legitimately be considered in determining whether an alternative design is reasonable and whether its omission renders a product not reasonably safe. The factors

lowing the doctrinal distinctions established by courts subsequent to the promulgation of section 402A,[167] the drafters have broken "product defect" into three types: manufacturing, design, and failure to warn or to provide instructions for safe usage.[168]

"Manufacturing defects," except in the case of food products, are defined by utilization of a "deviation from the norm" test—that is, the "product contains a manufacturing defect when the product departs from its intended design even though all possible care was exercised in the preparation and marketing of the product."[169] In food cases, however, the drafters have proposed that the consumer expectation test be retained to determine "defectiveness."[170]

The Third Restatement "failure to warn" defects are defined by what appears to be a straight-forward negligence test. A product will be "defective" by reason of a lack or inadequacy of warnings or instructions for safe usage "when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller or other distributor . . . and the omission of the instructions or warnings renders the product not reasonably safe."[171]

Under the new proposal, the existence of a "design defect" is established by comparing the design which is alleged to have caused the harm to a "reasonable alternative design." The comparison that

---

include . . . the magnitude of the foreseeable risks of harm, the instructions and warnings accompanying the product, and *the nature and strength of consumer expectations regarding the product.* The relative advantages and disadvantages of the product as designed and as it alternatively could have been designed may also be considered. Thus, the likely effects of the alternative design on production costs; . . . product longevity, maintenance, repair, and esthetics; and the range of consumer choice among products are factors that may be taken into account.

Restatement (Third) of Torts: Products Liability § 2, cmt. e (Proposed Final Draft) (emphasis added).

167. Id. "Reporter's Note" to § 1 cmt. a ("Abundant authority recognizes the division of product defects into manufacturing defects, design defects, and defects based on inadequate instructions or warnings.") The extensive list of authorities is omitted here. Priest argues:

[T]he founders did not fully appreciate the distinctions among manufacturing defects, design defects, and defective warnings that would become the centerpiece of modern law. Section 402A represented only a limited change in the law because the founders intended the Section's strict liability standard, with minor exceptions, to apply *only* to what we now call manufacturing defect cases. Section 402A and its Comments were drafted with little more than manufacturing defect cases in mind. There was unanimous agreement among the founders that design defect cases were to be controlled by traditional negligence law and that warning and instruction cases were to be controlled by a negligence approach.

Priest, 10 Cardozo L. Rev. at 2303 (cited in note 110).

168. Restatement (Third) of Torts: Products Liability § 2 (Proposed Final Draft).

169. Id. § 2(a).

170. Id. § 2 cmt. g.

171. Id. § 2(c).

the drafters contemplate is to be done by means of a fairly conventional risk-utility analysis, with consumer expectation considered as one of the factors.[172]

2. Comments on Evaluating a Restatement

Before attempting to compare and evaluate the two schemes of products liability, it is first necessary to set forth briefly the nature of the ALI's "Restatement" projects. As Professor Shapo has explained:

> At its most reductionist, it involves counting the decisions and selecting the majority rule, at least where there are enough decisions on a particular issue to justify calling the rule a "majority" position.
>
> But those who have wrangled over the contents of Restatements for more than half a century would not be satisfied with this answer. They would say that, since the purpose of Restatements is to improve the law, restaters should seek wisdom and excellence in their choice of legal rules.[173]

However, in addition to "restating the law," or restating the law with an eye toward the incremental improvement of the law, Professor Shapo identifies a third approach toward the drafting of a restatement: "[This] approach assumes that a Restatement should be candidly responsive to competing political interests. Like a legislative body although without its socially conferred power—[the restaters] ultimately should seek a resolution that is politically viable, so long as it is not constitutionally irrational."[174]

The literal understanding of "Restatements" as restating the existing law makes it impossible, or at least inappropriate, to level criticism against Restatements in the same way that one might criticize a journal article or other scholarly work. While under other circumstances internal inconsistency between an instrumentalist approach and an assessment of conduct approach might well be a valid basis for criticism, here it is not. Inasmuch as there is enormous inconsistency in the existing case law, it is almost inevitable that some would be reflected in the Restatements of the Law.

---

172. Id. § 2 cmt. e.

173. Shapo, 48 Vand. L. Rev. at 634 (cited in note 1).

174. Id. at 635. Though it presents an extremely important issue, this Article will not deal with the entire question of the Restatement as "quasi-legislation" offered for adoption by judges for subsequent imposition on the community. While I have briefly pointed out the basis of my view that a commitment to majoritarian rule demands a jury's assessment of conduct rather than a judge's imposition of his or her own views or interpretation of community views, a full discussion and defense of that position is beyond the scope of this Article.

Nevertheless, it bears mentioning that there is considerable internal inconsistency in the Second Restatement and even more within the proposed Third Restatement.

Additionally, and more importantly, I believe that the failure to recognize explicitly the group selection issue set forth here constitutes a serious shortcoming in the Second Restatement. This shortcoming has been perpetuated and exacerbated by the approach taken by the drafters of the Third Restatement.

1. The Nature of Liability Established by the Restatements

a. Section 402A

It is difficult to say with any confidence how much the drafters of section 402A intended to base liability on conduct and to what extent they contemplated reducing a purely non-behavioral enterprise liability approach to tort law to Restatement blackletter.[175] Explaining the theoretical basis of the Restatement (Second) of Torts section 402A, comment c states in part:

> [T]he justification for the strict liability has been said to be that the seller, by marketing his product for use and consumption, has undertaken and assumed a special responsibility toward any member of the consuming public who may be injured by it: that the public has the right to and does expect, in the case of products which it needs and for which it is forced to rely upon the seller, that reputable sellers will stand behind their goods; that public policy demands that the hurden of accidental injuries caused by products intended for consumption be placed upon those who market them, and be treated as a cost of production against which liability insurance can be obtained; and that the consumer of such products is entitled to the maximum of protection at the hands of someone, and the proper persons to afford it are those who market the products.[176]

The drafters' approach seems to combine instrumentalist notions of efficient cost allocation with a traditional fairness justification for strict liability without entirely resting upon or being consistent with either.[177] A non-behavioral, cost-allocation justification for strict

175. See Priest, 10 Cardozo L. Rev. at 2307 (cited in note 110) ("[C]entral figures in the Restatement process occasionally alluded to risk distribution as grounds for extending liability, but the arguments were most often simply additional points and seldom at the heart of the analysis." (footnotes omitted)).

176. Restatement (Second) of Torts § 402A cmt. c.

177. See Wertheimer, 60 U. Cin. L. Rev. at 1184-87 (cited in note 140) ("[A]s between the innocent plaintiff and the innocent manufacturer, the choice to place liability on the manufacturer is not dictated by economic theory alone.").

liability asks who is in the best position initially to absorb the accident cost without major economic dislocation and subsequently spread that cost.[178] Enterprise liability is not necessarily linked to the defendant's conduct. While most theorists agree that liability may be imposed on the party who caused the accident (as distinct from some wholly uninvolved third person), the justification for this approach is not linked to any notion of just deserts or even fairness.[179] Requiring a causal link serves to identify the party who should internalize the cost in order to induce that party to engage in some desirable conduct in the future—to invest in research and development, for example.[180] The imposition of liability is thus forward-looking and divorced from the behavior that caused the harm at issue.

The proposition that the drafters intended an instrumentalist approach finds support in some of the blackletter provisions of section 402A.[181] If such an approach was intended, it makes complete sense to provide for liability even though "the seller has exercised all possible care in the preparation and sale of his product,"[182] and also to provide that only those in the "business of selling"[183] should face strict

---

178. See Guido Calabresi, *The Cost of Accidents: A Legal and Economic Analysis* (Yale U., 1970).

179. As Professor Klemme has asserted:

> This requirement of "but for" cause cannot be explained on the ground that it is essential to having a tort judgment provide a deterrent effect on the defendant's future conduct. On the contrary, exactly the opposite seems true. A more valid explanation of the rule lies in the theory of enterprise liability and its rationale of using the market place as a tool for "best" allocating the community's limited resources.

Howard C. Klemme, *The Enterprise Liability Theory of Torts*, 47 U. Colo. L. Rev. 153, 163 (1976). Professor Klemme continues:

> [T]he general statement of the theory of enterprise liability does not tell us from among all the infinite "but for" causes which may have brought about the plaintiff's loss *which particular* "but for" activity or enterprise the loss should be assigned to, it does tell us we ought not assign it to an activity which had no "but for" causal relationship with that particular loss at all.

Id. at 165.

180. The drafters of the Third Restatement have stated:

> On the premise that tort law serves the instrumental function of creating safety initiatives, imposing strict liability on manufacturers for harm caused by manufacturing defects is thought to encourage greater investment in product safety than does a regime of fault-based liability under which, as a practical matter, sellers may escape their appropriate share of responsibility.

Restatement (Third) of Torts: Products Liability § 2 cmt. a (Proposed Final Draft).

181. But see Priest, 10 Cardozo L. Rev. at 2317-24 (cited in note 110) (analyzing the blackletter and finding little support for the proposition that section 402A was intended to establish an instrumentalist system of loss allocation).

182. Restatement (Second) of Torts § 402A(2)(a).

183. See id. § 402A cmt. f.

liability, as such parties are in a position to internalize the cost thus incurred.

That an enterprise liability approach was intended finds additional support in the "substantial change" provision.[184] One of the most difficult issues for the enterprise liability theorist has always been to determine which of several enterprises should be required to internalize a particular accident's cost.[185] Section 402A's provision that a post-sale "substantial change in the condition" of the product will immunize the original seller from liability can be seen as a way of determining that an enterprise other than the original seller should have to internalize the cost. Additionally, as to non-manufacturing and non-designing sellers—those in the chain of distribution who merely act as conduits—there appears to be no plausible claim that section 402A establishes anything other than a cost-allocation mechanism.

At its core, however, section 402A does not seem to be consistent with the establishment of a pure instrumentalist cost-allocation system. If one were truly committed to accomplishing this aim, the prerequisite for liability that the product be "in a defective condition unreasonably dangerous to the user or consumer" would be counterproductive. After all, the goal of such a system is presumably the internalization of all costs generated by the product.[186] At least in the design and warning cases, requiring that the product be defective introduces the question of the degree of danger inherent in design choices and thus, in effect, requires the creation of a certain level of risk before liability is imposed. The result of the drafters' approach is that only some of the accident costs associated with products will be internalized.

At the same time, section 402A is not entirely consistent with a *Fletcher v. Rylands and Horrocks*[187] notion of strict liability either. The original *Rylands* idea is that one acts at one's own peril. That is, as between two innocent parties, the loss should be borne by the one who, for his own benefit, exposed another to a risk of harm.[188] Again,

---

184. Section 402A provides for liability "if... [the product] is expected to and does reach the user or consumer without substantial change in the condition in which it is sold." Id. § 402A(1)(b).

185. See, for example, Klemme, 47 U. Colo. L. Rev. at 164-65 (cited in note 179).

186. See Richard L. Abel, *The Real Tort Crisis—Too* Few *Claims*, 48 Ohio St. L. J. 443, 459 (1987) (making the point that if internalization of accident costs is intended to influence the behavior of economically rational actors, both tortfeasors and consumers, more liability claims will further deterrence and informational goals).

187. 159 Eng. Rep. 737 (1865), rev'd, L.R. 1 Exch. (1866), aff'd, 3 L.R.-E.&I. App. 330 (1868).

188. 4 H. & C. at 271 (Blackburn, J.)

however, the blackletter requirement that the product be "in a defective condition unreasonably dangerous to the user or consumer" introduces a threshold level of risk that must have been created before liability is imposed. One can thus create some lower level of risk for one's own benefit without having to compensate persons who are injured as a consequence.[189]

Assuming one does not choose to interpret section 402A as seeking only to assess the condition of the product rather than the conduct that created it—an interpretation that has been rejected by the courts[190]—the fact that section 402A requires the creation of a high level of risk as a prerequisite for the imposition of liability while also expressly asserting the irrelevance of the level of care exercised by the seller does not necessarily make the section incoherent.

With regard to those actively involved in the design or manufacture of the product, the "defective condition unreasonably dangerous" language converts section 402A from an instrumentalist, non-behavioral strict liability provision to one which requires an assessment of conduct. Fault, in the traditional sense of comparing a manufacturer's conduct with that of the "reasonable manufacturer" is not required. In fact, section 402A(2)(a) expressly precludes such analysis.[191] However, fault in the sense that the defendant's conduct is adjudged unacceptable from another's perspective is still required. In effect then, section 402A creates behavioral strict liability.

In this context, it is critically important to recognize that the comments to section 402A identify the perspective to be utilized in assessing behavior. The product is defective if it is "in a condition not contemplated by the ultimate consumer which will be unreasonably dangerous to him."[192] Thus, at its core, section 402A represents a system of behavioral strict liability with a "default" rule that is the exact reverse of that chosen in this Article.

---

189. One possible explanation has been offered by Professor Fletcher. He argues that it is the non-reciprocal risk creation which triggers liability rather than "just" risk creation. See Fletcher, 85 Harv. L. Rev. at 542 (cited in note 7). But see Jules L. Coleman, *Justice and Reciprocity in Tort Theory*, 14 W. Ontario L. Rev. 105 (1975) (criticizing Professor Fletcher's analysis).

190. See notes 22-23 and accompanying text.

191. The Restatement (Second) of Torts § 402A(2) provides: "The rule stated in Subsection (1) applies although (a) the seller has exercised all possible care in the preparation and sale of his product . . . ."

192. Id. § 402A cmt. g.

b. The Third Restatement

Regardless of whether a lack of internal consistency constitutes a valid basis for criticizing the Third Restatement, the conclusion that such inconsistency exists is inescapable. Some of the proposed revisions represent unabashedly instrumentalist, non-behavioral strict liability. Other provisions are based on a traditional negligence approach. Still others contemplate behavioral strict liability and seek to have a defendant's conduct judged by the standards of a group to which he, she, or it does not belong.

Consider, for example, the drafters' decision to leave section 402A unchanged to the extent that it holds non-manufacturing sellers of products (retailers and wholesalers) liable for injuries caused by a product defect even though the product was "defective" for reasons having nothing to do with any act or omission on their part. In comment a to section 2 the drafters explain:

> An often-cited rationale for holding wholesalers and retailers strictly liable for harm caused by manufacturing defects is that, as between them and innocent victims who suffer harm because of defective products, the product sellers as business entities are in a better position than are individual users and consumers to insure against such losses. In most instances, wholesalers and retailers will be able to pass liability costs up the chain of product distribution to the manufacturer. . . . Finally, holding retailers and wholesalers strictly liable creates incentives for them to deal only with reputable, financially responsible manufacturers and distributors, thereby helping to protect the interests of users and consumers.[193]

Thus, an instrumentalist rationale underlies the drafters' approach to a middleman seller's liability. Yet the ability to "insure" (whether contractually or through common law indemnity claims) and the creation of various behavior incentives are rejected as the basis for imposing liability on manufacturers for harm caused by products that presented risks unforeseeable at the time of manufacture.

Section 2, comment a states, in part:

> For the liability system to be fair and efficient, most courts agree that the balancing of risks and benefits in judging product design and marketing must be done in light of the knowledge of risks and risk-avoidance techniques reasonably attainable at the time of distribution. To hold a manufacturer liable for a risk that was not foreseeable when the product was marketed might foster increased manufacturer investment in safety. But such investment by definition would be a matter of guesswork. To insure against future claims, the manufacturer would be required to estimate the risks upon which claims would be

193. Restatement (Third) of Torts: Products Liability § 2 cmt. a (Proposed Final Draft).

> based. A commercial insurer would be in no better position to make such an estimate. Thus, with respect to unforeseeable or incalculable risks, manufacturers would find it inherently impossible adequately to protect themselves with insurance. Furthermore, manufacturers may persuasively ask to be judged by a normative behavior standard to which it is reasonably possible for manufacturers to conform. For these reasons, Subsections (b) and (c) speak of products being defective only when risks were reasonably foreseeable.[194]

Thus, non-behavioral strict liability is contemplated for non-manufacturing sellers, while traditional negligence governs manufacturers. Recognizing a manufacturer's normative claim to be judged by a behavioral standard to which it can conform, while refusing to recognize the retailer's identical claim seems logically indefensible. This approach strikes a poor compromise between moving the law in the right direction and restating existing doctrine.

The inconsistency in theoretical underpinnings is also evident in the explanation for the imposition of liability in the manufacturing defect cases. The drafters offer several justifications for imposing liability when injury is caused by a product that fails to conform to the manufacturer's own design specifications. The "instrumental functions" of spurring "greater investment in product safety," discouraging "the consumption of defective products by causing the purchase price of products to reflect . . . the costs of defects," and the reduction of "transaction costs involved in litigating that issue" are all duly noted.[195]

In justifying the imposition of strict liability for manufacturing defects, however, the drafters also seem to view product defectiveness as proof of a manufacturer's misconduct. Thus, they assert:

> In many cases manufacturing defects are in fact caused by manufacturer negligence but plaintiffs will have difficulty proving it. Strict liability therefore performs a function similar to the concept of res ipsa loquitur, allowing deserving plaintiffs to succeed notwithstanding what would otherwise be difficult or insuperable problems of proof.[196]

---

194. Id.

195. Id.

196. Id. The idea that "strict liability" eases the proof problems that otherwise might exist in negligence cases can be traced back to Dean Prosser and was later repeated by Dean Keeton. See William E. Prosser, *The Assault Upon the Citadel (Strict Liability to the Consumer)*, 69 Yale L. J. 1099, 1114 (1960); W. Page Keeton, *Products Liability—Proof of the Manufacturer's Negligence*, 49 Va. L. Rev. 675 (1963). See also Priest, 10 Cardozo L. Rev. at 2309-10 (cited in note 110) (discussing Prosser and Keeton).

Not only are instrumentalist non-behavioral strict liability and traditional negligence justifications presented, but behavioral strict liability also makes an appearance. In manufacturing defect cases that involve inedible matter in food products, the drafters, following the majority of courts that have considered the issue,[197] recommend the use of a consumer expectation test. They argue:

> A consumer expectation test in this context relies upon culturally defined, widely shared standards that food products ought to meet. Although consumer expectations are not adequate to supply a standard for defect in other contexts, assessments of what consumers have the right to expect in various commercial food preparations are sufficiently well-formed that judges and triers of fact can sensibly resolve whether liability should be imposed using this standard.[198]

In short then, the proposed Third Restatement sets forth the justifications not only for traditional negligence, but for behavioral and non-behavioral strict liability as well. While this undoubtedly is a fair reflection of the currently chaotic state of American product liability law, it has little to recommend it as a map for future direction.

2. The Group Selection Omission

a. Section 402A

As previously noted, the drafters of the Second Restatement, section 402A utilized a "consumer expectation" test to define both "defective condition" and "unreasonably dangerous to the user or consumer."[199] The effect of this approach is to reverse the default rule proposed by this Article.[200] In other words, 402A reverses the traditional negligence approach, the application of which would assess manufacturers' conduct from a reasonable manufacturer's perspective. Instead, it mandates the use of a consumer's perspective as its default rule.

The primary exception to this approach is contained in comment k.[201] In the case of "unavoidably unsafe products," rather than

---

197. See note 106 and accompanying text.
198. Restatement (Third) of Torts: Products Liability § 2 cmt. g (Proposed Final Draft).
199. Restatement (Second) of Torts § 402A cmts. g and i.
200. See text accompanying note 109.
201. Comment k provides:

> There are some products which, in the present state of human knowledge, are quite incapable of being made safe for their intended and ordinary use. Such a product,

assess the extent of danger from the consumer's perspective, comment k contemplates the utilization of a risk-utility test. The result is that, if the product is accompanied by an adequate warning, the assessment of danger in view of the accompanying benefits is assessed from the manufacturer's perspective.[202]

In the case of the Pasteur vaccine for rabies, to use the drafters' own example, even though administration of the drug may itself have serious repercussions for the patient, the consumer's expectation is irrelevant to the liability issue. The alternative to receiving the drug is a horrible death and, therefore, the utility of marketing the product clearly outweighs the risk.[203]

The problem with the Second Restatement's choice of consumer perception as a default rule, however, is that it violates the basic fairness notion which underlies the traditional negligence group selection decision[204] without offering the majoritarian rule-enforcing justification discussed here,[205] or any other justification for departing from a traditional negligence approach. As explained earlier, the particular inter-group or inter-personal dealings between the parties may provide a good reason for judging one person's behavior from another's perspective.[206] In the absence of one of those reasons, however, such a shift in the default rule seems indefensible.[207]

While comment k recognizes one situation in which a consumer perspective approach should not be utilized, section 402A does not contain enough similar exceptions that permit deviation from the reverse default rule adopted by the drafters. As previously discussed, judging a manufacturer's conduct from the perspective of the consumer will not be appropriate in many, and perhaps most, cases.[208]

In fact, the criticisms of the "consumer expectation" test of product defect frequently point to situations in which it is inappropri-

---

properly prepared, and accompanied by proper directions and warning, is not defective, nor is it *unreasonably* dangerous.... The seller of such products ... is not to be held to strict liability for unfortunate consequences attending their use, merely because he has undertaken to supply the public with an apparently useful and desirable product, attended with a known but apparently reasonable risk.

Restatement (Second) of Torts § 402A cmt. k.

202. See notes 108-10 and accompanying text. As before, I assume here that "risk-utility" represents a "manufacturer standard" of behavior.

203. Restatement (Second) of Torts § 402A cmt. k.

204. See text accompanying notes 79-82. See also text accompanying note 192.

205. See text accompanying notes 87-89.

206. See text accompanying notes 91-107.

207. Unless it was intended te create non-behavioral strict liability, of course.

208. See text accompanying notes 64-73.

ate or even impossible to move away from a traditional negligence test.[209] Consider, for example, the possibility that the nature of the defendant's business is such that consumers really have no expectations regarding manufacturers' conduct. Under these circumstances, in which the group selection decision is between two groups only one of which has expectations, the court must necessarily choose the group with expectations.[210]

By rigidly fixing the perspective that is to be utilized through definition, section 402A denies the courts that adopt it the flexibility necessary to resolve many cases satisfactorily. More importantly, assuming that section 402A was not intended exclusively to represent an instrumental cost-allocation approach (the insistence on the existence of a product "defect" seems to support this assumption), there is no satisfactory justification offered for judging manufacturers' conduct from a consumer's viewpoint.[211]

b. The Third Restatement

While section 402A resolved the group selection issue in favor of the consumer group as a matter of definition,[212] the Third Restatement generally proposes resolving it in favor of the manufacturer group, at least in design and warning cases.[213]

In the design defect cases, although "consumer expectation" is made part of the general risk-utility calculus used to determine the existence of defect,[214] it is presumably to be considered to the extent that a reasonable manufacturer (judged from a manufacturer's perspective) would take a consumer's expectations into account. In other words, incorporating "consumer expectation" into the test for defect

209. See Montgomery and Owen, 27 S.C. L. Rev. at 803 (cited in note 64).

210. See text accompanying notes 64-69. The consumer expectation test is also frequently criticized as being inappropriate where the defect is obvious and in cases where a bystander is harmed. See, for example, Montgomery and Owen, 27 S.C. L. Rev. at 823 (cited in note 64). However, if a manufacturer's conduct in creating the product is being assessed, these objections to a consumer-oriented approach disappear.

211. While it is true that section 402A is partly based on *Greenman v. Yuba Power Products, Inc.*, 27 Cal. Rptr. 697, 377 P.2d 897 (1963), and also true that *Greenman* raises the issue of manufacturer misrepresentation, misrepresentation is not expressly utilized in section 402A as a justification for rejecting negligence. In fact, no basis is satisfactorily articulated.

212. Restatement (Second) of Torts § 402A cmts. g and i.

213. See Restatement (Third) of Torts: Products Liability § 1, cmt. a (Proposed Final Draft) ("The concept of strict liability, which focuses on the product rather than the conduct of the manufacturer, may help make the point that *a defendant is held to the expert standard of knowledge available to the relevant manufacturing community at the time the product was manufactured.*") (emphasis added)).

214. Id. § 2 cmt. f.

does not alter its fundamental reliance on the manufacturer's perspective.[215]

Section 2(b) provides that "a product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller . . . and the omission of the alternative design renders the product not reasonably safe."[216] Other than by the assertion that the "defendant is held to the expert standard of knowledge available to the relevant manufacturing community at the time the product was manufactured,"[217] the draft does not explicitly address the "according to whom" question. Nevertheless, the choice of the manufacturer's perspective is evidenced by the fact that the primary justification for the rule is the manufacturer's right, in fairness, "to be judged by a normative behavior standard to which it is reasonably possible for manufacturers to conform."[218] However, just as section 402A's consumer group selection was not always justifiable, the Third Restatement's manufacturer group selection will not always be defensible.

Consider, for example, a variation of a hypothetical posed at the ALI meeting in May of 1994. Suppose that a drug manufacturer developed a product that cured the common cold but caused substantial harm to a small but significant percentage of those who used it.[219] Given the enormous aggregate costs of the common cold, the marketing of such a product might be justifiable from an industry standpoint if the associated incidence of harm was not excessively high. From a consumer's perspective, however, the marketing of that product might well be judged unacceptable.[220]

---

215. Except that, as previously noted, a true consumer perspective approach is taken in the impure food cases. See note 170 and notes 197-98 and accompanying text.

216. Restatement (Third) of Torts: Products Liability § 2(b) (Proposed Final Draft).

217. Id. § 1 cmt. a.

218. Id. § 2 cmt. a.

219. Proceedings of the American Law Institute, 71st Annual Meeting 113 (1994) (comments of Professor William S. Crowe, Sr.). Professor Crowe's hypothetical actually sought to point out problems in requiring proof of a reasonable alternative design. To this end it posited blindness in 10% of the consumers.

220. Actually, the prohlem with the Third Restatement's treatment of design defects is even greater than indicated. Not only has group selection been rigidly determined, hut the content of that standard is fixed. Section 2(b) makes the question of whether or not a manufacturer has conformed with the standard turn on the existence of a "reasonable alternative design." In the ahsence of such an alternative, the product is not defective no matter how dangerous or how the decision to market such a dangerous product would be otherwise judged.

There is only a limited exception to this "reasonable alternative" requirement. In May of 1994, on motion of Rebert L. Habush, the ALI voted to adopt language which acknowledges that

Along the same lines, consider *Turner v. General Motors Corp.*,[221] a case stemming from injuries sustained in an automobile roll-over accident. The automobile involved in the accident was a sedan with an essentially cosmetic roof that afforded little protection when the vehicle rolled. While such a design choice might be defensible from a manufacturer's perspective, it probably is not from a consumer's perspective.[222]

The failure to consider the group selection process is also a significant problem in the Third Restatement's treatment of "failure to warn" defects. While section 2(c) provides that "a product is defective because of inadequate instructions or warnings when the foreseeable risks of harm posed by the product could have been reduced or avoided by the provision of reasonable instructions or warnings by the seller," the "reasonable according to whom" issue is not addressed except to the extent that it is asserted that the reasonableness test parallels subsection (b).[223] Section 2(b), in effect, adopts a reasonable manufacturer standard for judging the safety of product designs. Thus, presumably, a seller's perspective standard is intended in the warning cases as well. However, this should not always be the case.

The problem presented in *Murray v. Wilson Oak Flooring Co.*[224] provides a useful illustration. In that case, vapors from a floor adhesive were "capable (1) of traveling for some distance along a floor from the point at which the mastic is spread, (2) of burning with explosive force on encountering any form of exposed flame, and (3) of transmitting that flame back to the body of spread adhesive."[225] The warning on the can specifically stated, "extinguish flame—including pilot lights" and, in larger letters, "DO NOT USE NEAR FIRE OR FLAME."[226] In the course of reversing a judgment n.o.v. and reinstating the verdict for the plaintiff, the court reasoned, "We

---

the design of some products is so "manifestly unreasonable" that liability may be imposed even in the absence of an alternative.

Illustration 5 to section 2 provides the example of an exploding cigar which causes serious injury. Presumably, the utility of a cure for the common cold would be high enough, however, to take it out of this limited exception.

221. 514 S.W.2d 497 (Tex. Civ. App. 1974).

222. Id. at 500 (citing testimony "based upon . . . forty-five years of sales experience, [that] the average consumer believes that a sedan vehicle will be a reasonably safe product in a roll-over").

223. Restatement (Third) of Torts: Products Liability § 2 cmt. h (Proposed Final Draft). See also id. at § 1 cmt. a.

224. 475 F.2d 129 (7th Cir. 1973).

225. Id. at 132.

226. Id. at 130.

cannot say as a matter of law that the term 'near' was sufficient to inform Murray that his spreading of adhesive within four feet of a pilot light *located behind a closed door* and within eight feet of stove pilot lights three feet off the floor exposed him to the risk of an explosion and attendant fire damage."[227]

The adequacy of the warning—or more accurately the perceived culpability of the manufacturer's conduct in choosing what warning to give—may well turn on the group selection issue. To people with somewhat specialized knowledge about the dangers involved in using the product and which safety precautions "obviously" must be taken, the manufacturer's conduct in providing the particular warning would undoubtedly seem reasonable. However, from the perspective of the do-it-yourselfer, reasonableness is a closer question and, as the court recognized, one appropriately left to the jury. In these types of cases, the jury should be expressly instructed as to whose perspective on reasonableness is to be utilized, depending on the group selection decision.

In short then, the Third Restatement has not corrected the flaw in the Second Restatement, but simply reversed it. The Second Restatement failed to recognize the common need to depart from utilization of the consumer's perspective and the Third Restatement, by selecting the reasonable manufacturer or seller standard based on the intuitive fairness considerations underlying the default rule developed here, fails to consider the need for exceptions and the underlying justification for those exceptions.

VI. CONCLUSION

It has long been assumed that tort law can be viewed largely as a choice between negligence and strict liability. In this Article, I have tried to demonstrate the descriptive and analytical shortcomings of this way of thinking about tort doctrine.

There are, in fact, at least three different bases for the imposition of liability that cut across the common negligence and strict liability classification scheme. First, a party's conduct can be assessed by comparing it to the norms of behavior developed by the group or

227. Id. at 132-33. A variation on the recurring pilot light theme of *Murray* is used by the drafters of the Third Restatement. See Restatement (Third) of Torts: Products Liability § 2 illustration 10 (Proposed Final Draft).

subgroup in which he or she is a member. While traditionally this has been the "negligence" approach, some cases commonly labeled as "negligence" cases do not fit within such a framework.

For example, cases involving the liability of children who have engaged in "adult" activities such as driving represent a different liability rule—one in which a party's behavior is assessed by comparing it to the norms of behavior developed by a group to which the party does not belong. I have termed this second form of liability "behavioral strict liability." While it involves the assessment of a party's behavior, it does not require "fault" in the conventional sense.

Within the areas of tort law that are commonly labeled "strict liability" cases one finds both "behavioral strict liability" and a third form which I have called "non-behavioral strict liability." Non-behavioral strict liability seeks to impose liability on a party as part of an instrumental cost-allocation process. While the goals of such a process may be to influence the future behavior of individuals—by increasing investment in research for example—non-behavioral strict liability is distinct from behavioral strict liability. Non-behavioral strict liability does not seek to impose tort liability based on a determination that a party's injury-causing conduct fails to meet some group's standard.

To a large extent, this Article has focused on one major consequence of the failure to recognize the existence of these separate and distinct forms of liability. Although instrumentalism held sway within the legal community for a time,[228] its later rejection by courts and commentators seems to have led many people to the erroneous conclusion that the only alternative to such non-behavioral strict liability is traditional negligence doctrine. This, however, is not the case. Behavioral strict liability has not only survived the death of instrumentalist tort liability, but is also evident throughout existing legal doctrine, even though it is not named or otherwise identified as such.

If I am correct in claiming that the real choice now is between traditional negligence and behavioral strict liability, we must seek to identify a principled basis for choosing whether one's conduct will be

228. See George P. Fletcher, *Why Kant*, 87 Colum. L. Rev. 421, 421-22 (1987) ("From the second world war to Kennedy's assassination and for several years thereafter, a consensus prevailed in law schools about the policies that should guide the law's development. The reigning policies were these: (1) in tort law: cost spreading, compensation of victims and discouragement of excessive risk taking; (2) in contracts: facilitation of economically productive exchanges. . . . The pursuit of these policies in the least costly way defines a utilitarian approach to legal decision making.").

assessed from the perspective of one's own group or that of another. As things presently stand, the choice is frequently made tacitly, solely on the basis of intuition, or inappropriately made in furtherance of non-behavioral strict liability goals.

In this Article, I have tried to sketch briefly the underpinnings for my belief that our commitment to majority rule provides the basis for making the all-important group selection decision in a principled fashion. While there may be enormous disagreement as to what goals our society should pursue at any given time, I believe there is an overwhelming consensus that some version of majoritarian politics is the process by which those goals—whatever they may be—should be chosen. If this is correct, then it follows that the group selection process must be consistent with and in furtherance of majority rule within a pluralistic society. Since a lack of openness and honesty in dealings between groups directly affects the ability of group members to enter the political process to alter an unsatisfactory status quo legitimately, a ban on misrepresentation and an insistence on full disclosure emerge as the obvious bases for making the group selection decision.

I do not pretend that this Article adequately explains any particular version of majoritarian theory or defends its importance in the decision of common law cases. Obviously, one cannot do so without confronting the larger questions of the roles of the judiciary and jury as lawmaking institutions and the extent to which direct participatory democracy remains a part of our system. Rather, as the title indicates, this Article is intended only as an overview of issues which require and deserve far more extensive consideration.